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# Labor Law -- J.P. Stevens: Searching for a Remedy To Fit the Wrong

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than the rigid job situs test; and concededly, the substantial contacts test could often produce results parallel to those of the job situs test.<sup>67</sup> Despite its favorable points, however, the substantial contacts approach is hampered by the uncertainty of the identification and balancing of factors in each employment relationship.<sup>68</sup> Such uncertainty gives rise to an unpredictability in the determination of the validity of proposed union security provisions. For this reason, reliance on the job situs standard, with its certainty of application, is more desirable, since it enables collective bargaining parties to know in advance what laws will apply to their employment relationship.

Despite its practicality, the job situs test cannot possibly cover every conceivable employment relationship, and even when the standard is utilized, courts may be called upon to determine which job situs in an employment relationship is the predominant one. In some situations, courts may conclude that no job situs is so predominant as to be the controlling factor in the determination of state right-to-work law applications, and therefore, some reliance on a substantial contacts approach may be necessary. As long as right-to-work laws remain valid, however, the job situs test represents the best practical solution that recognizes the intent of the Taft-Hartley Act and the national labor policy to deal with multistate workforce situations.

JONATHAN ADAMS BARRETT

### Labor Law—J.P. Stevens: Searching for a Remedy To Fit the Wrong

The stated purpose and policy of the National Labor Relations Act (NLRA or Act)<sup>1</sup> is to prescribe the rights of employees and employers in their interactions and to encourage the collective bargaining process.<sup>2</sup> Section 7 of the NLRA<sup>3</sup> guarantees to employees the right

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67. The Supreme Court majority conceded this possibility in its criticism of the substantial contacts approach. See 96 S. Ct. at 2147.

68. *Id.*

1. 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975).

2. *Id.* § 151.

3. *Id.* § 157.

to organize themselves, to form, join or assist labor organizations, or to refrain from such activities. In a determined campaign to prevent or forestall unionization of its Southern plants, the J.P. Stevens Company has effectively negated these purposes, policies and guarantees. This campaign has involved numerous flagrant unfair labor practices, including coercive interrogation of union adherents,<sup>4</sup> surveillance of union organizers,<sup>5</sup> appeals to racial animosities,<sup>6</sup> threats of plant closings,<sup>7</sup> and economic reprisals such as extensive discriminatory discharges.<sup>8</sup> Neither fifteen adverse National Labor Relations Board (NLRB or Board) decisions, most of which have been enforced by circuit courts of appeals,<sup>9</sup> nor two contempt orders, issued by the

4. See, e.g., J.P. Stevens & Co. [*Stevens II*], 163 N.L.R.B. 217, 218, *enforced as modified sub nom. Textile Workers Union v. NLRB*, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

5. See, e.g., J.P. Stevens & Co. [*Stevens I*], 157 N.L.R.B. 869, 923 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

6. See *Oversight Hearings on the National Labor Relations Act Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. 181 (1976) [hereinafter cited as *1976 Hearings*].

7. See, e.g., J.P. Stevens & Co. [*Stevens VII*], 179 N.L.R.B. 254, 257-58 (1969), *enforced*, 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971).

8. See, e.g., J.P. Stevens & Co. [*Stevens I*], 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

9. For ease of reference, and following the pattern used by the NLRB and the courts of appeals, these cases will be cited as follows:

*Stevens I*: J.P. Stevens & Co., 157 N.L.R.B. 869, 872 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

*Stevens II*: J.P. Stevens & Co., 163 N.L.R.B. 217, *enforced as modified sub nom. Textile Workers Union v. NLRB*, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

*Stevens III*: J.P. Stevens & Co., 167 N.L.R.B. 266 (1967), *enforced as modified*, 406 F.2d 1017 (4th Cir. 1968).

*Stevens IV*: J.P. Stevens & Co., 167 N.L.R.B. 258 (1967), *enforced as modified*, 406 F.2d 1017 (4th Cir. 1968).

*Stevens V*: J.P. Stevens & Co., 171 N.L.R.B. 1202 (1968), *enforced*, 417 F.2d 533 (5th Cir. 1969).

*Stevens VI*: Black Hawk Corp., 177 N.L.R.B. 944 (1969), *enforced in part and denied in part*, 431 F.2d 900 (4th Cir. 1970).

