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Rights Under a Collective Bargaining Non-Agreement: The Question of Monetary Compensation for a Refusal to Bargain

PAUL R. BAIER

"We have to deal in new ways with the subject of making legal precepts effective. We must study the limits of effective legal action . . . . We must examine our armory of legal weapons, appraise the value of each for the tasks of today, and ask what new ones may be devised and what we may expect reasonably to accomplish by them when devised."

—Roscoe Pound

INTRODUCTION

Admittedly, the universe of rights and correlative duties which exists in the absence of a collective bargaining agreement is very large indeed. And one may naturally inquire what the non-existence of a collective bargaining agreement has to do with any enumeration of Hohfeldian pairs. The writer must confess an ulterior motive, but certainly the expression "rights under a collective bargaining non-agreement" has meaning enough for those ignorant of any Hohfeldian
The experience of two representatives of that happy class demonstrates the point. Fortunately, their experience also eliminates the ever uncomfortable problem of where to begin. We begin in the beginning.

The beginning is dated September 27, 1935. One Warren C. Evans, business agent for the Marine Engineers’ Beneficial Association No. 13, approached a Mr. L.H. Garrison, general manager of the Delaware-New Jersey Ferry Co., presented him with some signed cards and demanded that Mr. Garrison recognize and bargain collectively with Beneficial Association No. 13. This was all very confusing to Mr. Garrison. In the past he had always negotiated with his employees individually and he so informed Evans. Evans replied that under the National Labor Relations Act one representing a majority of employee groups was authorized to negotiate on their behalf. Mr. Garrison’s response was classic. He expressed a lack of familiarity with the Act and a desire to have a copy of it. Evans immediately furnished a copy and the episode concluded with Garrison’s refusal to recognize the Association.

It is to Warren Evans’ probable interpretation of the expression “rights under a collective bargaining non-agreement” that this article is addressed. The concern here is with the same right relied upon by Evans in his confrontation with Garrison—the right of the New Jersey Ferry Company’s engineers and the right of all employees “to bargain collectively through representatives of their own choosing.” The subject is that of making the right to bargain collectively and its correlative duty meaningful and effective. Our concern is also with remedies. The task is to examine the armory of weapons used in the past to secure the right to bargain collectively and to appraise those suggested for use in the future. The question is whether monetary compensation should issue to redress a refusal to bargain.

Evolution to the Present—The Need for Re-Examination of The Remedial Arsenal

The agency charged with enforcement of the duty to bargain is the National Labor Relations Board. Its power to redress refusals to

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2. Their position is enviable. For legal buffs who are likewise ignorant of the Hohfeldian analysis I have but condemnation and a citation. See Corbin, Legal Analysis and Terminology, 29 Yale L.J. 163 (1919).
5. Section 8(a)(5) of the NLRA provides, “It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . .” 29 U.S.C. § 158(a)(5) (1964); section 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3) attaches the same duty upon labor organizations.
bargain derives from section 10(c) of the NLRA, which authorizes the Board to order an adamant employer, for instance, to cease and desist any unlawful refusal to bargain. Just such action was taken by the Board to redress the Evans-Garrison incident, the first reported violation of section 8(a)(5). A year later the Board recast its remedial order in cases of unlawful refusals to bargain and commanded:

Take the following affirmative action, which the Board finds will effectuate the policies of the Act: (a) Enter . . . into negotiations in good faith with the United Textile Workers of America . . . with the object of making an agreement covering wages, hours and working conditions.

Rather than ordering the guilty party to refrain from inaction, the Board now required an employer to do something affirmative, to enter into negotiations in good faith. However, the change in remedial process was little more than an avoidance of grammatical error, the double negative. The new order offered little assistance to union organizational efforts and "serve[d] only to represent formal

6. If upon a preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . 29 U.S.C. § 160(c) (1964).
7. Then Section 8(5) of the original NLRA, 49 Stat. 453 (1935). The Board commanded "that respondent Delaware-New Jersey Ferry Company . . . cease and desist from refusing to bargain collectively with Marine Engineers' Beneficial Association No. 13 as the exclusive representative of the licensed engineers employed in such a capacity by respondent in respect to rates of pay, wages, hours of employment and other conditions of employment." Delaware-New Jersey Ferry Co., 1 N.L.R.B. 85, 96 (1935).
9. The changes in remedies should not be confused with the change in the substantive scope of the duty to bargain in good faith. For the origins of the duty to bargain see Smith, The Evolution of the "Duty to Bargain" Concept in American Law, 39 Mich. L. Rev. 1065 (1941). For changes in its substantive dimensions see Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958). While there is no dispute as to the relief available after the event of a refusal to bargain, there remains at present considerable debate as to the appropriate role of the NLRB in determining whether an employer has met the standard of good faith. Compare Cox, supra at 1419 ("For the Board to appraise the employer's bargaining position with respect to some major issue as a means of ascertaining his good faith would involve passing judgment upon the reasonableness of his proposals and thus would apply pressure to make concessions.") with Gross, Cullen & Hanslowe, Good Faith in Labor Negotiations: Texts and Remedies, 53 Cornell L. Rev. 1009, 1020 (1968) ("If section 5(a)(5) . . . is to impose 'any substantial obligation at all,' then the NLRB can and even must make an assessment of the reasonableness of the parties' substantive positions.").
10. "It is also true that union attempts at organization are not always assisted by a mere finding of an unfair labor practice, an order to cease and desist, and a posting of the order." Retail Store Union v. NLRB, 385 F.2d 301, 307 (D.C. Cir. 1967).
acknowledgement of the law."  For the ensuing three decades the Board's remedial armory in cases of refusal to bargain has remained unaltered. As in 1936, the standard order remains that the respondent cease and desist from refusing to bargain and, affirmatively, that he bargain in good faith.

At first glance the effectiveness of the Board's remedies appears disputed. Frank McCulloch, chairman of the NLRB, reported in 1962 that the major objective of the NLRA—"effective collective bargaining"—had been and increasingly was being achieved. He stated that the "most salient" feature of the Board's administration of the Act was "the high degree of compliance with, and successful operation of, our law." On the other hand, one practitioner has blasted the Board's ineptitude:

It is safe to say that if Lord Mansfield had been as timorous and unimaginative in developing rules for effective enforcement of commercial obligations as the Board has been in adopting equitable doctrines and remedies to enforcement of the duty to bargain, the commercial law would have atrophied. The conflict, however, is no more than a divergence in focal awareness; the parties are addressing different problems. Most observers would agree that the remedies available in cases of refusal to bargain are sufficient, for the very good reason that, in general, voluntary compliance with the law obviates any need for remedial process. At the same time, those same observers would agree that,

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12. Address by Frank W. McCulloch, American Bar Association's Labor Relations Law Section, San Francisco, Aug. 6-8, 1962, in 50 L.R.R.M. 36, 37 (1962). Chairman McCulloch's remarks were based upon the findings of Professor Philip Rose. See P. Ross, The Government as a Source of Union Power 242 (1965). Professor Ross has published later findings in The Labor Law in Action: An Analysis of the Administrative Process Under the Taft-Hartley Act (1966) (Hereinafter cited as "Ross"). Professor Ross' study covered the years 1957-62 and is based upon the 7,866 § 8(a)(5) charges filed and the 1,008 § 8(a)(5) complaints issued during the period. Table 1 at 39. Professor Ross noted: "The legal standards of bargaining have been extremely pervasive and have influenced employer behavior in a manner that, in general and on the whole, has been consistent with the Congressional mandate. Employers, by and large, take their obligations in this area seriously and most of them have accepted Board policies and procedures in their dealings with unions." at 2.
14. And, it should be noted that such remedies as do exist may very well have nothing to do with the observed compliance. "There is reason to believe that economic considerations, economic strength, and not the processes of the NLRB, ultimately will resolve almost every labor-management quarrel . . . ." Graham, How Effective Is The National Labor Relations Board.
15. See Ross, supra note 12, at 2. ("The major shortcoming of the NLRB lies in its failure
when attention focuses upon cases of violation of the law, the standard order "is something akin to an exercise in futility."\textsuperscript{14}

The Board itself has noted\textsuperscript{17} that most concern over the adequacy of its remedial scheme centers upon violation of the law rather than compliance; the numerous, successfully established bargaining relationships often are unmentioned. And the concern is universal. It has produced scholarship\textsuperscript{18} and a host of congressional hearings.\textsuperscript{19}

The writer would go too far, no doubt, were he to draw any implication from a failure in the "literature of inadequacy" to discuss success stories; like the news, those who gain attention in this field are those who are able to cause the most trouble. But the point of general success should be made explicit. Although the author agrees with Professor Lesnick that "the simple notion of doing over again what has worked badly once is hardly a reassuring method of undoing the effects of the abortive attempt,"\textsuperscript{20} I would question any general application of his rationale for the adoption of new forms of relief: "[I]t is impossible to defend a refusal to impose [a form of relief] unless one is willing to defend the adequacy of the particular remedies in fact applied . . . ."\textsuperscript{21} A cease and desist order and an affirmative order to bargain may be wholly inadequate to remedy a refusal to bargain; however, inadequacy and need cannot alone justify the imposition of new forms of relief. The suggestion here is for monetary

to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act."; McCulloch, \textit{Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA}, 19 LAB. L.J. 131, 133-35 (1968).


\textsuperscript{17} "The agency notes, as it has in the past, that while attention may focus on those cases of violation of the law, it is still true that both management and labor, by large majority, voluntarily observe their duties and obligations under the Act." \textit{THIRTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD} 1-2 (1968).

\textsuperscript{18} Bok, \textit{The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act}, 78 \textit{Harv. L. Rev.} 38 (1964); Note, \textit{The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act}, 112 U. PENN. L. REV. 69 (1963).


\textsuperscript{21} \textit{Id.}
Compensation in cases of refusal to bargain. In reviewing the appropriateness of one monetary award, Mr. Justice Black has stated:

The statute commands that the Board must order "back pay" if the policy of the Act will thereby be effectuated. At least two persons are immediately involved in "back pay," as used here; one who pays and one who receives. The propriety of a "back pay" order as an instrumentality for effectuating the Act's policies, must therefore be determined by the manner in which it influences the payor and payee, one, or both.22

In evaluating the suggested new remedy, one must also analyze "the manner in which it influences" the effects it may reasonably be expected to have on the immediate parties involved; and, going a step beyond Mr. Justice Black, the effects of the remedy on the conduct of unions and employers not immediately involved.

The author joins those who have discerned a need for improvement. His quarrel is with the suggested form of improvement. We have seen where the Board has been. The words of trial examiner Owseley Vose provide an indication of where the Board may be going.

Take the following affirmative action which it is found will effectuate the policies of the Act: (b) Compensate, in the manner set forth in the section hereof entitled "The Remedy," each of its employees for the monetary value of the minimum additional benefits, if any, including wages, which it is reasonable to conclude that the Union would have been able to obtain through collective bargaining with the Respondent, for the period commencing with the date of Respondent's formal refusal to bargain collectively... and continuing until paid.23

Certainly, here there is more than an avoidance of grammatical error.

The Proposal—Monetary Compensation for a Refusal to Bargain

"Take some more tea," the March Hare said to Alice, very earnestly.

"I've had nothing yet," replied Alice in an offended tone: "so I can't take more."—Alice's Adventures in Wonderland

22. Republic Steel Corp. v. NLRB, 311 U.S. 7, 14 (1940) (dissenting opinion).
Unions and Alice have very little in common. But the quarrel which has developed between labor and management over the suggested remedy is, like Alice's adventures, filled with much delightful nonsense. The issue is surrounded with emotionalism; like Alice, management has responded in an offended tone: "Upon what meat doth this Caesar feed?" The riddle of language is also involved. Indeed, the question of the Board's power to order the proposed relief is cast in terms of a "punitive-remedial" conundrum.

In Ex-Cell-O Corp. the UAW won a Board-conducted election on October 22, 1964 by a vote of 102-93. The company immediately filed objections to conduct affecting the results of the election, alleging union misrepresentation which prevented its employees from exercising a free choice of representatives. The objections were overruled and the Board on October 28, 1965 affirmed the certification of the union. The next day the company advised the union: "As you know, the only way the Labor Board's decision in this case can be reviewed is through a technical refusal to bargain, and consequently we are unable to meet with you and bargain until the review procedure is carried out." A complaint issued charging a violation of section 8(a)(5). The company defended on the ground that the Board's certification was invalid.

At the hearing before trial examiner Owsley Vose the UAW announced that it was seeking in the case, in addition to the usual remedy afforded by the Board in refusal to bargain cases, a monetary award in favor of the employees to make them whole for their losses resulting from the respondent's failure to comply with its duty to bargain collectively, and the union adduced evidence which it asserted justified the monetary relief. The company presented no rebuttal evidence on the question of compensation, relying instead upon the Board's rejection in prior decisions of similar demands. Examiner Vose characterized the action as one involving:

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24. J. P. Stevens & Co. v. NLRB, 380 F.2d 292, 304 (2d Cir. 1967). The company's inquiry was addressed to an exercise of the Board's remedial authority in a case involving unlawful coercion and discrimination. However, management's response to the specific proposed remedy is no less colorful. "Thus, in effect, the Labor Board [would] become a crystal ball gazer to determine what the bargaining results might have been had there been any results:" Labor Law Study Committee (U.S. Chamber of Commerce), The Need for Labor Law Reform 26 (unpub. mem. undated). The union's position is no less emotional. "[T]he usual boiler place remedy is like trying to cure cancer with aspirin instead of radium or surgery." Charging Party's Brief to the Trial Examiner at 4, Ex-Cell-O Corp., Case No. 25-CA 2377 (N.L.R.B. TXD-80-67, Mar. 7, 1967). Like the Second Circuit, see J.P. Stevens & Co. v. NLRB, 388 F.2d 896, n.8 at 904 (2d Cir. 1967), the writer approaches the problem "somewhat less emotionally" than do the parties.


26. Id. at 3.

simply a technical refusal to bargain in order to obtain court review of the Board's determination . . . that the Respondent's Objections to Conduct Affecting the Results of the Election were without merit, and that the Union should be certified . . . . A finding of a refusal to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act necessarily follows. 28

Since it was examiner Vose's opinion that "the Board's existing remedies are ineffectual" and that "some additional form of relief should be adopted," 29 his recommended order 30 provided monetary compensation for the refusal to bargain.

Ex-Cell-O, together with three other cases, 31 is currently pending where the Board in response to a like remedial demand stated: "[W]e find that the remedial order requested by the Charging Party is without merit." n. 1 at 323. Trial examiner Vose was not impressed by the citation. "The Board's summary statement contains not one word of explanation of its reasons for its action in denying the requested relief. The remedial issue before the Board in the Preston case is not one, in my opinion, which is susceptible of such summary disposition, without any articulation of the reasons for its decision," TXD-80-67 at 10. The trial examiner's position appears sound. The Board itself has, on occasion, adopted new forms of relief, e.g., "does not bear analysis." APW Prods. Co., Inc., 137 N.L.R.B. 25, 29 (1962).

Where no reasons at all are given for the denial of such relief, that the denial should not bar a well-reasoned demand for such relief.

29. Id. at 12.
30. See text accompanying note 23 supra.


The employer's campaign involved unlawful coercive interrogation of employees, unlawful threats of loss of employment, and constructive discharge of the leading employee organizer. The union lost a subsequent election. The trial examiner rejected the employer's assertion of a good faith doubt in the validity of the claimed card majority and held that the company had violated its duty to bargain. The trial examiner's recommended order was that the employer should: "Make its employees in the appropriate unit . . . whole for any loss or damage they may have suffered as a result of Respondent's refusal to bargain collectively with the Union. . . ." TXD-662-66 at 23.

In Herman Wilson Lumber Co. the Board had certified the Union after it won an election by a vote of 62-57. The employer refused the union's demand for bargaining, advising the union of its intention to exhaust judicial remedies. The company asserted that a union handbill had misrepresented and omitted material facts, thereby vitiating the election. Although the trial examiner found that the employer had refused to bargain in violation of § 8(a)(5), he refused to recommend, as requested by the union, monetary relief. "I do not perceive in the present case how an appropriate remedy of the kind sought by the Charging Party can be fashioned. I am deterred by the absence in this case of any objective criteria by which it may be decided that the employees did in fact lose material benefits by the Respondent's actions or, if so, how these losses could . . . be measured." TXD-757-66 at 5.

The Rasco decision did not involve initial contract negotiations; rather, the trial examiner
before the Board. More than two years have elapsed since the oral argument, July 13, 1967; and, although the Board has, by implication, denied such relief in prior decisions, it is apparent that the question is

found that the employer had refused to bargain in good faith during negotiations for a renewal contract. Upon oral argument before the Board, the participating unions dropped the issue of a compensatory remedy for refusals-to-bargain over the terms of a renewal contract. The Board was requested to defer the issue for decision in the light of future experience. Hope was expressed, however, that if the Board adopted a compensatory remedy for first contract cases, it would likewise apply the compensatory remedy to renewal cases. Official Report of Proceedings Before the NLRB, Docket No. 25-CA-2377 et al., oral argument, July 13, 1967, at 156-258.

32. The Board, by notice of hearing dated May 26, 1967, invited the participating parties to consider the following questions: 1. Whether the Board has the authority to order an employer to reimburse his employees for the loss of wages and fringe benefits that they would have obtained through collective bargaining if the employer had not refused to bargain in good faith; 2. By what objective standard, or standards, could the Board calculate the amount of benefits lost by employees as a result of the employer's refusal to bargain; 3. If reimbursement of employee losses should be ordered, what period should it cover; 4. Assuming reimbursement is proper, for what losses might employees be compensated; 5. If an expanded remedy be adopted, should the Board distinguish refusal to bargain based upon a desire to obtain judicial review of a certification from refusal to bargain in good faith accompanied by flagrant violations of other sections of the Act, and grant an order for reimbursement only in the latter; 6. If it should become relevant, to what extent and at what stage of an unfair labor practice proceeding should the parties litigate whether a loss occurred and/or the method to be used to measure the loss of benefits in the particular case; 7. Whether there are available alternative or additional methods of returning the employees to the status quo ante. NLRB Notice of Hearing (May 26, 1967).

33. The first attempt to secure relief akin to that requested in Ex-Cell-O was made on petition to review United Ins. Co., 154 N.L.R.B. 38 (1965). The Ins. Workers petitioned the Court of Appeals for the District of Columbia for review of the decision, basing their aggrieved status on the contention that "the Board's order should have compelled United to accept and to abide by the terms of a collective bargaining agreement which . . . would have been entered into if United had bargained in good faith with the Union." Ins. Workers Int'l Union v. NLRB, 360 F.2d 823, 824 (D.C. Cir. 1966). The court rejected the contention stating: "So inherently speculative a proposition suggests that the Board would have lacked the power to 'compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements,'" at 827 (citing NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

In UAW v. NLRB, 373 F.2d 671 (D.C. Cir. 1967), on the union's petition to review the Board's denial of compensatory relief, see Preston Prods. Co., 158 NLRB 322 (1966) and note 27 supra, the District of Columbia Circuit, in effect, reversed its earlier position and held that the union was aggrieved by the denial, "[W]e cannot say either that the Union's claim is frivolous or that it is not genuinely aggrieved," at 673-74. And, although the court recognized "that the Union's claim may raise troublesome questions under Section 8(d) of the Act," it was not prepared to decide the issue on a preliminary motion. n. 7 at 674. Subsequently, the Board itself petitioned the court and requested that it remand that part of the Board's order which had denied the compensatory relief, urging that it was the Board's intention to re-evaluate the requested relief. The court then enforced the Board's order that Preston bargain in good faith, except for that portion of the order which had denied the union's request for compensatory relief which was remanded to the Board. UAW v. NLRB, 392 F.2d 801 (D.C. Cir. 1967). In UAW v. NLRB, 57 LC 12, 468 (D.C. Cir. 1968) the court noted, per curiam, that "In enforcing the order otherwise, we did not intend to compel the company to bargain on the union's request for compensatory relief. As to that issue the company may await the further order of the Board," at 20, 890.

