Judicial and Administrative Enforcement of Individual Rights under the National Labor Relations Act and under the Labor-Management Relations Act between 1935 and 1990 - An Historical and Empirical Analysis of Unsettled Intercircuit and Intracircuit Conflicts

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JUDICIAL AND ADMINISTRATIVE ENFORCEMENT OF INDIVIDUAL RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT AND UNDER THE LABOR-MANAGEMENT RELATIONS ACT BETWEEN 1935 AND 1990—AN HISTORICAL AND EMPIRICAL ANALYSIS OF UNSETTLED INTERCIRCUIT AND INTRACIRCUIT CONFLICTS

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TABLE OF CONTENTS

I. INDIVIDUAL EMPLOYEES’ RIGHTS AND THE SCOPE OF PROTECTION UNDER THE NLRA AND, AS AMENDED, UNDER THE LMRA ................................................................. 659
   A. Section 7—Scope of Protection and Congressional Intent 659
   B. “Concerted Activity”: Legislative Intent, Shifting Definitions, and Conflicting Administrative and Judicial Decisions About Its Scope of Protection .......... 662

II. HISTORICAL PROBLEMS ASSOCIATED WITH ADMINISTRATIVE ENFORCEMENT OF INDIVIDUAL RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT .................................... 669
   A. A General Overview of NLRA’s Enforcement Provisions 669
   B. The Adverse Effects of Administrative and Judicial Constraints on the Enforcement of Individual Rights in NLRB Proceedings ........................................... 673
      1. Administrative Delays and Backlogs .............. 673
      2. Conflicts Between the NLRB and Courts of Appeals over the NLRB’s Refusal to Follow Circuit Precedent 676

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C. Disparate Effects of Statutory and Judicially Created
Defenses on an Individual's Access to and Participation in
NLRB Proceedings ................................................. 680
1. Intercircuit Conflicts Respecting the Offending Party's
Defense Under the Statute of Limitations Provision . 680
2. Intercircuit Conflict Respecting the Charging Party's
Defense Under the Statute of Limitations Provision . 683
D. The Breadth of General Counsel's Prosecutorial
Discretion: Intercircuit Conflicts and Their Disparate
Impact on the Administrative Enforcement of Individual
Rights .......................................................... 687
1. Intercircuit Conflict over Whether the General
Counsel Has Unreviewable Authority to Issue or Not
to Issue a Complaint ........................................... 689
2. Intercircuit Conflict over Whether the General
Counsel Has Unreviewable Authority to Determine
the Scope of a Complaint ....................................... 691
3. Intercircuit Conflict over Whether the General
Counsel Has Discretion to Dismiss a Charge and
Withdraw a Complaint ........................................... 693
4. Intercircuit Conflict over Whether the General
Counsel Has Unreviewable Discretion to Grant or
Deny an Evidentiary Hearing ................................... 696
5. Intercircuit Conflict over Whether the General
Counsel's Adverse Decisions Are "Final Orders" of
the Board Thereby Allowing an Individual to Obtain
Judicial Review .................................................... 698

III. NLRA COMPLAINANTS' DIFFERENTIAL ACCESS TO PRIVATE
JUDICIAL REMEDIES UNDER THE NATIONAL LABOR RELATIONS
ACT AND ADMINISTRATIVE PROCEDURE ACT ................. 701
A. Intercircuit Conflict over Whether an Aggrieved Individual
Is Entitled to Private Judicial Relief Under the NLRA . 702
B. Intercircuit Conflict over Whether an Aggrieved Individual
Is Entitled to Private Judicial Relief Under the
Administrative Procedure Act ................................. 706

IV. JUDICIAL ENFORCEMENT OF INDIVIDUAL RIGHTS UNDER
SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT OF
1947 .......................................................... 709
A. Legislative Intent and an Overview of the LMRA's
Enforcement Provisions ..................................... 709
B. Intercircuit Conflicts Involving Procedural Matters Under
Section 301 ....................................................... 711
1. Intercircuit Conflicts Respecting the Appropriate
Statute of Limitations and Filing and Service
Requirements .................................................. 711
2. Intercircuit Conflicts Involving Intraunion Exhaustion Requirements After Clayton v. UAW ........................................ 715
3. Intercircuit Conflict over Whether Aggrieved Individuals Must Exhaust Contractual-Grievance Procedures .................................................. 720
C. Intercircuit Conflicts Generated by the Judicially Created Doctrine—Breach of Duty of Fair Representation .......... 723
V. LABOR LAW CASE STUDY ........................................ 727
A. Statistical Findings ........................................... 728
1. Significant Findings Reported in Table 1 ................ 728
2. Significant Findings Reported in Table 2 ................. 729
3. Significant Findings Reported in Table 3 ................ 730
B. An Empirical Analysis of Some Unexpected Problems Inherent in Litigating Individual Rights Suits in the Supreme Court and Federal Courts of Appeals ................. 731
2. The Disposition of NLRA and LMRA Claims in Federal Courts: A Multivariate Probit Two-Stage Analysis .................................................. 733
C. Recommended Congressional Action to Cure the Disparate Treatment of Labor Law Litigants and the Inequitable Enforcement of the LMRA and NLRA .......... 734
VI. CONCLUSION .................................................. 736
APPENDIX .......................................................... 738

INTRODUCTION

Over fifty years ago, Congress enacted the National Labor Relations Act ("NLRA").¹ One of the NLRA's articulated purposes was "to remove obstructions to the free flow of commerce [by] promot[ing] equality of bargaining power between employers and employees."² Congress also hoped that the NLRA would "even the power balance between manager and worker by allowing each to bring certain economic weapons to the negotiating table."³

Although Congress enacted the NLRA "to encourage the normal flow of commerce by avoiding or minimizing industrial strife,"⁴ it has been suggested

that the Act's major proponents were concerned primarily with "union organization." A careful examination of the NLRA's legislative history and hearings clearly demonstrates that unionization was indeed a major concern of many members of the 74th Congress. Senator Wagner, for example, who was one of the bill's primary sponsors, repeatedly emphasized throughout the hearings the importance of unions in the world of commerce. He stressed that unions were needed to help individual employees compete with the vast economic and political resources of corporations and business associations.

Following the NLRA's enactment, unions grew in number, size, and strength. As union influence grew, some employers and corporate managers began to perceive organized labor as too powerful. Thus, twelve years after the NLRA's promulgation, Congress again was called upon to address what some viewed as another serious problem in labor-management relations.

Consequently, in 1947, Congress significantly overhauled the NLRA by passing the Labor-Management Relations Act ("LMRA"). Ostensibly, the LMRA was enacted to protect the interests of the individual employee, both union and nonunion. Some considered the LMRA to be "far more the
Magna Carta of American working men and women than... the... Wagner Act." 

An analysis of congressional debate prior to the LMRA's enactment, however, suggests that protecting individual union or nonunion employees was not the legislature's true goal.

For example, Representative Hartley, a major proponent of the LMRA, readily admitted that the amendment's primary purpose was "to make the relationship between labor and management equitable, to place them on an equal basis." Furthermore, considering that the LMRA "retain[ed], without limitation, the power of collective bargaining, the power of employees to choose their own representatives... [and] the power [of employees] to deal with their employer as one man," one may reasonably infer that the 80th Congress was significantly more concerned about expanding protection for the employer rather than increasing individual employee rights.

This Article does not focus on whether Congress enacted the NLRA and its amendment to protect individual employees, the union hierarchy, or management. A careful reading of each Act reveals some independent protection for the interests of all three parties. Rather, this Article is concerned with ex-


In 1935, the New Deal brought forth the National Labor Relations Act... and by it surrendered to the labor barons sovereign powers over the working man and woman... This year, this Congress gives to these working men and women their bill of rights. And whom do we hear complaining of our purpose?... We hear the labor barons [who have] gathered... to fight this bill, the worker's bill of rights...

Id.

13. 93 Cong. Rec. 3521, 3535 (1947), reprinted in 1 Legislative History of the LMRA, supra note 12, at 601, 617; see also Note, Section 8(b)(1)(A) from Allis-Chalmers to Pattern Makers' League: A Case Study in Judicial Legislation, 74 Calif. L. Rev. 1409, 1411 (1986) ("In the Taft-Hartley amendments, Congress sought to circumscribe union power because of a perceived imbalance between the powers of union and employer."). But see Mikva, supra note 3, at 1127 ("Taft-Hartley did not repeal the Wagner Act[,] it amended it. It did not remove [protection] given to labor, it simply outlawed unfair tactics by both sides. ... Taft-Hartley aimed to equalize bargaining power, not to return workers to a primal state of vulnerability.") (emphasis in original)).


15. Although it is fairly apparent, we must remember that the interests of union leaders and of the individual union and nonunion employee are not necessarily the same. This point needs stressing at this juncture to ensure the appreciation of the pro-worker arguments and of the empirical evidence advanced in this Article. See, e.g., 93 Cong. Rec. 4549, 4558 (1947), reprinted in 2 Legislative History of the LMRA, supra note 11, at 1182, 1198 ("The opponents of the [NLRA] amendment seem to confuse the rights and welfare of the individual employee with the rights and welfare of the union. They are two different things.") (statement of Senator Ball); Gould, Black Power in Unions: The Impact upon Collective Bargaining Relationships, 79 Yale L.J. 46, 67 (1969) ("[T]he Board should not strain to discover a rapport between the union and the worker, for in most cases no such rapport exists in fact."); Schatzki, Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities, 47 Tex. L. Rev. 378,
ploring the extent to which both the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947 have protected individual employees' rights in administrative and judicial proceedings.

In recent years both labor law scholars and laypersons have exhibited a keen interest in reforming the NLRA again. A close scrutiny of various reform proposals, however, strongly suggests that revisions are being advocated primarily to strengthen the protection of either the interests of management or the interests of union officials. Indeed, these proposed reforms only express marginal concern for adequately protecting the individual rights of both non-union and union workers.

402 (1969) ("The American experiment of exclusive representation of unit employees in collective bargaining generally has been considered a success. One of the unfortunate by-products of the exclusivity doctrine, however, has been the forgotten interests of the individual worker."); Simpson & Berwick, Exhaustion of Grievance Procedures and the Individual Employee, 51 TEX. L. REV. 1179, 1179 (1973) ("In theory the union stands as the worker's sword and shield. In practice this protection may be ephemeral, particularly when the interests of the union entity collide with the interest of the individual or coincide with those of the employer.").

16. See, e.g., Gould, Some Reflections on Fifty Years of the National Labor Relations Act: The Need for the Labor Board and Labor Law Reform, 38 STAN. L. REV. 937, 941 (1986) (disputing arguments calling for the repeal of the NLRA); Mikva, supra note 3, at 1124, 1135-40 (arguing that the NLRA is obsolete); Comment, supra note 4, at 375.


19. See Mikva, supra note 3, at 1136 ("It is time to consider overhauling the Wagner Act. . . . The first step Congress might consider is the codification of the mandatory-permissive subject distinction."); de Bernardo, supra note 17, at 18 (advocating reforms that would spur private enterprise and would decrease unionization among public employees).

20. See Gould, supra note 16, at 939-43 (supporting an amendment that would allow (1) greater protection for the freedom of association, (2) collective bargaining outside the traditional arrangement between an exclusive bargaining agent and an employer, and (3) union officials to have a greater voice in plant-closing decisions); Mikva, supra note 3, at 1139 (supporting proposals that "impose monetary sanctions against employers who fail to bargain in good faith" and a proposal that would "create a private right of action for . . . unions"); see also Jaffe, The Individual Right to Initiate Administrative Process, 25 IOWA L. REV. 485, 493 (1940) (advocating a private right of action for unions).

21. See Jaffe, supra note 20, at 530-31 (supporting a private right of action for the individual employee); Mikva, supra note 3, at 1139 (advocating an amendment that would allow workers to be reinstated pending the resolution of an unfair labor practice and that would "create a private right of action for [union] workers"); Note, Individual Control over Personal Grievances Under Vaca v. Sipes, 77 YALE L.J. 559, 561 (1968) (advocating amending the LMRA to allow the individual union employee to press his own grievance under the collective bargaining agreement). See generally Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 RUTGERS L. REV. 631 (1959) (arguing for granting the individual union employee greater control over "critical job interests" and claims under the LMRA).
As mentioned, this Article examines how favorably the organized or unorganized worker\textsuperscript{22} has fared under the NLRA and LMRA when forced to defend his individual interests against the encroachment of management and union leaders. Part I outlines and critiques the protected rights of individual employees under the respective Acts. Part I also analyzes the legislative history which purportedly fosters those rights. Part II discusses historical problems associated with the administrative enforcement of individual rights under the NLRA.

Part III appraises the quality of both administrative and in judicial enforcement of the individual union and nonunion employees' rights under the NLRA. Part IV then discusses and analyzes judicial enforcement of individual rights under the LMRA. Parts II, III, and IV argue that widespread administrative problems, a progression of inconsistent Supreme Court decisions, and many unresolved intracircuit and intercircuit conflicts are undermining the effective enforcement of individual employees' rights under both Acts. It is further argued that these major problems have existed for more than fifty years and will continue to exist until Congress amends the NLRA.

Finally, Part V reports some of the more significant findings that were uncovered from an analysis of 1,249 labor law cases. The statistical findings of this study are reported in the Appendix to this Article. Part V also presents an empirical examination of the disposition of individual complaints in administrative forums and of their private causes of actions in federal appellate courts. This Part assesses the effect of inconsistent decisions and extralegal variables on the outcome of union and nonunion employees' disputes. Lastly, after examining 200 National Labor Relations Board ("NLRB") decisions and 1049 private action suits under both the NLRA and LMRA,\textsuperscript{23} the Article calls for major labor law reforms that would ensure less cumbersome, more timely, and more consistent enforcement of individual rights under these Acts.

I. INDIVIDUAL EMPLOYEES' RIGHTS AND THE SCOPE OF PROTECTION UNDER THE NLRA AND, AS AMENDED, UNDER THE LMRA

A. Section 7—Scope of Protection and Congressional Intent

The enormity of the burden an individual employee must overcome to protect his interests, in both administrative and judicial proceedings, originates in the very section of the NLRA that creates individual rights. Section 7 of the NLRA guarantees workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of

\textsuperscript{22} Some employment establishments are unionized and others are not. In unionized plants, some employees may be union members while others are not. In a nonunionized plant, some workers may belong to a union that is not the representative of workers in that particular plant. For purposes of this article, an “unorganized” and a “nonunion” employee are synonymous; and a “union” and an “organized” employee have identical meanings.

\textsuperscript{23} The author's database is available at the office of the DePaul Law Review.
collective bargaining or other mutual aid or protection...."

Whether Congress intended section 7 to create a very broad or narrow range of protection for individual rights is unclear; the legislative history of section 7 is fairly limited. It is very clear, however, that section 7: (1) "imposes no enforceable obligation upon employees"; (2) does not protect every employee in the labor force; (3) protects an individual's conduct whether it is or is not inspired by a union; (4) "protects a broader range of activities than [union-related] activities"; (5) does not protect individual conduct which is "contrary to the terms or spirit of the National Labor Relations Act or allied federal legislation"; and (6) fails to create "any specific economic rights that employees [may] demand from the employer."

Section 7, on its face, protects individual behavior arising for the "mutual

24. 29 U.S.C. § 157 (1988) (emphasis added); see also Note, supra note 13, at 1409 ("The amended section 7 gives employees the right to refrain from union activity: 'Employees shall have the right to self-organization, to form, join, or assist labor organization, ... and shall also have the right to refrain from any or all of such activities ...." (emphasis in original) (citing 29 U.S.C. § 157 (1982))).


26. 79 Cong. Rec. 2332, 2338 (1935), reprinted in 2 Legislative History of the NLRA, supra note 6, at 2430, 2444 (statement of Senator Boland).

27. See 29 U.S.C. § 152(3) (1988). Section 152(3) provides:
The term 'employee'. .. shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . .

Id.

28. See A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 812-13 (9th ed. 1981) [hereinafter Bok] ("[N]ot all concerted activity is union inspired ... [T]he language of Section 7 makes rather clear on its face, it is not necessary to have a union sponsoring concerted activity, or anywhere on the scene, in order that such activity be protected ... .")

29. Note, Protecting Employee Activity, supra note 25, at 813 n.3.

30. See Bok, supra note 28, at 822.


Congress, while setting forth the rights of collective action, did not designate ... any specific economic rights that employees were entitled to . . . . The obvious theory was that the collective unit of employees, once established, would use whatever strength it had achieved to obtain specific economic rights directly from the employer in a contract.

Id.
aid or protection" of workers as a group. However, the 74th Congress' intended meaning of "mutual aid" and "mutual protection" is less apparent. One commentator argues that "activities directed at a dispute over terms or conditions of employment [and] pursued on behalf of all employees satisfy the 'mutual aid' requirement." Another commentator asserts that "activity for mutual aid or protection means all acts reasonably related to the employees' jobs or to their status as employees." In contrast, the Supreme Court has refused to interpret the clause definitively. In *Eastex, Inc. v. NLRB*, the Court asserted: "It is neither necessary nor appropriate . . . for us to attempt to delineate precisely the boundaries of the 'mutual aid or protection' clause. That task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it."

Significantly, a review of relevant case law strongly suggests that the "mutual aid or protection" clause has not been an insurmountable barrier for the individual employee to overcome in either administrative or judicial deliberations under the NLRA and LMRA. Among the several competing explanations for this occurrence, one stands out: the National Labor Relations Board has "read[] the 'mutual aid or protection' language very liberally." Also, "[t]he Court of Appeals . . . themselves . . . [have taken] a broader view of the [scope of protection under] the 'mutual aid or protection' clause." More important, the Supreme Court has refused to read the language narrowly. In the Court's view, a narrower reading "could frustrate the policy of the Act to protect the right of workers to act together to better their working conditions." Thus, the mutual aid or protection clause has not been an insurmountable barrier for individual employees to overcome. Unlike the mutual aid or protection clause, however, it is clear that section 7's "concerted activities" language is a major obstacle for a union or nonunion employee in both administrative and judicial forums.

32. See supra text accompanying note 24.
34. Note, Rights for Organized and Unorganized Employees, supra note 25, at 1008.
36. Id. But see Note, supra note 33, at 374. The commentator argued that the Court has indeed interpreted the clause:

The Supreme Court set out the most sensible interpretation of "mutual aid" in *NLRB v. J. Weingartner, Inc.*: the "solidarity" established when an employee's activity gives "assurance to other employees in the bargaining unit that they, too, can obtain . . . aid and protection" in like circumstances is "'mutual aid' in the most literal sense."

*Id.* (quoting *NLRB v. J. Weingartner, Inc.*, 420 U.S. 251, 261 (1975)).
37. Note, Rights for Organized and Unorganized Employees, supra note 25, at 1008.
39. *Id.* at 567 (quoting *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962)).
40. See supra text accompanying note 24.
B. "Concerted Activity": Legislative Intent, Shifting Definitions, and Conflicting Administrative and Judicial Decisions About Its Scope of Protection

The origin of section 7's "concerted activities" language is unclear, although commentators have advanced various theories. Additionally, "no clear consensus exists among the National Labor Relations Board . . . and the United States Courts of Appeals as to what constitutes concerted activity." This lack of consensus is especially apparent where the behavior and interest of a single union or nonunion employee are involved. Among other consequences, this absence of a clear consensus has produced an exorbitant amount of debate and commentary among labor law scholars about the scope of individual protection under the "concerted activities" language. More seriously, the dearth of intelligible guidance from the Board and the Supreme Court regarding this matter leaves the individual employee uncertain about three important issues:

41. See Note, Protecting Employee Activity, supra note 25, at 816 ("[T]he Norris-LaGuardia Act of 1932, which had the avowed purpose of preventing the use of injunctions in labor disputes, used the same language as in . . . section 7."); Note, Rights for Organized and Unorganized Employees, supra note 25, at 1006 ("[T]he Act's authors borrowed the term 'concerted activities' from previous legislation. 'Concerted activities' first appeared as part of the statement of public policy in section 2 of the anti-injunction bill reported to the Senate by the Judiciary Committee on May 26, 1938."); see also Eastex, Inc. v. NLRB, 437 U.S. 556, 566 n.14 (1978) (noting that "Congress modeled the language of § 7 after that found in § 2 of the Norris-LaGuardia Act").

42. Note, Protecting Employee Activity, supra note 25, at 815; see also Bok, supra note 28, at 822 ("With no legislative guidelines . . . to distinguish between 'protected' and 'unprotected' concerted activity, the Board and courts have assumed the task of drawing that distinction.").

(1) whether the clause protects an individual employee who acts solely on his
own behalf but, in the process, imparts benefit to other workers; (2) whether a
specific act is the type of activity for which the "concerted activities" language
was fashioned; and (3) whether one's union or nonunion status will influence
one's likelihood of receiving a fair hearing on a claim altogether.

First, the Board44 and federal courts45 generally have accepted the concept
of "individual" concerted activity. And they have protected such activity in
instances where an employee (1) acts on behalf of, and as the chosen representa-
tive for, a group of workers;46 or (2) acts independently, without conferred
authority, to induce or to prepare for group activity.47 Among other reasons,
individual action is protected under these circumstances because the behavior
is viewed as furthering the longstanding policy favoring group activity for mu-
tual aid or protection.48

A major conflict exists, however, between the Board and the courts about
whether to protect individual activity if the purpose of the conduct is not to
induce group action. In recent years, the Board has adopted the position that
individual activity should be protected "if any benefit inures to a group of
employees from an individual's action."49 The Board first articulated this stan-
dard, commonly referred to as the "benefit" standard, in Alleluia Cushion
Co.50 The Board's reason for adopting this position rested, in part, on the pre-
sumption that the likelihood of all workers benefitting is enhanced whenever a
single employee's activity is protected.51 What is problematic, however, for

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44. See Note, Protecting Employee Activity, supra note 25, at 818 (stating that "[t]he most
expansive approach towards protection of individual action has come from the Board").

45. See Note, supra note 33, at 377 ("Each of the twelve federal circuits has accepted the
concept of individual concerted activity.").

46. This type of protection falls under what is commonly referred to as the "representation"
standard. See, e.g., Comment, supra note 4, at 352. The commentator explained:

Under the "[r]epresentation" standard, the employee acts as a representative of fel-
low employees; an individual claim or complaint must be made on behalf of other
employees to be concerted activity. A claim made solely on behalf of oneself is not
concerted activity and is thus unprotected . . . . [Moreover, u]nder the
"[r]epresentation" standard, there must be actual group activity represented by the
individual's actions.

(failing to find protected concerted activity where the individual employee did not act on behalf of
a group); Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009, 1017 (3d Cir. 1980) (finding
protected individual activity where an employee acts as "spokesman for the safety of all . . .
employees").

47. In Mushroom Transp. Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964), the court stated that
individual action may constitute protected concerted activity if "it was engaged in with the object
of initiating or inducing or preparing for group action or that it had some relation to group action
in the interest of the employees." Id. at 685. This has come to be known as the Mushroom
standard or test. Unlike the "representation" standard which requires actual group activity, the Mush-
room standard does not require any group behavior.

48. Note, Protecting Employee Activity, supra note 25, at 818.

49. See Comment, supra note 4, at 356.

50. 221 N.L.R.B. 999, 1000 (1975).

51. Id.
many union and nonunion employees seeking to enforce their rights is that some federal courts have rejected the NLRB's "benefit" standard altogether.82

In addition, a number of federal circuit courts have refused to embrace the Interboro principle,83 which the NLRB established in NLRB v. Interboro Contractors, Inc.84 This principle ensures protection when an employee attempts to enforce a provision of an existing collective bargaining agreement.85 Prior to Interboro, the Board shielded such activity because in its view such individual efforts were merely "an extension of the concerted activity giving rise to [the collective bargaining agreement]."86 This reasoning was also the Board's implicit rationale in Interboro.87 But again, a majority of the federal courts have refused to accept this reasoning,88 preferring instead to view such individual conduct as benefiting "other employees only in a theoretical sense."89

The second critical issue confronting the individual complainant is determining whether his specific behavior is the sort of behavior that the concerted activity clause protects. It is generally accepted that the clause's language does not protect individual actions that are "unlawful, violent, in breach of contract [or] indefensibly disloyal."90 Moreover, it is well settled that the clause protects individual employment-related activity designed to improve the "terms or conditions of employment—[for instance] wages, promotions, health and safety, [and] race and sex discrimination in work assignment."91

But what is less clear and, consequently, more problematic from a complaining union or nonunion employee's perspective is the scope of protection for employment-related behavior that is covered by state or other federal employment legislation. Without doubt, this ambiguity is at least partially at-

52. See Note, supra note 33, at 386.
53. See infra notes 58-59 and accompanying text.
54. 157 N.L.R.B. 1295 (1966), aff'd, 388 F.2d 495 (2d Cir. 1967).
55. NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 500 (2d Cir. 1967).
57. See Interboro, 157 N.L.R.B. at 1298 (finding concerted activity protected by § 7 because the individual's complaints "were made in the attempt to enforce the provisions of the existing collective bargaining agreement") (citing with approval Merlyn Bunney, 139 N.L.R.B. 1516 (1962)); see also Note, Rights for Organized and Unorganized Employees, supra note 25, at 1009.
58. See, e.g., Royal Development Co., v. NLRB, 703 F.2d 363, 374 (9th Cir. 1983); Roadway Express, Inc. v. NLRB, 700 F.2d 687, 694 (11th Cir. 1983); ARO, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719 (5th Cir. 1973); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971); see also Kohls v. NLRB, 629 F.2d 173, 176-77 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981) (expressing serious doubts about the validity of Interboro).
59. Note, Rights for Organized and Unorganized Employees, supra note 25, at 1009; see also NLRB v. Northern Metal Co., 440 F.2d 881, 884-85 (3d Cir. 1971) (criticizing Interboro as creating the "legal fiction" of "constructive concerted activity").
60. Comment, supra note 4, at 351.
61. Gorman & Finkin, supra note 43, at 289-90; see also Schatzki, supra note 15, at 378-79 ("[T]he Act does not protect every kind of concerted activity by employees . . . . It is well settled that employees who . . . . engage in slowdowns, refuse to perform overtime work, or . . . . engage in . . . . a 'partial strike' are subject to discharge by their employer.").
tributable to inconsistent Supreme Court and NLRB decisions.

