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STATUS OF THE MAKE-WHOLE REMEDY IN REFUSAL-TO-BARGAIN CASES

An employer's refusal to bargain with a union on a first contract is an unfair labor practice as defined in section 8(a)(5) of the National Labor Relations Act¹ and can result in serious consequences for his competitors, his employees, the courts and the union. An employer who refuses to negotiate in order to delay payment of possible contract benefits to his employees is unjustly enriched to the extent that he gains an economic advantage over those competitors who do bargain in good faith.² One to four years often are consumed in litigation from the initial filing by the union for recognition or for an election to the exhaustion by the employer of administrative and judicial procedures.³ Because the position taken by the employer in this litigation is often "palpably without merit with respect to its refusal to bargain," judicial resources are diverted "from [providing] justice to . . . meritorious litigants whose claims clamor for attention."⁴

Perhaps the most serious consequence of the employer's refusal to bargain is that during the delay, employee support of the union can wane significantly.⁵ For example, the union's likelihood of negotiating a first contract is approximately 84 to 90 percent if the employer and union bargain voluntarily; the chance for success decreases to less than 36 percent when negotiations are ordered by the NLRB and enforced by the courts in an effort to remedy the employer's wrongful refusal to bargain.⁶ Lengthy litigation is the apparent cause.⁷ In addition to delaying or avoiding a collective bargaining agreement, an employer who delays bargaining "imposes actual and serious financial injury"⁸ upon his employees in the form of delayed or ultimately non-existent contract benefits such as increased wages. Finally, the employees are effectively denied their statutory right to collective-bargaining representation.⁹

1. 29 U.S.C. § 158(a)(5) (1970) [hereinafter cited as NLRA].

2. Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059-60 (1968).

3. *Id.* at 1060.

4. *IUEW v. NLRB*, 426 F.2d 1243, 1250 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970).

5. *Id.* at 1249; cf. McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with National Labor Policy?*, 14 WAYNE L. REV. 1086, 1101 (1968).

6. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 115 n.48 (1970). See generally Ross, *Analysis of Administrative Process Under Taft-Hartley*, 1966 LAB. REL. YEARBOOK 299, 306.

7. 185 N.L.R.B. at 115; Ross, *supra* note 6, at 302; Note, *An Analysis of the NLRB's Objections to a Make-Whole Remedy in Refusal-to-Bargain Cases*, 3 RUTGERS • CAMDEN L.J. 272, 278 (1971).

8. Schlossberg & Silard, *supra* note 2, at 1064. The authors note that "[a]n employee denied a 3% increase during an average collective bargaining delay of three years loses in straight pay improvements alone approximately \$900." *Id.*

9. NLRA § 7, 29 U.S.C. § 157 (1970).

Both the NLRB¹⁰ and the United States Court of Appeals for the District of Columbia Circuit¹¹ have recognized the need for a remedy in refusal-to-bargain cases that will "advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation."¹² The court and the NLRB have not, however, agreed on what the proper remedy is; the court has been willing to accept union proposals of a make-whole remedy¹³ in certain situations while the Board has been adamant in its refusal to grant make-whole relief under any circumstances. The legality of make-whole relief has been adequately discussed elsewhere;¹⁴ this note will focus on the development of a test that would identify offending employers whose conduct might warrant some sort of compensatory remedy.

Since 1968 three major refusal-to-bargain cases dealing with make-whole relief have been decided by the NLRB and the United States Court of Appeals for the District of Columbia Circuit: *Heck's, Inc.*,¹⁵ *Tiidee Products, Inc.*¹⁶ and *Ex-Cell-O Corp.*¹⁷ Chronologically, Heck was the first of these employers to appear before the Board to answer unfair labor practice charges.¹⁸ Heck had appeared before the Board on eight previous occasions involving unfair labor practice charges resulting from Heck's company-wide policy of maintaining the nonunion status of its stores.¹⁹ This ninth appearance of Heck included a section 8(a)(5) refusal-to-bargain charge and a request for make-whole relief by Food Store Employees Local 347.

In May 1967, Local 347 presented Heck with 19 employee authori-

10. *Tiidee Prods., Inc.*, 174 N.L.R.B. 705 (1969), *application for enforcement granted and case remanded sub nom. IUEW v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970).

11. *IUEW v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970).

