

Spring 1968

Runaway Shop: Enforced Bargaining at a New Location

Recommended Citation

Runaway Shop: Enforced Bargaining at a New Location, 2 Val. U. L. Rev. 379 (1968).
Available at: <http://scholar.valpo.edu/vulr/vol2/iss2/8>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



RUNAWAY SHOP: ENFORCED BARGAINING AT A NEW LOCATION

INTRODUCTION

“Runaway shop” is the common term for the relocation of operations by an employer without first bargaining with the statutory representative of its employees,¹ or the relocation with the primary intent of escaping this representative.² This term applies to a relocation rather than an actual termination of operations.³

The National Labor Relations Board has been dealing with the “runaway” shop almost since the inception of the Board. While the NLRA does not expressly condemn the “runaway” shop, the Board has held that the relocation may constitute three separate unfair labor practices under section 8 of the Act.⁴ First, it can constitute a violation of section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by section 7 [which among other things guarantees employees the right to organize].”⁵ Secondly, there can be a violation of 8(a)(3), which states that an employer commits an unfair labor practice if he “by discrimination in regard to hire or tenure of employment or any term or condition of employment . . . encourage[s] or discourage[s] membership

1. *E.g.*, Sidele Fashions, Inc., 133 N.L.R.B. 547, 552-54 (1961), *enforced sub nom.*, Philadelphia Dress Joint Board v. NLRB, 305 F.2d 825 (3d Cir. 1962); Industrial Fabricating Inc., 119 N.L.R.B. 162, 163-72 (1957), *enforced sub nom.*, NLRB v. Mackneish, Inc., 272 F.2d 184 (6th Cir. 1959); Schieber Millinery Co., 26 N.L.R.B. 937 (1939), *modified by consent*, 116 F.2d 281 (8th Cir. 1940); California Footwear Co., 114 N.L.R.B. 765, 771 (1955), *enforced in part sub nom.*, NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957).

2. Garwin Corp., 153 N.L.R.B. 664, 676 (1965), *enforcement denied sub nom.*, Local 57, International Ladies' Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir. 1967). *See* NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962).

3. An employer may terminate his business “for any reason he pleases.” Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965). *See* Getman, *Section 8 (a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 752-55 (1965). Determining the existence of a relocation rather than a termination may require proof of the relationship between an old business operation and a new one. *See* Garwin Corp., 153 N.L.R.B. 664 (1965); California Footwear Co., 114 N.L.R.B. 765 (1955).

4. Schieber Millinery Co., 25 N.L.R.B. 937 (1939), *modified by consent*, 116 F.2d 281 (8th Cir. 1940).

5. National Labor Relations Act § 8, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (1964).

6. *Id.* at § 8 (a)(1), 29 U.S.C. § 158 (a)(1). New Madrid Mfg. Co., 104 N.L.R.B. 117 (1953); S. & K. Knee Pants Co., 2 N.L.R.B. 940 (1937); J. Klotz & Co., 13 N.L.R.B. 746, 781 (1939).

in any labor organization.”⁷ This unfair labor practice attaches when the relocation results in the discharge of employees.⁸ Thirdly, a relocation can constitute an unfair labor practice under section 8(a)(5) if the employer “refuse[s] to bargain collectively with the representative of his employees. . . .”⁹ This subsection prohibits the “secret move.”¹⁰

Section 10(c) of the NLRA states that the Board, upon finding an unfair labor practice,

shall issue . . . an order requiring such person to cease and desist from such unfair labor practice [listed in section 8], and to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of this Act.¹¹

Under this section, the Board’s usual action in “runaway” shop cases is to order the employer to provide reinstatement, backpay, and travel and moving expenses.¹²

The Board’s order is usually framed in the alternative, allowing the employer to return to his old site or to remain at his new one.¹³ If the employer chooses to return, he is required to offer reinstatement at the old plant to his old employees.¹⁴ If he elects to remain at his new site,

7. National Labor Relations Act § 8(a)(3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (a)(3) (1964). See *Winchester Electronics, Inc.*, 128 N.L.R.B. 1292 (1960); *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954).

8. *Winchester Electronics, Inc.*, 128 N.L.R.B. 1292 (1960); *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954). See Getman, § 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice, 32 U. CHI. L. REV. 735 (1952).

9. National Labor Relations Act § 8(a)(5), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (a)(5) (1964). See *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954). For a discussion of labor violations of runaway shops see 7 HARV. L. REV. 1100 (1964).

10. *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954); *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999 (1953).