As early as 1942, the Court stressed in Southern Steamship Co. v. NLRB:62 "the Board has not been commissioned to effectuate the policies of the . . . Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another . . . ."63

Over the years, the Board followed the Court's counsel and applied a very broad interpretation of the Southern Steamship Court's "accommodation" language. More specifically, it fashioned a presumption of protected individual concerted activity under section 7. In so doing, the Board safeguarded specific acts when an employee, acting solely on his own behalf, attempted to enforce a statutory right64 either under state or other federal employment statutes.65 Recently, however, the NLRB reversed itself. In Meyers Industries, Inc. ("Meyers I"),66 the Board held that "the concept of concerted activity first enunciated in Alleluia [did] not comport with the principles inherent in Section 7 of the Act";67 correspondingly, "individual activity . . . aimed at securing employer compliance with other [employment-related] statutes" no longer re-

63. Id. at 47; see also Comment, supra note 4, at 371 ("The NLRB in Alleluia noted that the Supreme Court told it to recognize the purpose and policies of other employment legislation and to construe the Act in a manner supportive of the overall statutory scheme.").
64. For an examination of the Board's action involving federal employment-related statutes and issues, see Salisbury Hotel, Inc., 283 N.L.R.B. 685, 686 (1987) (finding protected concerted activity for a female employee who filed a wage and hour complaint with the Department of Labor); General Teamsters Local 528 (Theatre Service Co.), 237 N.L.R.B. 258, 260-61 (1978) (finding a single employee's filing of a Title VII racial discrimination complaint against a union with the Equal Employment Opportunity Commission is protected concerted activity); Dawson Cabinet Co., 228 N.L.R.B. 290, 292 (1977) (finding protected concerted activity when a single female employee initiated a Title VII complaint about sex discrimination in the workplace); Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1976) (holding that a single California employee's Occupational Safety & Health Act ("OSHA") complaint about unsafe working conditions was protected concerted activity).
65. For cases involving state statutes and regulations, see Hotel & Restaurant Employees, 252 N.L.R.B 1124, 1133 (1980) (holding that the filing of a sole employee's sex discrimination complaint with California Fair Employment Practice Commission is protected); Bighorn Beverage, 236 N.L.R.B. 736, 752-53 (1978) (finding protected concerted activity when an employee acted alone in complaining to the state Department of Health and Environmental Sciences about carbon monoxide fumes in the workplace); Air Surrey Corp., 229 N.L.R.B. 1064, 1064 (1977) (finding protected concerted activity where a sole, discharged employee attempted to prevent his employer from violating an Ohio criminal statute).
ceives the Board’s protection.68

Whether the Meyers standard remains fixed and provides any credible guidance for future individual complainants is very doubtful. As the Board itself noted in Meyers I: “Although the definition of concerted activity we set forth . . . is an attempt at a comprehensive one, we caution that it is [by] no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise in this area of law.”69

More important, the courts of appeals are divided over whether section 7’s concerted activity language must be harmonized with the enforcement language appearing in other employment-related statutes.70 Again, the Supreme Court is principally responsible for this confusion. The Court has refused to state a clear methodology that would enable lower federal courts as well as the Board to follow the instructions advanced in Southern Steamship. Those instructions require lower tribunals to carefully accommodate section 7 and related NLRA provisions with other legislative schemes such as federal employment statutes.71

68. Meyers Indus., Inc. (“Meyers II”), 281 N.L.R.B. 882, 888 (1986); see also Barmet of Indiana, Inc., 284 N.L.R.B. 1024, 1027 (1987) (holding that to the extent an employee was discharged for participating in an OSHA investigation, such discharge is not unlawful under the Act and is permissible under Meyers II). See generally Finkin, Labor Law by Boz—A Theory of Meyers Indus., Inc., Sears, Roebuck and Company and Bird Engineering, 71 IOWA L. REV. 155 (1985) (criticizing the Board’s adoption of the Meyers II rule).


70. Compare Frank Briscoe, Inc. v. NLRB, 637 F.2d 946, 951-53 (3d Cir. 1981) (finding protected concerted activity for each of five discharged ironworkers who filed respective Title VII discrimination complaints with the EEOC) with Jim Causley Pontiac v. NLRB, 620 F.2d 122, 125 (6th Cir. 1980) (finding no protection for individual activity when an employee filed a workplace-safety complaint with the Michigan Department of Public Health) and NLRB v. Bighorn Beverage Co., 614 F.2d 1238 (9th Cir. 1980) (finding no protected concerted activity when an employee complained to a state Occupational Health Board about carbon monoxide poisoning from truck fumes) and NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083-84 (8th Cir. 1977) (finding no protected concerted activity for a discharged female employee who attempted to enforce Title VII’s policy of banning sex discrimination in employment) and Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (finding no protected concerted activity and upholding the discharge of an employee who intended to report a company’s violation to the Interstate Commerce Commission).

71. Compare Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) (admonishing the Board to undertake the responsibility for accommodating the statutory scheme of the NLRA to other federal legislation) with Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 73 (1975) (refusing to find protected concerted activity for individual black workers complaining about Title VII racial discrimination). The Emporium Capwell Court refused to “accommodate” the NLRA to another act as it instructed the Board to do in Southern S.S. Co.:

[W]e are told that relief is typically available to the party filing a charge with the NLRB in a significantly shorter time, and with less risk, than obtains for one filing a charge with the EEOC. Whatever its factual merit, this argument is properly addressed to the Congress and not to this Court . . . . In order to hold that employer conduct violates . . . the NLRA because it violates . . . Title VII, we would have to override a host of consciously made decisions . . . [and t]his obviously, we cannot do.

Id. (emphasis in original).

For a debate about the wisdom of protecting Title VII statutory rights as concerted activity
The final and, conceivably, most egregious barrier influencing whether individual conduct is treated as protected concerted activity is an employee's union or nonunion status. Clearly, "the activities of organized and unorganized workers are indistinguishable when those activities relate to employment conditions."\(^7\) Furthermore, it is well settled that section 7 protects: (1) nonunion employees engaging in a wide variety of concerted activity;\(^8\) (2) "unionized employees acting outside established grievance procedures";\(^7\) and (3) "concerted conduct by employees . . . contempl[ating] neither union activity nor collective bargaining."\(^7\)

But, what is also exceedingly clear and quite undesirable from the viewpoint of a complaining worker is that federal courts are allowing one's union or nonunion status to influence whether individual protection is granted under the concerted activity clause.\(^7\) Such impropriety is occurring without any apparent, defensible legal or statutory explanation. Indeed, the absence of a sound justification partially explains the splits among circuits\(^7\) as well as the inconsistent rulings within circuits over this matter. Furthermore, these intercircuit conflicts are unnecessary because the Supreme Court has had ample opportunity to render a definitive ruling regarding this issue.

Over twenty-five years ago, the Court decided in *NLRB v. Washington Aluminum Co.*\(^7\) that a group of dissident nonunion employees was protected by section 7.\(^7\) In *Washington Aluminum*, a group of seven day-shift, nonunion workers had repeatedly complained to management about cold, unsafe working conditions.\(^8\) Although these dissident nonunion employees were not the official representatives of all rank and file employees, the Court held that management could not discharge the dissident workers for leaving their jobs as a protest against a poorly heated plant.\(^8\) Moreover, the Court observed that nonunion employees do not "necessarily lose their right to engage in concerted activities under [section] 7 merely because they do not present a specific de-
mand upon their employer to remedy a condition they find objectionable."[^1]

Thirteen years later, the Supreme Court reached a very different conclusion in *Emporium Capwell Co. v. Western Addition Community Organization*.[^2] In *Emporium Capwell*, several dissident union employees complained about a specific and an objectionable employment policy based on race.[^3] Although the dissidents did not represent all rank and file members, they demanded to deal directly with top management and expressed their intention to picket the store.[^4] When two of the dissident union employees distributed leaflets calling for a consumer boycott, management fired them.[^5]

Unlike the Court in *Washington Aluminum*, the *Emporium Capwell* Court ruled against the discharged union employees.[^6] Writing for the majority and citing a competing need to protect the interests of the union hierarchy, Associate Justice Marshall asserted that the union has "a legitimate interest in presenting a united front on this as on other issues and in not seeing its strength dissipated . . . by subgroups . . . separately pursuing what they see as separate interests."[^7] An analysis of the Court's earlier decision involving dissident nonunion employees, however, reveals that Justice Marshall's rationale is unpersuasive.

The *Washington Aluminum* Court was cognizant of competing sets of interests, too. In *Washington Aluminum*, a union wanted an employer to recognize and bargain with it.[^8] There were also seven discharged nonunion employees wanting that same employer to reinstate them.[^9] While acknowledging that a ruling for or against the nonunion employees would have a direct bearing on the union's ability to attain its goal,[^10] the Court, nevertheless, gave independent attention and support to the nonunion workers' claim.[^11] Simply put, the Supreme Court in *Washington Aluminum* was indifferent to whether the union prevailed on its claims.

That the Supreme Court and lower federal courts continue to discriminate

[^1]: Id. at 14.
[^3]: Id. at 53.
[^4]: Id. at 55.
[^5]: Id. at 55-56.
[^6]: Id. at 73.
[^7]: Id. at 70 (emphasis added).
[^9]: Id. at 10.
[^10]: Id. at 10 n.1. The Court stated:

The Court of Appeals also refused to enforce another Board order requiring the respondent company to bargain collectively with the [Union] as the certified bargaining representative of its employees. Since the Union's status as a majority bargaining representative turns on the ballots cast in the Board's election by four of the seven discharged employees, the enforceability of that order depends upon the validity of the discharges being challenged in the principal part of this case. Our decision on the discharge question will therefore also govern the refusal-to-bargain issue.

[^11]: Id.
[^12]: See id. at 15.
between union and nonunion complainants without stating some sensible legal justification is rather unsettling. There is nothing in section 7's legislative history or in the NLRA that justifies protecting unorganized employees' activity while denying that same protection to organized employees' individual activity. This is necessarily so because, as previously expressed, section 7 "does not distinguish between the rights of employees before union recognition and the rights of employees after union recognition."  

II. HISTORICAL PROBLEMS ASSOCIATED WITH ADMINISTRATIVE ENFORCEMENT OF INDIVIDUAL RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

A. A General Overview of NLRA's Enforcement Provisions

The NLRA's enforcement provisions are stated very generally. More important, the chief provisions have been the subject of much litigation since the Act's inception. Yet, courts expect an aggrieved and, typically, unsophisticated union or nonunion employee to be knowledgeable of these provisions' material language. Additionally, appellate courts expect these employees to comply with several important procedures before obtaining final redress in either an administrative or a judicial proceeding.

An aggrieved individual must initially seek redress in an administrative forum. A charge must be filed with one of several regional directors who has responsibility for gathering pertinent information involving the aggrieved worker and the alleged offending employer or union. A regional director has discretion to dismiss the charge altogether if the grievance lacks merit; the

93. See Tables 2-4 in the Appendix to this Article; infra notes 467-68 & 478-82 and accompanying text.

94. Lynd, supra note 43, at 723. Lynd advanced one plausible, although indefensible, explanation of why the Court as well as lower federal courts are likely to treat the individual activity of union and of nonunion employees differently:

[T]he Court appears to have adopted the position that when a union has been recognized, concerted activity without union approval is presumed to be unprotected. Emporium Capwell seems to say that concerted activity which was protected before union recognition becomes unprotected because of the mere presence of a recognized union.

Id. at 722-23.

95. See, e.g., Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (applying § 8(a)(1) of the NLRA); NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (applying §§ 7 and 8(a)(1) of the NLRA); see also infra notes 105-10 & 112-15 and accompanying text.

96. See, e.g., Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 165-66 (1983) ("In the labor setting . . . the employee will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union.").

97. 29 U.S.C. § 153(b) (1988); see also BOK, supra note 28, at 105 ("[A] charge may be filed by any person or employer or qualified labor organization in the office for the region in which the alleged unfair labor practice occurred.").

complaining worker, however, may appeal an adverse decision99 to the General Counsel's office.100

It is generally accepted that the General Counsel has final authority over whether a complaint will be issued.101 He acts on behalf of the NLRB102 and has discretion to issue a formal complaint against an offending employer or union for engaging in unfair labor practices.103 Additionally, after adopting a regional director's findings, the General Counsel acquires the right to exercise considerable prosecutorial authority over the individual's charge from that point until the grievance is resolved in a formal proceeding before the Board.104

99. This includes the situation where the regional director refuses to issue a complaint. See Bok, supra note 28, at 106-07 ("Should the Regional Director refuse to issue a complaint, the matter may be appealed to the General Counsel. If the General Counsel declines to issue a complaint, it is generally understood that the charging party has no further recourse.").

100. 29 U.S.C. § 153(d) (1988) ("There shall be a General Counsel of the Board who shall ... exercise general supervision over all attorneys employed by the Board ... and over the officers and employees in the regional offices.").

101. Id. Section 153(d) provides in part:

[The General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

Id.

There is conflict, however, among federal courts of appeals over whether the phrases "final orders of the Board" and "final authority of the General Counsel" are synonymous when reference is made to the General Counsel's prosecutorial discretion. In addition, conflict exists over whether the exercise of the General Counsel's final authority is subject to judicial review. See infra notes 274-90 and accompanying text.

102. See 29 U.S.C. § 153(a) (1988) (stating that the NLRB "created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members"); see also id. § 154(a). Section 154(a) provides:

The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions ....

Id.

103. Section 8(a)(1) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1988). In 1947, Congress added the Labor-Management Relations (Taft-Hartley) Act ("LMRA") amendments to the NLRA which included rules governing employee-union relations. See supra notes 10-11 and accompanying text. Section 8(b)(1)(A) states that "[i]t shall be an unfair labor practice for a labor organization or its agents ... to restrain or coerce ... employees in the exercise of the rights guaranteed in section 157 of this title." Id. § 158(b)(1)(A); see also Note, supra note 13, at 1411-17 nn.11-33 (providing a representative sample of the types of unfair labor practices to which employers and union officials may not subject the individual employee).

104. See Note, The Charging Party Before the NLRB: A Private Right in the Public Interest, 32 U. CHI. L. REV. 786, 787 (1965) ("[T]he charging party retains only limited power over the prosecution of his own case.").
The General Counsel's substantial control over a complainant's case is often a source of friction between Counsel and an aggrieved individual employee. Indeed, much federal litigation has occurred addressing whether the NLRA gives the General Counsel absolute authority to issue, withdraw, dismiss, settle, and determine a complaint's scope without receiving a complainant's input or giving the individual an evidentiary hearing to voice his dissatisfaction. Unfortunately, these procedural conflicts continue to generate much scholarly debate as well as unproductive, unwarranted lawsuits more than fifty years after the NLRA's enactment. Furthermore, such conflicts between the General Counsel and complaining individuals only minimize the likelihood of the latter receiving prompt and adequate redress of their grievances in both administrative and judicial proceedings.

A second major provision preventing a quick resolution of an individual's claim is the NLRA's statute of limitations provision, section 10(b). This provision requires an unsophisticated, aggrieved worker to file a charge and give notice to an offending union or employer within six months of an alleged unfair labor practice. This arguably very stringent duty has sparked much debate among labor law commentators since the Act's inception in 1935. Additionally, lower federal courts have persisted in giving conflicting opinions

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105. See infra notes 212-25 and accompanying text.
106. See infra notes 237-56 and accompanying text.
107. Id.
108. The Supreme Court settled the general conflict among the circuits over whether post-complaint informal settlement agreements are subject to judicial review. In NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 126-27 (1987), the Court held that the General Counsel's decision to make such settlement agreements was not judicially reviewable under the NLRA. Conflict persists, however, over whether an aggrieved individual is entitled to an evidentiary hearing when informal settlement agreements are made without the individual's consent or input. See infra notes 265-71 and accompanying text.
109. See infra notes 226-36 and accompanying text.
110. See infra notes 257-73 and accompanying text.
111. See infra notes 180-82 and accompanying text.
112. 29 U.S.C. § 160 (b) (1988). Section 10(b) of the NLRA states in part:
   Whenever it is charged that any person has engaged in or is engaging in [an] unfair labor practice, the Board, or any agent . . . shall have power to issue a complaint stating the charges . . . and containing a notice of hearing before the Board . . . . [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .
   Id.

At first blush, it appears that § 10(b) only requires an aggrieved individual to give notice to a defending union or employer. However, a controversy exists among federal courts of appeals over whether § 10(b) also requires management and union defendants to give some type of notice to an aggrieved individual. See infra notes 183-205 and accompanying text.
about proper service and filing requirements, thereby further undermining an individual's ability to receive adequate and timely redress in administrative proceedings. Such results are to be expected, given a worker's ignorance about statute of limitation requirements and what some consider to be the forced abdication of the individual employee's control of his grievance early on in the administrative process.

After a complaint is properly filed and notice served, an offending employer or union may file an answer and appear in person at a specified time to give testimony. After all testimony has been considered, the Board may issue an order requiring the offending party to stop discriminating against the individual employee. The Board's orders, however, carry no enforcement power. Rather, to ensure compliance with its orders, "the Board must secure enforcement by filing a petition in a federal court of appeals . . . in the circuit in which the unfair labor practice was committed." It must be stressed, however, that such complicated procedural requirements are not the major factors undermining a worker's ability to receive adequate and timely relief in NLRA administrative proceedings. Other factors are even more restricting. Major NLRB administrative and monetary problems, for example, as well as a history of conflicting judicial interpretations of key NLRA administrative provisions are significantly more likely to prevent an individual's success than, say, inconsistent service and filing requirements. It is to these issues, therefore, that we now turn our focus of attention and analysis.

115. See infra notes 180-82 and accompanying text.
116. See Note, supra note 21, at 561-62. According to the commentator:

"[Courts should] allow the individual to process and pursue his own grievance against the employer. . . . The Taft-Hartley Act, like the Wagner Act before it, made . . . [the] union . . . the exclusive bargaining representative of all the employees. The justification offered for this creation of monopoly power over contract negotiations . . . is the need for and ability of a single bargaining representative to prevent repeated minority strikes and work stoppages . . . . [T]he same reasoning does not justify a similar grant of power in the settlement of individual grievances under that agreement . . . ."

Id. (emphasis added).
117. Section 10(b) of the NLRA states in part that "[t]he person so complained of shall have the right to file and answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint." 29 U.S.C. § 160(b) (1988).
118. Section 10(c) of the NLRA states in part:

The testimony taken . . . shall be reduced to writing and filed with the Board. . . . 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, . . . the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . . .

Id. § 160(c).
119. Box, supra note 28, at 109; see also 29 U.S.C. § 160(e) (1988) ("The Board shall have power to petition any court of appeals of the United States or . . . any district court of the United States, within any circuit or district . . . for the enforcement of such order and for appropriate temporary relief or restraining order . . . .").
B. The Adverse Effects of Administrative and Judicial Constraints on the Enforcement of Individual Rights in NLRB Proceedings

1. Administrative Delays and Backlogs

Briefly stated, administrative delays are major barriers that prevent aggrieved individuals from obtaining a timely and fair resolution of their complaints in NLRA administrative proceedings. "The delay in resolving unfair labor practice charges . . . has always been a concern but in the last few years delays have become more common and more extreme." Moreover, evidence strongly suggests that the problem of delay has been more acute at the Board, rather than at the General Counsel level, since the NLRA's enactment in 1935.

Several factors persistently cause administrative delays and backlogs. First, the number of unfair labor practice charges filed each year is staggering. Moreover, the staff provided to process and meaningfully treat each complaint is insufficient. In recent years, more than 40,000 charges were filed annually,
and evidence strongly suggests that a significant abatement in the current levels of filings will not occur in the near future. Second, NLRB vacancies, a continuing reexamination of Board precedents, and severe internal Board conflicts and disagreements are major operational problems that are causing burgeoning caseloads and administrative delays.

Third, some delays are caused by the respective parties' requests for continuances and for extensions of time to file briefs. Fourth, one commentator has argued that protracted proceedings and delays are caused by "the Board's


The Board has experienced a long period of turmoil and change in its personnel. It functioned with fewer than its full complement of five members virtually the entire period from December 1979 until August 1981. From January to August of 1981, the Board functioned with only three members, a situation unprecedented since the Taft-Hartley Act expanded the Board to five members.

Id.; see also Mikva, supra note 3, at 1135 ("[A]n unfilled vacancy on the 5-member Board . . . is holding up many important decisions"); Irving, NLRB: Master of its Own Destiny (Fate?), in LABOR LAW DEVELOPMENTS 1982, at 67 (M. Landwehr ed. 1982). Irving notes:

During the past year, we have seen greater personnel flux at the Board than at any time in its history. For more than six months of this year, the Board has operated with three instead of five members. Resignations and term expirations made 1980 an equally unsettled year for the Board.

Id. at 73.

126. See Mikva, supra note 3, at 1135. ("[A]n ongoing reexamination of Board precedent . . . has postponed decisions in a host of related cases.").

127. To understand some of the issues that generate conflict among Board members themselves, compare Zimmerman, supra note 125, at 51-52, with Irving, supra note 125, at 68-70. According to Zimmerman:

One criticism that has repeatedly been levelled at the Board is that . . . the Board fails to defer sufficiently—or, some would say, hardly at all—to the decisions of the Courts of Appeals that disagree with the Board's interpretation of labor's and management responsibilities under the National Labor Relations Act. My thesis . . . is that the courts have been equally guilty of fostering confusion and that the Board faces a difficult, thankless, and in some cases virtually impossible task in reconciling its national responsibilities with the views of various Circuit Courts.

Zimmerman, supra note 125, at 51-52. Irving writes:

In a speech . . . at the Ninth Annual Personnel Policy Conference of Executive Enterprises, Inc. . . . I suggested . . . that the Board has contributed to its own caseload dilemma by overextending its jurisdiction and by issuing decisions in certain areas which . . . are ill conceived . . . and which do little to promote labor-management stability or Agency credibility. . . . I gave examples of how the Board frequently invites litigation by ignoring reasoned arguments and instructions of the courts and by failing to reconcile its own inconsistent opinions . . . . Within two weeks of my . . . remarks, Member Zimmerman responded . . . by calling me a "one man task force to cut the Board's budget."

Irving, supra note 125, at 68-70.

128. See Murphy, supra note 121, at 832-33.
... often unreflective, conclus[ive] decisions which virtually invite reversal or remand."\textsuperscript{129} Finally, frequent revisions of legal memos, routine circulations of all decisions to every Board member, and excessive modifications of Board decisions before issuances contribute to severe administrative delays.\textsuperscript{130}

Over the years, several recommendations have been advanced to help resolve the problem of delays and mounting caseloads. One suggestion encourages the Board "to solicit the views of management, labor, and the bar for suggestions on coping with its [administrative] problems."\textsuperscript{131} Another proposal advises the NLRB to reinstate its policy of awarding great deference to arbitrators' decisions and to "[place] more, not less, reliance on arbitration" as a means of satisfying its administrative responsibilities.\textsuperscript{132} A third recommendation, advanced by the Kennedy administration more than twenty-five years ago, encourages Congress to allow the NLRB "to delegate . . . its functions to a division of the Board, [to] an individual Board member, [to] a hearing examiner, or [to] an . . . employee board."\textsuperscript{133}

A final suggestion is found in the now defunct Labor Reform Bill of 1978.\textsuperscript{134} This bill included a "summary affirmance" proposal that was designed to help alleviate administrative delays. The bill would have "required the Board to establish a procedure for summary affirmance of its Administrative Law Judge[s'] [ALJs'] decisions . . . upon motion of the party prevailing before the ALJ."\textsuperscript{135} Many regarded the summary affirmance proposal as an effective means of reducing administrative delays because, among other rea-

\begin{itemize}
  \item 130. Id.
  \item 131. See Irving, supra note 125, at 107.
  \item 133. See Reorg. Plan No. 5 of 1961, 87th Cong., 1st Sess., \textit{reprinted in 1961 U.S. Code Cong. & Admin. News} 1359, 1360. Simply put, the Kennedy Administration plan would have given the Board authority to delegate all of its key functions to another administrative entity, "including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter." \textit{Id}.
  \item 134. H.R. 8410, 95th Cong., 1st Sess. (1977); S. 2467, 95th Cong., 2d Sess. (1978). This bill was never enacted and its demise occurred for reasons having very little to do with protecting individual rights in administrative proceedings. Instead, supporters of management's interests were able to prevail over those supporting the interests of union officials. See Schulman, \textit{The Proposed Labor Reform Legislation—Its Frustration and Suggested Consequences}, in \textit{Labor Law Developments} 1979, at 29, 32 (M. Landwehr ed. 1979). Schulman wrote:
    
    In the House, H.R. 8410 . . . passed by a substantial majority . . . [; however a] small senatorial group, assisted by their specialized attorneys and aided and abetted by such "friends" of American working people as the U.S. Chamber of Commerce and the National Association of Manufacturers . . . prevent[ed] the Senate from . . . vot[ing] . . . [on] the issue . . . [by r]esorting to the filibuster . . . .
    
    \textit{Id}; cf. Nash, \textit{The Labor Reform Act of 1977—A Management Viewpoint}, in \textit{Labor Law Developments} 1979, at 43 (M. Landwehr ed. 1979) ("That bill, which presumably was to be quickly passed by Congress . . . failed to gain broad-based support, in part . . . because it was such an obvious pro-union, antimanagerial proposal.").
  \item 135. Apruzzese, supra note 122, at 49.
\end{itemize}
sons, (1) most issues coming before the ALJs are factual, and the view is that judges are in the best position to resolve them; 136 (2) the overwhelming majority of ALJ “decisions are adopted without any modification or [with only] minor clarification”; 137 and (3) “[m]ore than 80 percent of [ALJs’] positions are affirmed by the Board.” 138

As of this writing, Congress has failed to enact any of the proposals outlined above. This inaction is indefensible in light of the severe administrative delays that continue to prevent complaining unions and nonunion employees from obtaining fair and timely resolutions of their complaints.

