Ex-Cell-O Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Case 25-CA-2377

August 25, 1970

DECISION AND ORDER

On March 2, 1967, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceeding, finding that Respondent Ex-Cell-O Corporation had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, including an order directing the Respondent to make whole its employees for any losses suffered on account of its unlawful refusal to bargain with the UAW (the Charging Party), as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, together with a request for oral argument. As the compensatory remedy adopted by the Trial Examiner in this case poses several novel issues of importance, the National Labor Relations Board granted oral argument and consolidated this matter for purposes of said argument with three other cases involving the same or related issues (*Zinke's Foods, Inc.*, 30-CA-372; *Herman Wilson Lumber Company*, 26-CA-2536; *Rasco Olympia, Inc. d/b/a Rasco 5-10-25 cents*, 19-CA-3187).

The Board granted a number of motions for permission to file briefs *amicus curiae* and also invited certain other interested parties to file them and to participate in the oral argument which was held on July 12 and 13, 1967. The parties who submitted *amicus* briefs and participated as such in the argument were: The Chamber of Commerce of the United States, the National Association of Retail Merchants, The American Federation of Labor and Congress of Industrial Organizations, and The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Amicus briefs were also submitted by the National Association of Manufacturers, Preston Products Company, Inc., and The NAACP Legal Defense and Educational Fund, Inc.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, the briefs of the parties and those submitted *amicus curiae*, the oral arguments made before the Board, and the record in the proceeding, and adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.[1]

This case began with the UAW's request for recognition on August 3, 1964. Ex-Cell-O refused the Union's request on August 10, 1964, and the Union immediately filed a petition for Certification of Representative. After a hearing the Regional Director ordered an election, which was held on October 22, 1964, and a majority of the employees voted for the Union. The Company, however, filed objections to the conduct of the election, alleging that the Union made certain misrepresentations which assertedly interfered therewith, but the Acting Regional Director, in a Supplemental Decision of December 29, 1964, overruled them. The Company then requested review of that decision, which the Board granted, and a hearing was held on May 18 and 19, 1965. The Hearing Officer issued his Report on Objections on July 15, 1965, and recommended that the objections be overruled. The Company filed exceptions thereto, but on October 28, 1965, the Board adopted the Hearing Officer's findings and recommendations and affirmed the Regional Director's certification of the Union.

The day after the Board's certification was issued, the Company advised the Union that it would refuse to bargain in order to secure a court review of the Board's action[2] and later reiterated this position after receiving the Union's request for a bargaining meeting. The Union thereupon filed the 8(a)(1) and(5) charge in this case and the complaint was issued on November 23, 1965. The Respondent's answer admitted the factual allegations of the complaint but denied the violation on the ground that the Board's certification was invalid. The hearing herein, originally scheduled for February 15, 1966, commenced on June 1, 1966;[3] it was adjourned until June 29, 1966, to permit the Union to offer evidence supporting its request for a compensatory remedy for the alleged refusal to bargain; the hearing was postponed again until July 28, 1966.[4]

[1] The Respondent's motion, filed on August 19, 1970, seeking dismissal of the complaint herein is denied *N.L.R.B.* v *Gissel Packing Co.*, 395 U.S. 575, 610, *N.L.R.B.* v *Katz*, 369 U.S. 736, 748, fn. 16, *Franks Bros. Co.* v *N.L.R.B.*, 321 U.S. 702. See also *N.L.R.B.* v *Rutter-Rex Manufacturing Company, Inc.* 396 U.S. 258.

[2] The Company's letter stated that

> We have received the Labor Board's decision concerning our objections to the conduct of the union election held October 22, 1964. 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.

[3] This delay was caused by Respondent's unsuccessful attempt to subpena the Regional Director's files in the representation case.

[4] This postponement grew out of the Company's objections to the authenticity of certain collective-bargaining contracts offered by the Union to substantiate its request for a compensatory remedy. The Company (cont'd)

The Company also petitioned the United States District Court for an injunction against the Regional Director and the Trial Examiner to restrain the latter from closing the hearing until the Regional Director had produced the investigative records in the representation case. The court issued a summary judgment denying the injunction on December 13, 1966, and on December 21, 1966, the Trial Examiner formally closed his hearing. On March 2, 1967, the Trial Examiner issued his Decision, finding that the Company had unlawfully refused to bargain in violation of Section 8(a)(5) and (1) of the Act and recommended the standard bargaining order as a remedy. In addition the Trial Examiner ordered the Company to compensate its employees for monetary losses incurred as a result of its unlawful conduct.

It is not disputed that Respondent refused to bargain with the Union, and we hereby affirm the Trial Examiner's conclusion that Respondent thereby violated Section 8(a)(1) and (5) of the Act. The compensatory remedy which he recommends, however, raises important issues concerning the Board's powers and duties to fashion appropriate remedies in its efforts to effectuate the policies of the National Labor Relations Act.

It is argued that such a remedy exceeds the Board's general statutory powers. In addition, it is contended that it cannot be granted because the amount of employee loss, if any, is so speculative that an order to make employees whole would amount to the imposition of a penalty. And the position is advanced that the adoption of this remedy would amount to the writing of a contract for the parties, which is prohibited by Section 8(d).[5]

We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from the loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where, as in the recent *N.L.R.B.* v. *Tiidee Products, Inc.*,[6] case, the court found that the employer had raised "frivolous" issues in order to postpone or avoid its lawful obligation to bargain. We have weighed these considerations most carefully. For the reasons stated below, however, we have reluctantly concluded that we cannot approve Trial Examiner's Recommended Order that Respondent compensate its employees for monetary losses incurred as a consequence of Respondent's determination to refuse to bargain until it had tested in court the validity of the Board's certification.

Section 10(c) of the Act directs the Board to order a person found to have committed an unfair labor practice to cease and desist and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." This authority, as our colleagues note with full documentation, is extremely broad and was so intended by Congress. It is not so broad, however, as to permit the punishment of a particular respondent or a class of respondents. Nor is the statutory direction to the Board so compelling that the Board is without discretion in exercising the full sweep of its power, for it would defeat the purposes of the Act if the Board imposed an otherwise proper remedy that resulted in irreparable harm to a particular respondent and hampered rather than promoted meaningful collective bargaining. Moreover, as the Supreme Court recently emphasized, the Board's grant of power does not extend to compelling agreement. (*H K. Porter Co., Inc.*, v. *N.L.R.B.*, 397 U.S. 99.) It is with respect to these three limitations upon the Board's power to remedy a violation of Section 8(a)(5) that we examine the UAW's requested remedy in this case.

The Trial Examiner concluded that the proposed remedy was not punitive, that it merely made the employees partially whole for losses occasioned by the Respondent's refusal to bargain, and was much less harsh than a backpay order for discharged employees, which might require the Respondent to pay wages to these employees as well as their replacements. Viewed solely in the context of an assumption of employee monetary losses resulting directly from the Respondent's violation of Section 8(a)(5), as finally determined in court, the Trial Examiner's conclusion appears reasonable. There are, however, other factors in this case which provide counterweights to that rationale. In the first place, there is no contention that this Respondent acted in a manner flagrantly in defiance of the statutory policy. On the contrary,

later withdrew its objection It also refused to comply with a *subpoena duces tecum* requesting production of certain records relating to wage increases and fringe benefits

[5] 49 Stat 454 (1935), as amended, 29 U S C §158(d) (1958) "but such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession "

[6] 426 F 2d 1243 (C A D C)

the record indicates that this Respondent responsibly fulfills its legally established collective-bargaining obligations. It is clear that Respondent merely sought judicial affirmance of the Board's decision that the election of October 22, 1964, should not be set aside on the Respondent's objections. In the past, whenever an employer has sought court intervention in a representation proceeding the Board has argued forcefully that court intervention would be premature, that the employer had an unquestioned right under the statute to seek court review of any Board order before its bargaining obligation became final. Should this procedural right in 8(a)(5) cases be tempered by a large monetary liability in the event the employer's position in the representation case is ultimately found to be without merit? Of course, an employer or a union which engages in conduct later found in violation of the Act, does so at the peril of ultimate conviction and responsibility for a make-whole remedy. But the validity of a particular Board election tried in an unfair labor practice case is not, in our opinion, an issue on the same plane as the discharge of employees for union activity or other conduct in flagrant disregard of employee rights. There are wrongdoers and wrongdoers. Where the wrong in refusing to bargain is, at most, a debatable question, though ultimately found a wrong, the imposition of a large financial obligation on such a respondent may come close to a form of punishment for having elected to pursue a representation question beyond the Board and to the courts. The desirability of a compensatory remedy in a case remarkably similar to the instant case was recently considered by the Court of Appeals for the District of Columbia in *United Steelworkers [Quality Rubber Manufacturing Company, Inc.]* v. *N.L.R.B.*, 430 F.2d 519. There the court, distinguishing *Tiidee Products' supra,* indicated that the Board was warranted in refusing to grant such a remedy in an 8(a)(5) case where the employer "desired only to obtain an authoritative determination of the validity of the Board's decision." It is not clear whether the court was of the opinion that the requested remedy was within the Board's discretion or whether it would have struck down such a remedy as punitive in view of the technical nature of the technical nature of the respondent's unfair labor practice. In any event, we find ourselves in disagreement with the Trial Examiner's view that a compensatory remedy as applied to the Respondent in the instant case is not punitive "in any sense of the Word."

In *Tiidee Products* the court suggested that the Board need not follow a uniform policy in the application of a compensatory remedy in 8(a)(5) cases. Indeed, the court noted that such uniformity in this area of the law would be unfair when applied "to unlike cases." The court was of the opinion that the remedy was proper where the employer had engaged in a "manifestly unjustifiable refusal to bargain" and where its position was "palpably without merit."[7] As in *Quality Rubber,* the court in *Tiidee Products* distinguished those cases in which the employer's failure to bargain rested on a "debatable question." With due respect for the opinion of the Court of Appeals for the District of Columbia, we cannot agree that the application of a compensatory remedy in 8(a)(5) cases can be fashioned on the subjective determination that the position of one respondent is "debatable" while that of another is "frivolous." What is debatable to the Board may appear frivolous to a court, and vice versa.[8] Thus, the debatability of the employer's position in an 8(a)(5) case would itself become a matter of intense litigation.

We do not believe that the critical question of the employer's motivation in delaying bargaining should depend so largely on the expertise of counsel, the accident of circumstances, and the exigencies of the moment.

In our opinion, however, the crucial question to be determined in this case relates to the policies which the requested order would effectuate. The statutory policy as embodied in Section 8(a)(5) and (d) of the Act was considered at some length by the Supreme Court in *H. K. Porter Co., Inc.* v. *N.L.R.B., supra.* There the Court held that the Board had power to require employers and employees "to negotiate" but that the Board was without power to compel a company or a union "to agree to any substantive contractual provision of a collective bargaining agreement." The purpose of the Act, the Court held, was to ensure that employers and their employees "work together to establish mutually satisfactory conditions." The Court noted that Congress was aware that agreement between employers and unions might not always be reached, that agreement might in some cases be impossible, or thwarted by strikes and lockouts. But it was never intended, the Court held, that the Government in such cases step in and become a party to the negotiations. Recognizing that the Board's remedial powers might be insufficient to cope with important labor problems, the Supreme Court nevertheless struck down an order requiring the respondent employer involuntarily to agree to a specific contractual provision. It was the job of Congress,

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[7] In these cases, at least, it would seem incumbent on the Board to utilize to the fullest extent its authority under Sec 10(j) and (e) of the Act, thereby minimizing the pernicious delay in collective bargaining and consequent loss of benefits to the employees affected See also Justice Harlan's concurrence in *H K Porter, supra*

[8] Cf *N L R B* v *Magnesium Casting Co*, 427 F 2d 114 (C A 1, May 21, 1970)

not the Board or the courts, Justice Black wrote, "to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands."