*Stevens VII*: J.P. Stevens & Co., 179 N.L.R.B. 254 (1969), *enforced*, 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971).

*Stevens VIII*: J.P. Stevens & Co., 181 N.L.R.B. 666 (1970), *enforced in part and denied in part*, 449 F.2d 595 (4th Cir. 1971).

*Stevens IX*: J.P. Stevens & Co., 183 N.L.R.B. 25 (1970), *enforced*, 461 F.2d 490 (4th Cir. 1972).

*Stevens X*: Black Hawk Corp., 183 N.L.R.B. 267 (1970).

*Stevens XI*: J.P. Stevens & Co., 186 N.L.R.B. 180 (1970), *enforced without opinion*, 455 F.2d 607 (5th Cir. 1971).

*Stevens XII*: J.P. Stevens & Co., 190 N.L.R.B. 751 (1971), *remanded*, 475 F.2d 973 (D.C. Cir.) (per curiam), *modified*, 205 N.L.R.B. 1032 (1973).

*Stevens XIII*: J.P. Stevens, 217 N.L.R.B. 513 (1975), *enforced*, 93 L.R.R.M. 2262 (4th Cir. 1976).

Second<sup>10</sup> and Fifth<sup>11</sup> Circuits, have deterred J.P. Stevens' anti-union animus. Not even the payment of \$1.3 million in backpay awards to approximately 300 discriminatorily discharged workers has slowed the J.P. Stevens crusade.

The Textile Workers Union of America (TWUA) and the Industrial Union Department of the AFL-CIO launched their coordinated campaign to organize approximately twenty-five of the forty J.P. Stevens plants in North and South Carolina in the Spring of 1963.<sup>12</sup> Prior to the coming of the union, plants had been operated in a permissive manner. The Company was tolerant, even lenient, in such matters as absences, work breaks, transfers and re-hirings.<sup>13</sup> This pattern was quickly changed with the advent of the union. In the initial months of its campaign the union succeeded in enlisting a substantial number of employees, many of whom sent letters to Stevens notifying it of their support for the TWUA.<sup>14</sup> Subsequently, J.P. Stevens reprimanded and/or discharged many of these workers because of their union support; discharges followed as quickly as pretext could be found.<sup>15</sup>

This pattern of disregard for the dictates of the NLRA, with the added refinements of plant closings and unlawful refusals to bargain with NLRB recognized unions, has continued to the present. As the Fifth Circuit Court of Appeals stated in *Stevens VII*,<sup>16</sup> "Stevens' intransigent recidivism is patent and overt. . . . [N]either passage of time nor the admonishments of judicial tribunals have caused the Company

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*Stevens XIV*: J.P. Stevens & Co., 219 N.L.R.B. 850, enforced, 93 L.R.R.M. 2262 (4th Cir. 1976).

*Stevens XV*: J.P. Stevens & Co., 220 N.L.R.B. No. 34 (1975).

10. NLRB v. J.P. Stevens & Co., 464 F.2d 1326 (2d Cir. 1972) (per curiam).

11. NLRB v. J.P. Stevens & Co., 538 F.2d 1152 (5th Cir. 1976).

12. For a factual history of the J.P. Stevens situation, see 1976 *Hearings, supra* note 6, at 178-93. Ironically, J.P. Stevens, the second largest textile manufacturer in the South, with some 46,000 workers, was chosen as the target for this campaign because it was thought that J.P. Stevens would be more receptive to unionization than would Burlington Industries, the largest textile manufacturer in the South. Interview with Daniel H. Pollitt, Professor of Law, in Chapel Hill, N.C. (Jan. 7, 1977).

13. *Stevens I*, 157 N.L.R.B. 869, 963-64 (1966), enforced as modified, 380 F.2d 292, 296 (2d Cir.), cert. denied, 389 U.S. 1005 (1967).

14. This was done to ensure compliance with a Board requirement that in order to prove a discriminatory discharge in violation of section 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), it must be shown that the employer had knowledge of the worker's union affiliation. See generally Comment, *Employer Discrimination under Section 8(a)(3)*, 5 U. TOI. L. REV. 722 (1974).