2. Conflicts Between the NLRB and Courts of Appeals over the NLRB’s Refusal to Follow Circuit Precedents

A major and continuing debate over whether the NLRB must follow a circuit’s precedent in cases originating within that circuit also undermines timely, predictable, consistent, and effective administrative enforcement of individual rights. The NLRB has maintained that it possesses nationwide authorization to enforce the NLRA, in general, and individual rights, in particular. Consequently, in the Board’s view, it “cannot acquiesce to the disparate views of every Circuit.” 139 Several courts of appeals, on the other hand, have ruled that the Board must follow circuit precedents in cases originating within a particular circuit, unless the Board intends to seek a Supreme Court review of a particular proceeding. 140

Given the breadth of the Board’s authority under the NLRA and the number of courts involved, it appears likely that the Board and federal courts of appeals will remain severely divided for an interminable period of time. This need not be. Over the years, both Congress and the Supreme Court have had ample opportunity to end this conflict and reduce its adverse consequences on the administrative enforcement of individual rights. More important, Congress itself planted the seed of this specific altercation when, in 1935, it enacted the NLRA’s venue clauses, section 10(e) 141 and section 10(f). 142

137. Id.
138. Id.
139. Zimmerman, supra note 125, at 63.
140. See, e.g., NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74, 75 (9th Cir. 1987) (stating that administrative agencies must follow circuit precedent in cases arising within the circuit, “unless the Board has a good faith intention of seeking review of the particular proceeding by the Supreme Court”); see also Yellow Taxi Co. v. NLRB, 721 F.2d 366, 382 (D.C. Cir. 1983) (“[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect.” (quoting Allegheny General Hospital v. NLRB, 608 F.2d 965, 968, 970 (3d Cir. 1979))); Ithaca College v. NLRB, 623 F.2d 224, 228 (4th Cir.) (“The position of the Board is one in which we cannot acquiesce. While deference is to be given to an agency’s interpretation of the statute it administers . . . it is the courts that have the final word on matters of statutory interpretation . . . .”), cert. denied, 449 U.S. 975 (1980).
141. 29 U.S.C. § 160(e) (1988); see supra note 119 (providing the text of § 160(e)).
Section 10(e) authorizes the NLRB to seek enforcement of its orders in courts of appeals in circuits where offending employers and union officials either reside, transact business, or violate the rights of the individual employee. Likewise, section 10(f) permits complaining union leaders and employers to challenge the Board’s adverse final orders outlawing the alleged abuse of individual rights. As petitioners, these employers and members of the union hierarchy may initiate causes of actions in federal appellate courts in the circuit where the petitioners reside, transact business, or committed the unfair labor practice.

Section 10(f) clearly provides an aggrieved petitioner an extraordinarily broad venue to challenge the Board’s inauspicious orders. Indeed, section 10(f) “virtually invites forum shopping.” Consequently, section 10(f) effectively prevents the Board from predicting the circuit to which its decisions will be appealed. Furthermore, from the perspective of an aggrieved individual employee, section 10(f)’s broad venue clause produces two undesirable consequences: (1) it skews circuits’ precedents involving individual rights; and (2) it causes selective enforcement of NLRB’s pro-individual orders.

Existing case law readily exemplifies the gravity of the selective-enforcement problem. One need only examine a representative sample of inconsistent section 8(a)(3) dual-motive decisions involving nonunion individuals’ attempts to organize collective bargaining units. Indeed, the First Circuit, in

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142. Id. § 160(f). Section 160(f) reads in pertinent part:

Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . .

Id.

143. Id. § 160(e).

144. Id. § 160(f).

145. Id.

146. Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1066 (7th Cir. 1988).

147. See Zimmerman, supra note 125, at 63.

148. Nielsen, 854 F.2d at 1066.

149. 29 U.S.C. § 158(a)(3) (1988). Section 158(a)(3) prohibits employers from 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.” Id.


An employer violates section 8(a)(3) by discharging or [by] disciplining an employee as punishment for participation in lawful union activity. A problematic situation commonly occurs when an employer had lawful and unlawful motives to discipline or [to] discharge an employee. Courts and commentators call this situation a dual motive case. . . . Consequently, when employer motivation in employment decisions is unclear, parties . . . ask the . . . Board . . . to decide whether an employer acted pursuant to legitimate or illegitimate reasons.

Id. at 1096-97.
DEPAUL LAW REVIEW

NLRB v. Wright Line,\textsuperscript{151} correctly observed that dual-motive rulings were "the source of a continuing controversy among the circuits and between the Board and this court."\textsuperscript{152} To resolve the conflict, the First Circuit ruled that once the Board's general counsel makes a prima facie showing that an employee's union activity motivated an employer to discharge or discipline the employee, the burden of proof shifts to the employer to show that it would have taken the same action in the absence of the employee's protected union activity.\textsuperscript{153}

Wright Line became good law in the First Circuit and other circuits after the Supreme Court approved the test in NLRB v. Transportation Management Corp.\textsuperscript{154} One would presume, therefore, that an individual employee\textsuperscript{155} need not be further concerned about inconsistent dual-motive rulings or about employers shopping for sympathetic courts to obtain favorable decisions involving such rulings. The converse, however, is true. Concern is warranted because the Court's Transportation Management decision has not and will not stop forum shopping or selective enforcement of individual rights.

An examination of dual-motive cases following Transportation Management and Wright Line reveals an unexpected phenomenon: some courts are deferring to the Board's discriminatory intent findings and enforcing the Board's dual-motive orders,\textsuperscript{156} while other courts are not.\textsuperscript{157} This occurrence, in itself,
is not disconcerting since the Wright Line burden of proof analysis can and will produce such outcomes. What is disturbing about this new development, however, is that several courts of appeals across the circuits are resolving dual-motive disputes without truly performing a Wright Line type of analysis as mandated by the Supreme Court in Transportation Management. This judicial recalcitrance is disconcerting because it encourages forum shopping and creates conflicts between the Board and courts of appeals.

While the Board retains a national charter to enforce all aspects of the NLRA, including individual rights, the NLRB—like other federal agencies—must follow each circuits’ respective precedents. On the other hand, federal circuit courts “[are] not authorized to interpret . . . labor laws with binding effect throughout the whole country.” Moreover, if venue is properly conferred, federal courts of appeals may not decline jurisdiction simply because they believe another circuit would be the more appropriate forum.

(applying the Wright Line approach and ruling that the discharges were not caused by antiunion sentiment); NLRB v. Eldorado Mfg. Corp., 660 F.2d 1207, 1214 (7th Cir. 1981) (employing the Wright Line test and finding no impermissible discharges); TRW, Inc. v. NLRB, 654 F.2d 307, 312 (5th Cir. 1981) (citing the Wright Line analysis and holding that the Board failed to show that employee's pro-union activities caused an alleged retaliatory discharge); NLRB v. Consolidated Freightways Corp., 651 F.2d 436, 437-38 (6th Cir. 1981) (applying Wright Line and rejecting an administrative judge’s finding that the employer had a mixed motive for refusing to hire an individual); Peavey Co. v. NLRB, 648 F.2d 460, 461-62 (7th Cir. 1981) (citing Wright Line and holding that evidence did not support the Board’s finding of a discriminatory discharge).

158. See, e.g., Eisenberg v. Lenape Prods., Inc., 781 F.2d 999, 1004 nn.3-4, 1005 (3rd Cir. 1986) (disregarding petitioner's § 158(a)(3) claim and failing to apply a Wright Line analysis but summarily concluding that “[t]here [was] no evidence that management was aware of the employees' embryonic efforts to unionize their division”); Intermountain Rural Elect. Ass'n v. NLRB, 732 F.2d 754, 764 (10th Cir.) (finding that employee's reprimand was a violation of § 158(a)(3) but holding that “a remand to restate the findings in terms of the Wright Line analysis [was] unnecessary”); cert. denied, 469 U.S. 932 (1984); Artra Group, Inc. v. NLRB, 730 F.2d 586, 591 (10th Cir. 1984) (ignoring petitioner's complaint and holding that although the administrative law judge failed to use the exact words of the Wright Line test, it was obvious that the standard was applied); Pioneer Natural Gas Co. v. NLRB, 662 F.2d 408, 418 (5th Cir. 1981) (failing to apply the Wright Line analysis and failing to “uphold the Board's conclusion that Pioneer violated § 158(a)(3) . . . by discharging [the employee]”).

159. See Ithaca College v. NLRB, 623 F.2d 224, 228 (4th Cir.), cert. denied, 449 U.S. 975 (1980). In Ithaca, the Second Circuit stated:

[T]he Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow. The Board cites no contrary authority except its own consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views.

Id.; see also Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980) ("'[T]his is a most unusual circumstance in which a federal agency has refused to apply the law announced by the federal judiciary.' . . . [T]he Board seems to ignore precedent from federal appellate courts in favor of its own interpretations of its own decisions." (quoting Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 968 (3d Cir. 1979))); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) ("A decision by this court, not overruled by the United States Supreme Court, is . . . binding on all inferior courts and litigants in the [circuit], and also on administrative agencies.").

160. Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1066-67 (7th Cir. 1988).

161. See Rikal, Inc. v. NLRB, 721 F.2d 402, 404 (1st Cir. 1983); see also United States Elec.
In addition to these restrictions, there is a complicating factor: "It is well settled that the unfair labor practice and the Board's hearings need not have occurred in the same circuit where [judicial] review is sought." It is apparent, then, that the liberal venue requirements of section 10(e) and (f) are producing unnecessary conflicts between the NLRB and circuit courts. Furthermore, as demonstrated above, such conflicts are producing inconsistent, inequitable, and untimely dispositions of individual claims in administrative proceedings. Clearly, Congress did not intend the NLRA's venue provisions to affect the administrative enforcement of personal rights so severely. Moreover, it is equally apparent that "this is a matter certainly within the power of Congress to change."

C. Disparate Effects of Statutory and Judicially Created Defenses on an Individual's Access to and Participation in NLRB Proceedings

1. Intercircuit Conflicts Respecting the Offending Party's Defense Under the Statute of Limitations Provision

As noted above, section 10(b)—the NLRA's statute of limitations provision—may prevent an individual union or nonunion employee from having his grievance heard. Of course, that this statute of limitations defense may bar an individual's claim is not, in itself, a source of concern. More unsettling, however, are the very contrasting interpretations of section 10(b) that are found among lower federal courts' opinions. These contrasting interpretations have caused competing statute of limitations rules to emerge that have barred individual claims from NLRB deliberations in a disparate manner. The Supreme Court's ill-conceived section 10(b) decisions have fostered the issuance of these incompatible appellate court rulings and unreasonable, disparate

Motors, Div. of Emerson Elec. Co. v. NLRB, 722 F.2d 315, 318 (6th Cir. 1983) ("Neither a petitioner nor the Board can confer jurisdiction on this court when the record is devoid of any evidence whatsoever that the petitioner transacts business within this judicial circuit."). cert. denied, 467 U.S. 1216 (1984); NLRB v. Indiana & Mich. Elec. Co., 124 F.2d 50, 53 (6th Cir. 1941) ("Our jurisdiction of the present case cannot be declined or renounced, even though it may appear preferable that the cause should have been brought in another jurisdiction authorized by the statute."); aff'd, 318 U.S. 9 (1943); NLRB v. Friedman-Harry Marks Clothing Co., 83 F.2d 731, 732-33 (2d Cir. 1936) ("Section 10(e) ... very plainly declares that ... the court 'thereupon shall have jurisdiction of the proceedings and of the question determined therein ...'.")

162. *Rikal*, 721 F.2d at 404; *see also Friedman-Harry Marks*, 83 F.2d at 732 ("[U]nder section 10(e) [and (f)] any Circuit Court of Appeals ... will acquire jurisdiction of an enforcement proceeding, if the respondent 'transacts business' within its circuit; the hearings need not have been conducted within that circuit, nor need the forbidden acts have occurred there." (emphasis added)).

163. *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 694 F.2d 1289, 1301 (D.C. Cir. 1982); *see also Indiana & Mich. Elec., 124 F.2d at 53 ("Venue, under the National Labor Relations Act, is wholly a matter for the Congress."). In recent years, various venue proposals have been advanced in Congress. *See, e.g.*, S. 1134, 100th Cong., 1st Sess., 133 CONG. REC. 18511-12 (1987); H.R. 439, 99th Cong., 1st Sess., 131 CONG. REC. 3129-31 (1985).

164. *See supra* notes 112-16 and accompanying text.

165. *See infra* notes 181-82, 187-205 and accompanying text.
The disparate manner in which federal appellate courts bar individual claims from NLRB proceedings need not exist. As early as 1959, the Court had a good opportunity to outline a fairly sound methodology that would help lower federal courts apply section 10(b) in a rational and on a nondiscriminatory basis. The Court also has had a subsequent opportunity to explain clearly both charging and offending parties' rights and defenses under section 10(b)'s statute of limitations proviso. In both instances, the Court failed to do so.

_NLRB v. Fant Milling Co._ was the Supreme Court's first opportunity to provide guidance regarding the section 10(b) issue. The Supreme Court, however, limited its first section 10(b) ruling to the narrow issue of whether section 10(b)'s proviso applies to unfair labor practices committed "[s]ubsequent to the filing of . . . [an original] charge." In _Fant Milling_, the Court held that the NLRB may consider unfair labor acts committed while an original proceeding was pending if an offending party's subsequent acts were "related to" and were of the "same class" of violations as those alleged in the original charge. Less than a year after the _Fant Milling_ decision, the Supreme Court issued its second section 10(b) ruling in _Local Lodge No. 1424, International Association of Machinists v. NLRB_. Again the Court restricted the scope of its review and refused to outline clearly the extent of both charging and offending parties' defenses under the proviso.

In _Local Lodge_, a nonunion employee filed an unfair labor practice charge against both the union and employer. The employee alleged that her rights and the individual rights of other employees were abridged when the union and employer signed a union-shop contract and entered into additional supplemental agreements without the employees' input. The union and employer defended by arguing that the employee's supplemental unfair labor charges were filed at least ten months after the formation of an allegedly illegal contract. Therefore, the defendants argued that section 10(b)'s proviso prevented the employee's supplemental charges from being addressed by the

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166. Compare infra note 181 and accompanying text with infra note 182 and accompanying text.

167. The 1947 amendments to the NLRA added a proviso to § 10(b). The proviso states that: 

[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.


168. 360 U.S. 301 (1959).

169. Id. at 309 n.9.

170. Id. at 307.


172. Id. at 414.

173. Id.

174. Id.
Board. Both the NLRB and the D.C. Circuit Court disagreed, holding that the six-month limitation proviso did not prevent the Board from addressing the employee's charges.

The Supreme Court granted certiorari and restricted its review to an extremely narrow question, one even narrower than the question presented in Fant Milling. In Local Lodge, the Court asked whether section 10(b)'s proviso allows the Board to consider a charge, if a charge (1) involves otherwise lawful behavior occurring within six months of a filing, and (2) involves otherwise lawful behavior that is "tainted" by and is a continuation of illegal conduct occurring more than six months before a filing.

Writing for the majority, Justice Harlan ruled that the employee's claim and comparable claims were barred by section 10(b)'s six-month limitation period. Justice Harlan also stressed that 10(b)'s proviso did not recognize a "[d]octrine of continuing violation" in instances where an otherwise legal act became illegal only by cloaking it with the illegality of a time-barred, unfair labor practice.

While the Local Lodge decision is sufficiently comprehensible, it is also remarkably narrow. Furthermore, Justice Harlan clouded the ruling by needlessly stating: "It is doubtless true that 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge." This language, unfortunately, has caused much confusion and disparate treatment of individual employees' claims among and within the federal circuits.

Some courts of appeals cite Justice Harlan's dictum as support for the doctrine of continuing violation. Other courts dismiss the language altogether,
ENFORCEMENT UNDER THE LABOR ACTS

One major consequence of such competing interpretations becomes readily apparent: the doctrine of continuing violation is applied in an unreasonable and disparate manner to bar individual claims from administrative forums. Congress clearly did not intend for this statute of limitations proviso to produce such unwarranted individual discrimination. The problem, however, will remain until the Court resolves the conflict or Congress acknowledges the source of the controversy and amends the NLRA.

2. Intercircuit Conflict Respecting the Charging Party’s Defense Under the Statute of Limitations Provision

The text of section 10(b) is clear: whenever an employer or union officials are charged with "engaging in any . . . unfair labor practice, the Board . . . shall . . . issue and cause to be served upon such person[s] a complaint stating the charges . . . and containing a notice of [a] hearing." Section 10(b) also provides that the Board may not issue a complaint "based upon any unfair labor practice occurring more than six months" before the filing and service of the charge.

Congress inserted this language in the Act to serve the interests of offending employers and union officials. These same 10(b) excerpts, however, raise three important and interrelated questions regarding the rights of individual employees: (1) whether section 10(b) requires offenders to give an aggrieved individual notice of an unfair labor practice; (2) whether the language requires giving a specific type of notice to a complaining individual; and (3) whether notice,
per se, commences the tolling of the statute of limitations.

The Supreme Court has not ruled on these issues. A simple majority of federal circuits, however, has held that section 10(b) requires offending parties to give some type of notice to an individual charging party.188 Moreover, there is some agreement among federal courts of appeals that the tolling of section 10(b)’s limitation period commences only after notice is given.189 Intracircuit and intercircuit conflicts over these issues are pronounced because courts of appeals cannot agree on the type of notice that individual complainants must receive. Correspondingly, such disagreement is causing a disparate selection of individual grievances for NLRB review within and across the federal circuits.

The plight of the single, nonunion employee in NLRB v. California School of Professional Psychology187 demonstrates the severity and nature of this conflict. In California School of Professional Psychology, Professor Michael Cohen had attempted to organize faculty members, which caused tension between him and the school administration.188 The school mailed a formal letter of notification, dated July 23, 1975, to Professor Cohen informing him that his employment contract would terminate on August 31, 1975.189 After receiving this letter, Professor Cohen filed an unfair labor practice charge with the NLRB.190

Professor Cohen filed his charge less than six months after his official termination date but more than seven months after the date of formal notification.191 The school argued that the charge was barred by section 10(b) because the complainant had failed to file within the six-month period.192 The Board disagreed, holding that the limitation period started running on the date of Professor Cohen’s termination, rather than on the date of his official notification.193 The school appealed, compelling the Ninth Circuit to decide whether section 10(b)’s period of limitation starts when an aggrieved individual is notified that an unfair labor practice will occur or when he is informed that an unfair labor act has occurred.

If Professor Cohen had filed his charge in the Third Circuit, the filing would have been timely. The Third Circuit has held that notice of an intent to commit an unfair labor practice fails to trigger section 10(b).194 Similarly, the Second, Fifth, and Seventh Circuits would have upheld the filing because these courts have held that the limitations period begins when an unfair practice

185. See infra notes 194-205 and accompanying text.
186. See infra notes 196-98 and accompanying text.
187. 583 F.2d 1099 (9th Cir. 1978).
188. Id. at 1100.
189. Id.
190. Id.
191. Id.
192. Id. at 1101.
193. Id. at 1100.
194. See NLRB v. Al Bryant, Inc., 711 F.2d 543, 547 (3d Cir. 1983) ("A statement of intent or threat to commit an unfair practice does not start the statutory six months running.").
1991] ENFORCEMENT UNDER THE LABOR ACTS 685

actually occurs. Apparently, notice of an unfair act, per se, is not required in these circuits.

Contributing to the confusion, however, are rulings issued by the First, Sixth, Seventh, Tenth, and D.C. Circuits. These courts of appeals have held that the limitation period begins when a party receives actual or constructive notice of an unfair labor practice. More specifically, the First Circuit, adopting a fairly recent Board decision, has held that the "clock starts when a 'final adverse employment decision is made and communicated to an employee.'"

Of these five latter circuits, three would exacerbate the section 10(b) chaos by imposing on the complainant a standard of care similar to that found under a negligence doctrine. Specifically, the Sixth, Seventh, and D.C. Circuits would have shifted the burden of discovering when the unlawful act occurred from the school to Professor Cohen. The shift would occur because these three latter circuits have ruled that section 10(b)'s period of limitations commences when an aggrieved individual should have discovered an unfair labor act.

195. See, e.g., id. ("The running of the limitations period can begin only when the unfair labor practice occurs."); Local 1104, Communications Workers v. NLRB, 520 F.2d 411, 416 (2d Cir. 1975) ("It does not seem reasonable to argue that the statutory limitations period begins to run or may even run out before the violation occurs."); cert. denied, 423 U.S. 1051 (1976); Russell-Newman Mfg. Co. v. NLRB, 406 F.2d 1280, 1283 (5th Cir. 1969) (holding that the six-month statute of limitations did not bar a charge that was filed four months after the occurrence of the unfair labor practice); NLRB v. Plumbers & Pipe Fitters Local Union 214, 298 F.2d 427, 428 (7th Cir. 1962) ("To hold that the running of a limitations period can begin only when the unfair labor practice occurs . . . is in accord with well-established principles.").

196. See, e.g., Land Air Delivery, Inc. v. NLRB, 862 F.2d 354, 360 (D.C. Cir. 1988) ("The limitations period does not begin to run until the party filing the charge knows . . . that an unfair labor practice has occurred."); cert. denied, 110 S. Ct. 52 (1989); Teamsters Local Union No. 42 v. NLRB, 825 F.2d 608, 614 (1st Cir. 1987) ("It is settled that the limitations clock does not begin to tick until the charging party has notice that an unfair labor practice occurred."); NLRB v. Babcock & Wilcox Co., 697 F.2d 724, 727 (6th Cir. 1983) (holding that the statute of limitations period commenced when the union employee had actual notice of his discharge); NLRB v. Allied Prods. Corp., Richard Bro. Div., 548 F.2d 644, 650 (6th Cir. 1977) ("[T]he six month limitation[s] period does not begin to run until the employer's unlawful activity . . . has become known to the charging party."); Wisconsin River Valley Dist. Council of the United Bhd. of Carpenters v. NLRB, 532 F.2d 47, 53 (7th Cir. 1976) ("The Act's statute of limitations does not begin to run until the aggrieved party knew . . . that his statutory rights were violated."); NLRB v. Shawnee Indus., Inc., 333 F.2d 221, 224 (10th Cir. 1964) ("[T]he limitation[s] period begins when the facts of a discriminatory hiring policy first become known to an applicant.").

197. Postal Serv. Marina Center, 271 N.L.R.B. 397, 400 (1984). The Board stated:

Where a final adverse employment decision is made and communicated to an employee—whether the decision is nonrenewal of an employment contract, termination, or other alleged discrimination—the employee is in a position to file an unfair labor practice charge and must do so within 6 months of that time rather than wait until the consequences of the act become most painful.

Id.

198. Teamsters Local Union No. 42 v. NLRB, 825 F.2d 608, 614 (1st Cir. 1987) (citation omitted).

199. Land Air Delivery, 862 F.2d at 360 ("The limitations period does not begin to run until the party filing the charge . . . has reason to know that an unfair labor practice has occurred.");
Professor Cohen’s charge, however, was not filed in these circuits; it was filed in the Ninth Circuit. There, the court barred the charge “[b]ecause Cohen could have filed his claim as of the date of receiving the letter of termination.”200 In the court’s view, the complainant erred because section 10(b)’s period of limitation commences “when the employee can first file an unfair labor practice charge to protect his interests.”201

Obviously, the federal courts of appeals are sharply divided over the issue of when a complainant’s section 10(b) period of limitation begins. Furthermore, extremely incompatible section 10(b) decisions can be found within the same circuit. The Ninth Circuit, for example, has ruled that section 10(b)’s period of limitations starts when an employee can first file a charge about an impending unlawful act.202 But the Ninth Circuit has also adopted the doctrine that “notice of the intention to commit an unfair labor practice does not trigger section 10(b).”203 Additionally, the Ninth Circuit has espoused the view that the limitation period begins the moment after an unfair labor practice is committed.204 Moreover, this court has embraced the principle that the limitation period begins to run only after “the party filing the charge receives actual notice that an unfair labor practice has occurred.”205 Clearly, this conflict
within and among the federal circuits must be resolved before the discriminatory, administrative selection of individual charges can end.

D. The Breadth of General Counsel's Prosecutorial Discretion: Intercircuit Conflicts and Their Disparate Impact on the Administrative Enforcement of Individual Rights

The General Counsel's prosecutorial discretion is another important factor affecting whether an individual employees' interests will be addressed and defended in administrative proceedings. Unquestionably, the NLRA provides the General Counsel with an extraordinary amount of prosecutorial discretion. Indeed, one commentator recognizes that when an employer or a union violates the NLRA, and the General Counsel fails to issue a complaint, "the 'wronged' [individual] has no redress." Another commentator argues that the General Counsel's "failure to issue a complaint is a denial of relief under the statute, leaving the [individual] who claims to be suffering from an unfair labor practice without any remedy at all, since [the individual] is usually not entitled to relief in any other forum." Despite this considerable prosecutorial discretion, the General Counsel does not have absolute control over whether an individual's grievance receives adequate and timely redress before the NLRB. Both federal regulations and case law support this proposition. For instance, the National Labor Relations Board's rules and regulations, as opposed to the NLRA, provide ag-

206. See Murphy, supra note 121, at 823-24. Murphy stated:

The power of the General Counsel to decide whether a complaint shall issue has been recognized by the courts as being unreviewable, either by the Board or by the courts themselves. This fact was realized in 1947 when Taft-Hartley was before Congress and led to charges that the General Counsel would become a "labor czar." [I]t is a very great and important power.

Id.; see also H.R. 3020, 80th Cong., 1st Sess. (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LMRA, supra note 11, at 1559-60. Senator Morse remarked:

[I]t is a tremendous power that has been given to the General Counsel . . . . I simply shall never vote to vest in any single individual any such sweeping power over the handling of labor relations cases in this country . . . . This person would control the procedural right of every employer and every labor union in the country. And, when it comes to the question of issuing complaints, it can be done independently of the Board. The Board members would sit there and twiddle their thumbs and could not do anything about it . . . .

Id.

207. Schatzki, supra note 15, at 399.
208. Murphy, supra note 121, at 824.
209. 29 C.F.R. § 102.38 (1990) outlines the rights of parties and states in pertinent part:

Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the administrative law judge . . .

Id.; see also International Union, UAW v. Scofield, 382 U.S. 205, 219 (1965) ("[Once] the General Counsel issues a complaint . . . the charging [individual] is accorded formal recognition: he
grieved individuals a right to participate in an administrative proceeding before the NLRB. Because such a right exists, it is unlikely that the General Counsel will exercise complete control over the plight of an individual's grievance.

More important, the Board itself curtails the extent of General Counsel's prosecutorial discretion. The Board influences whether Counsel addresses and protects an aggrieved individual's legitimate concerns and interests. In fact, many intercircuit conflicts exist regarding whether an injured union or nonunion employee has a right to take complete control of his grievance and challenge the General Counsel's prosecutorial discretion. The following section examines several issues that are generating these intercircuit conflicts and contributing to the disparate enforcement of individual rights in administrative proceedings.

210. See, e.g., Marshall, 622 F.2d at 1191 n.5 (Pollack, J., concurring in part and dissenting in part) ("The NLRA does not, in terms, provide that the charging [individual] can participate as a party to Board proceedings.").

211. The language of the Act clearly separates the administrative functions of the General Counsel and of the Board. The Sixth Circuit in Jackman v. NLRB, 784 F.2d 759 (6th Cir. 1986), concluded:

Section 3(d) amended the Act to provide that the General Counsel be vested with "final authority . . . in respect of the . . . issuance of complaints . . . and in respect of the prosecution of such complaints before the Board. . . ." The obvious intent of amended [s]ection 3(d) was a complete separation of the prosecutorial and adjudicatory functions of the Act, with the former to be exercised by the General Counsel and the latter by the Board.

Id. at 763.

