A STUDY OF REINSTATEMENT UNDER THE
NATIONAL LABOR RELATIONS ACT

by

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ABSTRACT

"A Study of Reinstatement under the National Labor Relations Act"

by

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This is a study of the effectiveness of remedies used by the National Labor Relations Board in violations of section 8(a)(3) of the National Labor Relations Act. The study is based on a two-year sample of 8(a)(3) cases processed by the First Region Office in Boston.

Chapter 1, the introductory chapter, discusses section 8(a)(3) of the Act, the role of the NLRB and the remedies presented in violations of 8(a)(3). Other works bearing on the subject of this thesis are considered in this chapter, as are various aspects of the sample used in this study.

Chapter 2 discusses the factors influencing a Discriminatee's decision to accept or refuse reinstatement.

Chapter 3 examines what happens to those Discriminatees who accept reinstatement and discusses the countervailing pressures which determine successful reinstatement.

Chapter 4 considers the effectiveness of the reinstatement remedy and examines the subsequent history of those Discriminatees who severed relations with the company.
Chapter 5 considers another aspect of the effectiveness of the reinstatement remedy -- the effect on the other employees. This aspect is studied through an examination of the effect of reinstatement on the union organization drive.

Chapter 6 looks at the effectiveness of the other two remedies in 8(a)(3) cases -- backpay and the posting of notices.

Chapter 7 contains a brief summary of the results of the study, some conclusions, and concludes with some policy recommendations.

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To four people at the First Region Office I owe a special debt of gratitude. They are Mr. Thomas E. McDonald, the Compliance Officer; Mr. Thomas M. Harvey, Mr. Perry G. Panos and Mr. Harold M. Kowal. The amount of time and effort that these four put in to helping me, answering my questions, and making me familiar with Board procedures can never be repaid.

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However, to my thesis advisor, Professor Douglass V. Brown, belongs most of the credit for any value that this study may have. It was his course on Labor Public Policy which first aroused my interest in the field, and it was his friends and contacts in the labor policy area which made it possible for me to get the necessary statistical data for the study. Without Professor Brown, this thesis would have been on an entirely different subject.
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CHAPTER I

INTRODUCTION

"It shall be an unfair labor practice for an employer by discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."\(^1\)

Consider the following situation: Several employees meeting together decide that they want a union to represent them in their company. One of the employees is designated to contact the union. He comes back with union authorization cards and instructions from the union to get them signed by at least 30 per cent of the employees in the unit. When the cards are signed, a petition can be sent to the National Labor Relations Board requesting a representation election. While these cards are being circulated, the management of the company discharges these pro-union employees. Company officials say the employees were discharged because their work was unsatisfactory. The union and these employees claim they were discharged for union activity and an Unfair Labor Practice charge is filed. A typical 8(a)(3) case is brought before the N.L.R.B.

Section 8(a)(3) is the most frequently violated section of the National Labor Relations Act.\(^2\) The 8(a) sections of the Act contain the

\(^1\) Section 8(a)(3) of the Labor Management Relations Act as amended.

\(^2\) See the Annual Reports of the National Labor Relations Board for the statistics on the types of charges filed.
unfair labor practices which apply to companies, while the 8(b) sections contain those which apply to unions. About two-thirds of all unfair labor practice charges are charges of violation of one of the 8(a) sections. And 8(a)(3) charges make up 70 to 75 per cent of the total 8(a) charges. Thus half of the unfair labor practice charges (against both companies and unions) are 8(a)(3) charges.

Section 8(a)(3) is the part of the Act which protects the individual's right to organize. The declared policy of the Act is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." In order to guarantee this "full freedom," Section 8(a)(3) was included. It declares that it is an unfair labor practice for a company to encourage or discourage membership in any labor organization by discriminating as to hire, tenure, or condition of employment. Thus Section 8(a)(3) is really central to the main purposes of the Act. To violate Section 8(a)(3) is to violate the essence of the Act itself.

Administering the Act is the National Labor Relations Board and a short review of its functions and procedures is probably in order. Under the Act, the NLRB has two main functions: (1) to prevent and remedy unfair labor practices (both by companies and labor organizations), and (2) to determine by elections whether workers wish to have unions represent them in collective bargaining. Most of the Board's time is taken up by the unfair labor practice cases.

Processing an unfair labor practice case cannot begin until a charge has been filed with the Board. Once a charge has been filed, a field investigation is conducted by the NLRB’s Regional Office. On the basis of this investigation, the Regional Office decides whether or not it will issue a complaint. In only one-third of the charges does the Regional Director issue a complaint. Most of the charges are found to have no merit and are dismissed or voluntarily withdrawn. If the Regional Office does decide to issue a complaint, it is fairly certain, in the absence of an Informal Settlement, of winning the case. The Regional Office knows what makes a case strong or weak, and, of those cases which are not settled informally, the Board wins about 80 per cent.  

But, in fact, most of the cases are settled in an informal agreement between the two parties. Such Informal Settlements, approved by the Regional Director, may take place before complaint is issued or anytime right through the Hearing. The Regional Office is very active in pursuing the possibilities of Informal Settlements, and about 75 per cent of all cases are settled in this way. However, there is also the possibility of a non-Board settlement. In these cases the two parties reach a settlement and the charge is withdrawn. The approval of the Regional Director is not sought in this kind of settlement. Finally, in the absence of some form of informal agreement, the case may be decided on any one of a number of levels. It is first heard and decided by a Trial Examiner. If the respondent declines to comply with

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4 See the Annual Reports of the National Labor Relations Board.
5 See the Annual Reports of the National Labor Relations Board.
the Trial Examiner's Decision, exceptions may be filed with the Board in Washington. The Board then weighs the evidence again. If the Board adopts the Trial Examiner's findings, it issues a Decision and Order in which the respondent is directed to take certain steps to remedy the violations. If the respondent declines to comply with the Decision and Order, the case is taken before the Circuit Court by the Board, seeking enforcement of its Order, and from there, may be appealed to the Supreme Court.

Thus 8(a)(3) charges, as do other unfair labor practice charges, follow one of several of these paths to its settlement. The charge may be found to have no merit or complaint may be issued. The case may be settled in a couple of days or it may drag on for a couple of years. It may be settled informally, by compliance with the Trial Examiner's Decision, by compliance with a Board Order, or by Court Decree.

It is interesting to note that the absence of an Informal Settlement does not necessarily mean that the case is close. In fact, several of the strongest cases of violation were carried to a Board Order and beyond. The lawyers in these cases were either unwilling or unable to convince their clients of the hopelessness of their position.

Anyway, at no matter what level the Board settles the case, if the charge has merit, the remedies which the Board seeks are the same. In 8(a)(3) cases such remedies are three in number.

First, the company must post notices in places conspicuous enough so that all employees see them, documenting which unfair labor practices the company has committed and stating that the company will not commit them in the future. The notices also contain statements of affirmative action which the company will take to remedy the situation. At no point
does the notice require that the company admit having committed an unfair labor practice, but neither will the Board allow notices to contain non-admission clauses.

Secondly, the company must reimburse the individuals for any loss of pay suffered due to the unfair labor practice. Thus if the Discriminatee was discharged, the company must pay him backpay for the time he was out of work. Backpay is calculated on a "make whole" principle. If the Discriminatee had other employment while the case was being settled, those earnings are subtracted from the amount the company is required to pay.

Finally, the company must offer to the Discriminatee reinstatement to the same or "substantially equivalent" employment. If such employment does not exist at the time of settlement, the Discriminatee's name is placed on a preferential hiring list and he is to be offered employment before all others. The Discriminatee may, of course, prefer not to go back to that company and he may refuse the offer of reinstatement.

An important factor about these remedies is that they contain no special penalties for the company. Certainly it will cost the company something to give the individual Discriminatees their backpay, but beyond that there are no fines or restrictions. The Act seeks only restitution not punishment.

The other important factor about these remedies is the extent to which the Board is involved in seeing that they are carried out. Limitations of time and staff size impose restrictions on the amount of supervision which the Board is able to do.

In the case of "notices" and "backpay" the supervision is considerable. Backpay checks are sent by the company to the Board which in turn
forwards the check to the Discriminatee. There is virtually no chance that the backpay will go unpaid. Notices are required to be posted for 60 days and at some time during that period, someone from the Board stops at the company to make sure they are up. At the start of the 60-day posting period, a letter is sent by the Board to whoever filed the charge asking him to notify the Board if the notices do not remain posted. Any complaints are immediately investigated.

But in the case of reinstatement the Board takes no supervisory initiative. If the union or the Discriminatee himself believes that he has not been reinstated to the same or substantially equivalent position, or that he is still being discriminated against (with respect to seniority, hours, etc.), charges can again be filed. If the Board again finds merit to the charges, the previous settlement may be set aside, or a Court Order sought, or a new case opened, depending upon the circumstances.

What this lack of Board supervision means is that the Board, in effect, relies on the unions and Discriminatees to police this aspect of the settlement. But there is evidence to suggest that neither is up to the task. Few Discriminatees are well versed enough in the provisions of the Act to be expected to know their rights under reinstatement. And few unions are as interested in the welfare of individuals as this task would require. For example, when a union organization drive has been successful the union might be expected to take an interest in those who helped in the victory, but can we really expect the union to take the same interest in the Discriminatees if the organization drive fails and no union represents the employees in that company?
If the Discriminatees and the unions are not equipped at present to supervise reinstatement, neither is the Board. There is neither budget nor staff available for the kind of job this would require. Reinstatement compliance is an incredibly difficult problem. If a company wants to, there are any number of ways to make life miserable for an employee. Many of these ways would offer the Board nothing tangible on which to proceed. On the other hand, a particular Discriminatee going back to the company might be overly sensitive. Or there may be Discriminatees who try to use their reinstatement to gain special advantage. The problems here are immense and to take the initiative in sorting them out would require a major reorganization in the efforts of the Regional Office.

The problem of the responsibility for reinstatement compliance remains, but many other questions arise at the same time. To what extent is the reinstatement remedy being violated? And how successful is the 8(a)(3) section of the Act? Is there anything that can be done to make reinstatement more effective? And does reinstatement really make a difference to the individual or the union? The answers to these questions and others will occupy the rest of this study, and, no doubt, other studies beyond.

II

For some time now, it has been recognized that the major barrier to recommending changes in the National Labor Relations Act or to pronouncing generally on labor public policy issues is that so little is known about what the Act is doing now. Empirical work is needed on any
number of issues but so far there have been only several attempts and the results of these have been rather sketchy.

Only two works that I am aware of bear directly on the problems of company reinstatement. One of these is a study by Arthur Ross which looks at what happened after reinstatement in arbitration cases. Reinstatement in arbitration cases, of course, is a slightly different matter from reinstatement under the NLRA, but nevertheless, some of the factors which he found to be significant (such as the importance of seniority) were found to be significant for successful reinstatement in this study. The Ross study used questionnaires sent to the companies and the unions (but not to the persons reinstated) and came to the conclusion that "From an operational standpoint, about two-thirds of the cases have worked out well."

The other study on this subject is a study of reinstatement under the NLRA conducted by Douglass Brown in the Chicago area. The sample in this study was much smaller than the sample used here, but the results obtained in the Brown study are recognizable as examples of those obtained in the present study. The Brown study was most helpful from the standpoint of methodology. It charted the difficulties that lie ahead for


7 Ibid., p. 58.

anyone doing this sort of examination and the suggestions contained in
his paper for anyone attempting further examination were all carried out
in the present study.

Other studies on the effectiveness of the present labor public
policy are not as pertinent to the 8(a)(3) problem. A study by Bernard
Samoff of job discrimination under 8(b)(2) and 8(a)(3) looks at the re-
instatement problem created when unions cause the discrimination. He
found that "Although experiences vary . . . the general picture was un-
pleasant." 9

Another study, by Philip Ross, looked at the 8(a)(5) section of the
Act and concluded that the "duty to bargain" order was often effective. 10

Several other studies on the results of NLRB activities are not
very current, and in any case, are not very helpful on the 8(a)(3)
section. 11

9 Bernard Samoff, "The Impact of Taft-Hartley Job Discrimination

10 Philip Ross, The Government as a Source of Union Power (Providence:

11 Studies of the Results of National Labor Relations Board Activities:
Office, 1946); and Robert W. Pullen, "The Effect on Collective Bargaining
of Unfair Labor Practice Cases under the Wagner Act" (unpublished thesis,
Massachusetts Institute of Technology, 1949).
III

With respect to the effectiveness of the 8(a)(3) section, still unanswered are such basic questions as: How many Discriminatees accept reinstatement and how many refuse? If they go back to the company, do they stay or leave? If they leave, what is their reason? It was to get the answers to these kinds of questions and to the larger policy questions that this study was undertaken.

Between July 1, 1962 and July 1, 1964, 71 8(a)(3) cases involving reinstatement were settled by the NLRB's First Region Office in Boston. It is these cases which have supplied the all-important empirical data. Some regions are more unionized and some are less unionized than the First, but perhaps the First Region is as typical as any. The two years chosen were two years of uninterrupted economic expansion, but they were chosen because to go further back would make it difficult to find out what subsequently happened to the Discriminatees. To the extent that the First Region is typical and that these two years are typical, the information in this study should have general validity.

Warnings about the sample are not the only ones in order here. It should also be pointed out that there was no attempt in this study to apply significance tests to the numerical results. Largely this omission is

12 8(a)(3) cases not involving a choice about reinstatement (i.e., job discrimination only) were not included. They were omitted partly because this study is primarily concerned with reinstatement, but also because they would have been more difficult to find due to the way the records are kept in the First Region Office. Also, a single case involving 125 Discriminatees was omitted because the results of this one case would have dominated the sample.
because the conclusions put forth in this study came not only from the numbers. They also came from discussion with the people involved. The numbers give structure to the conclusions but the other sources are just as important in their determination.

Because so many approaches have been used in empirical studies of this sort, a word about the method of gathering data is perhaps in order. In this study the approach was different from that in others. About 80 per cent of the data for this study comes from the "Informal Files" of the First Region's Office in Boston. The affidavits, the Field Examiner's report, the inter-office memos, and even short notes jotted on scraps of paper contain a wealth of information about both the company and the Discriminatee. The other 20 per cent comes from interviews with the Discriminatees themselves, with the NLRB agents involved in the case, and with other employees both pro-union and anti-union.

For various reasons some of the usual sources of information for studies of this kind were not tried, and others were abandoned early in the investigation. For example, mailed questionnaires were not attempted for fear of low response, and unions were found very early to be a poor source of information. The unions were anxious to help but they rarely had the necessary knowledge. Often the union people involved in the case were no longer to be found and those that were available remembered the case well but had little information on the Discriminatees. The companies, as might be expected, were reluctant to talk, especially when speculation or opinions were involved, but occasionally they supplied factual employment data which were helpful. Much more information can be obtained from a pro-company employee than from a company official.
Locating the Discriminatees was not easy but in most cases it was not impossible. The starting point was their last known address -- usually the address to which the backpay checks were sent. If, as was often the case, the person no longer lived at that address, perhaps the people who did live there knew where he was. Sometimes the neighbors or the Telephone Company knew, or other people knew who gave affidavits or were otherwise involved in the case. In large cities the Telephone Company lists phone numbers by street address. In small towns the telephone operator or rural mail carrier can sometimes supply more information than one really wants to know.

At any rate, personal contact was made with 71 per cent of the 194 Discriminatees involved in the 71 8(a)(3) cases. Another 10 per cent were either in the armed services or had moved to another part of the country. The remaining 19 per cent were not found. For those who were unavailable for personal interview, as much information as possible was taken from the files and the supplementary sources -- friends, fellow employees, and the NLRB agents.

The result then is our sample of 71 cases involving 194 Discriminatees. The companies in this sample ranged in size from three employees to 800 employees. Of the 71 companies, 36 were in manufacturing, 21 in service, and 14 in sales.

The overwhelming majority of cases arose out of a union organization drive. Out of 71 cases, 62 were cases involving an attempt to organize the company. There were seven cases in which the company was already organized and two cases in which no union was involved. Most of the cases were pure 8(a)(3) cases. In 58 of them the charges filed were only 8(a)(1)
and 8(a)(3). In 11 cases, an 8(a)(5) violation was also charged and there was one each of 8(a)(2) and 8(a)(4) charges.

The Informal Settlements (there were 50 of them) were the most numerous. There were seven cases which resulted in a Unilateral Settlement Agreement between the NLRB and the party charged -- the other party refusing to sign, usually because it was still involved in some litigation with the opposition. (However, the other party has a right to appeal the Unilateral Settlement Agreement to the General Counsel of the NLRB.) In three of the cases there was compliance with the Trial Examiner's Report; five cases were settled by a Board Order, and six by Court Decree.

