Volume 19 | Issue 2 Article 7

1973

Federal Statutes and Government Regulation

Various Editors

in implementing the suggestions would appear to be minimal, and their effect should be to decrease the number of colorable post-sentence claims. However, since conformity with the procedures remains at least theoretically optional, it would appear that as long as a district court complies with the minimum requirements of rule 11 the Third Circuit would not hold a failure to follow the suggestions to be grounds for reversal or for the withdrawal of a plea.[43]

R. G. E.

Federal Statutes and Government Regulation

ADMINISTRATIVE LAW — PROCEDURAL DUE PROCESS — CLEAN AIR ACT AMENDMENTS OF 1970 — STATE PROMULGATED REGULATIONS — ENVIRONMENTAL PROTECTION AGENCY MUST EITHER PROVIDE A LIMITED LEGISLATIVE HEARING OR STAY FEDERAL ENFORCEMENT WHILE STATE ACTIONS ARE PENDING.

Duquesne Light Co. v. Environmental Protection Agency (3d Cir. 1973)

The Clean Air Act Amendments of 1970 (Clean Air Act)[1] provide for federal-state interaction in order to achieve higher standards of air quality. Sections 108 and 109 of the Clean Air Act provide for federal designation of air pollutants and for promulgation of federal standards with regard to pollutants so designated.[2] Section 110(a)(1), which defines the responsibility of the states within this bi-level scheme, requires that within 9 months of the promulgation of these federal standards, each state is to adopt and submit to the Administrator of the Environmental Protection Agency (EPA), a state implementation plan for achieving the federal standards within the state.[3] Upon approval of the state plan by the Administrator, it is enforceable by federal as well as state authorities.[4]

Pursuant to this scheme, the Pennsylvania Environmental Quality Board held hearings[5] and, in January 1972, adopted regulations limiting

43. *See* notes 25–30 & 33 and accompanying text *supra*.

1. 42 U.S.C. §§ 1857–58a (1970).
2. *Id.* §§ 1857c–3 to c–4.
3. *Id.* § 1857c–5(a)(1).
4. Clean Air Act § 113, U.S.C. § 1857c–8 (1970). After permitting a period of 30 days to pass after notifying the offender of a violation, the Administrator may impose civil and criminal sanctions upon the violator. Under this section, fines not greater than $25,000 a day and/or imprisonment of not more than 1 year are authorized for first violations. *Id.* § 1857c–8(c)(1) (1970).
5. Duquesne Light Co. v. EPA, 481 F.2d 1, 5 (3d Cir. 1973). Representatives of petitioners appeared at these hearings and presented evidence in the form of oral testimony and written statements. *Id.*

the emission of polluting sulfur oxides into the air.[6] Without further proceedings, the Administrator of the EPA, in accordance with section 110(a)(2) of the Clean Air Act, [7] approved part of the Pennsylvania plan.[8]

Petitioners,[9] invoking section 307(b)(1) of the Clean Air Act,[10] sought reconsideration of the approved portion of the plan by the Administrator, contending *inter alia* that requirements of due process demanded that they be afforded some form of hearing prior to federal adoption or enforcement of the state implementation plan.[11] The Third Circuit accepted this contention and ordered reconsideration of the case by the EPA without specifying the type of procedure to be followed.[12] On consideration of the EPA's motion opposing that order,[13] the court determined that section 4 of the Administrative Procedure Act (APA)[14] was inapplicable and that an adjudicative hearing was not constitutionally required.[15] Nevertheless, the court stated that since the petitioners had complied with the provisions of the Clean Air Act allowing for judicial review[16] and had initiated state administrative proceedings,[17] it was fundamentally unfair to subject them to the risk of punishment without allowing full opportunity for the expression of objections to the state

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6. *Id.* at 4–5. The regulations in question were part of the Pennsylvania state implementation plan enacted pursuant to section 110(a)(1) of the Clean Air Act, 42 U.S.C. § 1857c–5(a)(1) (1970).

7. 42 U.S.C. § 1857c–5(a)(2) (1970). This section provides that:

> The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing.

Id.

8. 37 Fed. Reg. 10842, 10889–91 (1972).

9. Petitioners were Duquesne Light Co., Pennsylvania Power Co., Ohio Edison Co., and St. Joe Minerals Corp., 481 F.2d at 2.

10. 42 U.S.C. § 1857h–5(b)(1) (1970). This section provides that within 30 days of the date of the Administrator's approval, petitions for review may be filed in the United States Court of Appeals for the circuit in which the state is located. Section 307(b)(2) prohibits litigation in enforcement proceedings of issues subject to review under section 307(b)(1). 42 U.S.C. § 1857h–5(b)(2) (1970).

11. 481 F.2d at 5, 7–8. Petitioners requested that reconsideration be conducted as either a rulemaking hearing, pursuant to section 4 of the Administrative Procedure Act (APA) or as an adjudicative-type hearing, pursuant to section 5 of the APA. 5 U.S.C. §§ 553, 554 (1970). Rulemaking is that part of the administrative process which resembles a legislature's enactment of a statute. It affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any individual will be affected by it. Adjudication is that part of the administrative process that resembles a court's decision of a case. It operates concretely upon individuals in their individual capacities. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01 (1958).

12. 481 F.2d at 3. Remand was granted on January 22, 1973, without opinion.

13. Respondent EPA's motion was designated a "Motion for Clarification, or in the Alternative Petition for Rehearing." *Id.* The EPA contended that redress through the state administrative process was the proper course for petitioners to follow. *Id.* at 7.

14. 5 U.S.C. § 553 (1970).

15. 481 F.2d at 7.

16. Petitioners filed petitions within the 30 days required by section 307(b)(1). 42 U.S.C. § 1857h–5(b)(1) (1970). The Third Circuit, in a previous decision, had held that unless this requirement is met, review by the court of appeals is foreclosed. Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

17. 481 F.2d at 7.

implementation plan.[18] Accordingly, the court clarified its earlier decision, *holding* that the EPA must *either* refrain from imposing sanctions on petitioners during pendency of their state administrative and judicial actions, so long as such actions were pursued in good faith and with due diligence, *or* afford petitioners a limited legislative hearing. *Duquesne Light Co. v. Environmental Protection Agency,* 481 F.2d 1 (3d Cir. 1973).

The decision of the court in *Duquesne* embraces three significant elements: 1) the refusal to apply the requirements of the APA to the EPA's action in adopting the state plan;[19] 2) the decision that a limited legislative hearing was constitutionally required if federal enforcement were to precede completion of state administrative and judicial proceedings;[20] and 3) the attempt to shape relief in order to avoid what the court termed the *"Getty Oil* dilemma."[21]

1. *Refusal to Apply the Requirements of the Administrative Procedure Act*

Manifest congressional desire for expedience in cleaning the air,[22] coupled with an attempt to maintain local control over enforcement and implementation procedures,[23] resulted in the bi-level program under the Clean Air Act, whereby certain aspects of pollution control are deemed to be within the exclusive province of the EPA while other aspects are delegated to the states.[24]

In *Appalachian Power Co. v. Environmental Protection Agency,*[25] the United States Court of Appeals for the Fourth Circuit emphasized

18. *Id.* at 10. Since section 113 of the Clean Air Act makes the state regulations federally enforceable, petitioners were subject to federal sanctions while awaiting resolution of their request for variances through the state administrative process. *Id.* at 8.

19. *Id.* at 8.

20. *Id.* at 10. The court provided for both submission of written comments and presentation of oral statements in its definition of the limited legislative hearing posed as an alternative on remand. *Id.*

21. *Id.* at 7-8. *See* notes 45-51 and accompanying text *infra.*

22. S. REP. No. 91-1196, 91st Cong., 2d Sess. 1-2 (1970); H.R. REP. No. 91-1146, 91st Cong., 2d Sess. 1, 5 (1970). This need for alacrity has caused some courts to inject an element of flexibility in determining what procedures are required of the EPA. *See, e.g.,* International Harvester Co. v. EPA, 478 F.2d 615 (D.C. Cir. 1973); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972). *See also* notes 25-29 and accompanying text *infra.* This type of judicial treatment is arguably more responsive to the needs raised by particular issues than adherence to strict categorization. *See* 1 K. DAVIS, *supra* note 11, § 5.01; Clagett, *Informal Action — Adjudication — Rule-Making: Some Recent Developments in Federal Administrative Law,* 1971 DUKE L.J. 51; Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485 (1970).

23. The Clean Air Act provides in part that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . . ." 42 U.S.C. § 1857(a)(3) (1970).

24. Requirements under section 110(a)(1) of the Clean Air Act for state enactment of plans to achieve federally-established standards serve the purpose of preserving basic state and local control of air pollution regulations, while provision for federal approval, in section 110(a)(2), and federal enforcement, in section 113, of state plans is an attempt to achieve more effective and expeditious results. 42 U.S.C. §§ 1857c-5(a)(1)-(2), c-8 (1970).

25. 477 F.2d 495 (4th Cir. 1973).

those legislatively-imposed time restraints in determining that evidentiary hearings were not statutorily required at the federal level before approval of state plans under section 110 of the Clean Air Act.[26] In reaching this conclusion, the Fourth Circuit avoided classifying the action of the Administrator solely as traditional rulemaking subject to APA requirements of a "hearing."[27] Thus, the decision that the EPA action was "informal"[28] was that court's method of accommodating legislative intent in this area.[29]

In refusing to require application of section 4 of the APA, the *Duquesne* court endorsed the Fourth Circuit's reasoning and conclusion that Congress had made a finding that a hearing at the federal level would be both "impractical" and "unnecessary," thus meeting the requirements for exemption of the proceeding from the APA "hearing" requirement.[30]

The *Duquesne* court's refusal to require the EPA to adhere to the APA can be justified on the basis of precedent and legislative concern with rapidity of action. However, APA procedures for notice and opportunity to participate are not so cumbersome that the desired solution to the air pollution problem would suffer a serious set-back were they to be utilized.[31] This consideration, coupled with the fact that the court's

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26. *Id.* at 499–500. Section 110 of the Clean Air Act calls for approval by the Administrator of a state implementation plan "if he determines that it was adopted after reasonable notice and hearing." 42 U.S.C. § 1857c-5(a)(2) (1970). *See* note 7 and accompanying text *supra*. The court considered omission of any prior "hearing" requirement at the federal level as purposeful, in view of congressional desire for expedition. Since "hearings" at both state and federal levels would be repetitious and unduly time-consuming, the court concluded that Congress had made a finding that a second "hearing" would be both "impractical" and "unnecessary." 477 F.2d at 503. Section 4 of the APA allows exemption of a rulemaking proceeding from the requirements of notice and opportunity to participate when such a finding is made. 5 U.S.C. § 553(b)(B) (1970).

27. 477 F.2d at 500. "Hearing" is used in a broad sense in this context, as referring to the requirements of adequate notice to interested parties and an opportunity to participate set forth in section 4 of the APA, 5 U.S.C. § 553(c) (1970). *See* note 31 *infra*. The court stated that providing a second hearing before the Administrator was unnecessary "whether the Administrator's action be deemed 'rulemaking' or otherwise." *Id.* at 502. In reference to the congressional finding that a federal hearing was both "impractical" and "unnecessary," the court further stated that:

> [it] met the requirements of Section 553(b)(3)(B), U.S.C.A., exempting certain rulemaking proceedings from any requirements of a hearing if, as the petitioners argue, that Act is applicable to the Administrator's action.

Id. at 503. Thus, the court apparently avoided an actual determination that the proceeding was not rulemaking.

28. Informal action refers to administrative action which may be taken without a formal hearing and which is not subject to the public participation provision of section 4 of the APA, 5 U.S.C. § 553 (1970).

29. *But see* Buckeye Power, Inc. v. Environmental Protection Agency, 481 F.2d 162 (6th Cir. 1973). In *Buckeye*, decided shortly after *Duquesne*, the Sixth Circuit held section 4 of the APA, 5 U.S.C. § 553(b) (1970), applicable to the EPA's decision to approve the Ohio and Kentucky state implementation plans.

30. 481 F.2d at 8, *citing* 477 F.2d 495, 499–500 (4th Cir. 1973).

31. Section 4 of the APA provides in part:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the ruling making through submission of written data, views or arguments with or without opportunity for oral presentation.

5 U.S.C. § 553(c) (1970).

ultimate decision involving a limited hearing will itself entail some delay,[32] leaves the decision on this issue subject to criticism.

2. *The Decision to Grant a Legislative Hearing*

For purposes of analysis in a situation in which a hearing is requested, such as that in *Duquesne,* the facts before the decisionmaker may be characterized as either "adjudicative" or "legislative."[33] "Adjudicative" facts are those which pertain specifically to the parties involved and their activities, and are of such a nature that they are within the parties' peculiar knowledge.[34] "Legislative" facts, on the other hand, are those of general knowledge and which aid a tribunal in deciding questions of law, policy, and discretion.[35] Because "adjudicative" facts are best presented by the parties themselves, they intrinsically require that the form of the proceeding be that of trial,[36] whereas "legislative" facts are best presented either by oral testimony or by written submission of evidence.[37] The major distinction between the two categories, however, lies not in the form which actual presentation of evidence should take, but rather in the more basic premise that due process requires a hearing only when "adjudicative" facts are involved.[38]

Under this analysis, the Third Circuit reached a proper theoretical conclusion in determining that petitioners had no constitutional right to

32. It is interesting to note that the limited legislative hearing posed by the court as an alternative on remand would provide the petitioners with what is, in effect, the equivalent of APA, section 4 participation. *Compare* note 20 *supra with* note 31 *supra.*

33. This model of analysis has been suggested by Professor Davis, 1 K. DAVIS, *supra* note 11, § 7.02. Another mode of analysis for distinguishing between the type of hearing required classifies proceedings as either rulemaking or adjudication. *See* note 11 *supra.*

34. 1 K. DAVIS, *supra* note 11, § 7.02.

35. *Id.*

36. A proceeding of this type normally includes opportunity for cross-examination and confrontation of witnesses. *Id.* § 5.01.

37. *Id.* § 7.02.

38. *Id.* § 7.07. The classic examples of the differences between the demands of due process in situations involving the two different categories of fact are found in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915), and in Londoner v. Denver, 210 U.S. 373 (1908). In *Londoner,* the Court held that a landowner who objected to an assessment against his land as its share of the benefit resulting from the paving of a street had a due process right to a hearing with notice. Local procedure had granted the right to file a written complaint, but not to be heard orally. The Court stated that even though the written objection afforded a hearing, "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." *Id.* at 385–86. However, in *Bi-Metallic Investment Co.,* the Court held that no hearing at all was constitutionally required prior to a decision by state tax officers to increase substantially the valuation of the taxable property in Denver. The decision distinguished *Londoner* on the basis that there a small number of persons were "exceptionally affected, in each case upon individual grounds." 239 U.S. at 445–46. Thus, in *Londoner,* a situation involving "adjudicative" facts, the Court held that due process demanded at least a hearing including oral argument, whereas in *Bi-Metallic Investment Co.,* the Court held that due process required no form of hearing whatsoever, noting that "[w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption." *Id.* at 445. For a more recent pronouncement to the same effect in a situation involving "legislative" facts, *see* Air Line Pilots Ass'n Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960), 289 F.2d 319 (2d Cir.), *cert. denied,* 368 U.S. 982 (1961).

an adjudicative hearing since the facts involved in *Duquesne* were "legislative."[39] Moreover, under the precedent relied on by the court, there is no statutory right to an adjudicative hearing unless the statute in question provides for "a hearing on the record,"[40] which is not the case with section 110 of the Clean Air Act.[41] In addition, there is no constitutional right to an adjudicative hearing where, as here, agency action is general in nature and prospective in application.[42]

In sharp contrast to this well-supported decision regarding the right to an adjudicative hearing, the court took the unusual position that there existed, on these facts, a constitutional right to a limited legislative hearing on solely "legislative" facts. Because this decision rests on no cited precedent, the explanation for the court's holding must be found elsewhere.