15. See *Stevens I*, 157 N.L.R.B. 869 (1966), enforced as modified, 380 F.2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967).

16. 441 F.2d 514 (5th Cir.), cert. denied, 404 U.S. 830 (1971), enforcing 179 N.L.R.B. 254 (1969).

to alter its now all too familiar pursuance of full-scale war against unionization."<sup>17</sup> The economic rationale behind this "intransigent recidivism" is obvious: the Company has saved untold millions of dollars by refusing to cooperate in collective bargaining. One estimate has placed the value of J.P. Stevens' unlawful conduct at \$18,400 *per hour*.<sup>18</sup>

As long as violation of federal law wins financial enrichment for the wrongdoer, there remains a continuous and open invitation to ignore the law. This incentive to violate the NLRA emphasizes the need for a proper remedy for the J.P. Stevens situation. The Board and the courts must be especially concerned not only with the narrower context of struggle between union and employer but also with respect for the mandates and policies of the NLRA.<sup>19</sup> Neither the Board in its remedial orders<sup>20</sup> nor the courts in their contempt orders<sup>21</sup> have adequately confronted the need for an extraordinary remedy for the J.P. Stevens situation. It has become clear that only an order that requires, or holds out the promise that it may require, Stevens to pay out an amount of money commensurate with the amount it has saved by avoiding a collective bargaining contract<sup>22</sup> will serve to halt the J.P. Stevens anti-union crusade.

### BOARD REMEDIES

The National Labor Relations Board has been given broad powers

17. 441 F.2d at 521. *See also* the Second Circuit's contempt citation, in which the court stated:

[R]espondents have flouted our prior decrees in many ways. In a continued attempt to dissuade employees from joining the Textile Workers Union of America, the company and its management personnel in various plants, despite our prior orders, have continued to resort to such unlawful tactics as engaging in surveillance of organizing activities, interrogating employees about their union inclinations, threatening pro-union employees with discharge and other reprisals, discriminatorily altering their working conditions and discharging them because of their union sympathies. In fact, one of the employees so discharged had been illegally terminated before, was reinstated by our prior order, but was then illegally discharged again.

NLRB v. J.P. Stevens & Co., 464 F.2d 1326, 1328-29 (2d Cir. 1972) (*per curiam*) (footnote omitted).

18. 1976 *Hearings*, *supra* note 6, at 164; *see* 464 F.2d at 1329.

19. *See* SPECIAL SUBCOMM. ON LABOR OF THE HOUSE COMM. ON EDUCATION AND LABOR, 90TH CONG., 2D SESS., NATIONAL LABOR RELATIONS ACT REMEDIES: THE UNFULFILLED PROMISE (Comm. Print 1968).

20. *See, e.g., Stevens I*, 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

21. *See* 1976 *Hearings*, *supra* note 6, at 184. The Fifth Circuit has not yet formulated its order. NLRB v. J.P. Stevens & Co., 538 F.2d 1152 (5th Cir. 1976).

22. *See* text accompanying note 18 *supra*.

to remedy unfair labor practices through section 10(c) of the NLRA.<sup>23</sup> The Supreme Court has often expressly acknowledged that broad discretion has been vested in the Board by Congress to formulate remedies.<sup>24</sup> Nevertheless, the Court has imposed two significant limitations on the Board's discretion: the sanction applied must be remedial rather than punitive,<sup>25</sup> and it must be appropriate to the particular situation before the Board.<sup>26</sup> In *Republic Steel Corp. v. NLRB*<sup>27</sup> the Court justified the punitive-remedial distinction as being in keeping with the remedial tone of the Act read as a whole.<sup>28</sup> Consequently, the Board cannot justify an order solely by showing that the remedy will deter unfair labor practices.<sup>29</sup> Rather, the remedy must be a reasonable attempt to compensate for the damage caused by the unfair labor practice. The second limitation is essentially a corollary of the first; a remedy not appropriate to the particular circumstances before the Board will be oppressive. Furthermore, an inappropriate remedy will fail to effectuate the policies of the Act.<sup>30</sup>

Within these limitations the Board may properly exercise considerable discretion. Too often, however, the NLRB resorts to preordained formulas that fail to safeguard adequately the rights guaranteed by the Act in the precise context before the Board.<sup>31</sup> In the J.P. Stevens cases the Board has restricted itself to the traditional framework of a cease and desist order accompanied by reinstatement with backpay and posting of notice orders. Only within the posting requirement has the NLRB attempted to tailor a remedy to fit the precise circumstances. Recognizing that the effects of Stevens' unfair labor practices extend beyond the plants directly involved, the Board in

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23. 29 U.S.C. § 160(c) (1970) provides that, upon a finding that an unfair labor practice has occurred, the Board "shall issue and cause to be served . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]."