This then is the study and the sample used. This study is not particularly concerned with the merits of the cases or whether the Board's findings were just or unjust. Rather it is concerned with the results of the cases, taking the Board's findings as given. To some extent the study is concerned with how settlements came about, but it is more concerned with what happens after a case has been settled. In particular this study is concerned with reinstatement.

13 Section 8(a)(1) charge is a general charge. It says that it is an unfair labor practice "to interfere with, restrain or coerce employees in the exercise of their rights . . ." Thus any charge under an 8(a) section automatically includes an 8(a)(1) charge. But some charges are only 8(a)(1) charges.

14 Section 8(a)(2) says it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." Section 8(a)(4) says it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." And Section 8(a)(5) says it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."
CHAPTER II

THE DECISION TO ACCEPT OR REFUSE REINSTATEMENT

"The undersigned voluntarily states that he does not desire reinstatement to his former position at this time. However, in the event that a settlement agreement is not reached, the undersigned does not know what his decision will be." 1

The initial reaction of most Discriminatees is to want reinstatement. As a matter of routine the NLRB Agent usually asks the Discriminatees to state in their affidavits whether they want reinstatement and 82 per cent of those asked responded in the affirmative. Of course, this is at the beginning of the investigation of the case and not all affirmative responses are enthusiastic. Some may be undecided and could go either way. Thus when the case investigation begins, probably about 80 per cent are definitely interested in reinstatement and probably not more than 15 per cent are definitely opposed.

Yet, less than half of the Discriminatees ever go back. The figures are given in Table 1. Of 194 Discriminatees, 78 accepted reinstatement, 84 refused, and 23 were put on preferential hiring lists. There were 10 Discriminatees who were special cases.

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1 Statement signed by Discriminatee waiving reinstatement in informal settlement agreements.
TABLE 1

NUMBER OF DISCRIMINATEES REFUSING AND ACCEPTING REINSTATEMENT
(194 Discriminatees)

78 Accepted Reinstatement
84 Refused Reinstatement¹
23 Preferential Hiring Lists¹

3 Forfeited Reinstatement
4 Accepted Reinstatement after a Non-Board Settlement
2 Not Actually Discharged -- Suspended Only
1 Company Refused to Hire -- Board Found that There was Discrimination and He was Offered Employment

¹ One Discriminatee listed twice as he both waived reinstatement and asked that his name be put on preferential hiring list.

Of the 10 special cases there were three who forfeited reinstatement through strike and picket violation and thus did not go back to the company. The other 7 special cases all went back. There were four who settled privately and went back dropping their charges against the company, two who were suspended only and went back at the end of their suspension, and one whom the company had refused to hire and went to work for the company when the General Counsel found that the company's refusal to hire was discriminatory. Thus, at the time the case was settled, 85 Discriminatees went back to their companies, 87 did not, and 23 were put on preferential hiring lists. Table 2 shows these totals.
TABLE 2

NUMBER OF DISCRIMINATEES WHO WENT BACK AND NUMBER WHO DID NOT GO BACK
(194 Discriminatees)

<table>
<thead>
<tr>
<th>Went Back</th>
<th>Did Not Go Back</th>
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<tr>
<td>85</td>
<td>87</td>
</tr>
<tr>
<td>23</td>
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1 One Discriminatee listed twice as he both waived reinstatement and asked that his name be put on the preferential hiring list.

Our special concern now is with those who did not go back and what caused so many of them to change their mind. The answer to this question is found in the attitude of the companies. While most of the Discriminatees initially prefer reinstatement, most of the companies have quite another preference.

If given a free choice in the matter, most, if not all, of the companies would choose not to reinstate their Discriminatees. The employer, after all, fired the employees in question and an unfair labor practice charge filed on their behalf is not likely to change his mind. In our sample almost all the companies exhibited some reluctance to taking back the Discriminatees, and in some cases this reluctance was very strong.

For example, in nearly half of the cases reinstatement was the block to a quick Informal Settlement Agreement. The company in each case was willing to put up the notices and pay the backpay provided the Discriminatee was willing to waive reinstatement. In four of the cases the company lawyers even made inquiries as to whether it would be possible
to pay the Discriminatee more than his backpay in lieu of reinstatement. This is not the kind of action when the Board condones, but in one case for certain and in another quite probably the company gave money to the Discriminatee on the side and he waived reinstatement.

When the company does not want the Discriminatee reinstated, it seems to have little difficulty in conveying this attitude to the Discriminatee. One way this company attitude is conveyed is through the negotiations for an Informal Settlement Agreement. In arranging such settlements the Board informs the Discriminatee of offers which the company makes, and if the company is adamant in not wanting him back the Discriminatee is soon made aware of it. Even if the case is not settled informally, he is made aware of it merely through the negotiations.

Table 3 shows how important this factor is. There were 30 companies which offered to settle their cases provided the Discriminatees were willing to waive reinstatement. In 21 of them reinstatement was ultimately refused and in only nine cases was it accepted. Where there was no such stipulation on the part of the company, the figures were reversed. In 20 cases out of 29 the Discriminatees accepted.
TABLE 3
EFFECT OF VARIOUS SETTLEMENT OFFERS ON ACCEPTANCE OF REINSTATMENT

<table>
<thead>
<tr>
<th>Where Company Settlement Offer Stipulated No Reinstatement (30 Companies)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>In:</td>
<td></td>
</tr>
<tr>
<td>9 Companies Discriminates Accepted</td>
<td>9 Companies Discriminates Refused</td>
</tr>
<tr>
<td>21 Companies Discriminates Refused</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Where Company Settlement Offer Had No Such Stipulation (29 Companies)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>In:</td>
<td></td>
</tr>
<tr>
<td>20 Companies Discriminates Accepted</td>
<td>9 Companies Discriminates Refused</td>
</tr>
<tr>
<td>9 Companies Discriminates Refused</td>
<td></td>
</tr>
</tbody>
</table>

1 There were 71 companies in the sample. The total companies here comes to 59. There were 5 companies in which the Discriminates were put on preferential hiring lists, and 7 companies in which the Discriminates were split, some accepting and some refusing reinstatement.

It seems then that company resistance to reinstatement is a major factor in the low number of acceptances. The more the company opposes reinstatement the less likely it is that the Discriminates will go back. Here the length of time it takes to settle a case is indicative. The closeness or the complications of a case can be important in the length of time it takes to settle. However, settlement time is mostly a matter of company tactics, and how antagonistic the company's representatives feel toward the case, toward the Discriminates, or toward unions in general. A long settlement time usually indicates two things. First, it indicates that the company has strong feelings against the Discriminates and/or the union. And second, it indicates that because of this (and because of other pressures growing out of this which are discussed later), the Discriminates are not as likely to press for reinstatement.
The figures in Table 4 demonstrate the influence of settlement time quite clearly. A settlement time of more than four months means that the Discriminatee is less likely to go back. But the truly remarkable factor is that nobody refused reinstatement when the case was settled in less than a month. (A settlement time of less than a month usually means that the case was settled before the complaint was issued.)

TABLE 4

EFFECT OF SETTLEMENT TIME ON ACCEPTANCE OF REINSTATEMENT

<table>
<thead>
<tr>
<th>Discriminatees Who Accepted (78)</th>
<th>Time of Settlement of Case</th>
<th>Discriminatees Who Refused (84)</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>0 - 1 week</td>
<td>38</td>
</tr>
<tr>
<td>2</td>
<td>1 - 2 weeks</td>
<td>13</td>
</tr>
<tr>
<td>10</td>
<td>2 - 4 weeks</td>
<td>10</td>
</tr>
<tr>
<td>18</td>
<td>1 - 2 months</td>
<td>13</td>
</tr>
<tr>
<td>15</td>
<td>2 - 3 months</td>
<td>13</td>
</tr>
<tr>
<td>9</td>
<td>3 - 4 months</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>4 - 5 months</td>
<td>2</td>
</tr>
<tr>
<td>11</td>
<td>Over 6 months</td>
<td>7</td>
</tr>
<tr>
<td>2</td>
<td>Unknown</td>
<td>1</td>
</tr>
</tbody>
</table>

The company's success in achieving a settlement without reinstatement often depends on its effectiveness in persuading the Discriminatee to voluntarily waive reinstatement before the case settles. If the Discriminatee waives reinstatement, an Informal Settlement (with no reinstatement) quickly follows. Even if there is no formal waiver before the settlement, companies will often agree to an Informal Settlement on the understanding that the
Discriminatee does not want to be reinstated. In Informal Settlement negotiations, reinstatement is one of the things which is, in effect, bartered.

Those cases which were settled informally resulted more often in the Discriminatees refusing reinstatement. While those cases which were settled by the Board or by the Courts more often resulted in the Discriminatee accepting reinstatement. The figures are given in Table 5.

**TABLE 5**

**EFFECTS OF THE TYPE OF SETTLEMENT ON ACCEPTANCE OF REINSTATEMENT**

<table>
<thead>
<tr>
<th>Firms in Which Discriminatees Accepted (29)</th>
<th>Firms in Which Discriminatees Refused (30)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Settlement</td>
<td></td>
</tr>
<tr>
<td>20 Informal</td>
<td>23</td>
</tr>
<tr>
<td>Unilateral</td>
<td>5</td>
</tr>
<tr>
<td>Trial Examiner's Decision</td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>5</td>
<td>Court Decree</td>
</tr>
</tbody>
</table>

The total firms here is 59. In 5 other firms the Discriminatees were put on preferential hiring lists and in another 7 companies the Discriminatees split, some accepting and some refusing reinstatement.

These figures seem to be significant, but they are not easy to interpret. For instance, it may be that a reinstatement order from the Board or Court gives a Discriminatee the confidence to accept reinstatement. But on the other hand it may be that in these cases the Discriminatee was
more determined to have reinstatement and thus an Informal Settlement could not be reached.

An interesting factor, however, is that in none of the five cases which resulted in a Unilateral Settlement Agreement did the Discriminatees accept reinstatement. In each of these cases the Unilateral Agreement was signed by the Board and the company (but not by the union). Apparently, if the union declines to take part in the settlement, the company is even more effective in persuading the Discriminatee to refuse reinstatement.

If the Discriminatee insists on reinstatement, the NLRB will not agree to an Informal Settlement without it. Once the Board decides to issue a complaint, it will go to a hearing and beyond to get the reinstatement that a Discriminatee wants. But a Discriminatee who insists on reinstatement is unusual. As the investigation of the case proceeds and the company's attitude becomes clear, doubts, pressures and other factors cause the Discriminatee to re-evaluate his earlier preference. In the light of the company's offer most Discriminatees decide that they do not want reinstatement after all. It is time now to turn to the reasons why most Discriminatees do not go back.

The reasons which the Discriminatee gave for refusing reinstatement are given in Table 6. The total comes to more than 78 Discriminatees because several of them gave more than one answer. "Fear" was the only answer 28 times and "Better Job" was the only answer 16 times.
TABLE 6

DISCRIMINATIEES' REASONS FOR REFUSING REINSTATEMENT
(78 Discriminatees)

<table>
<thead>
<tr>
<th>Reason</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fear of Company Retaliation</td>
<td>39</td>
</tr>
<tr>
<td>Possession of a Better Job</td>
<td>25</td>
</tr>
<tr>
<td>Needed Backpay (Accepted Company Offer to Settle Without Reinstatement)</td>
<td>10</td>
</tr>
<tr>
<td>Had Weak Case (Accepted Company Offer to Settle Without Reinstatement)</td>
<td>3</td>
</tr>
<tr>
<td>Did Not Like the Company</td>
<td>9</td>
</tr>
<tr>
<td>Unknown</td>
<td>12</td>
</tr>
<tr>
<td>&quot;Fear&quot; the Only Reason Given</td>
<td>28</td>
</tr>
<tr>
<td>&quot;Better Job&quot; the Only Reason Given</td>
<td>16</td>
</tr>
</tbody>
</table>

"Better job" is a simple reason for deciding not to go back. If the Discriminatee has a better job, it does not matter that the company does not want him reinstated, he has a better job and he feels little pressure to return. Having a better job solves the problem for him.

A possible difficulty, however, is that Discriminatees may say they had a better job when they meant something else. The answers given for this table were not taken at face value but were checked for consistency against other information. For instance, of the 16 Discriminatees who refused only because they had a better job, it was found that all 16 of them had jobs while the case was being investigated; all 16 had jobs at the time of settlement; and at least 13 and possibly all 16 were receiving higher salaries in their new jobs. This kind of information comes from the backpay computations.

If there is any bias in the information of this table, it may be found in a second reason for refusing reinstatement -- the number who
settled because they needed backpay. Ten gave this as a reason for refusing and this may be an understatement. The longer a Discriminatee is out of a job the greater become the pressures of money problems, and the need for the backpay check is probably at least a supplementary reason for settling in more cases than is admitted.

When a Discriminatee loses his job because of an unfair labor practice case, he may have no income at all. Getting another job is rarely easy and being involved in a labor dispute is not likely to make it any easier. The Discriminatee may not even be eligible for unemployment benefits. State laws on this vary, but if the company says he was discharged for poor work, or insubordination or for any number of other reasons, he is ineligible. An investigation by the Unemployment Compensation Board follows the claim that a person is out of work due to an unfair labor practice, but when in doubt the Board is rather cautious in granting benefits.

In the meantime the Discriminatee's creditors are pressing and the company is offering backpay of perhaps several hundred dollars if he will only sign a statement waiving reinstatement. Recognizing this predicament, some of the unions try to find their Discriminatees jobs on the union payroll for the duration of the case. The Retail Clerks are especially good at this. But not enough unions do it and consequently many Discriminatees succumb.

At least 14 of the 78 Discriminatees who refused reinstatement did so even though they had no other job during the time the case was being processed, and at least 23 refused even though they had no other job at
the time of settlement. Thus nearly one out of every three Discriminatees who refused reinstatement did so even though he had no job to turn to. The need for backpay money may well be a larger factor here than the numbers in Table 6 indicate.

Certainly, however, backpay is not the only factor. As the investigation of the case proceeds and the possibilities of an Informal Settlement are explored, "money" is only one of several kinds of pressures that begin to build up on the Discriminatee. The first and greatest of these pressures is "fear."

During the settlement negotiations and during the union organization drive, the Discriminatee is able to observe the company's attitude and he begins to think about what it will be like to go back. He thinks about what it would be like to work for a company where the management is watching for every mistake. He knows that some jobs are heavier or dirtier than others and he thinks about how they will be assigned. He knows, in fact, that if the company wants to, it can make his life miserable.

Thus 39 out of 78 Discriminatees listed fear of company retaliation as one of the reasons they did not accept reinstatement. Most of the cases in the sample involved a single Discriminatee and if he was afraid to go back he did not go back. But where there were more than one, the decision to refuse was often taken only after some consultation. Such comments as "I don't want to go back if I am the only one" are not infrequent.

The figures in Table 7 show this quite clearly. A slightly larger number of single Discriminatee cases resulted in refusal and a slightly larger number of multi-Discriminatee cases resulted in acceptance. But
the significant figure is the low number of cases where the Discriminatees were divided. Out of 31 multi-Discriminatee cases, only 7 had a split where some Discriminatees accepted and others refused. The rest seemed to feel strongly that there is truth to the adage about safety in numbers, and they accepted or refused as a group.

TABLE 7

EFFECT OF THE NUMBER OF DISCRIMINATEES ON ACCEPTANCE OF REINSTATEMENT

<table>
<thead>
<tr>
<th>Single Discriminatee Cases (35 Cases)</th>
<th>Multi-Discriminatee Cases (31 Cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td>In: 16 Cases Discriminatees Accepted</td>
<td>In: 13 Cases All Discriminatees Accepted</td>
</tr>
<tr>
<td>19 Cases Discriminatees Refused</td>
<td>11 Cases All Discriminatees Refused</td>
</tr>
<tr>
<td></td>
<td>7 Cases Discriminatees Split</td>
</tr>
</tbody>
</table>

1 The total cases here comes to 66. There were five other cases which resulted in the Discriminatees being put on preferential hiring lists.