Perhaps the only justification for the court's decision is the desirability of avoiding recurrence of the *"Getty Oil* dilemma."[43] Stated simply, the "dilemma" is that, despite the absence of a federal hearing, petitioners could be subject to federal sanctions for violation of regulations developed solely by the state and eventually rendered unenforceable at the state level.[44] Under the holding in *Duquesne,* the state plan must either be vindicated at the state level or a hearing must be held at the federal level before approval or enforcement can occur. Thus the court has avoided what could be an unseemly, if not constitutionally unfair, sequence of events.

Although the court has clearly stepped beyond precedent in holding a limited legislative hearing to be constitutionally required, it is difficult to call the decision a misstep because of the presence of the *"Getty Oil* dilemma." If the requirement of a legislative hearing on legislative facts is limited to situations involving the type of federal-state interaction present in *Duquesne,* the result seems justifiable. However, a blind extension of this holding in other factual settings could result in a serious interference with the administrative decisionmaking process due to the increased administrative burden that it would entail.

3. *Resolution of the* "Getty Oil *Dilemma*"

Having decided that due process demanded that relief in some form be granted, the court was faced with resolving what it termed the *"Getty*

39. The Pennsylvania state regulations represent essentially a general policy decision and therefore are based on "legislative" facts.

40. 481 F.2d at 7, *citing* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973); United States v. Allegheny-Ludlum Steel Co., 406 U.S. 742 (1972).

41. 42 U.S.C. § 1857c-5(a)(2) (1970). *See* note 7 and accompanying text *supra.*

42. 481 F.2d at 7, *citing* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973); Virgin Islands Hotel Ass'n v. Virgin Islands Water & Power Authority, 476 F.2d 1263 (3d Cir. 1973). These cases did not employ the "legislative" — "adjudicative" facts analysis but rather made a distinction between rulemaking and adjudication. The procedure is rulemaking if the regulations are prospective and general in application, whereas it is adjudication if the challenged provisions are retrospective and individual in impact. *See* note 11, *supra.*

43. *See* notes 45-51 and accompanying text *infra.*

44. *See* notes 47 & 48 and accompanying text *infra.*

Oil dilemma." In *Getty Oil Co. v. Ruckelshaus,*[45] the Delaware state implementation plan had received federal approval and a variance from the state plan was sought through the state administrative process.[46] Variance was denied and Getty sought and was granted relief from the denial in Delaware state court.[47] Consequently, Getty found itself subject to federal sanctions for violation of state regulations adopted by the federal government, but, in effect, repudiated by the state.[48]

Similarly, in the present case, state action on the petitioners' applications for variances was pending, while at the same time federal enforcement of the state plan was possible under section 113.[49] Because the final state administrative determination is subject to judicial review,[50] the *Duquesne* court was confronted with the problem of shaping relief in order to avoid recurrence of the *"Getty Oil* dilemma." The court stated that:

> The basic problem presented by the Getty Oil dilemma and the legislative hearing request is that the petitioning companies are liable to sanctions before they have had an opportunity either to complete their state administrative and judicial remedies or to be heard at the federal level.[51]

Viewing the dilemma, then, as the possibility of federal sanction without adequate opportunity to be heard at either the state or federal level, the court found a novel method of extricating the petitioners. In effect, it left the decision as to the real import of the congressional desire for expediency up to the EPA. If the agency determines that the quickest possible resolution would best serve the purposes of the Clean Air Act, it will proceed with the limited legislative hearing outlined by the court.[52] If, on the other hand, the agency finds that the situation before it does not present an issue of great urgency, it can then await completion of the more time-consuming state administrative and judicial procedures.

It is submitted that there is one other factor which may influence the Administrator's decision on which course to follow. If the decision is to await state procedures, there is then the risk that the state adjudication will nullify the plan, in which case there would be no plan which could be adopted or enforced at the federal level. If a federal hearing is held, however, the plan, if acceptable, could be adopted and enforced

45. 467 F.2d 349 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).

46. *Id.* at 353.

47. *Id.* at 354. The state court granted a temporary restraining order against enforcement of the objectionable provisions. *Id.*

48. The Third Circuit denied Getty's request for an injunction against federal enforcement on the ground that the court did not have jurisdiction since Getty had failed to seek federal judicial review under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1) (1970). *Id.* at 357.

49. 481 F.2d at 7.

50. Pennsylvania Administrative Agency Law § 41, PA. STAT. ANN. tit. 71, § 1710.41 (1962).

51. 481 F.2d at 10.

52. *Id.* at 11.

by the EPA regardless of the results of state litigation. Thus, the decision to await completion of state procedures involves an element of risk to the plan itself which is beyond the control of the EPA.

The opinion as a whole demonstrates a willingness to apply novel solutions to the difficult problems inherent in any attempt to balance the individual's right to fair procedures against society's desire for a cleaner environment — a task the difficulty of which is only increased by the bi-level nature of the Clean Air Act. Because of the novelty of its solution, the court has exposed itself to criticism.[53] However, it merits commendation for confronting the issues in a responsive manner.

K. A. B.

LABOR LAW — ARBITRATION — THIRD CIRCUIT DECISION THAT SAFETY DISPUTES ARE NOT PRESUMED ARBITRABLE DESPITE GENERAL FEDERAL POLICY FAVORING ARBITRATION OF LABOR DISPUTES REVERSED.

Gateway Coal Co. v. Local 6330, UMW (3d Cir. 1972) (*rev'd*, U.S. 1974)

Gateway Coal Company (Company) and Local 6330 of the United Mine Workers (Union) were parties to a collective bargaining agreement which contained a broad binding arbitration clause.[1] A dispute arose as a result of the failure of three assistant foremen to carry out certain prescribed safety procedures.[2] After an inspection disclosed that there had been a falsification of mine records with regard to that incident, the Union membership voted not to work under the foremen involved and the foremen were subsequently suspended.[3] When the Company reinstated two of the foremen, the miners walked off the job.[4] The Company offered to submit the dispute to arbitration but the Union refused, contending that the dispute was not arbitrable under the terms of the collective bargaining agreement.[5] The Company, invoking federal jurisdiction under section 301 of the Taft-

53. Indeed the court acknowledged the possibility of such criticism:
> We are operating on the frontiers of legal thought, and any advance post that we take up is liable to the dangers of heavy ground assault. But it is only by such expeditions that knowledge of the terrain ahead may be gained.

481 F.2d at 10 n.49.

1. A section of the agreement entitled "Settlement of Local and District Disputes" provided that "should any local trouble of any kind arise at the mine" the parties were to attempt to settle it through local negotiation. If these procedures failed, the final step was to refer the dispute to an impartial umpire for decision with the provision that the "decision of the umpire shall be final." Gateway Coal Co. v. Local 6330, UMW, 466 F.2d 1157, 1159 (3d Cir. 1972), *rev'd*, 94 S. Ct. 629 (1974). The agreement did not contain an express no-strike clause. *See id.*

2. *Id.* at 1158.

3. *Id.*

4. *Id.*

5. *Id.*

Hartley Act,[6] sought a *Boys Markets* injunction[7] to stop the walkout on the theory that the dispute fell within the scope of the arbitration clause and was, therefore, subject to federal injunctive relief.[8]

The district court issued a preliminary injunction directing that: (1) the dispute be submitted to an impartial umpire for binding decision; (2) the three foremen involved be suspended pending such decision; and (3) the miners not strike to enforce their demands for the removal of these men.[9] While the Union's appeal was pending, arbitration proceedings were held which resulted in a decision that the dispute was arbitrable, that the miners' contention that it was unsafe to work under the foremen was without merit, and that the foremen should be allowed to return to work.[10]

The Third Circuit reversed the order of the district court and vacated the preliminary injunction, *holding* that, at least in the absence of a contract clause specifically making safety disputes arbitrable, the Union could not be compelled to submit the dispute to arbitration in the absence of proof that the miners did not have a good faith belief that their lives were unduly endangered while the particular foremen involved were responsible for safety procedures. *Gateway Coal Co. v. Local 6330, UMW*, 466 F.2d 1157 (3d Cir. 1972), *rev'd*, 94 S. Ct. 629 (1974).

The strong federal policy favoring arbitration as a means of settling labor disputes was clearly expressed by the Supreme Court in the *Steelworkers Trilogy*.[11] The development of this federal pro-arbitration attitude culminated in the decision in *Boys Markets, Inc. v. Local 770, Retail Clerks*[12] wherein the Court indicated that a binding arbitration clause, with its attendant no-strike obligations, was enforceable in some instances by a federal anti-strike injunction regardless of the prohibition against such a procedure contained in section 4 of the Norris-LaGuardia Act.[13]

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6. Labor-Management Relations Act, 29 U.S.C. § 185 (1970).

7. 466 F.2d at 1160 n.1. *See* Boys Markets, Inc. v. Local 770, Retail Clerks, 398 U.S. 235 (1970), *noted in* 16 VILL. L. REV. 176 (1970).

8. 466 F.2d at 1159.

9. Gateway Coal Co. v. Local 6330, UMW, 80 L.R.R.M. 2634, 69 CCH Lab. Cas. ¶ 12,944 (W.D. Pa. 1971).

10. 466 F.2d at 1158.

11. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). In these cases the Supreme Court applied a presumption of arbitrability. For a detailed history of the federal policy favoring arbitration, and an explanation of the presumption of arbitrability created thereby, *see* Note, *Labor Injunctions,* Boys Markets, *and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972).

12. 398 U.S. 235 (1970).

13. 29 U.S.C. § 104 (1970).

Prior to *Boys Markets*, it was held that section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970), barred a federal court from enjoining a strike in breach of a collective bargaining agreement, notwithstanding the fact that such agreement contained binding arbitration provisions enforceable under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1970). Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

The Third Circuit previously had interpreted *Boys Markets* as being applicable only to those situations where the collective bargaining agreement contained an express no-strike clause. Avco Corp. v. Local 787, UAW, 459 F.2d 968 (3d Cir. 1972), *noted in* 18 VILL. L. REV. 320 (1972).

Prior to *Gateway,* the Third Circuit recognized this policy and applied a presumption of arbitrability to labor disputes where economic issues were involved.[14] However, in instances where employee safety was at issue, a good faith belief in the existence of abnormally dangerous conditions at the place of work had been held sufficient to protect a work stoppage, under section 502 of the Taft-Hartley Act.[15]

In *Gateway,* the collective bargaining agreement did not particularly state that safety disputes were subject to arbitration; nor were they specifically excluded.[16] There was, however, a separate clause authorizing the closing of the mine for safety reasons.[17] The Third Circuit found that under such circumstances it could not be said that it was "unambiguously agreed in the labor contract that the parties [should] submit mine safety disputes to binding arbitration."[18] Had the court chosen to apply the usual presumption of arbitrability, the dispute could well have been found within the scope of the arbitration clause.[19] The court, however, declined to apply the general presumption as it had done in earlier cases, and held matters of life and death to be *sui generis,*[20] stating that the "[c]onsiderations of economic peace that favor arbitration of ordinary disputes have little weight here."[21] The court further determined that the legislative policy expressed in section 502 "should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration."[22] The court thus established that, insofar as safety disputes were concerned, a presumption of nonarbitrability should govern. In addition, the court was willing to recognize, in the absence of evidence to the contrary, that the employees' alleged good

14. Avco Corp. v. Local 787, UAW, 459 F.2d 968, 973 (3d Cir. 1972); Radio Corp. of America v. Association of Professional Eng'r Personnel, 291 F.2d 105, 110 (3d Cir.), *cert. denied,* 368 U.S. 898 (1961).

15. Section 502 provides, in part:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment . . . be deemed a strike under this chapter.

29 U.S.C. § 143 (1970).

See Philadelphia Marine Trade Ass'n v. NLRB, 330 F.2d 492 (3d Cir.), *cert. denied,* 379 U.S. 833, 841 (1964), wherein a walkout over unsafe conditions at the place of work was held to be protected action under section 502 of the Taft-Hartley Act after the procedure employed in the unloading of a ship was found to be an unreasonably dangerous condition. 330 F.2d at 494; *accord,* NLRB v. Knight Morley Corp., 251 F.2d 753 (6th Cir. 1957), *cert. denied,* 357 U.S. 927 (1958). A lockout by the employer in response to this work stoppage was held to be an unfair labor practice. 330 F.2d at 495.

16. *See* note 1 *supra.*

17. 466 F.2d at 1159. This clause provided that a mine must be closed if the mine safety committee of the local union found it to be "immediately dangerous." *Id.* The court regarded the meeting of the parent body of such committee, at which the vote not to work under the foremen was taken, as substantially equivalent to this procedure. *Id.*

18. *Id.*

19. *See, e.g.,* Blue Diamond Coal Co. v. UMW, 436 F.2d 551, 555 (6th Cir. 1970).

20. 466 F.2d at 1159.

21. *Id.* at 1160.

22. *Id.*

faith belief that a work stoppage was required to protect their safety was sufficient to invoke the protection of section 502.[23]

The United States Supreme Court reversed the Third Circuit's decision in *Gateway* with one Justice dissenting.[24] The Court found three questions presented by the case: (1) Did the collective bargaining agreement impose a compulsory duty on the parties to submit safety disputes to impartial arbitration? (2) If so, did that duty give rise to an implied no-strike obligation which would support issuance of a *Boys Markets* injunction? (3) Did the circumstances of the case satisfy the traditional equitable considerations which control the availability of injunctive relief?[25] The Court answered all three questions in the affirmative.[26]

As to the first question the Court held that the presumption of arbitrability announced in the *Steelworkers Trilogy,* and previously recognized and applied by the Third Circuit to economic disputes, applied with equal force to safety disputes.[27] The Court then found that the dispute in *Gateway* fell within the scope of the arbitration clause in the collective bargaining agreement.[28]

With regard to the second issue the Court recognized the existence of a contractual obligation not to strike even in the absence of an express no-strike clause by virtue of the principle expressed in *Teamsters Local 174 v. Lucas Flour*[29] which implies a no-strike obligation where there exists a mandatory arbitration clause covering the dispute in question.[30] Such a no-strike obligation was deemed sufficient to render a strike in violation thereof subject to federal injunctive relief under *Boys Markets.*[31]

Lastly, the Court found that the traditional prerequisites for the granting of injunctive relief existed in that the mine operation would be caused irreparable harm if the strike in violation of the Union's no-strike obligation was allowed to continue.[32] The Court further declared that any safety issue had been eliminated by the suspension of the foremen in question pending a final decision by the arbiter.[33]

The Court's decision makes it clear that safety disputes may not properly be held to be presumptively nonarbitrable, and that the general presumption of arbitrability of industrial disputes should not be considered vitiated by the congressional concern with industrial safety expressed in section 502. That section deals solely with work stoppages, but does not mention the arbitration agreement situation found in *Gateway.*[34] The Third

23. *Id.*
24. Gateway Coal Co. v. UMW, 94 S. Ct. 629 (1974).
25. *Id.* at 635.
26. *Id.*
27. *Id.* at 638.
28. *Id.*
29. 369 U.S. 95 (1962).
30. *Id.* at 104–06.
31. 94 S. Ct. at 638–41.
32. *Id.* at 641.
33. *Id.*
34. *See* note 15 *supra.*

Circuit considered the policy expressed in that section — protection of "work stoppages caused by good faith concern for safety" — controlling in both situations, *i.e.*, when there is a safety work stoppage and also when a court must determine whether a safety dispute falls within the scope of a broadly worded arbitration agreement. The court reasoned that since a duty not to strike and a duty to submit a dispute to binding arbitration "are opposite sides of a single coin," and that since the duty not to strike in the case of safety disputes is eliminated by section 502, the duty to submit to arbitration should likewise be eliminated.[35] The Supreme Court, however, found no evidence in the legislative history of section 502 that indicated that the section was intended as a limitation on arbitration.[36] Noting that the section, on its face, appeared to bear more on the scope of a no-strike obligation than on the question of arbitrability, the Court stated:

> To the extent that § 502 might be relevant to the issue of arbitrability, we find that the considerations favoring arbitrability outweigh the ambiguous import of that section in the present context.[37]

The Court did recognize the importance of the section in the context of safety disputes,[38] yet considered that the Third Circuit had gone too far in concluding that "an honest belief, no matter how unjustified, in the existence of 'abnormally dangerous conditions for work' necessarily invokes the protection of § 502."[39] The Court agreed with Judge Rosenn's dissent that to come within the protection of the section, there must be some objective evidence to support a conclusion that dangerous conditions actually existed.[40] The Third Circuit, by finding that the walkout was nonenjoinable absent proof that the miners did not have an honest belief that their lives were endangered, had shifted the burden of proof on that point to the employer. It would appear that the only way an employer could have defeated the Third Circuit's presumption of nonarbitrability would have been to prove that no such honest belief existed. In that respect, the Third Circuit's decision represented a significant departure from precedent.[41]

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35. 466 F.2d at 1160.
36. 94 S. Ct. at 636 n.8.
37. *Id.*
38. *Id.* at 640. The Court stated:
> This section provides a limited exception to an express or implied no-strike obligation. . . . [A] work stoppage called solely to protect employees from immediate danger is authorized by § 502 and cannot be the basis for either a damage award or a Boys Market [*sic*] injunction.