12. *Id.* at 1251.

13. The make-whole remedy consists of monetary compensation to be paid by an employer to his employees for wages and benefits that they might have received but for the employer's unlawful refusal to bargain. *See* 426 F.2d at 1252-53.

14. *See* McGuiness, *supra* note 5; St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039 (1968); Schlossberg & Silard, *supra* note 2; Note, *The Ex-Cell-O and Tiidee Products Cases—Continuing Controversy Over the Make-Whole Remedy in Refusal-to-Bargain Cases*, 19 KAN. L. REV. 325 (1971); Note, *supra* note 7.

15. 172 N.L.R.B. 2231 (1968), *application for enforcement granted and case remanded*, 433 F.2d 541 (D.C. Cir. 1970), *remedial order*, 77 L.R.R.M. 1513 (1971), *application for enforcement of remedial order granted and case remanded*, 476 F.2d 546 (D.C. Cir. 1973).

16. 174 N.L.R.B. 705 (1969), *application for enforcement granted and case remanded*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), *remedial order*, 191 N.L.R.B. 1234 (1972).

17. 185 N.L.R.B. 107 (1970), *motion for summary reversal granted*, 449 F.2d 1046 (D.C. Cir.), *application for enforcement granted*, 449 F.2d 1058 (D.C. Cir. 1971).

18. 172 N.L.R.B. at 2231.

19. *Id.* at 2231 n.5.

zation cards from a total employee complement of thirty-three. Heck rejected the union's demand for recognition and requested that an NLRB representation election be held. The next month the total employee complement had risen to thirty-eight and twenty-three authorization cards were presented to Heck, who then filed a petition with the NLRB. The Board conducted an election in July in a stipulated unit including all employees of the employer's Clarksburg store, excluding supervisors, guards and professional employees; the union lost by a nineteen to sixteen vote.²⁰ The union challenged the election result, claiming that its attempt to organize was undermined by Heck's pre-election acts of interference directed at thirty-three of the thirty-eight employees in the unit in May, June and July 1967. Local 347 also charged that Heck's rejection of the union authorization cards was an unlawful refusal to bargain. Heck challenged several of the cards. The trial examiner stated that if the company's testimony concerning the challenges were fully credited, three or four union cards would have been rejected, but he concluded that testimony showed all authorization cards to be valid and Heck's objections to be unfounded.²¹ He thus found that Local 347 represented a majority of the employees in the stipulated unit, but recommended to the Board only that the election be set aside because of Heck's unlawful conduct during the pre-election period. This conduct included threats, interrogation, coercive interviews and illegal polls,²² all of which violated sections 8(a)(1), (b)(6) and (b)(7) of the NLRA,²³ which prohibits interference with employee collective-bargaining rights. The trial examiner did not sustain the section 8(a)(5) allegation of the complaint, finding

20. *Id.* at 2237-39.

21. *Id.* at 2237-38. Heck produced two employee witnesses who testified that they signed only after their jobs were threatened by the union organizer. One of these witnesses testified that another employee signed under similar duress. The fourth card under attack was that of a hospitalized employee. The record suggests that he would not have signed but for one of the employee witnesses' act of signing. The trial examiner found all the cards held by the union to be valid designations.

22. *Id.* at 2233-38. For example, company president Haddad approached two female employees (Mason and Jeffers) one day in June as they worked and stated that Montgomery Ward had closed its Clarksburg store because of union activity. He also told them that he planned to transfer them to another store because they had been "bad girls." *Id.* at 2234. Upon testifying before the trial examiner, Haddad recalled that he had discussed the "rumor" that Montgomery Ward's closing was caused by union activity. The trial examiner concluded that "his statement that he 'kidded' with the employees furnishes no defense to a threat to transfer 'bad girls,' uttered in a context of antiunion sentiments." *Id.* at 2235.

23. 29 U.S.C. §§ 158(a)(1), 158(b)(6)-(7) (1970). Section 158(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title."

that General Counsel had failed to establish Heck's lack of a good faith doubt as to the union's majority status.²⁴

The NLRB, on the other hand, found a section 8(a)(5) violation and extensive section 8(a)(1) violations.²⁵ It determined that Heck's refusal to bargain was not based on a good faith doubt of the union's majority status, finding, rather, that Heck's "refusal was for the purpose of utilizing the preelection period to undermine the Union's majority."²⁶ The Board in September 1968 set aside the election and issued a cease and desist order as well as a bargaining order.²⁷ It should be noted that the NLRB's finding of a section 8(a)(5) violation was based in part on Heck's "flagrant repetition of conduct previously found unlawful."²⁸ A petition for review of the July 1968 NLRB order in the *Heck* case was filed with the District of Columbia Circuit.