But numbers represent only one of the ways through which to seek safety. Another way is through union organization. Table 8 gives the figures. In the sample there were 37 cases in which the representation issue was decided before the 8(a)(3) case was settled. Where the union was successful in its organization drive the Discriminatee was more likely to go back. He refused more often when the union drive had been unsuccessful.
TABLE 8

EFFECT OF UNION ORGANIZATION ON ACCEPTANCE OF REINSTATEMENT
(37 Companies)

Companies That Were Organized (19 Companies)

In: 10 Companies Discriminatees Accepted
5 Companies Discriminatees Refused
3 Companies Discriminatees Split
1 Company Discriminatee on Preferential Hiring List

Companies That Were Not Organized (18 Companies)

In: 7 Companies Discriminatees Accepted
9 Companies Discriminatees Refused
2 Companies Discriminatees Split

In fact, anything which lessens the Discriminatee's fear about company retaliation is likely to encourage reinstatement. However, a factor which may increase fear of company retaliation and thus have an adverse effect on reinstatement is the company's labor relations history. The result of this is shown in Table 9. In companies which have had previous unfair labor practice charges filed against them, the Discriminatees are less likely to accept reinstatement.
<table>
<thead>
<tr>
<th>Previous Unfair Labor Practice Charges (Against 17 Companies)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>In:</strong></td>
</tr>
<tr>
<td>No Previous Unfair Labor Practice Charges (in 42 Companies)</td>
</tr>
<tr>
<td><strong>In:</strong></td>
</tr>
</tbody>
</table>

1 The total companies here is 59. In 5 other companies the Discriminatees were put on preferential hiring lists and in another 7 companies the Discriminatees split, some accepting and some refusing reinstatement.

"Better Job," "Fear," and "Need of Backpay" are the really important reasons why Discriminatees refuse reinstatement. Next to them the other reasons are relatively obscure. In 9 cases the Discriminatees said they refused because they did not like the company they worked for, but this reason rarely came up unless in conjunction with some other. Those who used it were almost all women who perhaps could be more casual about whether or not they had any job at all.

The final reason for refusal is rather interesting. In three cases the Discriminatees did not insist on reinstatement, and in fact accepted the company's offer of settlement without it, because they had weak cases. In talking over the case with the Board Agent, the Discriminatee was told that if he wanted reinstatement, the Board would try the case, but his case was not very strong, and if the case was lost, the backpay...
would be lost as well. After thinking this over, the Discriminatee de-
cided not to press for reinstatement.

What this suggests is that one of the most important factors
influencing the Discriminatee's decision cannot be measured. This is
his conversations with the Board Agent. The Board Agent must tell the
Discriminatee of reasonable offers which the company makes. Also in
all fairness, he must tell him if there is a good possibility that the
case will be lost. But the important factor is not so much what he says
but how he says it and in what order.

If the Board Agent seems hesitant and continually asks the Dis-


criminatee if he wants reinstatement, the results are going to be quite
different from a series of conversations where the Board Agent is con-
fident and more or less assumes that the Discriminatee wants to go back.
These conversations are not recorded and their effect cannot be measured,
but they seem to be immensely important.

There is one other unmeasurable factor whose importance varies
from case to case. This concerns the union's stake in reinstatement.
Out of the 71 8(a)(3) cases 62 arose out of an attempt to organize
the company (or plant) and it is this organization drive which is the
union's main interest. If, to win the election, the union needs the
Discriminatee's vote or needs a show of power, there is likely to be a
great deal of pressure put on him to accept reinstatement.

But in 37 of the 71 cases, the representation issue was decided
before the 8(a)(3) case came to a settlement, and, at any rate, the
union's power to bring pressure on the Discriminatee does not seem so
great. In 14 cases where the union really could have been helped had
the Discriminatees gone back, the Discriminatees accepted reinstatement only seven times.

By all of this it would be wrong to picture the Discriminatees as nothing more than some sort of weather vane -- being pushed this way or that by external forces. True, most Discriminatees initially want reinstatement, but some of them want it more than others. The Discriminatee's own personal resolve must be taken into account.

For instance, as one might expect, the more seniority he has, the more the Discriminatee is interested in reinstatement. This is borne out by the figures in Table 10. Low seniority is not so influential. Discriminatees with seniority of less than one year refused reinstatement only slightly more often than they accepted. But high seniority is different. With several years of seniority behind him, a Discriminatee is giving up something quite important by not pressing for reinstatement. Out of 28 Discriminatees with over five years' seniority, 20 of them went back.

**TABLE 10**

**EFFECT OF SENIORITY ON ACCEPTANCE OF REINSTATEMENT**

<table>
<thead>
<tr>
<th>Discriminatees Who Accepted (78)</th>
<th>Seniority at Time of Discharge</th>
<th>Discriminatees Who Refused (84)</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>0 - 3 months</td>
<td>13</td>
</tr>
<tr>
<td>7</td>
<td>3 - 6 months</td>
<td>13</td>
</tr>
<tr>
<td>10</td>
<td>6 - 12 months</td>
<td>14</td>
</tr>
<tr>
<td>17</td>
<td>1 - 2 1/2 years</td>
<td>15</td>
</tr>
<tr>
<td>9</td>
<td>2 1/2 - 5 years</td>
<td>14</td>
</tr>
<tr>
<td>16</td>
<td>5 - 10 years</td>
<td>5</td>
</tr>
<tr>
<td>4</td>
<td>10 - 15 years</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>Over 15 years</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>Unknown</td>
<td>7</td>
</tr>
</tbody>
</table>
There is no evidence that high seniority in any way softened the company's attitude toward the Discriminatee. On the contrary in several cases company officials were more upset by long-term employees who were involved in union organization than they were about the activities of those more recently hired. In general, however, such factors as "the time to settle the case," and "offers of settlement without reinstatement" were the same for those Discriminatees of high seniority as they were for the whole sample.

Besides seniority, as might be expected, the Discriminatee's views toward reinstatement are colored by his ability to find other employment. This is true not only of those who waive reinstatement because they have a better job. Even though he has not found a job which he considers better, if the Discriminatee has found any job at all, he is less likely to press for reinstatement.

The figures are given in Table 11. There were 73 Discriminatees who had interim jobs (i.e., jobs at some time while the case was being settled), and 63 who had jobs at the time of settlement. There are more in the former category because anyone who had a job at settlement was counted as having an interim job, but there were 10 Discriminatees who had interim jobs who were not employed at the time of settlement.²

As Section I of Table 11 shows, more Discriminatees who had interim jobs refused reinstatement and more who had no interim jobs

2 All of the sections of Table 11 include the Discriminatees who refused because they had a better job. All 16 of them are in those who refused and "Had Interim Employment"; all 16 are in those who refused and "Had Other Employment at Settlement"; and 13 are included in those who refused and were "Earning Higher Salary at Settlement."
accepted. Apparently, given some success in finding a job, the Discriminatee would rather face the labor market than his former employer.

TABLE 11
EFFECT OF INTERIM EMPLOYMENT EXPERIENCE ON ACCEPTANCE OF REINSTATEMENT

I. Interim Employment

Discriminatees Had Interim Employment (73 Discriminatees)
26 Discriminatees Accepted
47 Discriminatees Refused

Discriminatees Had No Interim Employment (38 Discriminatees)
24 Discriminatees Accepted
14 Discriminatees Refused

II. Other Employment at Settlement

Discriminatees Had Other Employment at Settlement (63 Discriminatees)
19 Discriminatees Accepted
44 Discriminatees Refused

Discriminatees Had No Other Employment at Settlement (52 Discriminatees)
29 Discriminatees Accepted
23 Discriminatees Refused

III. Higher Salary at Settlement

Discriminatees Earning Higher Salary at Settlement (31 Discriminatees)
4 Discriminatees Accepted
27 Discriminatees Refused

Discriminatees Not Earning Higher Salary at Settlement (21 Discriminatees)
9 Discriminatees Accepted
12 Discriminatees Refused

1 There are a large number of unknowns in this table. In Section I there are 51 unknown Discriminatees, there are 47 unknowns in Section II, and 11 in Section III.
The influence of "Other Employment at Settlement" was more lopsided. As Section II of the table shows, if the Discriminatee had other employment at the time the case was settled, he refused reinstatement by a ratio of greater than 2 to 1. But if he had no other employment, he accepted only slightly more often than he refused. Apparently there were so many uncertainties about going back to a former employer that if the Discriminatee had another job there was a high probability that he would refuse reinstatement, but if he had no other employment there was only a slightly higher probability that he would accept.

It appears then that a new job in the hand was worth considerably more than the old job in the thorny brier patch. This was true even if the new job did not pay as well. Section III of Table 11 gives the figures. If the Discriminatee was earning more money at the new job, he refused reinstatement overwhelmingly (27 out of 31 times). But even if the Discriminatee was earning less money at the new job, he refused more often than he accepted.

One other factor which affects the Discriminatee's resolve to seek reinstatement should be mentioned. This factor is the Discriminatee's personal commitment to his job. In businesses such as retail selling where there is traditionally a high staff turnover, one would expect to find a higher percentage of refusals. And as Table 12 shows, this was the case. Only in manufacturing was there a higher percentage of acceptances than refusals.
TABLE 12
EFFECTS OF COMPANY TYPE ON ACCEPTANCE OF REINSTATEMENT

<table>
<thead>
<tr>
<th>Company Type</th>
<th>Number of Companies</th>
<th>Discriminating Cases</th>
<th>Accepted</th>
<th>Refused</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing Companies</td>
<td>28</td>
<td>17</td>
<td>11</td>
<td>0</td>
</tr>
<tr>
<td>Sales Companies</td>
<td>13</td>
<td>5</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>Service Companies</td>
<td>18</td>
<td>7</td>
<td>11</td>
<td>0</td>
</tr>
</tbody>
</table>

1 The total companies here is 59. In 5 other companies the Discriminatees were put on preferential hiring lists and in another 7 companies the Discriminatees split, some accepting and some refusing reinstatement.

These then are the factors which went into reinstatement decisions. All these forces, mixed in different proportions in each case, determined whether or not the Discriminatee was reinstated. Basically the Discriminatee wanted to accept the reinstatement, but his company did not want him back. Gradually, the Discriminatee's own determination to go back began to conflict with his fears of how he would be treated once he got there. And, as we have seen, various factors influenced the Discriminatee's determination to go back and/or his fears of company retaliation.

The result then is that in spite of, and because of, all these forces 85 Discriminatees went back and 87 did not. Less than 50 per
cent in our sample actually returned to their company. However, the NLRB in the appendix to its annual report for the fiscal year 1964 gives a national total which shows that 75 per cent accepted reinstatement in that year.\(^3\) A word about the difference between our sample and the NLRB total is in order. For I believe the NLRB figures are misleading on two counts.

In the first place the NLRB figure says that 75 per cent of the "employees offered reinstatement" accepted. Discriminatees who waived reinstatement before the time of settlement were not included in the total. But as we have seen, it is before the time of settlement that various factors can exert a great deal of pressure on the Discriminatee not to go back. The settlement of the case from the company's point of view is often conditional upon the Discriminatees waiving reinstatement.

Secondly, and more important, the Regional Office does not know for certain how many Discriminatees actually go back. There is no follow up of any kind. Thus a Discriminatee may act like he is going back and indicate to the company and the Regional Office that he is going back, but on the morning that he is to report for work he does not show up. Invariably "Fear" was the reason these Discriminatees gave for not appearing.

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\(^3\) Twenty-ninth Annual Report of the National Labor Relations Board for the Fiscal Year ended June 30, 1964, Appendix A, Table 4, p. 173. The report for 1964 is the first year in which this table appears (the 1965 report was not yet available for me). In 1964 the "Employees offered reinstatement total" was 4,044. Of these 3,004 accepted and 1,040 declined.
In our sample, adding together those Discriminatees who waived reinstatement before the case settled, those Discriminatees who refused reinstatement at the time of settlement, and those Discriminatees who just did not show up, we find that less than half of the Discriminatees returned. Those that went back, and those that did not, can be said to have "accepted" or "not accepted" reinstatement only with, as Churchill would say, a certain amount of terminological inexactitude. For most Discriminatees would have been willing to "accept" reinstatement, but most of them faced pressures against it which were too great. Or, at least, most of them did not have enough of a stake in reinstatement themselves to overcome the pressures which they did face.

At any rate, the case is settled and the Discriminatee's decision is made. Backpay is paid. Notices go up. The NLRB is no longer in day-to-day contact. To a large extent now the Discriminatee is on his own.
"In the last twenty-five years I've built this company up from nothing with my own hands and no reinstated union son of a bitch is going to come in here now and tell me how to run it."  

When the case is settled and reinstatement has been resolved, the case is still not officially closed, but to a large extent the Board loses contact with the Discriminatee. The Board knows that the notices are up and that the backpay has been paid for these things it has checked. But when the closing letter on a case has been sent out at the end of the 60-day posting period for notices, the Board rarely has any knowledge of the subsequent history of the Discriminatee.

In the cases in which the Discriminatees were reinstated the Board has no knowledge of whether they are still there or what kind of treatment they are receiving. In the cases in which there was a discriminatory cut in wages or a discriminatory allocation of jobs, the Board has no knowledge of whether the old wages or old jobs were restored.

In one case it was not until a year later that the Board happened to discover that nine employees had not received the restoration in wages which was part of the Settlement Agreement. This case is not one of those in our sample, but it was pointed out to me as an example of the sort of

1 Remark by the President of a Rhode Island firm overheard by witnesses and brought out in a second Hearing. This second Hearing took place because a reinstated Discriminatee had been fired a second time.
thing which can happen when the union is very lax and the employees do not know their rights under the settlement. In fact, the Board would never have discovered this violation had not an entirely new case been filed and had not one of the Board Agents possessed a good memory.

If the Discriminatee, or the union on his behalf, contacts the Board with a complaint, there is, of course, an investigation. But unless some initiative is taken by the Discriminatee or the union, the company and the Discriminatee are left alone with each other. In our sample 85 Discriminatees went back, 87 did not, and 23 were put on preferential hiring lists. What happened to these Discriminatees after the case had been settled?

Because of the lack of policing, we might imagine that the 23 Discriminatees put on preferential hiring lists would be hurt the most. The company's reluctance to take back Discriminatees makes it unlikely that these people would be asked back without some prodding. And it is unlikely that a Discriminatee from outside the company would have the necessary information to initiate the prodding.

In fact, the Discriminatees put on preferential hiring lists were not asked back. Out of 23 Discriminatees, not one was ever asked to return to his company. Some of these Discriminatees may have been difficult to find, but many were still at the same address and phone number. At any rate, there was no evidence that any attempt was ever made to contact any of these Discriminatees.

In the case of ten of them a clear violation of the settlement was not evident. The company involved in the case never went back into
business or the particular line of work was never resumed. A Board investigation would be necessary, however, to determine whether or not violations occurred in these ten cases, for the settlements say that the Discriminatees are to be offered reinstatement to the same or "substantially equivalent" position. In the case of the other 13 Discriminatees there is less of a question. Employees say that the companies are still in business and are hiring people for the jobs which the Discriminatees held.

It is not just that none of these Discriminatees ever returned to their company -- none of them was ever **asked** to return. The same company feeling about not wanting to reinstate Discriminatees which was such a large factor before settlement, continues to be a large factor after settlement. And it even continues to be a large factor after reinstatement.

Of the 85 Discriminatees that were actually reinstated, I found that 60 had subsequently left their company.² The rest were still employed at their reinstated position. Table 13 lists the reasons these 60 Discriminatees gave for leaving.

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² The 85 Discriminatees who went back comprise 78 who accepted reinstatement, 4 who withdrew their charges and went back, 2 who were suspended only, and 1 refusal to hire case. See Table 1, Chapter II.
TABLE 13
REASONS FOR LEAVING THE COMPANY
(60 Discriminatees who accepted reinstatement and then left)

<table>
<thead>
<tr>
<th>Reason</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Left due to Company Treatment</td>
<td>40</td>
</tr>
<tr>
<td>Discharged by Company</td>
<td>4</td>
</tr>
<tr>
<td>Laid Off</td>
<td>2</td>
</tr>
<tr>
<td>Company Closed</td>
<td>2</td>
</tr>
<tr>
<td>Left due to Health Reasons</td>
<td>4</td>
</tr>
<tr>
<td>Replaced in a Later Strike</td>
<td>1</td>
</tr>
<tr>
<td>Retired</td>
<td>1</td>
</tr>
<tr>
<td>Left for a Better Job</td>
<td>4</td>
</tr>
<tr>
<td>Unknown</td>
<td>3</td>
</tr>
</tbody>
</table>

1 The total here comes to 61. One Discriminatee was discharged, reinstated a second time, and finally left due to company treatment.

The really striking figure is that 40 Discriminatees left because of bad company treatment. Usually this involved a specific complaint: "They were always on my back," or "I always get the worst jobs." But sometimes the complaints were general: "It was really awful," or "I hope I never have to go through that again."

In 12 of these 40 cases there was evidence, obtained from talking to the Discriminatees, that the settlement may have been violated. The NLRB says that a Discriminatee "must be reinstated to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed." A Board investigation would be needed to determine whether in fact there was discrimination after reinstatement, but in these 12 cases there appeared to be some tangible evidence on which to file another charge.