Id.
39. *Id.* at 640–41.
40. *Id.* at 641.
41. Prior to *Gateway*, the circuits had divided on the question of what was necessary for the employees' action to be protected by section 502. Some held that evidence establishing the existence of abnormally dangerous conditions at the place of work had to be presented. NLRB v. Fruin-Colon Constr. Co., 330 F.2d 885 (8th Cir. 1964); *accord*, Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964); Sud Maid by v. NLRB, 377 F.2d 468 (1st Cir. 1967). *But see* Hanna Mining Co. v. United Steel Workers, 464 F.2d 568 (8th Cir.

The Supreme Court's decision also made it clear that the Third Circuit's pre-*Gateway* interpretation of *Boys Markets*[42] as requiring the presence of an express no-strike clause before injunctive relief could be granted was erroneous.[43]

> Absent an explicit expression of [an intention to negate any implied no-strike obligation], however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.[44]

Under the Supreme Court's decision in *Gateway,* a no-strike obligation, express or implied, is sufficient to render federal injunctive relief available to an employer under *Boys Markets,* provided that there is compliance with the other requirements enumerated therein.

After *Gateway,* in order for a union to avoid being subject to a *Boys Markets* injunction in a strike over any dispute, safety or economic, it must bargain for an express clause in the collective bargaining agreement which either places the question in dispute outside the scope of the arbitration clause contained therein, or specifically negates any implied no-strike obligation arising by virtue of the fact that such an arbitration clause exists. Moreover, in order to be afforded protection from an injunction or suit for damages resulting from a safety strike under section 502, a union will have to present ascertainable objective evidence of the existence of immediately dangerous conditions to support its alleged good faith belief in those conditions.

G. F. A.

1972). Other circuits, the Third among them, held that a good faith belief in the existence of dangerous conditions was sufficient to render section 502 applicable, without requiring actual proof of the existence of such conditions. Philadelphia Marine Trade Ass'n v. NLRB, 330 F.2d 492 (3d Cir.), *cert. denied,* 379 U.S. 833, 841 (1964); Marble Products Co. v. Local 155, United Stone Workers, 335 F.2d 468 (5th Cir. 1964); NLRB v. Knight Morley Corp., 251 F.2d 753 (6th Cir. 1957), *cert. denied,* 357 U.S. 927 (1958). However, even in those cases there was evidence presented which showed the existence of dangerous conditions or other unusual circumstances which tended to support the assertion that the workers' actions were taken in good faith and reasonably founded in fact. In addition, the National Labor Relations Board had interpreted section 502 as requiring a presentation of objective evidence of dangerous conditions in order for its protection to be extended to striking workers who sought to invoke it. Redwing Carriers, Inc., 130 N.L.R.B. 1208, *enforced as modified,* 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 905 (1964).

42. *See* note 13 *supra.* The contract in *Gateway* did not contain an express no-strike clause. Since the Third Circuit chose to decide the issue of whether the district court's *Boys Markets* injunction was proper by determining whether the dispute was arbitrable, rather than on the basis that no express no-strike clause existed, it would appear that the Third Circuit rejected the view it had previously taken and adopted an interpretation of the requirements of *Boys Markets* similar to the one expressed by the Supreme Court in its opinion. *See* 94 S. Ct. at 638–39.

43. 94 S. Ct. at 638–39.

44. *Id.* at 639.

CIVIL RIGHTS — EQUAL EMPLOYMENT OPPORTUNITY — WHERE EMPLOYER RELIED ON CONFLICTING STATE PROTECTIVE STATUTE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN NOT AWARDING BACK PAY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Kober v. Westinghouse Electric Corp. (3d Cir. 1973)

Plaintiff, an employee of Westinghouse Electric Corporation (Westinghouse), brought suit against her employer alleging that she had been discriminated against in her employment on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964.[1]

In 1961 the plaintiff held a position from which employees were normally promoted within one year's time. The employer, however, refused to promote her, both before and after the effective date of Title VII, because the higher position would have required her to work hours in excess of the maximum permitted by the Pennsylvania Women's Labor Law.[2]

When Westinghouse refused to file for an exception from the Pennsylvania prohibition,[3] plaintiff filed a charge of discriminatory employment practices with the Equal Employment Opportunity Commission (EEOC) as provided by Title VII.[4] The EEOC found reasonable cause to justify a finding of discriminatory practices,[5] and initiated conciliation proceedings.

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1. Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 242 (3d Cir. 1973). Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1970).

2. 480 F.2d at 242–43. PA. STAT. ANN. tit. 43, §§ 103(a), 107 (1964), *as amended* (Supp. 1973). The statute prohibits a woman employee from working in excess of 5 continuous hours without a 30 minute meal or rest break, working in excess of 6 days and 48 hours a week, and working in excess of 10 hours a day.

3. PA. STAT. ANN. tit. 43, § 103(a) (1964), *as amended* (Supp. 1973), provides in pertinent part:

> Where the strict application of the schedule of hours, provided for by this section, imposes an unnecessary hardship and violates the intent and purpose of this act, the Secretary of Labor and Industry, with the approval of the Industrial Board, may make, alter, amend, and repeal general rules and regulations prescribing variations from said schedule of hours . . . .

4. Section 703(a) of the Civil Rights Act provides in part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1970).

Section 706(a) provides for the filing of discrimination charges with the EEOC and the attempted elimination of the unlawful discrimination by the EEOC. *Id.* § 2000e-5(a) (1970).

5. Section 706(a) of the Civil Rights Act provides in part:

> If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the discrimination charge is true, the Commission shall

When conciliation failed, plaintiff commenced suit in federal district court.[6] Thereafter, the EEOC for the first time indicated that it would no longer consider protective statutes, such as the Women's Labor Law, a defense to an otherwise established unlawful employment practice under Title VII,[7] and, at approximately the same time, the attorney general of Pennsylvania advised that the Pennsylvania Human Relations Act[8] implicitly had repealed the Women's Labor Law.[9] As a result, Westinghouse declared that it considered the protective statute repealed and promoted the plaintiff.[10]

The district court found that Title VII had superseded the Pennsylvania Women's Labor Law and that plaintiff had suffered wage loss by her failure to be promoted.[11] Nevertheless, the court refused to award back pay or injunctive relief on the basis that Westinghouse had not acted "intentionally" within the meaning of section 706(g) of Title VII[12] because of the conflicting provisions of state law.[13] In addition, the court determined that, even if Westinghouse had acted intentionally within the meaning of Title VII, an award of back pay and injunctive relief was discretionary,[14] and was inappropriate under the circumstances of the case.[15]

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endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(a) (1970).

The EEOC's finding was justified on the ground that Westinghouse had not sought an administrative exception from the Women's Labor Law pursuant to regulation G-19 of the Pennsylvania Industrial Board. 480 F.2d at 244, 250.

Later, after plaintiff consented to an exception from the statutory overtime restriction, the Pennsylvania Secretary of Labor and Industry authorized Westinghouse, by letter, to permit plaintiff to work the extra hours, but specifically indicated that Westinghouse could not *require* her to work in excess of the limits of the Pennsylvania Women's Labor Law. *Id.* at 244. Westinghouse still refused to promote plaintiff.

6. *Id.* at 244-45.

7. 29 C.F.R. § 1604.2(b)(1) (1973).

8. PA. STAT. ANN. tit. 43, §§ 951 *et seq.* (1964), *as amended* (Supp. 1973).

9. 480 F.2d at 245.

10. *Id.*

11. Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467, 473 (W.D. Pa. 1971).

12. Section 706(g) provides in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g) (1970).

13. 325 F. Supp. at 473.

14. *See* note 12 *supra.*

15. 325 F. Supp. at 474. The district court did, however, grant the plaintiff reasonable attorney's fees as provided by 42 U.S.C. § 2000e-5(k) (1970). 325 F. Supp. at 474.

The Third Circuit, while disagreeing with the district court's determination that Westinghouse had not intentionally engaged in an unlawful employment practice in violation of section 706(g), affirmed, *holding* that the award of appropriate relief under Title VII was left to the discretion of the district court to be exercised in the light of all the circumstances, and that since the discrimination was due to the employer's reliance on a conflicting state protective statute, the district court had not abused its discretion in not awarding back pay and injunctive relief. *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973).

The EEOC has not maintained a consistent position regarding state protective statutes as a defense to charges of unlawful employment practices.[16] In December 1965, the EEOC declared that state protective statutes would be considered as the basis for a bona fide occupational qualification exception to the requirements of Title VII,[17] but that those which simply subjected women to a denial of benefits would not.[18] In August 1966, the EEOC indicated in a policy statement that it would no longer make determinations on the merits in cases involving conflicting state protective legislation, where administrative exceptions were unavailable. However, the EEOC, reserving the right to appear as amicus curiae, would advise the charging parties of their right to sue for a judicial determination of the validity of the state law.[19] In February 1968, the EEOC returned to its original policy.[20] Finally, in August 1969, the EEOC declared that state protective laws, such as the Pennsylvania Women's Labor Law, would not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.[21]

Against this background of a fluctuating EEOC position and the reliance of Westinghouse on the state protective law, the district court determined that Westinghouse had not intentionally engaged in an unlawful employment practice.[22] The Third Circuit concluded, however, that the

16. The EEOC position was of great importance because of the deference the courts give such administrative determinations. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971); Udall v. Tallman, 380 U.S. 1, 16, *rehearing denied,* 380 U.S. 989 (1965).

17. Section 703 of the Civil Rights Act provides in pertinent part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e–2(e) (1970).

It should be noted that the EEOC expected an employer asserting such an exception to attempt to obtain an exception from the agency administering the state protective law. 29 C.F.R. § 1604.1(c)(3) (1966). Pennsylvania permitted an employer to seek an exception from the state labor laws by application to the Pennsylvania Industrial Board pursuant to regulation G–19, effective April 23, 1966. 480 F.2d at 244. *Cf.* note 5 *supra.*

18. 30 Fed. Reg. 14926–27 (1965).

19. *See* 480 F.2d at 244.

20. 33 Fed. Reg. 3344 (1968).

21. 29 C.F.R. § 1604.2(b)(1) (1973).

22. 325 F. Supp. at 473.

prevailing case law on the question of what constituted an intentional violation of section 706(g) of the Civil Rights Act was clear, and required a contrary result.[23] The cases relied upon by the court held that intentional unfair employment practices under section 706(g) were those which were engaged in deliberately rather than accidentally.[24] On that basis, the *Kober* court concluded:

> [I]t is now the law that discrimination based on reliance on conflicting state statutes is an intentional unfair employment practice. Intentional unfair employment practices are those engaged in deliberately and not accidentally. No wilfullness on the part of the employer need be shown to establish a violation of section 706(g).[25]

Having found an intentional violation, the court considered the question of whether an award of back pay was mandated by Title VII, or whether such determination was within the discretion of the district court. Plaintiff contended that the cases of *Robinson v. Lorillard Corp.*[26] and *Bowe v. Colgate-Palmolive Co.*[27] required an award of back pay when there was an "intentional" unlawful employment practice.[28] Those cases held that the purpose of Title VII was to end proscribed discriminatory practices, and to provide pecuniary relief to those who have been the subjects of such practices.[29] The court also considered *Moody v. Albermarle Paper Co.*[30] as possibly supportive of plaintiff's position. In *Moody*, the Fourth Circuit held that an award of back pay to members of a class, who had succeeded in obtaining an injunction against racial discrimination, was required by Title VII, unless special circumstances rendered such an award unjust.[31]

The Third Circuit recognized that the cases relied on by the plaintiff severely restricted the circumstances under which a trial court could deny

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23. 480 F.2d at 245–46.

24. *See* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1227 (9th Cir. 1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791, 796 (4th Cir.), *cert. denied*, 404 U.S. 1006–07 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); United Papermakers Local 189 v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *See also* Manning v. General Motors Corp., 466 F.2d 812, 815–16 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973). *Contra* Garneau v. Raytheon Co., 341 F. Supp. 336, 338 (D. Mass. 1972); Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 341 (D. Ore. 1969).

25. 480 F.2d at 246.

26. 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

27. 416 F.2d 711 (7th Cir. 1969).

28. 480 F.2d at 246.

29. 444 F.2d at 804; 416 F.2d at 720–21.

30. 474 F.2d 134 (4th Cir. 1973).

31. *Id.* at 142. The *Moody* court appeared to base its conclusion on an equation of section 706(g) with section 706(k) of the Civil Rights Act. *Id.* at 142. While section 706(k), 42 U.S.C. § 2000e–5(k) (1970), allows the court in its discretion to grant attorney's fees, the Fourth Circuit in Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971), held that plaintiffs who succeeded in obtaining an injunction in a Title VII case should ordinarily be awarded attorney's fees, unless special circumstances were found.

an award of back pay.[32] However, the court was convinced, by precedent of other circuits[33] and the permissive language of section 706(g),[34] that the award of back pay was within the discretion of the district court, "to be exercised in the light of all the circumstances of each case."[35]

After concluding that the determination of the appropriate relief was within the discretion of the trial judge, the *Kober* court considered the question of whether there had been an abuse of discretion in the denial of an award of back pay to plaintiff.[36] The court first noted that since there had been no judicial or quasi-judicial rulings on the validity of the Pennsylvania protective statute until 1969,[37] Westinghouse had been faced with a dilemma resulting from the conflict between the state and federal law, and that Westinghouse had acted to end the discrimination after the determination that the protective provisions of the state law had been implicitly repealed.[38] Second, reviewing the letters written to Westinghouse by the Pennsylvania Secretary of Labor and Industry in regard to an exception from the Women's Labor Law for the plaintiff, the court concluded that the limited exception available would not have insulated Westinghouse from the provisions of the Pennsylvania statute.[39] Therefore, since the Third Circuit found no basis upon which to question the good faith of Westinghouse, it concluded that there was no abuse of discretion in the denial of an award of back pay by the district court.[40]

Title VII of the Civil Rights Act was intended to correct a serious public problem as well as provide a remedy for private grievances.[41] Presently, however, the vast majority of Title VII violations continue

32. 480 F.2d at 247.

33. The court followed the reasoning of the courts in LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972); Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); and Schaeffer v. Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972). The holdings of those cases, which placed the allowance of injunctive relief or an award of back pay within the discretion of the trial court, may be summarized by the statement of the *Schaeffer* court:

> A court may enjoin and may award damages, but should only order affirmative action, such as back pay, when such relief is "appropriate." In a case of damages . . . a court must balance the various equities between the parties and decide upon a result which is consistent with the purpose of the . . . Act, and the fundamental concepts of fairness.

Id. at 1006.

34. *See* note 12 *supra*. Note the language of the act, that "the court *may* enjoin the respondent . . . and order such affirmative action as *may be appropriate*." 42 U.S.C. § 2000e-5(g) (1970) (emphasis added).