In United Steelworkers v. NLRB, 376 F.2d 770 (D.C. Cir. 1967), enforcing Northwest Eng'r Co., 158 N.L.R.B. 624 (1966), the court said that it was not an abuse of discretion for the Board
receiving complete review. The participating unions have requested that the Board "articulate the necessary conditions for the remedy and the standards for determining the measure of damages."°

The unions have also made their own suggestions as to the remedy and its administration. It is the position that the Board should adopt a compensatory remedy in all cases of unlawful refusals to bargain in initial contract situations. The remedy should apply both in cases of employer refusal to bargain following a certification demand for bargaining and in cases of employer refusal to bargain following a post-certification demand for bargaining and in Joy Silk cases—those in


In decisions subsequent to oral argument in Ex-Cell-O, the Board has likewise refused compensatory relief. See Tidewater Prods., Inc., 174 N.L.R.B. No. 103, 1969 CCH NLRB Dec. 20,564 (1969). In Waycross Sportswear, Inc., 170 N.L.R.B. No. 139, 1968 CCH NLRB Dec. 22,342, 68 L.R.R.M. 1107 (1968), a decision postdating argument in Ex-Cell-O, the Board refused to adopt the trial examiner's recommended compensatory remedy: "We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5), and therefore do not adopt the Trial Examiner's recommended make-whole remedy." 68 L.R.R.M. at 11. No reasons were given for the Board's action.

34. Brief for Local 1401, Retail Clerks at 12. Before the NLRB, Ex-Cell-O Corp., Case No. 25-CA 2377 et al. (Hereafter a citation to a brief without identification of the case indicates that the brief was submitted to the Board in Ex-Cell-O and consolidated cases).

35. As distinguished from refusals to bargain arising during negotiations for a renewal contract. See note 31 supra.

36. Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), enforcing in pertinent part, 185 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951). The Joy Silk doctrine dictates that when an employer is presented with authorization cards purportedly signed by a majority of his employees in what the union considers an appropriate bargaining unit, the employer must recognize and bargain with the union as representative of his employees, unless the employer has a goodfaith doubt that a majority of his employees have designated the union as their representative. See generally, Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851 (1967).

Should an employer refuse a card demand for recognition the union can immediately file a § 8(a)(5) charge or proceed to an election, and a subsequent election loss does not bar the union's claim that the employer wrongfully repudiated the card demand. Bernet Foam Prod. Co., 146 N.L.R.B. 1277 (1964). At the hearing on the § 8(a)(5) charge the General Counsel has the burden of proving that the union had in fact procured authorizations from a majority of unit
which an employer, without a good-faith doubt, refuses to accede to a union's demand for recognition based upon a majority card show. Nor should any distinction be drawn between a refusal to bargain based upon an employer's desire to procure judicial review of Board action and refusals accompanied by flagrant violations of other sections of the Act.

In Ex-Cell-O, examiner Vose was impressed by the fact that since the original certification of the Union the employees of Respondent's Elwood, Indiana, plant, the plant here involved, have not enjoyed all the employment benefits which the Respondent provides for its employees at its plants in the adjoining states of Ohio and Michigan, who are covered by collective-bargaining contracts with the Union, and there do not appear to be compensating advantages accruing to the Elwood employees.

The examiner was commenting on the evidence presented by the UAW in support of its contention that the "employer's refusal to bargain ... imposes actual and serious financial injury upon the employees." The UAW had introduced collective bargaining contracts which it had successfully negotiated with respondent Ex-Cell-O at plants in Michigan and Ohio. As a measure of the employee loss, the UAW suggested a comparison of the wage and fringe levels it had negotiated with respondent Ex-Cell-O at the Michigan and Ohio plants with the level of economic benefits at Elwood since certification. As an alternative yardstick, contracts which the UAW had negotiated at General Motors and Chrysler plants in the Elwood area were introduced—the measure of relief to be likewise the difference in wage and fringe levels. Both of these suggested

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37. In both Ex-Cell-O and Herman Wilson Lumber Co. the employers had refused to bargain in order to obtain judicial review of the Board's action in overruling their objections to union conduct which, it was alleged, vitiated the union election victories. Only by refusing to bargain could the employers obtain such review, as the Board's post-election certification of the unions was a non-reviewable order. Boire v. Greyhound Corp., 376 U.S. 473 (1964). For the various kinds of employer contentions which can be raised on review of the representation proceedings by way of a refusal to bargain, see NLRB v. Air Control Prods., Inc., 335 F.2d 245 (5th Cir. 1964) (challenges to union conduct, unit determination, "employee" status, and denial of hearings).

38. "We adamantly oppose the Board's differentiating between different motivations underlying unlawful employer refusals to bargain." Brief for the UAW at 52.

39. TXD-80-67 at 11.

40. Brief for the UAW at 15.

41. TXD-80-67 at 13.
standards—a comparison of wage increments successfully negotiated with the same employer at other plants and a comparison of benefits procured from other employers at plants in the same geographic area as the respondent employer reflect the "proven prospects of the particular union refused recognition for achieving collective bargaining increments for the employees it represents." In its brief to the Board the UAW appended a survey of sixty-six first contracts successfully negotiated by the UAW which detailed the wage and fringe increments obtained by the UAW in first contract situations. The survey was offered to demonstrate that

where workers have chosen the UAW as collective bargaining representative, they may fairly anticipate that if good faith bargaining promptly commences, they will each gain $478.40 in additional benefits the first year alone, with further increases in succeeding years.

As amicus curiae, the AFL-CIO proposed a third standard by which the Board could measure the loss to employees—a presentation based on the national average percentage change in straight time hourly wages computed by the Bureau of Labor Statistics. The Board is to compare the employees' wage rates at the

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42. *Ex-Cell-O* presented the only situation of a multi-plant employer. Therefore, only a comparison of wage levels with other employers in the same geographic area could be made in *Zinke's Foods* and *Herman Wilson Lumber Co.* In *Zinke's* the union suggested that "the employer would be liable to each person in the bargaining unit for an amount of money equal to the relative percentage impact of unionism upon the wage levels in the industry in issue within the jurisdiction of the affected local union ..." Brief for Local 1401, Retail Clerks at 12. The suggested relevant market was the retail food industry in the Beloit, Wisconsin labor market. Id. at 17. The comparison suggested in *Herman Wilson Lumber Co.* was to "the wages and other benefits obtained by other employees in the lumber industry in the State of Arkansas ..." Charging Party's Brief to the Trial Examiner at 13, Herman Wilson Lumber Co., Case No. 26-CA-2536 (N.L.R.B. TXD-757-66, Dec. 29, 1966).

43. Brief for the UAW at 26.

44. The survey, a result of a study by Professor Philip Ross, covered a six month period in 1966 and provided information for 66 representative situations on the differences between wages and other working conditions which existed prior to the UAW's certification and those embodied in the first contract. The study revealed that every contract provided economic gain and that the average increase in wages for the 66 plants was 16.52 cents per hour, on an average percentage increase of 7.9%. The range of wage increments for the first year was from a low of 7 cents per hour to a high of 45 cents per hour; this represented percentage increases ranging from 3.1% to 17.7%. The average increase in fringe benefits was 7 cents per hour, or an average percentage gain of 3.79%. The period elapsed from certification to contract ranged from 1 month to 9 months, with an average of 3 ½ months. Brief for the UAW, App. C at 57-60.

45. Brief for the UAW at 16.

46. Brief for AFL-CIO as Amicus Curiae at 14. The BLS provides two different figures: First, wage adjustments for the first year of contract settlements, and second, wage adjustments negotiated under current or prior settlements. For manufacturing the figures are compiled from substantially all major contracts, i.e., those covering 1,000 or more employees, and from a stratified sample of smaller establishments. For non-manufacturing the figure is derived from
time of the unfair labor practice with the BLS average percentage change figure between the date the employer initially refused to bargain and the date bargaining actually commences. This standard is to be used where the parties introduce no other reliable evidence and is offered as a “prima facie ground for awarding back pay to the injured employees.” Where, however, any party provides appropriate and statistically reliable alternative evidence, it should be received. The payment is to be a single, lump-sum payment and the period of liability is to commence with the initial refusal to bargain following a post-certification bargaining demand or a request for recognition under the Joy Silk doctrine. Contrary to examiner Vose’s recommendation, it is the unions’ position that employer liability would end on the day the employer commences to bargain in good faith.

In accordance with established back pay practice, the unions

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47. Brief for the UAW at 27.
48. Id. After the presentation of a prima facie case, an employer “should be allowed to attempt to impeach the validity of the Bureau of Labor Statistics figures . . . and he should, of course, be allowed to present data based on an alternative theory of the proper yardstick.” Brief for the AFL-CIO as Amicus Curiae at 19.
49. Brief for the UAW at 39.
50. Id. at 31. And see note 36 supra.
51. Examiner Vose had recommended that the employer’s liability continue “until paid.” TXD-80-67 at 18. See text accompanying note 23 supra.
52. Brief for the UAW at 31. Under the union proposal an employer could toll the monetary award by bargaining in good faith pursuant to the Board’s decision sustaining the § 8(a)(5) violation. Although an employer’s duty to bargain is not suspended while he seeks cert. denied, 385 U.S. 935 (1966), it is unrealistic to believe that an employer would bargain and negotiate an agreement with a union which he contends is not legally his employee’s representative. See the Brief for the AFL-CIO as Amicus Curiae at 12 (“[A] settlement between the parties on the issue of how much money is due the employees is unlikely to be effectuated while the employer is contesting the underlying violation.”) Hence, there is little difference between the union proposal as to termination and that suggested by examiner Vose.
have suggested that the Board’s order should merely provide that monetary compensation is to be awarded—determination of the amount due is to be left to the parties or, if the matter is not amicably settled, the amount due can be determined at a supplementary back pay proceeding.54

The participating unions are apparently divided on the question of unilateral increases in wages following certification or recognition demand. Should unlawful unilateral increases in wages be deducted from any monetary liability?55 One response is that the question is one which “might better be left to the future.”56 A second response is that “the Board should disregard the amount of the unilateral increase in ascertaining the employer’s reimbursement obligation.”57

THE HOUSE THAT PHILIP BUILT

In Tildee Products, Inc.58 an employer threatened to “close up its plant and go fishing” if the union were elected bargaining representative. In Ex-Cell-O and its companion cases the employer position is equally colorful:

54. Brief for the UAW at 53. If the parties were unable to agree on the amount due, a supplementary proceeding would be held after court enforcement of the Board’s order to bargain and pay compensation. For the rationale of the supplementary proceeding see Savoy Laundry, Inc., 148 N.L.R.B. 38, 40 (1964): “Compliance procedures are an indispensable element in assuring that the Board remedies are equitably applied. For it is almost axiomatic that the record before the Board concerning the unfair labor practice is inadequate for the spelling out of a precise, detailed remedy.” The proceeding is before a trial examiner who hears and decides the questions at issue. A supplemental Board order would then issue as to such questions, subject to review by a court of appeals. For an example, see East Texas Steel Castings Co., Inc., 116 N.L.R.B. 1336 (1956), enforced, 255 F.2d 284 (5th Cir. 1958) (disagreement as to amount due at informal negotiations, supplementary proceeding to resolve the question, supplemental Board order, court review of the order).

55. NLRB v. Katz, 369 U.S. 736 (1962). In each of the four currently pending cases the employer had unilaterally increased wages following certification (Ex-Cell-O; Herman Wilson Lumber Co.), recognition demand (Zinke’s Foods), and the commencement of negotiations (Rasco Olympia.)

56. “What effect would a unilateral increase in wages and benefits by the employer after an unlawful refusal to bargain have on the calculation of the amount of reimbursement pursuant to such an order?” Question 4, NLRB Notice of Hearing (May 26, 1967).

57. Brief for the UAW at 51. Brief for the AFL-CIO as Amicus Curiae at 21. The UAW stated: “We are particularly concerned that if the Board now provides a make-whole remedy but permits the offset by the employer of his unilateral and unlawful increases during the refusal to bargain period, the Board would be fostering unilateral increase violations of the statute of a kind which are well-nigh incurable after the fact. [I]t may develop that fuller recourse to injunctive remedies once the Board has filed an 8(a)(5) complaint could provide protection against unilateral employer changes in pay and benefits.” Brief for the UAW at 52.

58. Brief for the Retail Clerks Int’l Assn’n at 8. As Amicus Curiae, the teamsters were emphatic: “[U]nlawful, unilateral increases during the period of violation should not be an offset to the back pay award.” Brief for Teamsters as Amicus Curiae at 5.

59. 174 N.L.R.B. No. 103, 1969 CCH NLRB Dec. 20,564 (1969). The case is one in which the union requested monetary compensation for an employer’s refusal to bargain in good faith and the Board adopted the trial examiner’s decision refusing such relief. See note 33 supra.
The impossibility of making meaningful historical speculations is well known. No one can do more than conjecture about what would have happened had Lee won at Gettysburg, had Lenin not gone to Russia in 1917, had Kennedy not been assassinated.80

Even the vision of a permanent plant closure has been drawn61 in support of management's position that, as a matter of law, it is impossible to determine that a contract would have been entered. Thus, it is said, no finding of actual loss can be made.

As a matter of statistics, the unions rely upon the "house that Philip built." Philip is Professor Philip Ross. Professor Ross' empirical studies62 are said to demonstrate that "Board certification of a union's majority status ordinarily leads to the execution of a first bargaining contract"83 and that

one may fairly state that employees who have won the right to collective bargaining under the statute have an excellent expectancy—approaching a certainty—that if good faith bargaining promptly commences a collective bargaining agreement will be concluded.84

As further support for the proposition that "the opportunity to bargain collectively is a valuable right,"85 the AFL-CIO again relied on BLS figures.86

60. Brief for the Nat'l Ass'n of Retail Merchants as Amicus Curiae at 8.
61. "[I]t cannot be said in any individual case that a contract would have resulted had the employer lived up to its statutory duty. Conceivably, bargaining may have resulted in total loss of earnings to the employees; an impasse may have resulted from good faith bargaining, followed by a legitimate strike lockout or permanent plant closure." McGuiness, Is The Award of Damages for Refusals to Bargain Consistent with National Labor Policy?, 14 WAYNE L. REV. 1086, 1090 (1968). Mr. McGuiness is counsel for Ex-Cell-O Corp.
62. In THE GOVERNMENT AS A SOURCE OF UNION POWER (1965), Professor Ross found that contracts were negotiated in 84-90% of post-certification cases in which the employer bargained in good faith, at 251. This conclusion was based upon the study of 67 case histories at five NLRB Regional Offices in 1960. Table 2 at 184. In THE LABOR LAW IN ACTION: AN ANALYSIS OF THE ADMINISTRATIVE PROCESS UNDER THE TAFT-HARTLEY ACT (1966), a more extensive study, see note 12 supra, Professor Ross concluded that contracts were negotiated in 86% of the post-certification cases reviewed, at 12. In his special study of UAW experience, see note 44 supra, contracts were negotiated in 97% of cases reviewed in which the employer bargained in good faith. Although Professor Ross' studies included only post-certification case histories, it is apparent that the findings are to be relied upon to prove actual loss in authorization card cases such as Zinke's Foods. See Brief for Local 1401, Retail Clerks at 20. ("From this data alone, it is reasonable to infer that the commitment of a majority of Zinke employees to unionism would have resulted in the execution of an agreement, but for the employer's interference.").
63. Brief for the UAW at 11.
64. Id. at 15.
65. Brief for the AFL-CIO as Amicus Curiae at 5.
66. Id., Tagle IA at 24. Such data indicated, for example, that in 1963 77% of surveyed employees received wage increments, in 1964 89%, in 1965 92%, and in 1966 99% of surveyed employees received wage increases.
It is apparent that the parties involved have reached opposite conclusions. While management suggests that an employer may very well be "out fishing," labor argues that the employees have already returned home with a "full creel."

LEGAL POSITIONS—DIVERGENT FOCUS AND OPPOSITE CONCLUSIONS REITERATED

This writer has previously mentioned\(^6\) that there exist two considerations relevant to a determination of the appropriateness of a monetary remedy in cases of unlawful refusal to bargain. One is the question of need. The other is the issue of effects. The dichotomy is manifest in the arguments in *Ex-Cell-O*; and, not unexpectedly, the unions emphasize need, while the employers focus upon effects.\(^6\) The unions do focus upon "effects"; but those considered—"the corrosive effects of denying a compensatory remedy"—\(^6\) are different in kind from the *in futuro* considerations which worry management—compulsory arbitration, for instance.\(^7\)

One such corrosive effect, financial injury to employees, has already been mentioned.\(^7\) However, the unions further underscore the need to redress that injury by disclosing two allegedly aggravating circumstances. The financial injury to employees is one "for which they now have no redress."\(^7\) Further, "the near certainty of collective relationship becomes highly improbable" following court review of section 8(a)(5) orders. The latter disclosure is again a reference to the empirical studies of Professor Ross: contracts are reached in only 36

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6. See text accompanying notes 21-24, supra.

6. The succeeding text only details the points made by the parties in so far as they are important to the analysis of the problems raised by *Ex-Cell-O* which the writer offers. For a complete account of the parties' contentions see McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with National Labor Policy?*, 14 WAYNE L. REV. 1086 (1968) (employer position); Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal-To-Bargain Cases*, 14 WAYNE L. REV. 1059 (1968) (union position). Mr. Schlossberg is General Counsel for the UAW.

7. Brief for the UAW at 8.

7. "[The remedy] would be a radical change-over to a policy of compulsory arbitration, albeit compulsory arbitration imposed in the name of free collective bargaining." Brief for the Nat'l Ass'n of Retail Merchants as Amicus Curiae at 8. "In effect, the unions are requesting the Board to adopt, in the guise of a remedial order, a new national policy of governmental dictation of the substantive terms and conditions of employment, and thus, government dictation of the substantive terms of collective bargaining agreements." Brief for the Nat'l Ass'n of Mfrs as Amicus Curiae at 1.

7. See note 44 supra and accompanying text.

7. Brief for the UAW at 15. This is not simply restating the obvious. Although the writer is sure the comment was directed to the lack of such a remedy before the Board, he will intentionally misconstrue it as directed to the unavailability of monetary relief in any other forum. See infra.

7. Brief for the UAW at 16.
per cent of reviewed 8(a)(5) cases. And it is the use of the review procedure as a tactic—one designed to “sap the union’s vitality”—which the unions allege is the principal evil.

This “dilatory” employer... is keenly aware that the ultimate remedy it will have to comply with will be nothing more than the enforcement of a teethless and meaningless Board order such as... bargaining on request with a union that has been castrated by the employer’s “dilatory” tactics.

The injury is not only to the employees but also to the union “as an institution.”

There is an element of adjudication by aphorism in the arguments of the unions. For example, the UAW opens its brief with the suggestion that the case is already closed. “To decide this case we need to look no further than the maxim that no man may take advantage of his own wrong.”

A strong contention no doubt in the light of Board policy. See A.P.W. Prods. Co., Inc., 137 N.L.R.B. 25, 29-30 (1962) (“[The argument’s] real thrust is in the direction of benefitting the wrongdoer at the expense of the wronged—a result antithetical to th fundamental aim of the Board’s remedial authority and powers.”). However, there are those who label the maxim “deceptively simple” when applied without consideration of the effects of its application. Comment, Union Authorization Cards, 75 Yale L.J. 805, 817 (1966). Further, Professor Wellington has noted: “From time to time concern with freedom of contract allows even a wrongdoer to escape without sanctions.” Wellington, Freedom of Contract and the Collective Bargaining Agreement, 112 U. Penn. L. Rev. 467, 476 (1964). And freedom of contract, at least from management’s point of view, is precisely the issue. See note 70 supra.

The unions also suggest that “in pleading for a compensatory remedy... one might rest entirely on the ancient principle ‘no right without a remedy’...” Brief for the UAW at 8 (citation omitted). However, there is an equally ancient principle, one enunciated by Mr. Justice Holmes: “[T]he word is one of the most deceptive of pitfalls. Most rights are qualified.” American Bank & Trust Co. v. Federal Res. Bank, 256 U.S. 350, 358 (1921). Compare the remarks of Professor Cox: “The word right is often used loosely to imply a privilege.” Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 624 (1956). Professor Cox provided an interesting citation: “For example, in... NLRB v. Jones & Laughlin Steel Corp., the Court spoke of the right to organize and bargain collectively as a ‘fundamental right’ which antedated statutory recognition.” n. 50 at 624 (citation omitted). Although some have come close to a Hohfeldian discussion in their analysis of the issue of monetary compensation, see Note, Monetary Compensation as a Remedy for Employer Refusal to Bargain, 56 Geo. L.J. 474, 514 (1968) (“It cannot be assumed that such a right, although provided by statute, possesses any monetary value.”), this writer has committed himself to an avoidance of any Hohfeldian examination of the “right” to bargain collectively. See notes 1-5 supra and text accompanying.
postponement of their right to collective bargaining is equated with what employers gain—an unjust financial enrichment.29

The legal contentions of the parties remind one, once again, of Alice’s adventures.