3 This wording is taken from the notices.
In most cases, however, the discrimination was too intangible for a new charge. The company had complied with the letter of the law but not the spirit. Very few of these companies discharged their Discriminatees a second time. (One Discriminatee was discharged, filed a new charge and was again reinstated only to leave a few months later because of company treatment.)

In some cases the harassment even extended to others. No systematic effort was made to find out how widespread this was, but in two cases close relatives of the Discriminatee, who themselves had taken no part in the union organization drive, left the company because they were badly treated. And in several cases witnesses who testified at the Hearing on the Discriminatee's behalf, suffered the same fate. 4

Perhaps the worst case in the sample involved a single Discriminatee at a small manufacturing plant in Connecticut. He reported for work after the reinstatement order on a Monday morning. Immediately he was taken into the President's office for a talk. The company and the Discriminatee disagree on what was said at that meeting but there is practically no disagreement on what happened for the rest of the week.

On Monday, the Discriminatee worked at his former machine. He was a little rusty but he thought he had not done badly considering the long layoff. As he started for home, he discovered that his car had a flat tire. This he had fixed before work on Tuesday.

4 Section 8(a)(4) of the NLRA says that it is an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."
When he came in on Tuesday, he was given a warning letter from the President saying that for the amount of time he had worked on Monday he should have produced 1500 pieces and he had only done 1245. During the day on Tuesday, he was moved from machine to machine and never became proficient with any of them. He was aware that the foreman was watching him and the president came past his bench several times during the day. Late in the day he was a little nervous and he jammed one of the machines causing some delay. When he finished he started for home only to discover that he again had a flat tire.

Reporting for work on Wednesday, he was again given a warning letter pointing out that on Tuesday not only did he have insufficient pieces, but that 45 per cent of the pieces that he did produce were scrap. Wednesday, he again worked at several machines, but each time he made a questionable piece he asked the foreman if it was alright. Each time the foreman said it was. And for the third day in a row, when he finished work his car had a flat tire. One of the other employees gave him a ride home and remarked that he was getting a rough time. This employee asked him if he was going to be able to stick it out. He said, "I have to, I have four kids to feed."

On Thursday morning, he was again given a warning letter. In spite of his precautions of the previous day, the letter said his work was 30 per cent scrap. And again on Thursday he was moved from machine to machine. When he punched out for lunch he heard some employees behind him laughing and one said, "I guess that's number four." He went out to the parking lot and for the fourth straight time, he had a flat tire. He took the tire to the garage and ran home for lunch. While running back to
work after lunch, he became sick and had to return home. His wife called the company and said he would not be in until the next day.

On Friday when he reported for work, he was called into the President's office. The President handed him a letter containing his record for the week -- the number of pieces he should have produced, the number he did produce, and the percentage of scrap. He read the letter, put it down and walked out. He never came back to the company again. His wife came several days later to pick up the check for the few days he had worked.

This example, to be sure, was an exceptional one. It should not be thought of as typical of what happens -- rather it is an example of the worst that happens. But its real value is that it points out the different kinds of pressures which can be brought to bear on a reinstated employee.

With such pressures it may be thought strange that more Discriminates do not contact the NLRB or file new charges. One reason for this is that very few of the Discriminates know of their rights under the Act. Most of the original charges were filed by the union on the Discriminates' behalf, and the Discriminates do not know the Act or even the procedures of filing well enough to do it.

But secondly, and more important, there is a widespread feeling among the Discriminates of "what's the use?" Processing an unfair labor practice case can be hard not only on the Discriminatee, but also on his family and friends. Going through all that again is not a pleasant thought, and at the end there is only reinstatement once more, with no guarantee that company treatment will be any different.
Ultimately then, the Discriminatee feels that no job is worth so much trouble. But it is interesting to see how long it takes before he is ready to give it up. Table 14 gives these figures showing how long these 40 Discriminatees stayed after reinstatement.

**TABLE 14**

LENGTH OF TIME STAYED AFTER REINSTATEMENT
(40 Discriminatees who left because of company treatment)

<table>
<thead>
<tr>
<th>Length of Time</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 1 week</td>
<td>4</td>
</tr>
<tr>
<td>1 - 2 weeks</td>
<td>3</td>
</tr>
<tr>
<td>2 - 4 weeks</td>
<td>3</td>
</tr>
<tr>
<td>1 - 2 months</td>
<td>1</td>
</tr>
<tr>
<td>2 - 3 months</td>
<td>7</td>
</tr>
<tr>
<td>3 - 4 months</td>
<td>4</td>
</tr>
<tr>
<td>4 - 5 months</td>
<td>2</td>
</tr>
<tr>
<td>5 - 6 months</td>
<td>3</td>
</tr>
<tr>
<td>6 - 7 months</td>
<td>3</td>
</tr>
<tr>
<td>Over 7 months</td>
<td>4</td>
</tr>
<tr>
<td>Unknown</td>
<td>6</td>
</tr>
</tbody>
</table>

One bulge of Discriminatees left in the first week, but a larger bulge left after two months. The timing of this second bulge may be due to the closing letter in the case, which is sent out at the end of the 60-day posting period. There is some indication from a couple of Discriminatees that conditions were worse after the notices came down. But this is only a tentative conclusion. It may just be that two months is all that most people can stand.

5 The last paragraph of the closing letter warns against just this sort of thing. It says "Please note that the closing is conditioned upon continued observance of the Agreement and does not preclude further proceedings should subsequent violations occur."
There is a question here which should be raised. Nearly half (40 out of 85) of those who went back listed "company treatment" as the reason for leaving their company. But if we had a random sample of employees who had not been involved in an unfair labor practice case and who left their jobs, would not "company treatment" be the main reason for their leaving? In other words, is the reaction of an employee leaving after an 8(a)(3) reinstatement any different from the reaction of an average employee leaving his job?

To this question I have no numerical answer. It is my feeling, however, from talking to these Discriminatees that on the whole they left because of company treatment relating directly to their efforts to organize that company. The type of treatment which they received, its timing, and the selection of who was to be treated in this way, all point to this conclusion. More significantly, there appears, for the most part, to be little doubt in the minds of other employees that these Discriminatees were driven out because they were trying to bring in a union.

It appears then that reinstatement was not a success for 40 out of 85 Discriminatees who went back. Yet 25 remained with their company and another 20 had left, but for reasons other than "company treatment."

6 I am indebted to Professor Taylor of M.I.T. for pointing this out to me.

7 "Successful reinstatement" means that the Discriminatee accepted reinstatement and was not driven out by company treatment. "Unsuccessful reinstatement" means that the Discriminatee accepted reinstatement and was driven out by company treatment. These definitions should not be confused with the success of the Act which is discussed in Chapter IV.
From talking to the Discriminatees, I have concluded that of the 20 who left the company for other reasons, there were 6 cases of successful reinstatement. These 6 Discriminatees had few complaints about their treatment and would have continued with the company had it not been for special circumstances. These six include four who left because they got a better job, one who retired and one of those who left because the company closed.

Of the remaining 14, I am not sure. They were not pleased with their treatment at the company, but it is not clear that they would have left had not special circumstances terminated their jobs for them. Of those fired or laid off, it is not possible to judge, without a thorough Board-like investigation, whether their terminations were for good reason.

Of the 25 who are still with their company, four constitute a special case -- they were reinstated after a non-Board Settlement. They withdrew their charges against the company and were reinstated after a private agreement with the company. The Board did not take part in these settlements at all.

It is interesting to note that our sample has four Discriminatees who went back after a non-Board settlement and all are still employed at the company. All of them, too, appear to be very content with their jobs. Although it is a very small sample, the fate of these four is certainly different from the fate of the 81 Discriminatees reinstated by the Board.

Thus I conclude that of the 85 Discriminatees who went back to their companies, 40 were not successfully reinstated, 27 reinstatements were successful (21 still employed and 6 who would have been still employed),
14 are unknown, and 4 were reinstated on their own and not by the Board. These figures are given in Table 15.

TABLE 15

I. Success of Reinstatement by Discriminatee
(85 Discriminatees)

4 -- Non-Board Settlement
27 -- Successful Reinstatement
40 -- Unsuccessful Reinstatement
14 -- Unknown

II. Success of Reinstatement by Companies
(36 Companies)

10 -- Reinstatement a Success
17 -- Reinstatement Not a Success
6 -- Mixed
3 -- Unknown

1 The 36 companies here include: 29 companies where all Discriminatees accepted reinstatement and 7 companies where some accepted and some refused.

Table 15 also includes the more difficult breakdown by companies. A single company may have both successfully and unsuccessfully reinstated Discriminatees -- and indeed six companies have just this mixture. But the difficulty is with the unknown Discriminatees. In general they are ignored. Thus if a company has one Discriminatee who was successfully reinstated and another who is unknown, the company is put in the column of companies where reinstatement was a success. This method left three companies with only unknown Discriminatees.
To get behind the numbers to the causes of successful reinstatement, comparisons are needed. Is there any reason why reinstatement is a success in the case of one Discriminatee (or company) and not the other? Or, to put the matter more bluntly, on what does successful reinstatement depend?

Let us begin the investigation by noting some surprising factors on which it does not depend. The first of these, and perhaps most surprising, is union organization. Whether or not a company is organized has nothing to do with the success of reinstatement, Table 16 gives the figures. Of the 16 companies where reinstatement was wholly or partially successful, only 6 were organized.

Section II of the table shows that this ratio holds when we consider only the ten companies where reinstatement was wholly successful. Here four out of ten have been organized. But when we look at the 17 companies where reinstatement was wholly unsuccessful, we find that eight of them have unions. On the basis of our sample, it seems that a Discriminatee has a better chance for success in reinstatement if the union organization drive fails.

A second factor which surprisingly has no influence on the success of reinstatement is the type of settlement. Much of the emphasis which the NLRB puts on Informal Settlements is based on the premise that a settlement which is agreeable to both sides is more likely to have a satisfactory compliance than a settlement which is forced upon the parties. The figures do not bear this out.

Out of the ten wholly successful cases, seven (or 70 per cent) were settled informally, while out of the 17 wholly unsuccessful cases, 12 (or 71 per cent) were settled in this way. Apparently agreeing to an Informal
TABLE 16

EFFECT OF UNION ORGANIZATION ON SUCCESS OF REINSTATEMENT

I. Companies Where Reinstatement Was Wholly or Partially Successful
(16 Companies)

2 -- Union already there
2 -- Union won the election
2 -- Company ordered to bargain with the union on a card count

3 -- Union lost the election
4 -- Petition withdrawn or dismissed
2 -- No petition (not enough signatures)
1 -- No union ever mentioned

II. Companies Where Reinstatement Was Wholly Successful
(10 Companies)

2 -- Union already there
1 -- Union won the election
1 -- Company ordered to bargain with the union on a card count

1 -- Union lost the election
3 -- Petition withdrawn or dismissed
2 -- No petition (not enough signatures)

III. Companies Where Reinstatement Was Wholly Unsuccessful
(17 Companies)

3 -- Union already there
3 -- Union won the election
2 -- Company ordered to bargain with the union on a card count

4 -- Union lost the election
1 -- Petition dismissed
3 -- No petition (not enough signatures)
1 -- No union ever mentioned

---

1 There were 10 companies where reinstatement was wholly successful and 6 companies where the success of reinstatement was mixed. See Table 3. Thus there were 16 companies where reinstatement was wholly or partially successful, 10 where it was wholly successful and 17 where it was wholly unsuccessful.
Settlement does not necessarily mean a conciliatory attitude on the part of the company. But rather it is just as likely to mean only a tactical retreat when it becomes clear that the case cannot be won. The warfare conducted after reinstatement seems to be just an extension of the previous diplomacy by other means.

Let us take an example. Before settlement there were 30 companies whose settlement offers stipulated no reinstatement. As we have seen in the previous chapter, the company's attitude persuaded most of those Discriminatees not to go back. In 21 companies they refused. But in nine companies they still accepted. Now, when we look for successful reinstatement, we find that in only one of these nine cases was reinstatement a success. In six cases it was definitely not a success, and the results in two cases are unknown.

The time required to settle the case was, in the previous chapter, another indication of the company's animosity toward the union and/or the Discriminatee. There it was noted that early settlements encouraged the Discriminatees to go back. Table 17 shows that in this appraisal, the Discriminatees were right for it is also true that early settlements more often led to successful reinstatements. The real breaking point seems to come at four months. Of 12 Discriminatees who were reinstated after a settlement time of four months or more, only two reinstatements were successful.
TABLE 17
EFFECT OF TIME TO SETTLEMENT ON SUCCESS OF REINSTATEMENT

<table>
<thead>
<tr>
<th>Successful Reinstatement (27)</th>
<th>Time to Settlement</th>
<th>Unsuccessful Reinstatement (40)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>0 - 1 week</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>1 - 2 weeks</td>
<td>5</td>
</tr>
<tr>
<td>4</td>
<td>2 - 4 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 - 2 months</td>
<td>13</td>
</tr>
<tr>
<td>6</td>
<td>2 - 3 months</td>
<td>5</td>
</tr>
<tr>
<td>3</td>
<td>3 - 4 months</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>4 - 5 months</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>5 - 6 months</td>
<td>7</td>
</tr>
<tr>
<td>4</td>
<td>Unknown</td>
<td>1</td>
</tr>
</tbody>
</table>

There are other ways of measuring company animosity. A strong 8(a)(1) case, for instance, is one way. Company officials who commit strong 8(a)(1) violations are more likely to have their Discriminatees leave because of bad company treatment. Out of ten companies in which reinstatement was a success, only two had committed strong 8(a)(1) violations. But out of the 17 companies in which reinstatement was not successful, six had done so.

In several cases the Board Agent had difficulty getting testimony on behalf of the Discriminatee. Employees were afraid to sign their affidavits or to become involved in the case in any way. In these circumstances, if the Discriminatee goes back, he is in for a rough time. There were four such cases where the Discriminatee went back and all four were unsuccessful. And these were among the cases where the treatment was the worst.
A final indicator of company animosity, and thus of the possibilities of successful reinstatement, is family ownership of firms. Family-owned firms seem to be more anti-union than firms run by professional management. Perhaps this attitude stems from the deep personal commitment and sheer amount of effort which the owner has put into the company. When a union tries to organize his company, the owner often takes it personally and his feelings are likely to be taken out on the Discriminatees involved. There were 8 family firms among the 17 companies where reinstatements were not a success and only three family firms among the ten that were successful.

The moral of the story here is not much different from that of the last chapter. If the company does not want the Discriminatees, it can be remarkably successful in keeping them out. If the company cannot dissuade the Discriminatee from accepting reinstatement, it can often force him out after he has been reinstated.

But again we must take into account the views of the Discriminatee himself. Depending upon such factors as seniority and job prospects, he may be easily persuaded to leave the company, or he may be remarkably tough about hanging on to his reinstated position.

If seniority was an important factor in whether or not a Discriminatee accepted reinstatement, it is even more important in determining whether or not he stays after reinstatement. Where reinstatement was successful, the average seniority of the Discriminatees was 6 1/2 years and the median was between 3 1/2 and 4 years. Where reinstatement was not successful, the average seniority was only 2 1/2 years and the median was only 1 1/4 years. A more detailed breakdown is given in Table 18.
To a large extent, the Discriminatee stays because he is protecting his seniority. The more seniority he has, the more determined he is to stay. But what factors influence how determined the company is that he should go?

Most, if not all companies, given a free choice, would choose not to take the Discriminatees back. But we have noted several factors which show that certain companies are more adamant about this than others. It is time now to turn to the problem of what strengthens (or weakens) the company's determination that the Discriminatee should not remain.

There are, in fact, several factors. They are not factors which are immediately obvious, but they came out in the discussions with the people involved. Three of them are so important that, among them, they can account for nearly every successful case of reinstatement.
The first, and most important of these is company size. The figures are given in Table 19. There were five companies with 10 or less employees, and five others with more than 300 employees. Out of these ten companies, seven were cases with successful reinstatement. Thus if the company is very small or very large, successful reinstatement is a distinct possibility, but it is less so if the company falls in between.

**TABLE 19**

EFFECT OF COMPANY SIZE (NUMBER OF EMPLOYEES) ON SUCCESS OF REINSTATEMENT

<table>
<thead>
<tr>
<th>Successful Companies (16)</th>
<th>Number of Employees</th>
<th>Total Companies (36)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 (60%)</td>
<td>0 - 10</td>
<td>5</td>
</tr>
<tr>
<td>9 (37%)</td>
<td>11 - 300</td>
<td>26</td>
</tr>
<tr>
<td>4 (80%)</td>
<td>Over 300</td>
<td>5</td>
</tr>
</tbody>
</table>

1 The 16 successful companies are the companies where reinstatement was wholly or partially successful. The 36 total companies are the companies where all or some of the Discriminatees accepted reinstatement. See Table 15, p. 46.