Before that order was reviewed, a second employer, Tiidee Products, appeared before the NLRB on unfair labor practice charges.²⁹ The union in *Tiidee Products* commenced its organizing campaign in July 1967. A petition was filed on August 1, and the union and employer entered into an agreement for consent election on September 1.³⁰ The election was conducted on September 14, and resulted in a union victory.³¹ The union was therefore certified by the regional director.³² The employer, however, would not bargain with the certified representative. Accordingly, the union filed a section 8(a)(5) violation charge against Tiidee Products for its refusal to bargain with the union. The trial examiner found that the union had been properly certified; the employer was therefore found to be in violation of the NLRA.³³ The trial examiner recommended a cease and desist order, reinstatement with back pay of employees discriminatorily discharged or laid off, and a bargaining order. He declined to grant the make-whole remedy requested by the union, since it involved "both legal and policy ques-

24. 172 N.L.R.B. at 2231.

25. *Id.* at 2231-32.

26. *Id.* at 2232.

27. *Id.*

28. *Id.* at 2231. The trial examiner had not found a refusal-to-bargain violation since Heck did file a representation petition and Heck's challenges to authorization cards had proved to be well-founded in prior cases. *Id.* at 2238.

29. 174 N.L.R.B. at 706.

30. *Id.*

31. *Id.* at 707. The result was nineteen votes for the union and six against, with three challenged ballots.

32. The employer challenged three ballots, but the regional director found his objections to be unfounded. *Id.*

33. *Id.* The employer was also found to have committed a further § 8(a)(5) violation by ignoring the union's request for information. *Id.* Also, Tiidee Products violated §§ 8(a)(1), 8(a)(3), by threatening to close the plant and by unlawfully laying off employees after the election. *Id.* at 708-14.

tions which should be initially considered by the Board."³⁴ In February 1969 the NLRB adopted the findings, conclusions and recommendations of the trial examiner with a slight modification.³⁵ A petition for review of the *Tiidee Products* order was filed with the District of Columbia Circuit.

In April 1970 the court of appeals took advantage of the opportunity presented by this petition for review of the Board order in *Tiidee Products* to state its position in favor of make-whole relief, which it found to be both legal and proper.³⁶ It formulated the first judicial test for determining when make-whole relief would be appropriate for an employer's unfair labor practice: if the litigation raised "patently frivolous" objections, make-whole relief would be an appropriate remedy.³⁷ The court added that a "debatable question" might not be considered "patently frivolous."³⁸ The court found no statutory prohibition of the grant of make-whole relief, and it did not consider this remedy to compel concessions from an employer.³⁹ It characterized such relief as past damages "based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act."⁴⁰ The *Tiidee Products* order was remanded, the court urging the NLRB to consider the advisability of a make-whole remedy.

34. *Id.* at 714.

35. *Id.* at 705 n.3.

36. 426 F.2d at 1248-53.

37. *Id.* at 1248. The court felt that "[t]he Company's refusal to bargain was a clear and flagrant violation of the law. Its objections to the election were patently frivolous . . ." *Id.*

38. *Id.* at 1250.

39. *Id.* at 1252-53. Section 10(c) of the NLRA specifies several remedies that are available to the NLRB. These include cease and desist orders and "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." NLRA § 10(c), 29 U.S.C. § 160(c) (1970).

The court of appeals also stated that the power to accord meaningful relief is not necessarily undercut by § 8(d) of the NLRA. "[D]amages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with . . ."—even pre-contract. 426 F.2d at 1253. The court was pointing out that § 8(d), which prohibits any compelling of contract terms by either party to collective bargaining, does not forbid monetary relief such as the make-whole remedy. The court referred to the following note and article to support its position: St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039 (1968); Note, *An Assessment of the Proposed "Make-Whole" Remedy in Refusal-to-Bargain Cases*, 67 MICH. L. REV. 374 (1968). The court also pointed out that the Supreme Court, in *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), thought the cost burden occasioned by a period of unusual delay by the NLRB should be put on the wrongdoing employer. 426 F.2d at 1251-52.