*And here Alice began to get rather sleepy, and went on saying to herself, 'Do cats eat bats? Do cats eat bats?' and sometimes 'Do bats eat cats?' for, you see, as she couldn’t answer either question, it didn’t much matter which way she put it.*

The unions argue that the remedy is neither conjectural,86 contractual,81 nor punitive.82 The employers respond that the remedy is

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This is not to say, however, that his commitment bars an examination of the manner in which the remedy, if adopted, would influence the conduct of Warren Evans and those like him. See text accompanying notes 4 and 17, supra.

One final word in the world of aphorism. Compare Brief for the AFL-CIO as Amicus Curiae at 5 ("Congress did not leave this right inchoate. . .") with Local 60, Carpenters v. NLRB, 365 U.S. 651, 662 (1961) (dissenting opinion) ("It is certain that Congress did not intend by the Act to hold out to [employees] an illusory right for which it was denying them a remedy.") (citation omitted).

79. The UAW cited an impressive figure of $71,000 as the amount of financial gain unjustly procured by Ex-Cell-O during the initial year of its refusal to bargain ($343—the yearly loss in earnings of Ex-Cell-O employees, with computation based upon Professor Ross’ 16.52 cents average hourly wage increase figure, see note 44 supra, times 208—the number of unit employees). Brief for the UAW at 18. Although the figure is certainly impressive, it is somewhat misleading. Since Ex-Cell-O unilaterally increased wages and fringe benefits after certification, see TXD-80-67 at 13, 14, the employer may not have secured any financial gain. At the hearing before the trial examiner, Ex-Cell-O refused to produce financial records and as a result it is impossible to say whether the employer actually gained financially by its refusal to bargain.

A further alleged element of unjust enrichment is that an employer who refuses to bargain enjoys a competitive advantage over those employers who bargain in good faith. Brief for the UAW at 18. This assumes that wage increases have not eliminated any advantage, and although information as to amount is unavailable, unilateral increases were granted in each of the four pending cases. It should also be noted that employers often proffer "legitimate business reasons" for their unilateral increases as a hopeful defense to an 8(a)(5) charge. See Herman Wilson Lumber Co., Case No. 26-CA-2536 (N.L.R.B. TXD-757-66, Dec. 29, 1966) at 3. One such reason is the wage rates of competitors in the local labor market in order to preserve the labor force. Such action would not only eliminate the alleged competitive advantage, but it would also make the process of applying any "area standards" formula for computing the amount of compensation due employees for an employer’s refusal to bargain, see note 42 supra, a waste of time.

80. "Statistics available to the Board demonstrate the very high probability of the achievement of a collective bargaining contract . . ." Brief for the UAW at 37.

81. "Since a contract does not necessarily materialize in the collective bargaining negotiations, the wrong which the Board is redressing is not the denial of a contract but rather the right to bargain in pursuit of a contract." Id. at 38.

82. "If the damages are imposed in order to redress the injured party for the misconduct of the wrongdoer and their amount is a reasonable reflection of the amount of loss, then the damages, as here, are compensatory. Id. at 44.
punitivel,\textsuperscript{83} contractual,\textsuperscript{84} conjectural,\textsuperscript{85} and, in order to avoid any spoonerism, violative of the seventh amendment.\textsuperscript{86}

On the important question of the effects of the remedy on the parties immediately involved—"the manner in which it influences the payor and the payee"—sharp issue is drawn. When the parties return to the bargaining table, the UAW contends that the employees’ wage rates as of the day bargaining begins would not be the employees’ previous wage rate plus the additional amount representing the improved benefits the Board finds they could have won in collective bargaining, but simply their previous wage rates alone. This makes it clear that the Board is not being asked to use its power to set new terms and conditions of employment or to influence future settlements, but only to make employees whole for the period during which they were wrongfully denied their valuable right to collective bargaining.\textsuperscript{87}

Whereas the employers assert:

It is axiomatic that every collective bargaining agreement starts from necessity where the previous agreement left off and that it is impossible to rescind an employee benefit once granted. [T]he dictates of this Board’s order, supposedly as compensation for the past, will be demanded by the union as the basic given starting point for any future concessions.\textsuperscript{88}

\textsuperscript{83} "It is a penalty simply because money is taken away from an employer without regard to whether or not his employees were damaged by his acts." Brief for the Nat’l Ass’n of Retail Merchants as Amicus Curiae at 13.

\textsuperscript{84} "[W]hat the trial examiners are saying is not only that the respondent employers should have bargained but that they should have agreed to certain terms in the course of bargaining. Thus these trial examiners are placing their view of what a particular collective bargaining agreement should contain over the result of free collective bargaining." \textit{Id.} at 6.

\textsuperscript{85} "The permutations that can result from a bargaining session are so numerous that they prevent meaningful prophecy." \textit{Id.} at 10.

\textsuperscript{86} Brief for Zinke Foods, Inc. at 9. One thing this article shall not discuss is the Seventh Amendment. If a traditional back pay award does not violate the amendment, \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937), the writer cannot see how other monetary relief would violate the amendment.

\textsuperscript{87} Brief for the UAW at 39. The Retail Clerks, however, are not as categorical. "The parties are legally free to negotiate an initial contract without reference to the amount of compensatory damage, if they so choose. Legal compliance with the remedy does not \textit{directly} affect contract terms." \textit{Id.} at 21 (emphasis supplied). The Teamsters take the most realistic position in terms of the realities of labor relations and suggest that the very function of the remedy is that which the UAW denies. "Conceivably, the employees may choose to negotiate additional contract benefits and, in return, accept less than the fully amount of back pay due to them under the order." Brief for the Teamsters as Amicus Curiae at 7.

\textsuperscript{88} Brief for the Nat’l Ass’n of Retail Merchants as Amicus Curiae at 6, 7. One employer participant goes so far as to suggest that "if an employer \ldots sought to bargain from ‘scratch’,
Frank McCulloch, Chairman of the NLRB, was certainly correct when he commented, "This is a subject of many dimensions and vast complexity, interwoven with subtle problems of law, economics, technology and human relations." Ex-Cell-O presents no easy case.

LEGISLATIVE HISTORY—THE ISSUE OF CONGRESSIONAL INTENT

Mr. Justice Black has stated that "it is enough here to determine what Congress meant from what it said." What Congress said was that:

If upon a preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .

Mr. Justice Black was in dissent, and, in determining whether a particular order is within the Board's power, the Court has looked to legislative history. The difficulty lies with the breadth of the legislative authorization to take "affirmative action."

In Ex-Cell-O the employer participants have made much of the way in which Congress said what it said. The legislative history of section 10(c) supposedly "shows a clear intent by Congress preventing the Board from granting the remedy here in question." The reference is to certain legislative changes in the wording of what is now section 10(c).

or from his employment terms that were in effect prior to the Board's contract terms, the Board would find him guilty of an unlawful refusal to bargain. Brief for the Nat'l Ass'n of Mfrs as Amicus Curiae at 5.

89. McCulloch, Past, Present and Future Remedies Under Section 8(a) of the NLRA, 19 LAB. L.J. 131, 141 (1968). Mr. McCulloch's remarks were not directed specifically to the issue of monetary compensation for a refusal to bargain.

90. Republic Steel Corp. v. NLRB, 311 U.S. 7, 14 (1940) (dissenting opinion).


92. "[U]pon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy." NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 265 (1938).


94. Senate 2926, as introduced by Senator Wagner to the 73rd Congress, provided that the Board was to "take affirmative action, or to pay damages, or to reinstate employees, or to perform any other acts that will achieve substantial justice under the circumstances."
The significant change was the deletion of the reference to "damages" and the inclusion of "restitution." Thus, the scope of the Board's power in this regard was changed by legislative process from "damages" to "restitution" to the present law as exists today. Bear in mind that this change is from the greatest to least in terms of power, since restitution was construed as a blank check and the language ultimately incorporated was intended as an express limitation of "affirmative action."95

The latter contention that the "reinstatement" clause was intended to limit "affirmative action" is unsound as a matter of law.96 Moreover, since the employers' position admits that "restitution was construed as a blank check," it is arguable that in 1935 the Board was specifically authorized to take the very action requested in *Ex-Cell-O*.

The writer makes the argument, however, only to illustrate his hesitation with any suggestion of a "clear intent" on the part of the Seventy-fourth Congress.

A logical explanation for the deletion of "restitution" is simply that it was viewed as surplusage. Why reiterate something already included in the concept of "affirmative action?"97 It is at least

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95. *Legislative History of the National Labor Relations Act* 7 (1935). The bill was not enacted. The bill which was eventually enacted, S. 1958, as introduced in the 74th Congress, empowered the Board "to take such affirmative action, including restitution, as will effectuate the policies of this act." *Id.* at 1302. As reported by the Committee on Education and Labor, "restitution" was struck and the present language "including reinstatement of employees with or without back pay" was added. *Legislative History of the National Labor Relations Act* 229 (1935).

In introducing S. 1958, Senator Wagner stated: "[T]his bill is an entirely new draft, and that it must not be interpreted in the light of whether or not it contains provisions that were in the bill upon the same subject before Congress last year." *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 847 (1935). Therefore, reliance on the provisions of S. 2926 seems inappropriate. The companies also point to the testimony of James Emery before the Senate committee, wherein Mr. Emery expressed the view that any provision for restitution would be in violation of the Seventh Amendment, see *Hearings on S. 1958 Before the Senate Comm. on Education & Labor*, 74th Cong., 1st Sess. 847 (1935), and the companies urge that these remarks "were persuasive and undoubtedly a factor in limiting the scope of the Board's order-making power." Brief for Zinke Foods at 5. It should be noted, however, that Mr. Emery made other constitutional contentions to which Senator Wagner replied, "[Y]ou are addressing yourself to a question which is not involved here unless this committee is going to decide these constitutional questions rather than have them decided when they come up under the act." *Hearings on S. 1958 Before the Senate Comm. on Education & Labor*, 74th Cong., 1st Sess. 254 (1935). It is reasonable to conclude that Mr. Emery's remarks were far from persuasive; at least the bill's author disregarded them.

96. *Brief for Zinke Foods*, Inc. at 3, 4.

97. Compare S. 2926, note 94 *supra*, with S. 2926, as reported: "to take affirmative action or to perform any other act that will achieve substantial justice." *Legislative History of the National Labor Relations Act* 1091 (1935).
arguable that Senator Wagner so "intended," for in an address to the full Senate on S. 1958, as amended, he commented:

After appropriate hearings the Board will be empowered to issue orders forbidding violations of the law and making restitution to those who have been injured thereby.** (emphasis added)

If the deletion of "restitution" in committee were anything more than an elimination of surplus, it is difficult to believe that such a remark would have been made.

In the House Report**, mention was made of the orders "for appropriate restitution" which the old Labor Board** had issued. Assuming that "affirmative action" was intended to include the power of restitution, the testimony of Francis Biddle, then Chairman of the old Labor Board, suggests that such restitution included the very power to redress the injury alleged in *La-Cell-O*; and, although some might debate its meaning, it would surely be agreed that the testimony reads like a passage from the unions' briefs.***

Another aspect of the problem of enforcement . . . is the delay involved in the present machinery. A union, particularly a newly established union, is not a static organization. If an employer can strike a swift blow the organization may disappear entirely; if he can deny it the rights guaranteed by the law for a substantial period of time it will decline and disappear. It happens continually in our experience. *Restitution of damage done to an established organization* through violation of law is ordinarily possible only if secured promptly after the damage occurs. In perhaps the majority of situations the case becomes for all practical purposes moot at the end of 3 to 6 months.**** (emphasis added)

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** Senator Wagner's statement was made prior to Senate debate on the committee amendments. The amendment striking "restitution" was agreed to without comment. *Id.* at 2352. And see *Trailmobile v. Whirls*, 331 U.S. 40, 61 (1947) ("Moreover . . . the most important committee changes relied upon were made without explanation. The interpretation of statutes cannot safely be made to test upon mute intermediate legislative maneuvers.").


**** Prior to the enactment of the NLRA, the National Labor Board and the National Labor Relations Board (old) had administered § 7(a) of the National Industrial Recovery Act of 1933. For history see Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941).

Supra note 77. Compare note 77 supra.

****** Hearings on S. 1958 Before the Senate Comm. on Education & Labor, 74th Cong., 1st Sess. 95-6 (1935). Mr. Biddle also testified that he had assisted in the preparation of the bill. *Id.* at 75.
It can also be added that both the Board\textsuperscript{103} and courts\textsuperscript{104} have characterized exercises of the Board's remedial power in terms of "restitution."

The actions of the Eightieth Congress present more difficult problems. It is quite clear\textsuperscript{105} that the legislators in 1947 took a narrow view of the Board's remedial process. In 1947 Congress proposed that, among other things, it was to be an unfair labor practice for a union to engage in a secondary boycott. Amendments to section 8 of the NLRA were proposed "creating remedies for unfair labor practices by labor organizations."\textsuperscript{106} It is apparent, however, that at least Senator Taft thought very little of the Board's remedial powers. Without provision for a suit for damages caused by the proposed illegal conduct, "the remedy of dealing with the NLRB is a weak reed."\textsuperscript{107} Since there was "no possibility of a suit for damages,"\textsuperscript{108} Senator Taft proposed an amendment, eventually adopted,\textsuperscript{109} in order to "fill up gaps which we feel are serious."

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\textsuperscript{103} American Fire Apparatus Co., 160 N.L.R.B. 1318 (1966). And compare, "Congress in drafting Section 10(c) specifically rejected such language as 'substantial justice' and 'restitution which would have clearly permitted the award of interest on wages withheld. Congress chose instead the words 'reinstatement and backpay' with the knowledge that this unambiguous language 'necessarily results in narrowing the definition of restitution' . . . ." Isis Plumbing & Heating Co., 138 N.L.R.B. 716, n. 23 at 722 (1962) (dissenting opinion) (citations omitted).
\textsuperscript{104} NLRB v. Citizens Hotel Co., 326 F.2d 501, 508 (5th Cir. 1964) ("[T]here are circumstances in which, to effectuate the dominant policy of collective bargaining in good faith, a restitution order is permissible or required.")
\textsuperscript{105} For example, the Senate had amended \$ 10(c) and provided that where a Board order directs reinstatement of an employee back pay could be required of a labor organization, as well as of an employer. The House Conference commented on the amendment: "The language of the Senate amendment without which the Board could not require unions to pay back pay when they induce an employer to discriminate against an employee is included in the conference agreement." H.R. Conference Rep. No. 510, 80th Cong., 1st Sess. 54 (1947) (emphasis added). It would seem that the legislators took a very narrow view of "affirmative action."
\textsuperscript{107} S. Rep. No. 105, 80th Cong., 1st Sess. 54 (1947) (supplemental views (Senator Taft)).
\textsuperscript{108} Under the bill there is a kind of injunctive remedy through the National Labor Relations Board, but there is no possibility of a suit for damages. I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore the people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost.

We considered making it a procedure through the National Labor Relations Board also, but it is not felt I think by any of those on the other side of these questions that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that the particular function should be in the Board. So, if such remedy is to be provided at all, if there is to be any recourse for financial losses caused by unions, it must be by direct suit as proposed by the amendment.
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if the Board possessed any general power to redress injuries resulting from unfair labor practices, such amendments were necessary.

In *Ex-Cell-O* this question is raised and said to bar the Board’s adoption of the proposed relief.\(^\text{111}\) The contention is substantial; and, although one could not rest entirely upon the argument, this writer would not be surprised to see a court, if troubled otherwise with the proposed remedy, relying upon the language of Senator Taft and its accompanying history. Just such legislative history has produced dicta to the effect that “the Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay.”\(^\text{112}\) Further, were the Board to adopt the new remedy, it would first have to repudiate decisions\(^\text{113}\) relying specifically upon the same argument now presented to it by the employers in *Ex-Cell-O*.

It is appropriate here to mention an additional desideratum. Considerations of mutuality of remedy may weigh heavily in any

\(^{111}\) Brief for *Zinke Foods, Inc.* at 7.


\(^{113}\) In National Maritime Union, 78 N.L.R.B. 971 (1948), employers sought monetary compensation “making them whole for the economic consequences of a strike” in violation of § 8(b)(2) of the Act. The Board responded:

> [T]o do so would involve our assuming a power which is appropriately a function of the courts, rather than administrative tribunals. Congress (in § 303) thus considered the issue of money damages resulting from strikes which are union unfair labor practices. It confined the right to obtain money damages to cases involving specific kinds of strikes.

> That Congress did not intend thereby to vest in the Board a similar power

\(\ldots\) Id. at 989-90. Although the case is obviously distinguishable as it involved § 8(b)(2) rather than 8(a)(5), it would seem its reasoning is equally applicable in cases of refusal to bargain, particularly in cases of union refusal to bargain; and see the discussion of mutuality in the succeeding text.

In *United Furniture Workers (Colonial Hardwood Flooring Co.),* 84 N.L.R.B. 563 (1949), the Board held that it was without power to order a union to reimburse employees for any lost wages they may have suffered as a result of the union's unlawful interference with the non-striking employees' ingress to the plant. “An award of back pay here would be in the nature of damages to the employees for an interference with his right of ingress to the plant, as contrasted with compensation to him for losses in pay suffered by him because of severance of or interference with the tenure or terms of the employment relationship between him and his employer in the ordinary case in which back pay is awarded. [...]” Id. at 564-65. *Compare Local 513, Int'l Union of Operating Eng'rs*, 145 N.L.R.B. 554 (1963), where the Board on the same facts—interference with ingress—stated, “Without now deciding whether such a result is or is not required by any lack of statutory authority, we nevertheless believe it would not effectuate the policies of the Act for the Board to award back pay or other compensatory relief in such situations.” *Id.* at 555, with *Hearings on H.R. 667, H.R. 976, H.R. 1134, H.R. 1548, H.R. 2048, H.R. 3955, H.R. 4278, H.R. 5918, H.R. 6030 Before the Special Subcomm. on Labor of the House Comm. on Education & Labor, 89th Cong., 2nd Sess.* 72 (1966) where the Proposal is made: “that the Committee might wish to consider giving the Labor Board the authority to remedy this type of loss (ingress case).”
assessment of the proposed relief. *Kenscotta Copper Corp.*, a recent trial examiner’s decision, provides an example. In *Kenscotta* the trial examiner found that the respondent unions had refused to bargain in good faith by insisting upon company-wide, coordinated bargaining and striking in support thereof. The company requested that the trial examiner in his order require the unions, jointly and severally, to pay it “strike damages and other damages established at a subsequent hearing before the trial examiner.” The trial examiner denied the company’s request on the merits.

There is no warrant for such a remedy. The Board is not empowered to award damages. The traditional order issued to remedy a refusal to bargain will provide adequate “means of removing the consequences of violation” which have thwarted the purposes of the Act in this case. (citation omitted)

Since there is evidence that “equal responsibility before the law” was the pervasive mood of the Eightieth Congress, it is difficult to see how the Board could provide monetary compensation for an employer’s violation of section 8(a)(5), while at the same time denying the relief in such cases as *Kenscotta*. At least it is certain to this

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115. *Id.*

116. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 8 (1947). *Hearings on Administration of the Labor Management Relations Act in the NLRB Before the Subcommittee on National Labor Relations Board of the House Committee on Education & Labor, 87th Cong., 1st Sess. 665 (1961)* (“You believe, then, that it was the intent of Congress in passing the act to equalize responsibility and to put responsibility on unions as well as employers and that section 10(c) should be read against the background of the intent of Congress.”) (Statement of Representative Griffin).