11. 61 Stat. 147 (1947), 29 U.S.C. § 160 (c) (1964) (Emphasis added).

12. *Mount Hope Finishing Co.*, 106 N.L.R.B. 480, 502 (1953); *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 172 (1957); *J. Klotz & Co.*, 13 N.L.R.B. 746, 781 (1939); *Sidele Fashions, Inc.*, 133 N.L.R.B. 547, 557 (1961).

13. E.g., *Sidele Fashions, Inc.*, 133 N.L.R.B. 547, 557 (1961), *enforced sub nom.*, *Philadelphia Dress Joint Board v. NLRB*, 305 F.2d 825 (3d Cir. 1962); *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 172 (1957), *enforced sub nom.*, *NLRB v. Mackneish*, 272 F.2d 184 (6th Cir. 1959).

For a discussion of the reasons for the alternative remedy see Comment, 7 VILL. L. REV. 450, 464-65 (1962).

The alternative remedy solution to the runaway shop has met dissent on the Board on the ground that it allows the employer to enjoy the fruits of his unfair labor practice. *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369 (1954).

14. *California Footwear Co.*, 114 N.L.R.B. 765, 771 (1955), *enforced in part sub nom.*, *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957); *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 1373 (1954), *enforcement denied per curiam*, 226 F.2d 743 (6th Cir. 1955); *Mount Hope Finishing Co.*, 106 N.L.R.B. 480, 502 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954); *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 172 (1957), *enforced sub nom.*, *NLRB v. Mackneish*, 272 F.2d 184 (6th Cir. 1959). In *Darlington Mfg. Co.*, 139 N.L.R.B. 241, 258 (1962), where the employer was held to constitute a “single employer,” the Board directed reinstatement at the employer’s other

however, he must not only offer reinstatement, but must also pay his employees' travel and moving expenses.¹² If the reinstatement at the new site is accepted by the old employees (discriminatees), the workers at the new site (replacements) may be discharged to make room for the old employees.¹⁶ If insufficient work is available at the new site, the old employees not reinstated will usually be placed on a preferential hiring list.¹⁷

Backpay orders are almost invariably attached to reinstatement orders.¹⁸ The backpay that is awarded can cover the period from the time of the illegal shutdown until 1) the employee is offered reinstatement at the old site,¹⁹ 2) he accepts reinstatement at the new one,²⁰ 3) the employee is put on a preferential hiring list,²¹ or 4) he obtains substantially equivalent employment.²² The backpay award is reduced by the actual earnings of the employee²³ or by the amount that he could have earned²⁴ during the indicated period.

An additional remedy applied by the Board in some situations is an order to bargain with the old union at the new location.²⁵ The enforced

mills, if the Darlington mill was not reopened. But the Board did not order the employees at the other mills to be discharged if necessary to insure the discriminatees of getting jobs.

15. Mount Hope Finishing Co., 106 N.L.R.B. 480, 502 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954); Industrial Fabricating, Inc., 119 N.L.R.B. 162, 172 (1957), *enforced sub nom.*, NLRB v. Machneish, 272 F.2d 184 (6th Cir. 1959); J. Klotz & Co., 13 N.L.R.B. 746, 781 (1939); Sidele Fashions, Inc., 133 N.L.R.B. 547, 557 (1961), *enforced sub nom.*, Philadelphia Dress Joint Board v. NLRB, 305 F.2d 825 (3d Cir. 1962).

16. Mount Hope Finishing Co., 106 N.L.R.B. 480, 502 (1953); Industrial Fabricating, Inc., 119 N.L.R.B. 162, 172 (1957). In Garwin Corp., 153 N.L.R.B. 664, 666 n.6 (1965) the Board stated: "The standard 8 (a) (3) remedy requires discharge of replacements if necessary to reinstate discriminatees."

17. California Footwear Co., 114 N.L.R.B. 765, 772 (1955); Tennessee-Carolina Transp., Inc., 108 N.L.R.B. 1369, 1373 (1954); Industrial Fabricating, Inc., 119 N.L.R.B. 162, 172 (1957); Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1029 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963). In Williams Motor Co., 31 N.L.R.B. 715 (1941), however, the dissent maintained that to be placed on a preferential hiring list is really no remedy at all—not a return to the *status quo*, because the employee "might be on that list forever." *Id.* at 738.

18. In a few cases, reinstatement alone has been the remedy, but this has been applied only when the employer's new location is in the same area as the old. Omaha Hat Corp., 4 N.L.R.B. 878, 894 (1938); Robinson & Golluber, 2 N.L.R.B. 460, 470 (1936).