It is argued that the instant case is distinguishable from *H. K. Porter* in that here the requested remedy merely would require an employer to compensate employees for losses they incurred as a consequence of their employer's *failure to agree* to a contract he *would* have agreed to *if* he had bargained in good faith. In our view, the distinction is more illusory than real. The remedy in *H. K. Porter* operates prospectively to bind an employer to a specific contractual term. The remedy in the instant case operates retroactively to impose financial liability upon an employer flowing from a *presumed* contractual agreement. The Board infers that the latter contract, though it never existed and does not and need not exist, was *denied* existence by the employer because of his refusal to bargain. In either case the employer has not agreed to the contractual provision for which he must accept full responsibility *as though he had agreed to it.* Our colleagues contend that a compensatory remedy is not the "writing of a contract" because it does not "specify new or continuing terms of employment and does not prohibit changes in existing terms and conditions." But there is no basis for such a remedy unless the Board finds, as a matter of fact, that a contract would have resulted from bargaining. The fact that the contract, so to speak, is "written in the air" does not diminish its financial impact upon the recalcitrant employer who, willy-nilly, is forced to accede to terms never mutually established by the parties. Despite the admonition of the Supreme Court that Section 8(d) was intended to mean what it says, i.e., that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession," one of the parties under this remedy is forced by the Government to submit to the other side's demands. It does not help to argue that the remedy could not be applied unless there was substantial evidence that the employer would have yielded to these demands during bargaining negotiations. Who is to say in a specific case how much an employer is prepared to give and how much a union is willing to take? Who is to say that a favorable contract would, in any event, result from the negotiations? And it is only the employer of such good will as to whom the Board might conclude that he, at least, would have given his employees a fair increase, who can be made subject to a financial reparations order; should such an employer be singled out for the imposition of such an order? To answer these questions the Board would be required to engage in the most general, if not entirely speculative, inferences to reach the conclusion that employees were deprived of specific benefits as a consequence of their employer's refusal to bargain.

Much as we appreciate the need for more adequate remedies in 8(a)(5) cases, we believe that, as the law now stands, the proposed remedy is a matter for Congress, not the Board. In our opinion, however, substantial relief may be obtained immediately through procedural reform, giving the highest possible priority to 8(a)(5) cases combined with full resort to the injunctive relief provisions of Section 10(j) and (e) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ex-Cell-O Corporation, Elwood, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the appropriate unit as set forth in the attached Trial Examiner's Decision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the appropriate unit. The appropriate unit is:

> All production and maintenance employees, including tool crib store employees, shipping and receiving and followup employees, but excluding all office clerical and plant clerical employees, all professional employees, guards, and supervisors.

(b) Post at its Elwood, Indiana, plant copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional

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[9] In the event this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

MEMBERS MCCULLOCH AND BROWN, dissenting in part:

Although concurring in all other respects in the Decision and Order of the Board, we part company with our colleagues on the majority in that we would grant the compensatory remedy recommended by the Trial Examiner. Unlike our colleagues, we believe that the Board has the statutory authority to direct such relief and that it would effectuate the policies of the Act to do so in this case.

Section 10(c) of the Act directs the Board to remedy unfair labor practices by ordering the persons committing them to cease and desist from their unlawful conduct "and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."[10] The phrase "affirmative action" is nowhere qualified in the statute, except that such action must "effectuate the policies of this Act," and indicates the intent of Congress to vest the Board with remedial powers coextensive with the underlying policies of the law which is to be enforced. This provision "did not pass the Wagner Act Congress without objection to the uncontrolled breadth of this power."[11]

But the broad language survived the challenge.

The contention made by the Respondent herein that legislative history requires a narrow construction of the Board's remedial powers under Section 10(c) focuses on the deletion of the word "restitution" by the Senate and House Committees in reporting the original bills and their substitution therefor of the language: "including reinstatement . . . with or without back pay."[12] It is argued that because this change was made after a Senate Committee print asserted that "express language such as reinstatement, backpay etc., necessarily results in narrowing the definition of restitution,"[13] the subsequent deletion and substitution evidence congressional intent to restrict the Board's remedial power. This interpretation of the legislative history is negated by a closer look at the status of the Senate Committee print, and the statement of Senator Wagner, the author of the legislation, respecting the scope of the Board's remedial power under the present language of Section 10(c).

The assertion that substitution of the illustrative language "including reinstatement . . . with or without back pay" would narrow the definition of restitution was contained in an unsigned staff memorandum prepared for use by the Senate Committee. Whatever the status of such a document for purposes of legislative interpretation, it does not by itself prove congressional intent, especially when it is relied on, as here, to dispute the plain meaning of the statutory language.[14] Further, after the Wagner Act had been reported out of committee with the present language of Section 10(c), Senator Wagner stated, in floor debates, that under its provisions "the Board will be empowered to issue orders forbidding violations of the law and making restitution to those who have been injured thereby."[15] Clearly, although the legal phrase had been eliminated from the Act, its sponsor's intent was not thereby to narrow the concept of the Board's remedial powers. And, this broad construction of Section 10(c) has long been accepted by the courts.

The Supreme Court, in its consideration of the Board's remedial powers, has consistently interpreted Section 10(c) as allowing the Board wide discretion in fashioning remedies. Thus, in *Phelps Dodge Corp.* v. *N.L.R.B.*,[16] the Court stated that:

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[10] 49 Stat 454 (1935), as amended, 29 U S C § 160(c) (1958)

[11] *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO [Mechanical Handling Systems]* v *N L R B*, 365 U S 651, 657 (concurring opinion)

[12] Compare 1 Legislative History of the National Labor Relations Act, 1935 at 1302 with 2 Legislative History of the National Labor Relations Act, 1935 at 2292

[13] 1 Legislative History of the National Labor Relations Act, 1935 at 1360

[14] "Restitution" is a term of art used and misused in both common law and equity to describe particular techniques for judicial enforcement and maintenance of rights, and is distinguishable conceptually, but not always realistically, from damages and specific performance Thus, the term is imprecise both in meaning and application See, for example, Corbin, Contracts, §§1102–1103, 1107, Williston, Contracts §§1454, 1482–1483 Indeed, the American Law Institute's Restatement of the Law of Restitution does not include remedies for torts such as ejectment, replevin, or trover, even though restitutionary in nature, and most significantly that Restatement recites that it "does not present the circumstances under which an action can be maintained for a failure to perform an official, customary or statutory duty to pay money " Restatement, Restitution at 2–3 Dean Roscoe Pound made a comparable distinction in his treatise on jurisprudence in emphasizing that administrative modes for the enforcement and maintenance of rights deserve separate treatment from judicial techniques Pound, Jurisprudence at 351 (1959) From this background it is apparent that inclusion of the term "restitution" in Sec 10(c) would not have been appropriate to illustrate a broad flexible administrative remedy, and its deletion is readily understandable as a matter of draftsmanship

[15] 2 Legislative History of the National Labor Relations Act, 1935 at 2332

[16] 313 U S 177, 187–189

> Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.

The need for such broad remedial authority was obvious, for, as the Court went on to say:

> . . . 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.[17]

The declared policy of the Act is to promote the peaceful settlement of disputes by encouraging collective bargaining and by protecting employee rights.[18] To accomplish this purpose, Board remedies for violations of the Act should, on one hand, have the effect of preventing the party in violation from so acting in the future, and from enjoying any advantage he may have gained by his unlawful practices.[19] But they must also presently dissipate the effects of violations on employee rights[20] in order that the employees so injured receive what they should not have been denied.[21] A Board order so devised is to be enforced by the courts "unless it can be shown that the order is a patent attempt to achieve ends other that those which can fairly be said to effectuate the policies of the Act."[22]

Deprivation of an employee's statutory rights is often accompanied by serious financial injury to him. Where this is so, an order which only guarantees the exercise of his rights in the future often falls far short of expunging the effects of the unlawful conduct involved. Therefore, one of the Board's most effective and well-established affirmative remedies for unlawful conduct is an order to make employees financially whole for losses resulting from violations of the Act.[23] Various types of compensatory orders have been upheld by the Supreme Court in the belief that "Making the workers whole for losses suffered on account of an unfair practice is part of the vindication of the public policy which the Board enforces."[24] The most familiar of these is the backpay order used to remedy the effect of employee discharges found to be in violation of Section 8(a)(3) of the Act.[25] While the cease-and-desist and reinstatement orders remedy the denial of the aggrieved employee's rights and protect the prospective exercise thereof, the backpay order repairs the financial losses which have been suffered, and, in thus making the employee whole,[26] serves to recreate, as fully as possible, the conditions and relationships that would have been, had there been no unfair labor practice.[27]

As a result of its experience over the years, the Board has made modifications in its backpay orders to make them more effective. Thus, in *Isis Plumbing & Heating Co.*,[28] the Board ordered that interest at 6 percent be added to the reimbursement of wages lost by employees as a result of a respondent's wrong, in order to achieve a more equitable result and to encourage compliance with Board orders. The U.S. Court of Appeals for the District of Columbia, in upholding the Board's power to award such compensation, noted that even though the Board has waited for about 25 years to employ the interest mechanism, it could not close its eyes to the realities of the employees' position, and that in the evaluation of the law of remedies "some things are bound to happen for the 'first time.'"[29]

An earlier example of such modification occurred in *F. W. Woolworth Company*,[30] after the Board became aware that in numerous cases, after a long

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[17] *Id* at 194

[18] 49 Stat 552 (1935), as amended, 29 U S C § 151 (1958)

[19] *National Licorice Co* v *N L R B*, 309 U S 350, 364

[20] See, e g, *Franks Bros Company* v *N L R B*, 321 U S 702, 704, *N L R B* v *Fansteel Metallurgical Corp*, 306 U S 240, 257 ("The purpose of the Act is to promote the peaceful settlement of disputes by providing legal remedies for the invasion of employee rights ")

[21] *International Brotherhood of Operative Potters* [*Aztec Ceramics Co*] v *N L R B*, 320 F 2d 757, 761 (C A D C), enfg in part and remanding in part 138 NLRB 1178, *Leeds & Northrup Co* v *N L R B*, 391 F 2d 874 (C A 3), enfg 162 NLRB 987

[22] *Fibreboard Paper Products Corp* v *N L R B*, 379 U S 203, 216, citing with approval *Virginia Electric and Power Co.* v *N.L.R B*, 319 U S 533, 540 In *Consolo* v *Federal Maritime Commission*, 383 U S 607, the Supreme Court upheld a compensatory award by that Commission, which, like the Board, is among a number of administrative agencies that may grant compensatory remedies See 39 Stat 736, as amended, 46 U S C § 821 (1964), which states that the Commission "may direct payment of full reparation to the complainant for the injury caused by such violation " There the petitioner had also suffered financial loss because of the respondent's statutory violation, and the Court, relying heavily on cases involving this Board, stated (383 U S 620–621) that Congress was very deliberate in limiting judicial review of agency determinations because

> It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise

[23] *Virginia Electric and Power Company* v *N L R.B*, *supra* at 544

[24] *Phelps Dodge Corp* v *N L R B*, fn 16, *supra* at 197

[25] This remedy has been ordered since the Board reported its first case in 1935 *Pennsylvania Greyhound Lines, Inc*, 1 NLRB 1, enfd 303 U S 261

[26] Cf *Nathanson* v *N L R B*, 344 U S 25, *N.L.R B* v *Deena Artware, Inc*, 361 U S 398 (concurring opinion of Mr Justice Frankfurter)

[27] *Local 60, United Brotherhood of Carpenters* v *N L R B*, *supra* (concurring opinion of Mr Justice Harlan), *Leeds & Northrup Co* v *N L R B*, *supra*.