117. In *Hoisting & Portable Eng’rs.*, 141 N.L.R.B. 469 (1963), the Board held that a union had violated § 8(b)(3) of the Act by forcing employers by threat of strike to bargain outside of the traditional bargaining unit — a multi-employer unit. The employers had unwillingly negotiated individual contracts with the union and pursuant to those contracts had made payments to the union’s welfare fund. The Board ordered the union to cease giving effect to the individual contracts. The employers then sought “restitution” in a state court of alleged over payments to the union’s welfare fund and payments of wages to employees made pursuant to the unlawful contracts. The employers argued that had the union bargained in good faith both contributions to the welfare fund and payment of wages would have been less than those unlawfully negotiated. Relief in the state court was denied on grounds of pre-emption. *Corvallis Sand & Gravel Co. V. Hoisting & Portable Eng’rs.*, 247 Or. 158, 419 P.2d 38 (1966), *cert. denied*, 387 U.S. 904 (1967).

In its memorandum in opposition to the employer’s petition for certiorari, the Board stated:

Had the issue of recoupment been presented to the Board, it might have been concluded that it would be too speculative to attempt to determine the difference between the terms that were negotiated individually and those that might have been negotiated through *Cascade*; or it might have been concluded that a reimbursement order would be excessive for the violations found, or that to impose such a remedy would not be conducive to satisfactory bargaining relations between the parties in the future.

Memorandum for the United States as Amicus Curiae Opposing Certiorari at 9, Corvallis Sand
writer that any such disparity would add further cries to the mounting employer charge of unequal treatment.\textsuperscript{118}

Although the legislative history of section 303 provides support for a contention that the Board is precluded from remediying refusals to bargain with monetary compensation, surely it should not be regarded as dispositive.\textsuperscript{119} A union seeking monetary relief need not prove any actual loss, the reasons given by the legislators\textsuperscript{120} and even the Board itself\textsuperscript{121} for denying the Board power "to assess damages" would be inapplicable. The supplemental proceeding would not involve difficult factual questions; all that would be required would be application of a standard formula. This seems no more difficult than quarterly calculation\textsuperscript{122} of back pay or computation of interest\textsuperscript{123} on back pay awards. Indeed, it might be argued that the Boards very decision to pay interest on back pay awards implicitly rejects any broad contention that section 303 stands as a bar to the suggested remedy. In this posture reliance upon section 303 as a limitation on the Board's remedial powers resembles the attempt which was made in \textit{Phelps Dodge Corp.}\textsuperscript{124} to read another

\textsuperscript{118} "Another disparity demonstrating the Board's pro-union bias... is found in the differences of remedial inventiveness displayed when a union is the charging party, and when a union is the respondent." Ervin \textit{Hearings}, note 13 \textit{supra}, at 182 (Statement of J. Mack Swiger!). Although such diatribe should be discounted, political considerations will undoubtedly influence the Board's deliberation of \textit{Ex-Cell-O}. For those who insist upon predictions, I might very well have placed it here. Instead, I offer additional diatribe: "Mr. Chairman, I have concluded that the time has come to abolish the NLRB...." Ervin \textit{Hearings} at 17 (Statement of Senator Griffin).

\textsuperscript{119} Note, \textit{An Assessment of the Proposed "Make-Whole" Remedy in Refusal-To-Bargain Cases}, 67 Mich. L. Rev. 374 (1968). The argument suggests that the employer's illegal conduct should preclude any consideration of whether an actual loss has occurred. \textit{Id.} at 381.

\textsuperscript{120} Senator Taft was concerned that the Board would not be "an effective tribunal for the purposes of trying to assess damages. See note 108 \textit{supra}."

\textsuperscript{121} In \textit{Local 513, Int'l Union of Operating Eng'rs}, 145 N.L.R.B. 554, 556 (1963), the Board denied monetary relief in an ingress case on the grounds that, among other things, "the numerous and complicated factual questions involved in settling such claims are not such questions as fall within the Board's special expertise, but do fall within the competence of judge and jury."

\textsuperscript{122} The practice was adopted in \textit{F.W. Woolworth Co.} v. \textit{N.L.R.B.}, 90 N.L.R.B. 289 (1950) and sustained in \textit{N.L.R.B. v. Seven-Up Bottling Co. of Miami, Inc.}, 344 U.S. 344 (1953). The \textit{Seven-Up} case itself provides strong support for the position of the unions in \textit{Ex-Cell-O}. As in \textit{Woolworth}, experience has shown that past practice, here an order to bargain, is ineffective. In \textit{Seven-Up}, the Court noted that "The Board must draw on enlightenment gained from experience" and that the Board's power "is a broad discretionary one." at 346.

\textsuperscript{123} \textit{Isis Plumbing & Heating Co.}, 138 N.L.R.B. 716 (1962).

\textsuperscript{124} \textit{Phelps Dodge Corp. v. N.L.R.B.}, 313 U.S. 177 (1941).
express section of the Act as limiting section 10(c), Mr. Justice Frankfurter rejected the contention. "The syllogism is perfect. But this is a bit of verbal logic from which the meaning of things has evaporated."\(^{125}\) Even assuming that the Board, were it to provide monetary compensation for a refusal to bargain, would label the relief "an award of damages for breach of the obligation to negotiate," as suggested by the UAW,\(^{126}\) a reviewing court could reasonably take the same position as was taken when the legitimacy of the Board's awarding interest was at issue:

The argument on this score is that only Congress could authorize such remedial action and it failed to do so. So far as we can ascertain the history of the legislation sheds no light and we can only assume Congress gave no thought to the specific issue of interest one way or the other.\(^{127}\)

In order to consider the effect that section 303 and its history might have on resolution of the question of monetary compensation, it has been assumed that the remedy is "in the nature of damages" as argued by the employers in Ex-Cell-O. The assumption is not necessarily correct. Were the relief considered "back pay," section 303 would be irrelevant; the Board is specifically authorized to provide reinstatement with back pay and this relief encompasses unlawful refusals to bargain.\(^{128}\) Traditionally, back pay has been defined as compensation for "time lost,"\(^{129}\) and it is difficult to see how Ex-Cell-O employees would be "reinstated" with compensation for "time lost." However, it seems safe to say that traditionalism is not the touchstone. Just recently the Supreme Court sustained an order of the Board requiring an employer, found to have violated section 8(a)(5) by refusing to sign an agreement previously reached, to make those payments to the union's trust fund as welfare benefits due under the contract.\(^{130}\) The argument that such fringe benefits were not compensation for time lost, back pay in the traditional sense, was given only footnote consideration and rejected.\(^{131}\) By analogy to those cases\(^{132}\) in which an employer bargains in bad faith by refusing to sign

\(^{125}\) Id. at 191.
\(^{126}\) Brief for the UAW at 42.
\(^{127}\) Int'l Br't of Operative Potters v. N.L.R.B., 320 F.2d 757, 760 (D.C. Cir. 1963).
\(^{129}\) NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).
\(^{131}\) "The fact that the payments in question here did not constitute direct pay to the employee is irrelevant in our view of the case." Id. n. 4 at 360. Compare Mr. Justice Douglas' dissenting opinion at 362-63 (award of back pay is an express part of legislative grant of authority, while the award of fringe benefits is not).
\(^{132}\) Coletti Color Prints, Inc., 159 N.L.R.B. 1593 (1966), enforced 387 F.2d 298 (2nd Cir. 1967).
an agreement previously reached and is ordered to make the employees whole for any lost wages, it can be argued that the relief sought in Ex-Cell-O is within the Board's back pay power.133

Finally, were the Board to characterize the remedy as a "make-whole" measure, the Ex-Cell-O employees would, indeed, be on their way home with a "full creel," since "making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces."134 In fact there are decisions which indicate that the Board has come very close to taking just such a position. In M.F.A. Milling Co.,135 an employer bargained in bad faith during negotiations for an initial contract following union certification. The remedy adopted by the full Board required that the employer reimburse the employee members of the union negotiating committee for wages lost while attending the futile bargaining sessions. So far, here there is nothing unusual; the remedy required only the payment of compensation for time lost. Two things, however, are noteworthy. First, as the employer had previously rejected a union request that the employee negotiators be paid for time spent in bargaining, the remedy required, in effect, that the employer retroactively agree to a proposal he had specifically rejected at the bargaining table.136 Logically, it can be argued that Ex-Cell-O is an easier case; for in Ex-Cell-O the employer had not explicitly rejected any of the terms of the "make-whole" contract to which he would otherwise have agreed.137 Second, the language of the Board's decision:

As a result of Respondent's 8(a)(5) conduct, the employee members of the negotiating committee did not receive the

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133. A very important substantive element in refusal to sign cases is that an agreement was in fact reached. See Greer Stop Nut, 162 N.L.R.B. 626 (1967) (employer did not violate § 8(a)(5) by refusing to execute agreement since duration remained unsettled); Retail Clerks v. NLRB, 373 F.2d 655 (D.C. Cir. 1967) (substantial evidence did not support Board's finding that agreement had been reached). In Ex-Cell-O, although no agreement has been reached, it is the union's position that had the employer bargained in good faith an agreement would have been concluded. See note 64 supra. Therefore, at some point after the rejection of a post-certification demand for bargaining or of a demand for recognition in Joy Silk case, the employer has, in effect, refused to sign the agreement which he would have signed absent the refusal to bargain; and the analogy holds. But see text accompanying note 125 supra.

134. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).


136. The Board explicitly limited the payment to those wages lost while attending past negotiating sessions. "[I]t is inappropriate to apply the remedy, at this time, to any future negotiating sessions, since that will require a later determination as to whether they are conducted in bad faith." 68 L.R.R.M. at 1080. Compare the union's proposals as to when to toll the requested monetary relief in Ex-Cell-O and companion cases, see text accompanying notes 47-53 supra.

137. See note 133 supra.
compensatory benefit of good faith bargaining for which they had sacrificed their wages. Since the Respondent never had any intention to bargain in good faith, it deliberately deprived the employees of their wages as well as this anticipated benefit. Therefore, we believe it is appropriate that, in order to make these employees whole, they be reimbursed for wages lost while attending those past negotiating sessions. . . . 138

(emphasis added)

It would be but a simple step to expand this order to include all unit employees, making them whole for the loss of the anticipated benefit of good faith bargaining—precisely the relief requested in Ex-Cell-O.

SHOULD THE BOARD ADOPT THE PROPOSED RELIEF?

It depends. And again, the relevant considerations are those of law, economics, policy, and human relations. It depends on how the Board resolves certain anticipated evils. 139

In a related area Professor Bok has suggested that "the key question is to determine how much value will be derived from the Government's efforts." 140 The inquiry is likewise relevant in resolving the question of monetary compensation for a refusal to bargain. An appropriate place to begin is to determine the extent of the problem—just how many employees and unions have suffered the "corrosive effects of denying a compensatory remedy." 141 The principal evil, it is alleged, is the use of judicial review as a delay tactic. As a result

the employer may well escape with no contract at all because the initial organizing strength has meanwhile been so far eroded that he can outlast a strike and break union representation completely. 142

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139. Compare Savoy Laundry, Inc., 148 N.L.R.B. 38 (1964). The Board discussed generally its back pay power and made reference to "anticipated evils" raised in the past and shown by experience to have been imaginary. "It was claimed at the time that such a remedy was unfair and punitive. But the continued development of a body of backpay law has established reasonable rules for the fair administration of this remedy which have dispelled the fears." Id. at 40. In the succeeding text I likewise raise anticipated evils—what I consider to be the reasonably probable effects of the proposed remedy on the immediate parties involved and on bargaining relationships generally. Because those effects are, in my view, contrary to the policies of the Act, I suggest that the Board should not adopt the remedy. Then, assuming that the Board adopts the relief, I shall consider the problem of judicial review.


141. Brief for the UAW at 8.

142. See notes 74-78 supra and accompanying text.

143. Brief for the UAW at 19.
In fiscal 1967, of the 1,282 cases closed against employers in which collective bargaining was begun, bargaining was begun pursuant to court order in but 77 cases.\(^{111}\) Since the unions suggest that those employers who exhaust judicial review avoid contracts in 64 per cent of 8(a)(5) cases,\(^{115}\) in fiscal 1967 only 49 unions and their members suffered as a result of the unavailability of the proposed remedy. It would seem that the problem of need is rather small.\(^{116}\) On the other hand, the problem of effects—the anticipated evils—appears quite large.

**Pre-Emption—“For Which They Now Have No Redress”**

It has been said that the Board acts only in the public interest, enforcing “public” rather than “private rights.”\(^{117}\) In fact, the Board has been admonished for submerging in its daily operations the NLRA’s public aspects.\(^{118}\) Just what all this means is puzzling. If the suggestion means anything more than at times injury will go without Board redress, I have my doubts.\(^{119}\) But, for the moment, assume that an attorney, having learned of all this, decides to seek relief for his client, a certified union denied recognition and bargaining two years ago, in

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\(^{111}\) Thirty-second Annual Report of the National Labor Relations Board Table 4 at 222.

\(^{115}\) See notes 74-78 supra and accompanying text.

\(^{116}\) Although the calculation is hardly dispositive on the issue of need, it demonstrates two points. Contrary to my statistical calculation need may be quite large. I have a like hesitation with the statistical demonstrations of the unions in Ex-Cell-O. Compare Murphy, The National Labor Relations Board—An Appraisal, 52 Minn. L. Rev. 819 (1968). Professor Murphy discussed the research inadequacy of the Board and commented, “One source the Board does have—feedback from companies and unions—is not always reliable because it too often involves mere polemical special pleading.” Id. at 844. Secondly, in 1967, 1,006 of the cases so closed in which bargaining was begun were settled informally. Were the remedy of monetary relief available in cases of refusal to bargain, I seriously question whether such a large number of cases could, in the future, be informally settled.

\(^{117}\) “The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights.” National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940).

\(^{118}\) Note, The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act, 112 U. Penn. L. Rev. 69, 77 (1963).

\(^{119}\) It is interesting that in Ex-Cell-O itself the Board cast its notice of hearing in terms of “returning the employees to the status quo ante.” NLRB Notice of Hearing (May 26, 1967) (emphasis added.) Compare S. Doc. No. 81, 86th Cong., 2nd Sess. 5 (1960) (Cox Advisory Panel on Labor-Management Relations Law) (“[A]lthough proceedings before the NLRB are undertaken in the public interest, since 1947 they have also been concerned with the vindication of essentially private rights. Unions often intervene in NLRB proceedings in order to press complaints of unfair labor practices against employers. Not infrequently they carry adverse decisions to the courts.”). In Ex-Cell-O the unions have laid the foundation for appeal to the courts by contending that, were the Board to deny such relief, the Board would have abused its discretion. Brief for the UAW at 19. Such a contention is likely to meet with little success. Amalgamated Clothing Workers v. NLRB, 371 F.2d (D.C. Cir. 1966); Retail Store Union v. NLRB, 385 F.2d 301 (D.C. Cir. 1967).
another forum.\textsuperscript{150} The forum to which he turns is the state of Schlossberg, undoubtedly receptive to all union claims.\textsuperscript{151} A federal court of appeals has just enforced a Board decision finding unlawful the employer's refusal to bargain with the union, and upon preliminary research the lawyer discovers that Judge Learned Hand has characterized the employer's action as a tort.\textsuperscript{152} Smilingly, he turns to Prosser to find "what tort?" and discovers an appropriate pigeon-hole—§ 124, Interference with Prospective Advantage.\textsuperscript{153} Armed with statistics, our lawyer confidently draws his complaint. Unfortunately, he would find that, even in Schlossberg, relief would be unavailable.\textsuperscript{154}

\textsuperscript{150} The writer has selected the state forum for illustrative purposes only. He thinks it clear that relief would be unavailable in any forum other than the Board. For the rationale applicable to state forums see succeeding text and San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). For the bar to relief in federal courts see United Electrical Works v. Int'l Br'hd of Electrical Workers, 115 F.2d 488 (2nd Cir. 1940); Amazon Cotton Mill Co. v. Textile Workers 167 F.2d 183 (4th Cir. 1948). But see DeLucia, Federal Jurisdiction and a Right to Damages in Primary Labor Disputes. 14 RUTGERS L. REV. 601 (1959). Although it is generally agreed that relief in another forum would be unavailable, some suggest that such a result is an additional reason for the adoption of monetary relief. See Comment, Employee Reimbursement for an Employer's Refusal to Bargain: the Ex-Cell-O Doctrine, 46 TEX. L. REV. 758, 762 (1968). The writer suggests that the result cuts in precisely the opposite direction.

\textsuperscript{151} Mr. Schlossberg is General Counsel for the UAW.

\textsuperscript{152} NLRB v. Remington Rand, Inc., 94 F.2d 862, 872 (2nd Cir. 1938). But see Comment, State Jurisdiction over Torts Arising from Federally Cognizable Labor Disputes, 68 YALE L.J. 308, 317 (1958) (an employer unfair labor practice which inhibits the union's right to organize and bargain collectively breaches no interest recognized by the tort law of most states.) Some states, however, have created private causes of action for damage resulting from unfair labor practices (conduct prohibited under state law but generally defined in terms identical with those of the Federal act) and conceivably, after the adjudication of an unfair labor practice before the Board, suit could be brought in a state forum under such statutes. See Denver Building & Const. Trades Council v. Shore, 132 Col. 187, 287 P.2d 267 (1955). After an adjudication by the Board finding that a union had violated § 8(b)(2) of the Act, an employer sued in a state court under a local statute which today reads: "Any person who suffers injury because of some act of unfair labor practice . . . shall have a right of action . . . against all persons participating in such action for damages caused to the injured persons thereby." COLO. REV. STAT. ch. 80, art. 4-19(1) (1963). Relief was granted over a contention of pre-emption. It is submitted that the court erred. The court should have dismissed the cause on the grounds of pre-emption. Compare Corvalis Sand & Gravel v. Hoisting & Portable Eng'rs, 247 Or. 158, 419 P.2d 38 (1966), and see note 117 supra. cert. denied, 387 U.S. 904 (1967). "This opinion has treated the suit against the union as one for recission and restitution. It was unnecessary to decide whether it might in fact be a tort action for damages occasioned to the employers. . . . If it is in fact a tort action . . . against the union because of unfair labor practices, pre-emption would also prevent its prosecution. Id. n. 8 at 168-69.

\textsuperscript{153} PROSSER ON TORTS § 124 (3d ed. 1964). "In such cases there is a background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff, would have received it if the defendant had not interfered." Id. at 974-75. Compare the unions' position in Ex-Cell-O, see note 44 supra (value of what has been lost) and text accompanying notes 59-66 supra (likelihood that contract would have been entered had not the employer refused to bargain.).

It can be argued that the rationale of pre-emption is likewise a relevant desideratum in considering whether the Board should adopt the new remedy. Far from being an aggravating circumstance, the fact that Ex-Cell-O employees "now have no redress" may weigh against adoption of monetary relief. The Board itself has expressed one of the reasons for precluding the tort action:

... to impose such a remedy would not be conducive to satisfactory bargaining relations between the parties in the future.

The fear is that the damage action might "frustrate the effort of Congress to stimulate the smooth functioning of (the bargaining) process." Pursuant to the enforced order of the Board the parties would have entered negotiations. The pendency of the tort litigation, "serving primarily to expand the area of dispute and prolong the controversy," might "subvert the national policy for minimizing industrial strife." It might be maintained, however, that the relationship of the parties has so far deteriorated because of the employer's initial refusal to bargain that any added disruption would have only marginal impact on what are already spoiled relations. This might indeed be the case where an employer has used the review procedure merely to frustrate the bargaining relationship. But this writer wonders whether the same is true in cases where the employer honestly believes that the Board has erred in certifying the union, for example, and seeks review in good faith. Such an employer, returning to the bargaining table only to be served with process, or even with a

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155. See notes 68-72 supra and accompanying text.
156. In order to avoid circuitry, I examined only one of the reasons for pre-emption, reserving consideration of other reasons for discussion in connection with the Board's remedial power.
157. Memorandum for the United States as Amicus Curiae Opposing Certiorari at 9, Corvalis Sand & Gravel Co. v. Hoisting & Portable Eng'rs, 387 U.S. 904 (1967). See note 117 supra. I can see no rational distinction between the Board's fear as expressed to bar state relief and full application of the same argument to the Board's own remedial process.
160. Ex-Cell-O was such a case. "I have been assuming, and do assume, that the Respondents challenge to the Board's decision overruling the Respondent's objections to the election is not based upon hostility to the collective-bargaining process but upon a sincere desire to obtain a review of what it regards as an erroneous ruling by the Board." TXD-80-67 at 16. Likewise, Herman Wilson Lumber Co. involved a good faith employer desire to obtain judicial review. See TXD-757-66 at 5.
Board back pay specification, might reasonably decide to take a very hard line in any future negotiations. Here the fear is real rather than apparent.

