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## Remedial Effectuation of the Policies of the NLRA

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# REMEDIAL EFFECTUATION OF THE POLICIES OF THE NLRA

## INTRODUCTION

A subject of current<sup>1</sup> and past concern<sup>2</sup> is the adequacy of the National Labor Relations Board's remedy for unfair labor practices. Under section 10(c)<sup>3</sup> of the National Labor Relations Act, the Board is given the power to fashion remedies that will effectuate the policies of the Act.<sup>4</sup> Court construction of section 10(c) has resulted in the Board's having wide discretion as to the remedial orders it can formulate.<sup>5</sup>

The traditional remedy for the common 8(a)(1)<sup>6</sup> and 8(a)(3)<sup>7</sup>

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1. *Renewed Interest in NLRB Remedies For Unlawful Anti-Union Campaigns*, 1 LAB. REL. REP., 65 Analysis 53-56 (July 31, 1967); *How Far May NLRB Go in Fashioning Remedies for Unfair Labor Practices*, 1 LAB. REL. REP., 67 Analysis 5-8 (Jan. 8, 1968).

2. STAFF OF SUBCOMM. ON NLRB, HOUSE COMM. ON EDUCATION AND LABOR, 87TH CONG., 1ST SESS., ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT BY THE NLRB 20 (Comm. Print 1961): "The caseload, and hence the delay, in unfair labor practice situations is due in large part to the fact that the normal Labor Board Remedy is inadequate to the occasion and does little to discourage knowing and repeated violations of the law."

3. National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 160(c) (1964). "If upon the 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."

4. National Labor Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964) (Taft-Hartley Act): "Short Title and Declaration of Policy: It is the purpose and policy of this Act . . . to provide orderly and peaceful procedures for preventing the interference by either [the employee or employer] with the legitimate rights of the other. . . ." The employee rights are expressed in section 7 of the National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964). "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

5. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). As to the Board's power under section 10(c), the court said:

That section 'charges the Board with the task of devising remedies to effectuate the policies of the Act.' *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* 'The relation of remedy to policy is peculiarly a matter for administrative competence. . . .' *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194 (1941). 'In fashioning remedies to undo the effects of violation of the Act, the Board must draw on enlightenment gained from experience.' *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). The Board's order will not be disturbed '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.' *Virginia Elec. & Power Co. v. Labor Board*, 319 U.S. 533, 540 (1943).

6. National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964). "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ."

violations has been to order the employer to cease and desist from discouraging self-organization and, if the employee was fired for such activities, to reinstate him with back pay.<sup>8</sup> However, it has become evident that this traditional remedy is inadequate to protect employees' rights as guaranteed in section 7 of the NLRA.<sup>9</sup>

The need for new remedies is not disputed. The difficult question is how far the Board may go under the broad powers of section 10(c) to effectuate the policies embodied in section 7<sup>10</sup> of the Act.

#### NEW REMEDIES OF NLRB

In its decisions in *J.P. Stevens & Co., Inc.*,<sup>11</sup> the Board gave its standard order of reinstatement, back pay and posting-of-notice requirements.<sup>12</sup> However, it recognized that these traditional remedies would be inadequate "to undo the effect of the massive and deliberate unfair labor practices."<sup>13</sup> Therefore, it fashioned several new remedies to restore the

7. National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(a) (3) (1964). "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

8. *Bridgement Brass Co.*, 130 N.L.R.B. 1332 (1961); *Edwards Trucking Co.*, 129 N.L.R.B. 385 (1960); *Peyton Packing Co., Inc.*, 49 N.L.R.B. 828 (1943). The inquiry into the remedial effectuation of the policies of the NLRA has been for the most part directed toward the Board's solutions to the massive and deliberate unfair labor practices committed by an employer in violation of sections 8(a)(1) and 8(a)(3). Unfair labor practices in violation of section 8(a)(5) are not considered in this note.

9. *Hearings Scheduled on Adequacy of Taft-Hartley Remedies*, 1 LAB. REL. REP., 65 Analysis 65 (May 29, 1967): "In fiscal 1965, allegations of section 8(a)(3) violations, covering discharges and other forms of discrimination against employees, were made in 7,367 or 67.4 per cent, of all charges filed by unions;" see note 2, *supra*.

10. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

11. *J.P. Stevens & Co., Inc.*, 157 N.L.R.B. 869, 61 LRRM 1437 (1966), *modified*, 380 F.2d 292, 65 LRRM 2829 (2d Cir. 1967), *cert. denied* 389 U.S. 1005 (1967). There have been four subsequent cases before the Board involving *J.P. Stevens & Co., Inc.* concerning similar violations of the NLRA. Thus, the above case cited will be hereinafter cited as *J.P. Stevens No. 1*; *J.P. Stevens & Co., Inc.*, 163 N.L.R.B. No. 24, 64 LRRM 1289 (1967), *modified*, 388 F.2d 896, 67 LRRM 2055 (2d Cir. 1967), *petition for cert. filed* 37 U.S.L.W. 3020 (U.S. June 24, 1968) (No. 224) hereinafter cited as *J.P. Stevens No. 2*; *J.P. Stevens & Co., Inc.*, 167 N.L.R.B. No. 37, 66 LRRM 1024 (1967) hereinafter cited as *J.P. Stevens No. 3*; *J.P. Stevens & Co., Inc.*, 167 N.L.R.B. No. 38, 66 LRRM 1030 (1967) hereinafter cited as *J.P. Stevens No. 4*; *J.P. Stevens & Co., Inc.*, 171 N.L.R.B. No. 163, —LRRM—(1968) hereinafter cited as *J.P. Stevens No. 5*.

12. The Board requires the employer to post a Notice to All Employees evidencing his intent to remedy and refrain from unfair labor practices. The notice is displayed at the plants where these violations occurred for a period of sixty days. See *Peyton Packing Co., Inc.*, 49 N.L.R.B. 828 (1943).

13. See *J.P. Stevens No. 1*, 157 N.L.R.B. at 878. The employer's unfair labor practices in violation of section 8(a)(1) had been: (1) twenty-three threats of reprisals and promises of benefits, (2) seventeen acts of interrogation, (3) four acts of surveillance, (4) posting and mailing to the employees a notice warning them against the union, (5) posting names of union adherents, (6) intimidating an employee giving a statement to the Board, and (7) removing a union button from an employee. The employer's actions in violation of section 8(a)(3) had been seventy-one acts of

imbalance created by the employer's actions.

One such Board order required the employer to mail a copy of the "Notice to All Employees."<sup>14</sup> While this order did not originate in *J. P.*

discharge for union activity. Also, in violation of section 8(a)(4), the company had refused to reinstate an employee who had given testimony before the Board. Section 8(a)(4), National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(4) (1964), states that "[i]t shall be an unfair labor practice for an employer—(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act. . . ."

14. *J.P. Stevens No. 1*, 157 N.L.R.B. at 882:

Notice to All Employees—Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the purposes of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not discharge, force the termination of, refuse overtime work to, or otherwise discriminate against employees in order to discourage membership in or support of Textile Workers Union of America, AFL-CIO, or any other labor organization.

We will not discharge or otherwise discriminate against employees for giving testimony under the Act.

We will not engage in surveillance of employees' activities with respect to union organization.

We will not interrogate any employee concerning such activities by them or other employees.

We will not threaten our employees with discharge or other reprisal if they become or remain members of the Union or give any assistance or support to it.

We will not alter our working conditions for the purpose of defeating the organizational effort of our employees or of Textile Workers Union of America, AFL-CIO, or the efforts of any other labor organization of our employees.

We will not encourage or permit employees to engage in anti-union activity while prohibiting employees from engaging in activity on behalf of the Union.

We will not interrogate and intimidate employees concerning statements the employees gave to Board agents.

We will not encourage and assist employees in withdrawing from the Union.

We will not instruct employees to watch for and report to the Respondent the union activities of other employees.

We will not prohibit employees from wearing union insignia or threaten them with discharge for wearing union insignia.

We will not intimidate and coerce employees into withdrawing from the Union.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist, the aforesaid Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

We will offer to the employees named below [list of seventy-one discharged employees] immediate and full reinstatement to their former or substantially equivalent positions, without loss of seniority or other rights and privileges, and we will make them whole, with interest, for any pay they lost because of the discrimination against them.