[28] 138 NLRB 716

[29] *International Brotherhood of Operative Potters* v *N L R B*, *supra* at 761 See *ABC Air Freight Co, Inc.* v *C A B*, 391 F 2d 295 (C A 2), concerning the need for flexibility

[30] 90 NLRB 289

period of unemployment following their discriminatory discharges, employees succeeded in obtaining higher paying jobs. With the type of backpay order then in effect, some employers secured an advantage by being dilatory and refraining from offering reinstatement, for greater delay meant a progressive reduction backpay would waive their right to reinstatement in order to toll the running of the period and freeze the amount of backpay owing at the highest possible amount. In *Woolworth,* the Board countered this stratagem of delay by ordering that backpay be computed on a quarterly basis, with the earnings in one particular quarter having no effect upon the backpay liability for any other quarter. The Supreme Court upheld the new method of compensation in *N.L.R.B.* v. *Seven-Up Bottling Company of Miami, Inc.,*[31] and stated that it is the function of the Board to give coordinated effect to the policies of the Act. The Court further indicated that in consideration of the practical interplay of the individual remedies of backpay and reinstatement, "both of which are within the scope of its authority," the Board may fashion one so that it complements, rather than conflicts with, the other.[32]

It is clear from the Act that the Board's compensatory remedies need not be limited to the above situations, and the courts have always interpreted the phrase "with or without back pay" as being merely an illustrative example of the general grant of power to award affirmative relief.[33] The Board, with judicial approval, has also employed make-whole orders to remedy various other types of violations of the Act. In *Virginia Electric and Power Company* v. *N.L.R.B., supra,* for example, the Supreme Court upheld a Board order directing the employer to make whole its employees for dues checked off in favor of a company-dominated union. The Court's rationale in part was that "Like a backpay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices," and that ". . . both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act . . ."[34]

The Board has already recognized in certain refusal-to-bargain situations that the usual bargaining order is not sufficient to expunge the effects of an employer's unlawful and protracted denial of its employees' right to bargain. Though the bargaining order serves to remedy the loss of legal right and protect its exercise in the future, it does not remedy the financial injury which may also have been suffered. In a number of situations the Board has ordered the employer who unlawfully refused to bargain to compensate its employees for their resultant financial losses. Thus, some employers unlawfully refuse to sign after an agreement. The Board has in these cases ordered the employer to execute the agreement previously reached and, according to its terms, to make whole the employees for the monetary losses suffered because of the unlawful delay in its effectuation.[35]

Similarly, in *American Fire Apparatus Co.,*[36] the employer violated Section 8(a)(5) by unilaterally discontinuing payment of Christmas bonuses, and the Board concluded that only by requiring the bonuses to be paid could the violation be fully remedied. The Court of Appeals for the Eighth Circuit in enforcing the order commented "Nor do we believe that the difficulty in computing the precise amount due each employee is a substantial reason for modifying the Board's order." In *Leeds & Northrup Co.* v. *N.L.R.B., supra,* which involved a related problem, the Court of Appeals for the Third Circuit reached a similar conclusion. There, the employer unilaterally altered its formula for computing its annual profit-sharing bonus. The Board found that a violation of Section 8(a)(5) had occurred and ordered payment to the employees of the difference between what they had received and the amount they would have been paid under the prior method of computation. In enforcing that order, the court stated:

> The Board's backpay award in this case is supportable on the ground that the union might have successfully resisted all or a portion of the reduction in its share of profits had it been afforded an opportunity to bargain, and the employees should not be left in a worse position than they might have enjoyed if the union had been given the opportunity to bargain. While

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[31] 344 U S 344

[32] *Id* at 348

[33] See, e g , *Virginia Electric and Power Co* v *N L R B*, *supra* at 539, *Radio Officer's Union* v *N L R.B*, 347 U S 17, 54, *Phelps Dodge Corp* v *N L R B*, 313 U S 177, 187–189

[34] *Supra* at 543

[35] See, e g , *Schill Steel Products, Inc*, 161 NLRB 939, *Huttig Sash and Door Co*, 151 NLRB 470, enfd in part 362 F 2d 217 (C A 4) Cf *N L R B* v *George E Light Boat Storage, Inc* , 373 F 2d 762 (C A 5), where the court of appeals enforced the Board's compensatory order which compelled the employer to reimburse employees for back overtime and welfare payments according to the terms of the contract which was unlawfully repudiated in violation of Sec 8(a)(5) The court noted that

> A simple order to bargain in good faith would not be sufficient To allow an employer unlawfully to repudiate a collective-bargaining agreement at the small cost of being required, sometime in the future, to sit down and bargain with the union would encourage such violations of the Act For the period from the breach until a new agreement, if any, is reached pursuant to the Board's bargaining order, the employer would be at liberty to disregard the terms of the contract The temptation to violate the Act in a situation where the employer would have everything to gain and nothing to lose would be overwhelming

The principle underlying these decisions has been affirmed by the Supreme Court in *N L R B* v *Joseph T Strong, d/b/a Strong Roofing & Insulating Co*, 393 U S 357

[36] 160 NLRB 1318, enfd 380 F 2d 1005 (C A 8)

> it is true that a retroactive order might afford the employees a better position than the union's bargaining might have achieved, the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act. Retroactive enforcement must always contain in it some element of hardship on the employer, but a failure to grant back pay imposes at least an equal hardship on the employees.

And in *Fibreboard Paper Products Corp.*,[37] the employer unilaterally contracted out its maintenance operations in violation of Section 8(a)(5). The Board concluded that an order to bargain about this decision could not, by itself, adequately remedy the effects of the violation. It further ordered the employer to reinstate the employees and to make them whole for any loss of earnings suffered on account of the unlawful conduct. The Supreme Court upheld the compensatory remedy, and stated that "There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act."[38]

The question now before us is whether a reimbursement order is an appropriate remedy for other types of unlawful refusals to bargain. On the basis of the foregoing analysis regarding Section 10(c), we believe that the Board has the power to order this type of relief. Further, for the reasons set forth herein, we are of the view that the compensatory remedy is appropriate and necessary in this case to effectuate the policies of the Act.

An employer's unlawful refusal to bargain completely frustrates the purposes of the Act, as it directly contravenes the congressional policy of encouraging collective bargaining and also denies the statutory right of the employees to bargain collectively through their chosen representative.[39] It is clear from the Act itself and from its legislative history that immediate recognition of this right was contemplated; and partly to achieve this goal Congress, in originally enacting the Act in 1935, excluded Board orders in certification proceedings under Section 9(c) from direct review in the courts.[40] This judgment was reaffirmed in 1947 when a conference committee rejected a proposed House amendment which would have permitted any interested persons to obtain review immediately after certification because "such provision would permit dilatory tactics in representation proceedings."[41] Very often, as noted by the Supreme Court, the procedural delays necessary to make a fair determination on charges of unfair labor practices have the effect of postponing indefinitely the performance of employers' statutory duty to bargain, thus depriving employees of their legal right to such collective-bargaining representation.[42] The Board has taken various steps in an effort to relieve the wrongful effects of such delay. Thus, in *Franks Bros. Company*,[43] for example, the Board issued a bargaining order even though the union had lost its majority before the issuance of the complaint alleging the refusal to bargain, and the Supreme Court upheld this action, commenting that to order further elections would be "providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it had adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement."[44]

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[37] 138 NLRB 550, enfd 322 F 2d 411 (C A D C), affd 379 U S 203

[38] 379 U S at 216 See also *N L R B* v *Joseph T Strong, d/b/a Strong Roofing & Insulating Co*, *supra* at fn 35

[39] Both the legislative history of the Act and decisions of the Supreme Court emphasize the central role of the employees' right to bargain and the correlative duty of employers to honor it S Rep No 573, 74th Cong 1st Sess 12 (1935) See, e g, *Consolidated Edison Co of New York, Inc* v *N L R B*, 305 U S 197, 236 "The Act contemplates the making of contracts with labor organizations That is the manifest objective in providing for collective-bargaining", *N L R B* v *Insurance Agents' International Union, AFL-CIO [Prudential Ins Co]* 361 U S 477, 483 "It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement"

[40] A Board decision in a certification proceeding is not a "final order" made reviewable by Sec 10(e) and (f) in the courts of appeals See, e g, *American Federation of Labor, et al. [Shipowners' Assn of the Pacific Coast]* v *N L R B*, 308 U S 401, *Boire* v *The Greyhound Corporation*, 376 U S 473 The House Report clearly states the policy behind this restriction

> When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representatives, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power H R Rep No 972, 74th Cong, 19 Sess 5-6

[41] Statement by Senator Taft, 93 Cong Rec 6444 (1947), as cited in *Boire* v *The Greyhound Corporation*, fn 40, *supra* at 479

[42] *International Association of Machinists, Tool and Die Makers Lodge No 35 [Serrick Corp]* v *N L R B*, 311 U S 72, 82, *Frank Bros Company* v *N L R B*, 321 U S 702, 704, where the Court observed that

> Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representative disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions

[43] 44 NLRB 898, enfd 137 F 2d 989 (C A 1), affd 321 U S 702

[44] *Supra* at 705 See also the Board's policy of computing backpay on a quarterly basis discussed *supra* Further, in *Bernel Foam Products Co, Inc*, 146 NLRB 1277, the Board held that the filing of a refusal-to-bargain charge was not foreclosed by the fact that the union lost a representation election, since an employer's unlawful activities could very well have caused the loss To do otherwise would lend "the Board procedures as a tool to thwart the statutory rights of the majority of the employees involved and subverts the very purpose of the Act" 146 NLRB at 1281

The present remedies for unlawful refusals to bargain often fall short, as in the present case, of adequately protecting the employees' right to bargain. Recent court decisions, congressional investigations, and scholarly studies have concluded that, in the present remedial framework, justice delayed is often justice denied.[45]

In *N.L.R.B.* v. *Tiidee Products, Inc.*, the Court of Appeals for the District of Columbia Circuit recently stated that:[46]

> While [the Board's usual bargaining] remedy may provide some bargaining from the date of the order's enforcement, it operates in a real sense so as to be counterproductive, and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant. The obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace, *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952).
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> . . . Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. See Ross, *Analysis of Administrative Process Under Taft-Hartley,* 1966 Labor Relations Yearbook 299, 302–303; Note, *An Assessment of the Proposed 'Make-Whole' Remedy in Refusal-To-Bargain Cases,* 67 Mich. L. Rev. 374, 378 (1968). Thus the employer may reap a second benefit from his original refusal to comply with the law: He may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.

A study by Professor Philip Ross shows that a contract is signed in most situations where the employer honors its duty to bargain without delay,[47] but that the chance of a contract being signed is cut in half if the case must go to court enforcement of a bargaining order.[48] In the interim, of course, the employees are deprived of their rightful union representation and the opportunity to bargain over their terms and conditions of employment, while at the same time their employers may gain a monetary advantage over their competitors who have complied with their legal duty.

The present case is but another example of a situation where a bargaining order by itself is not really adequate to remedy the effects of an unlawful refusal to bargain. The Union herein requested recognition on August 3, 1964, and proved that it represented a majority of employees 2-1/2 months later in a Board-conducted election. Nonetheless, since October 1965 the employer, by unlawfully refusing to bargain with the Union, has deprived its employees of their legal right to collective bargaining[49] through their certified bargaining representative.[50] While a bargain-

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[45] The Cox Advisory Panel's report to the Senate Committee on Labor and Public Welfare concluded that a major weakness in labor-management relations law is the long delay between the point at which a union seeks recognition of its majority status and the day when the employees' right to bargain through their chosen representative is vindicated by enforcement of a bargaining order The Panel posed the question "If an employer refused to bargain collectively on June 3, 1959, how much good will be done by an order to bargain entered December 1, 1961?" It concluded that "A remedy granted more than 2 years after the event will bear little relation to the human situation which gave rise to the need for Governmental intervention" Pages 2 and 10 of report pursuant to S Res 66 and S Res 141, 86th Cong, 2d Sess 81 (1960) A similar conclusion is evident from the testimony given in the hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor on H R 11725 (1967) which investigated the adequacy of Board remedies

[46] *Supra*

[47] An independent study of UAW experience in obtaining first bargaining contracts during a 6-month period was made by Professor Ross, and its results were appended to the UAW's brief The study indicates that the UAW succeeded in obtaining contracts in 97 percent of the cases following a Board-conducted election The contracts resulted in average percentage wage increases of 7 9 percent and an average increase in the value of fringe benefits amounting to 3 9 percent

[48] A study made of 1960 cases in five Board Regional Offices revealed that unions succeeded in gaining contracts in 84 to 90 percent of the cases following their winning Board-conducted elections Ross, The Government as a Source of Union Power 251 (1965) Professor Ross' more recent study, The Labor Law in Action An Analysis of the Administrative Process Under the Taft-Hartley Act (1966), considered all 8(a)(5) cases during a 5-year period Cases concerning first bargaining situations yielded the following conclusions

> By far, the most significant influence on bargaining consequences was the stage of case disposition The facts speak for themselves About two-thirds of cases closed before issuance of complaints resulted in execution of first contracts
>
> With the exception of a handful of cases which required Supreme Court action prior to closing, the longer the litigation the less likely was the prospect of the signing of a first contract Only about half (approximately 57 percent) of all cases closed after a Board order resulted in such contracts and less than 36 percent of the cases closed after circuit court enforcement ended up with agreements
>
> The explanation for these results which comes most readily to mind is the factor of time The long, drawn out process of administrative investigation, hearing and findings and, ultimately adjudication, bring two, three or four years of delay and a weakening of the charging union through the effects of the unexpunged unfair labor practices upon the employees

Professor Ross' earlier study revealed that on the average nearly 2–1/2 years elapse between the filing of an unfair labor practice charge and the issuance of a judicial decree Ross, The Government as a Source of Union Power, at 171

[49] Cf *N L R B* v *Southbridge Sheet Metal Works, Inc*, 380 F 2d 851 (C A 1) Such delay frustrates the purposes of the Act and leads to strikes and other labor unrest

[50] We find no merit in the Respondent's contention in the present case that, at least in a "technical" refusal-to-bargain situation, a compensatory remedy would penalize it for obtaining judicial review of the Board's representation proceedings In *Consolo* v *Federal Maritime Commission, supra* at 624–625, the Court rejected the same contention Relying on a case involving the Board *(N L R B* v *Electric Vacuum Cleaner Company, Inc*, 315 U S 685), the Court concluded that "At any rate it has never been the law that a litigant is absolved from liability for that (cont'd)

ing order at this time, operating prospectively, may insure the exercise of that right in the future, it clearly does not repair the injury to the employees here, caused by the Respondent's denial of their rights during the past 5 years.