**ADMINISTRATION OF THE REMEDIAL PROCESS—BEYOND OUTRIGHT REFUSALS**

In its brief to the Board, the AFL-CIO suggested that the basic prudential question in determining whether the Board should change its present remedies is "what effect does the present system have on a rational man who is subject to its sanctions?" The writer suggests that the rational men about whom we are talking—those who cause all the difficulties—might accomplish their primary goal, avoidance of the union, and do so in a manner which, unless the proposed remedy were extended beyond outright refusals to recognize, would leave them none the worse off.

Here the subject matter is the rational "union buster"—those employers who do in fact use judicial review as a tactic; one grounded in the psychology of labor-management warfare. The refusal to recognize and bargain provides a "devastating blow" to the "enthusiasm of organization and the high hopes of successful negotiations." If the new remedy were adopted, it would be reasonable to assume that this very special class of rational men would abandon the tactic in exchange for but another.

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161. Brief for the AFL-CIO as Amicus Curiae at 6. The tendered response was that the present system tempts the rational man to violate the law. One might argue that, if adopted, the new remedy would tempt the rational union, the rational weak union, to violate the law. The present problem for the type of union which falls victim to the corrosive effects of the current remedial scheme is that it "lacks the economic power to use the strike as a weapon for compelling the employer to grant it real participation in industrial government." Cox, The Duty to Bargain in Good Faith, Harv. L. Rev. 1401, 1413 (1958). This I think is the type of union we are talking about; for example, in Herman Wilson Lumber Co., the union attempted to call a strike after the employer had refused a post-certification demand for bargaining. After two weeks the employees returned to work and the strike was unsuccessful. Official Report of the Proceedings Before the NLRB, Docket No. 25-CA-2377 et al., oral argument, July 13, 1967, at 187. The new remedy, if adopted as proposed, would provide each employee with a lump-sum payment, see text accompanying notes 47-53 supra, coincident with the commencement of bargaining. This I think would significantly improve the ability of the union and the employees to strike. As a result, the more favorable posture for the weak union is one in which the employer outright refuses recognition and bargaining in the first instance—after certification or card show. One way for the union to guarantee this result is that it engage in tainted pre-election conduct or unlawful solicitation of authorization cards in order to force the employer to seek judicial review. And although the union would gain nothing were the employer’s claim sustained on review, it has been argued, at least in the authorization card area, that the risks for the union are slight. See Comment, Union Authorization Cards, 75 Yale L.J. 805 (1966).


163. I don’t think that any rational employer of this type would want to begin negotiations with the union after his employees have each received a large lump-sum back pay award. See note
The bargaining status of a union can be destroyed by going through the motions of negotiation almost as easily as by bluntly withholding recognition.164

If, in fact, the new remedy were to encourage the motions of negotiation rather than the substance, then the Board would be required in order to reach such cases in the future to provide a form of relief which in prior decisions it has been hesitant to apply. The decisions involve contract signing as a remedial measure;165 and, interestingly enough, in such cases the Board has rejected a ratio decidendi it would be required to embrace were it to adopt Ex-Cel-O relief in the first instance. A hypothetical provides an example. Suppose that an employer commences bargaining with a newly certified union and after several sessions he agrees to a ten cent an hour wage increase. Although the employer has no intention of reaching an agreement, he makes the tentative agreement on wages in order to create expectations on the part of his employees, expectations the employer knows he can frustrate—the union is weak and the employer does not fear a strike. After further sessions, one issue remains open: health and welfare benefits. Here the employer refuses to provide financial information, the negotiations break down, and the union is without agreement. Assume that, in addition to the unlawful refusal to provide financial data,166 other evidence demonstrates that the employer’s mind was closed against agreement with the union. In the actual case,167 the union requested and the trial examiner recommended that the employer be ordered to execute a contract incorporating the terms agreed upon and with respect to matters not agreed upon to bargain. The trial examiner repudiated the employer’s contention that no final agreement had been reached:

I think that such a contention would be without merit. Respondent’s failure and refusal to reduce to writing and execute a contract incorporating matters agreed upon is not

161 supra. Although for different reasons, the same assumption is suggested in Comment, Recent Developments in the Creation of Effective Remedies Under the National Labor Relations Act. 17 Buff. L. Rev. 830, 839 (1968). It is there suggested that as an employer “would prefer to work out [his] own agreement” bargaining would commence at the outset. The article suggests that an employer “would have a choice between having control over the agreement by bargaining at the outset on the one hand or losing his control over the terms by refusing to bargain and letting the case go to the Board for decision on the other.” I would suggest that there will indeed be bargaining from the outset; all bargaining and no bargain, form rather than substance.

164. Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1413 (1958). For an example, see MacMillian Ring-Free Oil Co., Inc., 160 N.L.R.B. 877 (1966) (negotiations spanned almost four years and the parties met some thirty times without reaching an agreement.)

165. See text accompanying notes 130-134 supra.


attributable to the fact that health and welfare proposals were left open at the time Respondent broke off negotiations. I think the Respondent may not avoid its obligation to execute a contract embodying its wage offer as accepted by the union, and other matters agreed upon by pleading unresolved issues, when it made agreement on such unresolved issues impossible because of its own unfair labor practices.168 (emphasis added)

Although agreeing that the employer had refused to bargain in good faith, the Board refused to adopt the trial examiner's recommendation. The parties had not yet reached "full and complete agreement."169 The injury, however, was the same as that alleged in Ex-Cell-O. The employees had been deprived of the compensatory benefit of good faith bargaining; the union had suffered a loss of status. Nevertheless, the Board refused to provide what would have amounted to monetary relief,170 rejecting the very rationale tendered by the unions171 in Ex-Cell-O—that although complete agreement has not been reached, the respondent should not be allowed to plead uncertainties he himself created.

168. Id. at 282.
169. Id. at 227, Accord, Greer Stop Nut Co., 162 N.L.R.B. 626 (1967). Although unexpressed, the rather obvious rationale of the Board's decision is that the prior agreement on wages were tentative only. See Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, n. 36 at 1410 ("The general understanding in collective bargaining is that agreement on any particular point is tentative until there is agreement upon all the issues."). More importantly, were the Board to order the employer to execute the agreement, the order would necessarily have to supply the incomplete terms and the order would in all likelihood bind the employer to those terms in the future. This is something the Board has been manifestly unwilling to do. See Intercity Petroleum Marketers, Inc., 173 N.L.R.B. No. 222, 1968-2 CCH NLRB Dec. 20,437, 70 L.R.R.M. 1036 (1968). In Intercity, agreement had been reached between the parties and the employer refused to sign the agreement. The agreement contained an unlawful union security clause, although the record made it clear that the parties intended to incorporate a lawful security clause. The trial examiner recommended that the employer be ordered to execute an agreement containing a lawful union security clause. Although ordering the employer to execute the previously agreed-upon contract, the Board refused to adopt the trial examiner's recommendation. "This would require the Board to write a union-security clause the parties never agreed to." 1968-2 CCH NLRB Dec 20,437 at 25,711. The Board ordered the employer to execute the agreement with the unlawful clause deleted. The Board has, however, ordered an employer to concede checkoff as a remedy for repeated violations of § 8(a)(5), an action fixing a term binding on the employer in the future. See H.K. Porter Co., Inc., 172 N.L.R.B. No. 72, 1968-2 CCH NLRB Dec. 20,040 (1968). Nevertheless, the Board's action was extremely reluctant. For the history of the case see H.K. Porter Co., Inc., 153 N.L.R.B. 1370, enforced sub nom. United Steelworkers v. NLRB 363 F.2d 272 (D.C. Cir. 1966), 389 F.2d 295 (D.C. Cir. 1967), on motion for reconsideration

171. "One whose wrongful act precludes exact determination of the amount of damage cannot evade his duty to compensate for that damage because of the uncertainty caused by his own wrongdoing." Brief for the UAW at 29.
Of course, Ex-Cell-O. it might be said, is a distinguishable case. The unions have argued that the Board would not be fixing, contrary to its policy, any future contract terms; the Board would only be making the employees whole. When bargaining commences anew, the level of wages would not be the previous wage rates "plus"; the old wage rates alone would mark the starting point of negotiation. But one can question whether the parties' bargaining relations can be so neatly severed—make whole for the past, free and unfettered bargaining for the future. Experience with compulsory arbitration suggests that the level of wage and fringe benefits decreed will in fact set a floor for future negotiations, as anticipated by management in Ex-Cell-O. Indeed, data offered by the unions to demonstrate that the right to bargain is a valuable right seem to confirm this anticipated "manner of influence."

Further, it could be argued that in Ex-Cell-O. had the employer bargained in good faith, the parties would have reached full agreement. Therefore the hypothetical contract-signing case is an imperfect analogy. The unions offer a panoply of statistical evidence as proof that "if good faith bargaining promptly commences a collective bargaining agreement will be concluded." But even here the Board has required the actual nod of the employer's head. In United Aircraft Corp. an employer after some five months of bargaining withdrew recognition and refused to bargain, questioning the union's majority status. After adjudication of the 8(a)(5) charge, the union sought to reopen the record and submit evidence relating to the prior negotiations which was offered to prove that, but for the unlawful refusal to bargain, the employer would have accepted the union's last contract offer. The Board refused the offer of proof: "[T]he evidence . . . is deemed irrelevant to a determination of whether the Respondent would have accepted the Charging Party's last contract offer." The necessary prerequisite is always that the parties themselves must have reached actual agreement.

This requirement could be changed. A plausible argument could
be made in support of a position which the Board itself has enunciated:

[I]t is reasonable to believe, as the Act assumes, that if petitioner had dealt with the Union as the law requires, the parties would have concluded a collective bargaining agreement.*

The evidence offered by the unions in Ex-Cell-O to prove that a contract would have been entered, evidence of actual injury, might now likewise be deemed irrelevant. Were the Board willing, the Board could assume actual injury, although there is judicial opinion to the contrary. The writer, however, believes that the Board's insistence

179. Brief for the NLRB at 21, Franks Bros. v. NLRB, 321 U.S. 702 (1944). That the Board might assume an agreement would have been concluded in Ex-Cell-O would not however, have anything to do with something inherent in the Act itself, as the Board here seems to suggest. See note 180 infra. In fact, even in 1944 when the Board made its statement, the Act had been interpreted as suggesting quite the contrary. "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

180. The argument in support of such an assumption is simply that, as the employer has made it impossible to determine whether or not the employees have suffered actual loss, this uncertainty is to be resolved against the employer. The principle has been pervasively applied in the administration of the Board's back pay orders and has been applied in cases where the back pay order includes compensation for a probable expectancy denied to an employee because of the employer's unlawful act. See NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966) (back pay included safety award to an employee discriminatorily discharged after having worked ten months without an accident although no evidence was adduced to prove actual loss; uncertainty resolved against the wrongdoer). Mooney Aircraft, Inc., 156 N.L.R.B. 326 (1965), enforced, 375 F.2d 402 (5th Cir. 1967) (employee compensated at rate applicable to a position to which employee would have been promoted in absence of discrimination. Compare Note, An Assessment of the Proposed "Make-Whole" Remedies in Refusal-To-Bargain Cases, 67 Mich. L. Rev. 374, 381 (1968) (employer's illegal conduct should preclude any consideration of such a question) with Comment, Employee Reimbursement for an Employer's Refusal to Bargain; the Ex-Cell-O Doctrine, 46 Tex. L. Rev. 758, 781 (1968) (complaining union must prove contract would have been negotiated).

That the fact of injury might be assumed should not, however, be confused with any assumptions about the amount of compensation to be awarded. For example, the unions in Ex-Cell-O equate the value of what has been lost to what otherwise would have been procured in the absence of the refusal to bargain. See text accompanying notes 41-46 supra. Hence a tacit assumption is made about the amount of compensation to be received. Although in the administration of its back pay orders the Board has likewise made such assumptions, the distinction should be carefully noted.

181. In Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), the Court refused to enforce a Board order said to be based upon "an unwarranted and extravagant assumption." Id. at 238. It has been argued that the judicial fate of the Board's Brown-Olds remedy, see generally, Schiller, The N.L.R.B.'s Dues Reimbursement Remedy in Perspective, 14 Vand. L. Rev. 503 (1961), in Local 60, Carpenters v. NLRB, 365 U.S. 651 (1961) (Board order requiring union to reimburse dues not enforced since no showing of actual coercion precludes adoption of Ex-Cell-O relief without proof that an agreement would have been negotiated had the employer bargained in good faith. Comment, Employee Reimbursement for an Employer's Refusal to Bargain: the Ex-Cell-O Doctrine, 46 Tex. L. Rev. 758, 766 (1968).

As is apparent, see note 180 supra, the scholarship has made much of the question whether
upon actual agreement, its hesitancy in the absence of mutual agreement upon terms to make the suggested assumption, reflects more than a refusal to apply common law rules of damage.\textsuperscript{182} In this writer's view, the Board's hesitancy reflects an unwillingness to serve other than as umpire\textsuperscript{183} in the game of labor-management relations. The game itself is for the players.

**Effectuating the Policies of the Act—"To the Lion Belongs the Lion's Share"**

The metaphor is Professor Cox's.\textsuperscript{184} In a phrase it expresses the ground rule of labor-management relations under the NLRA. Were the Board to order monetary compensation in cases of refusal to bargain, there is a possibility that something other than economic power would determine the terms and conditions of employment—the "shares" of labor and management. The possibility presents the primary anticipated evil.

In *Ex-Cell-O* the Board cast its notice of hearing\textsuperscript{185} in terms of "returning the employees to the status quo ante." The principle is the basic aim of the Board's administration of its remedial process:

**Effectuation of the policies of the Act is achieved by**

\textsuperscript{182} Certainty as to the fact of injury (have Ex-Cell-O employees actually lost anything) and a reasonable basis for calculation of the amount of compensation due (by what standards are the employees to be compensated). See Brief for the UA W at 29-38.

\textsuperscript{183} By analogy to Fibreboard, the make-whole remedy... could be approved without proof of whether a contract would in fact have resulted...."


\textsuperscript{185} NLRB Notice of Hearing (May 26, 1967).
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restoration in so far as possible of the status quo existing before the commission of the unfair labor practice.186

The parties are to be returned to the situation they would have occupied had no unfair labor practices occurred. One limiting doctrine, relevant in Ex-Cell-O and companion cases, has been developed. It has been given various expression187 but simply stated it is that the Board’s remedial measures are not to be used to make parties more than whole. Unfortunately, in situations analogous to that in Ex-Cell-O, the principle has been inconsistently applied.188


The Supreme Court has also recognized and embraced the doctrine. “The primary purpose of the provision for other affirmative relief has been held to be to enable the Board to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice. Local 60, Carpenters v. NLRB, 365 U.S. 651, 657 (1961) (concurring opinion).

187. The employees are to be compensated only for “actual losses”, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941); NLRB v. Mastro Plastics Corp., 354 F.2d 170, 177 (2d Cir. 1965). The Board must give regard “to circumstances which may make [a remedy’s] application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.” NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 349 (1953); accord Southland Paper Mills, Inc., 161 N.L.R.B. 1077 (1966). “[E]mployees are entitled by way of a Board remedy to payment of which they were not deprived or which they would not reasonably have received absent the unfair labor practice.” New Orleans Bd. of Trade, Ltd., 152 N.L.R.B. 1258 (1965). “Restitution is not an automatic or inflexible remedy,” Leeds & Northrup Co., 162 N.L.R.B. No. 87, 1967 CCH NLRB Dec. 21,043, 64 L.R.R.M. 1010 (1967) (dictum), enforced, 391 F.2d 874 (3rd Cir. 1968).

188. The cases are those in which an employer has taken unilateral action in violation of § 8(a)(5) and the question which arises is the amount of compensation which is appropriate to remedy the violation. The cases are analogous to Ex-Cell-O in that, because of the employer’s unlawful act, the situation which would have resulted had the employer bargained in good faith is unknown. In my own terms, the problem is the extent to which the amount of compensation must reflect the economic position of the parties.

The Board itself has given the problem different treatment. In Wonder State Mfg. Co., 147 N.L.R.B. 179 (1964), an employer unilaterally discontinued an employee bonus. The Board refused to adopt the trial examiner’s recommendation that the employees be made whole, as it appeared that the employer’s economic situation was such that he would have omitted the bonus in any event. The Board’s review of the economic situation in Wonder State is not the typical approach, however. More recently, the Board has determined the amount of compensation due by making the assumption that had good faith bargaining taken place the employee’s representative would have resisted any reduction in economic benefits which occurred. Back pay is ordered at the rates of pay existing prior to the unlawful unilateral reduction. For example, in Overnight Trans. Co., Inc., 157 N.L.R.B. 1185 (1966), enforced 372 F.2d 765 (4th Cir.), cert. denied, 389 U.S. 838 (1967), an employer after purchasing a plant hired his predecessor’s employees but reduced their wages without prior bargaining with the employee’s representative. The employer was ordered to make the employees whole for losses suffered as a result of the reduction in wages. It was stated: “Had Respondent honored its bargaining obligation . . . it is well within the realm of possibility that as a result of such bargaining the wages, etc., would not
As the basic remedial principle, a restoration of the status quo ante presupposes the antecedent existence of something which has been lost. In *Ex-Cell-O* it is said that after court review of 8(a)(5) cases, after the long delay involved, the union returns to the bargaining table only to bargain

from a position of weakness rather than the position which the union would have been in had the employer promptly following certification of the union . . . sat down and bargained over the terms of a contract.\(^\text{189}\) (emphasis added)

REFUSAL TO BARGAIN

Thus, in Examiner Yose's view the antecedent something is "strength." But what type of strength? The unions have characterized the pre-refusal strength as "initial organizing strength." It has been lost; monetary compensation is requested to restore to the union and the employees the bargaining power that existed at the time of the violation and to return to the union a measure of the bargaining status that likewise existed before the refusal to bargain. There is no doubt but that the unions have suffered a loss of prestige, as alleged. It is also likely that the unions have suffered as institutions. But the writer has some hesitation with the request that the Board restore bargaining power to the unions and employees. The hard question in Ex-Cell-O is whether pre-refusal bargaining power existed at all.

The Board's notice of hearing reflects a desire to return employees to the status quo ante. However, it may very well be true that, as a result of interim unilateral increases in employee wage and fringe benefits, the employees are already in the position they would have occupied had there been no refusal to recognize and bargain with the union. The writer would suggest that the real injury in Ex-Cell-O, what all the shouting is about, is not any deprivation of employee expectancy; rather, the employer has deprived the union of the esteem that comes with returning from the bargaining table and, in the name of the union, presenting to the employees this package of improved benefits. In such unilateral increase cases, just how an order compelling an employer to pay employees what in all likelihood a back pay proceeding will show he has already paid his employees is designed to restore this lost esteem is difficult to see. But for the

190. Brief for the UAW at 19.
191. Brief for the Teamsters as Amicus Curiae at 8.
193. See note 55, ibid.
194. In NLRB v. C&C Plywood, 385 U.S. 421 (1967), an employer unilaterally inaugurated a premium pay plan during the term of a bargaining agreement. In sustaining the Board's finding of an 8(a)(5) violation, the Court noted that "the real injury in this case is to the union's status as bargaining representative." 385 U.S. n. 15 at 429. The Court also noted that "it would be difficult to translate such damage into dollars and cents." Id.

If in Ex-Cell-O one accepts the analogy to contract signing cases, see note 133 supra, then the unions also have been deprived of the prestige that comes with presenting employees with a written contract incorporating the terms of employment. "Nothing more seriously injures the prestige of a union in the eyes of its members or is more effectively designed to undermine a union than depriving it of the earned reward of bargaining." Ogle Protection Service, Inc., 149 N.L.R.B. 545, 568 (1964); accord Amalgamated Clothing Workers v. NLRB, 324 F.2d 228 (2d Cir. 1963).