35. 480 F.2d at 248.

36. *Id.* at 248–50.

37. *See* notes 7–9 and accompanying text *supra*. Plaintiff was promoted to the first available vacancy after the EEOC and the attorney general of Pennsylvania made their determinations. 480 F.2d at 245.

38. 480 F.2d at 249.

39. *Id.* at 249–50. The letters indicated that plaintiff would be permitted to work the extra hours but that any attempt to require her to work the hours would be cause for immediate revocation of the authorization. The *Kober* court determined that regulation G–19 did not authorize the Secretary to grant an exception that would have insulated Westinghouse from liability under the facts of the instant case. *Id.* at 250.

40. *Id.* at 249–50.

41. *See* the discussion of Title VII in S. REP. No. 91–1137, 91st Cong., 2d Sess. 3–6 (1970). *See also* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719–20 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

uncorrected,[42] mainly because there is insufficient incentive to overcome the delay and expense of litigation.[43] Since the courts have generally limited monetary awards to back pay,[44] the importance of that award as an encouragement to bring legitimate suits cannot be ignored if Title VII is to achieve its intended effect. Discretion has always been circumscribed by the policy underlying its existence,[45] and the legislative intent behind the Civil Rights Act clearly was to grant all appropriate relief.[46] In light of the significance of back pay, it would be antithetical for the form of discretion to be allowed to hinder the substance of the policy which the discretion was meant to effect. On the other hand, however, the type of situation involved in the instant case is a difficult one for the employer because the employer must make a determination as to whether to follow the federal law or the state statute.[47] The *Kober* court determined that the latter consideration was controlling where there was no clear indication that the federal statute had superseded the state statute, finding it inappropriate and unnecessarily burdensome to demand back pay from an employer in such a dilemma.

In establishing the limits within which it considered that discretion could be exercised, the court indicated that it would leave the award to the discretion of the district court until a *judicial* determination was made on the relative validity of the statutes.[48] Once a judicial decision had been reached, the employer would be required to comply with that decision and, if determination occurred due to noncompliance, a denial of back pay might well be an abuse of discretion. Whether a quasi-judicial determination would be sufficient notice to the employer was not clearly determined.

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42. Only a small percentage of violations are even brought to the EEOC. Of those that are brought, private actions account for less than 10 per cent of the cases in which the EEOC found reasonable cause, but was unable to conciliate successfully. *Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. 40 (1969). *See* U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 336 (1970). *See also* Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1252–56 (1971); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 467 (1965).

43. *See* Note, *supra* note 42, at 1252. Four years passed from the time the plaintiff filed her complaint until the district court rendered its decision in the instant case.

44. *Id.* at 1259. While attorney's fees are also awarded they are ineffective as an incentive because, although they make the suit easier for the complainant, they provide no individual benefit and therefore no real positive incentive to bring suit. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 75 (1966).

45. The court in Bowles v. Goebel, 151 F.2d 671 (8th Cir. 1945), stated: "Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists." *Id.* at 674. In determining the proper scope of the exercise of the discretion, the objective sought to be accomplished by the Act must be given great weight. Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944).

46. A House report referring to section 706(g) of the Civil Rights Act stated that the "provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible." H.R. REP. No. 899, 92d Cong., 2d Sess. ___ (1972).

47. State as well as federal statutes are entitled to a presumption of constitutionality until there has been a judicial determination as to their invalidity. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 153 (1944).

48. 480 F.2d at 250.

Although the court's discussion of the problem could give rise to such a conclusion,[49] the court declined to find an abuse of discretion when the district court did not grant back pay for the time between the EEOC and the attorney general's statements in 1969 and the promotion of plaintiff in April 1970.[50] It is submitted, however, that as administrative interpretations are given great deference by the courts,[51] it would not be inequitable to find such an administrative determination as sufficient notice to the employer.

The court also made clear that the employer did not have to rely on a limited exception that would have permitted the plaintiff to consent to work the extra hours, but would have prohibited Westinghouse from requiring her to work those hours.[52] Hence, Westinghouse did not have to provide back pay to the plaintiff for the period between the time it was informed of the limited exception to her promotion because, in the court's view, to so order under such a set of circumstances would be "unfair" to Westinghouse.[53] The fact that Westinghouse could not require the plaintiff to work the hours comes dangerously close to the generally condemned argument that profit-motivated business reasons give rise to a bona fide occupational qualification.[54] At least it is a matter of weighing the dichotomous policy considerations between the possible inconvenience to Westinghouse in finding another operator to fill in when plaintiff refuses to work,[55] and the public and private reasons for awarding back pay.[56]

It is hoped that the *Kober* court's decision will be read as granting the district courts wide discretion in the determination of whether or not to award back pay only in those situations in which a conflicting state statute is involved, rather than as allowing wide discretion in the award of back pay in any case, a position which might itself be read as signaling an attitude against the award of back pay as a matter of course. Given the narrower interpretation, the court's decision may only slightly decrease the already low incentive for bringing Title VII cases when state protective legislation is involved, but may not substantially affect suits in other areas of employment discrimination.

J. T. H.

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49. *Id.*
50. *Id.*
51. *See* note 16 *supra.*
52. 480 F.2d at 250. *See* notes 5 & 39 and accompanying text *supra.*
53. 480 F.2d at 250.
54. One commentator has cautioned:
> The words of the exception allow an employer to discriminate only when the job requires sex itself as a [bona fide occupational qualification], and not when the characteristics commonly associated with sex or the savings accompanying discrimination on the basis of sex make the job's operation more profitable to the employer. If the cost of changing a discriminatory hiring policy gave rise to a [bona fide occupational qualification], it would allow an employer to enshrine the status quo that the Act was meant to change.

Employment Discrimination, supra note 42, at 1180.
55. It should be noted in this regard, that plaintiff was obviously very anxious to work the extra hours, indicating that the instances of Westinghouse's inconvenience would be rare. 480 F.2d at 244.
56. *See* notes 41–43 and accompanying text *supra.*

ANTITRUST — DOCTRINE OF PRIMARY JURISDICTION PROPERLY INVOKED IN AN ACTION FOR DAMAGES BUT THE FACTS REQUIRE A STAY RATHER THAN DISMISSAL.

Laveson v. Trans World Airlines (3d Cir. 1972)

In 1967, 12 domestic air carriers, including the defendants, sought approval from the Civil Aeronautics Board (CAB) of an agreement providing for a $2.00 charge for visual in-flight entertainment on domestic flights.[1] The CAB deferred final approval of the agreement,[2] and issued notice of proposed tariff amendments regarding in-flight entertainment.[3] On March 6, 1968, the CAB adopted the proposed tariff regulation,[4] but subsequently stayed its effectiveness.[5] Alleging that defendants had conspired, in violation of Sections 1 and 2 of the Sherman Act,[6] to establish a $2.00 visual in-flight entertainment fee for coach passengers while providing visual in-flight entertainment free of charge to first-class passengers, plaintiffs, coach passengers on defendants' flights, filed a federal class action suit[7] seeking treble damages[8] instead of filing a complaint with the CAB.[9] The district court dismissed the case holding that the action was subject to the primary jurisdiction of the CAB.[10] The Third Circuit vacated the district court's order and remanded the case, *holding* that while the application of the primary jurisdiction doctrine was proper, rather than dismissing the case, the district court should have stayed the action. *Laveson v. Trans World Airlines,* 471 F.2d 76 (3d Cir. 1972).

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1. The CAB has authority over contracts and agreements between air carriers relating to transportation rates, fares, charges, and the regulation of competition. All such agreements must be filed with the agency. Federal Aviation Act, 49 U.S.C. § 1382 (1970). Agreements approved by the CAB exempt the parties from the operation of the antitrust laws "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." *Id.* § 1384.

2. Laveson v. TWA, 471 F.2d 76, 78 (3d Cir. 1972); 32 Fed. Reg. 4086 (1967). The CAB did suggest, however, that a fee of less than $2.00 for a full length motion picture would be unreasonable. 471 F.2d at 78; 32 Fed. Reg. 4087 (1967). Approval was deferred because the CAB thought that the implementation of such a charge would be accomplished more appropriately by the exercise of its rate-making and rulemaking power. Implementation in such a manner would extend the rate to all carriers. *Id.*

3. The proposed amendments provided that in the absence of a contrary showing, a tariff providing for a charge of less than $2.00 for visual entertainment would be considered unjust and unreasonable and subject to suspension and investigation. 471 F.2d at 78; 32 Fed. Reg. 4076 (1967).

4. 471 F.2d at 78; 14 C.F.R. § 221.38(a) (1968) (adding subparagraphs (a)(8) and (a)(9)). The rules deleted all reference to the $2.00 minimum charge, but the CAB noted that it expected to use the $2.00 fee as a standard for testing the reasonableness of tariffs filed. 471 F.2d at 78; 33 Fed. Reg. 4456 (1968).

5. The stay was announced because a number of objections to the rule were filed. 471 F.2d at 79; 33 Fed. Reg. 6241 (1968). The stay was in force at the time this action was commenced. 471 F.2d at 79. The regulations were subsequently reenacted. 14 C.F.R. § 221.38(a) (1973).

6. 15 U.S.C. §§ 1-2 (1970).

7. 471 F.2d at 77.

8. Plaintiffs originally sought both damages and injunctive relief, but in response to defendants' motion to dismiss or stay the action, filed an amended complaint demanding only damages. *Id.* at 79.

9. *See* Federal Aviation Act, 49 U.S.C. § 1482(a) (1970).

10. 471 F.2d at 77.

The doctrine of primary jurisdiction is essentially a flexible method of allocating decisionmaking responsibility on particular issues between a court and an administrative agency.[11] The doctrine was first enunciated by the Supreme Court in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*,[12] wherein the issue raised was whether the state court or the Interstate Commerce Commission (ICC) should decide the reasonableness of certain railroad rates. The Court found that the ICC had been vested with the power to establish uniform nondiscriminatory rates, and held that uniformity was best achieved by delegating the initial determination of the reasonableness of rates to the ICC.[13] The need for uniformity of regulation was thus the criterion initially established for guiding the decision of whether first resort should be to the regulatory agency or to the courts.[14]

In *Great Northern Ry. v. Merchants Elevator Co.*,[15] the first modification of the doctrine appeared. The Court therein characterized the issue which concerned the construction of a tariff as a question of law and held that the doctrine was inapplicable.[16] The Court, however, did state that where the inquiry was essentially one of fact involving technical matters, uniformity could be achieved only if the determination were left to the agency.[17] It was in *Great Northern* then that expertise, the second criterion recognized by the Court as a rationale for deferring, initially, to administrative agencies, was introduced.[18] Thus, the doctrine of primary jurisdiction grew from a combination of the need to obtain uniformity of regulation and the desire to maximize the effectiveness of administrative expertise.[19] The *Abilene* and *Great Northern* cases, the two cornerstone decisions for the doctrine of primary jurisdiction, did not involve violations of antitrust laws. In those cases the question was simply which forum, the court or the agency, was better equipped to decide the substantive issues arising under a single statute. In the antitrust field, the jurisdictional

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11. One court has stated that "the outstanding feature of the doctrine is properly said to be its flexibility, permitting the courts to make a workable allocation of business between themselves and the agencies." CAB v. Modern Air Transp., Inc., 179 F.2d 622, 625 (2d Cir. 1950). *See also* Fox, *The Antitrust Laws and Regulated Industries: A Reappraisal of the Role of the Primary Jurisdiction Doctrine*, 2 MEMPH. ST. L. REV. 279, 282 (1972).

12. 204 U.S. 426 (1907).

13. *Id.* at 441.

14. *See* Fox, *supra* note 11, at 283. *See generally* Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 YALE L.J. 315 (1956); Von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954).

15. 259 U.S. 285 (1922).

16. *Id.* at 290–91.

17. *Id.* at 291.

18. The Court stated:
Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensible; and such acquaintance is commonly to be found only in a body of experts.
Id.

19. Fox, *supra* note 11, at 283.

question becomes more complex since both regulatory and antitrust standards are involved.[20]

Whether competition or regulation is economically more desirable, and which of these approaches offers the better protection of the public interest are the basic policy issues in the application of the doctrine of primary jurisdiction in the antitrust field. The Sherman[21] and Clayton[22] Acts were designed to protect interstate and foreign commerce from unlawful restraints of trade and monopolies.[23] On the other hand, administrative agencies were created because Congress felt a need to substitute regulation for competition in some areas.[24] Certain of these regulatory agencies have been empowered to immunize specified activities from the operation of the antitrust laws,[25] thereby raising the problem of whether or not the power of the courts to entertain antitrust suits has been entirely supplanted or only limited in these areas by regulatory authority.[26] It is clear, however, that when an agency is so empowered, approval of agreements submitted to it, subject to review by the courts,[27] will immunize such agreements from the operation of antitrust laws.[28]

Generally, the problems in the area of antitrust and primary jurisdiction arise when the plaintiff, in the belief that the regulatory agency is industry-oriented and the antitrust standards are more rigorous, seeks to avoid the application of the doctrine of primary jurisdiction by structuring his complaint so as to avoid agency action.[29]

Due to the numerous complex regulatory statutes, the history of the application of the doctrine of primary jurisdiction to the antitrust field is somewhat confusing. However, the leading cases in this area may be considered in two groups. The first group of cases expanded the principle of administrative expertise to antitrust actions involving regulated industries.[30] In these cases, the Court did not articulate the basic problem of reconciling antitrust and regulatory statutes. The second group of cases, while continuing to recognize the importance of administrative expertise, began to consider the scope of the statutes which conferred power upon

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20. *Id.* at 284. *See* Petrucelli & Long, *Antitrust and the Regulated Industries: The Role of the "Doctrine" of Primary Jurisdiction,* 2 TOL. L. REV. 303 (1969).
21. 15 U.S.C. §§ 1-7 (1970).
22. 15 U.S.C. §§ 12-44 (1970).
23. *See* C. WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 1-18 (1940).
24. *See* Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 300-01 (1963).
25. *See, e.g.,* Federal Aviation Act, 49 U.S.C. § 1384 (1970).
26. Fox, *supra* note 11, at 284. *See* Jaffe, *Primary Jurisdiction,* 77 HARV. L. REV. 1037, 1060 (1964).
27. *See, e.g.,* Federal Aviation Act, 49 U.S.C. § 1486 (1970). *See also* Von Mehren, *supra* note 14, at 960-65.
28. *See, e.g.,* McManus v. Lake Cent. Airlines, Inc., 327 F.2d 212 (2d Cir. 1964).
29. *See* Von Mehren, *supra* note 14, at 941-42. *Compare* Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199 (D.N.J. 1951), *cert. denied,* 370 U.S. 160 (1953), *with* Apgar Travel Agency, Inc. v. International Air Transp. Ass'n, 107 F. Supp. 706 (S.D.N.Y. 1952).
30. *See, e.g.,* United States v. Carr, 284 U.S. 474 (1932); *accord,* Far E. Conf. v. United States, 342 U.S. 570 (1952).

the agency; that is, whether the regulatory statute empowered the agency to render a decision on the challenged activities.[31] However, it was not until the opinion of Mr. Justice White in *Local 189, Amalgamated Meat Cutters v. Jewel Tea*[32] that criteria for determining the application of the doctrine of primary jurisdiction to the field of antitrust began to unfold.[33]

Jewel Tea involved a private antitrust action initiated by a supermarket chain challenging a provision in its collective bargaining agreement which limited the operating hours of its meat departments. The union claimed this provision was a "term or condition of employment," and as such was subject to the labor exemption of the antitrust laws.[34] In rejecting the application of the doctrine of primary jurisdiction, Mr. Justice White set forth the criteria for allocating the decisionmaking process when determining antitrust immunity: the court's competence to proceed on its own,[35] and the need, utility,[36] and availability[37] of an agency decision.[38]

In *Carnation Co. v. Pacific Westbound Conference*,[39] the Court articulated another criterion for applying the doctrine of primary jurisdiction to antitrust actions. Plaintiffs therein filed a treble damage antitrust action alleging that the defendants had initiated and maintained a rate increase in order to implement certain rate-making agreements which were never approved by the Federal Maritime Commission.[40] The approach adopted by the *Carnation* Court was to consider whether or not the agreements were debatably legal. Under the Court's interpretation of the Shipping

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31. *See* Fox, *supra* note 11, at 287–89, *citing* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); California v. FPC, 369 U.S. 482 (1962); United States v. Radio Corp. of America, 358 U.S. 334 (1959); Federal Maritime Bd. v. Isbrandsten, 356 U.S. 481 (1954).