We will offer to . . . [names employees] . . . overtime work in accordance with the practice of offering these said employees overtime work prior to the date overtime work was discriminatorily withheld from each of them and make them whole for loss of overtime pay during the period of time overtime work was discriminatorily withheld from each of them, with interest.

All our employees are free to become or remain, or refrain from becoming or remaining, members of Textile Workers Union of America, AFL-CIO, or any

*Stevens No. 1*,<sup>15</sup> it was the first time the Board demanded that a notice be sent to employees working at plants where no unfair labor practices had occurred.<sup>16</sup>

This enlargement of the notice-giving order was also evident in the Board's expansion of its usual posting requirement. Normally, this order requires the employer to post the "Notice to All Employees"<sup>17</sup> in the plant where the unfair labor practice was committed. However, in *J. P. Stevens No. 1*, the Board also directed the employer to post the "Notice to All Employees" at the company's plants outside the sphere of unfair labor practices, but within the reach of the "atmosphere of fear"<sup>18</sup> caused by the managerial actions.

It would appear<sup>19</sup> that both the expanded mailing and posting order will be included in the remedial arsenal of the Board in the future. In cases where company policies are not framed at the individual plant level, and the publicizing of the employer's unfair labor practices is not limited to the plants where the violations of the NLRA occurred,<sup>20</sup> this extension of the Board's order would indeed seem proper. It assures that all employees who might fear reprisal for union activities, due to their employer's unfair labor practices, will be informed of the employer's intent to remedy the past violations and to refrain from future anti-organizational actions.

Another Board order granted the union, upon request, reasonable access to the plant bulletin board for the dissemination of organizational information after the unfair labor practices had occurred. However, this

other labor organization.

J.P. Stevens and Co., Inc., Employer

Dated..... By.....  
(Representative) (Title)

15. H.W. Elson Bottling Co., 155 N.L.R.B. 714, 60 LRRM 1381 (1965), 379 F.2d 223, 65 LRRM 2673 (6th Cir. 1967). In Jackson Tile Mfg. Co., 122 N.L.R.B. 764, 272 F.2d 181 (5th Cir. 1958), the Board required the employer to include a copy of the notice signed by the employer in the employee's pay envelope.

16. In *J.P. Stevens No. 1* the Board required the employer to send notices to all employees of its forty-three plants while unfair labor practices occurred only in the twenty plants where organization campaigns had begun. In the other Board decisions in which this remedial order was used, there was either only one plant involved or unfair labor practices occurred at all of the plants. See *Marlene Indus. Corp.*, 166 N.L.R.B. No. 58, 65 LRRM 1626 (1967); *Great Lakes Screw Corp.*, 164 N.L.R.B. No. 20, 65 LRRM 1236 (1967); *Scott's, Inc.*, 159 N.L.R.B. 1795, 62 LRRM 1543 (1966), *modified, sub nom.* *Electrical Workers (IUE) v. NLRB*, 383 F.2d 230, 66 LRRM 2081 (D.C. Cir. 1967); *H.W. Elson Bottling Co.*, 155 N.L.R.B. 714, 60 LRRM 1381 (1965).

17. See note 14, *supra*.

18. See *J.P. Stevens No. 2*, 64 LRRM at 1291. See, *e.g.*, *NLRB v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), where the Supreme Court notes the effect that a plant closing has on employees working in other plants under the same management.

19. See note 16, *supra*.

20. *J.P. Stevens No. 2, as modified* 380 F.2d 292 (2d Cir. 1967). The court also points out that employees will be able to absorb the meaning of the notice at home better than at work where the possibility of reprisal represents a more present fear.

requirement does not possess the general circuit court approval that the above remedies have received. The Second Circuit in *J. P. Stevens No. 1*<sup>21</sup> refused to enforce the Board's remedial order allowing the union use of company bulletin boards during the continuation of its organizational campaign. The court stated that there was no "unique problem of access"<sup>22</sup> in contacting the employees which would support this interference with the employer's property.<sup>23</sup> Also, the court pointed out that "the Board made virtually no findings concerning the issues relevant to solicitation, and made no adequate showing that the company's bulletin boards are necessary to the Union in its organizational campaign."<sup>24</sup> The Sixth Circuit,<sup>25</sup> however, affirmed the Board's ruling which allowed the union use of the bulletin boards, reasoning that such an order was necessary "to redress the imbalance"<sup>26</sup> created by the employer's violations of the Act.