The court of appeals did not order make-whole relief in *Tiidee Products*, but remanded for consideration of its appropriateness. 426 F.2d at 1253.

40. 426 F.2d at 1253.

In May 1970 the Court of Appeals for the District of Columbia Circuit⁴¹ found that the *Heck* bargaining order met the requirement laid down by the Supreme Court in *NLRB v. Gissel Packing Co.*⁴² *Gissel* required a finding of more than simple bad faith in order to justify an NLRB order requiring an employer to bargain without an election.⁴³ The court, however, remanded the *Heck* order on the union's request for more adequate relief in light of *Tiidee Products*; *Heck's* bad faith and flagrant misconduct clearly influenced the decision to remand.⁴⁴ The Board was instructed to determine if *Heck's* bad faith and flagrant misconduct had, in fact, generated frivolous litigation.⁴⁵

Several months after the *Heck* order was remanded, the NLRB stated in its decision in *Ex-Cell-O*⁴⁶ the Board's position against the appropriateness of make-whole relief as an available remedy under the NLRA. *Ex-Cell-O* began with an employer's refusal of a union recognition request in August 1964. The union immediately filed for Certification of Representative. After a hearing, the regional director ordered a representation election. The union won the election in October 1964. The company filed objections to the conduct of the election, but these were overruled by the regional director in December 1964. That decision was reviewed by a hearing officer in May 1965, who recommended that the company's objections be overruled. The NLRB in October 1965 adopted the hearing officer's findings and affirmed the regional director's certification of the union.⁴⁷ The employer then refused to bargain, so that it could obtain a court review of the NLRB's action. The union responded by filing charges under sections 8(a)(1) and 8(a)(5). In March 1967 the trial examiner found a refusal-to-bargain violation and recommended the standard bargaining order as a remedy.⁴⁸ In addition, the trial examiner "ordered the Company to compensate its employees for monetary losses incurred as a result of its unlawful conduct"—the make-whole remedy.⁴⁹

41. 433 F.2d at 541.

42. 395 U.S. 575 (1969).

43. 433 F.2d at 542 n.3.

44. *Id.* at 543. The court stated: "The Board's findings of bad faith and flagrant misconduct lead us to remand this case to the Board for reconsideration, in light of our recent decision in *Tiidee Products*, of the Union's request for further relief." *Id.*

45. *Id.*

46. 185 N.L.R.B. at 107.

47. *Id.*

48. Section 8(a)(1) violations were also found. 185 N.L.R.B. at 108. For details of the § 8(a)(1) violations, see the trial examiner's decision, *id.* at 120-29.

49. 185 N.L.R.B. at 108. See the trial examiner's decision, *id.* at 124-29, for his explanation of the make-whole remedy. He concludes:

My proposed compensation provision contemplates that the compensation

The NLRB rejected that portion of trial examiner's order recommending make-whole relief,⁵⁰ asserting the illegality and impracticality of the remedy.⁵¹ The decision clearly rejected the *Tiidee Products* test, stating:

With due respect for the opinion of the Court of Appeals for the District of Columbia, we cannot agree that the application of a

period will begin on the date on which the Respondent first refused the Union's request for bargaining conference, October 25, 1965. It may be suggested that it is unreasonable to assume that the parties would have been able immediately to reach a collective-bargaining agreement, and that therefore some later date should be adopted for the beginning of the compensation period However, in view of the fact that the Respondent's express refusal to bargain on October 25, 1965, was merely the continuation of a policy adopted by it, . . . it appears to me not unreasonable to adopt the October 25, 1965, date. . . . To adopt a later date for the commencement of the compensation period is to put a premium on disobedience of the statutory policy and unnecessarily to prolong the competitive disadvantage suffered by law abiding employers who accept Board certifications without challenge.

Id. at 129.

50. *Id.* at 110-11. No make-whole relief was included in the NLRB order.