It is also true, however, that some courts of appeals accept the view that the Board's adjudicatory responsibilities allow the Board to review, to modify and to restrict General Counsel's prosecutorial actions. This explains in part why the federal circuits are severely divided over whether General Counsel has "the broadest unreviewable discretion in the prosecution of unfair labor practices" involving individual rights. See id.
ENFORCEMENT UNDER THE LABOR ACTS

1. Intercircuit Conflict over Whether the General Counsel Has Unreviewable Authority to Issue or Not to Issue a Complaint

The circuit in which an individual submits his grievance for administrative review is very important. Indeed, depending upon the jurisdiction, a regional director—acting on the General Counsel's behalf—may refuse to issue a complaint against an alleged wrongdoer, leaving the aggrieved individual with the prospect of receiving no administrative remedy. Furthermore, the Courts of Appeals for the First, Third, Sixth, Seventh, and Tenth Circuits have recognized the General Counsel's discretion not to issue a complaint alleging unfair labor practice charges as unreviewable. See supra notes 97-104 and accompanying text.

212. See supra notes 97-104 and accompanying text.
213. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 139 (1975). The Court held:

In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that an individual's believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

Id.

214. See Lincourt v. NLRB, 170 F.2d 306, 307 (1st Cir. 1948) (“The issuance of a complaint is a matter of administrative discretion [and] the General Counsel of the Board 'shall have final authority .... ’”).

215. See Leeds & Northrup Co. v. NLRB, 357 F.2d 527, 533-34 (3d Cir. 1966) ([U]nder the Act and the rules and regulations of the Board, General Counsel, after investigation of a charge, may elect not to issue a complaint, and such action is discretionary.”); Marine Engrs' Beneficial Ass'n, No. 13 v. NLRB, 202 F.2d 546, 547 (3d Cir.) (“[N]o one has authority to compel the [General Counsel] to issue a complaint .... ”), cert denied, 346 U.S. 819 (1953); Jacobsen v. NLRB, 120 F.2d 96, 100 (3d Cir. 1941) (“[T]he Board does not have to cause a complaint to be issued .... or proceed to prohibit any unfair labor practices complained of. The course to be pursued rests in the sound discretion of the Board .... ”); Mobilab Union, Inc. v. Johansen, 600 F. Supp. 826, 828 (D.N.J. 1985) (“[T]he decisions of the General Counsel regarding the issuance of a complaint are not generally considered reviewable.”).

216. See Jones v. Truck Drivers Local Union No. 299, 838 F.2d 856, 874 (6th Cir. 1988) (“[T]he General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint.”), cert. denied, 110 S. Ct. 404 (1989); Jackman v. NLRB, 784 F.2d 759, 763 (6th Cir. 1986) (“General Counsel [has] the broadest unreviewable discretion in the prosecution of unfair labor practices .... [including] the discretion to refuse to institute an unfair labor practice complaint.” (dictum)); Retail, Wholesale & Dep't Store Union, Local 310 v. NLRB, 745 F.2d 358, 362 (6th Cir. 1984) (“The General Counsel has wide discretion in determining whether a complaint should issue and the Act provides no appeal from his decision.” (dictum)); Echols v. NLRB, 525 F.2d 288 (6th Cir. 1975) (“We have no jurisdiction to review a decision of the ... General Counsel not to file a complaint alleging unfair labor practice charges.”); Mayer v. Ordman, 391 F.2d 889, 889 (6th Cir.) (“It is well settled that the National Labor Relations Act precludes District Court review of the manner in which the General Counsel of the Board investigates unfair labor practice charges and determines whether to issue a complaint .... ”), cert. denied, 393 U.S. 925 (1968).

217. See Sparks v. NLRB, 835 F.2d 705, 706-07 (7th Cir. 1987) (sanctioning petitioner's counsel for initiating a “frivolous” action because in the court's view it is a “bedrock principle of labor law” which is "squarely on point" with “recent” Supreme Court decisions that the General Counsel's decision “not to file an unfair labor practices complaint is not judicially reviewable”); International Union, UAW v. NLRB, 231 F.2d 237, 242 (7th Cir.) (holding that the Act gives the General Counsel the discretion to prosecute complaints), cert. denied, 352 U.S. 908 (1956).

218. See General Drivers, Local 886, v. NLRB, 179 F.2d 492, 494-95 (10th Cir. 1950) (“The
Circuits have adopted the view that the General Counsel has the broadest unreviewable discretion to prosecute unfair labor practices. Consequently, these circuits hold that the Board and federal courts are prohibited from ordering the General Counsel to issue a complaint.

Other circuits, however, disagree. These latter circuits embrace the proposition that the General Counsel's decision not to issue a complaint is reviewable. For example, the Fourth Circuit has ruled that a review of the General Counsel's decision not to issue an unfair labor practice complaint is warranted if he acts "in excess of his delegated powers."219 Similarly, the Fifth Circuit has noted that a court may interfere with the General Counsel's decision to issue a complaint when he acts "in excess of . . . delegated powers and contrary to a specific prohibition in the Act."220 Additionally, the Ninth Circuit has held that "where the decision of the general counsel not to issue an unfair labor practices complaint is wholly without basis in law, a federal . . . court may mandate issuance of the complaint."221

Also, an intracircuit conflict exists over the issue of whether the General Counsel has complete discretion to issue an unfair labor practice complaint. In 1952, the D.C. Circuit decided that "a court has no power to order the General Counsel to issue a complaint . . . [because] the issuance of a complaint lay within the discretion conferred upon the General Counsel by the statute."222 The D.C. Circuit reaffirmed this view eight years later in Bandlow v. Rothman.223 Two years after Bandlow, however, the court complicated the circuit's law by holding that "courts should not be asked . . . to scrutinize [the General Counsel's] decisions in matters of [this] . . . kind, except perhaps in the most extreme situation."224


220. Bova v. Pipefitters & Plumbers Local 60, 554 F.2d 226, 228-29 (5th Cir. 1977). But see Hernandez v. NLRB, 505 F.2d 119, 120 (5th Cir. 1974) ("We find no basis for departing from the teaching of the Supreme Court that 'the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint.' ")

221. NLRB v. International Bhd. of Elec. Workers, Local Union 357, 445 F.2d 1015, 1016 n.2 (9th Cir. 1971); Southern Cal. Dist. Council of Laborers v. Ordman, 318 F. Supp. 633, 636 (C.D. Cal. 1970) (noting that the General Counsel's "refus[al] even to consider plaintiff's charges . . . make[s] this . . . an extreme case which compels limited judicial action"). But see Pacific Southwest Airlines v. NLRB, 611 F.2d 1309, 1311-12 (9th Cir. 1980) ("This and other courts of appeals have adhered to the view that the General Counsel's decision not to issue a complaint is unreviewable by the Board or [by] courts of appeals . . . To the limited extent such review may be available, it is in a district court.")


223. 278 F.2d 866, 866 (D.C. Cir.) (per curiam), cert. denied, 364 U.S. 909 (1960).

In sum, only some complaining individuals may force the General Counsel to issue complaints when their interests are threatened or abridged under the NLRA. Moreover, quick resolution of this disparate and selective access to administrative review appears unlikely in light of the D.C. Circuit's refusal to harmonize its inconsistent rulings. More relevant, the Supreme Court has declined to resolve the conflicts involving this issue within and among federal courts of appeals.225

2. Intercircuit Conflict over Whether the General Counsel Has Unreviewable Authority to Determine the Scope of a Complaint

A complaining nonunion or union employee commonly will ask for several remedies when a charge is filed. Remedies, for example, may include a "cease and desist" order, reinstatement, monetary compensation for loss of earnings, job promotion, and "other benefits."226

Whether an aggrieved individual secures the requested remedies depends in part upon the merits of his contention and the Board's evaluation of the charge. But it is fairly certain that an individual will not receive back pay, reinstatement, or any other remedy if the General Counsel refuses to include such requests in an unfair labor practice complaint. The magnitude of the General Counsel's authority to influence the likelihood of individuals receiving certain types of remedies is a narrow issue that has surfaced in case law.227

1962) (emphasis added).

225. See Associated Builders & Contractors, Inc., Baltimore Metro. Chapter v. Irving, 610 F.2d 1221, 1225 (4th Cir. 1979) ("Although the issue . . . has not been resolved definitively by the Supreme Court, that court . . ., in various decisions, [has] indicated in discussion that such a decision by the General Counsel is not reviewable by the courts." (emphasis added)), cert. denied, 446 U.S. 965 (1980); see also Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 553 (1988) ("The General Counsel has discretion to refuse to issue a complaint if she is not persuaded that the charge has merit or is of sufficient importance to justify prosecution." (dictum)); NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 122 (1987) ("[T]he General Counsel's approval of a determination not to file an unfair labor practice complaint is not subject to judicial review . . . ." (dictum)); Detroit Edison Co. v. NLRB, 440 U.S. 301, 316 (1979) ("To be sure, the Board's General Counsel could theoretically bring a separate unfair labor practice charge against the Union, but he could also in his unreviewable discretion refuse to issue such a complaint." (dictum)); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138 (1975) ("Congress has delegated to the Office of General Counsel on behalf of the Board the unreviewable authority to determine whether a complaint shall be filed." (dictum)); Vaca v. Sipes, 386 U.S. 171, 182 (1967) ("The Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." (dictum)).


According to the Court:

We are mindful that the Board is granted broad discretion in devising remedies to undo the effects of violations of the Act . . . and of the principle that in the area of federal labor law the relation of remedy to policy is peculiarly a matter for adminis-
however, a much broader issue contributes to the disparate, selective administrative enforcement of individual rights under the NLRA.

Currently, severe confusion exists within and among federal courts of appeals over whether the General Counsel has complete authority to determine the entire scope of a complaint without the Board's, federal courts', or an aggrieved individual's input or consent. The Third and Fourth Circuits, for example, have held that the General Counsel has complete discretion to determine a complaint's scope. Also, the Fifth and D.C. Circuits have ruled, on several occasions, that the General Counsel has plenary authority to determine the scope of complaints.

However, the Ninth, Fifth, and D.C. Circuits have rendered con-
trary decisions. All three circuits have held that the Board has discretion to amend a complaint and that a failure to exercise such discretion would be paramount “to assign[ing] to the General Counsel matters that clearly fall within the adjudicatory function of the Board.”

One consequence of this particular conflict is that a particular complainant's ability to shape an unfair labor practice complaint is highly influenced by the court of appeals in which the charge is filed. Thus, some circuits allow complainants to shape their complaints and thereby increase the probability of receiving adequate and timely remedy. Other circuits deprive complainants of this liberty. Clearly, such unwarranted, discriminatory action must cease because it undermines one of the Act's primary objectives: the elimination of unfair labor practices.

3. Intercircuit Conflict over Whether the General Counsel Has Discretion to Dismiss a Charge and Withdraw a Complaint

Another concern from an aggrieved individual's perspective is the ability of the General Counsel effectively to prevent complainants from receiving any administrative remedy. This problem exists because several federal circuits have accepted the view that the General Counsel has complete unreviewable discretion not to issue a complaint. Consequently, many complaining union and nonunion employees do not gain access to an administrative forum because the General Counsel dismisses their alleged unfair labor practice charges and withdraws their complaints without the injured parties' input.
Some courts of appeals have perceived such behavior as a legitimate exercise of the General Counsel's unreviewable prosecutorial discretion; others have not.\textsuperscript{239}

The intercircuit conflict over this particular issue is unnecessary. In \textit{NLRB v. United Food & Commercial Workers Union, Local 23},\textsuperscript{240} the Supreme Court had a good opportunity to resolve the controversy over whether the NLRA gives the General Counsel unreviewable authority to dismiss a charge and withdraw a complaint \textit{for whatever reason}. The Court did not take advantage of that opportunity. Instead, the Court issued a very narrow ruling that upheld the General Counsel's right to withdraw a complaint under certain conditions.\textsuperscript{241} Specifically, the Supreme Court held that the General Counsel has unreviewable authority to dismiss a charge and withdraw a complaint in cases involving settlement agreements.\textsuperscript{242}

Unlike the narrow ruling in \textit{United Food & Commercial Workers Union}, the NLRB's rules and regulations are much broader and unequivocal. They permit "[a]ny complaint [to] be withdrawn before the hearing by the regional director on his own motion."\textsuperscript{243} Moreover, if an aggrieved individual refuses to accept a regional director's recommendation to dismiss a charge, the latter may dismiss the charge without the individual's consent.\textsuperscript{244}

\textsuperscript{239} Compare infra notes 244-50 and accompanying text with infra notes 251-56 and accompanying text.

\textsuperscript{240} 484 U.S. 112 (1987).

\textsuperscript{241} Id. at 125-26.

\textsuperscript{242} Id. According to the Court:

\[W]e fail to see why the General Counsel should have the concededly unreviewable discretion to file a complaint, but not the same discretion to withdraw the complaint before hearing . . . . The General Counsel's unreviewable discretion to file and withdraw a complaint . . . logically supports a reading that she must also have final authority to dismiss a complaint in favor of an informal settlement, at least before a hearing begins.

\textsuperscript{243} 29 C.F.R. § 102.18 (1990).

\textsuperscript{244} Id. § 101.6. Section 101.6 states in part:

If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director thereupon informs the parties of this section [sic, probably should be action], together with a simple statement of the grounds thereof, and the complainant's right of appeal to the General Counsel in Washington, D.C., within 14 days.

\textsuperscript{245} It is also true that an individual's decision to dismiss an unfair labor practice charge does not affect General Counsel's prosecutorial discretion, because

\[t]he Board has . . . long recognized that the willingness of a charging party to withdraw charges is not necessarily grounds for dismissal of a complaint "for once a charge is filed, the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and the duty of enforcing the Act in which the public has an interest."

\textit{Oil, Chem. & Atomic Workers Int'l Union v. NLRB, 806 F.2d 269, 272 n.28 (D.C. Cir. 1986); see also Note, supra note 104, at 787} ("[T]he General Counsel can refuse to permit the charge to
The Second, Fourth, Sixth, and Ninth Circuits have supported the view expressed in the Board's regulations. The Ninth Circuit, for example, has consistently held that the General Counsel's decision to dismiss a charge and withdraw a complaint is an act of prosecutorial discretion that is unreviewable. But, the Ninth Circuit also has adopted the position that "the Board has the authority to alter its public position on matters of labor law either through changes and additions to its regulations or through Board decisions." Yet, this same circuit continues to support the proposition that the Board does not have authority to review General Counsel's withdrawal decisions.

Conversely, the Third Circuit has vehemently disagreed with the argument that Board regulations give the General Counsel and regional directors unreviewable authority to dismiss a charge and withdraw a complaint. In *Leeds & Northrup Co. v. NLRB*, the court strongly attacked the NLRB's regulation which allows a regional director to withdraw a complaint on his own motion. In *Leeds & Northrup*, the court held that the regulation "is inconsistent with the scheme of the Act . . . and arbitrarily aborts both administrative and judicial review contrary to law." In addition, the Third Circuit has supported the view that the General Counsel's decision to dismiss a complaint is reviewable under the Administrative Procedure Act. In support of this contention, the court reasoned that after a complaint has been issued, "an adjudicatory phase of the administrative process arises necessitating appropriate avenues of review, both administrative and judicial."
The D.C. Circuit has similarly supported some limited review of the General Counsel's decision to dismiss a charge and withdraw a complaint. The court's rationale for its position is that the General Counsel's "prosecutorial role may at times blend with the [Board's] adjudicatory role," and his "prosecutorial act often might . . . encompass basic policy considerations."\(^{256}\)

4. Intercircuit Conflict over Whether the General Counsel Has Unreviewable Discretion to Grant or Deny an Evidentiary Hearing

When the General Counsel refuses to issue a complaint, refuses to expand a complaint's scope, withdraws a complaint, or negotiates an informal settlement agreement\(^ {257}\) without an aggrieved individual's input or consent,\(^ {258}\) an individual's interests are unquestionably affected in a significant manner. Perceiving some inherent unfairness in such an exercise of prosecutorial discretion, several federal courts of appeals have ordered the General Counsel to provide aggrieved individuals an evidentiary hearing to voice legitimate concerns and disagreements. Other federal appellate courts have refused to order such hearings. Such disparate access to a forum to protest alleged abuses of prosecutorial discretion only fosters the continued, unequal administrative enforcement of individual employees' rights across this nation.

Under the NLRA, federal courts of appeals have granted or denied aggrieved litigants' requests for an evidentiary hearing for a variety of reasons. For example, the Sixth Circuit has asserted that there is no statutory right to an unconditional evidentiary hearing involving an unfair labor practice\(^ {259}\).

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256. ILGWU, Local 415-475 v. NLRB, 501 F.2d 823, 830-31 & n.29 (D.C. Cir. 1974). On another occasion, the D.C. Circuit has suggested that it will not give the General Counsel blanket authority to dismiss a charge and withdraw a complaint; instead, the General Counsel's discretion to withdraw a complaint would be subjected to a case-by-case review. American Fed'n of Gov't Employees v. FLRA, 785 F.2d 333, 334 (D.C. Cir. 1986) ("The question is whether the Authority General Counsel properly exercised his discretion [when he] withdrew the unfair labor practice complaint. We uphold the General Counsel's exercise of his discretion in this particular case . . . ." (emphasis added)).

257. See Modjeska, The NLRB Litigational Processes: A Response to Chairman Dotson, 23 Wake Forest L. Rev. 399, 425 (1988) ([A]pproximately 40,000 or more unfair labor practice charges are filed annually [and] General Counsel . . . has an impressive settlement rate of approximately 95%.").

258. See, e.g., Jaffe, The Public Right Dogma in Labor Board Cases, 59 Harv. L. Rev. 720, 727 (1946) ("[T]he Board appears to have absolute discretion . . . [and it] may settle a controversy either before or after formal action."); see also Note, Labor Law: Right of a Person Filing an Unfair Labor Practice Charge to a Hearing, 65 Colum. L. Rev. 1104, 1107 (1965) ("[T]he determination to enter into a settlement should not turn solely upon the interest of the charging party . . . . [T]he decision to settle [a] case and enter a consent order should be within the Board's discretion . . . . [but] the charging party . . . . [should have] an opportunity to present its reasons for objecting to the settlement . . . ."); Note, NLRB Settlement Agreements—Right of a Charging Party to an Evidentiary Hearing, 20 Sw. L.J. 901, 902-03 (1966) ("A formal settlement agreement results in the issuance of a final Board order and can be enforced by a court decree . . . . An informal settlement agreement is a gentlemen's agreement, and no formal order or court decree issues . . . . [S]ettlement agreements may give the charging party less than it sought.").
charge. 259 On the other hand, the Sixth Circuit has also held that “newly discovered or previously unavailable evidence” requires the General Counsel to grant an evidentiary hearing. 260

The Second Circuit, also, has refused to order evidentiary hearings as a matter of course. The court has noted that although section 10(b) of the Act may allow an aggrieved individual to participate in any hearing, “it does not purport to create an independent entitlement to . . . [an evidentiary] hearing.” 261 Additionally, the Ninth Circuit has rejected the notion that an aggrieved individual has a statutory right to an evidentiary hearing when a controversy involves an issue “outside the scope of the complaint.” 262

Among the circuits embracing the principle that a complaining individual has a statutory right to an evidentiary hearing, the Third and Fifth Circuits’ views are most poignant. The Third Circuit has supported the rule that “people who bring charges and succeed in getting complaints to be issued are entitled to [an evidentiary] hearing.” 263 Similarly, the Fifth Circuit has adopted the rule that a “charging party must be afforded . . . an evidentiary hearing on any material issues of disputed fact presented by his objections.” 264

Federal appellate courts also are divided over whether aggrieved union and nonunion employees have a right to an evidentiary hearing to protest unfavorable informal settlement agreements. In recent years, more than 40,000 unfair labor practice charges were filed annually and nearly all were resolved through informal settlement agreements. 265 These agreements often provide the complaining individual with a remedy that is less than what was sought in the complaint. 266 The complainants who have an opportunity to challenge unacceptable informal settlements in evidentiary hearings have an increased likelihood of receiving meaningful and adequate redress for imprudent settlement agreements. Indeed, some courts of appeals have acknowledged this fact and order postsettlement evidentiary hearings. Both the Third 267 and Ninth 268 Circuits have

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260. Id.
263. Leeds & Northrup Co. v. NLRB, 357 F.2d 527, 536 (3d Cir. 1966); see also Jacobsen v. NLRB, 120 F.2d 96, 101 (3d Cir. 1941) (holding that the NLRB, itself, must afford the charging party the opportunity to present additional evidence).
264. Concrete Materials, Inc. v. NLRB, 440 F.2d 61, 68 (5th Cir. 1971); see also Note, supra note 104, at 793-94. According to the commentator, “Since an unfair labor practice may indubitably affect the charging party in a substantial way . . . the charging party should be granted a right to be heard.” Id. The commentator also asserts that “[r]equiring a hearing to allow a charging party to place on the record his reasons for objecting to a consent order is unlikely to undermine the efficient use of Board resources.” Id. at 801.
266. See supra note 258.
267. See Food & Commercial Workers Union, Local No. 23 v. NLRB, 122 L.R.R.M. 2121, 2126 (3d Cir. 1986) (holding that the charging party is entitled to evidentiary hearing to protest a
circuits, for example, have instructed the General Counsel to conduct evidentiary hearings to resolve complainants' settlement disputes.

In contrast, other federal appellate courts have refused to order the General Counsel to conduct settlement-related evidentiary hearings. For example, the D.C. Circuit has ruled more than once that a victim of an unfair labor practice has no statutory right to an evidentiary hearing to discuss an informal settlement agreement. Likewise, the Sixth Circuit, in Jackman v. NLRB, adopted a similar position. In Jackman, the court held that the General Counsel's acceptance of an informal unfair labor practice settlement—before convening an evidentiary hearing for complainant to discuss and contest the agreement—did not violate "the intent and purposes underlying the Act." These conflicts that divide the federal courts of appeals continue to thwart predictable and unbiased administrative enforcement of individual rights under the NLRA, and the Supreme Court has refused to remedy this inequitable situation. In NLRB v. United Food & Commercial Workers Union," the Court settled several other NLRA procedural issues but concluded that "we need not determine whether an evidentiary hearing should have been ordered."

5. Intercircuit Conflict over Whether the General Counsel's Adverse Decisions Are "Final Orders" of the Board Thereby Allowing an Individual to Obtain Judicial Review

Clearly, an aggrieved individual who seeks administrative relief under the NLRA finds himself in a very unpleasant position if the General Counsel refuses to issue a complaint or withdraws a complaint and, instead, accepts an informal settlement agreement. An individual would find himself in a somewhat similar dilemma if the General Counsel refused to expand the scope of a complaint to adequately redress an unfair labor practice injury. Similarly, the General Counsel's unwillingness to grant an evidentiary hearing to discuss his settlement agreement), rev'd, 484 U.S. 112 (1987).

268. See International Ass'n of Machinists & Aerospace Workers v. Lubbers, 681 F.2d 598, 604 (9th Cir. 1982) ("This court held that an evidentiary hearing on the disputed facts was required. Other circuits similarly have ordered evidentiary hearings to consider objections raised by charging parties concerning the settlement of their complaints."); cert. denied, 459 U.S. 1201 (1983); NLRB v. International Bhd. of Elec. Workers, Local Union 357, 445 F.2d 1015, 1018 (9th Cir. 1971) (holding that an evidentiary hearing was required to resolve a material settlement issue).

269. See, e.g., ILGWU, Local 415-475 v. NLRB, 501 F.2d 823, 833 (D.C. Cir. 1974) ("[T]he proper exercise of discretion to accept the settlement agreement without [affording the charging party an evidentiary] hearing."); Textile Workers Union v. NLRB, 315 F.2d 41, 42 (D.C. Cir. 1963) (holding that the charging party was not entitled to an evidentiary hearing to protest against an informal settlement agreement).

270. 784 F.2d 759 (6th Cir. 1986).

271. Id. at 763.


273. Id. at 133.
final, adverse actions would very likely exacerbate the victim’s injury.

To soften the effects of the rule that a “victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of the General Counsel,” several federal circuits have characterized the General Counsel’s final, adverse decisions as “final orders of the Board.” In this way, some appellate courts have granted judicial review to complainants under the NLRA.

By way of example, the Third, Fourth, and D.C. Circuits have granted judicial review of certain “final” General Counsel decisions. These circuits have found decisions involving informal settlement agreements, the refusal to issue complaints, and the withdrawal of complaints to be final NLRB orders. The Ninth Circuit has suggested that the General Counsel’s decisions are final orders because Counsel’s action “is unreviewable by the Board or [by federal] courts of appeals.” Consequently, these courts have granted judicial review.

Conversely, other circuits have refused to view the General Counsel’s actions as final Board orders. In fact, the First Circuit has unequivocally stated

274. Turgeon v. FLRA, 677 F.2d 937, 940 (D.C. Cir. 1982).
276. See United Food & Commercial Workers Union, Local No. 23 v. NLRB, 122 L.R.R.M. 2121, 2125 (3d Cir. 1986) (holding that the General Counsel’s decision was a final order because “there [is] no distinction between disposition of complaints by formal or informal settlements”), rev’d, 484 U.S. 112 (1987). But see Leeds & Northrup Co. v. NLRB, 357 F.2d 527, 534 (3d Cir. 1966) (although finding that the General Counsel’s action was final Board action in the instant case, the court noted that the authority to issue final orders resides in the Board itself).
277. See Associated Builders & Contractors, Inc., Baltimore Metro. Chapter v. Irving, 610 F.2d 1221, 1225 (4th Cir. 1979) (suggesting that the General Counsel’s decision not to issue a complaint is a final order—subject to judicial review—because the Board cannot review the General Counsel’s decision), cert. denied, 446 U.S. 965 (1980). But see George Banta Co. v. NLRB, 626 F.2d 354, 356 (4th Cir. 1980) (“The phrase ‘final order of the Board’ . . . refers solely to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices . . . .” (emphasis added)), cert. denied, 449 U.S. 1080 (1981).
278. See ILGWU, Local 415-475 v. NLRB, 501 F.2d 823, 826 n.9 (D.C. Cir. 1974) (“There is no question . . . that the . . . charging party . . . has been aggrieved by the withdrawal of the complaint, [and] that the ‘order’ is final for review purposes . . . .”) But see Turgeon v. FLRA, 677 F.2d 937, 940 (D.C. Cir. 1982) In Turgeon, the court found:

Case law under the National Labor Relations Act has established that a decision of the . . . General Counsel declining to issue an unfair labor practice complaint is not a “final order of the Board” within the meaning of the judicial review provision of the NLRA. . . . “Such administrative determinations by the General Counsel are not denominated ‘orders’ in the Act, and the Act makes no provision for their review.” Id. (quoting Lincourt v. NLRB, 170 F.2d 306, 307 (1st Cir. 1948)).
279. Pacific Southwest Airlines v. NLRB, 611 F.2d 1309, 1311 (9th Cir. 1980). But see International Bhd. of Boilermakers, Union Local 6 v. NLRB, 872 F.2d 331, 332 (9th Cir. 1989) (“A federal court has the authority to review only those Board orders which are final. . . . Thus, if the General Counsel’s decision to withdraw his complaint was an act of ‘prosecutorial discretion,’ there is no opportunity for judicial review.” (emphasis in original)); Foley-Wismer & Becker v. NLRB, 695 F.2d 424, 427 n.2 (9th Cir. 1982) (noting that the General Counsel has “final authority” to issue a complaint and that his decision is not reviewable in any judicial forum).
that "the phrase 'a final order of the Board' . . . refers solely to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices." 280 Similarly, the Sixth Circuit has ruled that the General Counsel's final adverse informal settlement decisions are not final orders which would allow an aggrieved employee to obtain judicial review in federal court. 281 Finally, both the Fifth 282 and Tenth 283 Circuits have ruled that only the Board—not the General Counsel—has authority to issue a final order that is reviewable in a federal appellate court.