When the company is very large there may be more chance for the Discriminatee to be lost in the whole operation. When the company is very small, the employees and the manager may deal with each other on a more personal basis. In each case bad treatment by the company seems less likely to occur. However, most of the cases in our sample involve companies of the "in between" size.
A second factor which seems to lead to successful reinstatement is a change in the management. Management here can mean only one person, anyone from the foreman on up. At times the anti-union sentiment in a company can be traced to one man. If he leaves the company, there is an excellent chance that reinstatement will be successful.

For instance, in one case, the company hired a new manager in August and by January was faced with an unfair labor practice charge. The manager was very anti-union and very antagonistic toward the three Discriminatees -- in particular toward the leader of the three. When the case was settled, all three of them went back.

When I contacted the Discriminatees, I found that two of them had left but the one the manager was most antagonistic toward was not only still there, but had been given a promotion. It was then that I found out that the manager had been discharged two months after the case was settled. In that time he had been able to get rid of two of the Discriminatees but not the third. When I asked the company president about the manager, he said, "Yes, I got rid of him. He cost me over $5,000 in labor trouble."

There are no statistics on the number of times the management was changed and reinstatement was still not successful. But in four companies of the "in between" size in which reinstatement was successful, there was a change in management. In one case not only did the new management keep the reinstated Discriminatee but it is now trying to hire back another Discriminatee who waived reinstatement.
A third factor which can lead to successful reinstatement is fast company growth. Again there are no statistics linking rate of growth with unsuccessful reinstatement, but in three companies, growth seemed to be the prime reason why excessive pressure was not put on the Discriminatees. The Discriminatees who do go back are those with higher seniority and more experience. A large increase in business and the addition of new employees suddenly puts a premium on such people. In addition, it may be that the increased prosperity makes management more forgiving.

Of these three companies, two were companies where the number of employees doubled in two years, and in one the number of employees tripled in a little more than two years. Under these conditions, the company feels pressure not only to keep experienced hands but to give them more responsibility. In fact two of the Discriminatees involved in these three cases were promoted.

Thus of the 16 companies where reinstatement was wholly or partially successful, four of them had management changes, three were fast growth companies, three were very small companies, and four were very large companies. This still leaves two companies unaccounted for. There does not appear to be any way of dealing with these except as special cases.

In one of these companies the only thing keeping the Discriminatee is his determination to stay. The company has none of the special factors which have just been discussed and has treated the Discriminatee very badly. But he refuses to leave. All seven of the witnesses who gave testimony on his behalf at the Hearing have left. And when the Discriminatee was absent because of an injury to his hand, he had to file a new charge to get back in. He wants his job and he is tough enough to keep it.
The other company has two Discriminatees still employed and is rather an interesting case. Originally there were six Discriminatees all involved in an organization drive, and all were reinstated. In the investigation of the case, the Board Agent found witnesses who overheard a conversation about these six between the foreman and the manager. The foreman named four of them who he said were instrumental in the organization drive, and he mentioned that the other two were not ringleaders. The Board Agent was interested in this conversation as proof of company knowledge of the organization campaign. But it is of interest to us that of those named as ringleaders, all four have left due to company treatment. The other two are still there. They say their treatment has not been particularly good but it is "all right."

Thus there were 16 companies and 27 Discriminatees which comprise the cases of successful reinstatement in our sample. Reinstatement was a success in these cases not because the union was there to protect the Discriminatee, nor was it due to an agreeable settlement between the two parties. It was simply due to the fact that these Discriminatees felt more determined to stay, and their companies put less pressure on them to leave.

All Discriminatees feel to a varying degree pressure from the company to leave, and all feel some pressure (if only from their own original inclination) to go back. In fact, what really determines whether a Discriminatee accepts reinstatement or not, and having accepted reinstatement, whether he stays or not, is the relative strengths of these two groups of countervailing pressures. The Discriminatee will accept reinstatement and still be there if there are strong pressures for
him to stay -- high seniority, union pressure, poor job market -- and if there are weak pressures for him to go -- very small or very large company, change in management, fast company growth, etc.

For example, the 16 companies where reinstatement was a success originally had a total of 52 Discriminatees. Yet only 27 of them were successfully reinstated. To understand the differences, we need to look at the differences in the Discriminatees. When we do, we discover, for example, large differences in seniority. The 27 successfully reinstated Discriminatees had an average of four and one-half years more in seniority and a median of three years more in seniority.

When we turn the problem around and look at the Discriminatees first, we get the same result. There were 31 Discriminatees in the sample with five or more years of seniority and thus with a significant investment in their jobs. Yet only 12 of these were successfully reinstated. When we look at these 12 we find they were employed in very large or very small companies, companies with fast growth, or companies where the management had changed.

Our general appraisal of the reinstatement problem is thus most discouraging. Reinstatement success seems to depend on the right combinations of countervailing pressures. Usually it depends on weak pressures to leave combined with strong pressures to stay. In short, it depends on a combination which happens only infrequently.
CHAPTER IV

THE EFFECTIVENESS OF THE 8(a)(3) REMEDY

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue . . . an order requiring such person . . . to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act: . . . ."\(^1\)

I

Out of the whole sample, some special combination of pressures managed to produce 27 successfully reinstated Discriminatees distributed among 16 companies. But these bleak figures do not yet tell the full story of how unusual it is for the reinstatement remedy to be effective. The situation is even worse than it seems.

The aim of the remedy in unfair labor practice cases is to restore the status quo ante. There are no punitive measures. Notices go up to inform the employees of which company actions were not allowed under the Act and to overcome any fear and coercion which may have arisen in the employees' minds. Back pay is paid in an amount enough to make the Discriminatee whole. And the Discriminatee is to be reinstated to the same or substantially equivalent position without loss of seniority or other rights.

---

1 National Labor Relations Act as Amended, Section 10(c).
But in the case of the 27 successfully reinstated Discriminatees there is evidence that the status quo ante was not restored for all of them. Perhaps it was for 15, for these 15 have had few complaints of company treatment. In fact all of them have received salary increases and three of them have even received promotions.

However, there are seven others who have had fairly strong complaints about the way the company has treated them. Two of them had to file subsequent charges to keep their jobs. And in the case of two others, when the union tried another organization drive they were afraid to have anything to do with it. All of these Discriminatees still have their jobs, but in how many cases should we say that the Act's remedy has been effective?

The problem is the same with the 16 companies. After all six of these companies only exhibited mixed success where some Discriminatees stayed, but others left because of bad treatment. One of the remaining companies had Discriminatees who left for other reasons but who had complaints about the way the company was treating them. Thus there were only nine companies in which all the Discriminatees who went back were still there. But three Discriminatees in these nine companies had complaints about company treatment and there were two Discriminatees who refused reinstatement in these companies out of fear.

What all this suggests is that it is incredibly difficult to draw the line between where the Act has been effectuated and where it has not. It involves making distinctions among a large variety of shades of grey. Basically, these distinctions are so difficult because of the countervailing pressures which explain why a Discriminatee is still there.
For example, how can we say that the 8(a)(3) remedy has been effective in one case and not the other when the only difference is that in the former case the Discriminatee was more determined to stay? The case in the last chapter of the Discriminatee who is there only through his own determination is a good example. He is still there so reinstatement has been a success, but for most Discriminatees it would not have been.

What this means is that we are going to have to make different judgments about the remedy's effectiveness based on different premises. Let us begin with a rather optimistic one in Table 20.

TABLE 20
FIRST ESTIMATE OF EFFECTIVENESS OF THE REMEDY IN 8(a)(3) CASES

Discriminatees for which Remedy Effective

27 -- Successfully Reinstated
16 -- Refused Reinstatement for Better Job
---
43

Discriminatees for which Remedy Not Effective

28 -- Refused Reinstatement, Fear
10 -- Accepted Company Offer to Settle without Reinstatement Because Needed Backpay Money
40 -- Left Because of Company Treatment
13 -- Preferential Hiring (Could have been asked back but were not)
---
91

Discriminatees for which Effectiveness of Remedy Not Known

60 -- Unknown
Being optimistic we might say that if the Discriminatee is still there the pressures on him to leave cannot have been too great, and thus the remedy was effective for all Discriminatees who were successfully reinstated. We might also say that those who refused reinstatement because they had a "Better Job" are thereby better off and for them the remedy has been effective too.

But, there are several groups for which the remedy was clearly not effective. These include: Discriminatees who waived reinstatement because of fear or money; Discriminatees put on preferential hiring lists and not called back; and reinstated Discriminatees who left because of company treatment. All other groups would be counted as unknown.

These groups and the total numbers are given in Table 20. There were 43 Discriminatees for whom the remedy was successful, and 91 for whom it was not. Even with this optimistic approach we find that the remedy in 8(a)(3) cases is effective in only one out of every three cases.

But to take into account the several objections to this form of appraisal makes the percentage of successes even lower. The first objection is one which has already been noted. Basically what it says is that successful reinstatement does not necessarily mean that the remedy was effective. Some of the successfully reinstated Discriminatees were subject to heavy pressure to leave.

The problem here is that once we start to admit exceptions it is hard to know just where to stop. In some sense if there are any company pressures to leave, the Act has not been effectuated. This line of thought would soon reduce the number of times the remedy had been effective to nearly zero.
The only way out is to say that the Act has been effectuated when reinstatement has been successful and the Discriminatee's treatment at the hands of the company resembles the status quo ante. Even this may be too vague, but in our sample we might say, on this definition, that the Act was effectuated in the case of the 15 reinstated Discriminatees who had little or no complaints about company treatment.

The second objection concerns the status of those who refuse reinstatement. There is a strong school of thought which says that the Act has not been effectuated if reinstatement has been refused, no matter what the reason for refusing may be. The key consideration here is not the impact upon the Discriminatee but the impact on the other employees. As far as the other employees are concerned, the return of the Discriminatee is necessary to insure the restitution of the status quo ante.

There is some evidence for the view that if the Discriminatee does not return, the status quo ante has not been restored. In the sample there were several cases where employees were not only reluctant to take part in any union organization drive but were reluctant to get "mixed up" with a NLRB case. The reason given to the Board Agent was that something similar had happened a few years before and the company had "got rid" of those involved. Checking in the files of past cases invariably revealed that these were 8(a)(3) cases in which the Discriminatees had refused reinstatement. Handed down by word of mouth was the fact that these employees had left the company, but long forgotten were the notices and backpay.
Taking these two objections into account the remedy is not successful in any of the cases where the Discriminatee refused, nor when he was put on preferential hiring lists and not asked back, nor when he left because of company treatment. In fact we might say the only cases of an effective remedy are the 15 reinstated Discriminatees who had few complaints about company treatment. The figures are given in Table 21.

TABLE 21
SECOND ESTIMATE OF THE EFFECTIVENESS OF THE REMEDY IN 8(a)(3) CASES

Discriminatees for which Remedy Effective

15 -- Successfully Reinstated with No Complaints of Company Treatment

Discriminatees for which Remedy Not Effective

84 -- Refused Reinstatement (all reasons)
40 -- Left Because of Company Treatment
13 -- Preferential Hiring (Could have been asked back but were not)

137

Discriminatees for which Effectiveness of Remedy Not Known

42 -- Unknown

These then are two appraisals of the effectiveness of the 8(a)(3) remedy. By using other premises, of course, other appraisals are possible. Our result is that with an optimistic approach the Act was effectuated a little more than 30 per cent of the time, and with a more pessimistic approach about 10 per cent of the time. It is hard to escape the overall
conclusion that the 8(a)(3) section of the NLRA is something less than a success.

II

Perhaps a word about what happened to the Discriminatees after they severed relation with their respective companies is in order here, for this too has a bearing on our judgment of the Act's effectiveness. On the whole I found the Discriminatees philosophical about their experience. They did not want to go through it again but they thought they had learned from it and for the most part they thought "things had worked out for the best." They were rarely bitter toward their former employer, occasionally they were bitter toward the union, and almost without exception they were lavish in their praise of the NLRB.

Table 22 gives one series of post case employment comparisons between the 84 Discriminatees who refused reinstatement and the 54 who accepted and left. In every category there are significant numbers of Discriminatees whose answers are unknown.

---

2 There were 27 Discriminatees who were successfully reinstated, 40 who were not, and 14 whose success is not known. The 54 who accepted reinstatement and left is a combination of these last two groups.
TABLE 22
POST CASE EMPLOYMENT OF DISCRIMINATEES

<table>
<thead>
<tr>
<th>Discriminates Who Left (54)</th>
<th>Presently Employed?</th>
<th>Discriminates Who Refused (84)</th>
</tr>
</thead>
<tbody>
<tr>
<td>34</td>
<td>Yes</td>
<td>56</td>
</tr>
<tr>
<td>7</td>
<td>No</td>
<td>2</td>
</tr>
</tbody>
</table>

Number of Jobs
Since Leaving Their Company

<table>
<thead>
<tr>
<th>Number of Jobs</th>
<th>Since Leaving Their Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>None</td>
</tr>
<tr>
<td>26</td>
<td>One</td>
</tr>
<tr>
<td>6</td>
<td>Two</td>
</tr>
<tr>
<td>3</td>
<td>More</td>
</tr>
</tbody>
</table>

Was There Hindrance in Getting a Job Due to the Case?

<table>
<thead>
<tr>
<th>Number of Jobs</th>
<th>Was There Hindrance in Getting a Job Due to the Case?</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Yes</td>
</tr>
<tr>
<td>20</td>
<td>No</td>
</tr>
<tr>
<td>2</td>
<td>Maybe</td>
</tr>
</tbody>
</table>

1 When the numbers in the column do not add up to the total in parentheses, the difference is the unknowns.

The first thing to notice about this table is that of the 54 Discriminates who accepted reinstatement and left, 7 were not employed when I contacted them and 6 had never had another job since leaving their company. This could be misleading. In fact none of these people are hardship cases. They are either housewives who never really looked for another job or men very near to retirement whose age was a major barrier to further employment. Rather than draw the conclusion that those who leave have trouble finding another job, we should say that those near
to retirement and housewives marginally attached to the labor force are more likely to accept reinstatement. The only real hardship case is the one Discriminatee who refused reinstatement and has not been able to get a job since then.

The table shows not much difference between the two groups in "Number of Jobs Since Leaving Their Company." This "Number" includes the job they now have if they are presently employed. A Discriminatee who left the company, got another job and still has it is counted as having one job since leaving.

The question "Was There Hindrance in Getting a Job Due to the Case?" produced some interesting results. More of those who refused reinstatement found evidence of hindrance than those who left after reinstatement. The difference here is understandable. The case is much more on people's minds at the time of settlement than a few months later. In fact, of those who refused reinstatement much more than 7 would have said there was hindrance had not the union helped to find them jobs.

Usually the Discriminatees who experienced some hindrance in getting another job were in very small towns. Sometimes they were in small cities, but never in the larger cities. For example, a large proportion of 8(a)(3) cases arose in cities such as Boston or Providence. Yet none of the Discriminatees involved in these cities complained of any hindrance in getting another job.

What is suggested by the timing and geographical distribution of these examples of hindrance is that news of the 8(a)(3) case is what causes the hindrance and not active efforts on the part of the company
to "blackball" the Discriminatees. This appears to be true in most cases, but there are several examples to the contrary.

In one case the possibility of hindrance to getting another job arose even before the case was settled. Other employees had warned the Discriminatee that he would never again be able to get another job in that town. The union was worried about this too, and as part of the settlement the union representative wanted a letter from the company saying it would not prejudice the Discriminatee's chances for another job. The company refused this request and insisted on settling the case without reinstatement. Finally because the heat had been turned off in his house and other utilities were being taken away, the Discriminatee settled for backpay and waived reinstatement. The case was settled in January, 1964, and the Discriminatee has not worked in the two years since then.

He says that in a number of cases companies have hinted broadly that they could not hire him if they wanted to continue to do business with his former employer.