51. *Id.* at 108-10. The NLRB did not think that make-whole relief would effectuate the policies of the NLRA—to allow the employer and union to settle their differences. In its opinion, the Board stated that the NLRB did not have the statutory power to issue such a remedy. *Id.* The majority suggested that the proper response would be procedural reform to speed up the processing of § 8(a)(5) abuses. *Id.* at 110. It suggested that the practical computation problems would tax both courts and the NLRB. *Id.*

There was a lengthy dissent in *Ex-Cell-O* by NLRB members McCulloch and Brown, who argued that the NLRB does have power under § 10(c) to grant make-whole relief, which would effectuate the policies of the NLRA—to promote peaceful settlements of disputes by encouraging collective bargaining and by protecting employee rights *Id.* at 111-12. The dissenting members claimed that there exists ample data to devise a reasonable method for computation of the amount:

The criteria which prove valid in each case must be determined by what is pertinent to the facts. . . . [T]he following methods for measuring such loss do appear to be available, although these are neither exhaustive nor conclusive. . . . [I]f the particular employer and union involved have contracts covering other plants of the employer, possibly in the same or a relevant area, the terms of such agreements may serve to show what the employees could probably have obtained by bargaining. The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry. Or, the parties might employ the national average percentage changes in straight time hourly wages computed by the Bureau of Labor Statistics.

Id. at 118 (footnotes omitted). The dissenting members also pointed out that the NLRB already has effectively used the compensatory remedy of back pay, *id.* at 112-13, and declared that the NLRB was shirking its responsibility by refusing to tackle a difficult computational task. *Id.* at 119.

The major difference between the majority and dissenting members seems to be their point of emphasis. The majority emphasizes the encouraging of private collective bargaining, while the dissent also emphasizes the NLRA's protection of employee rights. *See id.* at 109, 112.

compensatory remedy in 8(a)(5) cases can be fashioned on the subjective determination that the position of one respondent is "debatable" while that of another is "frivolous." What is debatable to the Board may appear frivolous to a court, and vice versa. Thus, the debatability of the employer's position in an 8(a)(5) case would itself become a matter of intense litigation.⁵²

The NLRB here was particularly concerned that the employer's procedural right to judicial review be preserved. It pointed out that the remedy was not warranted where there was only a "technical 8(a)(5)"⁵³ violation, and seriously questioned the propriety of imposing the make-whole remedy "[w]here the wrong in refusing to bargain is, at most, a debatable question, though ultimately found a wrong."⁵⁴

The Court of Appeals for the District of Columbia Circuit was petitioned for temporary enforcement, pending disposition of review of the *Ex-Cell-O* order. It heard the case in April 1971. In March 1971 the court had considered the NLRB's rejection of the court's standard and remanded, stating that the NLRB should decide if the employer's reasons for litigating were "frivolous" or "fairly debatable."⁵⁵ The court, however, vacated the remand in a rehearing in which it decided, on the basis of its *own* determination, that the employer's objections were "fairly debatable."⁵⁶ Thus, at this point, make-whole relief was appropriate in the court's view if the litigation was "frivolous," but not appropriate if it was "fairly debatable."

In its July 1971 supplemental order in *Heck*, the NLRB explained what it believed the court of appeals meant by "frivolous" litigation:

[I]t is not the court's view that because a defense is found to be without merit, it must necessarily be found to be "frivolous." As we understand the court's use of "frivolous" in this context, it refers to contentions which are clearly meritless on their face; the court did not . . . intend to label as "frivolous" a defense, the merit of which in the last analysis rests . . . upon a Trial Examiner's resolutions of credibility."⁵⁷

52. *Id.* at 109.

53. *Id.* The NLRB distinguished *Tiidee Products* from *United Steelworkers of America v. NLRB*, 430 F.2d 519 (D.C. Cir. 1970) [hereinafter cited as *Quality Rubber*]. In *Quality Rubber* the court upheld the NLRB's refusal of make-whole relief for a "technical 8(a)(5)," that is, a violation of § 8(a)(5) solely for the purpose of having the court review an NLRB order. An employer has a right to have only *final* NLRB decisions reviewed. NLRA § 10(f), 29 U.S.C. § 160(f) (1970).

54. 185 N.L.R.B. at 109.

55. *UAW v. NLRB*, 449 F.2d 1046, 1050 (D.C. Cir. 1971).

56. *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058 (D.C. Cir. 1971).

57. *Heck's, Inc.*, 77 L.R.R.M. 1513, 1516-17 (1971).