While the "problem of access" to employees is significant in determining what rights a union has in conducting its organizational campaign, it is of doubtful relevancy in a determination of the appropriateness of a

21. *Id.*

22. *Id.* at 305.

23. In *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26, 64 LRRM 2295 (2d Cir. 1967), the court allowed union representatives admission to company property as there was no other available means of solicitation since the majority of employees lived in housing owned by the employer. Also, in other cases involving a company rule prohibiting union organizers from soliciting on company property, the Board has held that such a rule is presumptively valid, but the enforcement of such a rule would be an unfair labor practice where the union had no other means of access to contact employees. Such cases, however, did not deal with a remedial order of the Board directed towards redressing an imbalance in organizational opportunities created by an employer's unfair labor practice, but with the question of what acts of the employer will amount to an unfair labor practice in the normal industrial setting.

24. See *J.P. Stevens No. 2*, 380 F.2d at 305. The court apparently relied on the reasoning exhibited in the Supreme Court's decision in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941), relied on in *Don Juan Co.*, 185 F.2d 393 (2d Cir. 1950) :

The administrative process will best be vindicated by clarity in its exercise.

Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders [§ 10(e and f)], it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order.

See 112 U. PA. L. REV. 69, 81 (1963) :

Since a Court of Appeals, accustomed to one order consistently issued for a given unfair practice may reverse a unique order not obviously appropriate, the NLRB should note the aspect of the record or of its experience upon which it bases any novel order.

25. *H.W. Elson Bottling Co.*, 379 F.2d 223, 65 LRRM 2673 (6th Cir. 1967). Also, see *Scott's Inc.*, 159 N.L.R.B. 1795, 62 LRRM 1543 (1966), *aff'd sub nom. Electrical Workers (IUE) v. NLRB*, 383 F.2d 230, 66 LRRM 2081 (D.C. Cir. 1967) where the Court of Appeals of the District of Columbia affirmed, with no explanation, a Board order allowing union access to company bulletin boards.

26. *Id.* at 226. It is evident that the court in *Elson* followed the Board decision in *Scott's Inc.*, 159 N.L.R.B. 1795, 1808, 62 LRRM 1543, 1549 (1966).

remedial order of the Board.<sup>27</sup> The Board's purpose in ordering a particular remedy is to try to regain the status quo which existed before an unfair labor practice occurred. Whether such an order can stand should depend, not upon whether the union has an adequate opportunity to contact employees off company property, but upon whether the order will help to re-establish the status quo which existed before the employer committed his unfair labor practices,<sup>28</sup> without being punitive in nature. If the Board's remedy would effectuate this goal, then it should receive court approval.

In subsequent decisions<sup>29</sup> involving the J. P. Stevens Company, the Board ordered, with little explanation,<sup>30</sup> union access to bulletin boards for a year as a remedy for the employer's unfair labor practices. As the second decision involving the Stevens Company was written before the Second Circuit had refused to enforce this remedy, its fate on appeal was thought to be sealed. However, this time the court allowed the order albeit lacking any "unique problem of access" or determination by the Board that the union use of the bulletin boards was necessary to its organizational campaign.<sup>31</sup> Instead, the court reasoned that as the company had made extensive use of the bulletin boards in its anti-organizational effort, union access to the bulletin boards was therefore needed "to restore to the employees the opportunity to hear all viewpoints."<sup>32</sup> It is apparent that the Second Circuit has adopted the rationale behind the Sixth Circuit's allowance of this requirement, as the opportunity to hear

27. See note 23, *supra*.

28. National Labor Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964). In *Local 57, Int'l Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 300 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 942 (1967), the court stated ". . . that the purpose of a remedy must be restoration of the status quo to the greatest extent practicable. . . ." See, e.g., *Local 60, United Bhd. of Carpenters and Joiners v. NLRB*, 365 U.S. 651 (1961); *Frank Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

29. See *J.P. Stevens No. 2, 3, 4, and 5*.

30. In the NLRB decision of *J.P. Stevens No. 2*, the Board succinctly stated that "[i]n view of [the] extensive use by the Respondent of its bulletin boards [for unfair labor practices in violation of section 8(a)(1)] . . . we are also requiring the Respondent to give the Union and its representatives reasonable access to the Respondent's bulletin boards for a period of one year."