195. The writer makes the assumption here that interim unilateral wage increases would be deducted from any monetary liability. I shall later discuss whether the remedy, if adopted, should disallow such deductions.
moment, however, assume the absence of any unilateral wage increases.

Regardless of whether or not good faith bargaining would have resulted in a contract, the unions have suffered an injury to their bargaining status—their image as representative of employee interests. A hard fought election campaign, an election victory, and formal certification produces employee respect for the union. More importantly, the election campaign develops employee expectations. They look to the union anticipating successful negotiations and the fruition of campaign promises. When an employer then refuses even to meet with the union for negotiation and insists rather upon a course of adjudication for the next two or three years, these expectations are frustrated and the union’s status as bargaining representative has been severely diminished. The writer would have been much happier with the Board had its notice of hearing given explicit recognition to this loss—had it expressed an interest in restoring to the unions this antecedent bargaining status.

This loss of bargaining status, however, may have little to do with whether, after court review of section 8(a)(5) orders, a contract is eventually negotiated. Here the determinant is bargaining power—the willingness of employees to fight to obtain economic benefits. A hornbook labor reality will decide the question: “To put it in a phrase, the strike or the fear of a strike is the motive power that makes collective bargaining operate.” In Ex-Cell-O the unions likewise request a restoration of bargaining power. Their request, however, is inconsistent with a second labor reality, one which even the unions acknowledge. The argument made is that, in those cases where bargaining commences in good faith, agreements are almost always reached. After the delay of judicial review, however, contracts are only obtained in approximately one third of such cases. Therefore, somehow the delay reduces bargaining power which must be restored. The return of the union to the bargaining table is to be correlated with a compensatory payment to the employees in order that “the union can start from a fair position.”

196. “The employees need not strike against their will. And they generally possess some influence over the terms of the bargain, if only because the contract will depend, in the last analysis, on their willingness to fight to obtain it.” Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 135 (1964).


198. “Since the basic remedial principle is to restore the status quo, it is essential that the Board restore to the union and the employees the bargaining power that existed at the time of the violation.” Brief for the Teamsters as Amicus Curiae at 8.

199. Brief for Local 1401, Retail Clerks at 26.
suggest quite the contrary; the bargaining power of the union and its members is likely to be greatest after court review and the eventual commencement of negotiations. The UAW agrees:

Once recognition has been extended to the union and economic bargaining has begun, it is clear to the employees that the issue is no longer whether they will have a union but what they can win by supporting its efforts to gain an optimum result. By contrast, at the stage where employers like Ex-Cell-O refuse recognition in violation of the statute, they are challenging the very status and survival of the union. In contrast to an economic strike, in that situation it is often a much more onerous task for the union to call and maintain a strike...

The delay itself hardly diminishes bargaining power. And if after review the willingness of employees to strike is greatest, and yet "the employer may well escape with no contract at all" it would seem that had the employer promptly sat down and bargained immediately following certification the result would have been the same—all bargaining and no bargain. It is likely that the alleged injury to antecedent bargaining power for which the unions request a compensatory payment is non-existent. The proffered data suggest only that the employees were not willing to fight hard enough.

Curiously enough, the empirical studies of Professor Ross support such a conclusion:

How does an employer escape the duty to bargain and avoid permanent union relations? An examination of our cases leads to the belief that unions can be so weak that no strike—unfair labor practice strike or not—is possible. Of what value is a strike when only a small fraction of the employees go out? (emphasis added)

What is suggested here is simply that employers who do use judicial review as a "union busting" tactic do so without fear of an

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200. Brief for the UAW at 47-8.
201. Id at 19.
202. In Herman Wilson Lumber Co the employees after striking for two weeks returned to their jobs and the strike was broken. See note 161, supra.
203. P. Ross. THE GOVERNMENT AS SOURCE OF UNION POWER 203 (1965). Professor Ross' comment was made after reviewing those cases in his empirical study in which meritorious refusal to bargain charges were filed, the employers had been judicially ordered to bargain, and yet no contracts resulted.
204. For a discussion of unilateral action as a like "union busting" technique see Cox & Dunlop. Regulation of Collective Bargaining by the National Labor Relations Board, 63 HARV. L. REV. 389, 420 (1950). In addition to an insistence upon judicial review, the employers in Ex-Cell-O and companion cases unilaterally increased wages. See note 55 supra.
unfair labor practice strike. They know quite well that their employees are unwilling to abandon their jobs and strike the plant. This position, no doubt, is an unpopular one, since it raises an unpopular inquiry, "Why didn't the union strike?" The question elicits various responses. It is argued that forcing the union to strike disparages the union in the eyes of the employees. However, this argument seems to assume that a strike would have been unsuccessful. Otherwise it is difficult to see how a successful strike would result in any disparagement of the union. In Ex-Cell-O the employers have also raised the question and the UAW has provided a second response: "[I]t would make a duty of self-help out of what has always been viewed only as a right of self-help." Here there is a return to Hohfeldian legalese; and not only is the contention a departure from strict Hohfeldian construction, but it also is "a bit of verbal logic" which disregards the realities of labor-management relations. This writer would suggest that the absence of a strike is the relevant desideratum, and perhaps this is precisely what Judge Friendly had in mind when, on review of a back pay order, he observed that the union "rather obviously" lacked the bargaining power to compel the

205. It is interesting to note that Professor Ross considers an unfair labor practice strike the most effective method of enforcing the duty to bargain. In his empirical study the unfair labor practice strike, or threat to strike, accounted for employer compliance with the law in cases settled prior to formal action, "The bite of the law lies precisely here." P. Ross, THE GOVERNMENT AS A SOURCE OF UNION POWER 203 (1965). And see note 14 supra. In Ex-Cell-O the claim is that the employer's alleged defense to the refusal to bargain charge is raised as a ruse, purely in bad faith. If the employer's action is as egregious as claimed, then the employees would not be in fear of losing their jobs were they to strike, as they are entitled to reinstatement upon unconditional application and the employer must discharge any replacements hired. See NLRB v. Stevenson Brice & Block Co., 393 F.2d 234 (4th Cir. 1968); Note, A SURVEY OF LEGAL REMEDIES, Part I—Board Remedies, 54 VA. L. REV. 38, 82 (1968). In addition to "initial organizing strength," see text accompanying note 195 supra, this employment security would seem to make it easier for a union to invoke the sanction of an unfair labor practice strike to meet the employer's bad faith action upon post-certification or card demand for bargaining, compare the circumstances of an economic strike, NLRB v. McKahey Radio & Tel. Co., 304 U.S. 333 (1938) (employer free to hire permanent replacements for those employees participating in the strike). Arguably, the absence of an unfair labor practice strike would suggest that the employees were simply unwilling to strike and that the union was too weak to convince them otherwise. Again the studies of Professor Ross support such a conclusion:

But it is important to point out that this kind of compulsion upon an employer depends upon the existence of a certain amount of union strength. If the union lacks sufficient cohesiveness to go out on strike at the time of the refusal to bargain, this kind of sanction is ineffectual.


207. Brief for the UAW at 46.

208. Hohfeldians would label the strike as the exercise of a "privilege," see Cook, The Utility of Jurisprudence in the Solution of Legal Problems in LECTURES ON LEGAL TOPICS (1928).

209. See text accompanying notes 197-200, supra.
concession upon which the Board had predicated the amount of back pay to be awarded.\textsuperscript{210} Although it is true that the Act sought to obviate the need for strikes to enforce the duty to bargain,\textsuperscript{211} it is also true that a union, if able, would hardly hesitate to close down an employer’s plant to compel bargaining. The citation\textsuperscript{212} of policy alone should not be held a bar to consideration of an appropriate, although unpopular, question. It is also agreed that, even after 1947, the Act still seeks to encourage collective bargaining.\textsuperscript{213} But the issue in Ex-Cell-O is collective bargaining on what terms. The NLRB reports are filled with cases in which a union won an election but lacked the economic power necessary to achieve anything other than pro forma bargaining.\textsuperscript{214} Arguably, the situation in Ex-Cell-O and companion cases is no different. And if this is correct, rather than restoring bargaining power, the requested monetary compensation, if ordered, would provide bargaining power in the first instance.\textsuperscript{215} Upon return to the bargaining table, the position of the parties would be quite different from that which would have obtained but for the employer’s refusal to bargain. The monetary liability could now be used by the unions as an aid in bargaining to procure additional benefits—benefits over and above those that would have been negotiated had the employer not refused to bargain.\textsuperscript{216}

\textsuperscript{210} Cooper Thermometer Co. v. NLRB, 376 F.2d 684, 691 (2d Cir. 1967); see note 186, supra.

\textsuperscript{211} 29 U.S.C. § 151 (1964).

\textsuperscript{212} “The express purpose of the Act was to obviate the need for strikes to enforce the right to bargain.” Brief for the UAW at 47 (citing 29 U.S.C. § 151).

\textsuperscript{213} Compare Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851, 865 (1967) (“[I]t is simply not so that prior to 1947 the act sought to encourage collective bargaining but that it does so no more.”) with Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 44 (1947) (“The Taft-Hartley amendments represent an abandonment of the policy of affirmatively encouraging the spread of union organization and collective bargaining.”)

\textsuperscript{214} Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1413 (1958).

\textsuperscript{215} In situations where an employer not only refuses to bargain but also engages in coercive conduct in violation of the Act, it might be argued that these actions diminish the employees’ willingness to strike and thus dissipate bargaining power. Joy Silk cases, see note 36 supra, provide an example. However, it has been argued that liability under such circumstances would no longer be founded upon an employer’s wrongful deprivation of collective bargaining rights in violation of 8(a)(5), but would more resemble a penalty exacted in reparation of an employer’s 8(a)(1), etc., violations. See Note, Monetary Compensation as a Remedy for an Employer’s Refusal to Bargain, 56 Geo. L.J. 474, 511 (1968).

It might also be argued that, as the unions have suffered a loss of status, the compensatory payment would restore this loss. Certainly the payment would improve the union’s standing with its members, but I fail to see, however, just how compensating the employees for something they were unwilling to fight for in the first instance, making them more than whole, is an appropriate method of restoring a loss to the union. Furthermore, how one would measure this loss of bargaining status, see note 194 supra, and just how this loss is related to the amount of compensation the unions suggest the employees should receive present difficult problems.

\textsuperscript{216} In its brief to the Board, the Teamsters suggested that the back pay liability would
Bargaining Relationships Generally—Beyond the "Payor and Payee"

This fear that, if ordered in Ex-Cell-O, the monetary remedy would provide bargaining power where none previously existed extends beyond the immediate parties involved—beyond the "payor and payee." This article has suggested that adoption of the new remedy would encourage those employers who would otherwise use judicial review as a tactic to turn to pro forma bargaining in the first instance. Negotiations would begin immediately, but they would produce the form rather than the substance of bargaining. In order to reach such cases the Board would have to provide monetary compensation for bad faith bargaining during negotiations for a first contract, and the problem which this presents is how, if at all, the Board would reach the troublemakers without creating trouble. In resolving the question of monetary compensation, the Board will have to examine the probable effects of the remedy on bargaining relationships generally. Its range of inquiry cannot be confined to Ex-Cell-O alone.

Other reasons, quite independent of the prediction about the effects of the remedy on the immediate parties, support the view that, after the adoption of a monetary remedy in cases of outright refusal, the issue would immediately arise in cases of bad faith bargaining during negotiations for a first contract. There is, first, a notable tendency on the part of parties unsatisfied with the bargain as struck to seek relief in another forum, namely, before the Board. Also, persistent attempts are made to compel the Board to provide relief in

enable the employees to negotiate "additional contract benefits" in exchange for less than the full amount of back pay due. Brief for the Teamsters as Amicus Curiae at 7. Regardless of whether my conclusions about the conditions which would have existed but for the refusal to bargain are correct, it is clear from the position enunciated in the brief of the Teamsters that the unions regard the liability, once decreed, as an aid to future bargaining.

217. See text accompanying notes 20-22 supra.
218. See text accompanying notes 162-164, supra.
219. "The adversary character of the proceedings through which the NLRB makes its decisions not only curtails the scope of investigation, but during the trial focuses attention on the particular case at the expense of broader considerations of policy." Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 HARV. L. REV. 389,429 (1950).
220. See Cox, The Duty to Bargain in Good Faith, 71 HARV. L. REV. 1401, 1439 (1958) ("If the contract is too one-sided, the loser may file unfair-labor-practice charges"); Graham, How Effective Is the National Labor Relations Board, 48 MINN. L. REV. 1009, 1047 (1964) ("It is also true that too many union officials rely on an unwarranted extent on NLRB intervention in their quarrels with management . . . ").
221. The reference is to claims that, were the Board not to order the requested relief, the Board would have abused its discretion. See note 149 supra. [Section 10(c) contains the Board to remedy unfair labor practices by affirmative measures which go beyond mere cease and
otherwise distinguishable cases; and, although the Board has enunciated a policy of making such distinctions,\textsuperscript{222} the attempts have met with some success.\textsuperscript{223}

Perhaps it has been mistakenly assumed that the Board would not want to make monetary relief available on a broad scale, encompassing all cases of refusal to bargain. However, there are good reasons why such relief should not be available, even in cases of bad faith bargaining during negotiations for an initial contract.

It would generally be agreed that monetary liability, once decreed, provides additional leverage at the bargaining table. Repeatedly, it is said that the very purpose of a back pay order is to assure "meaningful bargaining" when the parties renew negotiations.\textsuperscript{224} One wonders whether the same could not be said for the potential obligation to pay compensation—that which would exist were the Board to make monetary relief available for bad faith bargaining during negotiations desist orders." Ervin Hearings 569 (statement of Bernard Kleiman, General Counsel, United Steelworkers). In Long Lake Lumber Co., 160 N.L.R.B. No. 123, 1966 CCH NLRB Dec. 20, 751, 63 L.R.R.M. 1160 (1966), the Board, although finding a violation of 8(a)(5), refused relief on the ground that the violation was de minimis. The union appealed on the ground that, with the finding of an 8(a)(5) violation, for the Board to refuse relief (cease and desist order) was an abuse of discretion. The claim was sustained and the court remanded in order that the Board order the requested relief. Local 3-10, Woodworkers v. NLRB, 380 F.2d 628 (D.C. Cir. 1967). "The Act says that the Board . . . 'shall issue . . . .' We think these words mean what they say . . . ." 380 F.2d at 631. I think it safe to predict that similar claims would be made for monetary relief for 8(a)(5) violations in cases other than outright refusals to bargain.

\textsuperscript{222} "The Board may conclude, in one case, that no back pay or other affirmative relief is required. and, in another case, that a back award is necessary, where although the basic substantive violations are similar or identical, they occurred in different contexts." Royal Plating & Polishing Co., Inc., 148 N.L.R.B. 545, 549 (1964).

I have already referred to one such "different context," namely, where the employer's refusal to bargain is not based upon any hostility to the collective bargaining process but upon a sincere belief that the Board has erred in its certification of the union, for example. The difficulty arises however, of determining when such "different contexts" exist—a question of intent. And the problem is compounded by the fact that, not only is it likely that demands for monetary relief would be made in almost all cases of 8(a)(5) violations, see note 221 supra, but any demands made are likely to be joined with the charge that the employer's refusal was in bad faith. Such a charge was made in Herman Wilson Lumber Co.; the employer was accused of deliberate procrastination. The trial examiner rejected the accusation. See TXD-757-66 at 4,5. For the extent to which a charge of bad faith refusal is pressed, see United Ins. Co., 154 N.L.R.B. 38 (1965) (General Counsel agreed that there was no question of deliberate procrastination; the union attempted to prove otherwise). The union then carried its case to a court of appeals for review on the charge of bad faith. The court rejected the accusation, 360 F.2d 823 (D.C. Cir. 1966).

\textsuperscript{223} "All too frequently a remedial device, once adopted, continues to be used in a rubberstamp fashion regardless of factual differences in succeeding cases." Note. A Survey of Legal Remedies Part I—Board Remedies, 54 VA. L. REV. 38, 94 (1968); accord Note. The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act. 112 U. PENN. L. REV. 69, 70 (1963).

for an initial contract. A hypothetical presents the problem. Imagine that the Weak Union has just been certified as the bargaining representative at the Exceptional Company. During the election campaign the union promised to "deliver" $3 an hour. The union is weak because the employees are unwilling to strike. The company is exceptional because it knows the employees are unwilling to strike; and, although the employer intends to reach an agreement, he is not prepared to pay more than $2 an hour. After several months of bargaining the union complains of bad faith bargaining and files an 8(a)(5) charge. After several more months agreement is reached on all issues except wages. Finally, the union informs the company that unless the company agrees to $2.50 an hour, negotiations will end and the union will press its unfair labor practice charge seeking a compensatory payment of $3 an hour—just what the union has been able to procure from Exceptional's competitors in the same area.

Assume that Exceptional is no troublemaker; were he to refuse the union's demands, an adjudication of the 8(a)(5) charge would not show bad faith bargaining. The risks involved might be great, however. For example, the employer realizes that the question of bad faith is one of intent, a difficult determination to make. Certainly the union has been vociferous in its charge of bad faith. And perhaps the employer has heard the charge that trial examiners are not overwhelmingly neutral. In addition, while negotiating the union made a point of exhibiting the numerous contracts obtained from Exceptional's competitors; and, although Exceptional has some evidence of financial inability, it hardly matches the abundance of evidence spread before him by the union negotiators. Exceptional decides to agree to $2.50.

Admittedly, the hypothetical is overdrawn. The issue, however, is to what extent; the writer would not concede that he has presented an imaginary evil.

In the hypothetical, the union utilized section 8(a)(5) to procure something it arguably would have been unable to obtain otherwise.

225. See note 222 supra.

226. "A prevalent criticism of the labor bar is that Examiners have too great a tendency to credit the General Counsel's witnesses and discredit the witnesses for the respondent." Murphy, The National Labor Relations Board—An Appraisal, 52 MINN. L. REV. 819, 829 (1968). For an extreme example, see NLRB v. Stevenson Brick & Block Co., 393 F. 2d 234, 237 (4th Cir. 1968) ("While the Board . . . was content to accept the conclusion of the Trial Examiner, we are unable to do so because it was derived in part from a palpable misinterpretation of certain testimony and a disregard of other evidence directly bearing thereon."). The important point is not whether or not such bias exists but only that employers such as Exceptional think it exists.

The tactic is not an unusual one. Unions frequently file refusal to bargain charges to compel recognition\(^{228}\) and the ambiguity of the section has been used by unions otherwise lacking in economic power to broaden their participation in industrial decision making.\(^{229}\) The union also filed what was assumed to be a non-meritorious charge. This too is nothing unusual. Sixty-nine per cent of all charges of refusal to bargain are dismissed or withdrawn because the employer has not engaged in the alleged misconduct.\(^{230}\) It would seem that the conduct of the union was representative rather than atypical.

In the hypothetical, the potential obligation to pay compensation also influenced the conduct of the employer.\(^{231}\) It restrained his freedom to agree or disagree with the union's proposal. The threat of pressing the 8(a)(5) charge was used as a weapon of economic coercion.\(^{232}\)

The concern here is for other employers and other unions\(^{233}\)—those not party to any bad faith conduct. Once the point of general success of the duty to bargain has been made explicit,\(^{234}\) the effects of any adoption of monetary relief in cases of refusal arising during negotiations for an initial contract upon what previously have been successfully established bargaining relationships must be considered. One of the policies of the NLRA is that the process of collective bargaining is to be free and voluntary.\(^{235}\) The parties are to have broad latitude to agree or disagree with each others' contract proposals.\(^{236}\) Were the Board to redress bad faith bargaining during the bargaining case, instead of restoring the parties to their original positions, in fact gives the union something which, but for the 8(a)(5) violation, it probably could not have achieved; Note, *A Survey of Legal Remedies Part I—Board Remedies*, 54 Va. L. Rev. 38, 65 (1968) (union should not be given the windfall of bargaining order it would not have been in a position to demand absent employer illegal conduct).