The NLRB applied this narrowed test for "frivolous" litigation, assuming *arguendo* that it possessed the necessary statutory authority. It found that Heck's litigation was not frivolous and hence did not warrant the make-whole remedy.⁵⁸

The NLRB's amended *Heck* order gave the union additional remedies—access to bulletin boards and the names and addresses of all company employees.⁵⁹ The NLRB denied any monetary relief for lost employee benefits (make-whole), increased union organizational costs, lost union dues and fees, and union and NLRB litigation costs caused by "frivolous" employer appeals.⁶⁰ The Board reiterated that it lacked the statutory power under the NLRA to grant such monetary relief and refused ever to award make-whole relief unless required by the Supreme Court to do so.⁶¹ A petition for review of this NLRB amended *Heck* order was filed with the District of Columbia Circuit.

In January 1972 the Board, reviewing the remanded *Tiidee Products* order, said that the make-whole remedy was not "practicable,"⁶² but that "in order to discourage future frivolous litigation," the Board and union should be reimbursed for costs incurred as the result of frivolous litigation.⁶³ Thus, in the period after the NLRB had explained what the court meant by "frivolous" litigation but before this explanation came up for review by the court of appeals, the NLRB, while continuing to deny that it had statutory power to order make-whole relief, applied the original *Tiidee Products* test and awarded monetary relief short of make-whole.⁶⁴

58. *Id.*

59. *Id.* at 1515.

60. *Id.* at 1516-17.

61. *Id.* at 1516. The majority stated:

"Unlike most of the requests for non-monetary relief . . . which presented questions of judgment as to the type of remedy that is appropriate in particular circumstances, the requests for monetary relief also require, at least in part, consideration of the Board's power to act. This is particularly true with respect to the requests that the employees be made whole for loss of collective-bargaining benefits. . . . [W]e remain convinced, as we stated in our decision in *Ex-Cell-O*, that the Board lacks statutory authority to grant such relief. We will therefore adhere to our position in this matter unless and until the Supreme Court decides otherwise."

Id.

62. *Tiidee Prods., Inc.*, 194 N.L.R.B. 1234 (1972). The NLRB concluded:

We know of no way by which the Board could ascertain with even approximate accuracy . . . what the parties "would have agreed to" if they had bargained in good faith. Inevitably, the Board would have to decide . . . what the parties "should have agreed to." And this, the court stated, the Board must not do.

Id. at 1235.

63. *Id.* at 1179.

64. *Id.* at 1177-79. See also *Retail Clerks Local 1401 v. NLRB*, 463 F.2d 316, 325 (D.C. Cir. 1972). In this decision the District of Columbia Circuit upheld the NLRB's finding

In March 1973 the District of Columbia court of appeals reviewed the amended *Heck* NLRB order⁶⁵ and accepted the narrowing of the *Tiidee Products* test for frivolous litigation.⁶⁶ Additionally, the court refined the test for make-whole relief by stating that a finding of "bad faith" which is based on prior employer conduct could influence the determination of "frivolous," as opposed to "debatable," objections.⁶⁷ The court cautioned, however, that the entire context of behavior should be considered, and in this particular case the employer's present conduct outweighed prior violations.⁶⁸ The court accepted the Board's refusal to grant make-whole relief,⁶⁹ but, after considering the NLRB's additional relief to the union, remanded the amended order for more adequate monetary relief.⁷⁰ The remand included instructions that the NLRB reconsider the imposition of both litigation costs, a remedy previously granted,⁷¹ and increased union organizational fees, a remedy never before granted.⁷² The court appears to be urging the NLRB to grant more adequate monetary relief, on the assumption that

that an employer's claims were "arguable" and hence not appropriate for make-whole relief. The NLRB said that "frivolous litigation" may trigger compensatory liability only if the challenge is not based on a "debatable question." *Id.*

65. *Food Store Employees Local 347 v. NLRB*, 476 F.2d 546 (D.C. Cir. 1973).

66. *Id.* at 554.

67. *Id.*

68. *Id.*

69. *Id.* Since Heck's defense to the § 8(a)(5) charge failed solely because of a credibility determination by the trial examiner, the NLRB concluded that Heck's litigation was not "patently frivolous," and hence make-whole relief was not appropriate. The court concluded:

[W]e are not inclined to say that the Board's treatment of this issue . . . is beyond the wide range of latitude traditionally accorded the Board in the matter of remedies. . . . The employer here appears to have had some basis for questioning the result of the card approach, and it exhibited its readiness to invoke the election process.