In these refusal-to-bargain cases there is at least a legal injury. Potential employee losses incurred by an employer's refusal to bargain in violation of the Act are not limited to financial matters such as wages. Thus, it is often the case that the most important employee gains arrived at through collective bargaining involve such benefits as seniority, improved physical facilities, a better grievance procedure, or a right to arbitration. Therefore, even the remedy we would direct herein is not complete, limited as it is to only some of the monetary losses which may be measured or estimated. The employees would not be made whole for all the losses incurred through the employer's unfair labor practice. But, where the legal injury is accompanied by financial loss, the employees should be compensated for it. The compensatory period would normally run from the date of the employer's unlawful refusal to bargain until it commences to negotiate in good faith, or upon the failure of the Union to commence negotiations within 5 days of the receipt of the Respondent's notice of its desire to bargain with the Union,[51] although here a later starting date could be used because this remedy would be a substantial departure from past practices.[52] Further, the Board could follow its usual procedure of providing a general reimbursement order with the amount, if any, to be determined as part of the compliance procedure.[53]

This type of compensatory remedy is in no way forbidden by Section 8(d).[54] It would be designed to compensate employees for injuries incurred by them by virtue of the unfair labor practices and would not require the employer to accept the measure of compensation as a term of any contract which might result from subsequent collective bargaining. The remedy contemplated in no way "writes a contract" between the employer and the union, for it would not specify new or continuing terms of employment and would not prohibit changes in existing terms and conditions.[55] All of these would be left to the outcome of bargaining, the commencement of which would terminate Respondent's liability.

Furthermore, this compensatory remedy is not a punitive measure. It would be designed to do no more than reimburse the employees for the loss occasioned by the deprivation of their right to be represented by their collective-bargaining agent during the

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time during which his litigation is pending" *(Id* at 624–625) and noted (at 625) that the time of appeal allowed the respondent to continue its unlawful conduct thus in turn continue to injure the petitioner That such a remedy would include the entire amount lost by the wronged party, instead of being reduced by the amount accruing while the violator was contesting the issue, no more makes the remedy penal in character under this Act than it does elsewhere "The litigant must pay for his experience, like others who have tried and lost" *Life & Casualty Ins Co* v *McCray,* 291 U S 566, 575

There is no question of the right of an employer to test the legal propriety of a Board certification or to test its legal position respecting any issue of law or fact upon which a Board bargaining order is predicated but it should not thereby realize benefits not usually flowing from such a proceeding In other words, should an employer choose to await court action, and if its legal position be sustained, it would not only be absolved of the duty to bargain, but also of any monetary remedy arising out of the order contemplated herein, if, on the other hand, an employer be found to have rested its refusal to bargain on an erroneous view of law or fact, any loss to employees incurred by its continued adherence to that error should be borne by that employer and not by its employees That is the risk taken by all litigants

The employer's argument for tolling the compensatory period during the time he contests the violation is contrary to the policy of the Act in fostering the prompt commencement of collective bargaining, a policy shown explicitly in the denial of judicial review of the Board's representation proceedings To allow the employer to avoid making his employees whole for the period bargaining was delayed by his litigating a mistaken view of the law would encourage such delay in the areas in which Congress particularly deemed speed to be essential

[51] It is argued that the remedy contemplated should not be computed from the beginning of the Employer's refusal to bargain since collective-bargaining contracts are usually not agreed upon immediately upon the inception of a duty to bargain However, an order that liability shall cease when the Respondent *commences* to bargain, not when an agreement is achieved, negates any such argument for a delayed date of liability For, the period between commencement of bargaining and agreement would be provided for at the end of the liability period rather than at the beginning In addition to providing beginning and ending dates more precise and less conjectural, a computation on such a basis has the added advantage of permitting the employer to accept its basic responsibility to bargain and thereby toll the accrual of reimbursable losses and leave it free actually to bargain without added pressure to reach a contract in order thereby to minimize its monetary liability, thus fostering collective bargaining without compelling agreement

[52] Cf *Fibreboard Paper Products Corp* v *N L R B*, *supra* at fn 22

[53] As Mr Justice Frankfurter said, concurring in *N L R B* v *Deena Artware, Inc*, 361 U S 398, which also involved a compensatory remedy

> The Board's procedure in unfair labor practice cases is first to hold a hearing to determine whether an unfair labor practice was committed, and, if it was, whether it would "effectuate the policies of the Act" for the Board to order reinstatement with backpay of any employees who were discharged Section 10(c) In such a proceeding, the Board does not concern itself with the amount of backpay actually owing This is excluded from the proceeding in the interest of the efficient administration of the Act [The Board's] primary function under Section 10, in connection with which it makes specific monetary orders for specific employees, is to prevent the conduct defined as unfair labor practices in Section 8 Section 10(c) provides that once the Board determines that an unfair labor practice occurred, it may make such remedial orders for reinstatement with backpay as will "effectuate the policies" of the Act We have held that the Board is granted broad discretion over the fashioning of remedial orders by this provision The salient fact which brings the Board's remedial power into play under Section 10(c) is its finding that the employer's conduct constituted an unfair labor practice [361 U S at 411–412]

[54] The provision in Sec 8(d) that neither party is required to agree to a proposal or make a concession appears to have been designed, not for the situation before us, but to preclude the Board from evaluating "the merits of the provisions of the parties" as a factor in determining whether bargaining was in good faith House Conference Report, Legislative History, p 538

[55] It is in this respect that this situation is distinguishable from the one that was before the Supreme Court in *H K Porter Co, Inc.* v *N L R B*, 397 U S 99, which involved a dispute over a contract clause See *I U E [Tudee Products Inc]* v *N L R B*, *supra*

period of the violation. The amount to be awarded would be only that which would reasonably reflect and be measured by the loss caused by the unlawful denial of the opportunity for collective bargaining. Thus, employees would be compensated for the injury suffered as a result of their employer's unlawful refusal to bargain, and the employer would thereby be prohibited from enjoying the fruits of its forbidden conduct to the end, as embodied in the Act, that collective bargaining be encouraged and the rights of injured employees be protected.[56] It is well settled that a reimbursement order is not a redress for a private wrong, since the Act does not create a private cause of action for damages,[57] but is a remedy created by statute and designed to aid in the achievement of the public policy embodied in the Act.[58] Accordingly, as the reimbursement order sought herein is meant to enforce public policy, the Board's exercise of its discretion in ordering such a remedy would not be strictly confined to the same considerations which govern comparable awards in either equity courts[59] or damage awards in legal actions.[60] In the first place, it is well established that, where the defendant's wrongful act prevents exact determination of the amount of damage, he cannot plead such uncertainty in order to deny relief to the injured person, but rather must bear the risk of the uncertainty which was created by his own wrong.[61] The Board is often faced with the task of determining the precise amount of a make-whole order where the criteria are less than ideal, and has successfully resolved the questions presented.[62]

But even if a reimbursement order were judged by legal or equitable principles regarding damages, the remedy would not be speculative. It is well established that the rule which precludes recovery of "uncertain damages" refers to uncertainty as to the fact of injury, rather than to the amount.[63] Where, as here, the employer has deprived its employees of a statutory right, there is by definition a legal injury suffered by them, and any uncertainty concerns only the amount of the accompanying reimbursable financial loss.

From a remedial viewpoint, the present type of refusal to bargain differs from other 8(a)(5) situations

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[56] *Local 57, International Ladies' Garment Workers' Union, AFL-CIO* v *N L R B*, [*Garwin Corp*], 374 F 2d 295 (C A D C), cert denied 387 U S 942, where the court of appeals, in refusing to enforce part of a Board order on the ground that it constituted a penalty, said that

> The Board is indeed correct when it states that the purpose of a remedy must be restoration of the *status quo* to the greatest extent practicable, however, the basic purpose of restoring the *status quo* is to redress the injury done to employees The crucial element in all these cases is that the interest being protected is the freedom of choice of the workers in a bargaining unit
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> [T]he purpose of Board remedies is to rectify the harm done to the injured workers, not to provide punitive measures against errant employers [374 F 2d at 300–303]

[57] See, e g, H R Rep No 1147 on S 1958 24 (1935), *Virginia Electric and Power Company* v *N L R B*, fn 22, *supra* at 744, *International Brotherhood of Operative Potters* v *N L R B*, fn 21, *supra* at 761

[58] In upholding the Board's *Woolworth* formula, the Supreme Court stated that

> It is the business of the Board to give coordinated effect to the policies of the Act We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive" It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act [*N L R B* v *Seven-Up Bottling Company*, fn 31, *supra* at 348]

[59] "For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law of chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained Whether and to what extent such matters should be considered is a complex problem for the Board to decide The fact that the Board may only have approximated its efforts to make the employees whole does not convert this reimbursement into the imposition of a penalty" *Virginia Electric and Power Company* v *N L R B*, fn 22, *supra* at 543–554, see also *Phelps Dodge Corp* v *N L R B*, fn 16, *supra* at 188, *F W Woolworth Company* v *N L R B*, 121 F 2d 658 (C A 2)

[60] See, e g, *N L R B* v *Deena Artware Inc*, fn 53, *supra* at 413, where Mr Justice Frankfurter, concurring, said that

> The Board's determinations are not merely administrative analogues of common law judgments and they do not purport to be As here, they uniformly contain a specific direction to take "affirmative action" In enforcing the Board's orders the Courts of Appeals similarly act not merely to review a common law judgment, but to "effectuate the policies" of the National Labor Relations Act

[61] *Story Parchment Co* v *Paterson Parchment Co*, 282 U S 555, 563 When reaffirming this principle in *Bigelow* v *RKO Radio Pictures*, 327 U S 251, 265, the Supreme Court relied on *F W Woolworth Company* v *N L R B*, 121 F 2d 658 (C A 2) The court of appeals in that case enforced the Board's backpay order even though, because of the employer's conduct, it could not be determined which employees were discriminatorily discharged, and stated that

> In this striving to restore the *status quo*, the Board was forced to use hypothesis and assumption instead of proven fact But its order is not invalid on that account, for Petitioner, by its unlawful conduct, has made it impossible to do more than to approximate the conditions which would have prevailed in the absence of discrimination Even in private litigation, the courts will not impose an unattainable standard of accuracy Certainty in the fact of damages is essential Certainty as to the amount goes no further than to require a basis for a reasonable conclusion

The same principle has been applied to a backpay award granted to remedy a violation of Sec 8(a)(5) in *Leeds & Northrup Co* v *N L R B*, *supra* (see statement quoted at pp 27–28 above)

[62] The problem most frequently arises when we must determine the amount of backpay due to unlawfully discharged employees As we recently stated in connection with this issue *(The Buncher Company*, 164 NLRB 340, enfd 405 F 2d 787 (C A 3))

> In solving many of the problems which arise in backpay cases, the Board occasionally is required to adopt formulas which result in backpay determinations that are close approximations because no better basis exists for determining the exact amount due However, the fact that the exact amount due is incalculable is no justification for permitting the Respondent to escape completely his legal obligation to compensate the victims of his discriminatory actions for the loss of earnings which they suffered In general, courts have acknowledged that in solving such backpay problems, the Board is vested with wide discretion in devising procedures and methods which will effectuate the purposes of the Act and has generally limited its review to whether a method selected was "arbitrary or unreasonable in the circumstances involved," or whether in determining the amount, a "rational basis" was utilized

[63] *Story Parchment Co* v *Paterson Parchment Co*, *supra*

where reimbursement has been ordered only in the method of proof needed to calculate the amount of financial loss, if any, which the employees may have suffered. In the cases involving employer refusals to sign agreements already reached, the employees' losses were compensated according to the terms of such agreement for the length of the delay in its effectuation caused by the employer.[64] Where the employer unilaterally discontinued a Christmas bonus, the amount of employee loss was determined by utilizing the past records of bonuses given and the methods by which they were previously calculated.[65] In a recent case,[66] a union and a multiemployer bargaining association successfully bargained to a contract. The employer subsequently refused to sign the contract and attempted to withdraw from the multiemployer bargaining association. The Board found a violation of Section 8(a)(5) and ordered the employer to cease and desist from unfair labor practices, to sign the contract, and to pay the fringe benefits provided for in that contract. The court of appeals had agreed with the Board's finding of violation and its order to cease and desist from violation and to sign the contract, but refused to enforce that part of the Board's order requiring the Respondent to pay the contractual fringe benefits as being outside the Board's powers. The Supreme Court, on writ of *certiorari,* affirmed the Board order *in toto,* finding that the provision ordering the Respondent to pay the contractual fringe benefits was within the Board's remedial power granted in Section 10(c) of the Act. In situations of unlawful unilateral discontinuance of part of an operation,[67] the compensation is based upon the wage rates previously earned by the injured employees. It may be noted that the Supreme Court upheld the order in *Fibreboard* even though the amount of actual loss might be deemed speculative because it was not shown that had the employer bargained lawfully it would not have contracted out the work and discharged the employees.