32. 381 U.S. 676 (1965). There was no majority opinion in *Jewel Tea*. However, of the three opinions filed, primary jurisdiction was discussed only in Justice White's opinion and his statements were not contradicted in the other opinions.

33. *See* Kestenbaum, *Primary Jurisdiction To Decide Antitrust Jurisdiction: A Practical Approach To The Allocation of Functions*, 55 GEO. L.J. 812 (1967).

34. 381 U.S. at 679–84.

35. Mr. Justice White recognized that the NLRB has special competence in resolving the challenged actions, but that this expertise is not exclusive, and that in many areas "the courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment." *Id.* at 685–86.

36. Mr. Justice White stated:

> [T]he doctrine of primary jurisdiction is not a doctrine of futility: it does not require resort to "an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency."

Id. at 686 (citation omitted).

37. In the *Jewel Tea* situation, the NLRB could never reach the antitrust question raised by the employer because of the absence of an available procedure for obtaining a Board determination. *Id.* at 687.

38. For a recent application of the *Jewel Tea* decision, *see* International Ass'n of Heat & Frost Insulators & Asbestos Workers v. United Contractors Ass'n, No. 71–1947 (3d Cir., filed July 17, 1973), where the court applied the language of the opinion of Mr. Justice White and concluded that the facts of the case called for the NLRB to make "initial fact finding for the resolution of the labor issues." *Id.* at 33.

39. 383 U.S. 213 (1966).

40. *Id.* at 215.

Act,[41] all unfiled agreements were unlawful and not debatably legal. Therefore, the doctrine of primary jurisdiction was not applicable.[42]

The *Carnation* Court indicated that its opinion did not conflict with the earlier decision in *United States Navigation Co. v. Cunard Steamship Co.*[43] wherein the Court had held that the challenged practices should be considered by the Shipping Board even though the agreements had not been filed for Board approval.[44] In *Cunard,* the plaintiffs sought injunctive relief;[45] in *Carnation* the action was for treble damages. Since all unfiled agreements were unlawful, damages could be awarded in *Carnation* for the period during which the agreements were not approved. The *Carnation* Court also ruled against referral to the Shipping Board because the Board had already construed its order and had found the alleged conduct to be a violation.[46] However, the Court stayed the action[47] because the agency order was being appealed.[48]

In the instant case, the plaintiffs attempted to by-pass the regulatory scheme of the CAB by alleging that (1) the challenged agreements had not been approved, and therefore, antitrust immunity could not be invoked since the alleged conspiracy could not be claimed to have been necessary to do anything authorized, approved, or required by CAB order;[49] and (2) the remedy sought — treble damages — could not be provided by the CAB.[50]

The treatment of the plaintiffs' contention that the doctrine of primary jurisdiction did not apply to agreements which had not been approved by the CAB was foreseeable. After recognizing the overriding interest of the CAB in the regulation of in-flight entertainment, the court applied the holding of *Cunard* and the later decision in *Far East Conference v. United States*[51] on unfiled agreements.[52] The fact that the challenged actions had not been approved was immaterial if a decision by the court might conflict with future CAB approval of the agreements.[53] Since the *Cunard* and *Far East* decisions were limited by *Carnation* to cases where injunctive relief is sought,[54] the plaintiffs, with a prayer for treble damages, sought sanctuary in the *Carnation* decision.

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41. 46 U.S.C. § 814 (1970).
42. 383 U.S. at 216–18.
43. 284 U.S. 474 (1932).
44. *Id.* at 487; *accord,* Far E. Conf. v. United States, 342 U.S. 570 (1952).
45. 284 U.S. at 478.
46. 383 U.S. at 223.
47. In deciding to stay the actions rather than to dismiss it, the Court held that, "a treble-damage action for past conduct cannot be easily re-instituted at a later time. Such claims are subject to the Statute of Limitations and are likely to be barred by the time the Commission acts." *Id.*
48. *Id.*
49. 471 F.2d at 80–81.
50. *Id.* at 81.
51. 342 U.S. 570 (1952).
52. 471 F.2d at 81–82.
53. *Id.* at 81.
54. *See* Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 220–22 (1966).

In *Carnation*, the unapproved agreements were clearly unlawful under the Shipping Act, and whether or not the agreement was immunized prospectively, damages were awardable for the period during which the challenged agreements were not approved. Under the Shipping Act such agreements were not debatably lawful. The statute conferring upon the CAB the power to immunize agreements from the operation of the antitrust laws does not state that such unapproved agreements are unlawful per se.[55] The challenged activity was "debatably lawful" if the CAB had the power to immunize, retroactively, pre-approval conduct.[56] The court's application of the doctrine of primary jurisdiction was, therefore, consistent with the theory announced in *Carnation*.[57]

The court's treatment of the issue of "retroactive immunization" might, however, leave the opinion open to criticism. The question of the CAB's authority to retroactively immunize agreements is a question of statutory interpretation, and statutory interpretation is a question for the court.[58] However, even critics of judicial abdications in the face of a regulatory scheme can find little fault with the court's rationale for referring the issue of retroactive immunization to the CAB. The court was interested in knowing the effect of retroactive immunity upon the regulatory scheme,[59] and recognized the value of the opinion of the Board which implements that scheme.

Although the application by the district court of the doctrine of primary jurisdiction was approved, the court, because of the nature of the relief sought — treble damages — did not affirm the dismissal of the action. Sensitive to the petition of the plaintiff, the court stayed the action pending consideration by the CAB.[60] In this way, the court did not block any avenues of relief.[61] If the CAB does not approve the challenged agreements,

55. *See* Federal Aviation Act, 49 U.S.C. § 1384 (1970).

56. 471 F.2d at 83.

57. A Supreme Court decision subsequent to *Laveson* supports the court's holding. In Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), the Court held that prior agency adjudication of the antitrust dispute would be a material aid in ultimately deciding whether the Commodity Exchange Act foreclosed the suit; the action was stayed pending agency review. *See also* Hughes Tool Co. v. TWA, 409 U.S. 363 (1973); FMC v. Seatrain Lines, 411 U.S. 726 (1973).

58. Prior to the cases cited in note 57 *supra*, one commentator stated, regarding issues of statutory interpretation: "Indeed, in none of the more recent cases has the Supreme Court shown any hesitancy in arriving at its decision as to antitrust immunity without seeking the aid of the relevant agency." Fox, *supra* note 11, at 295. In fact, the question of the CAB's authority to retroactively immunize agreements among carriers had already been given consideration. In Butler Aviation Co. v. Civil Aeronautics Bd., 389 F.2d 517 (2d Cir. 1968), the court held:

> We read § 414 [of the Federal Aviation Act] and similar provisions in other statutes, such as § 5(11) of the Interstate Commerce Act . . . as declaring that in the areas there delimited the *public interest* demands that if a transaction has survived examination by the appropriate regulatory agency, antitrust peace shall prevail . . . .

Id. at 521. *See* Interstate Inv., Inc. v. Transcontinental Bus Sys., Inc., 310 F. Supp. 1053 (S.D.N.Y. 1970). *See also* Kestenbaum, *supra* note 34, at 819.

59. 471 F.2d at 83 n.50.

60. *Id.* at 84.

61. *See generally* Von Mehren, *supra* note 14, at 952.

the action will not be barred by the statute of limitations. If approval by the Board is given, but no retroactive immunity is granted, damages may be awarded for the period during which the agreement was unapproved. If the agreements are approved and the Board and court agree that retroactive immunity is authorized by the statute, the plaintiff will be without remedy.

On the other hand, considering the reliance which the court placed upon *Far East, Cunard,* and *Carnation,* if the plaintiff had sought injunctive relief, it is clear that the action would have been dismissed. Since the CAB does have the power to grant a cease and desist order[62] and the plaintiff would always be able to re-institute his action for injunctive relief in the court, his position would not have been prejudiced by dismissal.[63]

The instant opinion demonstrates this court's respect for an agency's expert opinion, even when that opinion concerns the limits of the agency's authority. The approach taken to the criterion of debatable legality, as set forth in *Carnation,* makes it questionable whether, except in the most extreme cases, the Third Circuit would declare any challenged agreements "not arguably lawful" — that is, not within the purview of the primary jurisdiction doctrine.

J. L. C.

LABOR LAW — CONSTRUCTION EMPLOYER MAY ENTER INTO SUCCESSIVE SECTION 8(f) AGREEMENTS BUT MAY NOT REPUDIATE EXISTING 8(f) CONTRACTS CONTAINING ENFORCED UNION SECURITY PROVISIONS WHERE EMPLOYEES HAVE NOT SOUGHT REPRESENTATIVE ELECTION.

NLRB v. Irvin (3d Cir. 1973)

The Irvin-McKelvy Company (Employer), a company engaged in construction work for coal mine operators, entered into a collective bargaining agreement[1] with International Union of District 50, Allied and

62. Federal Aviation Act, 49 U.S.C. § 1381 (1970).
63. *See* Carnation Co. v. Pacific Westbound Conf., 383 U.S. at 222-23.

1. The contract was authorized by section 8(f) of the National Labor Relations Act (Act), 29 U.S.C. §§ 151 *et seq.* (1970). Section 8(f) allows an employer in the building and construction industry to enter into a collective bargaining agreement with a union before its majority status has been established in accordance with section 9 of the Act. Section 8(f) provides in pertinent part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement . . . *Provided,* That

Technical Workers of the United States (District 50) in 1964.[2] The agreement, which was subsequently converted into a project contract,[3] contained union security and dues check-off clauses.[4]

Late in 1968 the Employer became signatory to an agreement with the United Mine Workers of America (UMW).[5] The Employer continued to recognize District 50, under the revised 1964 contract, as the bargaining agent on existing projects until April 1, 1969, when it concluded that District 50 projects were substantially complete. The Employer thereupon repudiated the District 50 contract and applied the provisions of the UMW contract to all its employees.[6] In response, District 50 charged the Employer with violations of sections 8(a)(1), (2), (3), and (5) of the National Labor Relations Act (Act).[7] The National Labor Relations Board (NLRB) found, first, that by repudiating the District 50 contract and recognizing the UMW as the representative of the employees on unfinished projects, the Employer had violated sections 8(a)(5) and 8(a)(2) of the Act, and second, that by requiring District 50 members working on unfinished projects to join the UMW as a condition of continued employment, the Employer had violated sections 8(a)(3) and 8(a)(1). The NLRB further concluded that while the Employer, after termination of the District 50 contract, was free to enter into subsequent 8(f) agreements with other unions, it could only do so providing that a majority of the work force was not District 50 members.[8] On the Employer's motion for

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nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Id. § 158(f).

2. NLRB v. Irvin, 475 F.2d 1265, 1267 (3d Cir. 1973).

3. *Id.* at 1267. In 1967 the original agreement was supplanted by an industry-wide contract which was to be effective until 1970. The 1967 agreement contained a clause giving the Employer the benefit of any more favorable provisions in subsequent contracts entered into by District 50 with other employers. Pursuant to this provision, the agreement was converted from a specified term contract into a project contract in 1968 after District 50 had entered into a "project only" contract with another employer. Under a project contract, the bargaining unit is the group of employees at a particular project, and the contract is effective only for the duration of the project. *Id.*

4. *Id.* at 1267, 1271.

5. *Id.* at 1267. At this time, the Employer's customers advised that UMW labor was necessary before the construction contracts could be awarded. *Id.*

6. *Id.* at 1268.

7. *Id.* The provisions alleged to be violated, as a result of the withdrawal of recognition from District 50 and the recognition of the UMW, provide in part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization . . . ;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(1), (2), (3), (5) (1970).

8. David S. Irvin and James T. McKelvy, 194 N.L.R.B. 52, 53 (1971).

clarification of the order, the NLRB stated that whenever the employer utilized a work force on any project, old or new, a majority of which was District 50 members it could not contract with any other union.[9]

On petition by the NLRB for enforcement of its order, the Third Circuit *held* that the Employer had not violated sections 8(a)(1), 8(a)(2) or 8(a)(3) of the Act, but violated section 8(a)(5) by unilaterally substituting the UMW contract for the District 50 contract at three or four unfinished projects. The court, however, denied enforcement of the order since it considered that the need for injunctive relief may no longer have been present.[10] *NLRB v. Irvin*, 475 F.2d 1265 (3d Cir. 1973).

Section 8(f) of the Act, adopted by amendment in 1959,[11] permits an employer engaged primarily in the building and construction industry to enter into a prehire agreement which requires union membership as a condition of employment despite the undetermined majority status of the union.[12] One of the major considerations underlying the amendment was the fact that the employment relationship in the construction industry has a transitory nature — projects are often of short duration, and the employee often works for more than one employer.[13] Collective bargaining agreements were permitted to be made between employers and unions for jobs not yet begun for two reasons: first, the employer's need to know his labor costs so that he could calculate and submit bids; and second, the nature of the business necessitated an available supply of skilled craftsmen for quick referral.[14] It was in light of these considerations that the *Irvin* court reviewed the decision of the NLRB.

The first question presented for the *Irvin* court's consideration was whether a construction employer, whose business has more than one bargaining unit, could make a section 8(f) agreement with a new union without a representation election, where the new bargaining unit contained employees who had become members of the first union by operation of union security provisions in the first contract.[15] The NLRB, relying upon

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9. *Id.* at 52 n.*.

Where there is a lack of compliance with an order, as was true in the instant case, the NLRB is authorized by section 10(e) of the Act to apply for enforcement. 29 U.S.C. § 160(e) (1970).

10. 475 F.2d at 1271. The Third Circuit denied enforcement with respect to the section 8(a)(5) violation because the passage of time had eliminated the necessity for such action. Projects in progress on April 1, 1969 were, in all probability, completed during the 4 year period between the violation and the court's decision. However, the court granted the General Counsel 30 days in which to file a response indicating any reasons which supported enforcement of the NLRB order. *Id.*

11. Section 8(f) was enacted as section 705 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* (1970). *See* 29 U.S.C. § 158 (1970).

12. *See* note 1 *supra.*

13. The problems facing construction employers and the purposes behind the amendment of the Act are discussed in S. REP. No. 185, 86th Cong., 1st Sess. 27–29 (1959); H.R. REP. No. 741, 86th Cong., 1st Sess. 19–20 (1959).

14. S. REP. No. 185, 86th Cong., 1st Sess. 28 (1959); H.R. REP. No. 741, 86th Cong., 1st Sess. 19 (1959).

15. 475 F.2d at 1267. This first question was related to the Employer's recognition of the UMW on new projects.

the employer neutrality doctrine of *Midwest Piping & Supply Co.*,[16] had contended that the Employer had to resort to representation proceedings as specified in the Act[17] before entering into another contract.[18] The court found, however, that *Midwest Piping* was not controlling because section 8(f) excused the construction industry employer from the duty of neutrality,[19] the breach of which would ordinarily result in a violation of sections 8(a)(1), (2), and (3) of the Act.[20] Therefore, the Employer was permitted under section 8(f), to enter into a contract with a new union for subsequent projects, irrespective of the union membership of the prospective employees.[21] That right to contract with a new union for subsequent contracts is subject, however, to the right of the employees in the bargaining unit, and the prior union, to request a representation election to oust the new union.[22] Thus, although the employer is free to enter into prehire contracts with a different union, there is no guarantee that the contract will remain effective should there be a representation election pursuant to section 9(c) of the Act.[23]

The second question considered by the *Irvin* court was whether a construction employer could repudiate a section 8(f) contract which contained union security provisions that had been continuously enforced, and proceed, without a representation election, to apply a new section 8(f) contract covering a bargaining unit consisting of employees who had been subject to the repudiated contract.[24] The court concluded that the right of a construction employer under section 8(f) to ignore the normal neutrality requirement and provide assistance to a union by entering into a pre-hire collective bargaining agreement did not relieve the employer of his obligation to bargain collectively with the representative of the existing bargaining unit during the term of the agreement.[25] The Employer had contended that his refusal to bargain with District 50 after putting the UMW contract into effect was not a violation of section 8(a)(5) because District 50 was not a bargaining representative that was selected by a majority of the employees for collective bargaining pur-

16. 63 N.L.R.B. 1060 (1945). *Midwest Piping* established the employer's duty of neutrality. The NLRB therein declared that it was an unfair labor practice for an employer to recognize one of the two rival unions during the pendency of a representation dispute.