Id.

70. *Id.* The District of Columbia Circuit persistently reminds the NLRB that adequate monetary remedies may be effective in deterring future flagrant and calculated unfair labor practices. *See, e.g., IUEW v. NLRB*, 426 F.2d at 1249; *Ex-Cell-O Corp.*, 185 N.L.R.B. at 107.

71. 476 F.2d at 551. The court noted that:

It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board.

Id.

72. *Id.* at 552. The court found "nothing in the Board's Supplemental Decision which constitutes an adequate justification for the denial of extraordinary organizational costs to which the Union was exposed by reason of Heck's policy of resisting organizational efforts and refusing to bargain . . ." *Id.* at 551.

some remedy short of make-whole will deter calculated refusal-to-bargain violations of the NLRA by employers.⁷³

SUMMARY

Tracing the *Heck*, *Tiidee Products* and *Ex-Cell-O* decisions from their original NLRB orders to final dispositions⁷⁴ provides insight into attempts by the NLRB and the United States Court of Appeals for the District of Columbia Circuit to remedy section 8(a)(5) violations without encroaching on the system of private collective bargaining.⁷⁵ If the monetary remedies now in use by the NLRB⁷⁶ or suggested to it by this court of appeals⁷⁷ do not deter clear and flagrant refusal-to-bargain violations by employers, perhaps make-whole relief will have to be utilized.

The District of Columbia court of appeals and the NLRB have not agreed as to the propriety of such a remedy. The Board has emphasized the employer's statutory right to have a union's majority status judicially reviewed,⁷⁸ contending that this employer right should not be tempered by the threat of a large monetary liability in the event that the employer's case is ultimately found to be without merit.⁷⁹ Furthermore, the NLRB has denied that it has the statutory power to order a remedy which would cause an intrusion into the collective bargaining process.⁸⁰ It has considered make-whole relief to compel, at least indirectly, an agreement to a contract term in violation of section 8(d) of the NLRA.⁸¹ On the other hand, the Court of Appeals for the Dis-

73. *Id.* at 554 n.13. The NLRB has recognized that some additional monetary remedies could "undo some of the baneful effects" resulting from clear and flagrant violations of the law by an employer. 79 L.R.R.M. at 1178.

74. See notes 15-17 and accompanying text *supra*.

75. It has been concluded by one author that "[n]o solution [to the problem of employer intransigence] . . . which does not do violence to the basic value sought to be implemented in a system of free collective bargaining" has yet been suggested for refusal-to-bargain violations. McGuire, *Public Employee Collective Bargaining in Florida—Past, Present and Future*, 1 FLA. ST. U.L. REV. 28, 109 (1973).

76. The monetary remedies that the NLRB has granted—other than back pay, which is specifically authorized by § 10(c) of the NLRA—include union and NLRB litigation fees and increased union organizational costs. See *IUEW v. NLRB*, 426 F.2d at 1247-53; *Food Store Employee's Local 347*, 476 F.2d at 550-53.

77. See 476 F.2d at 551-54. The monetary remedy suggested by the court, but not put in use by the NLRB, provides repayment of extraordinary organizational costs incurred by the union due to the employer's wrongful resistance. 476 F.2d at 551-52.

78. This majority status can be gained by authorization cards or NLRB certification via a representation election. See NLRA § 9, 29 U.S.C. § 159 (1970).

79. 185 N.L.R.B. at 109. The Board felt that "the imposition of a large financial obligation . . . may come close to a form of punishment for having elected to pursue a representation question beyond the Board and to the courts." *Id.*

80. *Id.* at 108-10.