As previously indicated, the injury suffered by employees is predicated upon the employees' being deprived of the right to collective bargaining as required by the Act. The burden of proof would be upon the General Counsel at the compliance stage to translate that legal injury into terms of measurable financial loss, if any, which the employees might reasonably be found to have suffered as a consequence of that injury.

A showing at the compliance stage by the General Counsel or Charging Party by acceptable and demonstrable means that the employees could have reasonably expected to gain a certain amount of compensation by bargaining would establish a *prima facie* loss, and the Respondent would then be afforded an opportunity to rebut such a showing. This might be accomplished, for example, by adducing evidence to show that a contract would probably not have been reached, or that there would have been less or no increase in compensation as a result of any contract which might have been signed.

Accordingly, uncertainty as to the amount of loss does not preclude a make-whole order proposed here, and some reasonable method or basis of computation can be worked out as part of the compliance procedure. These cannot be defined in advance, but there are many methods for determining the measurable financial gain which the employees might reasonably have expected to achieve, had the Respondent fulfilled its statutory obligation to bargain collectively. The criteria which prove valid in each case must be determined by what is pertinent to the facts. Nevertheless, the following methods for measuring such loss do appear to be available, although these are neither exhaustive nor exclusive. Thus, if the particular employer and union involved have contracts covering other plants of the employer, possibly in the same or a relevant area, the terms of such agreements may serve to show what the employees could probably have obtained by bargaining.[68] The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry.[69] Or the parties might employ the national average percentage changes in straight time hourly wages computed by the Bureau of Labor Statistics.

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[64] E g , cases cited in fn 35, *supra*

[65] *Leeds & Northrup Co* v *N L R B* *supra*, *American Fire Apparatus Co* fn 36, *supra* The court of appeals, in enforcing the order in the latter case, stated that

> the only question is whether the Board can fairly arrive at the loss, and such determination on the part of the Board may not judicially be required to rest upon any greater degree of certainty as to amount than that applicable to the contract or statutory breaches generally [380 F 2d at 1006]

[66] *N L R B* v *Joseph T Strong, d/b/a Strong Roofing & Insulating Co , supra*

[67] *Fibreboard Paper Products Corp* v *N L R B , supra*

[68] As an example, the Union here presented evidence of the collective-bargaining agreements it had negotiated with Ex-Cell-O at five of its other plants in nearby States

[69] Data customarily cited by companies and unions in negotiations, according to the study by the National Industrial Conference Board, "Preparing for Collective Bargaining," pp 60 and 65, tables 2 and 6, could also assist in making the determination The company lists include settlements negotiated by other firms in company's industry, settlements negotiated by union with which company deals, settlements in company's immediate job area, settlements negotiated by big companies, settlements negotiated by subsidiaries of parent company, settlements negotiated by related industries, such as suppliers, settlements negotiated with other unions, etc The union lists include settlements by other companies within the jurisdiction of the union, settlements in the immediate job market area of the firm with which the union is dealing, settlements negotiated by the big companies, and miscellaneous

And there is other available significant data which may be utilized to indicate the value of the lost collective-bargaining opportunity. For example, the Bureau of Labor Statistics conducts an annual study of union wage scales in the building construction, local transit, local trucking, and printing industries. This study covers all local unions in 68 selected cities. BLS similarly makes a quarterly wage survey of seven major construction trades in 100 selected cities. The Bureau also issues monthly reports of wage and benefit changes under collective-bargaining agreements in manufacturing establishments employing 1,000 or more production and related workers. A related survey of wage developments in smaller manufacturing units covers both unionized and nonunionized establishments. There are other Bureau of Labor Statistics facts which may bear on the remedy. One of significance is the periodic wage and benefits survey of 50 manufacturing and 20 nonmanufacturing industries. The data collected in this program reports on about 20 million employees on both a national and regional basis, usually with listings by size of establishment, size of community, collective-bargaining coverage, and type of product or plant group. Another Bureau of Labor Statistics program periodically gathers wage and benefits data on a Standard Metropolitan Statistical Area basis for more than 60 occupational categories in all but the smallest establishments. Depending on the type of industry, these surveys cover from 8 to 72 metropolitan areas.[70] Guidance may also be forthcoming, on occasion, from other forms of data frequently cited in the collective-bargaining process,[71] such as Consumer Price Indices and productivity statistics. Other relevant wages and benefit information will be available to the General Counsel and the parties from private sources and their use and usefulness in the compliance process will likely vary with the particular circumstances of the individual case. Futhermore, additional data could become available through new compilations which might later be undertaken by the Bureau of Labor Statistics or other agencies, including this agency, as well as by unions, employers, and private and public organizations and institutions.

[70] All of the foregoing programs of fact gathering and analysis are described in detail in Bureau of Labor Statistics, Handbook of Methods for Surveys and Studies (1966)

[71] Measuring the amount of loss calls for a knowledge of pay rates in the industry and area for comparable jobs, a detailed understanding of the pay rates in Respondent's plant and increases therein during the period when compensation may have been accruing, and like specialized technical matters

Employers and unions are well equipped by their specialized knowledge and experience to deal with these matters Indeed, from time to time, they have been able to resolve the amounts due in large, complex backpay cases following Board orders remedying unfair labor practice discharges, etc , by negotiation for the approval of the Regional Directors

In the instant case, as noted above, a *prima facie* showing of loss can readily be made out by measuring the wage and benefit increments that were negotiated for employees at Respondent's other organized plants against those given employees in this bargaining unit during the period of Respondent's unlawful refusal to bargain. Granted that the task of determining loss may be more difficult in other cases where no similar basis for comparison exists, this is not reason enough for the Board to shirk its statutory responsibilities,[72] and no reason at all for it to do so in a case such as this where that difficulty is not present.

For the reasons set out above, we would order the Employer to make its employees whole for their measurable losses, if any, resulting from the unlawful refusal to bargain. We dissent from the Decision of the Board to the extent that it fails to direct such a remedy.

[72] As the Board was reminded by the court in the *Tidee Products* case

> A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulty in qualifying appropriate compensation as a justification for the withdrawal and frustration of the policy

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL, upon request, recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of all our employees in the appropriate bargaining unit. The bargaining unit is:

> All production and maintenance employees, including tool crib store employees, shipping and receiving and followup employees, but excluding all office clerical and plant clerical employees, all professional employees, guards, and supervisors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL bargain collectively, on request, with the above-named Union as the exclusive representative of the employees in the unit described above with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

EX-CELL-O
CORPORATION
(Employer)

Dated By
(Representative)
(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204, Telephone 317–633–8921.

TRIAL EXAMINER'S DECISION

Statement of the Proceedings

The Prior Representation Case, 25–RC–2670

OWSLEY VOSE, Trial Examiner. After the usual proceedings under Section 9 of the National Labor Relations Act, as amended, in which the Respondent was represented by counsel and fully participated, the Regional Director for Region 25, National Labor Relations Board, at Indianapolis, Indiana, issued a Decision and Direction of Election, in which he directed an election among the following employees of the Respondent whom he found constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Employer's Elwood, Indiana, plant, including tool crib stores employees, shipping and recieving employees and follow-up employees, but excluding all office clerical employees, plant clerical employees, all professional employees, guards, and supervisors as defined in the Act.

Pursuant to the aforesaid Decision and Direction of Election a secret-ballot election among the employees in the above-stated unit was conducted under the supervision of the Regional Director on October 22, 1964 Of the 196 ballots cast, 102 were cast in favor of the Charging Party, hereinafter referred to as the Union, 93 ballots were cast against the Union, and 1 ballot was challenged

On October 29, 1964, the Respondent filed timely objections to conduct affecting the results of the election. After an administrative investigation conducted by the Acting Regional Director in which the Respondent participated in that it submitted evidence in support of its position, the Acting Regional Director on December 29, 1964, issued a Supplemental Decision and Certification of Representative in which, after discussing and considering the Respondent's objections, he overruled them in their entirety, and issued a Certification of Representative stating that the Union was the exclusive bargaining representative of the employees in the aforesaid appropriate unit.

Thereafter, on January 25, 1965, the Respondent, pursuant to Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, filed a request for review of the Acting Regional Director's Supplemental Decision and Certification of Representative. By order dated April 23, 1965, the Board granted the request for review and directed a hearing for the purpose of taking evidence bearing upon the issues raised by the request for review. Such a hearing was held on May 18 and 19, 1965, before a Hearing Officer of the Board. All parties participated in the hearing and were given full opportunity to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues involved

On July 15, 1965, the Hearing Officer issued his Report on Objections in which he recommended that the Respondent's objections be overruled and that the Union be certified as the statutory bargaining representative of the Respondent's employees in the aforesaid appropriate unit Thereafter the Respondent filed timely Exceptions to the Hearing Officer's Report on Objections, together with a supporting brief.

In its supporting brief the Respondent relied solely on a letter mailed by the Union to the employees on October 19, 1964, the Monday before the Thursday election, and a statement made by a union representative at a union meeting on October 18, 1964 The Respondent contended that in the letter the Union had made the following material misrepresentations of fact. (1) that the Respondent had deprived the employees of wage increases amounting to 14 cents per hour, and (2) that the Respondent was hiring men to fill jobs women had previously performed and intended to continue doing so Regarding the Union's statement at the Union's October 18 meeting, the Respondent contended that the Union had told employees that if the Union lost the election, the Respondent's principal customer would stop its purchases. The Respondent argued that the Union's statements in the letter and at the union meeting prevented the employees from exercising a free choice of representatives in the election and urged that the election should be set aside

On October 28, 1965, after considering the Respondent's exceptions and the entire record, the Board issued its Decision on Review in which it overruled the Respondent's objections, adopted the Hearing Officer's findings and recommendations, and affirmed the acting Regional Director's certification of the Union as the exclusive representative of all employees in the aforesaid appropriate unit, effective as of that day

The Instant Unfair Labor Practice Case, 25–CA–2377

a. *The correspondence between the Respondent and the Union*

On October 29, 1965, the day after the Board's affirmance of the Acting Regional Director's certification of the Union, the Respondent wrote the Union as follows:

> We have received the Labor Board's decision concerning our objections to the conduct of the Union election held October 22, 1964. 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.

On November 9, 1965, the Respondent, in response to a letter from the Union dated November 8, 1965, requesting a bargaining meeting, declined the Union's request, reiterating that "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 "

b. *The charge, complaint, and answer*

The Union filed charges with the Regional Office on November 18, 1965, alleging that the Respondent was refusing to bargain collectively with it in violation of Section 8(a)(5) and (1) of the Act The General Counsel on November 23, 1965, issued his complaint alleging that the Respondent was violating Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union, the duly certified bargaining representative of its employees in an appropriate bargaining unit. Thereafter, on December 6, 1965, the Respondent filed an answer in which it admitted the underlying facts alleged in the complaint, but denied the conclusionary allegations of the complaint on the grounds that the Board's certification of the Union was invalid because of the Union's statements to the employees in its letter of October 19, 1964, and at the union meeting of October 18, 1964. These were the same matters relied on by the Respondent in the prior representation case which were considered by the Board and ruled on adversely to the Respondent in that case.

c *Other preliminary steps taken in the proceedings*

On December 8, 1965, the General Counsel filed a motion to strike portions of the Respondent's answer and for summary judgment. This motion was referred to Trial Examiner Thomas N Kessel for ruling Mr. Kessel issued an order directing the Respondent to show cause why the General Counsel's motion should not be granted. The Respondent filed a response and supplementary response thereto.