19. Mount Hope Finishing Co., 106 N.L.R.B. 480, 502 (1953); Industrial Fabricating, Inc., 119 N.L.R.B. 162, 172 (1957); California Footwear Co., 114 N.L.R.B. 765, 772 (1955); Tennessee-Carolina Transp., Inc., 108 N.L.R.B. 1369, 1373 (1954).

20. *Id.*

21. Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1029 (1962); Industrial Fabricating, Inc., 119 N.L.R.B. 162, 172 (1957).

22. Darlington Mfg. Co., 139 N.L.R.B. 241, 255 (1962); Sidele Fashions, Inc., 133 N.L.R.B. 547, 557 (1961).

23. Sidele Fashions, Inc., 133 N.L.R.B. 547, 555 (1961); California Footwear Co., 114 N.L.R.B. 765, 807 (1955).

24. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941).

25. See notes 81 & 82 *infra* and accompanying text.

bargaining remedy is designed to restore the collective bargaining relationship established by the employees at the old site.

In 1965, in a decision concerning the relocation of the Garwin Corporation,²⁶ the Board ordered the relocated *alter ego* of Garwin²⁷ to bargain with its old union at the new site,²⁸ regardless of that union's majority or minority status at the new site.²⁹ The United States Court of Appeals for the District of Columbia denied enforcement of this order.³⁰

This note considers the remedy of enforced bargaining at the new site and its status after the *Garwin* decisions.

BOARD'S AUTHORITY TO FRAME REMEDIES

The NLRA directs the Board "to take such affirmative action . . . as will effectuate the policies of this Act."³¹ On its face this directive appears to give the Board wide discretion in the framing of remedies. The Supreme Court held recently in *Fibreboard Corporation v. NLRB*³² that it would not disturb a board order "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."³³

The courts have not given a literal interpretation to the statutory directive of section 10(c).³⁴ They have interpreted the Board's authority as confined to the framing of remedies that are remedial and not punitive in nature.³⁵ In 1938, *Consolidated Edison Company v. NLRB* contained what may be the first use by the courts of this remedial-punitive test as a criterion upon which to grant or deny enforcement to a Board order.³⁶ The Supreme Court there stated:

We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order.

26. 153 N.L.R.B. 664 (1965).

27. The relocated Garwin was operating in Florida under the name of S'Agaro, Inc. *Id.*

28. *Id.* at 666.

29. *Id.*

30. Local 57, International Ladies' Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir. 1967).

31. National Labor Relations Act § 10 (c), 61 Stat. 147 (1947), 29 U.S.C. § 160 (c) (1964).

32. 379 U.S. 203 (1964).

33. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

34. Comment, *Labor Law*, 7 VILL. L. REV. 450, 465 (1962).

35. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

36. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

The power to command affirmative action is remedial not punitive, and is to be exercised in aid of the Board's authority to restrain violation and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.³⁷

The remedial-punitive distinction has met some criticism. One criticism is that the purpose of the distinction is to provide a "peg" for the reviewing court's decision.³⁸ The courts may be employing the doctrine to create a test of reasonableness for the Board's orders,³⁹ rather than limiting their determination to whether the order effectuates the policies of the Act as defined in section 1.⁴⁰ Moreover, determining what is "remedial" and what is "punitive" may be merely a matter of semantics.⁴¹

ARGUMENT FOR THE USE OF THE REMEDY

Various arguments may be advanced supporting the validity of the remedy of enforced bargaining at the new site. One such argument is that it completes the Board's attempt to restore conditions to the *status quo ante*—those existing before the commission of the unfair labor practice. The orders of reinstatement, backpay, and travel and moving expenses all endeavor to put the injured employees in the position they would have been in, absent the employer's unfair labor practice.⁴² The order to bargain furthers this restoration by reinstating the bargaining relationship established prior to the unfair labor practice. Admittedly, in "runaway" shop cases the policy of complete restoration of the status quo would seem to require a direct return order. The Board, although claiming that it is within its authority to order a "runaway"

37. *Id.* at 235.

38. 89 U. P. A. L. REV. 648, 655 (1941).

39. Comment, *Labor Law*, 7 VILL. L. REV. 450, 465 (1962); 2 CCH Lab. L. Rep. ¶ 3795 (1961).

40. 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

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, for the purpose of negotiating the terms and conditions of employment . . .

41. In *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953), the Court stated: It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does . . . and what order does not, bear appropriate relation to the policies of the Act.