Like other incompatible federal appellate courts' decisions involving the NLRA's administrative procedures, these intercircuit and intracircuit conflicts over the definition of "final orders of the Board" are contributing to the unjustified, disparate, and selective administrative enforcement of individual rights under the NLRA. It is equally apparent that the Supreme Court can bring an end to this unjustified discrimination by issuing broader, more intelligible, and sounder decisions.

Certainly, the Court's decision in NLRB v. United Food & Commercial Workers Union, Local No. 23284 regarding section 10(f) is neither intelligible nor sound. There, the Court had an opportunity to clearly state whether the General Counsel's prehearing determinations were "final orders" and therefore subject to judicial review. The Court did not seize this opportunity; instead, it presented a rambling discussion of "prehearing prosecutorial" and "post-hearing adjudicatory" determinations without precisely defining the meaning of these expressions. 285 In applying these ill-defined concepts, the Court concluded that the General Counsel's decision to accept an informal settlement agreement "before a hearing begins" is a "prosecutorial" determination that bars judicial review. 286

The Supreme Court's "final orders" decision in United Food & Commercial Workers is truly unsettling. Among other faults, the opinion fails to ade-

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281. See Jackman v. NLRB, 784 F.2d 759, 762 (6th Cir. 1986); see also Retail, Wholesale & Dep't Store Union, Local 310 v. NLRB, 745 F.2d 358, 362 (6th Cir. 1984) (suggesting that the General Counsel's decisions are not final orders because "the Act provides no appeal from his decision").
282. See American Fed'n of Gov't Employees Local 1749 v. FLRA, 842 F.2d 102, 105 (5th Cir. 1988). The American Fed'n court held:
   As is the case with the NLRB, the Authority's General Counsel has a role similar to that of a prosecutor, and his decision not to prosecute puts an end to the matter and is not reviewable, irrespective of the merits of the underlying unfair labor practice assertions. The General Counsel of the Authority having made his decision not to issue an unfair labor practice complaint [has issued] no "final order" of the Authority that confers jurisdiction on this court.
   Id. (emphasis added).
283. See General Drivers, Local 886 v. NLRB, 179 F.2d 492, 494 (10th Cir. 1950) ("The phrase 'a final order of the Board' . . . refers solely to an order of the [B]oard . . . .").
285. Id. at 125-30.
286. Id. at 130.
quately define the phrase "before a hearing begins." In addition, the decision does not resolve other controversies. Specifically, federal courts of appeals are still forced to debate and decide whether the General Counsel's refusal to alter the scope of a complaint and whether his refusal to grant an evidentiary hearing are "prosecutorial" or "adjudicatory" determinations. The controversy persists because these determinations may fall under either heading, depending upon when they are made.

For instance, a fair reading of the Court's decision suggests that the General Counsel's decision to modify the scope of a complaint is a "prosecutorial" act when the modification occurs after the commencement of a hearing but prior to the actual discussion of the merits of the unfair labor practice complaint. By necessary implication, the opinion suggests that the decision to modify would not be a final Board order and, therefore, not reviewable. Alternatively, the Board's decision to modify a complaint's scope before the beginning of a hearing may be labelled "adjudicatory," because an impartial reading of the Act strongly suggests that the Board can amend a complaint "any time prior to the issuance of an order." Presumably, this refers to any time before or after the commencement of a hearing. Thus, it is clear that the United Food & Commercial Workers decision will perpetuate the ambiguities and unfair discrimination that exists today with respect to the NLRA's administrative procedures.

Congress must act to correct the severe and persistent discriminatory effects that the federal appellate courts' inharmonious procedural rulings have caused. Congress is obligated to enforce individual rights and ensure that aggrieved union or nonunion employees who present meritorious charges receive timely and predictable redress in administrative proceedings under the NLRA. Congressional action is necessary because it appears that the Supreme Court is not ready or is unwilling to resolve these procedural conflicts in an intelligible and timely fashion.

III. NLRA Complainants' Differential Access to Private Judicial Remedies Under the National Labor Relations Act and Administrative Procedure Act

Certainly, many disgruntled union and nonunion employees who file charges

287. See supra notes 228-36 and accompanying text.
288. See supra notes 257-73 and accompanying text.
289. See supra notes 284-86 and accompanying text (discussing the Court's distinction between "prehearing prosecutorial" and "post-hearing adjudicatory" determinations).
290. 29 U.S.C. § 160(b) (1988) (emphasis added). Section 160(b) states in pertinent part:
   Whenever it is charged that any person has engaged in . . . any . . . unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges . . . and containing a notice of hearing . . .
   Any such complaint may be amended by . . . the Board in its discretion at any time prior to the issuance of an order based thereon.
   Id. (emphasis added).
under the NLRA overcome various procedural barriers and obtain resolutions of their unfair labor practice complaints on the merits. While the Board's final orders often include remedial directives that are congruent with the complainants' desires and expectations, sometimes they do not.\textsuperscript{293}

Appreciating that the NLRA allows any person to obtain judicial review of an adverse, final Board order,\textsuperscript{292} many unsuccessful nonunion and union employees seek such review in an appropriate federal court of appeals. Other unsuccessful parties originate private actions in a federal district court under the Administrative Procedure Act ("APA").\textsuperscript{293}

The laws of the respective federal circuits control whether an individual receives a private remedy under the NLRA and under the APA. Once again, conflicts exist. Some federal circuit courts allow aggrieved individuals to obtain a private remedy under the NLRA, while others do not. And some federal circuits allow unfair labor practice victims to commence private actions in federal district courts under the APA to secure a private remedy. A discussion of these procedural conflicts among the federal circuits and their significant contribution to the disparate and selective enforcement of individual rights under the NLRA follows below.

\textbf{A. Intercircuit Conflict over Whether an Aggrieved Individual Is Entitled to Private Judicial Relief Under the NLRA}

The debate over whether the NLRA protects a private right\textsuperscript{294} or a public right is almost as old as the Act itself. Fifty years ago, Professor Jaffe stated that "a law promoting 'public interests' does not exclude or negate private right."\textsuperscript{295} He added that "there is no clear and shining line between so-called private rights enforced by individual litigants and so-called public rights en-

\begin{footnotesize}
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\item 291. See, e.g., Darr v. NLRB, 801 F.2d 1404, 1405 (D.C. Cir. 1986) (where an unlawfully discharged employee challenged the NLRB's deferral to an arbitrator's "inadequate" award); NLRB v. Bin-Dicator Co., 356 F.2d 210, 213 (6th Cir. 1966) (where an unlawfully discharged employee—who allegedly threatened his supervisors—challenged the Board's denial of reinstatement and backpay).
\item 292. See supra note 144 and accompanying text.
\item 293. 5 U.S.C. §§ 701-706 (1988).
\item 294. An individual employee may seek protection for and enforcement of various "individual rights," "private interests," or "private rights." However, in the context of this discussion, "private rights" include—but are not limited to—the right to form, join and attend labor associations; right to solicit members; right to picket; and the right to wear union insignia on clothing. If the individual employee is discharged for participating in such activities, "private rights" means the right to be reinstated; the right to receive the actual amount of wages lost during a period of termination; and the right to occupy the same seniority status after reinstatement. And finally, where the Board adopts the General Counsel's recommendations and refuses to award reinstatement or backpay, "private rights" means the right to challenge the General Counsel's decision to perform or not to perform one or all of the following: issuing a complaint; expanding the scope of a complaint; withdrawing a complaint; accepting an informal settlement agreement and convening an evidentiary hearing for an individual to protest the General Counsel's adverse decisions.
\item 295. See Jaffe, supra note 20, at 493.
\end{itemize}
\end{footnotesize}
forced by an agency like the National Labor Relations Board." 296

The Third Circuit supports Professor Jaffe's position. The Third Circuit has observed that although "the Board and its Agents act in the public interests[,] . . . [they do] not [act] exclusively so, or in utter disregard of private interests, be they individual or collective." 297 The Ninth Circuit's position is similarly consistent with Professor Jaffe's argument. The Ninth Circuit has observed that "[t]he public may incidentally . . . [benefit] by peace in our industrial establishment but private rights are the primary concern of . . . [the] General Counsel['s] [function] under the NLRA." 298

Other federal appellate courts espouse a very different view about an individual's right to secure a private judicial remedy under the NLRA. The Fifth Circuit, for example, has consistently held that "the National Labor Relations Act [does] not provide a private administrative remedy and . . . provide[s] no private rights to victims of unfair labor practices." 299 Similarly, the First, 300 Second, 301 Fourth, 302 Seventh, 303 and D.C. 304 Circuits embrace the view that

296. See Jaffe, supra note 258, at 720.
297. Leeds & Northrup Co. v. NLRB, 357 F.2d 527, 532 (3d Cir. 1966); see also Marine Eng'rs' Beneficial Ass'n No. 13 v. NLRB, 202 F.2d 546, 547 (3d Cir.) ("That the Board is charged with the responsibility of representing public interests, [and] not that of private litigants [is recognized]. But this is one of those situations where general propositions do not decide concrete cases."); cert. denied, 346 U.S. 819 (1953). But see Schaefer v. NLRB, 697 F.2d 558, 560 (3d Cir.) ("It is well settled that an individual may not waive, bargain away or compromise any backpay which might be due him (or her) since it is not a private right which attaches to the discriminatee, but is, indeed a public right which only the Board or the Regional Director may settle." (quoting the administrative law judge's ruling)), cert. denied, 464 U.S. 945 (1983).
298. Pacific Southwest Airlines v. NLRB, 611 F.2d 1309, 1313 (9th Cir. 1980). But see Hateston Drug Stores, Inc. v. NLRB, 187 F.2d 418, 420 (9th Cir.), cert. denied, 342 U.S. 815 (1951). In Hateston Drug Stores, the court noted:

The courts have uniformly recognized that the National Labor Relations Act did not confer private rights, but granted only rights in the interest of the public to be protected by a procedure looking solely to public ends. The proceeding authorized to be taken by the Board was not for the adjudication or vindication of private rights. The Board's function as an administrative agency is to give effect to the declared public policy of Congress. These propositions have been too long and too firmly established to justify citation of the cases.

Id. (emphasis added).
299. Concrete Materials, Inc. v. NLRB, 440 F.2d 61, 65 (5th Cir. 1971); see also United States Contractors, Inc. v. NLRB, 697 F.2d 692, 695 (5th Cir. 1983) ("The Board . . . acts in the public interest by enforcing public, not private rights . . . ."); Gulf States Mfrs., Inc. v. NLRB, 598 F.2d 896, 901 (5th Cir. 1979) ("The Board acts in the public interest to enforce public, not private rights."); W.C. Nabors v. NLRB, 323 F.2d 686, 688 (5th Cir. 1963) ("The National Labor Relations Board 'does not exist for the adjudication of private rights'; it acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce . . . ."); cert. denied, 376 U.S. 911 (1964).
300. See, e.g., Saez v. Goslee, 463 F.2d 214, 215 (1st Cir.) ("The remedies of the National Labor Relations Act have generally been construed as protecting public rather than private rights . . . ."); cert. denied, 409 U.S. 1024 (1972).
301. See, e.g., Local 282, Int'l Bhd. of Teamsters v. NLRB, 339 F.2d 795, 800 (2d Cir. 1964) ([T]he National Labor Relations Act banned unfair labor practices in order to vindicate a public interest and did not create private rights in the charging party . . . .). But see NLRB v. Local
the NLRA only allows the vindication of a public right. Consequently, private rights are not recognized. These courts, therefore, would deny a disgruntled worker an opportunity to obtain private, make-whole relief in federal courts under the NLRA, regardless of the types of injuries or deprivations alleged in their unfair labor practice charges.

This private-right-of-action issue has produced conflicting rulings within and among the federal courts of appeals. Moreover, these inconsistent holdings contribute to the disparate enforcement of NLRA complainants' rights. Additionally, the Supreme Court has exacerbated this inequitable situation by refusing to state definitively whether an injured employee who challenges an adverse Board order is entitled to private judicial relief under the NLRA. Indeed, the Supreme Court's conflicting dicta in various decisions have kept the debate alive for half of a century.

As early as 1940, the Supreme Court observed in National Licorice Co. v. NLRB, 279 F.2d 83, 88 (2d Cir. 1960) ("[T]he reimbursement order vindicates public rights as well as private rights . . . .").

302. See, e.g., NLRB v. Globe Prods. Corp., 322 F.2d 694, 697 (4th Cir. 1963) ("It is true that the Board in issuing a back pay order is enforcing a public rather than a private right; but by making the individual whole for losses suffered from illegal discrimination, the public right is thereby vindicated."); NLRB v. Threads, Inc., 308 F.2d 1, 8 (4th Cir. 1962) ("[The] right of a discriminatorily discharged employee to reinstatement and back pay is not a private right subject, like an ordinary debt, to private adjustment, but a remedy that is provided in the public interest in order to enforce a public right.").

303. See, e.g., NLRB v. Rose, 347 F.2d 498, 499 (7th Cir. 1965) (holding that the "right of a discriminatorily discharged employee to reinstatement and back pay is not a private right subject to private adjustment, but a remedy that is provided in the public interest in order to enforce a public right""); Shank v. NLRB, 260 F.2d 444, 446 n.1 (7th Cir. 1958) ("This Court has held that although the National Labor Relations Act created rights against employers . . . such rights were not private rights vested in the employees, but were public right, and . . . the function of the Board was to . . . [perform] in the public interest and not in vindication of private rights."); Local Union No. 12, Progressive Mine Workers, Dist., No. 1 v. NLRB, 189 F.2d 1, 4 (7th Cir.) ("In this proceeding we are not dealing with private rights . . . [I]t is true that the National Labor Relations Act created rights against employers [but] such rights were not private rights vested in the employee but were public rights . . . ."); cert. denied, 342 U.S. 868 (1951); Inland Steel Co. v. NLRB, 170 F.2d 247, 266 (7th Cir. 1948) ("[A]ny benefit which employees . . . derived from the enforcement of these public rights was entirely incidental to the public purpose which enforcement was designed to achieve. True, under the Act, the Board acts in a public capacity, but not for the adjudication of private rights . . . ."). aff'd, American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

304. See, e.g., Oil, Chem. & Atomic Workers Int'l Union v. NLRB, 806 F.2d 269, 272 (D.C. Cir. 1986) ("The Board's policy against deference to private settlement agreements is grounded on the well-accepted principle that the Board, having filed an unfair labor practice complaint, proceeds in vindication of the public interest, not in vindication of private rights." (emphasis in original)).

305. See Darr v. NLRB, 801 F.2d 1404, 1406-08 (D.C. Cir. 1986) (the court remanded the case to the Board to explain why the Board deferred to the arbitrator's award which granted incomplete relief).

306. See generally Note, supra note 104, at 795 ("NLRB procedure continues . . . to make a distinction between 'public' and 'private rights' . . . . [I]njured parties may not seek private relief in the federal courts. This strict limitation on redress available to interested parties is unusual.").
ENFORCEMENT UNDER THE LABOR ACTS 705

NLRB\textsuperscript{307} that "[t]he proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights."\textsuperscript{308} And, a year later, the Court stated in Phelps Dodge Corp. v. NLRB\textsuperscript{309} that "[t]he Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace."\textsuperscript{310}

However, eleven years after the Phelps Dodge decision, the Supreme Court decided Nathanson v. NLRB.\textsuperscript{311} In Nathanson, the Supreme Court issued new dicta which substantially departed from that found in Phelps Dodge. Wanting to award individual victims a specific remedy without appearing to be abandoning the Phelps Dodge dictum, the Nathanson Court stated that "[a] back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice."\textsuperscript{312} In 1965, the Court reinforced this viewpoint in International Union v. Scofield.\textsuperscript{313} The International Union, UAW Court abandoned the Phelps Dodge dictum altogether, boldly pronouncing that "the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests[;] . . . the two interblend in the intricate statutory scheme."\textsuperscript{314}

Two years after the Scofield decision, however, the Phelps Dodge language reappeared in Vaca v. Sipes.\textsuperscript{315} In Vaca, the Supreme Court observed that "[t]he public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."\textsuperscript{316} This was the Court's general view for eight years until it decided NLRB v. Sears, Roebuck & Co.\textsuperscript{317} There, the Supreme Court reaffirmed what was said in Scofield when it refused "to characterize the enforcement of the laws against unfair labor practices either as a wholly public or [a] wholly private matter."\textsuperscript{318}

Undeniably, the Supreme Court must stop issuing such conflicting dicta. It is imperative that the Court conclusively and authoritatively decide whether the NLRA protects an injured employee's right to receive private, judicial re-

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\bibitem{307} 309 U.S. 350 (1940).
\bibitem{308} Id. at 362 (dictum); see also Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 266 (1940) ("The vindication of the desired freedom of employees is . . . confided by the Act, by reason of the recognized public interest, to the public agency the Act creates." (dictum)).
\bibitem{309} 313 U.S. 177 (1941).
\bibitem{310} Id. at 194 (dictum).
\bibitem{311} 344 U.S. 25 (1952).
\bibitem{312} Id. at 27 (dictum) (emphasis added); see also NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 258 (1939) ("The purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights." (dictum)).
\bibitem{313} 382 U.S. 205 (1965).
\bibitem{314} Id. at 220 (dictum).
\bibitem{315} 386 U.S. 171 (1967).
\bibitem{316} Id. at 182 n.8 (dictum).
\bibitem{317} 421 U.S. 132 (1975).
\bibitem{318} Id. at 156 n.22 (dictum).
\end{thebibliography}
lief after exhausting NLRA's administrative remedies. This type of irrefutable precedent is necessary to cure the discriminatory enforcement of private rights in which the federal circuits are now engaging. Abrogating the conflict among the federal circuits regarding the enforcement of private rights is necessary because neither the NLRA's language nor its implementing legislation contemplate such discriminatory outcomes among individuals who complain about the NLRB's final adverse orders.

B. Intercircuit Conflict over Whether an Aggrieved Individual Is Entitled to Private Judicial Relief Under the Administrative Procedure Act

In relevant part, the Administrative Procedure Act states that "[a] person suffering [a] legal wrong because of agency action . . . or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." The APA, however, only allows an aggrieved individual to contest a final agency action if there is no other adequate court relief available. Also, judicial review is not permitted under the APA if a "relevant statute" precludes it or if "agency action is committed to agency discretion by law." Some employees who are adversely affected by the NLRB's final orders seek individual relief in federal appellate courts under the Administrative Procedure Act. A few are successful; many are not. A careful examination of judicial rulings suggests that haphazardly reached conclusions—rather than sound, reasoned decisionmaking—explain much of the disparate enforcement of NLRA victims' rights under the APA. Furthermore, these decisions continue to generate inconsistent results within and among the federal courts of appeals.

For example, the Third Circuit has noted that the General Counsel is not required to issue a complaint. And, if an unfair labor practice complaint is issued to protect the rights of an aggrieved individual, the Board may resolve the controversy as it wishes. More important, this tribunal has further held that an individual may challenge a final action of the NLRB under the APA, "if after [a] hearing he does not like the result."

320. Id. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").
321. Id. § 701(a)(1).
322. Id. § 701(a)(2).
324. Id.; see also Piaszek Aircraft Corp. v. NLRB, 280 F.2d 575, 588-89 (3d Cir. 1960) ("It is true as was said . . . in Marine Engineers . . .: 'Our best judgment is that the charging party after complaint is issued, does have some standing [and] that he is entitled to have a chance to be heard as the Administrative Procedure Act requires.' "), cert. denied, 364 U.S. 933 (1961). But see Mobilab Union, Inc. v. Johansen, 600 F. Supp. 826, 828 (D.N.J. 1985) ("The Administrative Procedure Act . . . adds nothing to plaintiff's argument . . . Courts that have considered the General Counsel's discretion, in light of the APA, have all concluded that § 701(a) is applicable, and that review under the APA is not available.").
Additionally, a fairly recent ruling from the D.C. Circuit strongly suggests that an aggrieved individual can challenge a final adverse order from the NLRB under the APA in that circuit. In *International Association of Bridge Workers, Local No. 111 v. NLRB,* the court permitted judicial review. The court held that the NLRB violated the APA when, in light of prior case law, it failed to explain its decision to award lost wages to workers not affiliated with Local 111.

On the other hand, other federal appellate courts refuse to allow unfair labor practice victims to challenge the Board's final orders under the APA. For instance, the Second, Fifth, and Sixth Circuits have ruled that the NLRB's decisions may not be reviewed under the APA.

This conflict over whether an NLRA complainant has a right to private judicial relief under the APA should not exist. As recently as 1987, the Supreme Court refused to seize upon a good opportunity to resolve the controversy. In *NLRB v. United Food & Commercial Workers Union, Local 23,* the Court restricted a considerable amount of its deliberation to an extremely narrow issue: whether the General Counsel's "prosecutorial" determination is subject to judicial review under the APA. In *United Food & Commercial Workers Union,* the Court decided that such review was not required, because permitting judicial review of the General Counsel's settlement determination...

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325. 792 F.2d 241 (D.C. Cir. 1986).
326. *Id.* at 248. The court stated:

> What we hold, however, is not that the Board has no authority, but that it violated 5 U.S.C. § 557(c)(3)(A) by failing to provide the union with an explanation of the apparent inconsistency between its decision to exercise the authority in the present case and its decisions to refrain from exercising the authority in earlier cases.

*Id.*

327. *See* e.g., *New York Racing Ass'n v. NLRB,* 708 F.2d 46, 54-55 (2d Cir.) (holding that the district court had no jurisdiction to review the NLRB's decision pursuant to the APA), *cert. denied,* 464 U.S. 914 (1983); *Local 282, Int'l Bhd. of Teamsters v. NLRB,* 339 F.2d 795, 800-01 (2d Cir. 1964) (holding that the APA does not confer any private rights upon a charging party).

328. *See* e.g., *Concrete Materials of Georgia, Inc. v. NLRB,* 440 F.2d 61, 68 n.9 (5th Cir. 1971) (finding no private right of action for a charging party who files suit under the APA).

329. *See* e.g., *Retail, Wholesale & Dep't Store Union, Local 310 v. NLRB,* 745 F.2d 358, 363 (6th Cir. 1984) ("Equally without merit is . . . appellant's assertion that the Administrative Procedure Act confers jurisdiction on the District Court to review the Board's refusal to assert jurisdiction over employers in the horse racing business.").

331. *See supra* notes 284-88 and accompanying text.
332. *United Food & Commercial Workers,* 484 U.S. at 130-31; *see also* *Associated Builders & Contractors, Inc. v. Irving,* 610 F.2d 1221, 1226-27 (4th Cir. 1979) (concluding that the court is without authority under the APA to review the General Counsel's refusal to issue a complaint), *cert. denied,* 446 U.S. 965 (1980); *Saez v. Goslee,* 463 F.2d 214, 215 (1st Cir.) ("[I]t must be concluded that judicial abstention has been fully acquiesced in by Congress. Indeed, in view of the imposing authority in favor of non-reviewability, this situation seems paradigmatic of one which is 'committed to agency discretion' under section 10 of the Administrative Procedure Act . . . .") *cert. denied,* 409 U.S. 1024 (1972); *Balanyi v. Local 1031, Int'l Bhd. of Elec. Workers,* 374 F.2d 723, 726 (7th Cir. 1967) ("We also hold that the Administrative Procedure Act does not vest a district court with jurisdiction over the refusal of the General Counsel to issue a complaint.").
under the APA would conflict with the NLRA's spirit and text.\textsuperscript{333}

Although correctly recognizing that "[a]ppeals from final orders . . . of the Board are expressly directed to the courts of appeals,"\textsuperscript{334} the United Food & Commercial Workers Union Court needlessly complicated its decision by concluding that "Congress intended the right of judicial review on the merits of an unfair labor practice charge to be had only through the express provisions of the NLRA."\textsuperscript{335} Very conceivably, this dictum will exacerbate the controversy over whether NLRA complainants have a right to private relief under the APA. Some circuit courts are likely to cite this language and deny private judicial relief. Others will probably ignore the dictum and grant individual relief because neither the NLRA's legislative history\textsuperscript{336} nor its text supports the Court's dictum. More important, the APA's text is explicit: federal courts may review the final actions of an agency like the NLRB if a "relevant statute," such as the NLRA, does not preclude such review.\textsuperscript{337}

Again, it is worth reiterating that until Congress or the Supreme Court addresses such inconsistent rulings, the disparate enforcement of NLRA complainants' individual rights in the federal courts of appeals will continue. As several labor law scholars have observed:

The principles which guide appellate courts in reviewing questions of law and fact are plainly of a very general nature leaving much to the discretion

\textsuperscript{333.} United Food & Commercial Workers, 484 U.S. at 131 ("To allow judicial review through the APA of the General Counsel's settlement determinations would run directly counter to the structure of the NLRA.").

\textsuperscript{334.} Id.

\textsuperscript{335.} Id. at 133.

\textsuperscript{336.} To help justify its ruling in United Food & Commercial Workers Union, the Court referenced the remarks of Senator Morse—a strong proponent of the NLRA and of individual rights—and stated that "[o]ur conclusion is bolstered by the observation that nowhere in the legislative history of the [NLRA, as amended by the] LMRA is the availability of APA review adverted to, despite reference to the APA in other contexts." Id. at 131 n.28. But a careful reading of the LMRA's legislative history strongly suggests that the Act does not bar a review of the Board's or of the General Counsel's deliberations under the APA. See 93 Cong. Rec. 6593, 6613 (1947), reprinted in 2 Legislative History of the LMRA, supra note 11, at 1526, 1559-60. Senator Morse commented:

Mr. President, it is a tremendous power that has been given to the General Counsel. . . .