24. *E.g.*, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940).

25. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

26. *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385 (1946); *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941).

27. 311 U.S. 7 (1940).

28. *Id.* at 10.

29. *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 658 (1961) (Harlan, J., concurring).

30. *See NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

31. *See Note, The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. PA. L. REV. 69 (1963).

*Stevens I*<sup>32</sup> and *II*<sup>33</sup> directed that the notice be mailed to each employee of the Stevens plants in North and South Carolina and copies posted at all such plants. The NLRB further ordered that the notice be read to all employees, convened during working time, by a Company spokesman.<sup>34</sup>

In *Stevens XII*<sup>35</sup> the NLRB found that Stevens, in violation of section 8(a)(4)<sup>36</sup> of the NLRA, had discriminated against two workers for having testified on behalf of the union at a hearing. The Board's remedy consisted only of an order to cease and desist and to post compliance notices at the plant where the violations occurred. Acting upon the TWUA's petition for review of the NLRB order, the Court of Appeals for the District of Columbia Circuit remanded the case to the Board for consideration of a more stringent remedial order.<sup>37</sup> In response, the Board granted only the Union's request that additional material be added to the notice and directed that it be posted at all of J.P. Stevens' plants in North Carolina, South Carolina and Georgia.<sup>38</sup>

The ineffectiveness of such orders is amply demonstrated by the continuing stream of unfair labor practice charges involving J.P. Stevens that have been brought before the NLRB. Currently, ninety-four such charges are pending.<sup>39</sup> There is no question that the Board can and should take J.P. Stevens' history of recalcitrance into account in designing its remedy.<sup>40</sup> The Board's challenge, then, is to construct a sanction severe enough to deter Stevens' anti-union campaign while complying with the punitive-remedial distinction imposed by the Supreme Court.<sup>41</sup> Although under Supreme Court standards, deter-

32. 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

33. 163 N.L.R.B. 217, *enforced as modified sub nom. Textile Workers Union v. NLRB*, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

34. This part of the order was later modified by the court of appeals to allow Stevens the option of having a Board representative read the notice. *Stevens I*, 380 F.2d at 304-05; *Stevens II*, 388 F.2d at 903-04.

35. 190 N.L.R.B. 751 (1971), *remanded*, 475 F.2d 973 (D.C. Cir.) (per curiam), *modified*, 205 N.L.R.B. 1032 (1973).

36. 29 U.S.C. § 158(a)(4) (1970).

37. 475 F.2d 973 (D.C. Cir. 1973) (per curiam).

38. 205 N.L.R.B. 1032 (1973).

39. See *Oversight Hearings on the National Labor Relations Board before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 128 (1975) (testimony of NLRB Chairman Betty Murphy). It should be noted that these 94 charges all involve discriminatory discharges and, hence, may not constitute a complete list of J.P. Stevens cases pending before the NLRB.

40. Cf. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969) (cost of Board delay properly borne by wrongdoing employer).

41. See text accompanying note 25 *supra*.

rence in itself is not sufficient to justify a Board order it is certainly desirable that a properly remedial order have that effect.<sup>42</sup>

The net effect of fourteen years of unfair labor practices by J.P. Stevens has been to deny Stevens' employees their section 7<sup>43</sup> guaranteed rights to organize and bargain collectively.<sup>44</sup> Effective redress for this ultimate violation of section 8(a)(1)<sup>45</sup> should both compensate the party wronged and withhold from the wrongdoer the fruits of its violation.<sup>46</sup> Only the unique remedy of monetary compensation for loss of section 7 rights will serve directly to accomplish both these ends.