42. *Republic Steel Corp.*, 9 N.L.R.B. 219, 385 (1938), *modified*, 311 U.S. 7 (1940); *J. Klotz & Co.*, 13 N.L.R.B. 746, 778 (1939); *Schieber Millinery Co.*, 26 N.L.R.B. 937, 966 (1940).

employer to return to its old site,⁴³ has sought to remedy illicit relocations without resorting to this order.⁴⁴ If the Board may order the employer to return, an order requiring that the employer bargain with the very union it was trying to escape would seem to offer the next best alternative. In fact, as an attempted restoration, enforced bargaining at the new site is less adverse to the employer's interests than an order to return.⁴⁵

While the order to bargain is usually not applied where it is assumed that no employees will relocate,⁴⁶ the Board in *Garwin* argued that the order would serve the policies of the Act regardless of the number of employees actually relocated.⁴⁷ Because of the economic and geographic circumstances in *Garwin*, the standard remedies of reinstatement, back-pay, and travel and moving expenses would have little impact on the employer, and would allow him to benefit from his unfair labor practice. As stated by the dissent in the Court of Appeals review of the *Garwin* case:

In the present case, the Board reexamined its policy and found it inadequate, at least in relation to an employer whose purpose to throw off its union obligations coincided with economic and geographic circumstances which minimized the penalty to be anticipated under the Board's usual approach. Because those measures would permit *Garwin* to retain the fruits of its unfair labor practices at slight cost, the Board determined to take additional steps to remedy the deliberate evasion of the statutory responsibilities portrayed by this record.⁴⁸

The New York employees of *Garwin* were women who had family ties in New York and who could not feasibly accept reinstatement.⁴⁹ Refusing

43. *J. Klotz & Co.*, 13 N.L.R.B. 746, 778 (1939) (dictum).

44. 2 CCH Lab. L. Rep. ¶ 3795.50 (1961). Arbitrators, however, have ordered runaway employers to return and the courts have upheld the orders. 34 Lab. Arb. 771, *affirmed*, 34 Lab. Arb. 876 (N.Y. Sup. Ct. 1960). In 1936 a New York court ordered a runaway employer to return on the basis of a contract provision stating that "removal of factories beyond the 5-cent fare carrier limit was forbidden." This move was from New York to Pennsylvania. *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N.Y.S. 898 (Sup. Ct. 1936).

45. *See Garwin Corp.*, 153 N.L.R.B. 664, 666 (1965).

The union in *Garwin* appealed the Board's decision because the Board had not ordered *Garwin* to return. *Local 57 International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 300 n.7 (D.C. Cir. 1967).

46. *Garwin Corp.*, 153 N.L.R.B. 664, 682 (1965). The Trial Examiner would not recommend the compulsory bargaining order because he felt bound by the fact that the Board had not previously, under similar circumstances, made such an order.

47. *Id.* at 666.

48. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 307 (D.C. Cir. 1967).

49. *Id.* at 305.

reinstatement would necessarily preclude their incurring any travel and moving expenses. The tight labor market in New York would minimize any backpay liability that would attach to Garwin.⁵⁰

The dissents in other Board decisions have decried the inadequacy of a remedy that allows an employer to enjoy the fruits of its unfair labor practices with relative ease.⁵¹ In these cases the employers had closed departments in their businesses and moved the departments in an effort to thwart attempts at unionization.⁵² The dissents, pointing out that the "effectuation of the policies of the Act is achieved by restoration in so far as possible of the *status quo* existing before the commission of the unfair labor practices,"⁵³ advocated the issuance of an order requiring the employers to reopen their closed departments and reinstate the discharged employees.⁵⁴ Failure to adopt this form of remedy, it was contended, permitted the employer to enjoy the fruits of his unfair labor practices.⁵⁵

The order to bargain could force an unwanted union upon the employees in the new location. However, it might not be harsh to impose a bargaining agent on employees who owe the existence of their jobs to the unfair labor practice of the employer.⁵⁶ The Board in *Garwin* maintained that the rights of the newly hired employees in Florida to choose or not to choose their own bargaining representative "must yield to the statutory objective of fashioning a meaningful remedy to the unfair labor practices found."⁵⁷

The dissenting judge in the Court of Appeals decision in the *Garwin* case bolstered his argument for imposition of a bargaining agent on the new employees by an analogy to single location cases in which the union loses its majority after employer unfair labor practices. The dissent stated that it "is clear that an absence of majority status will not always defeat an order to bargain."⁵⁸ In *Franks Brothers v. NLRB*,⁵⁹ the Supreme Court rejected the argument that an order requiring an employer to bargain with a minority union is an improper remedy, because it does not take into account the desires of the majority of employees who do not

50. *Id.*

51. *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 1374 (1954); *Williams Motor Co.*, 31 N.L.R.B. 715, 738 (1941); *Schieber Millinery Co.*, 26 N.L.R.B. 937 (1940).