. . . I simply shall never vote to vest in any single individual any such sweeping power over the handling of labor relation cases in this country. . . .

The [Administrative] Procedure Act prescribes an adequate separation of functions for all agencies like the Board, and the Board complies with it. . . .

. . . [W]hen we pass[ed the NLRA,] . . . I [did] not know whether [the Board became] an administrative agency, a court, or what . . . , but it certainly stands as bird of its own color so far as the Administrative Procedure Act is concerned . . . . I see no reason why an exception should be made to the Administrative Procedure Act in this connection. I see no reason why the rules and regulations laid down in the Seventy-ninth Congress, when we passed the Administrative Procedure Act, should not likewise apply to the National Labor Relations Board.

\textit{Id.}

\textsuperscript{337.} See supra note 319 and accompanying text.
of the judges involved. . . . [C]ourts will presumably be influenced to some degree by such . . . factors as the respect they hold for the capabilities and impartiality of the Board and the cogency and comprehensiveness of the arguments made by that agency . . . . These factors are unavoidably subjective and may therefore cause considerable variation from one court to another concerning the nature of review.\textsuperscript{338}

Therefore, it is imperative that Congress act to minimize such variations, for they are seriously undermining timely and predictable administrative and judicial enforcement of individuals' rights under the NLRA.

IV. Judicial Enforcement of Individual Rights Under Section 301 of the Labor-Management Relations Act of 1947

Arguably, an aggrieved individual union or nonunion employee can avoid the many inconsistent procedural and substantive rulings under the NLRA by filing a private cause of action under section 301 of the Labor-Management Relations Act ("LMRA").\textsuperscript{339} Theoretically, an employee who presents a meritorious claim has a greater probability of receiving timely, predictable, and effective relief under the LMRA, an accomplishment presently impossible under the NLRA.

A careful examination of hundreds of relevant LMRA decisions spanning a period of forty-three years\textsuperscript{340} unfortunately reveals a disturbing development: Individual LMRA complainants must overcome many of the same procedural barriers confronting NLRA complainants. More important, federal courts of appeals are as seriously divided over procedural and substantive issues under the LMRA as they are over similar issues originating under the NLRA. This Section will briefly review the LMRA's enforcement provisions and then examine issues and intercircuit conflicts that contribute to the disparate enforcement of individual rights under the LMRA.

A. Legislative Intent and an Overview of the LMRA's Enforcement Provisions

It is fairly clear that the LMRA was established to weaken the perceived unwarranted economic power of labor unions rather than to protect individual employees' interests.\textsuperscript{341} To accomplish this end, Congress permitted disgrun-
tled employers to initiate private causes of actions under section 301(a) of the LMRA to enforce collective bargaining agreements. To satisfy labor, Congress also included a provision under section 301(b) giving labor organizations the right to sue employers in district courts for breach of contract.

The text of section 301, however, clearly does not provide an aggrieved union or nonunion employee the right to commence a private cause of action against either a union or an employer. But a careful reading of legislative history reveals that LMRA supporters wanted an aggrieved worker to have that right. Moreover, “[j]urisprudential developments have recognized that the language of [s]ection 301 was not intended to prevent the individual employee from bringing a federal court action for breach of a collective bargaining agreement.” Correspondingly, single victims of unfair labor practices may sue offending employers and/or union officials in federal district courts under the LMRA.

342. 29 U.S.C. § 185(a) (1988). Section 301(a) of the LMRA states in pertinent part: “Suits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties . . . .” Id.

343. Id. § 185(b). Section 301(b) of the LMRA provides in pertinent part: “Any [labor organization which represents employees] may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.” Id.

344. 93 Cong. Rec. 3521, 3535 (1947), reprinted in 1 Legislative History of the LMRA, supra note 12, at 601, 616 (The bill guarantees to the individual worker “[t]he right to . . . file charges against his employer, the union, or the union officers without suffering any penalty or discrimination . . . .” (statement of Rep. Hartley)); see also 93 Cong. Rec. 4549, 4558 (1947), reprinted in 2 Legislative History of the LMRA, supra note 11, at 1182, 1199 (“[I]t seems to me [that] individual employees in the free exercise of their rights guaranteed by this act are just as much entitled to protection from [the coercive] activities of unions as they are from the same kind of coercive activities on the part of employers.” (statement of Senator Ball)).

345. Comment, Section 301 Employee Remedies and the Duty of Fair Representation: The Growing Need for Judicial Action to Protect Individual Employee Rights, 11 S.U.L. Rev. 87, 88 (1985); see also Smith v. Evening News Ass'n, 371 U.S. 195, 198-200 (1962) (observing that § 301 is designed to vindicate individual and “uniquely personal” employee rights arising from separate employment contracts “between the employer and each employee”); Simpson & Berwick, supra note 15, at 1180-81. These commentators noted:

Section 301(a) of the Act provided that: “[s]uits for violation of contracts between an employer and a labor organization . . .” could be filed in federal court regardless of the amount in controversy or the parties citizenship. Yet because of the ambiguity in the italicized phrase, which could modify either “suits” or “contracts,” section 301(a) offered an uncertain basis for federal jurisdiction over disputes between individual employees and an employer.

In Smith v. Evening News Association, the Court finally announced that the language "between an employer and a labor organization" in section 301(a) modifies "contracts" thus concluding the question of section 301 jurisdiction over individual claims.

Id. (emphasis in original) (citations omitted).
B. Intercircuit Conflicts Involving Procedural Matters Under Section 301

1. Intercircuit Conflicts Respecting the Appropriate Statute of Limitations and Filing and Service Requirements

Section 301 of the LMRA has no statute of limitations clause. And for more than forty years, lower federal courts and the Supreme Court have given very conflicting instructions about when an action must commence before it is barred under section 301. These courts also have issued conflicting instructions about specific filing and service of process requirements under section 301. In 1966, the Supreme Court tried to provide guidance in *International Union, UAW v. Hoosier Cardinal Corp.* In *Hoosier Cardinal*, the Court refused to endorse a judicially created uniform period of limitations. The Court held that federal courts must select the most closely analogous state statute of limitations in suits involving the enforcement of collective bargaining contracts.

The Court's instructions in *Hoosier Cardinal* failed to provide adequate guidance for lower courts. Consequently, fifteen years after its decision, the Court was confronted with resolving a statute of limitations controversy propagated by its *Hoosier Cardinal* decision. In *United Parcel Service, Inc. v. Mitchell*, the Court was asked to decide whether lower courts must borrow the most closely analogous state statute involving actions to vacate arbitration awards or the most closely analogous state statute governing breach of contract actions. Writing for the majority, Chief Justice Rehnquist ruled that lower courts must choose a state statute of limitations that governs actions to

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346. 383 U.S. 696 (1966). In *Hoosier Cardinal*, a union commenced an action under § 301 to force an employer to honor the terms of the collective bargaining contract. *Id.* at 699.
347. *Id.* at 702-03.
348. *Id.* at 705. Writing for the majority, Justice Stewart observed:

That Congress did not provide a uniform limitations provision for § 301 suits is not an argument for judicially creating one, unless we ignore the context of this legislative omission. It is clear that Congress gave attention to limitations problems in the Labor Management Relations Act . . . . [I]t cannot be fairly inferred that when Congress left § 301 without a uniform time limitation, it did so in the expectation that the courts would invent one . . . . [T]he timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations.

*Id.* at 703-05.
349. 451 U.S. 56 (1981). In *Mitchell*, a union employee complained about an allegedly discriminatory discharge; however, he received an adverse decision after exhausting all the prerequisite contractual remedies—internal grievance and arbitration procedures—outlined in the collective bargaining contract. *Id.* at 58. Nearly a year and a half after the arbitration decision, Mr. Mitchell filed a § 301 "hybrid" suit in district court, alleging that the union breached its duty of fair representation and UPS discharged him for impermissible reasons. *Id.* at 58-59. "Both UPS and the union moved for summary judgment on the ground that the action was barred by New York's 90-day statute of limitations for actions to vacate arbitration awards." *Id.* at 59 (emphasis added). The district court granted the motion. On appeal, the Second Circuit held that the district court "should have applied New York's 6-year limitations period for actions alleging breach of contract." *Id.* (emphasis added). Recognizing a severe conflict among the circuits over this procedural issue, the Supreme Court granted certiorari. *Id.* at 60 & n.1.
vacate arbitration awards.\textsuperscript{350}

Significantly, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") filed an amicus curiae brief urging the Mitchell Court to abandon any version of a "state-borrowing" rule.\textsuperscript{351} Additionally, the AFL-CIO implored the Court to adopt the more uniform and analogous federal six-month statute of limitations found in section 10(b) of the NLRA.\textsuperscript{352} The Court refused because the parties to the suit did not raise this issue.\textsuperscript{353} Furthermore, the Court stressed that certiorari was granted only "to consider which state limitations period should be borrowed, not whether such borrowing was appropriate."\textsuperscript{354}

The Mitchell Court's failure to consider the statute of limitations issue advanced in the AFL-CIO's amicus brief was unwarranted.\textsuperscript{355} This decision also was, in effect, a waste of precious judicial resources because just two years later, in Del Costello v. International Brotherhood of Teamsters,\textsuperscript{356} the Supreme Court decided whether the NLRA's section 10(b) six-month statute of

\textsuperscript{350} Id. at 64.
\textsuperscript{351} Id. at 60 n.2.
\textsuperscript{352} Id.
\textsuperscript{353} Id.
\textsuperscript{354} Id. (emphasis in original).
\textsuperscript{355} 462 U.S. 151 (1983). Mr. Del Costello was a union member and was allegedly discriminatorily discharged in violation of the collective bargaining contract. After exhausting all contractual grievance procedures, the complainant failed to get reinstated. He commenced a § 301 suit in the District of Maryland against the employer and the union. Following the Court's instructions in Mitchell, both the district court and the Court of Appeals for the Fourth Circuit rejected Mr. Del Costello's argument that Maryland's three-year statute for actions on contracts applied. Accepting the union's and the employer's arguments, the lower courts ruled that the § 301 "suit was barred by Maryland's 30-day statute of limitations for actions to vacate arbitration awards." In fact, the 30-day statute of limitations applied to claims against both union and employer. Id. at 156.
limitations provision governed section 301 "hybrid" suits. The decision effectively overruled Mitchell's statute of limitations ruling because the Court proscribed the borrowing of any analogous state statute of limitations for "hybrid" suits initiated under section 301 of the LMRA.

As of this writing, Del Costello governs when a section 301 "hybrid" suit should commence before it is barred altogether. Whether the Court will modify, overturn, or distinguish Del Costello in later rulings remains unclear. There is evidence, however, that the Court will revisit this issue in the near future.

The first grain of evidence comes from some post-Del Costello cases. Writing for the majority in Del Costello, Justice Brennan stated "that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action... We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy." Unfortunately, this very dictum is generating another unsettling controversy among the lower federal courts. In some post-Del Costello cases, federal appellate courts are citing Justice Brennan's dicta. These courts have borrowed the most closely analogous state statute of limitations and have refused to apply section 10(b) in employees' "nonhybrid" causes of actions against employers. Conceivably, however, other courts will refuse to follow this path.

Secondly, the wisdom of applying section 10(b) to LMRA causes of actions is likely to be reargued before the Court. Supreme Court review is likely because a serious split already exists among and within the federal circuits over whether an injured section 301 employee must file a complaint and complete the service of process within a six-month period. The Ninth and Eleventh

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357. A § 301 "hybrid suit" arises when an employee sues his employer and union in one suit. See Del Costello, 462 U.S. at 164-65. The cause of action against the employer is premised upon § 301, while the cause of action against the union is based on the union's breach of its duty of fair representation. Id.

358. Id. at 169. The Court held:

In this case... we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is... an analogy to the present lawsuit more apt than any of the suggested state-law parallels. We refer to § 10(b) of the National Labor Relations Act, which establishes a 6-month period for making charges of unfair labor practices to the NLRB.

Id.; see also Brock v. Republic Airlines, 776 F.2d 523, 525 (5th Cir. 1985) ("In Del Costello, the Court refused to borrow an analogous state statute because federal policies were at stake and because federal law provided an even more analogous limitations period.").

359. Del Costello, 462 U.S. at 171 (emphasis added).


361. See, e.g., Gallon v. Levin Metals Corp., 779 F.2d 1439, 1441 (9th Cir. 1986) ("While the Court in Del Costello did not specifically address the timing of service in hybrid suits, we note that section 10(b) expressly requires both filing and service within a six-month period." (emphasis in original)), vacated, 481 U.S. 1009, on remand, 819 F.2d 943 (1987); Hoffman v. United Mar-
Circuits have held that section 301 "hybrid" claims must be filed and service of process must occur within six months of an alleged unfair labor practice. Conversely, some courts in the Third, Sixth, and Eighth Circuits only require that a claim be filed within six months after the accrual of the cause of action. Even more disquieting, other courts in the Sixth and Eighth Circuits require both filing and service within a six month period.

In *West v. Conrail*, the Supreme Court concluded that the "hybrid" filing-and-service controversy was resolved. The *West* Court allegedly settled this conflict between a Third Circuit decision involving the Railway Labor Act and a Sixth Circuit holding concerning the LMRA. The *West* decision,
however, is very troubling because it actually controls "hybrid" actions originating under the Railway Labor Act.\textsuperscript{876} Although the Court asserted in dicta that there is "no reason to distinguish the Labor Management Relations Act from the Railway Labor Act" for determining whether both filing and service must occur within six months,\textsuperscript{871} evidence strongly suggests otherwise.\textsuperscript{872} Therefore, until the Court or Congress addresses this particular filing-and-service conflict under the LMRA, disparate outcomes will continue among individual complainants who seek redress in federal district and appellate courts.

2. Intercircuit Conflicts Involving Intraunion Exhaustion Requirements after Clayton v. UAW

In \textit{Clayton v. International Union, UAW},\textsuperscript{878} the Supreme Court attempted to resolve several conflicting rulings involving the exhaustion of intraunion remedies under the LMRA.\textsuperscript{874} Moreover, the Court addressed numerous concerns of labor law commentators who severely questioned the wisdom of requiring unsophisticated union and nonunion employees to exhaust union griev-

tal Baking Co., 779 F.2d 1166 (1985) ... involved a hybrid action brought under § 301 of the Labor Management Relations Act ... rather than a hybrid action brought under the Railway Labor Act, ... [w]e find no reason to distinguish the Labor Management Relations Act from the Railway Labor Act ... for the limited purpose of determining whether service [and filing] must be effected within the limitations period.

\textit{Id.}

370. \textit{Id.} at 36.

371. \textit{Id.} at 38 n.2.

372. For example, consider the situation where a nonunion railway employee commences a cause of action against both the employer and the union. If the suit alleges a breach of duty of fair representation and challenges an allegedly discriminatory agency-shop agreement, there would be no statute of limitations conflict because under the Railway Labor Act, both issues can be raised in the same suit. However, a nonunion, nonrailway employee who resides in Texas and who raises the same issues must be concerned with two statutes—Texas' "right-to-work" statute that governs discriminatory agency-shop agreements and the Labor-Management Relations Act that governs the breach of duty of fair representation. Clearly, Texas' "right-to-work" laws and the LMRA are very different and the application of § 10(b) would be inappropriate, although the Labor-Management Relations Act controls the contractual agreement between the union and the employer. Cf. Wright, \textit{Clipping the Political Wings of Labor Unions: An Examination of Existing Law and Proposals for Change}, 5 \textit{Harv. J. L. & Pub. Pol'y}, 1, 17-26 & nn.128-29 (1982). According to Wright:

The Taft-Hartley Act clearly outlawed the closed shop, but the maximum degree of union security permitted by the Labor Management Relations Act can properly be classified as a modified agency shop. Unlike the Railway Labor Act, the Labor Management Relations Act provides that its authorization of union security agreements shall \textit{not} apply in states which have "right-to-work" laws outlawing such agreements.

\textit{Id.} at 21 (emphasis in original).


ance procedures before commencing a section 301 suit in federal court.\footnote{375}

Writing for the \textit{Clayton} majority, Justice Brennan stated that lower federal courts must consider at least three factors when deciding whether an aggrieved individual should exhaust internal union procedures.\footnote{376} The three factors are the following:

(1) whether union officials are so hostile to the employee that he could not hope to obtain a \textit{fair hearing} on his claim; (2) \ldots whether the internal union appeals procedures would be inadequate either to \textit{reactivate} the employee's grievance or to award him the \textit{full relief} he seeks under § 301; and (3) \ldots whether exhaustion of internal procedures would \textit{unreasonably delay} the employee's opportunity to obtain a judicial hearing on the merits of his claim.\footnote{377}

The majority further ruled that ``[i]f any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.''\footnote{378}

It is clear that the \textit{Clayton} decision has not remedied the conflict among and within the federal circuits over the intraunion exhaustion issue. Indeed, the decision has exacerbated the problem. The primary reason for this unwarranted development is the Supreme Court's decision to shift the burden of

\footnote{375. \textit{Clayton}, 451 U.S. at 693-96; see Fox & Sonenthal, Section 301 and Exhaustion of Intra-Union Appeals, a Misbegotten Marriage, 128 U. PA. L. REV. 989, 1026-29, 1034 (1980). Fox and Sonenthal made the following remarks: A clear picture of what an employee must do to exhaust intra-union remedies has yet to emerge from section 301 cases \ldots As a result, employees have little idea how far, or how long, they must pursue union appeals \ldots Because exhaustion of intra-union remedies rarely serves any useful purpose \ldots, the courts should presume that exhaustion of such remedies is futile \ldots [Moreover, the procedural rules \ldots are chaotic \ldots] and plaintiffs have little idea of what is necessary to preserve their cause of action and are often caught totally off guard \ldots. Under these circumstance, it is no wonder that many section 301 plaintiffs succumb to motions for summary judgment \ldots. [Simply expressed, the intra-union exhaustion requirement has been imported into section 301 litigation without any serious examination of its appropriateness] \ldots."

\footnote{Id. (emphasis added); see also Note, The Exhaustion of Intra-Union Procedures in Duty of Fair Representation Cases, 32 Rutgers L. Rev. 520, 530 (1979) ("[T]he Supreme Court's treatment of intra-union exhaustion in section 8(b)(1)(A) disciplinary action should arguably apply to duty of fair representation cases, whether initiated under [s]ection 301 or on judicial review under section 8(b)(1)(A)."), Simpson & Berwick, supra note 15, at 1215, 1220. According to these commentators:

\textit{Few courts have ever questioned directly the appropriateness of requiring intraunion exhaustion in the section 301-fair representation context} \ldots [I]ntraunion grievance procedures are poorly adapted to afford relief even from obvious injustices to individual employees. The chief difficulty is that most collective grievance procedures utilize relatively short limitations periods \ldots. \textit{Even if an employee knows that intraunion appeals are available, which is not always the case, the technical procedural requirements frequently are quite strict."

\footnote{Id. (emphasis added).}

\footnote{376. \textit{Clayton}, 451 U.S. at 689.}

\footnote{377. \textit{Id.} (emphasis added).}

\footnote{378. \textit{Id.}}
defining major concepts and phrases articulated in *Clayton* to the courts of appeals. The Supreme Court left undefined such key terms as “hostility,” “fair hearing,” “reactivation of grievance procedures,” “complete or full relief,” and “unreasonable delay.” The inappropriateness and ineffectiveness of leaving such terms undefined has become evident in light of the federal appellate courts’ subsequent inability or unwillingness to supply the necessary definitions. It is common for these courts to only incorporate *Clayton*’s key words and phrases into their holdings while ruling for or against intraunion exhaustion, rather than define these terms.

For example, without defining “reactivation,” the Sixth Circuit has held that a union employee must exhaust internal union remedies, although the employee had no knowledge of a reactivation of the grievance agreement between the union and the employer. In contrast, the Fifth Circuit has refused to require intraunion exhaustion where a union’s constitution does not provide for a procedure to reactivate a section 301 grievance.

A similar split involving another key phrase—“full relief”—exists between the Sixth and Ninth Circuits. In *Ghebreselassie v. Coleman Security Service*, the Ninth Circuit held that intraunion exhaustion was not required where an aggrieved union employee could not be fully recompensed for the damages he had suffered. In contrast, the Sixth Circuit held, in *Monroe v. International Union, UAW*, that intraunion exhaustion is required even if an aggrieved individual has no knowledge respecting whether he can receive full relief.

Also, the Supreme Court’s failure to define the key concepts outlined in *Clayton*’s intraunion exhaustion test has contributed to very inconsistent, as well as contradictory, intraunion exhaustion decisions within the Seventh and Ninth Circuits. For example, the Seventh Circuit has held that intraunion exhaustion is required unless the aggrieved employee establishes that hostility exists at every stage of the grievance process. However, in *Lewis v. Local*

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380. See, e.g., *Hammons v. Adams*, 783 F.2d 597, 602 (5th Cir. 1986). In *Hammons*, the court stated:

> If . . . the union constitution does not provide a procedure whereby [one’s] grievance concerning breach of a local union’s duty of fair representation may be heard and adequately remedied, there is nothing to exhaust. Absent an internal union remedy, the employee may proceed to file suit after pursuing his contractual remedies as far as possible.

*Id.*

381. 829 F.2d 892 (9th Cir. 1987), cert. denied, 487 U.S. 1234 (1988).
382. *Id.* at 896.
383. 723 F.2d 22 (6th Cir. 1983).
384. *Id.* at 25-26.
385. See *Sosbe v. Delco Elecs. Div. of Gen. Motors Corp.*, 830 F.2d 83, 86 (7th Cir. 1987) ("[T]o establish the degree of hostility that would excuse a union member from the ordinary duty to exhaust internal remedies, the member must establish futility at every step of the relevant grievance procedure.").
Union No. 100 of Laborers' International Union, this same court inferred that the grievance proceedings were hostile and decided that the employee did not have to exhaust internal union remedies.

The Seventh Circuit has been inconsistent in another significant way. On one occasion in 1982, this court presumed that an aggrieved worker could not be certain of the outcomes in a reactivated grievance proceeding and therefore held that exhaustion was not required. But on another occasion in 1982, the Seventh Circuit adopted the position that "the policies . . . reiterated in Clayton are served by requiring exhaustion even if the employee may not be able to obtain the same relief in the reactivated grievance procedure as might have been available in a § 301(a) suit."

An additional Seventh Circuit inconsistency can be found by comparing Tinsley v. United Parcel Service, Inc. and Bassett v. Local Union No. 705, International Brotherhood of Teamsters. Without attempting to define "complete or full relief," the Bassett court held that intraunion exhaustion was not required where remedies were inadequate to provide complete relief. In contrast, the Tinsley court required exhaustion because the "internal remedies were adequate to provide all the relief sought." What is truly disturbing about these latter two holdings is that the Seventh Circuit adopted unsupported presumptions about the adequacy or inadequacy of intraunion exhaustion procedures and allowed those presumptions to influence whether individual section 301 claims should remain in court.

386. 750 F.2d 1368 (7th Cir. 1984).
387. Id. at 1381 (holding that intraunion exhaustion was not required because the employee would not have been able to obtain a fair hearing).
388. Schultz v. Owens-Illinois, Inc., 696 F.2d 505, 513-14 (7th Cir. 1982) ("Even if plaintiffs exhaust these intraunion remedies, it is extremely doubtful whether the Union could . . . reactivate or reinstate the grievances. . . . [Therefore,] it would be unjust to require plaintiffs to exhaust the uncertain and inadequate intraunion remedies as a prerequisite to the suit . . . ." (emphasis added)); see also Rupe v. Specter Freight Sys., 679 F.2d 685, 690 (7th Cir. 1982) (holding that intraunion exhaustion is not required if the employee's grievance could not be reactivated).
389. Miller v. General Motors Corp., 675 F.2d 146, 149 (7th Cir. 1982); see also Baldini v. International Union, UAW, Local Union No. 1095, 581 F.2d 145, 148 (7th Cir. 1978) (no exception to exhaustion of internal union remedies requirement where a union official told plaintiff that nothing more could be done for him); Newgent v. Modine Mfg. Co., 495 F.2d 919, 927-28 (7th Cir. 1974) (allegations of ignorance and reliance upon misleading statements from union president that any effort to utilize internal appeals procedures would be fruitless are not sufficient to avoid defense of failure to exhaust internal union remedies).
390. 665 F.2d 778 (7th Cir. 1981).
391. 773 F.2d 932 (7th Cir. 1985).
392. Id. at 937.
393. Tinsley, 665 F.2d at 780.
394. Both the Tinsley and Bassett courts applied the Clayton Court's rule that an employee need not exhaust intraunion remedies to maintain a hybrid suit where the union's internal appeal process could not provide reactivation of the employee's grievance or an award of the complete relief sought in his § 301 suit. See Clayton, 451 U.S. at 689. In Tinsley, the plaintiff-employee's § 301 suit sought both compensatory and punitive damages. Tinsley, 665 F.2d at 779. The Tinsley court held that dismissal was proper because the employee had failed to exhaust intraunion remedies that "were adequate to provide all the relief Tinsley sought in his § 301 suit." Id. at 780. The
The Ninth Circuit has similarly adopted unsupported presumptions about the quality of internal union appeal procedures and has thereby imposed disparate treatment upon section 301 claimants. In *Zuniga v. United Can Co.*, for example, the Ninth Circuit did not require exhaustion because the exhaustion procedures would have produced unreasonable delays. In contrast, the Ninth Circuit concluded, in *Scoggins v. Boeing Co.*, that a union employee was required to exhaust his remedies because there was no appearance of hostility during the intraunion exhaustion proceedings.

Perhaps, there is a more troubling, unforeseen aftermath of the Court's *Clayton* decision. A review of post-*Clayton* rulings reveals that some federal appellate courts have modified *Clayton*'s liberal, three-pronged test and substituted a more conservative, narrower standard. The Third and Seventh Circuits, for example, have adopted a "reasonableness standard." This standard requires intraunion exhaustion whenever a court determines that it is reasonable. These courts, however, fail to provide any criteria for determining when intraunion exhaustion is and is not reasonable. Similarly, the Second

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footnotes:
395. 812 F.2d 443 (9th Cir. 1987).
396. Id. at 450 (holding "that further resort to the internal union appeal procedure would have unreasonably delayed or prevented a judicial hearing on the merits of [the] claim since the six-month limitation period would have likely expired" (emphasis added)).
397. 742 F.2d 1225 (9th Cir. 1984).
398. Id. at 1229 n.6 ("[F]or there to be an adequate demonstration of hostility, it must appear that persons involved in the intraunion appeals procedure are hostile toward the union member.").
399. See, e.g., Local Union No. 1075, United Rubber Workers v. United Rubber Workers, 716 F.2d 182, 187 (3rd Cir. 1983) (stressing that a court must look to "the reasonableness of imposing [intraunion exhaustion] under the circumstances of the situation").
400. See, e.g., Sosbe v. Delco Elecs. Div. of Gen. Motors Corp., 830 F.2d 83, 86 (7th Cir. 1987) (ruling that "a court must look to the reasonableness of imposing [intraunion exhaustion] under the circumstances of the situation"); accord Miller v. General Motors Corp., 675 F.2d 146, 150 (7th Cir. 1982) (finding it reasonable to impose intraunion exhaustion where a union member thought resort to the procedure would have been futile).
Circuit has deviated from Clayton's standard by adopting a bad faith standard. This standard requires a union employee to exhaust intraunion remedies unless the employee establishes that "the union ... acted in bad faith or in an arbitrary or discriminatory manner."