\(^{228}\) Ross, *supra* note 12, at 24-29.  
\(^{230}\) Ross, *supra* note 12, at 33.  
\(^{231}\) "The obligation to pay compensation can be, indeed is designed to be, a potent method of regulating conduct and controlling policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).  
\(^{232}\) That suits may be used as weapons of economic coercion has been recognized. *See Linn v. Local 114, Plant Guard Workers*, 383 U.S. 53, 64 (1966).  
\(^{233}\) In the administration of its remedial powers, the Board has given consideration to the effects of the imposition of any particular remedy upon the interests of "other employers" not party to the immediate suit. *See Garwin Corp. v. NLRB*, 374 F.2d 295, 303 (D.C. Cir. 1967).  
\(^{234}\) *See* text accompanying notes 20-22 *supra*.  
\(^{235}\) "The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Local 174, Teamsters v. Lucas Flour* 369 U.S. 95, 104 (1962).  
\(^{236}\) "The law does not require employers or employees to agree to each other's contract proposals; it assures them broad latitude to agree or disagree with each other. . . ." *McCulloch*,
initial contract negotiations with monetary relief, the mere availability of the relief may disrupt what should otherwise be free and voluntary negotiations. And although one might agree that "vehement concern for the employer's freedom to bargain is rather misdirected" in cases of actual pro forma bargaining, such a concern would not seem inappropriate in cases like that presented in the hypothetical.

Those instances where previously a union, although unsatisfied with the bargain, nevertheless reached agreement and a successful relationship later emerged also come to mind. Those cases in which

the union signs despite the employer's unfairness because almost any contract is preferable to a hiatus in which the union can offer its members nothing except the hope of winning an unfair labor practice case.238

With the adoption of monetary relief, the hope of winning an unfair labor practice case would become all the more meaningful. The existence of the remedy would place a premium upon making a strong record for Board scrutiny; and such a diversion from the "task of hammering out a labor agreement . . . diminishes the likelihood that negotiations will be successful." Experience with compulsory arbitration suggests that the evil envisioned is a very real one. When relief is available elsewhere, an unsatisfied party rarely trades out an agreement; there is little real collective bargaining.240 He turns rather

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239. Id. at 1440. A procedural point should here be noted. It is well settled that the filing of an 8(a)(5) charge does not relieve an employer of his duty to bargain. Kit Mfg. Co., Inc., 142 N.L.R.B. 957 (1963); Greer Stop Nut Co., 162 N.L.R.B. 626 (1967). Nor does interim execution of an agreement by the charging party waive any right possessed as a result of an employer's bad faith conduct antecedent to the execution of the agreement. Henry I. Segal Co., Inc. v. NLRB, 340 F.2d 309 (2d Cir. 1965). Were monetary relief available, once during the course of negotiations a union files an 8(a)(5) charge, although an employer would have a duty to continue negotiations if so requested by the union, he might be hesitant to reach any agreement. He would not know whether any agreement so reached would reflect the full extent of his labor costs, since the union might press the 8(a)(5) charge in an attempt to seek monetary relief for the alleged refusal to bargain. Also, he could not insist that the union drop its charge as a condition precedent to execution of any agreement which might be reached, as such a demand is itself a violation of § 8(a)(5). Heider Mfg. Co., 91 N.L.R.B. 1185 (1950); Lion Oil Co. v. NLRB, 245 F.2d 376 (8th Cir. 1957).
240. A COX & D. BOK, CASES ON LABOR LAW 905 (6th ed. 1965) ("During the war when the War Labor Board adjudicated disputes there was no real collective bargaining. If management and labor found themselves at issue, they rarely traded out agreement. Why should they? Each side hoped that it might get more favorable terms from the government.")
to the alternative forum in the hope of procuring more favorable terms, instead of attempting painstakingly to work out a voluntary agreement. The adoption of a monetary remedy designed to redress *pro forma* bargaining might serve only to encourage the very evil the remedy seeks to eliminate.

**Unilateral Action—To Run Twice as Fast**

"A slow sort of country!" said the Queen. "Now, here, you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!"—Through the Looking-Glass

In *Ex-Cell-O*, the unions suggest that a monetary remedy, if ordered in cases of outright refusals, might only encourage a second evil—interim unilateral wage increases. The troubleshooters would only run twice as fast; in order to avoid the embarrassment of having to pay their employees pursuant to the Board's demand, they would unilaterally increase wages prior to the adjudication of the 8(a)(5) charge. And the unions invite the Board likewise to run twice as fast. The Board should announce that any such increases are not to be deducted from the amount found to be due the employees upon adjudication of the refusal to bargain charge.

The proposal seems to make sense. Certainly, this writer would agree with the predication; were the Board to permit the deduction, it is likely that "union-busting" employers would turn to this tactic in order to frustrate administration of the proposed remedy. The rule would serve as an effective deterrent. There is one problem,

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242. There is also the problem of the effect of the compensatory remedy, if adopted, upon the willingness of parties to settle informally their disagreements. See note 146 supra.

243. See text accompanying notes 190-195, supra.

244. See note 58 supra.

245. I would go one step further, however. In addition to the prediction about encouragement of unilateral wage increases, with which I agree, I would suggest that the remedy, if adopted, would encourage hard core employers to engage in *pro forma* bargaining from the outset. See text accompanying notes 162-167, supra.

246. But see *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). In *Republic* the Court noted that "it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act." 311 U.S. at 12. The Court's pronouncement usually finds its way into judicial opinions when the Board's order is thought by a reviewing court to impinge upon other policies of the Act. See *Garwin Corp. v. NLRB*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967). One such policy is that the employees are not to be made more than whole, and, arguably, were deductions for unilateral wage increases disallowed, the employees would be placed in a better position than that which they would have occupied absent the unfair labor practices (refusal to bargain and unilateral wage increase). The more reasonable approach, however, would seem to be that taken by Mr. Justice Harlan in *Local 60, Carpenters v. NLRB*, 365 U.S. 651, 659 (1961) ("Deterrence is certainly a desirable even though not in itself
however. Although recognizing the tactic for what it is—an action
designed to undermine the union’s bargaining status—\textsuperscript{247} the Board has
refused to redress the actual injury involved. Rather, in cases of
unilateral wage changes, the Board has confined its remedial action to
an elimination of any detriment suffered by the employees.\textsuperscript{248} The
injury to the union as bargaining representative, an injury to its
status, goes unredressed. For example, in \textit{Indianapolis Grove Co., Inc.} an employer unlawfully refused to recognize and bargain with a
union while at the same time placing into effect a wage increase. The
trial examiner recommended that, in order to restore the status quo,
the employer be ordered to pay the employees an amount of money
equal to that which the employees had received pursuant to the
unlawful wage increase. The examiner’s rationale was that the order
was necessary to eliminate the unlawful bargaining advantage the
employer had derived from his action. Without explanation, the
Board refused to adopt the examiner’s recommendation.

The writer would suggest that the examiner correctly identified
the problem. His solution, however, is puzzling; and, although one
can only guess, perhaps his solution is what troubled the Board. The
injury identified was the disparagement of the union resulting from
the employer’s action. In effect, the employer announced to his
employees that a union was unnecessary to protect their interests. The
payment recommended, however, was one to the employees rather
than to the union. Although the receipt of the money might improve
employee respect for the union, it is difficult to see any rational
relationship between the injury suffered by the union\textsuperscript{250} and the rather
arbitrary selection of the amount of compensation recommended to
redress that injury. The same difficulty is presented by the proposal to
disallow the deduction of any interim wage increases from the amount

\textsuperscript{247.} In \textit{Crown Tar Co., Inc.}, 154 N.L.R.B. 562 (1965), an employer’s
unilateral wage increase was characterized as a tactic designed to
chill the union’s standing in the eyes of the employees. And see text accompanying notes 189-193, \textit{supra}.

\textsuperscript{248.} In \textit{Herman Sausage Co.}, 122 N.L.R.B. 168 (1958), an employer unilaterally increased
wages and decreased fringe benefits while negotiating with a union over the terms of a new
contract. The employer’s actions were taken in disregard to the bargaining status of the union
and designed to belittle the union in the eyes of the employees. The Board’s concern, however,
was only with eliminating any financial detriment suffered by the employees. See text
accompanying notes 194 and 195, \textit{supra}.


\textsuperscript{250.} See note 194 \textit{supra}.
of any monetary compensation ordered to remedy a refusal to bargain.\footnote{254}

The more appropriate solution would seem to be that suggested by the UAW\footnote{252} — fuller recourse to section 10(j) injunctive relief.\footnote{253} Indeed, were the Board to resort more extensively to temporary restraining orders in cases of egregious refusals to bargain, the injuries alleged in \textit{Ex-Cell-O} might be avoided altogether. If the delay in the commencement of bargaining in fact results in a loss of both bargaining power and bargaining status, then an appropriate solution would be to have the parties commence negotiations from the outset under order of a district court. As early as 1960, the Board was urged to take such action in cases of outright refusal to bargain,\footnote{254} but the Board’s recourse to interlocutory orders has been quite limited.\footnote{255}

\section*{The Right to “Bargain in Pursuit of a Contract” — Valuation and the Proposed Standards}

There is in the position of the unions a tacit assumption about the value of what has been lost—the right to “bargain collectively in pursuit of a contract.”\footnote{256} It is assumed that the value of what the employees have lost is equivalent to the monetary value of the “average agreement” reached in the absence of unlawful refusals to bargain.

\footnote{251}{See note 215 \textit{supra}. In NLRB \textit{v. Gullet Gin Co.}, 340 U.S. 361 (1951), the Court sustained the Board’s practice of disallowing deductions of amounts received as unemployment compensation from the back pay due to discriminatorily discharged employees. The Court noted that the unemployment compensation was a “collateral benefit”: it was not made to the employees by the respondent-employer to discharge any obligation of the employer. 340 U.S. at 364. By implication, the deduction of interim wage increases, payments made by the employer to his employees, would seem appropriate.}

\footnote{252}{See note 57 \textit{supra}.}

\footnote{253}{29 U.S.C. \textsection 160(j) (1964). The section empowers the Board in its discretion, after issuance of an unfair labor practice complaint, to petition a district court for injunctive relief in aid of the unfair labor practice proceeding pending before the Board.}

\footnote{254}{“Ordinarily a charge that an employer refused to bargain in good faith involves subtle inquiries which would make an interlocutory order inappropriate but the case would be entirely different if the union had been recently certified and the employer simply refused to begin negotiating a contract.” S. Doc. No. 81, 86th Cong., 2d Sess. 12 (1960) (Cox Advisory Panel on Labor-Management Relations Law).}

\footnote{255}{Although in fiscal 1967 interim relief was sought by the Board most frequently in cases of unlawful refusal to bargain, injunctive relief was obtained against employers in only 11 cases not all of which involved alleged violations of \textsection 8(a)(5). \textit{Thirty-Second Annual Report of the National Labor Relations Board} 176-77 (1968). For an example of a case involving a refusal to bargain where such relief was obtained, see Hoban \textit{v. United Aircraft Corp.}, 264 F. Supp. 645 (D. Conn. 1966). One difficulty the Board has experienced in its attempts to procure interlocutory aid is the insistence upon a showing that the injunction is necessary to preserve the status quo or to prevent irreparable harm. I wonder whether the Board could not make the same statistical showing the unions have presented in \textit{Ex-Cell-O} in order to meet the required standard.}

\footnote{256}{Brief for the UAW at 39.}
It seems clear to us that it follows, once it is shown that bargaining which is not tainted by an illegal refusal to recognize the employees' representative normally results in an agreement, that the monetary value of the average agreement reached is the proper measure of the value of the expectancy that has been defeated by the employer's violation of the Act.257

This position fails to recognize that what has been lost is not the "right to contract"258 but the probability that absent the employer's violation an agreement would have been reached and benefits would then have accrued to the employees. For example, when a contract which contains an option to renew is breached, damages for the loss of the innocent party's interest in that contract include the value of the option. But the damages measure the value of the option itself, not the value of the future contract that an exercise of the option might have created.259 In Ex-Cell-O, the probability that an agreement would have been reached had the employer not refused to bargain is the sum of the probable non-occurrence of all the factors that may have prevented agreement. "The key to any probability system is identifying these variables and assigning a probability value to them."260 In the collective bargaining situation identification of all factors which might have prevented agreement is an almost impossible task. Moreover,

even if the identification of all relevant factors were possible, the problem of estimating the probability of their occurrence seems insoluble.261

257. Brief for the AFL-CIO as Amicus Curiae at 12-13.
258. Brief for the UAW at 38. The UAW did make the distinction noted. "The Board is merely making them whole for the wage gains which they reasonably might or could have achieved had their rights been respected. Since a contract does not necessarily materialize in collective bargaining negotiations, the wrong which the Board is redressing is not the denial of a right to contract but rather the right to bargain collectively in pursuit of a contract." Id. at 38-9.

259. Comment, The Labor Management Relationship: Present Damages for Loss of Future Contracts. 71 Yale L.J. 563, n. 12 at 565 (1962). In the succeeding text I rely heavily upon the article in my discussion of the issue of valuation of the employee loss. The case noted in the article is Local 127, Shoe Workers v. Brooks Shoe Mfg. Co., 298 F. 2d 277 (3d Cir. 1962). In Brooks, an employer removed his plant in breach of contract and a union sued for loss of its expectancy in future dues. Recovery was allowed for the loss of future dues. The measure of recovery was the amount of dues normally received by the union under prior contracts (the parties had had a successful relationship for twenty years prior to the unlawful removal) projected twenty years into the future. The article is critical of the court's failure to distinguish between the actual injury to the union, the loss of the "chance" to make future contracts and the future contracts themselves. 71 Yale L.J. at 571.


261. Id. at 573.
What all of this means is simply, first, that the monetary value of the average agreement needs to be discounted in some fashion. If, as has been argued, the statistics offered by the unions demonstrate only that the employer bargained from the outset the result would likely have been the same as that occurring after review, then 64 percent of the time the employees would have gone without an agreement; somehow this must be "plugged" into the probability calculus. A very unsophisticated suggestion is that the value of the average agreement be discounted by two-thirds. Second, the task itself is a very difficult one. However, that the task is difficult should not bar all relief. And it should also be noted that, once the Board were to announce the proper valuation technique, its application would be a relatively simple matter.

The standards offered to prove the average agreement, that which would have been entered had the employer bargained, also present difficulties. Indeed, by way of dictum one court has characterized the attempted use of such standards as "inherently speculative." 264

262. See text accompanying notes 200-204, supra.

263. In American Fire Apparatus Co., 160 NLRB 1318 (1966), enf. 380 F.2d 1005 (8th Cir. 1967), an employer unilaterally eliminated an employee bonus in violation of § 8(a)(5). The trial examiner refused to recommend that the employees be compensated for the lost bonus. It was the trial examiner's view that ascertainment of the amount due presented a "difficult, if not impossible" task. 160 NLRB at 1324 (TXD). The Board rejected the examiner's rationale and ordered that the employees be reimbursed: "Nor is the difficulty of computing the employees' loss as a result of Respondent's unfair labor practices a legitimate reason for denying them all compensation." 160 NLRB at 1319.

264. In Montgomery Ward & Co., 154 NLRB 1197 (1965), the Board found that while engaged in multi-store bargaining an employer had reached agreement with an international union. Prior to entering the negotiations, however, the employer had announced that he was not bargaining for several stores where decertification petitions had been filed. The Board further found that the employer's action in refusing to bargain on behalf of those stores was unlawful, and that but for the refusal all the stores represented by the union would have had the opportunity to ratify the agreement. The Board ordered the employer to submit the agreement for employee ratification at those stores for which the employer had refused to bargain and if ratified to sign the agreement and give it retroactive effect. Enforcement of the Board's order was denied sub nom Retail Clerks v. NLRB, 373 F.2d 655 (D.C. Cir. 1967). The court held that the parties had not reached complete agreement, as the agreement reached was silent on the matter of wages and hours. Before the court the Board suggested that the order be enforced and the matter of wages and hours be left to supplemental proceedings for determination based upon an "area survey" standard. The court rejected the Board's proposal:

Reliance on the vague 'area survey' standard in a supplemental proceeding does not strike us as an appropriate substitute for evidence proving agreement. Indeed, 'so inherently speculative a proposition suggests that the Board would have lacked the power to compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' 373 F.2d n. 13 at 660 (citing Ins. Workers Int'! Union v. NLRB, see note 33 supra).

Several things should be noted. Although the employer had not violated § 8(a)(5) by refusing to sign the agreement, the employer has independently violated the section by refusing to bargain in fact. The situation is analogous to that presented in Ex-Cell-O. And compare the court's
Certainly, as has been suggested, use of the BLS figures would relieve the small or independent union of an onerous data-gathering burden. The problem, however, is that one needs to know whether the collective bargaining experience reflected in such figures reasonably depicts the likely experience of the particular union and the particular employer involved. The problem is one of divergence. The AFL-CIO addressed itself to this problem and remarked:

It should be noted first that so far as we are aware there is nothing in the theory of collective bargaining which suggests that such marked divergencies do exist. The argument thus rests on the intuitive hunch that given the different strength of various unions, the differing attitudes toward unionization in various parts of the country, the differing profit picture of various industries and of large and small companies or in an industry such divergencies must exist.

Unfortunately, there are many bargaining theorists who would disagree. The literature of collective bargaining theory seems to suggest that, even within the same geographic area "markedly different types of union-management accommodation" coexist and that the primary explanation for such divergencies lies in the attitudes and decisions of the particular parties. The statistics offered showing how others reacted to similar circumstances are of limited value. Although the BLS figures are attractive in their immediate availability, the writer is not at all convinced that they reasonably reflect what seems to be critical—the reactions of the particular parties.

The UAW has proposed an alternative standard, one which reflects the "proven prospects of the particular union refused..."
Here there would seem to be an answer to any objection that the proposed standard fails because of its generality. Again, however, problems remain. First, as refusal to bargain is a small firm phenomenon, it is unlikely that data would be available illustrating what the union was able to procure from the same employer at other plants, as was the case in Ex-Cell-O. Therefore, the bargaining experience of the union with other employers would have to be used and this approach possesses the same deficiency as that exhibited by the BLS standard. More importantly, a significant variable which determines the likely success of a particular union is its bargaining power, a function of its ability to call a strike. This in turn reflects the willingness of a particular group of employees to strike, and the fact that groups A, B, and C were willing to do so does not necessarily mean that group D is so willing.

Repeatedly it is said that, so long as the Board’s formula is reasonably calculated to arrive at the closest approximation of the amount of compensation due, the Board’s choice may not be rejected. Nevertheless, some doubts remain.

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270. Brief for the UAW at 26.
272. See note 42, supra.
275. NLRB v. Charley Topping & Sons, Inc., 358 F. 2d 94 (5th Cir. 1966); accord F.W. Woolworth Co. v. NLRB, 121 F.2d 658, 663 (2d Cir. 1941) (Board’s formula reflected a “common sense” treatment); NLRB v. Brown & Root, Inc., 311 F.2d 447 (8th Cir. 1963); Buncher Co. v. NLRB 405 F.2d 787 (3d Cir. 1969).
276. Even assuming that appropriate standards could be developed, there remains the problem of the acceptability of a Board decision applying those standards by a particular respondent employer. This is particularly important in the case where an employer refused to bargain without any anti-union animus. Experience with compulsory arbitration suggests that when one party objects to the standards which are applied regardless of whether such standards have been widely utilized, the decision will be rejected despite the sanctions provided by law. See Fleming, Reflections on the Nature of Labor Arbitration, 61 MICH. L. REV. 1245, 1255 (1963).
THE REMEDY AND THE DEGREE OF MORAL FAULT

In its notice of hearing, the Board inquired whether the proposed remedy should apply in cases of refusals to bargain based upon a desire to procure judicial review, as distinguished from refusals designed solely to frustrate the bargaining process accompanied by flagrant violations of other sections of the Act.\textsuperscript{277} One relevant consideration has previously been mentioned—the fear that imposition of the remedy in a case where the refusal was only "technical" might have a detrimental impact upon the future bargaining relationship of the parties.\textsuperscript{278} Other reasons also seem to support the view that the Board should make the distinction.