52. *Id.*

53. *Williams Motor Co.*, 31 N.L.R.B. 715, 738 (1940).

54. *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 1374 (1954); *Williams Motor Co.*, 31 N.L.R.B. 715, 738 (1941); *Schieber Millinery Co.*, 26 N.L.R.B. 937 (1940).

55. *Id.*

56. 16 CATH. U. L. REV. 474, 478 (1967).

57. *Garwin Corp.*, 153 N.L.R.B. 664, 666 (1965).

58. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 306 (D.C. Cir. 1967). The dissent cites nine cases.

59. 321 U.S. 702, 705-06 (1944). Sections 9(c)(3) and 9(e)(2) of the Labor Management Relations Act state that no election shall be held in a bargaining unit within a twelve month period following a valid election.

want to be represented by that union. *NLRB v. U.S. Sonics Corporation*⁶⁰ justified the use of this remedy as an attempt to “foster stability in collective bargaining relations by requiring the employer to deal with the union.” Although distinguishing the criterion as inapplicable to the present situation, the court in *Garwin* stated the basis of such compulsory bargaining orders:

Underlying the Board’s compulsory bargaining orders is an eminently reasonable principle: those workers who have voted for a representative should not have their choice cancelled out by an employer’s unfair labor practice. If a union loses its majority because some workers were coerced or because the company wrongfully refused to bargain with it, restoration of the status quo calls for the Board’s recognition of the Union.⁶¹

Since the Board may refuse to recognize the statutory rights of the majority of workers to choose their own bargaining representative in the interest of “stability in collective bargaining relations,”⁶² it seems valid to assert that this “stability” also needs to be served in the *Garwin* “runaway” shop situation. In the words of the *Garwin* majority: the “union [lost] its majority . . . because the company wrongfully refused to bargain with it, [therefore] restoration of the status quo calls for Board recognition of the Union.”⁶³

The “runaway” shop situation presents conflicting policies: the exercise of free choice by the new employees and the preservation of the existing collective bargaining relationship. Arguably, the Board should have the latitude to accommodate one policy to another.⁶⁴

ARGUMENTS AGAINST THE USE OF THE REMEDY

The Court of Appeals maintained that it was of paramount importance whether the necessity of removing from the employer the benefits of his wrongdoing

standing alone and without relationship to redressing grievances of the New York workers, who suffered the violation of their statutory rights, is enough to justify infringing fundamental rights of comparable magnitude vested by law in the Florida

60. 312 F.2d 610, 616 (1st Cir. 1963).

61. *Local 57, International Ladies’ Garment Workers v. NLRB*, 374 F.2d 295, 301 (D.C. Cir. 1967).

62. *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610, 616 (1st Cir. 1963).

63. *Local 57, International Ladies’ Garment Workers v. NLRB*, 374 F.2d 295, 301 (D.C. Cir. 1967).

64. *See Local 57, International Ladies’ Garment Workers v. NLRB*, 374 F.2d 295, 307 (1967) (dissenting opinion).

workers.⁶⁵

The court held that once it is determined that the New York workers will not move to Florida, the Board can no longer contend that, in framing this order, it is balancing their rights against those of the Florida workers.⁶⁶ “[A]t this point the New York workers are out of the picture, and denial of the basic rights of the Florida workers simply does not effectuate the policies of the Act.”⁶⁷ In answer to the dissenting opinion which endorsed the order,⁶⁸ the majority insisted “on a proper balancing of rights.”⁶⁹ The dissent, it maintained, failed to note that “restoration of the status quo” means redress to injured employees and not punishment of employers.⁷⁰

This majority position emphasizes the framework within which the courts have held that the Board must operate. The *Garwin* majority cited *Republic Steel Corporation v. NLRB* for the proposition that “deterrence alone is not a proper basis for a remedy.”⁷¹ The court stated that “it has been established . . . that the purpose of Board remedies is to rectify the harm done the injured workers, not to provide punitive measures against errant employers.”⁷²

If deterrence were a valid basis for a Board order, the enforced bargaining order fails even to achieve that objective. Depending on the circumstances at the new site, the compulsory bargaining order could have various effects. If the union is not strong enough in the new location to obtain a majority status in one year, then the order is of no real value since the employer is able eventually to obtain an unorganized shop. If the union is strong in the new area and would be able to establish a majority at the very outset, then the order is seemingly unnecessary. The order will have an effect only in those situations in which the union will be able to obtain majority support within the one year period.⁷³

It seems unlikely, however, that an employer, motivated by animosity toward the union or an unwillingness to bargain with the union, will relocate his plant in an area in which the very organizations that he is

65. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 302 (D.C. Cir. 1967).