This case was the worst example. There were a few others similar to it in the sample, but they were unusual occurrences. Most Discriminatees not only found other jobs but in fact found jobs which they considered to be much better. The figures are given in Table 23.
### TABLE 23

**POST CASE EMPLOYMENT OF DISCRIMINATEES**

<table>
<thead>
<tr>
<th>Discriminates Who Left (54)</th>
<th>Consider Present Job Better than Former One?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>24</td>
</tr>
<tr>
<td>No</td>
<td>4</td>
</tr>
<tr>
<td>Discriminates Who Refused (84)</td>
<td></td>
</tr>
<tr>
<td>Present Job Pay More than Former One?</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>39</td>
</tr>
<tr>
<td>No</td>
<td>4</td>
</tr>
</tbody>
</table>

1 When the numbers in the column do not add up to the total in parentheses, the difference is the unknowns.

In this table there again appears to be little difference between those Discriminatees who refused reinstatement and those who accepted and then left. Usually a job which pays more is considered a better job, but not always.

Some Discriminatees have jobs which are not readily classified under "better job" or "better pay." These are given in Table 24. Those Discriminatees appearing in Table 24 are not included in Table 23.
TABLE 24
POST CASE EMPLOYMENT OF DISCRIMINATEES

### #3

<table>
<thead>
<tr>
<th>Discriminatees Who Left</th>
<th>Some Special Types of Employment</th>
<th>Discriminatees Who Refused</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Self Employed</td>
<td>8</td>
</tr>
<tr>
<td>5</td>
<td>Armed Services</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Post Office</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Police Department</td>
<td>1</td>
</tr>
</tbody>
</table>

Also those Discriminatees who appear in Table 24 do not appear in Table 25. Table 25 shows how many Discriminatees took jobs in union organized companies and, of those who did have jobs in organized companies, how many got their jobs through union help. The figures are given below.

TABLE 25
POST CASE EMPLOYMENT OF DISCRIMINATEES

### #4

<table>
<thead>
<tr>
<th>Discriminatees Who Left</th>
<th>New Employer Union Organized?</th>
<th>Discriminatees Who Refused</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>Yes</td>
<td>18</td>
</tr>
<tr>
<td>12</td>
<td>No</td>
<td>18</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Union Help Discriminatee to Get Union Job?</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 Yes</td>
</tr>
<tr>
<td>8 No</td>
</tr>
<tr>
<td>Unknown</td>
</tr>
</tbody>
</table>
In each of the two groups of Discriminatees in Table 25 exactly one-half went to work in companies that were organized. But of those who did get jobs in organized companies a higher percentage of those who refused reinstatement received union help in getting their job. This difference is not so surprising. At the time of settlement the union is in much closer contact with the Discriminatee than at any time after a case is settled.

In the long run then, with a few glaring exceptions, the Discriminatees were better off. There was little of the bitterness and inability to find other work that Mr. Samoff found in his study of 8(b)(2) cases. For the most part 8(a)(3) Discriminatees found other work which they considered better and which paid more, and many times they were aided by the unions in their search.

One other factor must be mentioned. Occasionally there was evidence that conditions at the company for the employees in general improved after the 8(a)(3) case. And this improvement occurred in spite of the company's treatment of the Discriminatee, other witnesses or close friends and relatives of the Discriminatee. No systematic effort was made to find out how widespread this was, but the information was volunteered to me by employees of several companies.

All of these factors should be considered to some extent in judging the effectiveness of the 8(a)(3) remedy. The actual reinstatement remedy itself we have found to be much abused. But usually the effect on the

Discriminatees was not permanent, and occasionally their sacrifices made the working conditions of their fellow employees a little better. It is not saying much, but it appears that at least the 8(a)(3) section of the NLRA is not harmful to the Discriminatees.
CHAPTER V

REINSTATEMENT AND THE UNION ORGANIZATION DRIVE

"It's cheaper to fire employees mixed up in union affairs, even if you have to pay their backpay. I would do it again if the problem came up. It's the cheapest way out of it."\(^1\)

The remedies of the Act, as we have seen, are designed to restore the status quo ante not only for the Discriminatee but also for the other employees in that company. One indicator of how successful the remedies have been is the company attitude toward, and the working conditions of, the Discriminatees and the other employees after the case has been settled. This was discussed in the last chapter. But another indicator of the success of the remedies is the amount of freedom felt by the employees to engage in union activity. The Act has not been effectuated unless the employees feel free "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining . . ."\(^2\) What is the effect of the 8(a)(3) case and reinstatement on the employees' desires to join a union?

---

1 Employer in Vermont who has now been involved in three 8(a)(3) cases. His company is still not organized. This quotation was brought out in the hearing in his second case.

2 Title I, Section 7, of the National Labor Relations Act as amended.
We have already noted that out of 71 8(a)(3) cases in the sample, 62 arose out of an attempt to organize the company. Here, more often than not, this organization drive was a defensive move on the part of the employees. Low wages or poor working conditions are important targets for an organization drive, but they have existed for some time. What really gets a campaign started is a more immediate grievance or condition.

The following is a case typical of several in the sample: A company (or a division of it) is losing money and the president decides that what is needed is some new management. He hires a new vigorous executive with many ideas for improvement. But when this new manager puts his ideas into practice, he begins to create hostility among the employees -- often because he fails to tell them what he is doing and why. There is a general feeling of insecurity among the employees: some are having their hours changed, others are afraid that they are going to lose their jobs, and eventually several of them get together and contact one of the unions. But a union is exactly what the new manager does not want and he fires the employees involved. Thus, the 8(a)(3) charge is filed. And, as we have seen, when the case is settled, the employees are likely to stay with the company if the new manager leaves, but not if the new manager stays.

Most organization campaigns, in fact, began with the employees themselves. Relatively few were initiated by the union. In the sample there were 35 cases where the employees first talked it over among
themselves and then contacted a union. In only 16 cases did the union make the first move -- usually by contacting employees at their homes or by a leaflet campaign at the plant gate.

One result of employee initiative is the haphazard way in which a union is selected. The employees will contact a union that one of them used to belong to, or one which a relative belongs to, or just one which they may have heard of. Within the AFL-CIO group they are redirected to the union which would be most appropriate for them. But it does seem strange that so little thought is given to the differences in quality among unions. At any rate, Table 26 shows the great variety of unions which were finally involved in our sample of cases. 3

TABLE 26

A LIST OF UNIONS INVOLVED IN THE CASES OF THE SAMPLE

<table>
<thead>
<tr>
<th>Union</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Automobile, Aerospace and Agricultural Implement Workers of America, International Union, United</td>
<td>1</td>
</tr>
<tr>
<td>Bakery and Confectionery Workers International Union of America (Ind.)</td>
<td>2</td>
</tr>
<tr>
<td>Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, International Brotherhood of</td>
<td>2</td>
</tr>
<tr>
<td>Carpenters and Joiners of America, United Brotherhood of</td>
<td>3</td>
</tr>
<tr>
<td>Chemical Workers Union International</td>
<td>2</td>
</tr>
</tbody>
</table>

3 All organizations listed are AFL-CIO affiliates unless otherwise noted.
<table>
<thead>
<tr>
<th>Union Name</th>
<th>Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electrical, Radio and Machine Workers, International Union of</td>
<td>5</td>
</tr>
<tr>
<td>Electrical Workers, International Brotherhood of</td>
<td>1</td>
</tr>
<tr>
<td>Engineers, International Union of Operating</td>
<td>1</td>
</tr>
<tr>
<td>Furniture Workers of America, United</td>
<td>2</td>
</tr>
<tr>
<td>Garment Workers, International Ladies</td>
<td>1</td>
</tr>
<tr>
<td>Glass Workers Union of North America, American Flint</td>
<td>1</td>
</tr>
<tr>
<td>Hotel and Restaurant Employees and Bartenders International Union</td>
<td>1</td>
</tr>
<tr>
<td>Iron Workers, International Association of Bridge, Structural and Ornamental</td>
<td>1</td>
</tr>
<tr>
<td>Jewelry Workers Union, International</td>
<td>3</td>
</tr>
<tr>
<td>Longshoremen’s Association, International</td>
<td>1</td>
</tr>
<tr>
<td>Lithographers and Photoengravers International Union</td>
<td>1</td>
</tr>
<tr>
<td>Machinists, International Association of</td>
<td>5</td>
</tr>
<tr>
<td>Meat Cutters and Butcher Workmen of North America, Amalgamated</td>
<td>2</td>
</tr>
<tr>
<td>Oil, Chemical and Atomic Workers International Union</td>
<td>1</td>
</tr>
<tr>
<td>Printing Pressmen's and Assistants' Union of North America</td>
<td>3</td>
</tr>
<tr>
<td>Retail Clerks International Association</td>
<td>5</td>
</tr>
<tr>
<td>Retail Employees Union</td>
<td>2</td>
</tr>
<tr>
<td>Retail, Wholesale and Department Store Union</td>
<td>1</td>
</tr>
<tr>
<td>Sheet Metal Workers International Association</td>
<td>1</td>
</tr>
<tr>
<td>Shoe Workers of America, United</td>
<td>3</td>
</tr>
</tbody>
</table>
TABLE 26 (continued)

Steelworkers of America, United
1
Rubber, Cork, Linoleum and Plastic Workers of America, United, International Union
2
Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Brotherhood of (Ind.)
12
Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, International Alliance of
1
Typographical Union, International
1

A second result of employee initiated organization drives is an increase in the chances for success. This is shown in Table 27

TABLE 27

EFFECT OF EMPLOYEE INITIATIVE AND UNION INITIATIVE ON SUCCESS OF UNION ORGANIZING CAMPAIGN

Where Employees Took Initiative:

<table>
<thead>
<tr>
<th>Union successful</th>
<th>Union unsuccessful</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>23</td>
</tr>
</tbody>
</table>

Where Unions Took Initiative:

<table>
<thead>
<tr>
<th>Union successful</th>
<th>Union unsuccessful</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>13</td>
</tr>
</tbody>
</table>

1 There were 11 cases in which it is not known who took the initiative.
In both types of organization drives there were more unsuccessful attempts than successful ones. But where the employees took the initiative there was one success out of every three attempts. Where the unions took the initiative the successes were about one out of every five.

It seems from this that there were many more unsuccessful organization drives than successful ones. And, indeed there were. The figures are given in Table 28. In 7 companies the union was already there, so the organization drive was really only successful in 18 cases and was unsuccessful in 43 cases.

TABLE 28
RESULT OF UNION ORGANIZATION DRIVE
(71 Companies)\(^1\)

<table>
<thead>
<tr>
<th>Union In</th>
<th>25</th>
</tr>
</thead>
<tbody>
<tr>
<td>Union already there</td>
<td>7</td>
</tr>
<tr>
<td>Company ordered to bargain based on card count</td>
<td>5</td>
</tr>
<tr>
<td>Union won election</td>
<td>13</td>
</tr>
<tr>
<td>Union Not In</td>
<td>43</td>
</tr>
<tr>
<td>Union lost election</td>
<td>15</td>
</tr>
<tr>
<td>Petition dismissed or withdrawn</td>
<td>11</td>
</tr>
<tr>
<td>Not enough signatures to file petition</td>
<td>17</td>
</tr>
<tr>
<td>No Union Contacted</td>
<td>2</td>
</tr>
<tr>
<td>Plant Closed before Election</td>
<td>1</td>
</tr>
</tbody>
</table>

\(^1\) There were 62 cases where the 8(a)(3) case arose out of an organization drive; in 7 cases the union was already there and in 2 cases no union was contacted.
But of the 43 cases in which the union organization drive failed, only 15 were cases in which the election was lost. In the 28 other cases the drive never got as far as this last stage.

The first place in which an organization drive can be stopped lies in the failure to get enough authorization cards signed. To file an election petition the NLRB requires that at least 30 per cent of all employees in the unit sign cards authorizing that union as their bargaining representative and/or asking for an election. Without 30 per cent of the signatures, the petition cannot be filed. (If it is filed, it will be dismissed.) In our sample there were 17 cases where the union failed to get the necessary signatures to file a representation petition.

Once the petition has been filed, the union may at some time withdraw the petition or have it dismissed. Withdrawal or dismissal can occur for any number of reasons. The Board may determine that there are not enough cards signed, or that the signatures are incorrect, or that the cards are incorrectly dated. It may occur because the Board decides that the appropriate bargaining unit is something other than that in the union petition. Or it may occur just because the union decides it cannot win and withdraws the petition, in which case the petition is withdrawn "with prejudice" and another petition from that union cannot be filed for six months. In our sample there were 11 cases in which the organization drive failed because the petition was dismissed or withdrawn.
It should be mentioned that the Board, under certain circumstances, can order the company to bargain with the union on the basis of a card count alone. If the union files an 8(a)(5) (i.e., a refusal to bargain) charge, and if the union can demonstrate by a card count that it represents a majority of the employees in the unit, the Board can, if the right conditions prevail, order the company to bargain with the union without going any further. In 5 cases in our sample, the company was ordered to bargain with the union based on this procedure.

In most cases, however, the representation issue is settled by the election method and in our sample 28 cases reached this final stage. Here we begin to see the effect of an 8(a)(3) case on the union organization drive. Of the 28 cases that went to election, the union won 13 and lost 15. Thus, the union won only 48 per cent of the elections. Usually, unions win about 60 per cent of them. 4

The difference is substantial. The 48 per cent here is of course an overall figure, and includes both cases where the Discriminatee was reinstated and cases where he refused reinstatement. But, without any breakdown, it suggests that by committing acts which bring on an 8(a)(3) charge, the company, at the same time, reduces the probability of the union's winning the election.

Discharging the most active employees has two effects on the union organization drive. First, it deprives the union of its inside supporters. Once this has happened, the drive, at whatever stage it

4 See the Annual Reports of the National Labor Relations Board.
is in, suffers a severe blow. In fact, if the company can discharge these supporters soon enough, the drive will never get started.

Secondly, and equally as important, the firing of these employees is a show of company strength. It is not just that other employees begin to wonder what is going to happen to them if they get involved. It is that by discharging these employees the company has given a rather dramatic refutation of all the claims that unions can protect the employees.

This refutation makes it important to the union that these employees be reinstated. The activities of the Discriminatee may be important, but it is just as likely that the union wants him back to demonstrate that it too has power, and with the support of the government more power than the company.

Thus the 8(a)(3) charge is filed and the pressures for and against accepting reinstatement begin to build up on the Discriminatee. The union, in pressing the Discriminatee to accept, appears to be adopting the correct strategy. For at almost every stage the organization drive seems to be helped by a reinstated Discriminatee.

Of the 17 cases where the drive faltered because the union was unable to get enough signed authorization cards to file a petition, 12 were cases where the Discriminatees did not return. One was a case where some Discriminatees returned and others did not. There were only 4 cases where the Discriminatees returned, and there were still not enough signatures to file.
It may be, of course, that the Discriminatees are more likely to return to those companies where the organization drive has its best chances of success. But picking success in organization campaigns is very difficult, even for those closest to the scene.

However, there is other evidence which is more convincing. In representation cases the Board conducts an "Investigation of Interest" to insure that 30 per cent of the signatures were obtained. For each month the number of cards signed during that month are noted on a printed form. Many times there will be a large jump in cards signed in a particular month. Invariably in our sample, this turned out to be the month when the Discriminatee was reinstated.

The effect of reinstatement on withdrawals of petitions was not so significant. Before a settlement was reached in their 8(a)(3) case, 2 unions had representation petitions dismissed and 3 withdrew their petitions. None of these cases had anything to do with reinstatement. But there were 6 cases in which the petition was withdrawn after the settlement of the 8(a)(3) case. In 4 of these cases the petition was withdrawn (or not resubmitted after amendment) precisely because, without the Discriminatees going back, the union felt it could not win the election. Thus, in 4 out of 11 cases the failure of the Discriminatee to go back caused the union to lose its petition.

Reinstatement also seems to be associated with the results of elections. The figures are given in Table 29. Unions lost most of the elections held before the 8(a)(3) cases were settled and most of the
TABLE 29

EFFECT OF REINSTANTMENT ACCEPTANCE ON REPRESENTATION ELECTIONS

Elections Held before 8(a)(3) Case Settled:

| Union Won | 6 |
| Union Lost | 8 |

Elections Held after Settlement -- Discriminatees Refused

| Union Won | 1 |
| Union Lost | 2 |

Elections Held after Settlement -- Discriminatees Accepted

| Union Won | 4 |
| Union Lost | 2 |

1 The total here adds up to 23 elections. The other 5 elections were held before the 8(a)(3) charge was filed.

elections held after the settlements in which the Discriminatees refused reinstatement. Only in elections held after the settlements in which the Discriminatees accepted reinstatement, did the union win a majority.

Clearly, then, it would seem that the union would do well to try to persuade as many Discriminatees as possible to accept reinstatement. But it is not as simple a matter as that. In fact, when the 8(a)(3) charge is filed the union is faced with a difficult decision.