While employees choose to be represented by a union for a variety of reasons, it is axiomatic that the principal reason is economic. Employees want the opportunity to bargain collectively through a union because invariably there is a significant and direct monetary gain to them as a result of the first collective bargaining contract.<sup>47</sup> Thus, the economic value of the right to organize is the monetary gain that the employee may reasonably expect to obtain if the employer cooperates in the collective bargaining process. A compensatory remedy would direct Stevens to make its employees whole for the lost wages.

Correspondingly, the economic benefit to the employer may be measured by the increased wages not paid to its employees.<sup>48</sup> A related benefit to J.P. Stevens lies in the weakened support of the TWUA by Stevens' employees. As a result of Stevens' flagrant unfair labor

42. *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 659 (1961) (Harlan, J., concurring).

43. 29 U.S.C. § 157 (1970).

44. In light of this pattern of unfair labor practices it seems doubtful that Stevens' employees can freely exercise their right to organize. See Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209 (1963). This study of 20,153 elections (of which 267 were re-runs) held between 1960 and 1962 shows that in over two-thirds of the cases in which re-run elections were held the party who caused the election to be set aside by its unfair practices won the re-run election. See *id.* at 212. Further, certain unfair labor practices are more effective than others in destroying election conditions. Threats of economic reprisals are clearly the most effective. See *id.* at 216. Finally, time appears to be a major factor. The study shows that if the re-run is held within thirty days of the election or more than nine months after, the chances of a different result are only one in five. *Id.* at 221. Thus, it appears unlikely in the J.P. Stevens situation that the union can expect an untainted election in the near future.

45. 29 U.S.C. § 158(a)(1) (1970) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

46. See *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889, 894 (6th Cir. 1965).

47. See Ross, *Analysis of Administrative Process Under Taft-Hartley*, in 1966 LABOR RELATIONS YEARBOOK 299, 306; Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059, 1082-85 (1968).

48. The average pay of textile workers, excluding overtime pay, is \$3.38 per hour, as compared to an average of \$4.84 for all manufacturing production workers. 1976 Hearings, *supra* note 6, at 153.

practices, the union has proven itself too weak to bargain effectively when it has reached the bargaining table.<sup>49</sup> A final benefit inuring to Stevens lies in its improved competitive position in the marketplace as a result of its artificially low labor costs.<sup>50</sup> This last benefit should be of special concern to the NLRB in that it would seem to act as a continuous inducement for other employers, particularly other textile manufacturers, to violate flagrantly the NLRA. Thus, an order designed to make Stevens employees economically whole for the denial of their guaranteed right to organize is appropriate.<sup>51</sup>

In the context of J.P. Stevens' massive violations of section 8(a)(1), a make whole order cannot be classified as punitive. Employees would not be enriched by such a remedy; rather, they would merely be afforded monetary compensation equivalent to the loss sustained. Arguably, an order directing Stevens to make its employees whole for lost wages is less than fully compensatory in that it fails to account for the intangible benefits of a collective bargaining contract such as dignity and job security.<sup>52</sup> Nor can this make whole remedy be dismissed as speculative.<sup>53</sup> The rule barring recovery of uncertain damages does not preclude the recovery of damages that are definitely attributable to the wrong and only uncertain as to their amount.<sup>54</sup> When the nature of the wrongful act itself precludes the ascertainment of the

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49. The TWUA won an election at the J.P. Stevens plant in Roanoke Rapids, North Carolina on August 28, 1974. No contract has resulted, however. Rather, the union has filed refusal to bargain charges with the NLRB, under § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970). *Id.* at 191-92.

50. See note 48 *supra*.

51. The economic value of the right to organize is borne out by a recent study that found that a collective bargaining contract resulted in 86% of the cases in which the union was recognized by the employer as required by law. Ross, *supra* note 47, at 306. It should be noted that the appropriateness of this remedy is not undermined by recognition of the fact that section 7 also guarantees the right to refrain from self-organization. The reasonable expectation of monetary gain from the collective bargaining process is not dependent upon whether an employee supports the union or not. Rather, that expectation is a constant, an objective factor that must be weighed by the fully informed employee in deciding whether he wants union representation. In this context, the economic value of the right foregone is equal to that of the right exercised.