66. *Id.*

67. *Id.*

68. *Id.* at 304.

69. *Id.* at 303.

70. *Id.*

71. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 303 (D.C. Cir. 1967), citing *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

One writer maintains that the Board may fashion a remedy solely for its deterrent value. He contends that contrary implications of *Republic Steel* were “dispelled by *Phelps v. Dodge*.” 18 *STAN. L. REV.* 937, 942 (1966).

72. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 303 (D.C. Cir. 1967).

73. 18 *STAN. L. REV.* 937, 942-43 (1966).

trying to escape are strong and accepted by the people of the locality. The employer will in all likelihood relocate in an area in which unions are met with hostility.⁷⁴ Mr. Benjamin Wyle, General Counsel of the Textile Workers' Union of America, AFL-CIO, referred to these areas of hostility toward unions in 1961 while testifying before the Subcommittee on the National Labor Relations Board:

I raise the question with you in light of this new phenomenon which did not exist in the thirties and forties, of small communities in various parts of the country seeking to pirate industries away from other regions of the country and attempting to do so with all kinds of attractive propositions and offers, including the offer to keep unions out. . . .⁷⁵

If the employer has moved into an area, similar to that described above, in all probability the union would not be able to establish a majority prior to the expiration of the one-year compulsory bargaining period, and the employer would have the non-union shop he desired.

Not only will the compulsory bargaining order have little effect on the employer's position, it may have a detrimental effect upon the "full flow of commerce" referred to by section 1 of the Act.⁷⁶ A genuine threat to industrial peace is created by the attempt to force the employees to accept a bargaining agent with which they are not in sympathy and against which they may even be said to be hostile. In seeking to enforce its demands through the accepted medium of a strike, the union may find that it has no supporters. If the workers are not in sympathy with the union, they surely would not strike to help it obtain its goals. This would, in all likelihood, bring on conflicts and increase hostilities.⁷⁷

Another possible consequence of an order requiring the employer to bargain with a union that does not represent a majority of the workers is that the order might adversely affect the chances of the union to ultimately gain majority support within a similar one-year period.

In *Garwin* the Board assumed that none of the original employees would relocate.⁷⁸ This assumption seems to distinguish the basis for the argument that "absence of majority status will not always defeat an

74. The South, the primary area of relocations offers additional inducements such as tax concessions and low plant site rentals. 7 VILL. L. REV. 450, 451 (1962).

The biggest inducement, however, is the union hostility: "Unions are opposed by the pulpit, press and public." *Id.*

75. *Hearings Before the Subcomm. on National Labor Relations Board of the House Comm. on Education and Labor*, 87th Cong., 1st Sess., pt. 1 at 271 (1961).

76. National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

77. 18 STAN. L. REV. 937, 943 (1966).

78. *Garwin Corp.*, 153 N.L.R.B. 664, 666 (1965).

order to bargain."⁷⁹ As stated by the Court of Appeals in *Garwin*, the rationale underlying the single location cases that require bargaining in the absence of majority status is that the

interest being protected is the freedom of choice of the workers in a bargaining unit. The compulsory bargaining order is intended to put into effect what these workers had voted. Even when the majority of the plant vote against the union after an unfair labor practice and the swing votes are cast by new workers, a substantial number of workers still in the unit had opted for the union when free to do so. . . .⁸⁰

STATUS OF THE REMEDY AFTER GARWIN

The Short Move

The remedy at issue is not entirely new: the Board has applied it to "runaways" where the move was of such a short distance that the Board could assume that, absent the unfair labor practices, workers would have followed the employer to the new site.⁸¹

Prior to the *Garwin* decision, the Board relied upon the distance of the move in determining whether the union would be required to establish a majority at the new site before the employer would be required to bargain.⁸² If the distance between the old and the new site was not great, the Board "would order the employer to bargain with the union as the representative of the same unit of his employees at the new plant, without further proof of the union's representative status there."⁸³ If there was a considerable distance between the two plants, the Board, in an effort to "accommodate the remedy to the realities of the situation,"⁸⁴ conditioned its bargaining order on proof of the union's majority status at the new site.⁸⁵

The *Garwin* court pointed out that the Board's limiting the application of the enforced bargaining to short distance relocations had met with

79. See text accompanying notes 58-61 *supra*.

80. Local 57, International Ladies' Garment Workers v. NLRB, 374 F.2d 295, 301 (D.C. Cir. 1967).

81. *Id.* at 303.