If the 8(a)(3) charge is found to have merit, the Board will not complete the processing of the union representation issue. In com-
mitting an unfair labor practice there is a possibility that the company will have influenced the representation results and thus the Board will not proceed until the 8(a)(3) case has been settled. The union must then choose if it wishes to proceed with the representation case in spite of the 8(a)(3) case. If it does wish to proceed, it signs a waiver stating it will not use the 8(a)(3) charge to object to the representation election results.

This is a difficult decision for the union to make. On the one hand, if the union waits until the 8(a)(3) case is settled, it may find that the company has swayed a majority of employees against the union. But, on the other hand, if it does not wait, it must proceed without waiting for the Discriminatee to be reinstated.

Usually, if the union has any confidence of winning, it will choose to proceed. The fact that the 8(a)(3) charge is being processed gives the union some show of power, and majorities in these situations are extremely volatile. To wait just involves too many risks.

One case offers a good example of what can happen to the size of the pro-union vote, because in this case there were two election results to use as a comparison. The case involves a small company of 15 employees. Ten of these employees signed authorization cards and the company was small enough so that everyone in the plant knew who were the pro-union employees. The result of the first election was 7 for the union, 7 against the union, and one upheld challenge. Thus the union lost as it did not have a majority. The union filed objections,
the election was set aside, and a new election was ordered. The union did not file an 8(a)(5) charge and ask for an order to bargain because the wording of the authorization cards asked for an election only. But before a new election could be held, the company discharged two of the main union supporters and an 8(a)(3) case ensued.

Because of the close vote, the union decided to wait until the 8(a)(3) case was settled before proceeding with the representation case. The company delayed the 8(a)(3) case as long as it could, and the second election was not held until 14 months after the first election. By then there had been some changes in the company staff. Out of the 10 who had signed authorization cards, 6 had left the company, but of the 5 who had not signed, all were still there. With the 2 reinstated Discriminatees voting, the union lost the second election 8 to 2 with one challenge.

The decision whether or not to proceed with the representation case has a direct bearing on the union's attitude toward reinstatement. If the union decides to wait until the 8(a)(3) case is settled, it is very interested in having the Discriminatee reinstated. But if the union decides to proceed in the representation case before the 8(a)(3) case is settled, reinstatement becomes a less vital concern.

What is suggested by the union interest in reinstatement and by the positive influence of reinstatement on various stages of the organization drive is that there is some validity to the view that
the return of the Discriminatees is necessary for the restoration of the status quo ante. In our sample we have seen that when the Discriminatees did not return to their company, there was apparently an adverse effect on the organization drive. Notices and backpay were not enough. To restore the status quo ante for the other employees, it seems that reinstatement was needed.
CHAPTER VI

NOTICES AND BACKPAY

"Pursuant to the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that ..."¹

I

As we have seen, the notices and backpay alone do not seem to be effective in restoring the status quo ante. From the standpoint of the effect on the attitude of other employees, reinstatement seems to be the most important of the remedies. It may be that reinstatement is so important or so dramatic in its effect that nothing can replace it or compensate for its loss. But both the notices and backpay can be criticized for failing to be as effective as they might be. In each case, there are several factors which weaken the remedy.

In the case of the posting of notices, the remedy seems to be especially weak. The notices are designed to offset the effect of any prohibited anti-union statements or actions on the part of the company officials. Consequently, they are addressed to the employees and their wording is changed slightly to fit the particulars of each case. Mostly they contain statements of unfair labor practices which the company has committed and which the company promises it will not repeat in the future. They are a "slight wrist slap" to the company for

¹ Opening of the Notice to All Employees which is posted for 60 days in all unfair labor practice cases.
these violations. The notices also contain statements of affirmative actions which the company will take to remedy the situation. A typical notice is reproduced in Appendix A as an example.

When we look at a typical notice, one of the main factors which weakens its effectiveness is immediately apparent. The legalistic language of the notices cannot be understood by the employees. The contrast between the impact of the violations and the impact of the notices is obviously striking. Company violations, which the notice is designed to offset, are in almost every case committed in person (as when a company official delivers a threatening speech). To offset such violations by a posted notice is very difficult. With a notice written in legal terminology, it is almost impossible. The company violations invariably are straight to the point. The notices are not.

In some cases, the problem of comprehension is compounded by the fact that the employees cannot read English. In three cases in our sample the Discriminatees had to have their affidavits read to them before signing because they could not read the language (although they could speak it slightly). In two cases the employees' native language was Italian and in one case Portuguese, but the notices were posted in English.

Even if the notices can be read and understood, there is evidence to suggest that they are often not noticed. The number of notices that are posted depends upon the size and layout of the company. Usually there is one posted on every bulletin board and/or posted near
every time clock. They are placed so that every employee in his
daily routine will see one. But it seems that it is easy not to see
them at all.

For instance, at the beginning of the 60-day posting period,
the Board asks whoever filed the charge to inform the Board if the
notices do not remain posted for the required length of time. When
the union receives this request, it usually calls several of its mem-
bers to ask them if the notices are up. In eight cases in our sample,
the union reported back to the Board that its members had said that
the notices were not posted. The Board immediately sent someone to
investigate and, in each case, he found that the notices were posted
as directed. The employees had just not seen them.

Yet even when the notice is seen, read, and understood, its
effectiveness can be weak. At the bottom of the notice is a place
for it to be signed by a representative of the company. However, the
person who signs for the company may be someone the employees do not
know, and this further weakens the notice's effectiveness. If the
president of the company delivers a threatening speech, everyone in
the company knows who he is. But the notice, which is designed to
counteract that threatening speech, may be signed by someone as un-
familiar to the employees as the company's outside legal advisor.

In present practice, one further weakening factor is allowed.
The company often posts its own notice next to the official notice
of the Board. The Board, in its official notice, does not require
that the company admit having committed an unfair labor practice, but neither will it allow the notice to contain a non-admission clause. But the company can post its own notice with a non-admission clause alongside it and in effect nullify the whole thing.

It is not surprising, then, that the notices are not very effective. For the most part, they are incomprehensible and at times unreadable. They can be weakened by other notices posted alongside and can be signed by someone the employees do not know. In addition, some people just do not see the notices, however conspicuously they are displayed. In short, it is not surprising to find that the notices are not a very effective means of restoring the status quo ante in the minds of the employees.

II

While the notice is a remedy designed to help the other employees in the company, the backpay remedy is designed primarily to help the Discriminatees. Backpay is paid in an amount which makes the Discriminatee "whole" for the loss of wages or any other monetary losses due to the unfair labor practice. This "make whole" principle means that any earnings which the Discriminatee receives from other employment while the case is being settled are subtracted from the amount which the company is required to pay. But it also means that any expenses which the Discriminatee incurs because of the unfair labor practice

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2 However, if the Discriminatee had a second job before discharge, and continued to work this second job under the same conditions -- that is, same number of hours and same money -- during the backpay period, such earnings would not be deducted as interim earnings.
(for example, medical expenditures which are covered by a company policy) are included in the amount which the Discriminatee is paid. At the time of settlement, then, the Discriminatee is to be placed in exactly the same financial condition as he would have been had he kept his job.

Problems arise in coordinating this "make whole" principle with the unemployment compensation office. If an employee is out of work and has filed an unfair labor practice charge, he may or may not be eligible for unemployment compensation. State laws on this matter vary, but usually the important factor is the statement from the employer. Generally, if the company says that the employee was laid off due to a lack of work, he is eligible to receive benefits. But if the company says, for instance, that he was discharged for insubordination, he is not eligible. If the Discriminatee is not eligible, he can inform the unemployment compensation office that he has filed an unfair labor practice charge claiming that the real reason for his discharge was union activity. In these cases, the unemployment compensation office conducts its own investigation and decides whether there was an unfair labor practice and thus whether the employee can receive benefits.

There is no coordination with the NLRB on this investigation. The investigation of the employment compensation office is done strictly on its own and, because the payments should begin immediately, under pressure of time. It is not surprising, then, to find that the decision
of the NLRB's Regional Office and the decision of the unemployment compensation office do not always coincide on the merits of the charge. 3

In ten cases in the sample, the Discriminatees were denied benefits by the unemployment compensation office and later the NLRB Regional Office found merit to their charge. Ultimately these Discriminatees were given their backpay, but they received no financial help while the case was being processed. This denial of benefits to Discriminatees who should have been eligible was not studied systematically and these ten instances were brought to my attention by accident. Probably other Discriminatees found themselves facing the same situation.

The denial of benefits would not be so important were it not for the fact that "money," as we have seen, was one of the principal pressures causing the Discriminatee to settle for backpay only. Unemployment benefits are not large, but they do supply some income while the Discriminatee is trying to get reinstated.

The backpay check, then, does not fully compensate for the loss of steady earnings. The Discriminatee may need the money immediately to pay his bills, and because of the absence of unemployment compensation he may have no money at all. A sum of money some months in the future (even, as is now the case, with six per cent interest added) will not help him in his present situation.

3 The decision of the unemployment compensation office is admissible but not binding on a Trial Examiner in the trial of 8(a)(3) cases.
If the Discriminatee does settle for backpay only, he really has prejudiced his chances for unemployment compensation. As far as the unemployment compensation office is concerned, he has been offered employment and declined. No notice is taken of the fact that he may not have been "offered" reinstatement if it were not certain that he would refuse. The negotiations of the Informal Settlement Agreement are not known to the people in the unemployment compensation office.

In several other respects the lump sum payment of backpay does not compensate for the loss of a steady income. For example, if the Discriminatee has not found another job in the interim, he is allowed no deductions for expenses. Present Board policy dictates that the backpay check cannot exceed the full amount of wages which the Discriminatee would have received had he not been discharged. In other words, in computing the backpay, interim earnings cannot be less than zero. Any expenses which the Discriminatee incurs while out of work (as, for example, travel expenses in looking for employment) are not paid back to him in the lump sum payment.

One other practice which penalizes the Discriminatee should be mentioned. If the case drags on for more than a year, the backpay which the Discriminatee receives at the end of the case is counted as income in the year in which he receives it. When this happens, the Discriminatee suddenly finds himself in a higher tax bracket.
several cases (none of them in our sample) this considerably reduced
the take-home pay.

Thus, the lump sum backpay check does not fully compensate
the Discriminatee, even if the backpay is 100 per cent of the money
amount which the Regional Office calculates that he is owed. At
times, however, the amount of backpay which the Discriminatee re-
ceives is less than 100 per cent.

Calculating the amount of backpay which is owed can be a dif-

cult job. Problems arise as to the number of hours the Discriminatee
would have worked and the hours of overtime he would have been assigned.
They arise in determining what can be counted as an expense, and in
deciding whether the Discriminatee would have received salary increases
if other employees received them.

Largely because of these uncertainties, in Informal Settlements,
the backpay amount is subject to negotiation. The company and the Re-
gional Office will try to come to an understanding if differences
arise in their figures. In fact, the Regional Office can approve a
settlement in which the company offers to pay 80 per cent or more of
the full amount of backpay. If there is a settlement offer which the
Regional Office thinks should be approved with an offer of less than
80 per cent, the agreement must be approved by the General Counsel in
Washington.

At times settlement negotiations concern themselves with "cut-
off dates" for backpay. If the investigation reveals that the Dis-
A discriminatee was discharged for union activity, but that he would have been laid off for economic reasons at a later date, the amount of backpay which the company owes is calculated only to that later date. The determination of the exact cut-off date is, of course, quite speculative and thus it too is subject to negotiation.

The Discriminatee may thus find himself with an amount of backpay which is less than the full amount of the Regional Office calculations. Just how often this occurs is hard to determine. Not all backpay calculations are done by the Compliance Section of the Regional Office, and when they are not (as in Informal Settlements especially), the records are not as complete. It may well be that in a number of cases the Discriminatee was said to have received 100 per cent backpay when he actually received something less.

If the Discriminatee received unemployment benefits while the case was in progress and then, at the close of the case, received backpay, he should reimburse the unemployment office for the benefits which he received. The Board does not inform the unemployment compensation office of any settlements and consequently on many occasions the benefits are not paid back. However, many times the company will inform the unemployment office of its settlement, or sometimes the unemployment office will learn about the settlement itself. In these cases, the benefits are returned.

Besides the unfairness of this haphazard arrangement, the Discriminatee may be called upon to pay back the full amount of the bene-
fits while he received less than the full amount of backpay. In two cases in the sample, a cut-off date for backpay was set several weeks after the Discriminatees were discharged, but the settlement time in the case was several months. In these cases, the Discriminatees received backpay for less than a month, but paid back their unemployment benefits for the whole several months. They should have paid back the unemployment benefits for only the weeks they received backpay. But neither the Discriminatees nor the unemployment compensation office nor the Board knew what each of the others was doing.

If the Discriminatee takes a job in the interim which pays more than his original job, from that date his interim earnings would be greater than the earnings he would have received from the Respondent company. Backpay is computed by calendar quarters. During each quarter, the difference between the earnings of the Discriminatee at the new job and the amount that he would have earned at the old job is the amount which the company is required to pay for that quarter (plus interest at six per cent computed to the time payment is made). Thus, if the Discriminatee is out of work for a short time, and if he gets a better paying job, he may have wiped out the amount of backpay by the end of the quarter. If the backpay has not been wiped out at the end of the quarter, it must be paid. Each quarter is calculated separately and the sum of the amounts due for each quarter is the total backpay due.
Computing backpay in this manner may have the effect of postponing the settlement of the case. Usually it is thought that the daily increase in the backpay amount puts some pressure on the company to settle the case. But if the Discriminatees have a better paying job, the company would be anxious not to settle, at least until the end of the quarter.

In any case, even if the amount of backpay is increasing daily, the pressure on the company is likely to be less than the pressure on the Discriminatee. It depends, of course, on the size and the financial condition of the company. But usually several hundred dollars are not much money to a company and preventing an increase is not much of an inducement to settle the case. Several hundred dollars, however, can be a great deal of money to a Discriminatee and he may well be eager to settle the case to get it.

It would be wrong, however, to criticize the backpay remedy too strongly. In one important respect it is quite successful: we know that the backpay checks are always paid. The Regional Office receives the backpay check from the company and forwards it to the Discriminatee. There is virtually no chance that the Discriminatee will not receive his backpay.

As we have seen, the backpay check which the Discriminatee receives may, for one reason or another, not be the full amount. Backpay also does nothing to relieve the money pressures faced by the Discriminatee while the case is being processed. Thus the backpay remedy
is far from perfect. But when reinstatement has failed and the notices are having no effect, we know that the Discriminatee has the backpay, at least, to show for his efforts in the case. For all its shortcomings, backpay may be, in many cases, the only remedy that has any effect at all.
"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . ."

To summarize: This study has been an examination of the effectiveness of the remedies prescribed for violations of Section 8(a)(3) of the National Labor Relations Act. To examine the effectiveness of these remedies, a two-year sample of all 8(a)(3) cases was taken from the First Region's Office in Boston. The sample consisted of 71 cases involving 194 Discriminatees. The results of this study have turned out to be most discouraging for those who believed the Section 8(a)(3) remedies to be effective.

Reinstatement was a much abused remedy. At the start of the investigation of the cases by the Board, over 80 per cent of the Discriminatees indicated a willingness to accept reinstatement. Their companies, however, were opposed to reinstatement (some companies were violently opposed to it), and only 85 Discriminatees actually went back. Ultimately only 27 were successfully reinstated.

1 Title I, Section I of the National Labor Relations Act as amended.
To discourage Discriminatees from accepting reinstatement some companies continued to offer settlement to the Discriminatee on the basis of ample backpay, but no reinstatement. Delaying tactics were used so that by the time the settlement did come other pressures had undermined the Discriminatee's original preference for accepting reinstatement.

The pressures which the Discriminatee began to feel were mainly financial pressures and fear of company retaliation. If the Discriminatee had no income, he was inclined to accept the company's offer of a settlement with backpay only. Even if he was not in particularly poor financial condition, he was often afraid to go back.

Various factors were found to increase or diminish that fear. Discriminatees were more frightened of going back to those companies which had been involved in previous unfair labor practice cases. They were less frightened of going back if there were other Discriminatees going back with them.

Those Discriminatees who had a strong commitment to their jobs or who had higher seniority, felt that they had more of a stake in reinstatement and were better able to overcome the fear of going back. But if the Discriminatee had any luck in finding other employment, he was likely to refuse reinstatement. Those who found a better job refused almost certainly.

Of those who left after reinstatement, 40 said they left because of company treatment. Discriminatees were more likely to leave
due to company treatment in family-owned firms and in those companies in which the employees were reluctant to talk to the NLRB Agents. A strong 8(a)(1) case was another indicator of company animosity. Also those Discriminatees that did go back in spite of offers to settle without reinstatement and in spite of a long settlement time were more likely to leave because of company treatment.