52. In theory, a make whole remedy is less oppressive than the common reinstatement with backpay remedy for discriminatory discharge cases. There the employer must in essence pay twice for the same work—once to the discharged worker and once to the worker hired to replace him. See *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), *enforcement denied sub nom. UAW v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971) (*per curiam*).

53. For a discussion of the mechanics of determining the amount of compensation, see Note, *Monetary Compensation as a Remedy for Employer Refusal to Bargain*, 56 GEO. L.J. 474, 497-504 (1968).

54. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

amount of damages with certainty, the wrongdoer must bear the risk of the uncertainty that he has created.<sup>55</sup> Without question the Board is empowered to order relief that merely approximates the conditions that would have prevailed in the absence of an unfair labor practice.<sup>56</sup>

The Board's decision in *Ex-Cell-O Corp.*<sup>57</sup> raises a more significant objection. In that case the NLRB denied a union's request for a make whole remedy on the ground that such an order would constitute a compelled agreement in violation of section 8(d) of the NLRA.<sup>58</sup> *Ex-Cell-O Corp.*, however, involved a section 8(a)(5) unlawful refusal to bargain.<sup>59</sup> In that context, the make whole remedy operates as a direct, though retroactive, intervention in the bargaining process. In contrast, the J.P. Stevens make whole order would be designed to remedy violations of section 8(a)(1).<sup>60</sup> Presumed contracts benefits, in the form of lost wages, merely serve, in the section 8(a)(1) context, as a device to measure the injuries sustained by Stevens employees. The Board would not be interfering in any ongoing bargaining process. Thus, the J.P. Stevens make whole order cannot be characterized as a compelled agreement, "any more than a statutory treble damage action under the antitrust laws becomes a 'contract' action" merely because the plaintiff's damages "are measured in part by the estimated more favorable contract terms [he] would have secured but for the unlawful conspiracy."<sup>61</sup>

As an alternative to this section 7 make whole remedy, the NLRB might direct J.P. Stevens to bargain with the TWUA, despite the union's failure to win a representation election. The Supreme Court, in *NLRB v. Gissel Packing Co.*,<sup>62</sup> specifically authorized such a bargaining order. Balancing the sometimes conflicting goals of deterring employer misbehavior and effectuating employee free choice, the Court found that two circumstances justify the bargaining order remedy. First, even when a union has never demonstrated majority support

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55. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. at 265.

56. See *NLRB v. Mooney Aircraft Inc.*, 375 F.2d 402 (5th Cir.), cert. denied, 389 U.S. 859 (1967); *F.W. Woolworth Co. v. NLRB*, 121 F.2d 658 (2d Cir. 1941).

57. 185 N.L.R.B. 107 (1970), enforcement denied sub nom. *UAW v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971) (per curiam).

58. 29 U.S.C. § 158(d) (Supp. V 1975) prohibits the Board from compelling either party to agree to a proposal or make a concession. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

59. 29 U.S.C. § 158(a)(5) (1970).

60. *Id.* § 158(a)(1).

61. *St. Antoine, A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039, 1053 (1968).

62. 395 U.S. 575 (1969).

in an appropriate unit, the Board may issue a bargaining order when the employer's unfair labor practices are so "outrageous" and "pervasive" that their "coercive" effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."<sup>63</sup> Second, when the employer's unfair labor practices are less pervasive, the Board may issue a bargaining order upon a finding, not only that a fair election is improbable, but also that at one point the union had majority support.<sup>64</sup> The rationale behind the Court's decision is clear: if the Board could enter only a cease and desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him to profit from his wrongful acts, while at the same time severely curtailing the employees' right freely to determine whether they desire union representation.<sup>65</sup> The Board, however, has traditionally been reluctant to issue a bargaining order without a finding that the union at one time had majority support.<sup>66</sup>

The NLRB has issued a bargaining order in only one of its fifteen *Stevens* decisions.<sup>67</sup> In enforcing that order, the court of appeals held that, though the Board had carefully based its order upon a finding of majority status, a bargaining order would have been appropriate even if the Union had never possessed majority support.<sup>68</sup> This holding lends considerable support to the proposition that the *Stevens* situation fits well within the first set of circumstances that the Supreme Court found to justify a bargaining order and, consequently, it should be unnecessary for the Union to prove it once had majority support. The efficacy of a bargaining order in the J.P. *Stevens* context, however, remains open to question. In theory, the bargaining order deters interference with employees' rights to organize by making such unfair labor practices unprofitable. That deterrent force is completely undercut when the employer is willing, as J.P. *Stevens* obviously is,<sup>69</sup> to continue its unfair

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63. *Id.* at 613-14 (quoting *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967)).