82. *Id.*

83. Industrial Fabricating, Inc., 119 N.L.R.B. 162 (1957), *enforced per curiam sub nom.*, NLRB v. Mackneish, 272 F.2d 184 (6th Cir. 1959); Brown Truck and Trailer Mfg. Co., 106 N.L.R.B. 999, 1016 (1953); Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954); Rome Products Co., 77 N.L.R.B. 1217 (1948); New Madrid Mfg. Co., 104 N.L.R.B. 117, 124 (1953), *modified*, 215 F.2d 908 (8th Cir. 1954).

84. Industrial Fabricating, Inc., 119 N.L.R.B. 162, 174 (1957).

85. *Id.*

divided judicial response.⁸⁶ In *NLRB v. Lewis*,⁸⁷ the employer had moved its operations a distance of twelve miles.⁸⁸ The court enforced the Board's order requiring the employer to bargain with the old union at the new site. It asserted that it was a fair assumption that under a Board reinstatement order most of the old employees would follow the employer to its new site.⁸⁹ But in *NLRB v. Rapid Bindery, Incorporated*,⁹⁰ another "short-move" case, the court held that such an order "is not proper inasmuch as Union does not appear to represent any of the employees in the [new] plant."

In the *Garwin* appeal the Board attempted to distinguish *Rapid Bindery* on the grounds that there was no evidence of anti-union motivation in that case.⁹¹ The Court of Appeals did not accept this criterion of motivation as "a valid basis for an order."⁹² The court held the two cases to be conflicting and accepted the *Rapid Bindery* position.⁹³

Application of Garwin To All Situations

The regularly issued remedies (reinstatement, backpay, travel and moving expenses) are inconsequential in the context of the *Garwin* "runaway" shop.⁹⁴ In the *Garwin* situation the "economic and geographic circumstances . . . [minimize] the penalty to be anticipated under the Board's usual approach."⁹⁵ However, the ineffectiveness of other remedies should have no bearing on the acceptability of this remedy. The remedy of enforced bargaining at the new site should rise or fall on its own internal validity.

The approach of the Court of Appeals in *Garwin* presents arguments for a reevaluation of the remedy of enforced bargaining in "runaway" shop situations. The *Garwin* court emphasized that the Board should be concerned with remedying the infringed rights of the old site employees

86. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 303 (D.C. Cir. 1967).

87. *California Footwear Co.*, 114 N.L.R.B. 765 (1955), *enforced in part sub nom.*, *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957).

88. *NLRB v. Lewis*, 246 F.2d 886, 888 (9th Cir. 1957).

89. *Id.*

90. *Rapid Bindery, Inc. v. NLRB*, 293 F.2d 170, 177 (2d Cir. 1961).

91. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 303 (D.C. Cir. 1967).

92. *Id.*

93. *Id.* A footnote to the *Lewis* court's enforcement of the Board order stated that since the *alter ego* of California Footwear had disassociated itself from the company, the Board would impose no further duty to bargain with the local union, unless the two became associated again. This seems to raise the question of whether this case is good authority for the proposition of enforced bargaining at the new site, even in the short move situation. *NLRB v. Lewis*, 246 F.2d 886, 887 n.2 (9th Cir. 1957).

94. See notes 41-53 *supra* and accompanying text.

95. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 305 (D.C. Cir. 1967).

and not with the prevention of future relocations.⁹⁶ The reexamination of the Board's policy of ordering enforced bargaining should be undertaken with this criteria in mind.