17. 29 U.S.C. § 159(c) (1970).

18. 475 F.2d at 1270.

19. *Id.*

20. *See* 63 N.L.R.B. at 1070.

21. 475 F.2d at 1270.

22. *Id.* According to section 9(c), any employee or labor organization may file a petition with the NLRB alleging that the labor organization currently recognized by the employer as bargaining representative, is no longer the employee's representative. Upon a finding of reasonable cause to believe a question of representation exists, the NLRB will hold a hearing, and, if appropriate, will order an election. 29 U.S.C. § 159(c) (1970).

23. 475 F.2d at 1270.

24. *Id.* This second question related to the incompleted projects as of the time of the repudiation.

25. *Id.* at 1271.

poses as required by section 9(a).[26] The contention was based upon the NLRB's decision in *R.J. Smith Construction Co.*,[27] which, as interpreted by the Employer, left a construction employer free to repudiate a collective bargaining agreement made pursuant to section 8(f) with one union, and substitute a new contract with another union.[28]

The Third Circuit rejected the Employer's interpretation of section 8(f), declaring that nothing in section 8(f) suggested that "it was intended to leave construction industry employers free to repudiate contracts at will."[29] The court, however, expressly limited its holding that an employer is not free to repudiate his section 8(f) contract during its term to the instant situation, where the union's role as representative had been directly presented to the employees through the enforcement of union security and dues checkoff clauses, and, the employees had refrained from seeking a representation election for a sustained period of time.[30]

The issue that remains open after this decision is the general effect of section 8(f) upon the construction industry employer's obligation to bargain in good faith with the collective bargaining representative during the term of a section 8(f) agreement. In the instant decision, the court did not express an opinion as to the propriety of the NLRB's decision in *R.J. Smith Construction Co.*[31] In that case, the NLRB inferred that in some situations a rebuttable presumption of majority status of the signatory union may occur as a result of a section 8(f) contract, which would give rise to an obligation of the employer to bargain with the union regarding terms in the contract.[32] However, the NLRB declared that the presumption of majority status could be contested by the employer at any time during the term of the contract — not limiting such a contest to a petition for election pursuant to section 9(c) or 9(e) of the Act.[33]

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26. *Id.* at 1270. The basis of the Employer's argument was that District 50 had been given bargaining status by the Employer through section 8(f), and not by a majority of the employees in the unit. Since District 50 was not the exclusive section 9(c) representative, the Employer contended that he was under no obligation to bargain with it. *Id.*

27. 191 N.L.R.B. 693 (1971).

28. 475 F.2d at 1270.

29. *Id.* at 1271.

30. *Id.*

31. In *R.J. Smith Construction Co.*, a construction industry employer and a union had entered into a section 8(f) prehire agreement which contained no union security provisions. During the course of the contract, the employer, without notice to the signatory union, unilaterally changed the wages of a particular class of employees. The union brought section 8(a)(5) charges against the employer for failure to bargain with the collective bargaining representative of the employees regarding the contract changes. The NLRB found that the employer had not violated section 8(a)(5) because the union had, in fact, never represented a majority of the employees and, therefore, the employer had no duty to bargain over any changes irrespective of the existence of the prehire collective bargaining agreement. 191 N.L.R.B. at 695.

32. *Id.* at 695 n.5. The Third Circuit noted that the NLRB in *R.J. Smith Construction Co.* inferred that the employer may not be free to repudiate a section 8(f) contract during its term if the contract contained union security clauses which were enforced. 475 F.2d at 1269.

33. 191 N.L.R.B. at 694-95.

The *Irvin* decision could be read as rejecting the NLRB's construction of section 8(f) in *R.J. Smith Construction Co.* The Third Circuit noted, without disapproval, the General Counsel's interpretation of section 8(f), that once an employer executes a section 8(f) agreement, he may not change the collective bargaining representative except by means of a section 9(c) or section 9(e) representation election.[34] This would appear to be the proper interpretation of section 8(f), since the express language of the section limits the effects of its provisions, particularly the final proviso which "supplies an unmistakable guide to Congress' desire to immunize from liability only the preliminary contractual steps which precede an employer's acquisition of a work force on a project . . . ."[35] It is submitted that that proviso does not, as the NLRB suggested in *R.J. Smith Construction Co.,* permit the indiscriminate testing of the union's majority status by an employer at any time during the term of the project, but rather limits such a test of majority status to petitions for representation elections through sections 9(c) and 9(e).[36]

The effect of allowing the employer to repudiate a section 8(f) contract, which contains no union security provisions, at any time merely by claiming a lack of majority status of the union would be to render the prehire contract meaningless.[37] It would seem that if Congress had intended to abrogate the existing law regarding good faith bargaining during the term of a validly executed section 8(f) contract, it would have been such a deviation from the norm as to require an express declaration. In fact, the only indication that such contracts differ at all from other lawful collective bargaining agreements, once executed, is that section 8(f) contracts are not a bar to representation petitions filed pursuant to sections 9(c) and 9(e).[38]

It is submitted that the suggested interpretation of the operation of section 8(f) with respect to the obligation of a construction industry employer to bargain with the signatory union of a section 8(f) contract during its term, is the interpretation which would be applied by the Third Circuit if presented with a case involving an employer repudiation of a section 8(f) collective bargaining agreement containing no union security clauses. Although the court expressly declined to suggest its ruling in such a situation, it did declare that there was nothing in the text or legislative history of section 8(f) to suggest that construction industry employers could freely repudiate such contracts.[39] The court also noted, without apparent disapproval, the adoption of the suggested interpreta-

34. 475 F.2d at 1269.
35. 191 N.L.R.B. at 694.
36. *See* 29 U.S.C. § 158(f) (1970). *See also* note 1 *supra.* It should be noted in this regard that a representation election pursuant to sections 9(c) or 9(e) is the only method for testing majority status expressly recognized in the final proviso of section 8(f). 29 U.S.C. 158(f) (1970).
37. 191 N.L.R.B. at 696 (dissenting opinion).
38. 29 U.S.C. § 158(f) (1970). *See* 191 N.L.R.B. at 696 n.7 and accompanying text (dissenting opinion).
39. 475 F.2d at 1271.

tion of the effects of section 8(f) by the dissent in *R.J. Smith Construction Co.*[40] That, it is submitted, represents an apparent inclination to interpret section 8(f) as applying an exception to the existing law with respect to union recognition only as pertains to the prehire agreement, and not as being a change in the law regarding the employer's obligation to bargain with the union representative during the course of a contract, unless a representation election during its term results in a change in the collective bargaining representative.

The *Irvin* court has clarified section 8(f) as it pertains to a construction industry employer's ability to make successive section 8(f) contracts for new projects irrespective of his knowledge of union membership of the prospective employees on those new projects. It has also established, at least in cases involving collective bargaining agreements containing enforced union security and dues checkoff provisions, that a section 8(f) contract cannot be freely repudiated by an employer during its term. Although the application of that rule to contracts not containing such provisions was specifically reserved for an appropriate case, such application would appear to be both logical and probable.

J. M. F.

BANKRUPTCY — CREDITORS' RIGHTS — PUBLIC INTEREST IN RAILROAD REORGANIZATION AND EARLY STAGE OF PROCEEDINGS JUSTIFY WEAK STANDARD FOR TAKE-DOWN OF ESCROWED FUNDS SECURING CREDITORS' CLAIMS.

In re Penn Central Transportation Co. (3d Cir. 1973)

The trustees of the property of the Penn Central Transportation Company (Penn Central) petitioned the reorganization court[1] for authorization to undertake improvements on the company's freight yard at

40. As the *Irvin* court noted:

> Without suggesting how we would rule if presented with the repudiation during its term by a § 8(f) employer of a collective bargaining agreement containing no union security provisions [noting the dissent in *R.J. Smith Construction Co.*] . . . . [i]t is significant, we think, that despite the instant contract provisions and their enforcement, the employees did not, from June, 1964 to April, 1969, petition for a representation election. There was at least tacit acquiescence in the designation of District 50 as collective bargaining representative.

Id.

1. The reorganization court was the United States District Court for the Eastern District of Pennsylvania, Judge Fullam presiding. The Penn Central petitioned for reorganization on June 21, 1970, under section 77 of the Bankruptcy Act, which governs reorganization of railroads. 11 U.S.C. § 205 (1970). For a history and discussion of railroad reorganization *see* Haskell, *Railroad Reorganization for Beginners*, 24 ALA. L. REV. 295 (1972); Lasdon, *The Evolution of Railroad Reorganization*, 88 BANK. L.J. 3 (1971). For additional information on the rise and fall of the Penn Central, *see* J. DAUGHEN & P. BINZEN, THE WRECK OF THE PENN CENTRAL (1971).

Selkirk, New York,[2] and for permission to take-down certain escrowed funds with which to finance the improvements.[3] The Selkirk properties were subject to three mortgages, referred to collectively as the Hudson River Mortgages.[4] The funds sought by the Penn Central trustees were liened proceeds from the sale of properties subject to these mortgages.[5] The reorganization court held that the proposed improvements would constitute "additions and betterments"[6] to the freight yard and permitted the use of the escrowed funds to carry them out.[7] On appeal by the most junior mortgagee, Morgan Guaranty Trust Company (Morgan Guaranty), the Third Circuit affirmed the reorganization court's decision,[8] *holding* that creditors' rights in the escrowed funds were protected by the reorganization court's finding that there was "no demonstrated likelihood" that the reorganization would fail. *In re Penn Central Transportation Co.*, 474 F.2d 832 (3d Cir. 1973).

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2. The yard at Selkirk is a railroad interchange located near Albany, New York. It binds the Penn Central's rail services from New England and New York with those from the West, and thus is a critical part of the Penn Central system.

3. The improvements were physical additions to the plant, including additional track, a conductor's tower, and a bridge. These improvements were to result in an annual savings of $1,076,000 through the elimination of delays and increased utilization of the yard.

4. These mortgages were created between 1897 and 1913 by the New York Central and Hudson River Company, a predecessor of the Penn Central. Ownership by the railroad of the main rail line along the Hudson resulted in the term "Hudson River Mortgages." These mortgages were, in order of priority: (1) 3½% Gold Bond Mortgage, dated June 1, 1897; (2) Consolidated Mortgage, dated June 20, 1913; and (3) Refunding and Improvements Mortgage, dated October 1, 1913. The indenture trustee of this third mortgage was Morgan Guaranty Trust Company, the petitioner on appeal.

5. Railroad mortgages are often open-ended, permitting a railroad to sell mortgaged property and replace it with property of equal value to which a lien attaches. If property is sold but not replaced, the lien attaches to the sale proceeds. *See* Note, *Interim Financing Through Use of the Turnover Power in Railroad Reorganizations*, 71 YALE L.J. 1553, 1555 (1962). Under a similar system and pursuant to a 1961 agreement between Manufacturers Hanover Trust Company, indenture trustee under the first mortgage, and Penn Central's predecessor, the New York Central, proceeds from the sales of mortgaged property were used by Manufacturers to finance the purchase of rolling stock by the railroad under conditional sales agreements. The repayments by the railroad were held in escrow, subject to the mortgage. The trustees in the instant case petitioned for $2,074,000, approximately $1,756,480 of which was the product of these pre-reorganization sales. The remainder of the funds sought by the trustees were to be obtained from two separate accounts, one of approximately $100,264, and the other $333,214. These funds were made up of proceeds from post-reorganization sales of property, pursuant to prior orders of the reorganization court. The authority for these orders derived from section 77(a) of the Bankruptcy Act, 11 U.S.C. § 205(a) (1970), which grants the reorganization court exclusive control over the debtor's property, and section 77(o) which provides that proceeds from the sales of mortgaged property "be applied or disposed of in such manner as the judge . . . shall direct." 11 U.S.C. § 205(o) (1970).

6. Morgan Guar. Trust Co. v. Penn Central Trustees, 332 F. Supp. 1302, 1306 (E.D. Pa. 1971). *See* note 19 *infra*.

7. 332 F. Supp. 1302, 1306 (E.D. Pa. 1971).

8. The court also remanded with instructions that the reorganization court provide for the payment of interest on the pre-reorganization funds. 474 F.2d at 837. The basis of this special treatment was that the right to these funds was unclear because they were created prior to the reorganization. The court's order, requiring repayment with interest, would restore the status quo as to these contested funds. Thus the case did not decide the ultimate right to the fund. For an explanation of the nature of the pre-reorganization funds, *see* note 5 *supra*.

Section 77 of the Bankruptcy Act[9] contemplates reorganization rather than liquidation of the debtor.[10] The statute's two basic objectives are "the conservation of the debtor's assets for the benefit of creditors and the preservation of an ongoing railroad in the public interest."[11] In the interim period between the filing of the petition for reorganization and the creation of a self-sustaining railroad, the debtor must continue to operate, despite the fact that its revenues and other available financial resources cannot meet its fixed costs (funded and unfunded debt, taxes, and rentals on leased lines) and current operational expenses.[12] The continued operation of the railroad during this period may result in a conflict between the interests of creditors and the interests of the public. Where it is probable that the railroad can be returned to a profit making system, the interests of the creditors and the public are both served by reorganization. However, if the railroad is unlikely to ever turn a profit, their interests diverge — the secured creditors' desire to lose as little as possible might best be realized by liquidation, while the public interest requires continued operation. In such circumstances, providing services to the public at less than cost results in erosion of the assets which secure the creditors' debts, and leads to the subordination of their security interests to subsequently issued trustee's certificates.[13]

Similarly, take-downs for the purpose of "additions and betterments" may be to the benefit of creditors if reorganization is successful; but if it fails, the liquidation value of the "additions and betterments" is likely to be substantially less than the going-concern value.[14] For this reason courts have recognized that at some point the forced investment by way of take-downs for the purpose of "additions and betterments" may result in an unconstitutional taking of property,[15] and have sought to draw a line beyond which the public interest in continued rail service cannot infringe on creditors' rights in the debtor's property. The case of *In re*

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9. 11 U.S.C. § 205 (1970).

10. Bankruptcy Act § 77(b), 11 U.S.C. § 205(b) (1970). *See, e.g.,* New Haven Inclusion Cases, 399 U.S. 392, 431 (1970); 5 W. COLLIER, BANKRUPTCY ¶ 77.01, at 466.4 (14th ed. 1972).

11. New Haven Inclusion Cases, 399 U.S. 392, 431 (1970). The public interest in continued rail operation has long been recognized. *See* 5 W. COLLIER, *supra* note 10, ¶ 77.02, at 469. For a discussion of the statutory and judicial recognition of the public nature of railroads, *see* Haskell, *supra* note 1, at 303–05.

12. For a more detailed discussion of costs, *see* Haskell, *supra* note 1, at 308–12.

13. *Id.* at 298–306. It is apparent that if the railroad is operating, and making needed repairs and improvements, but revenues are not meeting the cost of this operation, the funds must come from other sources. These other sources are: (1) cash on hand, usually nonexistent in the case of an insolvent; (2) turnover orders, as in the instant case; or (3) the sale of trustee's certificates which create a lien on the debtor's assets which takes priority over previously outstanding security interests. *See* Note, *supra* note 5, at 1564.