64. *Id.* at 614-15.

65. See *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1943).

66. See, e.g., *Stevens I*, 157 N.L.R.B. 869, 877 (1966), enforced as modified, 380 F.2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967); *Stevens VII*, 179 N.L.R.B. 254, 254 n.2 (1969), enforced, 441 F.2d 514 (5th Cir.), cert. denied, 404 U.S. 830 (1971).

67. *Stevens VII*, 179 N.L.R.B. 254 (1969), enforced, 441 F.2d 514 (5th Cir.), cert. denied, 404 U.S. 830 (1971).

68. 441 F.2d at 522.

69. J.P. *Stevens*' reaction to the bargaining order in *Stevens VII* was to refuse to bargain in good faith. Finally, in 1975, *Stevens* closed down the plant involved, allegedly for economic reasons. 1976 *Hearings*, supra note 6, at 187-88.

labor practices by refusing to bargain in good faith. Experience has indicated that the Board is unable to devise an adequate remedy for section 8(a)(5) refusals to bargain.<sup>70</sup>

The same practical considerations militate against an order directing the employer to negotiate contract benefits retroactively to the time the bargaining would have occurred if the employer had accepted its statutory responsibility.<sup>71</sup> Given J.P. Stevens' history of anti-unionism, it seems likely that such an order would only reinforce Stevens' intransigence. Therefore, it appears that only the section 7 make whole remedy will serve to deter Stevens' unfair labor practices and to compensate its employees. While both the bargaining order and the retroactive bargaining order hold out the promise of deterrence and compensation, in practice it appears that neither are adequate to counter J.P. Stevens' "intransigent recidivism."

#### CONTEMPT REMEDIES

Section 10(e) of the NLRA<sup>72</sup> provides that the Board may petition the federal courts of appeals for enforcement of its orders. As the Supreme Court has recognized,<sup>73</sup> this section contemplates that a future contempt proceeding may be necessary either to ensure compliance with or punish disregard for the court-enforced order. The contempt power is particularly well suited for cases of repeated flagrant violators of the NLRA such as J.P. Stevens. Unrestricted by statutory limitations, a court's power to design contempt sanctions to fit the circumstances of the case before it is almost completely discretionary.<sup>74</sup>

In most cases the civil contempt power, as opposed to the criminal contempt power,<sup>75</sup> is more suitable to the labor law con-

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70. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970). See also Schlossberg & Silard, *supra* note 47, at 1059.

71. See *A Survey of Labor Remedies*, 54 U. VA. L. REV. 38, 52 (1968).

72. 29 U.S.C. § 160(e) (1970).

73. See *NLRB v. Warren Co.*, 350 U.S. 107 (1955).

74. See *Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966) (auxiliary deputy deprived of badge). See generally Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 267-82 (1971).

75. In contrast to civil contempt cases, use of the criminal contempt power brings into play the constitutional safeguards of the criminal process. In the context of a labor law violation, two of these safeguards are problematical. The criminal process requires proof beyond a reasonable doubt, a standard of proof that might cause many violations to go unpunished given the abundant possibilities for inventing legitimate sounding excuses for many unfair labor practices. Further, the court may not order imprisonment of more than six months without affording the contemnor the right to a jury trial—and juries have often reached questionable results in the controversial atmosphere of labor trials. See Bok, *The Regulation of Campaign Tactics in Representa-*

text.<sup>76</sup> A civil contempt order may be coercive, compensatory or both, while, in contrast, the purpose of a criminal contempt proceeding is to vindicate the court's authority.<sup>77</sup> The Second Circuit's 1972 civil contempt order against Stevens,<sup>78</sup> however, failed to accomplish either end. In its order, the Second Circuit, rather than directing a monetary penalty, attempted to protect the union's organizational activities by affording the union "similar facilities" to respond to the Stevens' anti-union representations.<sup>79</sup> The order has failed to deter Stevens' anti-union campaign; in 1973 the NLRB filed a second petition for adjudication in civil contempt with the Second Circuit.<sup>80</sup> A third petition was filed in 1976.<sup>81</sup>