In our sample there were 23 Discriminatees whose names were put on preferential hiring lists. None of them was asked back. There was no indication that any attempt was made to contact any of them, although the companies in which 13 of these Discriminatees were employed are in business and hiring similar employees.

A most interesting aspect of the whole reinstatement problem came from an examination of the cases in which reinstatement was a success. There were three special cases, but the other 24 successfully reinstated Discriminatees were all employed in either very large or very small firms, firms which were growing fast, or firms where there had been a change in management. For various reasons, firms of these four types did not put as much pressure on their Discriminatees to leave.

When there was not as much pressure on the Discriminatees to leave, those Discriminatees who had a high stake in reinstatement stayed. In fact, successful reinstatement was found to depend on a combination of strong pressures to stay -- high seniority, poor job
market -- combined with weak pressures to leave -- company size, company growth, change in management.

Successful reinstatement then depended on the right combination of countervailing pressures. It depended on strong pressures to stay, combined with weak pressures to leave. The discouraging fact is that it depended upon a combination which the NLRB was able neither to anticipate nor to control.

But successful reinstatement may not be an indication of successful effectuation of the Act. This study considered several different definitions of success in effectuating the 8(a)(3) section and came to the conclusion that on an optimistic definition the Act was effectuated through reinstatement only about 30 per cent of the time, and on a pessimistic definition only about 10 per cent of the time.

Reinstatement, of course, is not the only remedy, and backpay and the posting of notices were also considered. The notices were found to be an especially weak remedy, largely because they could not be understood and because they were not seen. The calculations and negotiations that went into the backpay figure often resulted in an amount "owed" to the Discriminatee that was less than his full loss of pay, but at least we know that he was paid the amount that he was "owed." In fact, in a number of cases it could be said that backpay was the only remedy that had any effect at all.
The 8(a)(3) cases make up roughly one-half of all unfair labor practice cases which come before the NLRB. Yet if our sample is representative, the remedies in these cases are very weak. Where does the fault lie and what can be done?

The main obstacle to the effectuation of the Act in our sample was company opposition. The companies were not only opposed to the investigation of the cases and to complying with the prescribed remedies. Often they were also opposed to the law. Since the Wagner Act was passed in 1935, the law has clearly stated that "employees shall have the right to self-organization, to form, join or assist labor organizations . . ."2 There is ample evidence among the companies in our sample that this right has not been fully accepted.

The lack of statistical evidence on the effectiveness of the Act has apparently misled the NLRB into believing that there is more widespread compliance on the part of the companies than actually exists. Frank McCulloch, Chairman of the NLRB, in a recent speech said:

"... the preponderance of cases filed involve clear violations of well understood sections of the law, and compliance will often follow when the Respondent is apprised of the facts and the law. The growing rate of settlements agreed upon (i.e., Informal Settlements) dem-

2 Title I, Section 7, of the National Labor Relations Act as amended.
onstrates the growing maturity in this area of employer-
employee relations."

But in our sample there was no evidence that compliance fol-
lowed when the Respondent was apprised of the facts and the law.
Rather, the attitude of the Respondent was marked by resistance to
compliance at every turn. If the Respondent could not dissuade the
Discriminatees from accepting reinstatement, he was often successful
in forcing the Discriminatees out after they had been reinstated.

Informal Settlements may have indicated a maturity on the part
of some of those involved, but it is just as likely to indicate a
tactical retreat when it was found that the case could not be won.
In our sample the type of settlement made no difference in the treat-
ment of the Discriminatees. In those cases where the Discriminatee
was successfully reinstated, 70 per cent were settled informally,
while of those cases where reinstatement was not successful, 71 per
cent were Informal Settlements.

Chairman McCulloch seems to be talking more about our sample
when at another point in the same speech he said:

3 "The Policy, the Purpose and the Philosophy of the NLRB as Re-
vealed in Decision Trends." Remarks of Frank W. McCulloch, Chairman
National Labor Relations Board, before the Texas Manufacturers Asso-
"But there is another prospect that clouds the future, and that is the continuing and determined resistance to the national labor policy itself. This is evident in the doubling of the Labor Board's caseload in the past eight years. Our Regional Officers and we at the Board see it in the violations of clear and simple rules laid down by Congress 30 and 18 and 6 years ago. We also see it in a more sophisticated testing and probing by some on both sides to find every possible loop-hole in the statute."  

The Chairman pointed out that the Labor Board's caseload doubled in the last eight years and that fact alone might tend to explode the "growing maturity" myth. But in fact this increase in cases has a much more ominous significance.  

The NLRB puts great emphasis on Informal Settlements in part because it believes that a settlement agreed upon by both sides is more likely to have a satisfactory compliance than a settlement forced upon the parties. This, as far as our sample was concerned, was not the case. But a second reason for the great emphasis on Informal Settlements is simply that the Board could not possibly handle the caseload if it were not for the fact that a great majority of cases never reach a formal order.  

Approximately two-thirds of all cases are found to have no merit and are dismissed. Of those cases where the investigation has determined that there is merit to the charge, about 75 per cent are settled informally. Thus really only a fraction of the unfair labor practice cases involve the Board in the Hearing and Decision process.  

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Again to quote Chairman McCulloch:

"... it is important that you realize that the swelling volume of petitions for elections and unfair labor practice charges..., would overwhelm the Board were it not for the voluntary compliance, dismissals and settlement in the vast majority of cases." 5

To survive, then, it becomes necessary for the NLRB to have a large number of Informal Settlements. As the caseload increases, it is going to become even more necessary.

The result of this reliance on Informal Settlements is rather unfortunate. Heavy pressure is put on the Regional Office to settle the cases informally. Periodic memoranda from Washington inform the Regional Office when its percentage of Informal Settlements falls below the national average. Other memoranda point out that every percentage point drop in Informal Settlements means that X number more cases must go before the Board. Recently, because its percentage of Informal Settlements was low, the First Region Office instituted a policy of offering to the company non-admission clauses in all Informal Settlement negotiations. 6 Previously the non-admission clause was included only at the company's insistence. It

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6 A non-admission clause included in the Settlement Agreements reads as follows: "By the execution of this agreement the Respondent does not admit that it violated any section of the National Labor Relations Act as amended."
was hoped that this new policy would pick up the lag in Informal Settlements so that the First Region could finish 1965 on or above the national average.

All of this has an adverse effect on the Discriminatee's resolve to seek reinstatement. The company is putting pressure on him to go elsewhere. The NLRB is doing its best, but it is under heavy pressure to get a settlement. Thus when the Discriminatee needs assurance about reinstatement, he may not get it. The NLRB agents, instead of giving him confidence and taking an active role in urging him to go back, often take a passive role and in fact tend to play the part of the "honest broker."

One other group which might give the Discriminatee assurance when it comes to reinstatement is the unions. But they too are concerned with their own problems. Most 8(a)(3) cases arose from an attempt to organize the company, and it is the organization drive which is the main concern to the unions. We have seen that reinstatement can be an important asset to an organization drive and when that is the case the unions are very interested in reinstatement. But when the success of the organization drive no longer hinges on reinstatement, the unions' interest in reinstatement is not so pressing.

Those Discriminatees who do go back are not adequately protected in their reinstated jobs by the Board or by the unions. The Regional Office of the Board checks on the posting of the notices and
insures that the backpay is paid, but no more contact is made with the Discriminatee unless the Discriminatee or the union on his behalf notifies the Board with a complaint.

As for the unions, we have seen that if a company is organized by the time the reinstatement decision was made, the Discriminatee was encouraged to go back. The presence of the union apparently gave the Discriminatee some confidence in overcoming his fear. But once the Discriminatee had been reinstated, it was surprising to find that union organization did not give the Discriminatee protection from company mistreatment. In fact, Discriminatees left because of company treatment more often in companies that were organized than in those that were not organized.

The Discriminatee, then, is the one who suffers. Neither the Board nor the unions actively encourage or protect reinstatement to a sufficient degree to overcome company opposition to it. And when the Discriminatee suffers, the whole remedy suffers; for there was ample evidence in our study (particularly from the study of reinstatement and the union organization drive) to suggest that reinstatement is necessary to restore the status quo ante for the rest of the employees.
Companies that do voluntarily comply with the law, do so by not breaking the law in the first place. Most companies fall into this category. In our sample of 71 companies which broke the law, only one was a company with a national reputation. It is important to remember that in these unfair labor practice cases, we are dealing for the most part with only one element of the business community.

However, for those companies which are not complying with the law and perhaps are not even accepting the law, reinstatement is the crux of effectuating the Act. We have already remarked on the importance of reinstatement in restoring the *status quo ante* for the other employees. Notices and backpay by themselves are not enough. If reinstatement fails, the whole remedy fails.

If reinstatement is to be made more effective, a whole battery of new weapons will be needed. Some will be designed to get more Discriminatees to accept reinstatement. Others will be designed to keep them in their reinstated jobs. And still others will be designed to make the Act generally more effective. The use of these weapons will no doubt result in a heavier caseload for the Board and will require, at least initially, added personnel and expense.

We have seen that the main reasons that so many Discriminatees did not go back were financial pressures and fear of company retaliation. Our first category of recommendations -- those designed to get
more Discriminatees to accept reinstatement -- should be aimed at overcoming these fears and pressures. Overcoming them requires that both the unions and the NLRB become more active advocates of reinstatement.

In the first place, unions should take it upon themselves to try to find a job on the union payroll for the Discriminatee while the case is being litigated. It may be that only the larger unions would have the resources to be able to do this, but if the unions could guarantee an income for the Discriminatee, much of the financial strain would be eliminated.

Secondly, the NLRB should make liberal use of the 10(j) provision of the Act. This provision allows the Board to seek an injunction and reinstate the Discriminatee immediately. It is a remedy which is now used extremely rarely and only in cases of repetitive violation. In none of the cases of our sample was the 10(j) provision used.

The advantage to using the 10(j) provision is that it would reinstate the Discriminatee before pressures against his accepting reinstatement persuade him to change his mind. Also, immediate rein-

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7 Section 10(j) reads: "The Board shall have power, upon issuance of a complaint ..., charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States ..., for appropriate relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."
statement puts the Discriminatee back into the company while the case is being litigated (a time when the company would not be likely to mistreat him) and when the case is settled, he would not be going back with "all eyes upon him."

Thirdly, the Board Agents should adopt a firm policy of reinstatement in all settlements. A few Discriminatees may, in spite of such a policy, still want to refuse, but accepting reinstatement should become the rule and refusals should be the fairly rare exception.

Fourthly, Discriminatees should be put on preferential hiring lists only in extremely rare cases. Only if the company has ceased operations altogether should preferential hiring lists be used. When they are used, the Board should check periodically until either the Discriminatee has been rehired or until the Board is convinced that the company will not go into business again.

These recommendations are designed to encourage more Discriminatees to go back. But convincing the Discriminatees to accept reinstatement is only half of the battle. Acceptance of reinstatement does little good if the Discriminatees are not properly treated when they go back. A second category of measures is needed to insure that they are not forced to leave soon after they return.

First, a system of follow-up interviews should be instituted. If the Board checks on the notices at least once, it should check on the Discriminatees at least twice. The company should be advised
that these interviews will take place, but should not be told when they will occur.

Secondly, the Board should send a letter to the Discriminatee when the case is settled, telling him what his rights are under re-instatement and what kind of treatment is not allowed. The letter should contain the name of the Compliance Officer whom he should contact if he has any trouble or any questions.

Thirdly, the company should be required to file a compliance report at the end of three months. The Compliance Division will no doubt have to remind the company at the time the report is due, but the company should be advised, when the case is settled, that such a report is expected.

Fourthly, the closing letter in the case should be eliminated. A letter will have to be sent at the end of the 60-day posting period informing the company that the notices can come down, but the time of closing of the case should be flexible and should take place only when the Board is convinced that full compliance has taken place.

There is no doubt that these recommendations would mean a great deal more work for the NLRB. Fewer cases would be settled informally, and so more cases would have to be processed by the Board. The Compliance Section would need an increase in staff to correspond with its increase in duties.

However, the only way to reduce the size, and hence the monetary cost, of these operations in the long run is to make the Act more
effective now. If our sample is representative, the Act in a very important section is not now effective and the caseload of the NLRB has doubled in eight years. The way to achieve the "growing maturity" and "voluntary compliance" which have been talked about is to make the provisions of the Act well known and effectively enforced. To this end, a third category of recommendations should be considered, which are designed to make the Act generally more effective.

First, unfair labor practice violations should be well publicized. The Regional Office of the Board should establish a rapport with the press and encourage reporting of unfair labor practice cases. If such cases were widely reported, as for instance price-fixing cases are, this might well prove to be an effective deterrent.

Secondly, violators should be called upon to pay damages. Treble damages are called for in other types of civil suits and in 8(a)(3) cases violators should pay to the Discriminatee damages of triple backpay. Recently, the Board instituted the principle of including the 6 per cent interest in the backpay figure on the theory that the Discriminatee might have invested his wages. This seems to be already very close to the principle of charging damages.

Thirdly, stiff fines should be imposed on repeat violators. It is very important to have this recommendation or something like it. There was evidence in our sample that some companies repeatedly and deliberately violated the law simply because it cost less money to break the law than to accept the union.
The format of the notice should be altered significantly. Not only should the message of the notices be put into language which the employees can read and understand, but the message should be delivered in person as well as put on the notice board. The president or personnel director should be required to deliver the message in a speech to all employees, either in one large meeting or, where that is not practical, in several smaller meetings. No other notices pertaining to the case should be allowed to be posted.

Backpay should not be computed by quarters. If the Discriminatee gets a better paying job, backpay should be cut off, but from that point on there should be no reduction in backpay previously accrued. A Discriminatee should be allowed to include all expenses regardless of whether or not he has an interim job. He should not be made to count backpay accrued over several years as income in the one year when he receives it.

Unfortunately, there is no one recommendation which, if put into practice, will make the 8(a)(3) remedies effective, but maybe all these recommendations taken together will make the Act more effective. In recognition of the difficulties of changing the Act, most of these recommendations involve only a change of policy on the part of the Board. The recommendations concerning damages, fines and the time when Discriminatees' backpay should be counted as income may well require changes in the law.
These recommendations, taken together, are designed to form a deterrent to breaking the law. As the law now stands, there are no penalties for violations. The law does not seek punishment; it seeks only restitution. But in our sample, this policy of conciliation did not work. Many companies were breaking the law because, in their view, the end justified it and because it cost them little or nothing to do it. Sufficient penalties, vigorously enforced, would offer important incentives to effectuating the Act.

To speak about the impossibility of legislating morality in this context is only partially pertinent. No one is asking the companies to welcome the unions, or even to refrain from opposing them. The companies are being asked, however, to recognize that certain methods of opposing the union are not lawful. What is being asked is that the companies recognize a law which has been in existence for thirty years -- "It shall be an unfair labor practice for an employer, by discriminating in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization . . ." 8

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8 Section 8(a)(3) of the National Labor Relations Act as amended.
NOTICE TO ALL EMPLOYEES

PURSUANT TO

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist

or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them, with interest thereon at 6 percent.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

(Employer)

Dated By (Title)

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

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.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board’s Regional Office,
LIST OF REFERENCES

Annual Reports of the National Labor Relations Board, 1959-1964.


McCulloch, Frank W., Chairman of the National Labor Relations Board, "The Policy, the Purpose and the Philosophy of the NLRB as Revealed in Decision Trends," Remarks before the Texas Manufacturing Association, 43rd Annual Conference of Texas Industry, Fort Worth, Texas, October 28-29, 1965.

National Labor Relations Act as amended.


BIOGRAPHICAL NOTE

Mr. Leslie Aspin was born in 1938 in Milwaukee, Wisconsin. After public school in Milwaukee, he attended Yale University. A member of Phi Beta Kappa, he graduated from Yale in 1960 summa cum laude and in his major field, History, he received "Honors with Exceptional Distinction." From 1960-62 he was in England attending Oxford University (Magdalen College), where he read "Politics, Philosophy and Economics." In the fall of 1962 he entered the Economics Department of the Massachusetts Institute of Technology and receives his Ph.D. degree in June 1966.

In summers since 1960, Mr. Aspin has worked on the staff of Senator Proxmire, as an economic consultant to the United Africa Company in Freetown, Sierra Leone, and as an assistant to the staff of President Kennedy's Council of Economic Advisers. In 1964 Mr. Aspin took a year's leave from M.I.T. to direct Senator Proxmire's campaign for re-election in Wisconsin. Mr. Aspin will go to Washington to join the Office of the Secretary of Defense in February, 1966.