31. Ostensibly, the court felt a determination had been made as they noted the Board's contention.

. . . that union access to the bulletin boards is necessary in order to offset the Company's use of the boards in its campaign of coercion and in the posting of lists of employees who had joined the Union, the names of those employees who withdrew being 'scratched' from the lists. 388 F.2d at 905.

However, the Board made a similar contention in *J.P. Stevens No. 1*, (see 157 N.L.R.B. 869, 872, 878) but the order there was disallowed. It is apparent that the court, in its effort to join the general circuit court approval of this remedy, was able to find a distinction between the two *Stevens* cases that was in fact non-existent.

32. See *J.P. Stevens No. 2*, 388 F.2d at 905.

union organizational views will go far in redressing the imbalance created by the extensive use of the boards in the employer's anti-organizational campaign.

#### THE BOARD'S FORMULATION OF THE PUBLIC READING

The Board in *J.P. Stevens No. 1*,<sup>33</sup> in addition to its other remedies, ordered the employer to assemble his workers at each of his plants in North and South Carolina and read his "Notice to All Employees."<sup>34</sup> The flagrant nature of the employer's actions was felt to warrant such an unusual remedy in order to dissipate any harmful effects on future organizational activity. The Board indicated that this additional order would assure notification to the employees of their employer's intent to remedy and refrain from anti-union actions.

In *J.P. Stevens No. 2*,<sup>35</sup> the Board particularized its reasons for ordering the public reading by the employer. Since the employer's supervisors had carried on his anti-organizational campaign with a "face-to-face approach,"<sup>36</sup> the Board felt that the employer's declaration of neutrality concerning organizational efforts should be delivered in a like manner. It reasoned that this approach would go further in the restoration of the prior status of organizational activity than the accompanying mailing order. In the interim between the two *Stevens* decisions, the Board ordered the identical remedy in *Scott's, Inc.*,<sup>37</sup> paraphrasing its arguments for ordering the public reading in *J. P. Stevens No. 1*.

In two previous decisions, the Board had ordered this same remedy, but for different reasons than in its more recent decisions. The fact that the employees were illiterate was the Board's sole rationale for the adoption of this remedy in *Laney & Duke Storage Warehouse Co.*<sup>38</sup> In *Jackson Tile Manufacturing Co.*,<sup>39</sup> the Board found this order appropriate because the employer encouraged or directed employees to refrain from reading a notice posted in accordance with an earlier settlement agreement. The Board also noted, in *Jackson*, the frequency and severe nature of the unfair labor practices and the fact that some of the employees were illiterate.

#### FEDERAL REVIEW OF THE PUBLIC READING

The Fifth Circuit enforced the Board's decision in the *Jackson*<sup>40</sup> case,

33. See note 11, *supra*.

34. See note 14, *supra*.

35. See note 11, *supra*.

36. *J.P. Stevens No. 2*, 64 LRRM at 1291.

37. 159 N.L.R.B. 1795, 62 LRRM 1543 (1966), *modified, sub nom.* *Electrical Workers (IUE) v. NLRB*, 383 F.2d 230, 66 LRRM 2081 (D.C. Cir. 1967).

38. 151 N.L.R.B. 248, 58 LRRM 1389 (1965). However, there were also severe and numerous unfair labor practices committed by the employer.

39. 122 N.L.R.B. 764 (1958).

40. *Jackson Tile Mfg. Co.*, 122 N.L.R.B. 764 (1958), *enfd* 272 F.2d 18 (5th Cir. 1959).

but refused to affirm the public reading order in *Laney*.<sup>41</sup> Without attempting to distinguish the two cases and with little explanation, the court announced that such an order "is unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act."<sup>42</sup>

It is submitted that the court was correct in refusing to enforce the public reading in *Laney*, as this drastic remedy was unnecessary on the facts of the case.<sup>43</sup> However, the court erred in not distinguishing the cases on the basis that in *Laney* the union had succeeded in becoming the employee's bargaining agent. Therefore, the court had merely to uphold the Board's order requiring the employer to bargain with the union and it did not have to utilize a remedy designed to counteract the original impediment to organizational activity.