81. *Id.* at 108. See also *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v.*

trict of Columbia Circuit has found no statutory prohibition of make-whole relief.⁸²

Despite this conflict between the Board and the court of appeals concerning the power to grant monetary remedies, it seems apparent that both now agree on a narrowly defined test that would identify section 8(a)(5) violators whose conduct warrants make-whole relief. Make-whole relief is appropriate when employers refuse to bargain based on objections that are "clearly meritless on their face"; this does not include objections which are ultimately decided on a trial examiner's resolutions of credibility.⁸³ The prior employer bargaining record should be considered in determining whether present objections are made in good faith. Thus, if the Supreme Court should rule affirmatively on the legality of such a remedy, or if Congress should specify that the NLRB possesses the power to award such relief, a standard for granting it will exist. The orders developing the test seem to indicate that the NLRB majority still believes that the primary purpose of the NLRA is to foster a collective bargaining process between employer and union. The protection of employee rights appears to be considered only as a secondary purpose.⁸⁴ Thus, unless the types of monetary remedies now in use by the NLRB prove unsuccessful in deterring frivolous litigation in refusal-to-bargain cases, the future of the make-whole remedy appears doubtful.⁸⁵

American Nat'l Ins. Co., 343 U.S. 395 (1952); *Retail Clerks v. NLRB*, 373 F.2d 655, 660 (D.C. Cir. 1967). Section 8(d) of the NLRA states that the mutual obligation of employer and union to bargain "does not compel either party to agree to a proposal or require the making of a concession . . ." NLRA § 8(d), 29 U.S.C. § 158(d) (1970).

82. See notes 36-39 and accompanying text *supra*.

83. See notes 37-68 and accompanying text *supra*.

84. 476 F.2d at 553-554. See also *IUEW v. NLRB*, 426 F.2d at 1249; *Ex-Cell-O Corp.*, 185 N.L.R.B. at 107. Chairman Miller, with the apparent support of two other NLRB members, has been described as having the following preference:

Above all else the Chairman has a profound respect for the process of collective bargaining, a respect for the ability of the parties to work out and solve their own problems. To this end he will stay the hand of the government so that the parties—labor and management—may achieve their own destiny—good and sometimes even bad—but their own.

Isaacson, *Discernible Trends in the "Miller" Board—Practical Considerations for the Labor Counsel*, 23 LAB. L.J. 531, 542 (1952).

85. Perhaps the trend is to order make-whole relief where extensive § 8(a)(1) and § 8(a)(3) violations indicate bad faith—an adaptation of *Gissel*. It is an unfair labor practice under § 8(a)(3) for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). In *Heck* the fact that Heck filed an election petition with the NLRB softened the impact of his extensive § 8(a)(3) and § 8(a)(1) violations. See 172 N.L.R.B. at 2231-32.

A May 1972 NLRB order found an employer § 8(a)(5) violation on grounds "so insubstantial as to be frivolous," but no make-whole relief was granted. John Singer,

The courts have the power under the NLRA to modify and enforce as modified any order of the NLRB.⁸⁶ The United States Court of Appeals for the District of Columbia Circuit apparently is not yet ready to force the issue of make-whole relief. This pragmatic approach of the court seems reasonable. If a measure that is less severe than make-whole⁸⁷ will deter section 8(a)(5) violators, then the ends sought by the NLRA will be effectuated; at the same time labor and management will be able to bargain without interference from a court or from the NLRB.

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Inc., 80 L.R.R.M. 1340, 1341 (1972). The NLRB stated: "As we have found that the Respondent's only apparent objective is to postpone its statutory obligation, we regard any further litigation as an abuse of the processes of the Board and the courts." *Id.* at 1341-42. A similar order was upheld in May 1973, when General Counsel's motion for summary judgment was granted. Farah Mfg. Co., 83 L.R.R.M. 1358 (1973). Make-whole relief was denied for the same reasons as those stated in *Ex-Cell-O.* *Id.* The NLRB, in *Singer*, seems to be taking a strong position against frivolous litigation. It remains to be seen if *Singer* will appeal this order. There are no extensive §§ 8(a)(1) or 8(a)(3) violations here. If *Singer* does appeal, thus generating frivolous litigation, the NLRB may have to consider a remedy that effectively will prevent this misuse of the courts. Perhaps make-whole relief will then be considered more favorably by the NLRB.

86. See NLRA §§ 10(e)- (f), 29 U.S.C. §§ 160(e)- (f) (1970).

87. See note 51 *supra*. The cost to the employer of union litigation and counsel expenses or increased union organizational costs certainly appears to be less than make-whole cost. It appears that some employers think that the cost of litigation entered into for the purpose of defeating or postponing unionization of their employees, is less burdensome than the increased labor costs which could accompany unionization.