14. *See* note 26 and accompanying text *infra.*

15. The fifth amendment provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. *See* Haskell, *supra* note 1, at 309–10.

New York, New Haven & Hartford R.R.[16] (*New Haven*) established four criteria to be evaluated and satisfied before a court could draw-down liened mortgage proceeds for the purpose of making "additions and betterments" in a section 77 reorganization:

> The rule for a reorganization under Sec. 77, in a case such as that now before the court and at this early stage of the proceedings, is that (1) in addition to finding that the funds are presently needed and cannot be obtained elsewhere, (2) the court need only conclude that reorganization is probably feasible, (3) that the money drawn-down and expended for additions and betterments will materially contribute to the possibility of successful reorganization and to the continuation of the transportation plant, or a substantial part thereof, as a going concern, and (4) that the interests of the bondholders are not thereby prejudiced.[17]

The *New Haven* test was endorsed, but not actually applied, by the Third Circuit in *Central R.R. of N.J. v. Manufacturers Hanover Trust Co.*[18] In that case, the proposed expenditure was for removal of a damaged span of a two-span drawbridge. The court held that removal of the damaged span would not be an "addition or betterment" and that the liened assets in question could not be utilized to defray such an operational expense unless substitute security of equivalent value was provided.[19] While the court discussed the *New Haven* test with approval,[20] it expressly stated that there was no need for the application of the test since the indenture trustee did not resist the take-down of funds, but only contended that some substitute security be provided.[21] The Third Circuit

16. No. 30226 (D. Conn., Dec. 7, 1961). The court in the *New Haven* case was also faced with the issue of the constitutional propriety of a request for take-down at an early stage in the reorganization proceedings. The court, after application of the four criteria announced by it, approved the take-down. For additional discussion, *see* note 17 *infra*.

17. *Id.* (enumeration added). The *New Haven* court, in deriving this test, relied heavily on *In re* Third Avenue Transit Corp., 198 F.2d 703 (2d Cir. 1952), a Chapter X reorganization case involving the take-down of mortgage proceeds for use as working capital. The test of *Third Avenue* required that the feasibility of reorganization be established to almost a certainty before a draw-down would be permitted. The *New Haven* court stressed its belief that such a stringent requirement was inapplicable in a section 77 context because of the overriding public interest present when the court is dealing with a railroad. The court's rationale extended to those Chapter X cases in which draw-downs were sought for "additions and betterments." The court concluded that Chapter X cases, while analogous in general principles to section 77 reorganization proceedings, were inapposite to the discussion of the criteria to be applied in a section 77 case. Chapter X cases involving the issue of feasibility of reorganization criterion include: *In re* Riker Corp., 385 F.2d 124 (3d Cir. 1967); Harding v. Stichman, 240 F.2d 289 (2d Cir. 1957); and *In re* Flying W Airways, Inc., 341 F. Supp. 26 (E.D. Pa. 1972).

18. 421 F.2d 604 (3d Cir.), *cert. denied*, 398 U.S. 949 (1970).

19. Expenditures for "additions and betterments" increase the operational plant, and the assets purchased are subject to the creditors' lien, thus affording them a substitute security for the cash draw-down. Expenditures for operating expenses are dissipated without the generation of substitute security upon which a mortgage lien can attach. The creditors' benefit, if any, is intangible — the continued operation of the railroad. *Id.* at 607.

20. *Id.* at 606.

21. *Id.* at 608.

did apply the *New Haven* test in a subsequent case which arose out of the Penn Central proceedings.[22] The court there held that it was improper for the district court to release property from the Hudson River Mortgages when the record did not contain support for the district court's statement that there was a "reasonable prospect of a successful reorganization."[23]

In the instant case, Morgan Guaranty contended that the reorganization court had improperly permitted a dissipation of Morgan Guaranty's security in the assets of the Penn Central. The order of the reorganization court provided that the escrowed funds utilized to finance the improvements were to be repayed from the proceeds of sales of other property subject to the mortgages.[24] The court analyzed the economic effect of that order by comparing the position of the security holders before and after its implementation. Before the order, the bondholders' security consisted of a freight yard, easily disposable property, and the escrowed funds. After implementation, their security would consist of an improved freight yard, a replenished escrow account equal to that on hand before the order, and a *diminished* amount of easily disposable property.[25] In the event the reorganization was unsuccessful, the security of the bondholders would be an interest in the improvements. Such an interest might provide adequate security if the railroad continued to operate, but its value would be substantially less in the event of liquidation, while easily disposable property would retain its value upon liquidation.[26] Thus, the effect of the order was to force the mortgage holders to contribute to the effort to return the Penn Central to financial solvency, by further entangling their funds with the railroad's operation.[27] The issue before the court was the constitutional propriety of this order, *i.e.*, whether it was designed to guard the rights of creditors while respecting the interests of the public in the survival of the railroad as a going enterprise, or whether it went beyond that and resulted in an unconstitutional taking of private property in violation of the fifth amendment.

The court initially determined that the standard to be applied, in reviewing the constitutionality of the reorganization court's order, was the *New Haven* test which it had endorsed in *Central of New Jersey*.[28] As the reorganization court had applied this same test in reaching its determination,[29] the court limited its analysis to a review of the reorganization court's findings with regard to the *New Haven* requirements, focusing principally on the "probably feasible" criterion.[30] Morgan Guar-

22. *In re* Penn Central, 468 F.2d 1222 (3d Cir.), *rev'g* 346 F. Supp. 1323 (1972).
23. *Id.* at 1227.
24. 474 F.2d at 835.
25. *Id.*
26. *See* Blum, *The Law and Language of Corporate Reorganization*, 17 U. CHI. L. REV. 565, 566 (1950).
27. 474 F.2d at 835.
28. *Id.* at 833.
29. 332 F. Supp. at 1304.
30. With respect to the remaining criteria, the court upheld the reorganization court's determination without discussion. 474 F.2d at 836 n.10.

anty contended that the trustees had failed to show that reorganization of the Penn Central was "probably feasible." The problem with respect to this element of the test was that at the time the reorganization court's decision approving the take-down was rendered, the reorganization proceedings were only a few months old, and the trustees had not yet formulated a plan of reorganization. However, the court circumvented this difficulty by adopting a reformulation of the "probably feasible" test which took into account the early stage of the proceedings and the unavailability of a plan of reorganization:

> Where, as in the present instance, the issue arises at a relatively early stage of the reorganization proceeding, when it is too early to make confident predictions one way or the other, I believe it should be sufficient to find merely that there is *no demonstrated likelihood of failure*.[31]

While the effect of this reformulated test was to reduce the burden of proof which the reorganization trustees were required to meet, the court made it clear that the burden would not shift to the indenture trustee.[32]

On the facts, there were two factors which indicated that the bondholders had not been prejudiced by the court's holding. First, although not discussed by the court, the security of the bondholders had been previously increased by $26 million in the form of "additions and betterments," prompting the reorganization court to suggest that the reorganization trustees might be entitled to the outright release of the escrowed funds.[33] Second, the improvements were made to an important rail yard which would no doubt be preserved through nationalization or government subsidies, even if an income-based reorganization did not become a reality.[34] However, given a different factual situation in which the above two mitigating factors are not present, it is questionable whether a test requiring merely a showing that "reorganization [is] not improbable"[35]

31. *Id.* at 836 (emphasis added). This reformulation of the feasibility of reorganization requirement was proposed and applied by the reorganization court. 332 F. Supp. at 1305. It is interesting to note that the court in the *New Haven* case created and applied the "probably feasible" test for just such an early stage in the reorganization proceedings. There the test was applied before any plan for reorganization had been submitted, less than 4½ months into the reorganization. The reorganization court in the instant case stated that the prospects for a successful reorganization were "undoubtedly at least as good as were the prospects . . . in the *New Haven* case," but nevertheless felt that "some further refinement" of the test was necessary. *Id.*

32. 474 F.2d at 837.

33. 332 F. Supp. at 1305.

34. *Id.* at 1306. *See* Note, *supra* note 5, at 1563. Recent legislation, the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236 (Jan. 2, 1974), is an example of the willingness of the federal government to invest in bankrupt railroads in the national interest. In addition to establishing procedural steps to effectuate the purpose of restructuring the rail system in the Northeast and Midwest regions, the Act authorizes the issuance of up to $1.5 billion in federally guaranteed loans to finance the purchase of rolling stock, and $500 million in direct federal payments.

Earlier legislation indicative of strong federal support for bankrupt railroads includes the Amtrak Improvement Act of 1973, Pub. L. No. 93-146 (Nov. 3, 1973), and the Rail Passenger Service Act of 1970, 45 U.S.C. § 501 *et seq.* (1972).

35. 474 F.2d at 837.

would adequately protect the rights of creditors.

While utilization of escrowed funds to finance improvements can be justified by the public interest rationale, it is submitted that a stricter feasibility of reorganization standard should apply to these forced loans, making the risk taken by the creditor closer to that which an investor might freely accept. Forcing investment in a railroad "when it is too early to make confident predictions one way or the other"[36] as to whether it will survive, may give too much weight to the public interest to the detriment of secured creditors.[37]

M. S. B.

CIVIL RIGHTS — SEX DISCRIMINATION IN PENSION PLAN VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Rosen v. Public Service Electric & Gas Co. (3d Cir. 1973)

Two male employees of the Public Service Electric and Gas Company[1] brought suit against their employer[2] alleging that the company's original noncontributory pension plan[3] and its subsequent modification[4]

36. 332 F. Supp. at 1305.

37. Of course the danger is that a standard which is too lenient may approach establishing a public right rather than merely recognition of a public interest. *See* Note, *Takings and the Public Interest in Railroad Reorganization,* 82 YALE L.J. 1004, 1017 (1973).

1. Both were active employees of the company when suit was commenced and, as such, had standing to sue. The court did not view the subsequent acceptance of retirement benefits by one of them as a forfeiture of standing. Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 94 (3d Cir. 1973). Utility Co-Workers Association, the certified bargaining representative for 1,800 of the 15,000 company employees, was also a party-plaintiff. The court refrained, however, from deciding whose rights the union had standing to assert. *Id. See generally* LABOR-MANAGEMENT SERVICES ADMINISTRATION, U.S. DEP'T OF LABOR, UNION STATUS & BENEFITS OF RETIREES (1973).

2. Plaintiff-employees had perfected their right to proceed in the district court by complying with the procedural requirements of The Equal Employment Opportunity Act, Pub. L. No. 88-352, § 706, 78 Stat. 259 (1964), *as amended,* 42 U.S.C. § 2000e-5 (Supp. II, 1972). Rosen v. Public Serv. Elec. & Gas Co., 409 F.2d 775, 782 n.24 (3d Cir. 1969).

3. The company's original pension plan, in force from 1911 to 1967, permitted retirement at different ages and after different periods of service for men and women. Male employees could retire with full pension benefits at age 65 after 25 years of service, and were forced to retire at age 70. Males were eligible for early retirement between the ages of 60 and 65 upon completion of 30 years' service but suffered a reduction in their benefits. Female employees became eligible for full pension benefits at age 60 with 20 years' service and mandatory retirement age was 65. 409 F.2d at 777 n.6.

4. The revised pension plan, although it eliminated the disparity in age and length of service, favored female employees by eliminating provisions for the reduction of their retirement benefits due to service with the company prior to the effective date of the modification. Thus, under both the original and modified plans, a male employee electing early retirement at age 60, after 30 years' service, would receive a lower annual pension payment than a female retiring at the same age with the same length of service, assuming the same average annual salary. Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454, 461 (D.N.J. 1971).

violated Title VII of the Civil Rights Act[5] (the Act) by discriminating against them on the basis of sex in the determination of benefits. Following reversal of its summary judgment in favor of the company,[6] the district court, on remand, found the pension plans in violation of the Act.[7] All parties appealed and the Third Circuit affirmed,[8] *holding* that section 703(a)(1) of the Act[9] prohibited sex discrimination in the determination of pension benefits and that to the extent that the plans in question differentiated between individuals solely on the basis of sex they violated the Act. *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973).

While Title VII[10] has been found applicable to many areas of employer-employee relations,[11] only recently have litigants invoked the Act to challenge the legality of fringe benefit programs.[12] Whether pension plans are properly within the sex discrimination prohibition of Title VII presented a question of first impression for the Third Circuit. In answering that question, the court gave initial consideraaion to the Equal Employment Opportunity Commission's[13] interpretation of the Act which construed section 703(a)(1) as including pension plans with-

5. Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e *et seq.* (1970), *as amended* (Supp. II, 1972). The Act provides in relevant part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

6. References to the district court's oral opinion are found in Rosen v. Public Serv. Elec. & Gas Co., 409 F.2d 775 (3d Cir. 1969).

7. Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454 (D.N.J. 1971).

8. While affirming the district court's finding that the plans were violative of the Act, the court remanded for a determination of damages. 477 F.2d at 96.

9. 42 U.S.C. § 2000e-2(a)(1) (1970).

10. A partial legislative history of Title VII can be found in 2 U.S. CODE CONG. & AD. NEWS 2355 (1964).

11. The provisions of Title VII have been found to be controlling in areas of hiring, Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971); job assignment, Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970); promotion, Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971), *aff'd on other grounds,* 460 F.2d 1228 (5th Cir. 1972); job classification, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); and wage differentials, Glus v. G.C. Murphy Co., 329 F. Supp. 563 (W.D. Pa. 1971). *See generally* Annot., 12 A.L.R. Fed. 15 (1972).

12. Fringe benefits include, but are not limited to: medical, hospital, accident, and life insurance; retirement benefits; profit sharing and bonus plans; and leave. Guidelines on Discrimination Because of Sex § 1604.9(a), 37 Fed. Reg. 6837 (1972). The instant case aside, the only reported case to date which has dealt with a commonly denominated fringe benefit of the employment relationship is Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971), which was cited approvingly by the Third Circuit in *Rosen. Bartmess* held that retirement plans are "conditions of employment" within the meaning of Title VII. *Id.* at 1189.

13. Equal Employment Opportunity Act, Pub. L. No. 88-352, § 705(a)-(d), (f)-(i), 78 Stat. 258, 259 (1964), *as amended,* 42 U.S.C. § 2000e-4 (Supp. II, 1972) established the Equal Employment Opportunity Commission (the EEOC), the administrative agency responsible for the Act's enforcement, and delineated its powers.

in its ambit.[14] While EEOC *Guidelines* do not have the force of law,[15] the court was convinced that the EEOC's interpretation furthered the Act's legislative purpose and was consistent with the plain meaning of the language employed.[16] The fact that language in the Labor-Management Relations Act,[17] similar to that found in section 703(a)(1) of the Act, had been held to include retirement benefits[18] further persuaded the court that discriminatory pension plans contravene Title VII.

Following the 1972 publication of revised EEOC *Guidelines* dealing with employment discrimination on the basis of sex, which gave specific attention to fringe benefits,[19] there had been speculation as to how fringe benefit plans would be affected by judicial construction of Title VII.[20] The decision in the instant case and that of the Seventh Circuit in *Bartmess v. Drewrys U.S.A., Inc.*,[21] which similarly held retirement plans containing different treatment for men and women to be violative of Title VII,[22] indicate that further speculation regarding the legality of discriminatory pension plans is unwarranted, and suggest the type of reception which the courts can be expected to give other discriminatory fringe benefit programs.

F. P. N.

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14. The EEOC Guidelines provide in pertinent part:
> It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates on the basis of sex.

Guidelines on Discrimination Because of Sex § 1604.9(4), 37 Fed. Reg. 6837 (1972).

15. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1190 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). However, the Supreme Court has said that the administrative interpretation of Title VII by the enforcing agency is entitled to great deference. Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).

16. 477 F.2d at 95.

17. 29 U.S.C. § 159(a) (1970).

18. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). The court in *Inland Steel* held that pension plans are included within the phrase "other conditions of employment," and rejected the argument that since retirement plans were not specifically mentioned in the labor legislation they were not a condition of employment. *Id.* at 249–50. The court referred to a variety of topics which the language discussed could readily cover. *Id.* at 253.