In the interim between the Fifth Circuit decision in *Laney* and the appeal decision of *Scott's, Inc.*, the Second Circuit modified the Board's order in *J.P. Stevens No. 1*. The court required the notice to be read only at the plants where the employer's unfair practices occurred and afforded the employer, at his option, the alternative of having an agent of the Board read the notice rather than a company official.<sup>44</sup>

The Second Circuit's option was an obvious accommodation to the Fifth Circuit's concern with the humiliating aspect of such an order in *Laney*. It is clear that the Second Circuit was aiming at a solution which would minimize employer embarrassment while insuring "that the full counteracting force of the remedial order would be felt by the employees."<sup>45</sup>

In *Scott's, Inc.*,<sup>46</sup> the District of Columbia Court of Appeals, echoing the reasoning of the Fifth Circuit, found that the future ramifications of employer humiliation caused by the reading of such an order would be far more detrimental to the organizational activities than any benefit that could be achieved by the forced reading. The court did not recognize the alternative provided by the Second Circuit as alleviating the problem, but rather as creating more difficulty.<sup>47</sup>

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41. *Laney & Duke Storage Warehouse Co.*, 151 N.L.R.B. 248 (1965), *rev'd* 369 F.2d 859 (5th Cir. 1966).

42. 369 F.2d at 869.

43. In *Laney* the Board ordered the reading provision based on the fact of employee illiteracy. Possibly, a less drastic order such as a reading of the notice by a shop steward could have achieved notification of the illiterate employees.

44. The court noted that it did not hold that the reading provision lacking the alternative of having an agent of the Board read the notice would never be appropriate. However, the court did not discuss when the unmodified reading order would be appropriate. 380 F.2d 292, 305 (2d Cir. 1967), 388 F.2d 896, 905 (2d Cir. 1967).

45. 380 F.2d at 305.

46. *Scott's Inc.*, 159 N.L.R.B. 1795, 62 LRRM 1543 (1966), *modified, sub nom. Electrical Workers (IUE) v. NLRB*, 383 F.2d 230, 66 LRRM 2081 (D.C. Cir. 1967).

47. The court reasoned that as the alternative of having an agent of the Board read

Subsequently, *J.P. Stevens No. 2*<sup>48</sup> reached the Second Circuit and the court answered the arguments raised against its modification of the earlier *Stevens* decision. The court recognized that “. . . the Board must be neutral in its approach to any proceedings before it. . . .” However, it went on to point out that “. . . once it has been found that an employer has acted unlawfully, the question is not how the situation can be neutrally remedied; it cannot, for a remedy is by definition not neutral.”<sup>49</sup> Also, in answer to the argument that the court had gone beyond its review function, the court noted that the impact of the Board’s order had not been changed, only the element of humiliation.

The foregoing historical analysis sets the stage for the investigation of the arguments for and against the remedy in question.

*Arguments disfavoring the remedy*

The company in *J.P. Stevens No. 1* would have had the Second Circuit find that the Board’s order to read the notice amounted to a coerced confession<sup>50</sup> by the employer. It would appear the District of Columbia Court of Appeals in its decision in *IUE v. NLRB*,<sup>51</sup> was willing to go this far by equating the Board’s remedial order with a “confession of sins.”<sup>52</sup>

The Second Circuit’s reply to the company’s assertion adequately dispenses with the emotional arguments constructed by the District of Columbia Court of Appeals. The Second Circuit pointed out that the Board’s notice no longer contained “cease and desist” language<sup>53</sup> and that all the employer was required to read was a reaffirmation of his employee’s rights as embodied in the NLRA.

An additional argument for refusing to enforce this remedy appears

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the notice would put the imprimatur of the Board on the particular union’s activities the neutrality of the Board would end and its effectiveness would be nullified. Also the court felt the Circuit Court should be limited to a review function and not be involved in the formulation of a *de novo* remedy.

48. See note 11, *supra*.

49. 388 F.2d at 904.

50. See note 11 *supra*. The company cited the recent Supreme Court decisions of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

51. *Scott’s, Inc.*, 159 N.L.R.B. 1795, 62 LRRM 1543 (1966), *modified, sub nom. Electrical Workers (IUE) v. NLRB*, 383 F.2d 230, 66 LRRM 2081 (D.C. Cir. 1967).