In the meantime, the Respondent, by letter dated February 4, 1966, requested the Regional Director to furnish it with "a true and correct copy of all reports of the investigation, or investigations, in Case No. 25–RC–2670 not heretofore made part of the record in Case No. 25–CA–2377 " In the letter the Respondent indicated that it was seeking "particularly the record of any *ex parte* investigations conducted by representatives of the Regional Director prior to the hearing on the Petition for Election and following the filing of the Employer's Objections to the Election." At the same time the Respondent requested the issuance of a *subpoena duces tecum,* explaining that it needed the material to aid it in preparing its response to the Trail Examiner's order to show cause.

Subsequently, on February 14, 1966, the Regional Director was served with a *subpoena duces tecum* issued at the request of the Respondent requiring him to produce the following.

> All files, documents, reports, memoranda, affidavits, notes, correspondence, and records pertaining to the investigation, or investigations, conducted by the Regional Director, or his representatives, prior to the hearing on the Petition for Election and following the filing of the Employer's Objections to the election in National Labor Relations Board Case No. 25–RC–2670, involving Ex-Cell-O Corporation, Employer, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, Petitioner

Thereafter a petition to revoke the above subpena was timely filed by the Regional Director. The Respondent filed a response thereto together with a request that the Trial Examiner hear oral argument concerning the issues raised by both the General Counsel's motion to strike and for summary judgment and by the subpena and the petition to revoke

Trial Examiner Kessel, after considering the Respondent's response to his order to show cause and the various documents submitted in connection with the *subpoena duces tecum* and the petition to revoke, on April 1, 1966, entered an order denying the General Counsel's motion to strike and for summary judgment and reserving the subpena question for ruling by the Trial Examiner at the hearing.

On April 28, 1965, the Regional Director rescheduled the hearing for June 1, 1966, at Elwood, Indiana.

On May 31, 1966, the Respondent filed an amendment to paragraph 6 of its answer eliminating subparagraph (b) of paragraph 6 of its original answer, in which it had alleged that the Union had threatened employees at a union meeting prior to the election that the Respondent's principal customer would stop its purchases if the Union did not achieve representative status, and adding a new subparagraph (c) alleging that at a union meeting on or about January 30, 1966, agents of the Union "admitted that it could not bargain with Respondent, because it had no charter, organization, officers or bargaining committee for the employees at Respondent's Elwood plant, and that such officers and committee must be elected before bargaining could be started "

d. *The June 1, 1966, hearing*

The hearing commenced on June 1, 1966, at Elwood, Indiana, before Trial Examiner Owsley Vose After the pleadings and other formal documents were received in evidence the General Counsel rested his case. At this point the Union announced that it was seeking in this 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 with their duly designated bargaining representative, and the Union proposed to adduce evidence which, it asserted, would justify the granting of this unusual relief. After hearing arguments pro and con from counsel for the Union and counsel for the Respondent, I ruled that I would entertain relevant and material evidence bearing upon this issue.[1]

[1] Counsel for the General Counsel stated that he was not joining the Union in requesting this remedy, but did not argue for or against the Union's proposal

At this point counsel for the Respondent acquiesced in counsel for the Union's request for a postponement of the hearing until June 29, 1966. The General Counsel opposed any postponement of the hearing for the purpose of taking evidence supporting the Union's request for a special remedy in this case. I ruled that after the Respondent had put in its defense on the merits, the hearing would be postponed until June 29, 1966, as agreed upon between the Union and the Respondent.[2]

At the beginning of the presentation of its defense, the Respondent called for the appearance of the Regional Director and the production of the documents listed in the *subpoena duces tecum* described above After consideration of the arguments made by counsel for the General Counsel and counsel for the Respondent and the supporting documents, and having in mind a clarification made by counsel for the Respondent,[3] I granted the Regional Director's petition to revoke the *subpoena duces tecum* which had been served upon him by the Respondent.

Counsel for the Respondent next stated that it desired as part of its defense to proffer certain witnesses to testify concerning matters as to which they had testified at the earlier hearing on objections (Case 25–RC–2670) and certain other witnesses to testify concerning matters which the Respondent had sought to adduce in the prior case, but which evidence the Hearing Officer refused to receive in that case The Board having already considered these matters and ruled on them in its Decision on Review, I held that such matters were not open before me, and accordingly refused to receive such proffered testimony. The Respondent made a written offer of proof as to the testimony which it proposed to adduce through these witnesses (Respondent's Rejected Exhibits 1–18, inclusive). All of the testimony detailed in these exhibits related to the Respondent's objection based upon the Union's letter to employees of October 19, 1964. I also ruled out certain additional testimony relating to the same subject matter which was tendered through the Respondent's personnel manager, William N. Cox, Jr. In part, this evidence, as the Respondent's offer of proof shows, was available at the time of the hearing on objections, and no explanation was offered for its nonproduction, and as to the remainder, it was irrelevant and immaterial, relating as it did to events subsequent to the election.

The only other evidence adduced or sought to be adduced by the Respondent at the hearing in this case related to the additional allegation in the amendment to paragraph 6 of its answer, dated May 31, 1966, to the effect that the Union admitted that it could not bargain with the Respondent because it had no charter, organization, officers, or bargaining committee for the employees at the Elwood plant. However, the evidence which was adduced does not support its contention in this regard, and since the Respondent in its brief no longer advances this contention, I see no reason to discuss this aspect of the case further

Pursuant to Rule 102.26 of the Board's Rules and Regulations, Series 8, as amended, the Respondent, on June 8, 1966, filed with the Board a request for Special Permission to Appeal Trial Examiner's ruling revoking the *subpoena duces tecum* which had been served on the Regional Director. By telegraphic order dated June 22, 1966, the Board denied the Respondent's request.

e. *The June 29, 1966, hearing*

The hearing in this case was reconvened at Indianapolis, Indiana, on June 29, 1966. At this hearing the Union offered in evidence numerous collective-bargaining contracts between the Union and General Motors Corporation, Chrysler Corporation, Borg-Warner Corporation, Perfect Circle Corporation, and Ex-Cell-O Corporation and subsidiaries at locations other than in Indiana. Although these contracts were initially received in evidence by me, I later decided that the Respondent's objection concerning the authentification of these contracts was sound, and consequently reversed my ruling receiving these contracts in evidence. At this time, pursuant to an agreement between the Union and the Respondent, and over the objection of the General Counsel, the hearing was postponed until July 28, 1966, to enable the Union to produce witnesses who would be competent to testify as to the authenticity of the contracts in question.[4]

f *The Union's unsuccessful attempt to subpena certain of the Respondent's records*

At the hearing on June 29, 1966, the Union served on Robert M Jones, a vice president of the Respondent, a *subpoena duces tecum* calling upon him to produce the following:

> All records of wage increases and fringe benefits granted to production and maintenance employees at the Elwood, Indiana, plant of Ex-Cell-O Corporation since 22 October 1964.

A petition to revoke this subpena was timely filed with me. On July 8, 1966, after consideration of the matter, I issued an order, together with an accompanying opinion, denying the petition to revoke. Thereafter Jones declined to comply with the subpena. No steps were taken in the United States District Court to obtain compliance with the subpena.

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[2] It was further understood, of course, that the Respondent would have an opportunity, after the Union had put in the evidence supporting its request for a special remedy in this case, to adduce countervailing evidence

[3] Counsel for the Respondent expressly disclaimed contending that the Board in its Decision on Review in Case 25–RC–2670 (in which the hearing upon the Respondent's objections to the election was held) relied on matters outside the formal record in that case

[4] At the close of the hearing on June 29, 1966, I was served with a copy of a complaint and summons in a civil action in the United States District Court for the Southern District of Indiana, Indianapolis Division, entitled *EX-CELL-O Corporation* v *William T Little, Regional Director, Twenty-fifth Region, National Labor Relations Board, Owsley Vose, Trial Examiner, National Labor Relations Board,* Case 1P66–C–313 The Respondent in its complaint sought an order restraining me from closing the hearing in the instant case until the Regional Director had produced the investigative materials in the representation case which were requested in the *subpoena duces tecum* served on the Regional Director before the first hearing in this case This injunction action is discussed more fully below

g *The July 28, 1966, hearing*

When the collective-bargaining contracts offered in evidence at the June 29 hearing were reoffered in evidence by the Union at the resumed hearing on July 28, 1966, the Respondent offered no objection to their authenticity, and they were received in evidence. At this hearing testimony was received from witnesses for the Union concerning certain aspects of some of the contracts which had been received in evidence and related matters, and also concerning wage increases granted by the Respondent, the Respondent's job classifications, and the wages of certain of the Respondent's employees. Vice President Jones did not appear at the July 28, 1966, hearing in response to the *subpoena duces tecum* and the records called for in the *subpoena duces tecum* were not produced.

The Respondent did not offer any evidence rebutting that put in by the Union on the question of the remedy in this case.

Because of the pendency of the Respondent's injunction action against the Regional Director and me, discussed immediately below, the Respondent requested, and the Union acquiesced in this request, that the hearing not be closed until the District Court had reached a decision in the injunction action. Thereupon the hearing was adjourned indefinitely, with the understanding that it would not be closed before the District Judge had decided the injunction action against the Regional Director and me, provided the District Judge had ruled within 60 days after he had heard oral argument upon the defendants' motion to dismiss or for summary judgment, which had been filed by this time.

h. *The injunction action*

It is appropriate briefly to discuss the injunction action brought in the United States District Court by the Respondent against the Regional Director and me because it was a factor in the delay in disposing of this case. As stated above, the Respondent sought in this action, which was commenced on June 29, 1966, to obtain an order restraining me from closing the hearing in this case until the Regional Director had produced the investigative materials in the representation case (in which the hearing upon the Respondent's objections to the election was held) subpenaed by it before the first hearing in this case As noted above, the subpena calling for the production of those investigative materials was revoked by me at the hearing on June 1, 1966, and the Respondent's request for special permission to appeal this ruling was thereafter denied by the Board. A motion to dismiss or for summary judgment was filed on behalf of the Regional Director and me and it finally came on for argument before Cale J Holder, United States District Judge, on December 1, 1966 On December 13, 1966, District Judge Holder issued an Order of Summary Judgment in favor of the defendants.

On December 21, 1966, I issued an order closing the hearing. Prior to the close of the hearing the Union filed a brief. The Respondent thereafter filed its brief.

On January 31, 1967, the Respondent filed a motion requesting (1) that the District Court proceeding be noticed judicially, and (2) that the Findings of Fact, Conclusions of Law, and Order of Summary Judgment for the defendants of the District Judge be incorporated in the record of this unfair labor practice proceeding. The Respondent's request (1) above is granted and (2) is denied In my opinion, proceedings in the District Court are not properly a part of the record in this case However, the District Judge's Findings of Fact will be included among the Trial Examiner's rejected exhibits and thus will be available for reference purposes

Upon the entire record, including the briefs filed by the Union and the Respondent, I make the following.

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent is engaged at its plant at Elwood, Indiana, in the manufacture of metal parts. During the year preceding the issuance of the complaint, the Respondent received from and shipped to points outside of Indiana more than $50,000 worth of materials and products. Upon these facts I find, as the Respondent admits, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

The Refusal to Bargain Collectively in Violation of Section 8(a)(5) of the Act

As indicated above, there is no issue of law or fact in this case concerning the appropriate unit, no issue of fact concerning the Boards' certification of the Union as the exclusive bargaining representative of the employees in the appropriate unit after the Union won the Board-conducted election, and no issue of fact concerning the Respondent's refusal of the Union's request for a meeting for collective-bargaining purposes.

The Respondent sought to raise before me certain additional factual issues relating to its objections to the election. As indicated above, the Respondent had a full opportunity to, and did in fact raise these issues in the prior representation proceeding, and the Board passed on these issues in its Decision on Review; consequently such additional issues were not open before me.

Thus, the case on the merits involves simply a technical refusal to bargain in order to obtain court review of the Board's determination in its Decision on Review in the prior representation case that the Respondent's Objections to Conduct Affecting the Results of the Election were without merit, and that the Union should be certified as the exclusive bargaining representative of the employees in the appropriate bargaining unit. 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.

IV THE REMEDY

As stated above, at the opening of the hearing the Union announced that it would seek from the Board in this case, in addition to the conventional refusal-to-bargain remedial provisions, a make-whole provision to compensate the Respondent's employees for losses assertedly flowing from the Respondent's refusal to observe its statutory collective-bargaining obligations. Over the objections of the Respondent, I permitted the Union to adduce evidence supporting its position with respect to the novel remedy sought by it in this case.