The main inquiry in *Garwin* of whether, without a prior determination of the number of old employees who will accept reinstatement and relocate, it "is enough to justify infringing fundamental rights vested by law in . . . workers [at the new site]"⁹⁷ does not become meaningless just because the move involves a relatively short distance. The Board itself has failed to develop a definable criteria for distinguishing a "short" move from a "long" move. In *Rome Products Company*,⁹⁸ where the move was 110 miles, the Board ordered compulsory bargaining at the new site without a determination of the union's majority status. In *Industrial Fabricating, Incorporated*,⁹⁹ where the move was 100 miles, the Board held that proof of majority status at the new site was a prerequisite to union recognition. In *Brown Truck and Trailer Manufacturing Company*,¹⁰⁰ the Board refused to assume that the employees would have relocated with the employer even though the move involved 30 miles of open road. In the *Lewis* case, the Board assumed that the employees would move 12 miles across downtown Los Angeles.¹⁰¹

As presently constituted, the short move assumption could operate unfairly. For example, in the case of a short move in which the presumption is indulged that a majority of workers will relocate, no employees may in fact relocate.¹⁰² The new employees at the new site would then be burdened with an unwanted union. Such a situation would represent a failure to observe the balancing of the rights of employees made paramount by the *Garwin* court.¹⁰³ Conversely, in a longer move,¹⁰⁴ up to 50 per cent of the old employees could in fact relocate, yet be denied representation of their union.¹⁰⁵

Proposed Solution

The "balancing of rights" approach necessitates the existence of two

96. *Id.* at 303.

97. *Id.* at 302.

98. 77 N.L.R.B. 1217 (1948).

99. 119 N.L.R.B. 162 (1957).

100. 106 N.L.R.B. 999 (1953).

101. California Footwear Co., 114 N.L.R.B. 765 (1955).

102. See California Footwear Co., 114 N.L.R.B. 765 (1955). Here the "runaway" relocated a distance of 12 miles.

103. Local 57, International Ladies' Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir. 1967).

104. *E.g.*, the 30 mile move in Brown Truck and Trailer Mfg. Co., 106 N.L.R.B. 999 (1953).

105. There would be no incentive for the old employees to relocate until after the Board has ordered the "runaway" employer to offer his old employees reinstatement, backpay, and travel and moving expenses.

conflicting interests. In the "runaway" shop situation as it existed in *Garwin*, there is only one interest, that of the newly hired workers in Florida. In its decision the Board assumed that none of the old employees in New York would relocate.¹⁰⁶ In order to conform its procedure to the *Garwin* court's decision, the Board could require the union to make a showing of the number of employees willing to relocate. This should represent no great burden on the union. The union would merely be required to consult its members in the old area. The employer could then attempt to rebut this proof by evidence that the old employees have not and will not relocate. The employer does not want the union and he therefore has an interest in protecting the rights of the new employees. The court in *Garwin* states that the fact that the employer is asserting the rights of the new employees does not divest that assertion of its validity.¹⁰⁷

With this number as a basis of determination, the Board is then in a position to "weigh" the competing interests and to decide whether the number of employees willing to relocate is "substantial" enough to justify the imposition of the enforced bargaining order. In this context, it should be noted that the *Garwin* court stated that

Were the Board engaging in a genuine balancing of rights of newly hired workers against those of discriminatees whose places they took, we would allow it very wide scope.¹⁰⁸

By having obtained this information undertaken this "balancing of rights," the Board more nearly operates within the *Garwin* court's outline of permissible authority.¹⁰⁹ This approach might have the effect of restoring the validity of the compulsory bargaining order employed by the Board to require "an employer to bargain with an established union which loses its majority because of the employer's unfair labor practices."¹¹⁰ No requirement of majority status at the new site is necessary because "a substantial number of the workers still in the unit had opted for the union when free to do so. . . ."¹¹¹

This result finds authority in *Franks Brothers Company v. NLRB*.¹¹² There the Supreme Court in enforcing a compulsory bargaining order stated:

106. *Garwin Corp.*, 153 N.L.R.B. 664, 666 (1965).

107. *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295, 302 n.16 (D.C. Cir. 1967).

108. *Id.* at 302.

109. *Id.*

110. *Id.* at 301.

111. *Id.*

112. 321 U.S. 702 (1944).

as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for reasonable period in which it can be given a fair chance to succeed.¹¹³

If the Board determines that a substantial number of old employees would relocate, the rationale stated above would apparently directly apply—regardless of the fact that the bargaining unit has relocated.¹¹⁴

CONCLUSION

In conclusion, it is submitted, that the Board must reevaluate its procedures and doctrines in relation to the “runaway” shop. The *Garwin* court decision delineates the areas in which the Board can operate. By attempting to operate within these bounds, the Board can adopt a remedial policy that will accomodate the remedy to the realities of the situation.

113. *Id.* at 705.

114. *See* 41 NOTRE DAME LAW. 267 (1965).