52. 383 F.2d at 234: The court stated “that a ‘confession of sins’ by an employer . . . makes such a remedy incompatible with the democratic principles of the dignity of man.”

53. 312 U.S. 426 (1941). Before this decision there had developed a “confession of guilt” theory through the use of “cease and desist” language. It is interesting to note that the Fifth Circuit and the District of Columbia Court of Appeals rejected the contention that the use of such language amounted to a “confession of guilt.” See *NLRB v. Arcade-Sunshine Co.*, 118 F.2d 49 (D.C. Cir. 1941); *Brown Paper Mill Co. v. NLRB*, 108 F.2d 867 (5th Cir. 1940).

in the *IUE* decision: the court reasoned that such a remedy was inappropriate for notifying the employees of their section 7 rights. If the sole motive for the Board's order was to notify employees of their rights, this position might be tenable. However, in both *J.P. Stevens No. 1* and *Scott*, employee fear of reprisal<sup>54</sup> for the slightest union adherence was evidenced. When a company official is ordered to tell workers about their organizational rights, the employees are receiving more than mere notification of their rights. They are also receiving assurance, directly from their employer, that he will respect these rights in the future. The necessity of this assurance in counteracting the effects of massive unfair labor practices was recognized by the Board in its decision in *Scott's, Inc.*<sup>55</sup>

A further argument against the enforcement of the remedial order is the humiliating aspect of the order. This was relied on by the Fifth Circuit in the *Laney* case<sup>56</sup> and approved by the District of Columbia Court of Appeals in *IUE v. NLRB.*<sup>57</sup> The court reasoned in the *IUE* case that humiliation of the employer would destroy any chance for successful future bargaining. The negative implication to be drawn from this argument is that after a Board reprimands an employer, without humiliating him, he is ready to allow his employees to unionize and to negotiate with their chosen representative. However, the employer in the *Stevens* cases was and still is<sup>58</sup> making a determined effort to frustrate any organizational drive. In addition, the embarrassment to the employer must be balanced against the humiliation suffered by an employee who has been discharged for engaging in union activities.

#### *Arguments favoring the remedy*

One of the best arguments in favor of the Board's newly conceived order lies in a review of the shortcomings of its standard remedy for 8(a)(1) and 8(a)(3) violations. When a union has not yet achieved majority status, any unfair labor practices can greatly deter a future organizational drive. The common order to cease and desist from discouraging membership in a labor organization and to reinstate the discharged employees with back pay ignores the time lost by the union until

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54. Bok, *The Regulation of Campaign Tactics in Representation Election Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 140-141 (1964): "In regulating organizational activity, a realistic sense of priorities should lead us to recognize that an elemental fear of reprisal still poses the major threat to the free and fair elections contemplated by the act."

55. *Scott's Inc.*, 159 N.L.R.B. 1795, 62 LRRM 1543 (1966), *modified, sub nom. Electrical Workers (IUE) v. NLRB*, 383 F.2d 230, 66 LRRM 2081 (D.C. Cir.1967).

56. 369 F.2d 859 (5th Cir. 1966).

57. 383 F.2d 230 (D.C. Cir. 1967).

58. *J.P. Stevens No. 4* (decided Aug. 31, 1967) and *J.P. Stevens No. 5* (decided June 12, 1968).

the date of the NLRB decision<sup>59</sup> and the time needed to counteract the original impediment to organizational activity.<sup>60</sup> Both the time element and the initial fear which his unfair labor practices has engendered in his employees are important tactical advantages to the employer.

The new remedy enforced by the Second Circuit in *J.P. Stevens No. 2* would begin to reduce this tactical advantage gained by the employer's violations of the NLRA. It would simply require the employer to diminish the organizational imbalance created by his own actions. This new order would also encourage compliance with the law.<sup>61</sup>

A further argument to be made in behalf of the new remedy is found in the Board's decision in the sequel<sup>62</sup> to the *J.P. Stevens No. 1* case. The Board ordered the employer's supervisors to read the notice, since the "face-to-face approach" by the supervisors would help to alleviate fears that supervisors were implicated in unfair practices and opposed to union organization. If the employer elects to use the alternative of having an agent of the Board read the notice, the beneficial aspect of the supervisory contact would not take effect.