The Board's power, in appropriate circumstances, to provide some form of a monetary award to remedy refusals to bargain collectively stems from Section 10(e) of the Act empowering the Board to require persons found to have engaged in unfair labor practices "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." The "broad reach" of the Board's discretion to determine "how the effect of unfair labor practices may be expunged" has long been established, *N.L.R.B.* v. *Link-Belt Company,* 311 U.S. 584, 600; *N.L.R.B.* v. *District 50, United Mine Workers,* 355 U.S. 453, 458. As stated in *Phelps Dodge Corp* v. *N.L.R.B.,* 313 U.S. 177, 194:

> Congress could not catalog 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. The exercise of the process was committed to the Board, subject to limited judicial review.

That it is within the Board's discretion to require the payment of backpay to remedy refusals to bargain in violation of Section 8(a)(5) of the Act is also settled by the highest authority. In *Fibreboard Paper Products Corp.* v. *N.L.R.B.,* 379 U.S. 203, the Supreme Court decided not only that the employer was obliged to bargain collectively with the representative of the affected employees concerning the contracting out, for legitimate business reasons, of certain maintenance operations, but also that the Board had the authority, in order to remedy the refusal to bargain, to order the resumption of the contracted-out maintenance operations and to require the "reinstatement with backpay" of the affected employees (379 U.S. at 215).

In various other situations the Board has provided monetary relief as one of the remedies for a refusal to bargain. In *Ogle Protection Service,* 149 NLRB 545, the Board ordered the employer (1) retroactively to give effect to the terms of an agreement which it had reached with the union but had refused to execute and (2) to make the employees whole for any losses resulting from the initial refusal to execute the agreement. Similar cases are *Huttig Sash and Door Company,* 151 NLRB 470, 475, enfd. with a modification not here relevant 362 F.2d 217, 219–220 (C.A. 4), and *Montgomery Ward and Co.,* 154 NLRB 1197, modified January 6, 1967 (C.A. D.C.), 64 LRRM 2108. *Chemrock Corporation,* 151 NLRB 1074, involved an employer who had acquired a business and continued unchanged the operations of its predecessor and who, without bargaining collectively with the representative of a small group of employees concerning the terms and conditions of their continued employment in the business, terminated them and replaced them with new employees. The Board, in order to remedy the employer's refusal to bargain, directed the reinstatement of the employees in question with backpay, with the rate of pay to be governed by that in the contract with the employer's predecessor. In its most recent decision in this area that I am aware of, *Schill Steel Products, Inc.,* 161 NLRB No. 83, where the employer had refused to execute a contract which had been previously agreed upon, the Board, in order to "recreate the conditions and relationships that would have been had there no unfair labor practice," ordered the employer "to put into effect and abide by its terms 1 year subsequent to the date on which the [employer] signs" the previously agreed-upon contract, and to reimburse all employees covered by the contract for the loss of benefits resulting from the employer's original refusal to sign. Cf. *N.L.R.B.* v. *Warrensburg Board & Paper Corp.,* 340 F.2d 920, 925 (C.A. 2).

In view of all of the foregoing decisions there can be no doubt as to the Board's power in appropriate circumstances to direct some form of monetary relief to remedy a refusal to bargain in violation of Section 8(a)(5) of the Act. Indeed, the Respondent does not argue to the contrary. Instead, relying on *Preston Products Company, Inc.,* 158 NLRB No. 35, and *Saks and Company,* 160 NLRB No. 59, the Respondent urges that the Board has decided against exercising its power to direct the relief requested by the Union in this case and that I am bound by the precedent established in these two cases.[5] After careful consideration of the whole problem, and with due respect for the views of the Court of Appeals in the *Preston* case, I conclude for the reasons stated below that the Board did not intend by the use of the summary language in the footnote in the *Preston* case to decide the remedy question on the merits, and that the differences in the relief sought by the union in the *Saks* case and that sought by the Union in this case are such as to render the *Saks* case inapplicable as a precedent for my decision in this case.

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[5] *Preston* is presently pending before the Court of Appeals for the District of Columbia Circuit upon the petition of the UAW, the Union involved in this case, for review of the Board's Decision and Order in that case. One of the issues raised by the UAW's petition in that case concerns the Board's refusal to grant the compensatory relief sought by the UAW as a remedy for the 8(a)(5) violation. The court of appeals, in ruling on preliminary motions, expressed the opinion that the Board had decided the remedy question on the merits (opinion on petition for reconsideration of order transferring cases dated January 25, 1967.) *Saks* is also pending for review in the Court of Appeals for the District of Columbia Circuit. Another case presenting a related remedy question pending in the same court is *United Steelworkers of America* v. *N.L.R.B.*, which involves the Board's Order in *Northwest Engineering Company,* 158 NLRB No. 48. In this case, the Steelworkers requested the Board at the exceptions and brief stage of the case for remedial provisions (1) specifically directing the employer to bargain about past benefits covering the period of the employer's refusal to bargain with the union, and (2) requiring any grievance and arbitration provisions ultimately arrived at be given retroactive effect. The Board's decision, which failed to include the requested remedial provisions, did not explain its reasons for failing to grant the relief requested.

The UAW's request for a financial reparation order as a remedy for the refusal-to-bargain violation in the *Preston* case was made for the first time in its exceptions to the Trial Examiner's Decision This request was supplemented by numerous statements of fact in the UAW's brief which were wholly without foundation in the record before the Board in the *Preston* case. The Board's summary statement in footnote 1 to its decision in the *Preston* case that "we find that the remedial order requested by the Charging Party is without merit" 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. See *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442–444. In these circumstances I think it more reasonable to interpret the Board's refusal to grant the requested relief in *Preston* as being the result of the UAW's failure to adduce evidence supporting its request for relief rather than the consequence of a considered decision on the merits regarding the remedy question.

In *Saks* the Charging Party requested that the Trial Examiner order that any collective-bargaining agreement ultimately negotiated by the parties be made retroactive to the date upon which the employer first refused to bargain collectively No evidence was offered by the Charging Party to support its request for this relief The Charging Party simply argued in effect that its proposed remedy was appropriate in any refusal-to-bargain case in which any substantial period of time would have elapsed between the initial refusal to bargain and the actual commencement of bargaining negotiations. The Board, without any explanation, affirmed the Trial Examiner's refusal to grant the Charging Party's requested relief. The fact that the Board, in a case involving no special circumstances warranting special relief, went along with the Trial Examiner in refusing the Charging Party's sweeping request that retroactivity be given all future contracts negotiated after Board orders in delayed bargaining situations does not mean, in my opinion, that the Board would not henceforth consider some form of compensatory relief in refusal-to-bargain situations in a case where special circumstances appeared to justify it.

For the foregoing reasons I am constrained to reject the Respondent's contention that the Board's decisions in *Preston* and *Saks* are dispositive of the question of the Union's request for compensatory relief in this case.[6]

Having concluded that the Board has the power to grant the relief sought by the Union in this case and that the cases relied on by the Respondent as precedents against granting the requested relief are inapplicable in the circumstances of this case, the question remains has the Charging Party made out a case for granting the special remedy sought by it.

The Union urges that the Board's usual remedial provisions in refusal-to-bargain cases—a cease-and-desist provision and an affirmative direction to bargain collectively upon request—constitute but "a slap on the wrist" to employers and do not provide any incentive to induce employers promptly to comply with their statutory duty to bargain collectively. The Union points out that it is possible for any employer to delay the commencement of collective bargaining for up to 2 years while he pursues the legal remedies available to him in the Act. This is the period of time consumed in processing the representation and unfair labor practice cases before the Board and the enforcement or review proceeding in the Court of Appeals. In the instant case over 2 years has already elapsed since the Board's original certification was issued, and another year more will certainly elapse before the Court of Appeals issues its decision on review

During this period the employees, frustrated in their efforts to obtain a contract, and seeing that their employer by his own efforts can prevent the collective-bargaining process from even getting started, lose interest in union representation When, after 2 years or more, the employer's bargaining obligation has finally been confirmed by the Board and the Court of Appeals, and the employer finally sits down at the bargaining table, the employees' representative is bargaining from a position of weakness rather than the position which the union would have been in had the employer promptly following the certification of the union as its employees' bargaining representative sat down and bargained over the terms of a contract. A result like this, the Union argues, is to place a premium on disobedience of the law. Employers who promptly comply with their bargaining obligations are placed at an economic disadvantage and flouters of the national policy, as embodied in the Act, are financially rewarded for their conduct Some indication of the extent of such financial rewards appears in the record in the instant case As is more fully developed below, it appears that during the period since the original certification of the Union the employees of the 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.

What is needed to remedy this situation, contends the Union, is to take the profit out of refusing to bargain collectively. The Union proposes that this be done by requiring that the employees be made whole for the period from the refusal to bargain until the Employer complies with his statutory bargaining obligations. In support of its contention in this regard the Union calls my attention to the decision of Trial Examiner Josephine H. Klein in *Zinke's Foods, Inc.*, presently pending before the Board, in which she included in her recommended order a make-whole provision such as the Union seeks in this case. Under the procedure contemplated by Trial Examiner Klein in the *Zinke's* case, the determination of the sums necessary

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[6] *Insurance Workers International Union* v *N L R B*, 360 F 2d 823 (C A D C), also cited by the Respondent in this connection is not a precedent No request for extraordinary relief was made of the Board, the point about the alleged inadequacy of the remedy having been raised by the Charging Party for the first time in the court of appeals This decision is treated further below in the discussion of the Respondent's contention that the remedy sought by the Union is speculative in character

to make the employees whole for their losses resulting from the employer's refusal to bargain would be left to a supplemental proceeding before the Board, if necessary.[7]

The considerations underlying the Union's request for an additional remedy in this case, in my opinion, are weighty ones The encouragement of collective bargaining is the central objective of the Act. The achievement of this objective can be frustrated in part by employers simply challenging the Board's actions in the representation case to the fullest extent permissible under the statute. The detriment to collective bargaining occurs whether the employer in good faith believes that the Board has made a serious error of law in the representation proceeding or whether the employer, as a deliberate maneuver to stall bargaining, raises spurious objections and thereafter pursues them to the utmost. The Board's existing remedies are ineffectual in these delay situations and in my opinion some additional form of remedy should be adopted in an effort to bring about more complete conformance with the policies of the Act in this area. After giving considerable thought to the precise form a remedial provision would take which would help solve the delay problem in refusal-to-bargain situations, I propose for consideration the following provision:

> 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 the Respondent's formal refusal to bargain collectively, October 25, 1965, and continuing until paid.

The Respondent's principal arguments against adopting some form of the additional remedy requested by the Union are that such a remedy would be punitive in effect and would require the Board to speculate concerning the terms of the collective-bargaining contract which the parties would have arrived at had they sat down and bargained collectively after the original certification of the Union. The former argument is discussed below. And the latter argument cannot be considered in the abstract; it must be viewed against the background of concrete facts contained in the record in this case.

As indicated above, the Respondent has three plants in Ohio, at Bluffton, Lima, and Fostoria, and two or more in Michigan, at Detroit and Traverse City The employees of these plants are all represented by the Union. The employees at all these plants are engaged in some form of metal working, although the products of all the plants are by no means the same. The collective-bargaining contracts negotiated by the Union on behalf of the employees of these plants in 1962, and again in 1965, were introduced into evidence by the Union in this case.[8] The provisions of these contracts, some of which are summarized in the chart below, show a certain degree of uniformity among the contract provisions covering the employees of all these plants. A comparison of the terms and conditions provided in the 1965 contracts for these plants with terms and conditions of employment prevailing at the Elwood plant reveals what appear to be significant differences between the terms and conditions of employment of the Elwood employees and those of the employees of the organized plants of the Respondent in Ohio and Michigan.

Unfortunately, the record is not as complete as it should be with respect to showing the terms and conditions of employment at Elwood in 1965 because of the refusal of the Respondent's vice president, Robert M. Jones, to obey what I, in effect, ruled was a valid subpena calling for his attendance at the hearing as a witness and calling upon him to produce records of wage increases and fringe benefits granted Elwood employees since October 22, 1964. Consequently, I have had to fall back on other sources of information concerning the terms and conditions of employment at Elwood during the period in question. The principal source of information in this regard is a booklet entitled "OUR EMPLOYEE HANDBOOK, ELWOOD PLANT, EX-CELL-O CORPORATION," which was received in evidence in the prior representation case. The booklet shows on its face that it has been revised from time to time, the last time being May 1963. While the record does not show that the handbook had been revised to reflect changes between May 1963 and April 1965, it was offered in evidence at the hearing in the representation case in May 1965 at the request of the Respondent's counsel. In any event, even if the handbook may not be up-to-date as of April 1965, it is immaterial since it is being relied on not to determine the precise measure of damages suffered by the Elwood employees, if any, as a result of the Respondent's refusal to bargain, but merely to help me to decide whether practical ways of measuring the extent of such damage exist The determination of the precise measure of damages, if any, will be left to supplemental proceedings before the Board, if differences in regard thereto cannot be adjusted informally.