It can be argued that Congress, when it established the review procedure, was fully aware of the damaging effects of the delay inherent in such a system of review.\textsuperscript{279} Nevertheless, it deliberately\textsuperscript{280} chose such a system of review as a safeguard against arbitrary administrative action; and that therefore it would seem, at least as a matter of fairness,\textsuperscript{281} that the proposed remedy should not be applied when the employer refuses to bargain in the sincere belief that the Board has erred. The language of the District of Columbia Circuit seems particularly appropriate:

The present case, however, does not serve as an appropriate vehicle for the creation of unprecedented remedies. There was only one violation of the Act alleged and found. And that violation, the failure to bargain, was not born out of any general hostility on the company's part to the unions or to the policies of the Act. The company refused to bargain only to obtain

\footnotesize{In the case where an employer has only "technically" violated § 8(a)(5), see text accompanying notes 27-31 \textit{supra}, there is the danger that an unacceptable application of such standards might interfere with the future bargaining relationship of the union and the employer involved. \textit{see notes 156-161 \textit{supra} and accompanying text.}}

\textsuperscript{277} \textit{NLRB Notice of Hearing} (May 26, 1967).

\textsuperscript{278} \textit{See} notes 156-161 \textit{supra} and accompanying text; note 276 \textit{supra}. In \textit{NLRB v. Scott's, Inc.}, 383 F.2d 230 (D.C. Cir. 1967), the court, in denying enforcement of a Board notice reading requirement, gave as one of its reasons the fact that the requirement "could have an impact on the atmosphere, not only at the time of reading, but in the future, for peaceful, fruitful, and effective labor bargaining." 383 F.2d at 233.

\textsuperscript{279} \textit{See} H.R. Rep. No. 969, 74th Cong., 1st Sess. 5 (1935); testimony of Francis Biddle note 95 \textit{supra} and accompanying text.

\textsuperscript{280} "That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress explicitly intended to impose precisely such delays." \textit{Boire v. Greyhound Corp.}, 376 U.S. 473, 478 (1964); \textit{accord AFL v. NLRB}, 308 U.S. 401 (1940).

\textsuperscript{281} In \textit{NLRB v. Seven-Up Bottling Co. of Miami, Inc.}, 344 U.S. 344 (1953) the Court noted that the Board must give regard to "circumstances which may make [a remedy's] application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." 344 U.S. at 349.
judicial review of the Board's conclusions in the representation case. It was the only means of obtaining such review.282

In *Ex-Cell-O*, Examiner Vose suggested that, if an appellate court ultimately were to rule that respondent *Ex-Cell-O* was right in urging that the election should have been set aside because of the UAW's pre-election conduct, then no obligation at all would devolve upon the employer. On the other hand, were the court to enforce the Board's order, then, queried Examiner Vose, "why should not the Respondent be required to pay damages?"283 This position seems fair enough. But the difficulty is that an employer would be forced to guess what a court ultimately would hold. The risks involved,284 particularly for a small employer, might cause him to forego pressing his objection in favor of recognition and bargaining; and, although it is true that regardless of an employer's motives in refusing to bargain the alleged injury to the employees is the same, nevertheless imposition of the remedy in such a case might be said to impinge upon an employee's section 7 right not to join a union.285 This writer is persuaded by the fact that a claim of Board error is legitimately raised in many cases. Forty per cent of all section 8(a)(5) cases reviewed by the courts are denied enforcement.286

Furthermore, the Fifth Circuit has noted that "the actual nature of the failure to bargain bears significantly on the remedy to be imposed by the Board."287 Repeatedly, one finds this principle applied both in

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282. *Retail Store Union v. N.L.R.B.* 385 F.2d 301, 308 (D.C. Cir. 1967). In *NLRB v. Air Control Prods.,* Inc., 335 F.2d 245 (5th Cir., 1964), the court noted, "With no criticism of the employer intended, its exercise of the lawful right to take the bold course of a section 8(a)(5) route to test the election has resulted in a delay of almost three years...." 335 F.2d at 252 (emphasis added). Contra. Note. In *Assessment of the Proposed "Make-Whole" Remedy in Refusal-To-Bargain Cases.*, 67 MICH. L. REV. 374, 386 (1968) ("[A]utomatic application of the remedy without regard to the suggested distinction would seem to further the purposes of the N.L.R.A.").


284. Again, see notes 225 and 226 and accompanying text supra. the questions involved would be largely questions of credibility. This would apply both in cases of union pre-election misconduct in certification cases and in cases of alleged misconduct in the solicitation of authorization cards.

285. 29 U.S.C. § 157 (1964). The section provides that employees shall have the right to refrain from self-organization and from joining a labor organization. The argument would be that if an employer refrained from pressing an appeal-worthy case and instead recognized the union, his action would be in disregard of the right of his employees not to be represented by the particular union involved. It also has been argued that adoption of the remedy would seriously interfere with the effective application of section 8(c), 29 U.S.C. § 158(c) (1964), of the Act by chilling legitimate antiunion employer free speech and thereby likewise interfere with the employee's right not to be represented by a union. Comment, *Employee Reimbursement for an Employer's Refusal to Bargain: the Ex-Cell-O Doctrine.*, 46 TEXAS L. REV. 758, 776 (1968).

286. Ross, supra note 12, at 35.

Board\textsuperscript{288} and court\textsuperscript{289} decisions. Finally, it should also be noted that Professor Ross, in making his recommendations for the adoption of more adequate and realistic remedies, recommended that such remedies be applied in “clear cut, naked refusal to bargain cases which are accompanied by widespread unfair labor practices or in a context of repeated violations.”\textsuperscript{290}

**Judicial Review**

It has been said that “in the evolution of the law of remedies some things are bound to happen for the ‘first time’.”\textsuperscript{291} If *Ex-Cell-O* proves to be a “first time,” what is the appropriate role of a court in reviewing the Board’s order? And should the order be enforced?

In the exercise of its remedial authority, the Board enjoys broad discretionary power. Mr. Justice Frankfurter enunciated the guiding principle:

\begin{quote}
[I]n the nature of things 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. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board’s discretion. . . .\textsuperscript{292}
\end{quote}

\textsuperscript{288.} Schill Steel Prods., Inc., 161 N.L.R.B. 939 (1966) (among the circumstances considered in formulating the remedy was the respondent’s history of serious unfair labor practices and the nature of the violation found); Witsock Supply Co., 171 N.L.R.B. No. 33, 1968 CCH NLRB Dec. 22,437, 68 L.R.R.M. 1043 (1968) (employer’s unlawful conduct took place in an atmosphere permeated with anti-union animus, coupled with several unfair labor practices).

\textsuperscript{289.} “It may well be that an order such as that proposed here would be appropriate under more aggravated circumstances.” NLRB v. H.W. Elson Bottling Co., 379 F.2d 223, 227 (6th Cir. 1967); NLRB v. Ben Duthier, Inc., 395 F.2d 28, 33 (6th Cir. 1968) (the violations were not the flagrantly coercive type that might show a complete rejection of the collective-bargaining principle).

\textsuperscript{289.} “It may well be that an order such as that proposed here would be appropriate under more aggravated circumstances.” NLRB v. H.W. Elson Bottling Co., 379 F.2d 223, 227 (6th Cir. 1967); NLRB v. Ben Duthier, Inc., 395 F.2d 28, 33 (6th Cir. 1968) (the violations were not the flagrantly coercive type that might show a complete rejection of the collective-bargaining principle).

\textsuperscript{289.} It might be argued that as it is well settled that an erroneous view of the law, even if held in good faith, is no defense to a refusal to bargain charge, see NLRB v. Bardahl Oil Co., 399 F.2d 365 (8th Cir. 1968), application of the remedy in cases of good faith refusals to bargain would seem appropriate. But it should be noted that the remedy applied in such cases, an order to bargain, is unlikely to have the same impact on the bargaining relationship of the parties, as would an order to pay compensation. See notes 156-161 and accompanying text and note 176. supra.

\textsuperscript{290.} Ross, supra note 12, at 32. It has also been argued that the proposed remedy should not be applied at all in authorization card cases, see note 36 supra, since authorization card procedure is speculative and the standards followed are generally poorly defined Comment, *Employee Reimbursement for an Employer’s Refusal to Bargain: the Ex-Cell-O Doctrine*. 46 Tex. L. Rev. 758, 781 (1968). And see note 161 supra.

\textsuperscript{291.} Int’l Br’hd of Operative Potters v. NLRB, 320 F.2d 757, 761 (D.C. Cir. 1963).

\textsuperscript{292.} Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).
The Board is also entitled to draw upon "enlightenment gained from experience"293 in deciding whether to adopt new remedies; and, as the Board is an administrative agency, considerable weight is to be given by a court to its administrative determinations.294 Further, "it is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged."295 The Board's power, however, is not unlimited. At times its orders have been held in excess of its authority.296 The essential limitations are those "which inhere in the very policies of the Act which the Board invokes."297 All of these principles are very nice. The difficulty comes in their application.

In Ex-Cell-O the UAW has taken the position that the Board is given "wholly unrestricted authority" under section 10(c)298 of the Act to fashion its remedies.299 Further, the UAW contends that the "as will effectuate the policies of this Act" clause of section 10(c) is not a restriction on the Board's authority.300 In order to raise one of the issues a reviewing court will have to face and the problems that will confront the court, the writer should like to test the UAW's position with a hypothetical.

Assume that an employer refuses to bargain with a newly certified union, challenging the Board's certification. The Board finds that the refusal was unlawful and the Board's order commands that the employer "execute the agreement currently in force between Local 309 and the department and variety stores with which Respondent is competing in Olympia."301 Such an order, quite obviously, would "impose minimum terms" upon the employer—a result the Board has been unwilling to reach.302 What is more important, however, is the

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294. Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943) ("[The Board's order] should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.").
295. Lodge No. 35, IAM v. NLRB, 311 U.S. 72, 82 (1940); accord NLRB v. Link Belt Co., 311 U.S. 584, 600 (1941).
298. 29 U.S.C. § 160(c) (1964). For text see note 91 supra and accompanying text.
299. Brief for the UAW at 23.
300. Id. at 24. The UAW argues that the clause serves rather as an expansion of the Board's remedial powers beyond the confines of the common law of damages.
301. The hypothetical order is, in fact, the order requested in the Rasco Olympia case, one of the four currently pending before the Board. Charging Party's Brief to the Trial Examiner at 15, Rasco Olympia, Inc. Case No. 19-CA-3187 (N.L.R.B. TXD, Dec. 9, 1966).
302. In Red Cross Drug Co., 174 N.L.R.B. No. 17, 1968-2 CCH NLRB Dec. 20,471, 70 L.R.R.M. 1064 (1969), an employer violated § 8(a)(5) by closing his store without bargaining with the union. In addition to recommending that the employer be ordered to bargain with the union about the effects of the closing, the trial examiner recommended that the employer be ordered to place the names of the laid-off employees on a preferential hiring list for hiring at the
fact that, were the Board to issue the order, a reviewing court would be in a position to observe this effect of the Board's order and judge it accordingly. The point becomes important later.

An argument can be made that the hypothetical order would be beyond the power of the Board, and that, therefore, a reviewing court should not enforce the order. Procedurally, the argument is that, as the order violates one of the Act's most basic policies, namely freedom of contract, it is the court's role to refuse enforcement of the order.\(^{303}\) An order of the Board must effectuate the policies of the Act—here lies the "central clue" to the Board's powers under section 10(c).\(^{304}\) One such policy is that the process of collective bargaining is to be free and voluntary.\(^{305}\) Agreements are to be those of the parties, not those dictated by the Board.

The Committee wishes to dispel any possible false assumption that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms.\(^{306}\)

As the hypothetical order binds the employer to a contract which he himself had not negotiated, a reviewing court might conclude that the Board's order exceeds its authority—the Board dictated contract terms contrary to its role under the Act.

In the argument reference to section 8(d) of the Act, which provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession,"\(^{307}\) was intentionally omitted. The section would also seem to express great concern for the autonomy of negotiations; and, arguably, the hypothetical order likewise impinges upon the policy expressed in section 8(d).\(^{308}\) All is not well with this contention, however. Recently, in United Steel-
workers v. NLRB the court, although recognizing the importance of freedom of contract, nevertheless held that

Section 8(d) defines collective bargaining and relates to the determination of whether a Section 8(a)(5) violation has occurred and not to the scope of the remedy which may be necessary to cure violations which have already occurred. Section 8(d) relates to the wrong itself rather than to the remedy ordered to redress that wrong. In the hypothetical it is clear that the employer has violated section 8(a)(5). He refused to bargain in fact.

Nevertheless, the writer would still be willing to argue that the hypothetical order might be denied enforcement by a reviewing court. Again, the question is how far does the principle announced in United Steelworkers extend. In Steelworkers an employer was ordered to concede checkoff. As in the hypothetical, the order bound an employer to a term to which he had not agreed. It might be maintained, however, that in the hypothetical the "minimum terms" imposed are different in kind from the concession ordered in United Steelworkers. In the hypothetical, the order imposed minimum "economic" terms upon the employer—wages and hours, the "heart of collective bargaining contracts." Thus, were a reviewing court to take such a distinction, it still might deny enforcement of the Board's order.

In Ex-Cell-O issue is sharply drawn concerning the effects of any order that the employer pay compensation. The employers argue that the Board would be imposing minimum wages and hours upon the employer. When the parties return to the bargaining table, the employers assert that the level of wages at which negotiations would begin would be those decreed by way of the Board's make-whole order. The unions assert quite the contrary. Unlike the

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309. 389 F.2d 295 (D.C. Cir. 1967).
310. We recognize that the National Labor Relations Act is grounded on the premise of freedom of contract—albeit collective contract. The substantive terms of the collective agreement are to be forged by the parties to it, not by the Board. This ideal of freedom of contract is both a noble and a practical one, and remedies which impinge on it are not to be casually undertaken, 389 F.2d at 300.
311. 389 F.2d at 299.
313. "A more difficult problem exists, however, when the only contested issues are economic—e.g., wages, insurance, seniority. It seems that the Board would properly hesitate before ordering a specific concession on one of these issues." Note, Forced Concession as a Possible NLRB Remedy, 68 COLUM. L. REV. 1192, n. 47 at 1199 (1968).
315. See note 88 supra and accompanying text.
316. Id.
hypothetical, however, it is not at all clear whether such would be the result of the Board’s order. The parties merely assert and counter-assert. The writer has taken the position that the employer’s fear is a real one, but the position is only an expression of opinion. The Board might be of quite the contrary opinion. If so, then on review of the Board’s order in Ex-Cell-O, although a court might fully embrace the arguments presented in the hypothetical, a court would not be in a position to apply those arguments. If the Board announces that, as a matter of its experience, it believes the envisioned evil an imaginary one, a reviewing court could hardly assert otherwise.

All of these and other factors outside our domain of experience may come into play. Their relevance is for the Board, not for us.

On this issue, if the employers are to prevail, they will have to prevail before the Board.

It has also been argued that, if in Ex-Cell-O the Board were to order the requested relief, the monetary liability would provide bargaining power where none previously existed—leverage which could then be used to procure more favorable terms than those which would have obtained in the absence of the refusal to bargain. Here, it appears, were a court to embrace this argument, it should not enforce the Board’s order.

In the Textile Workers (Personal Products) case the Board attempted what eventually proved an unsuccessful attempt to curb what it deemed an “abuse of the Union’s bargaining powers.” Professor Cox reacted as follows:

The NLRA sought to increase the bargaining power of employees by substituting collective bargaining for individual bargaining. Many sponsors of the Taft-Hartley amendments supposed that they were redressing the balance by outlawing specified union tactics. These are intelligent legislative policies but surely a quasi-judicial agency ought not to engage in an effort to readjust the balance under the guise of statutory interpretation.

The Supreme Court provided its own reaction:

And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it

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317. See notes 170-179 supra and accompanying text.
318. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 195 (1941).
319. See notes 200-216 supra and accompanying text.
would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. Our labor policy is not presently erected on a foundation of governmental control of the results of negotiations. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union. 322

In effect, this writer’s reaction to the proposed remedy in Ex-Cell-O is the same. If the Board cannot curb bargaining power by way of section 8(a)(5), an attempt to supply bargaining power by way of section 10(c) should also be held beyond its powers. “If one thing is clear, it is that the Board was not viewed by Congress as an agency which should exercise its powers to aid a party to collective bargaining which was in an economically disadvantageous position.” 323

There are difficulties, however. It is quite clear that the Board has made it a practice of restoring bargaining power which, as a result of an employer’s unlawful conduct, has been lost. 324 And it is also true that one of the policies of the Act is that of redressing employee injuries suffered on account of employer unfair labor practices. 325 Further, because it is again unclear in Ex-Cell-O that, were the Board to order monetary compensation, the effect of such an order would be to provide bargaining power where none previously existed, a reviewing court might reasonably decide to resolve all uncertainties against the employer and enforce the order. 326 The writer would have no objection to this approach; his fears, however, extend beyond the issue of judicial review of the Ex-Cell-O case itself. 327

CONCLUSION

Professor Summers has noted: “Relative strength is an economic fact. The ability of the law to work changes is limited.” 328 In Ex-Cell-O, I believe that the Board is being requested to work such a change. This article has raised what the writer considers to be the probable

324. “We cannot assure such meaningful bargaining without first restoring some measure of economic strength to the Union. . . .” Royal Plating & Polishing Co., Inc., 160 N.L.R.B. 990, 998 (1966).
325. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).
326. See note 188, supra.
327. See text accompanying notes 211-213, supra.
effects of the issuance of monetary compensation in cases of refusal to bargain—the manner of influence of the proposed remedy on both the immediate parties involved and those not directly involved. Because adoption of the remedy would carry, or would soon carry the Board beyond its proper role in the adjudication of labor disputes, it is recommended that the Board not adopt the new remedy.329

There remains the problem of the loss of status suffered by the union as a result of an employer’s refusal to bargain. The District of Columbia Circuit recently observed:

If the Board wishes to redress the injury suffered by the union, as such, it might well consider, for example, assessment on the Employer of an amount directed at reimbursing the Union for its loss. . . . 330

Certainly, when an employer in bad faith forces a union to litigate the validity of its representative status, the Board might order that the employer reimburse the union for its litigation expenses.331 Also, the Board might increase the efforts begun in H.W. Elson Bottling Co.332 For example, the employer might be ordered to make available to the union at the commencement of negotiations facilities for employee meetings in order that the union could re-establish pre-refusal union-employee rapport.

329. An alternative proposal which has received much attention is that the Board, upon the finding of a refusal to bargain, incorporate in its bargaining order a requirement that any contract eventually reached is to be applied retroactively to the date of the refusal to bargain. See Saks & Co., 160 N.L.R.B. 682 (1966), enforced sub nom Retail Store Union v. N.L.R.B. 385 F.2d 301 (D.C. Cir. 1967) (Union requested such an order but its request was denied). If the Board were to adopt an expanded remedy for violations of 8(a)(5), I believe this approach would be preferable to that suggested in Ex-Cell-O. The parties themselves would settle the terms to be applied retroactively, thus eliminating one of the difficulties presented in Ex-Cell-O—namely, the question of standards and the measure of the compensatory payment. More importantly, the retroactive proposal is more likely to provide a measure of relief which reflects the relative economic strength of the parties involved, thus eliminating the possibility that employees would be made more than whole. Further, it is unlikely that potential application of this form of relief would exert pressure to make concessions upon an employer who is otherwise bargaining in good faith. I would venture a guess that most “non-troublemakers” agree to retroactive application at any rate. One jurisdiction, Puerto Rico, has adopted this form of relief for violation of local labor law. See Labor Board of P.R. v. Ceide, (P.R. Sup. Ct. 1963) 57 L.R.R.M. 2070. And in order to test the criticism of those who oppose this form of relief, namely that agreement would never be reached after the employer is ordered to make any agreement reached retroactive, see Note. In Assessment of the Proposed "Make-Whole" Remedy in Refusal-To-Bargain Cases, 67 Mich. L. Rev. 374, 390 (1968), this writer requested of the Labor Board of Puerto Rico any information bearing on this issue. Unfortunately, none was available.


331. In Clement Bros. Co., 170 N.L.R.B. No. 152, 1968 CCH NLRB Dec. 22,347, 68 L.R.R.M. 1086 (1968), the Board was requested to order reimbursement of attorney’s fees of both the General Counsel and the union but the Board denied the request.