#### SUMMARY

The Board must formulate a remedy under section 10(c) of the NLRA to return the parties to the status of organizational activity which existed before the employer's disruptive actions. It must make the remedy mean more than what has been characterized as a slap on the wrist, but it cannot mold its order into a penalty.<sup>63</sup> Also, the Board may not formulate a remedy which would favor union organization beyond what is necessary to counteract the employer's unfair labor practices.

In order to achieve all these objectives, the Board must frame its remedial orders to meet the needs of each particular case. Where the

59. STAFF OF SUBCOMM. ON NLRB, HOUSE COMM. ON EDUCATION AND LABOR, 87TH CONG., 1ST SESS., ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT BY THE NLRB 21 (Comm. Print 1961). William Pollock, president of the Textile Workers Union, stated that

the Taft-Hartley penalties are so light that employers regard them largely as business operating expenses. As a result, discharging pro-union workers has become a favorite anti-union tactic. It takes only a few to kill an organizing campaign. The penalty is often at least 2 years in arriving. When it finally comes, it merely requires the employer to reinstate the worker to his job with back pay and to post a notice saying the company won't be naughty again.

60. Kendall Co., 126 N.L.R.B. 502 (1960). See 112 U. PA. L. REV. 69, 82 (1963).

61. *Exploring the World of Remedies*, 1 LAB. REL. REP., 66 Analysis 175 (Nov. 6, 1967). In a speech delivered by a NLRB member, Gerald A. Brown, it was noted: "While most employers and unions obey the law, our steadily rising unfair practice caseload proves that too many parties find it advantageous to defy the law."

62. See *J.P. Stevens No. 2*.

63. *Local 57, Int'l Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 300 (D.C. Cir. 1967), cert. denied, 387 U.S. 942 (1967).

facts indicate a massive and deliberate campaign against union organization, there is a sound basis for the Board's reading order. If the employer's practices were designed to prevent the employees from freely exercising their organizational rights, the Board's new remedies can help to insure that the effects of these practices on section 7 rights will be minimal when self-organization attempts are renewed.

It is not to be assumed that such an order would be proper where there is a lack of the aggravating circumstances found in the *Stevens* cases and in *Scott*. A distinction must definitely be made between a case where flagrant violations occurred and a case where this aggravating element is absent. In such a case, it is possible that the humiliating effect on the employer would outweigh any gain made in restoring the imbalance created by the employer's unfair labor practices.

This distinction was recently recognized in the NLRB decision of *Gotham Industries, Inc.*<sup>64</sup> The unfair labor practice by the employer was the announcement of a wage increase while an election was pending. This isolated incident of a violation of the NLRA cannot compare with the effect that the numerous and deliberate unfair labor practices in the *Stevens* cases and in *Scott* had on the union organizational activity. Had the Board ordered the employer to read the notice in a case like *Gotham*, the Board would definitely have been entering a punitive judgment.

In the formulation of the public reading order, the Board has adopted a realistic approach in its remedial effectuation of the policies of the NLRA. It has devised a remedy to restore the organizational setting to its status prior to a massive anti-organizational campaign. Hopefully, the public reading will gain the general circuit court approval which it has not received in the past.

*Edwin A. Harper*

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64. 167 N.L.R.B. No. 91, 66 LRRM 1127 (decided Oct. 2, 1967). Also see W.L. Bonnell Co., Inc., 170 N.L.R.B. No. 14, 1968 CCH LAB. L. REP. ¶ 22,218 (decided March 11, 1968), which gives some indication of what the Board would consider aggravating unfair labor practices. In *Bonnell* the employer had interrogated his employees about their union activities, solicited them to withdraw from the union, and committed various other 8(a)(1) violations. Also, in violation of 8(a)(3), he had discharged an employee who was a union advocate. The Board did not feel that these unfair labor practices warranted such an unusual remedy as the reading provision. Also, it noted there was no problem of union access to the employees. Heretofore the "problem of access" had been limited to the question of access to plant bulletin boards. Now the Board has extended its justification for refusal to the reading provision. As was noted earlier, [see text accompanying note 27] the "problem of access" is of doubtful relevancy in a determination of the appropriateness of a remedial order of the Board.