Set forth on the following page is a chart giving a comparison of the provisions of the 1965 contracts negotiated by the Union for the Bluffton, Lima, and Fostoria, Ohio, and Traverse City and Detroit, Michigan, plants with the terms and conditions set forth in the Elwood employee handbook for the Elwood plant.

It appears from the above chart that the Elwood employees have not enjoyed all the fringe benefits granted through the collective-bargaining process to the employees in the Respondent's organized plants in the neighboring States

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[7] *Zinke* is the only other case presenting this remedy question in which evidence was received by the Trial Examiner bearing upon the appropriateness of the requested remedy and methods of determining how the employees were to be made whole

[8] As stated above, the Union also introduced into evidence collective-bargaining contracts negotiated by it with General Motors Corporation, Chrysler Corporation, and certain other companies having plants in the vicinity of Elwood, Indiana The Union suggested that a comparison be made of the increases, direct and indirect, granted in contracts with these corporations with the increases granted by the Respondent at Elwood since the certification of the Union, and that such a comparison could be used as an alternative yardstick in this case In view of the availability of comparisons between the contract terms covering the Respondent's Ohio and Michigan plants with the terms and conditions at its Elwood plant, I find it unnecessary to consider the alternative yardstick proposed by the Union

	ELWOOD, INDIANA Employee Handbook (Revised 5-63)	BLUFFTON, OHIO 4-3-65 Agreement	LIMA, OHIO 4-1-65 Agreement	FOSTORIA, OHIO 4-1-65 Agreement	TRAVERSE CITY, MICH 5-8-65 Agreement	DETROIT, MICH 4-1-55 Agreement
Shift Premium	Afternoon $ 12 Midnight $ 16	Same*	Same	Same	Afternoon $ 15 Midnight $ 20	Afternoon $ 16 Midnight $ 20
Overtime	Daily, time and one half up to 10 hrs and up to 8 hrs on Saturdays Double time for the excess and for Sundays and Holidays	Same	Same	Same	Same	Same
Holidays	7 (8 in 1965 or 1966 (Tr 181))	9	9	9	8 (9 in 1966)	8 (9 in 1966)
Vacations	Year's Serv / Hrs Pay / Days off 1 / 40 / 5 3 / 60 / 7 5 / 80 / 10 10 / 100 / 12	Year's Serv / Pay / Days off 1 / 2%** / 5 3 / 2 8% / 7 5 / 4% / 10 10 / 5% / 12	Same as Bluffton	Year's Serv / Hrs Pay / Days off 1 / 40 / 5 3 / 60 / 7 5 / 80 / 10 10 / 100 / 12 15 / 120 / 15	Year's Serv / Pay / Days off 1 / 2 5% / 5 3 / 3 5% / 5 5 / 5 5% / 10 10 / 6% / 12 15 / 7% / 15	Same as Fostoria
Deferred Pay Plan	Additional $ 05 per hour, payable on layoff, leave of absence, termination or retirement	None	None	None	None	None
Hospital & Surgical Insurance	Co pays 75%***	Co pays all, incl after retirement	Same	Same	Same	Same
Group Life Insurance	$4500	$6000	Same	Same	$6500	$7000
Accidental Death	2250	3000	Same	Same	3250	3500
Sickness & Accident benefit	$40 25–45 50 per week	$60 00 per week	$50-65 per week	$50-65 per week	$65 per week	$70 per week
Bereavement Pay	No mention	Yes	Same	Same	Same	Same
Automatic cost-of-living Adjustment	No mention	Yes	Same	Same	Same	Same
Supplemental Unemployment Benefits	No (TR 182)	Yes	Same	Same	Same	Same

* Same as in column to the left
** Percent of past year's earnings
*** Co subsequently absorbed a cost increase

living adjustments,[9] their hospital and surgical benefits apparently are not given on as generous terms as those given the employees of the Respondent's organized plants, and their various insurance benefits do not appear to measure up to those accorded the employees of the Respondent's organized plants

The rates of pay of the Respondent's Elwood employees and the wage increases granted them in the period since the original certification of the Union may or may not compare favorably with the wages at the Respondent's organized plants These facts cannot be determined on this record because of the Respondent's refusal to obey the subpena calling for the production of the necessary factual data But these facts can be ascertained

When these and all of the other facts casting light on the Respondent's treatment of its Elwood employees as compared with its treatment of the employees at its organized plants are ascertained and considered in the light of the Respondent's pattern of treatment of the employees represented by the Union, a sound basis will exist, in my opinion, for drawing a reasonable conclusion regarding the minimum additional benefits which the Respondent's Elwood employees would have obtained had the Respondent complied fully with its duty to bargain collectively

It is settled that the losses or damages suffered by the Elwood employees need not be established with mathematical precision.

> . . where the defendent by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly In such circumstances "juries are allowed to act upon probable and inferential, as well as upon direct and positive proof" *Story Parchment Co.* v. *Paterson Co.,* [282 U S. 555, 563]. *Eastman Kodak Co.* v. *Southern Photo Co.,* [273 U S 359, 377–379]. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain

Bigelow v. *RKO Radio Pictures. Inc,* 327 U S 251, 264–265. See also *The Elyria-Lorain Broadcasting Company* v. *The Lorain Journal Company,* 358 F.2d 790, 793 (C.A 6).

While it is true that the courts have emphasized that the Board lacks the power to "compel concessions or otherwise sit in judgement upon the substantive terms of collective bargaining agreements" (*N L.R.B.* v. *American National Insurance Co.,* 343 U.S. 395, 404; *Insurance Workers International Union* v. *N.L.R.B.,* 360 F 2d 823, 827 (C.A.D.C.), the Board in making a determination on the facts which are available in this case as to the minimum additional benefits which the Elwood employees would have obtained had the Respondent engaged in bargaining with the Union, would not be deciding on the terms of a collective-bargaining contract. It would merely be drawing inferences from the facts of record of a kind which it is frequently called on to draw. For example, in backpay cases, the Board, because of the difficulty in reconstructing accurately the situation to what it would have been absent the unfair labor practices, is frequently compelled to adopt a formula which will give a fair approximation of the backpay due. See *N.L.R.B. v Brown & Root, Inc.,* 311 F 2d 447, 452 (C A. 8), *N L R.B.* v. *Rice Lake Creamery Co.,* 365 F.2d 888, 891 (C A.D C) While in some cases I can envisage practical difficulties in the way of ascertaining what additional benefits employees might have obtained through the collective-bargaining process, in the particular factual situation here presented, I can find no such serious problems.

The remedy which I am contemplating is not punitive in any sense of the word. It merely makes the employees partially whole for losses which they suffered as a result of the Respondent's refusal to bargain collectively with their chosen representative. A compensation order of the type proposed here is much less harsh than a backpay order to employees discharged in violation of the Act, which may require in effect that the employer pay double wages (backpay to the discharged employees and wages to the replacement employees). The proposed provision merely requires that the Respondent restore to the employees part of the extra profit which the Respondent realized at the expense of the employees from refusing to bargain collectively with their statutory bargaining representative. The Respondent is made no worse by this provision than it would have been had it fully observed its collective-bargaining obligations from the beginning. As between the Respondent's employees who suffered losses as a result of the Respondent's law violation and the Respondent, the wrongdoer, the equities certainly favor the victims of the Respondent's wrongdoing. *N.L.R.B.* v. *Don Juan Inc.,* 185 F 2d 393, 394 (C.A. 2). As the Court of Appeals for the Fifth Circuit has said in rejecting an analogous argument in another refusal to bargain situation, the order "makes those ' . . whole who [have] been deprived of a recognized interest by acts that constitute a violation of the Act. ' and. . is ' . designed to prevent the violator from benefiting by his misdeed. . . '" *N.L.R.B* v. *J. H. Rutter-Rex Mfg. Co.,* 245 F.2d 594, 597–598.

While the Respondent argues that it is being penalized for having resorted to the only method available under the Act of obtaining a review of the Board's action in overruling its objections in the representation case, I cannot agree with its conclusion in this regard. Assuming that the Board were to adopt the remedy proposed herein, and the case went to the Court of Appeals for review, if the court ultimately rules that the Respondent was right in urging that the election should have been set aside because of the Union's preelection conduct, then the Court of Appeals will set aside the Board's Order and no obligation whatever will devolve upon the Respondent. On the other hand, if the Court of Appeals should rule that the Respondent was wrong in taking the position that the Board's decision in the representation case was erroneous and that the Respondent should have granted the Union's request

[9]The Consumers Price Index issued by the Bureau of Labor Statistics of the United States Department of Labor shows that the period from the date of the original certification of the Union in 1964 to the present has been one of steadily rising prices CCH Labor Law Reports 12954

for bargaining, why should the Respondent not be required to pay the damages which it is reasonable to conclude its employees suffered as a result of the Respondent's having violated the National policy for a considerable period of time? When employees are discharged in violation of the Act they are made whole from the date of the employer's violation. I can see no valid reason why the same principle should not be applied in a refusal-to-bargain case

I recognize that the Board heretofore has not ordered any additional relief in technical refusal-to-bargain cases beyond the usual cease-and-desist and affirmative bargaining order provisions. However, I am aware of no case, other than the *Preston* and *Saks* cases cited by the Respondent and which have been disucussed above, in which this question has been presented. As stated above, there is nothing in the *Preston* and *Saks* indicating that the Board has seriously addressed itself to their problem. And, in my opinion, the problem is a serious one I have been assuming, and do assume, that the Respondent's challenge of 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.[10]

But the course which the Respondent has followed is one which is open to all employers, including ones who are opposed to collective bargaining in any event and who calculate that the cost of litigating is more than offset by the savings resulting from stalling the commencement of bargaining for possibly 2 years, or more During this period, assuming that the Court of Appeals ultimately sustains the Board's actions in the representation case, the National policy with regard to collective bargaining has been wholly frustrated, and the employees have been deprived of the fruits of the bargaining process. Employers who willingly accept the collective-bargaining obligations provided for in the Act are placed at a competitive disadvantage with those who break the law. These results, in my opinion, are completely antithetical to the purposes of the Act and call for a remedy which will help restore the situation to that which would have existed but for the unfair labor practices.

Accordingly, I will incorporate in my recommended order the compensation provision suggested above. The compensation shall be computed on a quarterly basis and shall bear interest at 6 per cent, per annum.

My proposed compensation provision contemplates that the compensation period will begin on the date on which the Respondent first refused the Union's request for bargaining conference, October 25, 1965. It may be suggested that it is unreasonable to assume that the parties would have been able immediately to reach a collective-bargaining agreement, and that therefore some later date should be adopted for the beginning of the compensation period, in the event this provision is approved by the Board. However, in view of the fact that the Respondent's express refusal to bargain on October 25, 1965, was merely the continuation of a policy adopted by it, certainly by January 1965, when it filed its Request for Review of the Acting Regional Director's Supplemental Decision and Certification of Representative, it appears to me not unreasonable to adopt the October 25, 1965, date. Had the Respondent accepted the Acting Regional Direstor's Supplemental Decision and Certificate of Representatives and commenced bargaining in good faith soon thereafter, in the normal course of events an agreement would probably have been reached before October 25, 1965. To adopt a later date for the commencement of the compensation period is to put a premium on disobedience of the statutory policy and unnecessarily to prolong the competitive disadvantage suffered by law abiding employers who accept Board certifications without challenge.

Under the terms of this provision, if adopted by the Board, it is possible that compensation will be due former employees of the Respondent. Of course the entitlement to such compensation will terminate as of the date of their leaving the Respondent's employ.

I will also include in my recommended order a preservation of records provision of the type customarily used in backpay cases

Conclusions of Law

1. All production and maintenance employees at the Respondent's Elwood, Indiana, plant, including tool crib stores employees, shipping and receiving and followup employees, but excluding all office clerical employees, plant clerical employees, all professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. On and at all times since October 25, 1965, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, has been the exclusive bargaining representative of the employees in the aforesaid collective-bargaining unit.

3. By refusing on and after October 25, 1965, to bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, as the exclusive bargaining representative of the employees in an appropriate bargaining unit, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication]

[10] I must admit that it is not without some question in my mind that I make this assumption, particularly in view of the Respondent's excursion into the United States District Court in an effort to obtain an injunction restraining me from closing the hearing in this case This was a factor causing part of the delay in this case However, I have resolved my doubts in this regard in favor of the Respondent