A more viable alternative to the Second Circuit's approach is suggested by the Fifth Circuit's recent contempt orders in *NLRB v. Schill Steel Products Inc.*<sup>82</sup> and *NLRB v. Johnson Manufacturing Co.*<sup>83</sup> In *Schill Steel Products*, the court found that the company had arbitrarily refused to sign an agreed-upon contract in violation of an earlier court order to bargain in good faith.<sup>84</sup> In its purgative order the court directed the company, in addition to executing the contract, to make its employees whole for all wages and benefits lost as a result of the company's refusal to sign the agreement.<sup>85</sup> In *Johnson Manufacturing Co.* the Fifth Circuit held the company in contempt of an earlier contempt order to bargain in good faith.<sup>86</sup> In its contempt order, the court fashioned a make whole remedy for the union, directing the company to reimburse the union for its expenses incurred by reason of the company's failure to comply with the first contempt order.<sup>87</sup>

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*tion Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 125-26 (1964).

76. The most significant limitation on the civil contempt power as a tool in enforcing the NLRA is the Board's traditional reluctance to petition for adjudications in contempt. During fiscal 1975, only 30 petitions for adjudication in contempt for non-compliance with decrees enforcing Board orders were filed, 29 seeking civil contempt relief and 1 seeking criminal sanctions. 40 NLRB ANN. REP. 172 (1975).

77. See Dobbs, *supra* note 74, at 235-49.

78. *NLRB v. J.P. Stevens & Co.*, 464 F.2d 1326, 1348 (2d Cir. 1972).

79. See 1976 Hearings, *supra* note 6, at 184. The Fifth Circuit has not yet issued its contempt order.

80. *Id.* at 169-70.

81. *Id.*

82. 480 F.2d 586 (5th Cir. 1973).

83. 511 F.2d 153 (5th Cir. 1975).

84. 480 F.2d at 592-93.

85. *Id.* at 598.

86. 511 F.2d at 154. The earlier order is reported in *NLRB v. Johnson Mfg. Co.*, 458 F.2d 453 (5th Cir. 1972).

87. 511 F.2d at 157.

Given the particular circumstances of the J.P. Stevens situation, it apparently is within the court's contempt power to construct a remedy designed to make Stevens employees whole for the losses sustained as a result of Stevens' flagrant unfair labor practices.<sup>88</sup> The chief advantage of such an order is its effect of removing the profit factor from the past contemptuous violations of court-enforced NLRB orders.<sup>89</sup> The contempt stage is crucial to the statutory scheme for preventing unfair labor practices; it is incumbent upon the courts to design contempt orders that, in the precise context of the cases before the court, will deter violations of the NLRA.

### CONCLUSION

J.P. Stevens, by its adamant refusal to recognize its employees' rights to self-organization, has challenged the integrity of the NLRA. In *Stevens III*,<sup>90</sup> Trial Examiner Boyd Leedom, a former Chairman of the NLRB, suggested that it may be impossible within the framework of the NLRA to devise a remedy that will right the wrongs of an employer who persists in violations in the manner that Stevens has persisted. Such defeatism belies the considerable discretion vested in the Board's remedial powers and the court's contempt powers. As Justice Whittaker noted in *Local 60 v. NLRB*,<sup>91</sup> "It is certain that Congress did not intend by the Act 'to hold out to [employees] an illusory right for which it was denying them a remedy.'"<sup>92</sup>

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88. See text accompanying notes 47-52 *supra*.

89. In contrast, the coercive fine is purely prospective. Its intent is merely to forestall future violations. Although a coercive fine might serve as a valuable adjunct to a make whole order, such a fine alone would allow Stevens to retain a handsome profit from its past violations.

90. 167 N.L.R.B. 266, 303 (1967), *enforced as modified*, 406 F.2d 1017 (4th Cir. 1968).

91. *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961).

92. *Id.* at 662 (Whittaker, J., dissenting) (quoting *Graham v. Brotherhood of Firemen*, 338 U.S. 232, 240 (1949)) (brackets in original).