3. Intercircuit Conflict over Whether Aggrieved Individuals Must Exhaust Contractual-Grievance Procedures

Assuming that a prospective section 301 complainant clearly understands and conforms to a specific circuit's statute of limitations and intraunion exhaustion requirements, he still must worry about another ongoing serious intercircuit controversy. In particular, the complainant must decide whether he should exhaust contractual remedies before commencing a section 301 suit. Some federal appellate courts require the exhaustion of contractual remedies; others do not.

Twenty-five years ago, the Supreme Court tried to resolve this intercircuit conflict. Writing for the majority in Republic Steel Corp. v. Maddox, Justice Harlan ruled that individuals asserting grievances under a collective bargaining agreement must attempt to exhaust grievance procedures agreed upon by an employer and a union. Two years later, however, the Court modified its holding by creating two exceptions to the Maddox ruling. In Vaca v. Sipes, the Supreme Court held that an employee is excused from exhausting contractual remedies where (1) an employer's conduct amounts to a repudiation of negotiated contractual remedies, or (2) a union breaches its duty of fair representation by wrongfully refusing to process the individual's grievance.

In addition to the Vaca exceptions, a few appellate courts have fashioned and adopted a third exception to the Maddox attempt rule. These courts have ruled that certain classes of individuals need not attempt to exhaust contractual remedies if they are not covered by the collective bargaining agree-

401. See Wozniak v. International Union, UAW, Local 897, 842 F.2d 633, 636 (2d Cir. 1988).
402. Id.
404. Id. at 652. There is some disagreement over the definition of "attempt." Compare Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 490 (7th Cir.) (stating in dictum that asking a union for help constitutes an "attempt"), cert denied, 400 U.S. 911 (1970) with Steen v. Local 163, UAW, 373 F.2d 519, 520 (6th Cir. 1967) (stating in dictum that asking union officials to act does not constitute an "attempt").
406. Id. at 185.
407. Id. The Supreme Court also created another exception to its Maddox decision in a case involving racial discrimination under the Railway Labor Act. Writing for the majority in Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 (1969), Justice Black held that the exhaustion of contractual remedies was not required where those who would pass on the racial discrimination claims were the very individuals charged with violating the employee's rights initially. Id. at 329-31.
ment when the private action commences. It is important to note that neither Maddox nor Vaca created this "inapplicability" anomaly to Maddox's attempt rule.

Deciding whether the "repudiation," "inapplicability," or "breach of duty" exception frees one from exhausting contractual remedies can be a painstaking task for an average union or nonunion employee. The individual, however, must overcome an even more serious procedural barrier: he must confirm that the repudiation of which he complains is the type of repudiation that a particular circuit recognizes. This task is complicated by the fact that there is no universally accepted definition of "repudiation." The majority of rulings on this issue simply conclude that an offending employer's behavior is or is not a repudiation of contractual grievance procedures.

The First, Third, and Ninth Circuits, for example, have found a repudiation to exist where (1) an employer "repudiated" an entire contract and maintained that the contract was "inapplicable," (2) an employer consistently maintained throughout ten years of litigation that a contract did not exist, and (3) a company denied that it was bound by a collective bargaining agreement or that it had any duty toward its aggrieved workers. In contrast, the Fifth, Seventh, and Eleventh Circuits have concluded that repudiation did not occur when (1) an employer took a "stance contrary to that of the employee during the grievance process," (2) a company fired a worker but took no steps to preclude the worker from challenging the dismissal, and (3) a company terminated and refused to reinstate an employee under the terms of the collective bargaining agreement.

Additionally, incompatible intracircuit pronouncements and conclusions about the meaning of repudiation are widespread. For example, the Sixth Cir-

409. See infra notes 420-24 and accompanying text.
412. Kaylor v. Crown Zellerbach, Inc., 643 F.2d 1362, 1366 (9th Cir. 1981). According to the court: Before the union filed an unfair labor practice charge with the NLRB, it attempted to negotiate a settlement with [defendant's] attorney. The attorney denied that [the defendant] was bound by the collective bargaining agreement, or that it had any duty toward the drivers. In so doing, [the defendant] repudiated the contractual remedy available to the drivers.
413. Bache v. American Tel. & Tel., 840 F.2d 283, 288-89 (5th Cir.), cert. denied, 488 U.S. 888 (1988); accord Rabalais v. Dresser Indus., Inc., 566 F.2d 518, 520 (5th Cir. 1978). But see Boone v. Armstrong Cork Co., 384 F.2d 285, 289 (5th Cir. 1967) ("It seems clear that a refusal to abide by contractual terms requiring the processing of a matter through a grievance procedure would be ... repudiation.").
414. D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1488 (7th Cir. 1985); see also Bailey v. Bicknell Minerals, Inc., 819 F.2d 690, 692 (7th Cir. 1987) (refusing to find a "repudiation" of a commitment to arbitrate where an employer refused to pay negotiated wages).
cuit has held that repudiation arises where an employer outrightly refuses to comply with grievance procedures. That court, however, also has held that repudiation does not occur when an employer refuses to process a complaint that is filed shortly before the filing of a section 301 suit. On another occasion, the Sixth Circuit ruled that repudiation occurs when an employer adopts the view that contractual remedies are not available to complainants; but, that court has also ruled that repudiation does not arise where an employer fraudulently withholding and misrepresents evidence that is tangentially related to terms of the contract or to the complaint. These holdings clearly do not help complainants decide whether they should exhaust contractual remedies. It is imperative, therefore, that the judiciary or legislature address and reform these expanding inharmonious rulings.

Lastly, prospective section 301 complainants must be concerned about one other exhaustion issue. As indicated above, the “inapplicability” exception releases certain classes of individuals from exhausting contractual remedies. But an intercircuit conflict is developing over what classes should be exempted. The debate currently centers on former employees—those who are either retired, disabled, or constructively discharged.

As an example, the Seventh Circuit has held on two occasions that constructively discharged employees—those who are no longer covered by a contract—must exhaust contractual remedies. Conversely, the Eighth Circuit has ruled that retirees are not “employees” within the meaning of the LMRA. Moreover, the Eighth Circuit has decided that retirees cannot

417. Anderson v. Ideal Basic Indus., 804 F.2d 950, 952 (6th Cir. 1986) (where employees filed a grievance only two weeks before commencing a suit, the company’s failure to process it in that short period of time did not constitute repudiation).
418. Geddes v. Chrysler Corp., 608 F.2d 261, 263 (6th Cir. 1979) (“Employers are normally estopped from seeking dismissal of a claim based on failure to exhaust remedies when they have taken the position that those remedies are not available to the employees.”).
Terwilliger asserts that Greyhound repudiated the contract when it fraudulently withheld the second physical examination report and misrepresented Terwilliger’s physical condition in order to secure Union agreement to a third physician’s examination. However, Terwilliger has not asserted that Greyhound ever refused to abide by the terms of the contract regarding the available grievance procedures.

Id.
420. See supra text accompanying notes 408-09.
421. Roman v. United States Postal Serv., 821 F.2d 382, 388 (7th Cir. 1987) (“Roman . . . attempts to create an additional exception based upon the fact that he was told by Union representatives . . . that there was nothing they could do for him because he was no longer an employee . . . . Nevertheless, we do not believe these allegations excuse Roman’s failure to exhaust his contractual remedies.”); Mitchell v. Pepsi-Cola Bottlers, Inc., 772 F.2d 342, 347 (7th Cir. 1985), cert. denied, 475 U.S. 1047 (1986) (rejecting an almost identical argument advanced by a former employee who had been forced to resign).
422. Anderson v. Alpha Portland Indus., Inc., 752 F.2d 1293, 1298-99 (8th Cir.) (en banc),
properly be joined with active employees within a collective bargaining unit. Therefore, such former employees do not have to exhaust contractual remedies before commencing a section 301 action. In addition to this intercircuit conflict between the Seventh and Eighth Circuits, there is a similar intracircuit conflict within the Sixth Circuit.

C. Intercircuit Conflicts Generated by the Judicially Created Doctrine—Breach of Duty of Fair Representation

Assuming that a section 301 complainant overcomes the procedural barriers and conflicts discussed above, she still faces an even more challenging obstacle if she commences a suit against a union. Specifically, she must prove that the union breached its duty of fair representation. This burden is nearly insurmountable because a universal representation standard does not exist.

The duty of fair representation evolved through the fires of numerous judicial decisions. As early as 1944, the Supreme Court recognized a statutory duty of fair representation in railroad cases. Nine years later, the Court imposed the duty on NLRB-certified unions. And although the scope of the

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cert. denied, 471 U.S. 1102 (1985); see also Johnson v. Colts, Inc., 306 F. Supp 1076, 1079 (D. Conn. 1969) (refusing to grant defendant-employer's motion to dismiss former employee's claim for failure to exhaust contractual remedies, but without prejudice to its renewal); Hauser v. Farrell, Ozmun, Kirk & Co., 299 F. Supp. 387, 392 (D. Minn. 1969) (holding that former employees—who had been advised that nothing could be done for them—exhausted available contractual remedies as far as practicable).


424. Compare Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968) (concluding that a former employee “had failed to follow the contractual grievance procedures with which she was intimately familiar, since her primary duty with the company had been the processing of employee grievances under the collective bargaining agreement”) with Schneider v. Electric Auto-Lite Co., 456 F.2d 366, 370 (6th Cir. 1972) (concluding that the contractual grievance procedure was “inapplicable” and, therefore, the former employees were not required to exhaust such remedies). See also United Elec. Workers v. Amcast Indus. Corp., 634 F. Supp. 1135, 1138, 1139 (S.D. Ohio 1986) (overruling defendant's motion to dismiss because former employees had not exhausted available contractual remedies).

425. After the enactment of the Labor-Management Relations Act, a considerable amount of judicial conflict and of scholarly debate ensued over whether a § 301 complainant must prove that a union breached its duty of fair representation before suing an employer. See, e.g., Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?, 126 U. PA. L. REV. 251, 252 (1977) (“The employee can sue the employer for breach of his rights under the collective agreement only after first showing that the union has acted unfairly in refusing to process his grievance to arbitration.” (emphasis added)).

Recently, the Supreme Court resolved this issue and related concerns in Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 110 S. Ct. 424 (1989). In Breininger, the Court stressed that “[o]ur reasoning in Vaca in no way implies . . . . that a fair representation action requires a concomitant claim against an employer for breach of contract . . . . Federal courts have jurisdiction to hear fair representation suits whether or not they are accompanied by claims against employers.” Id. at 433-34 (emphasis in original).

426. Breininger, 110 S. Ct. at 432.


“fair representation” standard is broad and has never been precisely defined, the rule’s purpose is clear: It is “a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.” More specifically, the rule prevents unions from discriminating on the basis of race, sex, or membership status. The rule also prohibits unions from arbitrarily ignoring workers’ meritorious claims and processing such claims in a perfunctory manner.

But what standard of conduct determines whether a breach of duty has occurred? This is a serious question confronting section 301 complainants. The issue is similarly a difficult one for the judiciary because it continues to generate much judicial conflict within and among the federal courts of appeals. In the end, the blame for such confusion must be laid upon the Supreme Court because the Court’s refusal to articulate a clear standard of conduct for unions to follow has prolonged this controversy.

Over the span of twenty-six years, 1964-1990, the Court has decided eight major questions concerning a union’s duty of fair representation under either the NLRA or the LMRA. During this period, however, the Court has failed to adopt a specific fair representation standard. Instead, the Court has either

431. See Ryan v. New York Newspaper Printing Pressmen’s Union No. 2, 590 F.2d 451, 455 n.9 (2d Cir. 1979) (“The Supreme Court recognized a statutory duty of fair representation over 20 years before Vaca v. Sipes . . . in railroad cases involving alleged racial discrimination.”); Clark, The Duty of Fair Representation: A Theoretical Structure, 51 TEX. L. REV. 1119, 1121 (1973) (“[T]he kinds of union conduct that constitute a DFR violation have never been satisfactorily defined . . . . Obviously, racial discrimination is prohibited.”).
432. See, e.g., Bell & Howell Co. v. NLRB, 598 F.2d 136, 146 n.29 (D.C. Cir.) (“The primary purpose of the LMRA was not, and is not, the eradication of discrimination in employment . . . . However, in prohibiting union discrimination, the Act clearly reflects a concern that unions [do] not use their power of exclusive representation to shut individuals out of the workplace based upon race or sex.”), cert. denied, 442 U.S. 942 (1979); cf. McCollum v. Bolger, 794 F.2d 602, 612 (11th Cir. 1986) (finding that two female employees failed to prove that the union breached its duty of fair representation by not filing their grievances), cert. denied, 479 U.S. 1034 (1987).
433. See, e.g., Bowen v. United States Postal Serv., 459 U.S. 212, 240 (1983) (“The duty of fair representation obliges a union ‘to make an honest effort to serve the interests of all [union and nonunion] members’ fairly and impartially.”); National Treasury Employees Union v. FLRA, 721 F.2d 1402, 1407 (D.C. Cir. 1983) (holding that a union’s policy of providing attorneys only for union employees was a breach of duty of fair representation and reaffirming the principle that a union may discriminate against neither union nor nonunion members affiliated with the public bargaining unit). But see National Treasury Employees Union v. FLRA, 800 F.2d 1165, 1172 (D.C. Cir. 1986) (holding that the union did not breach its duty of fair representation by refusing to provide attorneys to represent nonunion, public employees on a statutory appeal).
434. Vaca, 386 U.S. at 191.
435. Id. at 193.
436. See infra notes 440-57 and accompanying text.
437. See Comment, supra note 345, at 93 (“To date, the . . . Court has not established the precise degree of inadequacy of union representation which must be shown in order to sustain a breach of duty of fair representation claim.”).
ruled, or stated in dicta, that a union may breach its duty of fair representation by exhibiting one or any combination of the following types of conduct: "arbitrary," "hostile," "discriminatory," "malicious," "negligent," "fraudulent," "dishonest," or "deceitful." Additionally, some rulings have held that a breach occurs if union officers "intentionally" discriminate against members of the bargaining unit or if such officials act in "bad faith.

Over the years, the courts of appeals have grappled with and tried to apply the Court's fair representation rulings and dicta in a consistent manner. The pronounced examples of intracircuit and intercircuit conflicts, however, evidence the appellate courts' inability to do so. For instance, the Seventh Circuit has held that "mere negligence is insufficient to constitute a breach" of the duty of fair representation. On the other hand, the Ninth Circuit has stated that "union negligence may breach the duty of fair representation [where] the individual interest . . . is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." But on another occasion, the Ninth Circuit has ruled that more is required than mere negligence to establish a breach of the duty of fair representation.

As of this writing, an individual who commences an action in the Seventh Circuit must prove that a union's breach was "intentional" and "invidious.

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438. See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 110 S. Ct. 424, 436 (1989) ("The duty of fair representation . . . serves as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.'" (emphasis added) (citation omitted)); Communications Workers v. Beck, 487 U.S. 735, 743 (1988) (recognizing a duty of fair representation action where employees claimed that "the union failed to represent their interests fairly and without hostility" (emphasis added)); Bowen v. United States Postal Serv., 459 U.S. 212, 229 (1983) (accepting the proposition that "judgment against . . . [a] union can . . . be had only for those damages that flowed from [the union's] . . . own . . . discriminatory conduct" (emphasis added)); International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 46 (1979) (noting that "there was insufficient evidence of malicious, wanton, or oppressive conduct to justify the jury's punitive damages award" (emphasis added)); Foust, 442 U.S. at 52 ("The union's conduct . . . betrayed nothing more than negligence, and thus presented an inappropriate occasion for awarding punitive damages . . . ." (Blackmun, J., concurring) (emphasis added)); Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 299 (1971) (noting that there must be substantial evidence of fraud to establish a breach of the duty of fair representation); Humphrey v. Moore, 375 U.S. 335, 348 (1964) (stressing that there must be "substantial evidence of fraud, deceitful action or dishonest conduct" to establish a breach of the duty (emphasis added)).

439. See Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 301 (1971) ("The duty of fair representation was judicially evolved . . . and carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives . . . ." (emphasis added)); Vaca v. Sipes, 386 U.S. 171, 190 (1967) ("A breach of the . . . duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." (emphasis added)); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564-65 (1976) (accepting the proposition that a union breaches its duty of fair representation by acting in "bad faith" (emphasis added)).


441. Dutrisac v. Caterpillar Tractor Co., 749 F.2d 170, 1274 (9th Cir. 1983).


443. Thomas, 890 F.2d at 922 n.5.
While this "is the only circuit to require proof of intentional misconduct," the circuits are likely to remain indefinitely divided over this issue. The Seventh Circuit has "repeatedly declined all invitations to overrule the intentional misconduct standard." Likewise, other federal appellate courts show little or no inclination to force individual complainants to prove that a breach was "intentional" or "invidious."

Perhaps the most glaring example of intracircuit confusion involving the fair representation standard appears in the Ninth Circuit. This circuit has ruled that "[a] union breaches its duty of fair representation only when its conduct toward a member of the collective bargaining unit is 'arbitrary.'" Unfortunately, the Ninth Circuit has never provided a definitive definition of "arbitrary" conduct. Instead, several definitions have been advanced: A union's conduct is arbitrary if (1) the union fails to secure sufficient evidence "before assessing the merits of a grievance"; (2) the conduct is "without rational basis"; (3) the conduct is "egregious, unfair and unrelated to legitimate union interests"; (4) the union ignores a meritorious claim or handles the claim in a perfunctory manner by failing to initiate a "minimal investigation" of the grievance; and (5) the union exhibits "reckless disregard" for the rights of individual employees.

In addition to these various definitions, the Ninth Circuit further exacerbates the confusion over what constitutes arbitrary conduct by distinguishing two types of union conduct. The Ninth Circuit distinguishes between union

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444. Id.
449. Gregg v. Chauffeurs, Teamsters & Helpers Union Local 150, 699 F.2d 1015, 1016 (9th Cir. 1983) (quoting Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978)).
450. Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985).
451. Tenorio v. NLRB, 680 F.2d 598, 601 (9th Cir. 1982).
452. Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1089-90 (9th Cir. 1978).
453. Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985), cert. denied, 475 U.S. 1122
conduct that requires "an exercise of judgment" and union conduct that involves the performance of "a procedural or [a] ministerial act." In applying this distinction, this court holds that a union breaches its duty of fair representation only when it arbitrarily refuses to perform a procedural or a ministerial act.

Unquestionably, the Ninth Circuit regards its representation standard as the correct one. This tribunal assertively argues: "We have never held that a union acted in an arbitrary manner where the challenged conduct involved the union's judgment . . . . To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances." Yet, this same court correctly acknowledges that "the line separating 'procedural and ministerial' actions from those . . . requiring 'an exercise of judgment' is, at times, indistinct." Perhaps the single uncontroversible observation to emerge from this analysis is that there is no universal standard pertaining to the duty of fair representation. Consequently, it is clear that until Congress or the Supreme Court addresses the substantive problems generated by this judicially created doctrine, we will continue to witness conflicting fair representation decisions within and among the federal circuits. Moreover, it is equally apparent that such conflicting decisions will foster unwarranted disparate outcomes and promote the inequitable administration of the law with respect to section 301 complainants.

V. LABOR LAW CASE STUDY

This final Part presents findings from an analysis of 1249 cases—200 administrative decisions, 760 federal appellate court NLRA and LMRA decisions, and 289 Supreme Court NLRA and LMRA cases. A representative sample of administrative cases, NLRB decisions, was selected from the Decisions and Orders of the National Labor Relations Board. Similarly, representative samples of NLRA and LMRA appellate court cases were selected from the Federal Reporter. Finally, every reported NLRA and LMRA decision appearing in the U.S. Supreme Court Reporter was selected. Without doubt, the most egregious findings reported in this Article are based on a statistical analysis of cases decided in federal courts between 1935 and 1990.

(1986).

454. Id.

455. Id. According to the court:

There are some significant general principles that emerge from our previous decisions. In all cases in which we found a breach of duty of fair representation based on a union's arbitrary conduct, it is clear that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment and that there was no rational and proper basis for the union's conduct.

Id.

456. Id. (emphasis added).


458. The author's database is available at the office of the DePaul Law Review.
A. Statistical Findings

The results of the case study are presented in four tables in the Appendix. Table 1 illustrates the demographic characteristics of NLRA and LMRA litigants. Table 2 provides a more detailed comparison of nonunion and union complainants. Table 3 analyzes how certain "predictors" influence the disposition of labor law cases in both federal and administrative proceedings. Finally, Table 4 addresses some statistical questions that the study raises. A discussion of some of the more significant findings presented in these tables follows below.

1. Significant Findings Reported in Table 1

Table 1 illustrates the demographic characteristics of NLRA and LMRA litigants. A careful examination of Table 1 reveals that when complainants present grievances before the NLRB, those grievances have nearly a one hundred percent probability (98%) of being disposed of on the merits.459 In addition, NLRA actions have a substantially greater likelihood of being resolved on the merits than on procedural grounds; this is true among NLRA cases decided in federal appellate courts and in the Supreme Court.460 In contrast, however, LMRA complainants are more likely to have their causes of actions disposed of on procedural grounds in the courts of appeals and in the Supreme Court.461

Several reasons may explain why federal courts are substantially more likely to dispose of LMRA complaints on procedural grounds. First, significantly more procedural obstacles are found in LMRA suits than in NLRA actions.462 Second, disgruntled union employees are more likely to file LMRA suits,463 and their complaints are more likely to involve unprotected "individual activity" rather than protected "concerted activity."464 These factors would certainly reduce the likelihood of LMRA disputes being resolved on the merits. There is, however, a more compelling explanation: individual rights are significantly more likely to be addressed in a timely manner where a board of "experts" adjudicates the grievances and where those "experts" argue on behalf of individual complainants in federal courts of appeals. Unsophisticated LMRA complainants often hire attorneys who generally are not "experts." Moreover, LMRA grievants must help shoulder the burden of overcoming complicated procedural obstacles and proving violations in federal courts. In contrast, NLRA complainants are spared these problems; the NLRB and its

459. See Table 1 in the Appendix to this Article ("Grounds for Disposing Case").
460. See id.
461. See id.
462. See supra notes 346-424 and accompanying text.
463. See Table 1 in the Appendix to this Article ("Types of Complainants").
464. See id. ("Claims Involved"); see also supra notes 24-94 and the accompanying text (Part I discusses "protected" and "unprotected" concerted and individual activity under the LMRA and the NLRA).
general counsel argue on behalf of NLRA grievants at relevant points in both administrative and judicial proceedings. Therefore, many procedural obstacles are avoided or easily remedied.

Other significant revelations in Table 1 appear among the administrative cases: Employers are more likely to be defendants than are union officials (83.5% versus 16.5%); complainants are more likely to win than are defendants (72.5% versus 27.5%); and alleged victims of unfair labor practices are more likely to be employed in an unorganized shop or plant (55%).

Among NLRA and LMRA complainants who went to federal court, the overwhelming majority were employed in an organized shop or plant. Additionally, when comparing NLRA and LMRA plaintiffs who sought judicial review, the former group was significantly more inclined to complain about "willful violations," "repeated violations," and "retaliatory discrimination."  

2. Significant Findings Reported in Table 2

Table 2 provides a more detailed comparison than Table 1. There, nonunion and union complainants are compared. And the percentages reveal another example of blatant, disparate discrimination among individual victims of unfair labor practices. The findings in Table 2 indicate that nonunion complainants are significantly more likely to win in both administrative and judicial proceedings. Conversely, union employees are more likely to be unsuccessful in both forums. More important, Table 2 also confirms the finding stated above: in federal courts, nonunion employees' grievances are more likely to be disposed of on meritorious rather than on procedural grounds. The converse is true for union employees. These findings are clearly unwarranted. Moreover, it is untenable to contend that Congress intended these disparate results between union and nonunion employees when it enacted the facially neutral enforcement provisions of the LMRA and the NLRA.

Other findings were made with respect to administrative cases. One finding reveals that nonunion employees are more likely to complain about employers' alleged unfair practices (88.9%); union employees, on the other hand, are comparatively more likely to complain about union officials' alleged discriminatory behaviors (40%). In addition, nonunion employees are significantly more likely to complain about "harassment" on the job in administrative proceedings (88.9%). In contrast, union employees' claims are comparatively more likely to involve alleged breach of duty of fair representation (16%).
The demographic characteristics of complainants who decided to seek judicial review are very different. First, Table 2 reveals that nonunion employees are more likely to complain about punishment for engaging in "protected" concerted activity (86.5%); union employees are comparatively more likely to be punished for engaging in "unprotected" individual activity (52.1%). Second, nonunion employees are significantly more inclined than their union counterparts to complain about "harassment," "retaliation," and "discriminatory discharges" than are union complainants. The percentages are 53.3%, 83%, and 86.2%, respectively.

Finally, among complainants in federal courts, nonunion employees are more likely to commence actions against employers (91.6%) than are union employees (70.1%). Nearly a third (29.9%) of the latter group, however, initiated causes of actions against union officials. Whether these actions were filed specifically against local and international unions is uncertain, because Table 2 also reveals that union employees filed a statistically significant number of actions (25.1%) where a union's breach of a duty of fair representation was the overriding issue. As indicated above, for years federal judges required disgruntled employees to prove that a union breached its duty of fair representation before such employees could bring unfair labor practices suits against an employer. Lower federal courts clearly recognized and accepted this interdependence among suits involving unions and employers until the Supreme Court issued its less-than-sterling decision on the matter in 1990.

3. Significant Findings Reported in Table 3

Finally, two additional unexpected and unwarranted findings are reported in Table 3. Among NLRA decisions, the probability of winning in federal court is significantly influenced by the circuit where the action commenced. Specifically, complainants who filed actions in the Tenth Circuit are more likely to

471. See id. ("Types of Protected Activities").
472. See id. ("Unfair Labor Practices").
473. See id. ("Types of Defendants").
474. See id.
475. See id. ("Unfair Labor Practices").
476. See supra notes 425-57 and accompanying text.
477. See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 110 S. Ct. 424, 432-34 (1989). According to the Court:

The Court of Appeals . . . held that if an employee fails to allege that his employer breached the collective-bargaining agreement, then he cannot prevail in a fair representation suit against his union . . . . This is a misstatement of existing law . . . . Our reasoning in Vaca in no way implies . . . . that a fair representation requires a concomitant claim against an employer for breach of contract . . . . Respondent argues that the concern in Vaca that suits against the employer and union be heard together in the same forum is applicable to the hiring hall situation . . . . This reasoning misinterprets our reasoning in Vaca . . . . While in Vaca an allegation that the union had breached its duty of fair representation was a necessary component of [a section] 301 claim against the employer, the converse is not true here . . . .

Id. (emphasis in original).
Furthermore, when service-sector workers commence an action under the LMRA, they are more likely to win in a federal court of appeals. In contrast, there is no similar statistically significant finding among service employees who commence actions under the NLRA.

Close scrutiny of statutory language and of congressional intent discloses no valid justification for these findings. Additionally, there is nothing of significance in the hundreds of Supreme Court opinions and thousands of appellate court decisions to support the view that nonunion employees' grievances are more meritorious than those of union employees. Yet, nonunion employees are more likely to win than union employees. Further, a review of relevant case law failed to substantiate the claim that discrimination against employees in the Tenth Circuit is very different or more severe than that found in other federal circuits. Notwithstanding the similarity in employee treatment, however, Tenth Circuit complainants are significantly more likely to be successful than complainants in other circuit courts.

B. An Empirical Analysis of Some Unexpected Problems Inherent in Litigating Individual Rights Suits in the Supreme Court and Federal Courts of Appeals

This section presents a quantitative analysis of the way federal courts dispose of NLRA and LMRA causes of actions. Unexpectedly, this analysis uncovered a very disturbing finding: an individual complainant's likelihood of winning in federal court is significantly shaped by variables over which the complainant has little, if any, control and by factors that have little to do with a case's merits. In light of these compelling findings, alleged victims of unfair labor practices must be denied access to federal courts. Congress should encourage complainants to resolve individual disputes in federal administrative proceedings. More important, Congress must allocate more funds to help recruit a greater number of highly qualified administrative law judges. Enacting these suggestions would prevent the occurrence of the unwarranted results reported in this Article. Such enactments also would prevent the disparate treatment that union and nonunion employees are currently receiving in the Su-

478. See Table 3 in the Appendix to this Article ("Action Originated in Tenth Circuit").
479. See id. ("Service Sector Business").
480. See Table 2 in the Appendix to this Article ("Disposition (Outcome) of Case").
481. The author's database included 1249 cases—200 administrative decisions, 760 federal appellate court NLRA and LMRA decisions, and 289 Supreme Court NLRA and LMRA cases. The database is available at the office of the DePaul Law Review.
482. See Table 3 in the Appendix to this Article ("Action Originated in Tenth Circuit").
preme Court and federal courts of appeals.


A few of the statistically significant findings reported in Table 3 are discussed above. However, other significant findings appear in the table, and they are discussed here. The procedures for computing the phi coefficients and determining whether those coefficients are statistically significant have been thoroughly discussed elsewhere for a legal audience.

To help appreciate the significance of the findings reported in Table 3, the following questions are advanced. Should the disposition of federal suits be influenced by the geographic boundaries and by legal jurisdictions (types of circuits) in which complainants reside? Should federal judges or members of the Supreme Court allow results to be influenced by whether defendants were employers or union officials? Should nonunion employees have greater success in federal courts than union employees? Should actions originating in administrative proceedings have more favorable dispositions in federal courts of appeals than suits originating in federal district courts? The answer, of course, to these questions is a resounding "no."

Table 3, however, reveals the following "positive" statistically meaningful relationships: (1) actions originating in administrative proceedings are indeed more likely to be successful in the federal appellate courts and Supreme Court—the positive phi coefficients are .101 and .175, respectively; (2) As reported above, actions originating in the Tenth Circuit are more likely to be successful than actions originating in other circuits—the positive phi coefficient is .095; and (3) When defendants are private employers, individual complainants are notably more likely to win in the Supreme Court. This final relationship is very evident among actions filed under both the NLRA and LMRA. The positive phi coefficients are .246 and .359, respectively.

A statistically significant negative phi coefficient means that a particular variable decreases the likelihood of an individual winning in federal court. A negative coefficient also means that an inverse relationship exists between the disposition of a case and a particular variable. Several unexpected and unwarranted inverse relationships appear in Table 3. First, among federal appellate court decisions, union members are more likely to lose in federal court when they bring actions under either the NLRA or the LMRA. The respective significant negative coefficients are -.100 and -.320.

Finally, two other troublesome findings appear among Supreme Court cases.

484. See supra notes 478-79 and accompanying text.
485. See Rice, Grove-City Analysis, supra note 483, at 284-85 nn.403-04; Rice, Fair Housing, supra note 483, at 254-57 n.162.
486. See supra note 478 and accompanying text.
487. See Table 3 in the Appendix to this Article ("Types of Defendants").
For unknown reasons, both NLRA and LMRA employees are *more likely to lose* in that supreme tribunal when defendants are union officials—the negative phi coefficients are -.168 and -.300, respectively. Above, it was noted that these same complainants are *more likely to win* when defendants are private employers.\footnote{A careful reading of the respective Acts, their legislative history, and judicial decisions, fails to uncover a single legal justification for these disparate results.}

2. *The Disposition of NLRA and LMRA Claims in Federal Courts: A Multivariate Probit Two-Stage Analysis*

Are federal appellate court judges actually biased in favor of complainants from the Tenth Circuit? Are Court members truly biased in favor of nonunion employees? Are those Supreme Court Justices really antiworker when defendants are union officials? Apparently, federal judges and members of the Supreme Court are biased, and they are wittingly or unwittingly permitting extralegal factors to influence the disposition of unfair labor practices suits. This is a fair conclusion if we only consider the relevant statistics reported in Tables 2 and 3.

It is possible, however, that another phenomenon, called "self-selectivity bias"\footnote{Conceivably, the sample of federal court cases is biased because it includes only disgruntled employees who decided to file LMRA suits and decided to seek judicial enforcement of NLRB's orders. The sample does not include persons who decided not to advance their actions in federal court after receiving a favorable ruling in administrative hearings or in some other forum. Self-selection is involved in each decision; and, without testing for self-selectivity bias, it would be improper to conclude that judicial bias is causing the disparate or intentional discrimination.} is producing these unjustified, discriminatory results. One source of such bias could be the sample itself.\footnote{Additionally, the difference between litigants' financial resources is often another source of selectivity bias because a positive relationship exits between the level of one's financial resources and one's ability to purchase good legal representation. Therefore, a finding that employers-defendants are more likely to win in federal court than employees-plaintiffs could be a reflection of differential access to adequate resources rather than a reflection of judicial bias. Table 4 illustrates the results of a multivariate probit two-stage analysis.} Conceivably, the sample of federal court cases is biased because it includes only disgruntled employees who decided to file LMRA suits and decided to seek judicial enforcement of NLRB's orders. The sample does not include persons who decided not to advance their actions in federal court after receiving a favorable ruling in administrative hearings or in some other forum. Self-selection is involved in each decision; and, without testing for self-selectivity bias, it would be improper to conclude that judicial bias is causing the disparate or intentional discrimination.

Additionally, the difference between litigants' financial resources is often another source of selectivity bias because a positive relationship exits between the level of one's financial resources and one's ability to purchase good legal representation. Therefore, a finding that employers-defendants are more likely to win in federal court than employees-plaintiffs could be a reflection of differential access to adequate resources rather than a reflection of judicial bias.

Table 4 illustrates the results of a multivariate probit two-stage analysis.\footnote{This procedure has been reasonably discussed and explained in Rice, Grove-City Analysis, supra note 483, at 286-87 & nn. 406-10. If the reader wants more than a cursory discussion of this statistical procedure or of the computer software for generating the probit coefficients, he should consult the references outlined in the Grove-City article; or, the reader may contact the author.}

488. See supra note 487 and accompanying text.
490. Other relevant examples of self-selectivity bias from a legal perspective are found in Rice, Grove-City Analysis, supra note 483, at 286-87.
491. This procedure has been reasonably discussed and explained in Rice, Grove-City Analysis, supra note 483, at 286-87 & nn. 406-10. If the reader wants more than a cursory discussion of this statistical procedure or of the computer software for generating the probit coefficients, he should consult the references outlined in the Grove-City article; or, the reader may contact the author.
Simply stated, this procedure answers two important questions: (1) is there self-selectivity bias in the study?; and (2) if selectivity bias is not present, what are the simultaneous and multiple effects of certain factors on the disposition of NLRA and LMRA actions in federal courts between 1935 and 1990?

Seven "predictor" variables are listed in the very left column in Table 4. They appear because a preliminary statistical procedure revealed that each variable singularly and significantly correlated with one's decision to go to court and with the disposition of claims. However, when examining the simultaneous effects of the seven factors on one's decision to go to court after, say, an administrative hearing, only one statistically significant coefficient appears. The -.7019 probit coefficient and its corollary 4.560 t-statistic strongly suggest that when controlling for the influences of the other factors: (1) unions are less likely to be defendants in federal courts, or (2) disgruntled employees are significantly less likely to select union officials as defendants. Although this particular finding is interesting, it is of little relevance. The truly disturbing findings appear in the two columns situated on the right in Table 4.

First, the statistically insignificant lambda term (.3177) indicates that self-selectivity bias is absent and that disposition is not influenced by some alleged unique characteristics of complainants who decided to go to court. Second, the statistically significant and positive .4604 probit coefficient suggests that, when controlling for the influence of the other variables, complainants who commenced actions under the NLRA have a greater likelihood of winning in federal courts than persons who initiated suits under the LMRA.

Finally, the statistically significant and positive .4806 two-stage probit coefficient reinforces a previous finding: after removing the influence of the other factors, nonunion employees are still more likely to win in the Supreme Court and federal appellate courts than are union employees.493 Again, we are forced to ask: Did Congress intend these disparate results when enacting the National Labor Relations Act in 1935 and the Labor Management Relations Act in 1947?

C. Recommended Congressional Action to Cure the Disparate Treatment of Labor Law Litigants and the Inequitable Enforcement of the LMRA and NLRA

Here, two rather controversial recommendations are advanced to help reduce the disparate results and the incidence of other enforcement problems uncovered in this Article. First, Congress must repeal the LMRA if it is truly committed to protecting individual employees' rights as well as employers' and union officials' rights. As reported in Table 1, the majority of LMRA cases are disposed of on procedural grounds. By any appraisal, this is a serious waste of precious judicial resources. Moreover, among cases decided on the merits, impermissible extralegal factors are significantly influencing the outcomes.

492. See supra note 485 and accompanying text.
493. See supra notes 467-68 and accompanying text.
Against this background, Congress should do what has been suggested before: encourage or compel employers and unions to submit their grievances to binding arbitration or to some alternative dispute resolution forum.494 Congress should also force individuals who have grievances against unions or employers to file their complaints under the NLRA and resolve them before highly skilled administrative law judges.

The second suggestion is not new: Congress must reform the NLRA.495 Specifically, Congress should give individual complainants, rather than the General Counsel, the right to take unfair labor practice claims before administrative law judges after complainants have exhausted appropriate grievance proceedings in the workplace. Another needed reform is to make ALJ rulings final, subject only to the Board’s review. Judicial review of these administrative decisions in federal courts of appeals should not be permitted.

Two compelling reasons exist for prohibiting judicial review of an ALJ’s or Board’s ruling. First, as revealed above, there is an extremely high likelihood that an administrative hearing will result in discrimination disputes being resolved upon the merits.496 However, among cases decided in federal court, the likelihood of such disposition drops considerably.497 Clearly, administrative dispositions are superior. Further, administrative proceedings, arguably, are less costly.

Second, there are simply too many intercircuit conflicts involving enforcement issues under the NLRA and LMRA. Intracircuit conflicts are prevalent, too. Furthermore, both types of conflicts are not limited solely to NLRA or LMRA decisions. Conflicting judicial decisions are found wherever federal statutes permit judicial review of agency action.498 In fact, the problem is so widespread that, as of this writing, legal scholars and judges are debating the merits of a controversial proposal to help settle intercircuit conflicts.499

This proposal includes a recommendation by a federal courts study committee that Congress authorize a four-year pilot project that would allow the Supreme Court to refer intercircuit conflicts to an en banc court of appeals for final disposition.500 The en banc proceedings, however, would take place in a circuit not involved in the conflict.501 It is fairly unlikely that Congress will accept the committee’s recommendations, given past congressional reactions

495. See supra notes 16-18 and accompanying text.
496. See supra note 459 and accompanying text.
497. See supra note 461 and accompanying text.
500. Id.
501. Id.
and the debate's present tone.\textsuperscript{802} Congress, however, should seriously consider and enact the counsel proffered in this Article.

The suggestions made in this Article would require Congress to (1) pass legislation that would compel individual complainants to resolve unfair labor practice disputes in administrative proceedings, (2) provide adequate funds for hiring a substantially larger number of career-oriented administrative law judges, and (3) preclude judicial review of federally created individual rights. These changes would make unpredictable judicial outcomes, costly delays, exorbitant caseloads, and intercircuit conflicts moot issues. It is imperative for Congress to take remedial action soon. Indeed, Congress' failure to take such action to provide timely, predictable, and effective administrative relief would prompt one to conclude that congressional concern for ending groundless discrimination against individual employees is, at best, disingenuous.

VI. CONCLUSION

As early as 1930, the Supreme Court adopted the view that when a statutory right is created, a legal obligation to enforce that right in an appropriate administrative or judicial proceeding follows.\textsuperscript{502} The Court reaffirmed this principle nearly forty years later in \textit{Sullivan v. Little Hunting Park, Inc.}\textsuperscript{804} when it acknowledged that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies."\textsuperscript{805}

Both the NLRA and the LMRA create individual rights for union and non-

\textsuperscript{502} See McMillion, \textit{An End to Diversity?—New Report on Fed Courts Sparks Mixed Reac-
tions}, 76 A.B.A. J. 111 (1990). McMillion wrote:
The ABA is among the major organizations reviewing the draft report of the Federal Courts Study Committee, a panel created by Congress to examine federal court problems and to develop the first long-range plan for the federal judiciary .... The draft proposes shifting some types of cases to other tribunals, trimming back federal jurisdiction when appropriate or necessary, and altering the procedures for handling certain cases .... Recognizing that Congress has been skeptical of [similar] proposal[s] in the past, the committee also recommends alternatives that would drastically reduce the availability of diversity jurisdiction .... The ABA strenuously disagrees with [some] of these recommendations.

\textit{Id.} at 111; see also \textit{Legal Affairs—The Federal Courts Have a Drug Problem,} BUS. WK., Mar. 26, 1990, at 76, 77. The author noted:
The Federal Courts Study Committee has its own problems. The powerful American Bar [Association] opposes any effort to narrow access to the more esteemed federal courts .... And lawyers who specialize in the arcane world of tax law are angry about a proposal to make the U.S. Tax Court the only tribunal to hear tax disputes ....

\textit{Id.}

\textsuperscript{503} See Texas \& N.O.R.R. v. Brotherhood of Ry. \& S.S. Clerks, 281 U.S. 548, 569 (1930) ("The creation of a legal right .... does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided .... [B]ut .... a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each.").

\textsuperscript{504} 396 U.S. 229 (1969).

\textsuperscript{505} \textit{Id.} at 239.
union employees alike. However, an analysis of hundreds of relevant NLRA and LMRA decisions—covering a span of fifty-five years—leads to a dismal conclusion: poorly reasoned and conflicting Supreme Court decisions, a plethora of intracircuit and intercircuit conflicts over procedural matters, jurisdictional conflicts between the NLRB and the federal courts of appeals, and administrative delays are all severely undermining the enforcement of individual rights in a timely, predictable, and effective manner. This conclusion clearly does not comport with the well-settled principle that the creation of statutory right requires its enforcement. Moreover, this result is a substantial deviation from the congressional intent when the NLRA and the LMRA enforcement provisions were adopted.608 Because Congress could not have intended such results, it is necessary that Congress enact remedial measures to cure the inequitable administration of law that labor law litigants are currently experiencing.

506. See supra notes 6-15 and accompanying text.
TABLE 1. SOME SELECTED DEMOGRAPHIC ATTRIBUTES: NATIONAL LABOR RELATIONS ACT AND LABOR-MANAGEMENT RELATIONS ACT CASES DECIDED IN FEDERAL ADMINISTRATIVE AND JUDICIAL PROCEEDINGS BETWEEN 1935 AND 1990 (N = 1249)

<table>
<thead>
<tr>
<th>Selected Demographic Characteristics</th>
<th>National Labor Relations Board's Decisions (N = 200)</th>
<th>Federal Appellate Court Decisions (N = 760)</th>
<th>U.S. Supreme Court Decisions (N = 289)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selected (NLRB)</td>
<td>NLRA Decisions (N = 666)</td>
<td>LMRA Decisions (N = 94)</td>
<td>NLRA Decisions (N = 247)</td>
</tr>
<tr>
<td></td>
<td>LMRA Decisions (N = 42)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Disposition of Case:
- Complainants Win: 72.5%**
- Complainants Lose: 27.5%

### Alleged Violations (multiple responses):
- Defendant’s Willful Violations: 78.0%**
- Defendant’s Repeated Violations: 36.5%
- Defendant’s Retaliation: 36.5%
- Union Refused to Bargain: 44.5%
- Employer Refused to Bargain: 2.0%
- Union Refused to Represent: 3.0%

### Claims Involved:
- "Individual Activity": 25.5%
- "Concerted Activity": 41.5%

### Elections or [Procedural, Jurisdictional or Preemption Issues]:
- Merit: 98.0%**
- Procedural: 2.0%

### Grounds for Disposing Case:
- Merit: 97.9%**
- Procedural: 2.1%

### Types of Complainants:
- Unorganized Employees: 13.5%
- Employer: 8.5%

### Types of Defendants:
- Union Officials: 16.5%
- Employers: 83.5%**

### Employees Were:
- Organized: 45.0%
- Unorganized: 55.0%

### Types of Businesses:
- Construction: 7.0%
- Manufacturing: 57.5%
- Regulated Industries: 6.5%
- Transportation: 5.0%
- Retail Sales: 7.5%
- Services: 7.0%
- Public Sector: 9.5%

*Significant Disparities
## TABLE 2. SOME SELECTED DEMOGRAPHIC CHARACTERISTICS OF INDIVIDUAL EMPLOYEES COMMENCING ACTIONS IN FEDERAL ADMINISTRATIVE AND JUDICIAL PROCEEDINGS UNDER THE NATIONAL LABOR RELATIONS ACT AND THE LABOR-MANAGEMENT RELATIONS ACT BETWEEN 1935 AND 1990 (N = 710)

<table>
<thead>
<tr>
<th>Selected Demographic Characteristics</th>
<th>National Labor Relations Board's Administrative Decisions (N = 52)</th>
<th>Both U.S. Supreme Court &amp; Federal Appellate Court Decisions (N = 658)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Nonunion Employees (N = 27)</td>
<td>Union Employees (N = 25)</td>
</tr>
<tr>
<td></td>
<td>Percent</td>
<td>Percent</td>
</tr>
<tr>
<td>Federal Statutes Involved:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>National Labor Relations Act</td>
<td>52.0</td>
<td>48.0</td>
</tr>
<tr>
<td>Labor-Management Relations Act</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Gender of Complainants:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>3.7</td>
<td>12.0</td>
</tr>
<tr>
<td>Male</td>
<td>55.6</td>
<td>72.0</td>
</tr>
<tr>
<td>(Both)</td>
<td>40.7</td>
<td>16.0</td>
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<tr>
<td>Ethnicity of Complainants:</td>
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<tr>
<td>Anglo</td>
<td>25.9</td>
<td>24.0</td>
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<tr>
<td>Minority</td>
<td>11.1</td>
<td>12.0</td>
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<tr>
<td>(Both or Unknown)</td>
<td>63.0</td>
<td>64.0</td>
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<tr>
<td>Types of Business Sectors:</td>
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<tr>
<td>Manufacturing</td>
<td>66.7</td>
<td>36.0</td>
</tr>
<tr>
<td>Heavily Regulated Industries</td>
<td>3.7</td>
<td>4.0</td>
</tr>
<tr>
<td>Service</td>
<td>3.7</td>
<td>12.0</td>
</tr>
<tr>
<td>Transportation</td>
<td>3.7</td>
<td>8.0</td>
</tr>
<tr>
<td>Construction</td>
<td>11.1</td>
<td>32.0</td>
</tr>
<tr>
<td>Retail Sales</td>
<td>11.1</td>
<td>8.0</td>
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<tr>
<td>Plant’s Organization Status:</td>
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<tr>
<td>Unorganized Plant</td>
<td>81.5***</td>
<td>4.0</td>
</tr>
<tr>
<td>Organized Plant</td>
<td>18.5</td>
<td>96.0</td>
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<tr>
<td>Types of Protected Activities:</td>
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<tr>
<td>(Multiple Responses)</td>
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<tr>
<td>&quot;Concerted Activity&quot;</td>
<td>88.9</td>
<td>76.0</td>
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<tr>
<td>&quot;Individual Activity&quot;</td>
<td>70.4</td>
<td>56.0</td>
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<tr>
<td>Unfair Labor Practices:</td>
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<tr>
<td>Harassment</td>
<td>88.9***</td>
<td>48.0</td>
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<tr>
<td>Retaliation</td>
<td>81.5</td>
<td>84.0</td>
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<td>Discharges</td>
<td>70.4</td>
<td>68.0</td>
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<tr>
<td>Failure to Reinstatute</td>
<td>29.6</td>
<td>28.0</td>
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<tr>
<td>Union’s Breach of Duty of Fair</td>
<td>—</td>
<td>16.0*</td>
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<tr>
<td>Representation</td>
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<td>Types of Defendants:</td>
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<tr>
<td>Union Officials</td>
<td>11.1</td>
<td>40.0*</td>
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<tr>
<td>Employers</td>
<td>88.9*</td>
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<tr>
<td>Discrimination, per se</td>
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<tr>
<td>Both</td>
<td>3.8</td>
<td>4.0</td>
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<tr>
<td>Grounds for Disposal:</td>
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<tr>
<td>Procedural</td>
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<td>8.0</td>
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<tr>
<td>Injuries</td>
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<td>92.0</td>
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<tr>
<td>Disposition (Outcome) of Case:</td>
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</tr>
<tr>
<td>Complainants Won</td>
<td>92.6***</td>
<td>64.0</td>
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<tr>
<td>Complainants Lost</td>
<td>7.4</td>
<td>36.0***</td>
</tr>
</tbody>
</table>

Levels of statistical significance for Phi coefficients in a 2 x 2 table:

- **p < .001
- ***p < .01
- *p < .05

<table>
<thead>
<tr>
<th>Predictors Influencing the Disposition (Outcome) of Cases</th>
<th>National Labor Relations Board's (NLRB) Administrative Decisions (N = 200)</th>
<th>Federal Appellate Court Decisions (N = 760)</th>
<th>U.S. Supreme Court Decisions (N = 289)</th>
</tr>
</thead>
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<td>NLRA Decisions (N = 666)</td>
<td>LMRA Decisions (N = 94)</td>
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<tr>
<td></td>
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<td>LMRA Decisions (N = 42)</td>
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<tr>
<td>Action Originated in Administrative Proceedings</td>
<td>.000</td>
<td>.101*</td>
<td>.175*</td>
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<tr>
<td>Action Originated in Tenth Circuit</td>
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<td>.095*</td>
<td>.029</td>
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<td>Case Decided on Merits</td>
<td>.152</td>
<td>.118*</td>
<td>.266**</td>
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<td>&quot;Individual Activity&quot; Involved</td>
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<td>-.152**</td>
<td>-.098</td>
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<tr>
<td>&quot;Concerted Activity&quot; Involved</td>
<td>.246**</td>
<td>.030</td>
<td>.023</td>
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<td>Types of Violations Alleged:</td>
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<td>Employer's Willful Violations</td>
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<td>-.055</td>
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<tr>
<td>Employer's Repeated Violations</td>
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<td>.086</td>
<td>.206**</td>
</tr>
<tr>
<td>Employer's Retaliation</td>
<td>.188*</td>
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<td>.069</td>
</tr>
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<td>Discriminatory Discharges</td>
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<td>Employer Refused to Bargain</td>
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<td>.147**</td>
<td>.111</td>
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<td>Violence</td>
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<td>-.116*</td>
<td>-.052</td>
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</tr>
<tr>
<td>Union Employees</td>
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<td>-.100*</td>
<td>-.033</td>
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<td>Union Officials</td>
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<td>Private Employers</td>
<td>.027</td>
<td>-.064</td>
<td>-.196**</td>
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<td>Types of Defendants:</td>
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<td></td>
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<tr>
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<td>.003</td>
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<td>Private Employers</td>
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<td>.246**</td>
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<td>Type of Business: Service Sector</td>
<td>.037</td>
<td>.026</td>
<td>-.037</td>
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</table>

* Phi Coefficients (2 x 2 Table)  
Levels of Statistical Significance: **p < .001; *p < .01
<table>
<thead>
<tr>
<th>Selected Predictor Variables</th>
<th>Decision to Initiate a Cause of Action in a Federal Court</th>
<th>Disposition of NLRA &amp; LMRA Claims in a Federal Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Probit Coefficients (Standard Errors)</td>
<td>Absolute Values of t - Statistics</td>
</tr>
<tr>
<td>NLRA Complainants</td>
<td>-.3901 (.1402)</td>
<td>2.781</td>
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<tr>
<td>Unionized-Business Complainants</td>
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<td>1.556</td>
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<tr>
<td>Complainants Engaged in &quot;Individual Activity&quot;</td>
<td>-.3131 (.1270)</td>
<td>2.465</td>
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<tr>
<td>Complainants Engaged in &quot;Concerted Activity&quot;</td>
<td>.1845 (.1887)</td>
<td>.977</td>
</tr>
<tr>
<td>Nonunion Employees</td>
<td>.5161 (.1833)</td>
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</tr>
<tr>
<td>Private Employers</td>
<td>-.4549 (.2228)</td>
<td>2.041</td>
</tr>
<tr>
<td>Union Officials</td>
<td>-.7019 (.1539)</td>
<td>4.560***</td>
</tr>
<tr>
<td>LAMBDA Term (&quot;Self-Selectivity&quot; Bias)</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>CONSTANT</td>
<td>.2749 (.5775)</td>
<td>.476</td>
</tr>
</tbody>
</table>

Levels of Statistical Significance: 

- **p < .01**
- ***p < .001**
- *p < .05*