19. Guidelines on Discrimination Because of Sex § 1604.9, 37 Fed. Reg. 6837 (1972).

20. Haneberg, *The EEOC and Employee Benefit Plans*, 111 TRUSTS & ESTATES 726 (1972).

21. 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

22. *Id.* at 1189. The *Bartmess* court cited with approval the district court decision in the instant case. *Id.*

CRIMINAL LAW — TAX FRAUD — ACT DONE VOLUNTARILY, INTENTIONALLY, AND WITH SPECIFIC INTENT TO DO THAT WHICH THE LAW FORBIDS IS DONE WILLFULLY WITHIN THE MEANING OF SECTION 7205 OF THE INTERNAL REVENUE CODE, EVEN IF NOT DONE WITH BAD OR EVIL PURPOSE.

United States v. Malinowski (3d Cir. 1973)

Defendant Malinowski, a member of the Philadelphia War Tax Resistance League,[1] was convicted in the United States District Court for the Eastern District of Pennsylvania of violating section 7205 of the Internal Revenue Code (Code)[2] for willfully supplying false information on an Employee Withholding Exemption Certificate (Form W-4).[3] The defendant had submitted a Form W-4 to his employer in which he claimed 15 exemptions when he knew that under Internal Revenue criteria he was entitled to only two.[4] Attached to the form was a letter from Malinowski in which he noted his opposition to the use of his tax money for "war-making" purposes.[5]

The defendant requested jury instructions to the effect that he could not be found guilty of willfully making a false statement within the meaning of section 7205 because he had not acted with an evil or bad purpose.[6] The district court rejected Malinowski's argument, defining the proper standard for willfullness to be that the act had been committed "voluntarily and intentionally, and with the specific intent to do that

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1. United States v. Malinowski, 347 F. Supp. 347, 351 (E.D. Pa. 1972). This organization opposed the payment and use of federal income taxes for support of the war in Indochina. *See* Appendix to Brief for Appellant at 41a, 43a.

2. INT. REV. CODE of 1954, § 7205, provides in pertinent part:

> Any individual required to supply information to his employer under section 3402 who *willfully* supplies false or fraudulent information . . . shall . . . upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

Id. (emphasis added). Section 3402 requires the withholding of taxes from wages. *Id.* § 3402.

3. 347 F. Supp. at 351.

4. *Id.* at 350 n.2. The parties had stipulated that: (1) thirteen of the 15 exemptions claimed were not permitted exemptions; (2) appellant knew this at the time he submitted his Form W-4 to his employer; and (3) appellant knew that he was an individual who had to supply such information to his employer by reason of section 3402. United States v. Malinowski, 472 F.2d 850, 853 n.3 (3d Cir.), *cert. denied,* 411 U.S. 970 (1973). *See* INT. REV. CODE of 1954, § 152.

5. 472 F.2d at 852. The letter stated in part:

> Please note the sharp increase in exemptions on my W-4 tax form. I have entered into a relationship of economic and social dependency with a group of 15 persons. One of our aims is to exercise greater control over the use of our taxes, especially that large portion that is used for war-making. I will notify the Internal Revenue Service of this change in my status . . . .

Id. The employer notified the Internal Revenue Service and was instructed that all withholdings had to be made on the basis of the information furnished on the Form W-4 submitted by Malinowski. Brief for Appellant at 5.

6. 472 F.2d at 853. Defendant specifically requested jury instructions which provided that:

> In the criminal law, an act is wilfull if it is done with a bad purpose, without justifiable excuse, and without a ground for believing that the act was lawful.

Id.

which the law forbids,"[7] and entered judgment on the guilty verdict returned by the jury.[8] On appeal, the defendant contended that the district court had improperly interpreted the willfullness element of section 7205, and argued, alternatively, that his conduct constituted activity protected by the first amendment.[9] The Third Circuit affirmed, *holding* that the act could be found to have been done willfully within the meaning of section 7205 if done voluntarily and with the specific intent to do something forbidden by the law, even if it was not done with a bad or evil purpose. The court further held that the defendant's conduct did not fall within the first amendment's protection of symbolic speech. *United States v. Malinowski,* 472 F.2d 850 (3d Cir.), *cert. denied,* 411 U.S. 970 (1973).

While prior to *Malinowski* the term "willfully" had not been construed in the context of section 7205,[10] it had been interpreted in prosecutions under other penal sections of the Code, including section 7203, the provisions of which are analogous to those of section 7205.[11] In *United States v. Murdock,*[12] the Supreme Court held that bad faith or evil intent was an element of a willful failure to supply information to the Internal Revenue Service, as proscribed by the predecessor of section 7203.[13] The *Murdock* Court found that the petitioner's good faith belief that adherence to the letter of the Code would have threatened his right against self-incrimination could have negated the existence of the requisite willfullness, despite the fact that he had acted intentionally and without legal justification.[14]

The Court again discussed the meaning of willfully, as used in the predecessor of section 7203, in *Spies v. United States,*[15] wherein it held that two misdemeanors — willful failure to file a return and willfull failure to pay tax — taken together did not constitute the felony of willfull attempt to evade or defeat a tax.[16] In reaching this decision, the *Spies* Court noted, in dicta, that the willfullness element of tax crimes was susceptible to varying interpretations and that its meaning was often influenced by the context in which it was used.[17] While stating that

7. 347 F. Supp. at 353.

8. *Id.* at 351. Defendant's motions for a new trial and judgment of acquittal were denied by the district court.

9. 472 F.2d at 853.

10. *See* Brief for Appellant at 9; Brief for Appellee at 5.

11. Section 7203 is a tax misdemeanor statute, as is section 7205, which provides for a fine and/or imprisonment for the *willfull* failure to pay tax, file a return, keep records, or furnish required information. INT. REV. CODE of 1954, § 7203 (emphasis added).

Both the appellant and the appellee in this case relied upon section 7203 cases in their briefs as the principal source of precedent from which the proper meaning of the term "willfull" in a section 7205 context could be established. *See* Brief for Appellant at 9; Brief for Appellee at 5, 6.

12. 290 U.S. 389 (1933).

13. *Id.* at 394–95

14. *Id.* at 396–98.

15. 317 U.S. 492 (1942).

16. *Id.* at 497.

17. *Id.*

"[m]ere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfullness,"[18] the Court further noted that it would expect willfullness in the context of nonpayment of a tax to include some component of "evil motive and want of justification."[19]

Considerable confusion resulted in the circuit courts over the proper interpretation of these two Supreme Court opinions, and hence, over the proper construction of the term "willfully" in section 7203.[20] The Third Circuit's position has been that the "existence of a specific intent — an evil motive — at the time the crime charged was committed"[21] is required for conviction under section 7203;[22] while other circuits, relying on dicta from *Spies,* have held that, although bad purpose is required for conviction of a tax felony, something less is required for conviction of a tax misdemeanor.[23]

In addressing this troublesome question of interpretation, the *Malinowski* court initially examined those prior Third Circuit decisions which the defendant contended supported his position that proof of evil or bad purpose is a requisite element of willfullness. The court read the earlier decision in *United States v. Martell*[24] as holding that an instruction concerning willfullness in a tax evasion case which included the phrase "bad purpose" was confusing and gave the jury "the impression that one could be convicted for income tax evasion through inadvertent error," and, therefore, was erroneous.[25] The *Malinowski* court noted that willfullness, as defined by the *Martell* court, required only awareness by the taxpayer of the existence of an obligation in conjunction with a wrongful intent to conceal that tax obligation, and concluded that the jury charge in the instant case complied with that suggested in *Martell.*[26]

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18. *Id.* at 497–98.

19. *Id.* at 498.

20. *See* Abdul v. United States, 254 F.2d 292, 294 (9th Cir. 1958), which held that something less than bad purpose is required for a misdemeanor, basing its decision on *Spies* dicta. *But see* Haner v. United States, 315 F.2d 792, 794 (5th Cir. 1963), which specifically disapproved of the *Abdul* decision. *See generally* Orlando, *Use of Inconsistent Standards of "Willfullness" Under Section 7203 Creates Confusion,* 37 J. TAX 214 (1972).

21. United States v. Palermo, 259 F.2d 872, 882 (3d Cir. 1958).

22. *Id.* This position was emphatically reaffirmed in United States v. Vitiello, 363 F.2d 240 (3d Cir. 1966).

23. *See, e.g.,* Abdul v. United States, 254 F.2d 292 (9th Cir. 1958).

24. 199 F.2d 670 (3d Cir. 1952), *cert. denied,* 345 U.S. 917 (1953).

25. 472 F.2d at 854, *citing* 199 F.2d 670. The *Malinowski* court did not elaborate upon the situation presented in *Martell,* however, the specific context in which that decision was made should be noted. In *Martell,* the trial court had instructed the jury that, while no willfullness was required for conviction in a tax case, the Government had to prove beyond a reasonable doubt that defendant, with *bad purpose* attempted to evade his tax. 199 F.2d at 671. The Third Circuit held that these instructions were confusing to the jury and that willfullness was an essential element of the tax crime involved. *Id.* It was thus the use of the phrase "bad purpose" in the presence of a charge which excluded any requirement of willfullness that the *Martell* court had found to be confusing. The court in *Martell* did not address the issue of the necessity or propriety of a charge regarding "bad purpose" in other contexts.

26. 472 F.2d at 853–54, *citing* 199 F.2d 670.

Reviewing the other cases cited by defendant,[27] the court concluded that the phrase "bad purpose" had been interjected into the concept of willfullness in order to distinguish deliberate acts from acts of negligence or mistake, and to differentiate situations involving bona fide misconceptions about the requirements of a statute from those is which the conduct had been attended by knowledge of a legal obligation and a purpose to prevent the Government from receiving that which was lawfully required by the statute.[28] The *Malinowski* court concluded that the cases did not support the defendant's position because the intent-negligence dichotomy with which they dealt was not relevant in the instant situation, and because none of them had ever considered bad purpose to be an element of the offense separate and distinct from the specific intent to do something which law forbids.[29] The court expressly acquiesced in the district court's comment that " 'bad purpose' and 'evil purpose' are not 'magic words' which must be included in a jury charge on willfullness."[30]

In addressing defendant's contention that his good faith motive for violating the statute was a valid defense for his deliberate and intentional conduct, the court noted that this same argument, raised in the context of Vietnam War protest, had been rejected by the First and Fourth Circuits.[31] The court also drew a comparison between the case before it and the situation presented in *Crowe v. Commissioner of Internal Revenue,*[32] wherein the Eighth Circuit had taken the position that a taxpayer could not be allowed to "evade payment of his legal tax obligations on the basis of his dissatisfaction with the distribution of revenue."[33] Consideration of these cases led the *Malinowski* court to conclude that motive was not relevant to the issue of whether or not the defendant had violated the statute, and that the trial court had been correct in stating

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27. Those cases presented by defendant as supportive of his position included: United States v. Palermo, 259 F.2d 872 (3d Cir. 1958); United States v. Cirillo, 251 F.2d 638 (3d Cir. 1957), *cert. denied,* 356 U.S. 949 (1958); United States v. Litman, 246 F.2d 206 (3d Cir.), *cert. denied,* 355 U.S. 869 (1957).

28. 472 F.2d at 854–55.

29. *Id.* at 855.

30. *Id.*

31. *Id.* at 855–56, *citing* United States v. Boardman, 419 F.2d 110 (1st Cir. 1969), *cert. denied,* 397 U.S. 991 (1970); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied,* 397 U.S. 910 (1970).

In *Boardman,* the defendant, a conscientious objector, failed to report for civilian work in compliance with a selective service order, basing his action on his belief in the immorality and illegality of the Government's conduct in relation to the war. The First Circuit, defining the requisite mental element for conviction to be an awareness of legal obligation and a deliberate purpose not to comply, held that such claims did not preclude a criminal conviction. 419 F.2d at 114. *See* United States v. Rabb, 394 F.2d 230, 233 (3d Cir. 1968).

In *Moylan,* a draft record burning case, the Fourth Circuit concluded that the "statutory requirement of willfullness is satisfied if the accused acted intentionally, with knowledge that he was breaching the statute." 417 F.2d at 1004.

32. 396 F.2d 766 (8th Cir. 1968).

33. *Id.* at 767. The defendant in *Crowe* had argued that the Government did not have the right to compel contribution to the welfare of people who make no effort to support themselves." *Id.*

in its charge to the jury that defendant's motives could not be an acceptable defense.[34]

Defendant had further argued that his first amendment right of symbolic protest negated the existence of the essential element of willfullness.[35] He analogized his position to that of the defendant in *Murdock*, wherein the Court had found a possible negation of the requisite willfullness in the defendant's good faith belief that strict compliance with the Code would have threatened his constitutional right against self-incrimination.[36] The *Malinowski* court distinguished *Murdock*, noting that "[t]he crux of *Murdock* [was] not that the taxpayer was pointing to a provision in the Constitution that allegedly protected his conduct, but that he acted under a reasonable misapprehension of his obligation" under the Code.[37] As Malinowski had had no such misapprehension, the court rejected his first amendment argument, denominating it to be a restatement in constitutional terms of his "good faith" defense which had been rejected.[38]

The court's construction of willfully in section 7205, as denoting an act done voluntarily, intentionally, and with specific intent to do that which the law forbids, obviously facilitated resolution of the issues presented by the defendant's "good faith" and first amendment defenses. If that element of the offense requires only that the defendant have intended to do that which he did, then the reason why he did so — his

34. 472 F.2d at 856. Defendant had further argued that willfullness could be negated by proof that he had acted with a reasonable belief in the legality of his conduct. He pointed to Principles II, IV, and VII of the Nuremberg Charter, which provide that compliance with internal law or with the order of one's government does not relieve an individual from responsibility under international law where the conduct in question constitutes "[c]omplicity in the commission of a crime against . . . humanity . . . ." *Id.* at 856 n.7. The *Malinowski* court did not consider the defense applicable here, noting defendant's "remoteness" from and "utter lack of direct involvement" in the conduct he claimed to be wrong. *Id.*

35. *Id.* at 857. *See* Brief for Appellant at 16–20.

36. 472 F.2d at 857. *See* text accompanying notes 12–14 *supra.*

37. 472 F.2d at 857. The court noted, as another distinction between the two cases, that "Murdock was beset by the tax processes; whereas Malinowski deliberately engaged the tax processes as well as the criminal machinery." *Id. See* Brief for Appellee at 12.

38. 472 F.2d at 857. The court found support in United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied,* 397 U.S. 910 (1970), wherein the Fourth Circuit noted that to "encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos." 472 F.2d at 858 n.9, *quoting* 417 F.2d at 1009.

Defendant had raised several other arguments, all of which were rejected by the court. The first was that, since his employer and the Internal Revenue Service knew that the exemptions were not genuine but rather mere symbolic speech, they could not be considered false or fraudulent under section 7205. The court noted, however, that the expressed object of the action was to diminish his taxpaying obligations and thus the funds available for Government prosecution of the war. *Id.* at 858–59. The defendant further argued that reputation testimony should have been admitted at the trial. The court dismissed this contention as there was no controversy concerning the operative facts and the relevance of such testimony would therefore be questionable at best. *Id.* at 859–60. Defendant's last contention was that he had been a victim of selective prosecutorial discrimination. The court could find no abuse of discretion in the lower court's finding that defendant had failed to sustain his burden of proof in this matter. *Id.* at 860.

motive — is, as the *Malinowski* court noted, irrelevant.[39] The court determined that the phrase "bad purpose," employed by a number of courts in section 7203 cases, was "occasionally pertinent language" rather than "black letter law."[40] Apparently the *Malinowski* court regarded the "bad purpose" language of those cases as referring to the purpose or intent to do something forbidden by the statute. It is submitted, however, that bad purpose connotes something more than mere intent and that the court improperly construed willfully by refusing to include "bad purpose" in its definition.[41]

The added requirement of bad purpose would have been significant in light of the defendant's "good faith" argument. The thrust of that defense was the defendant's reasonable belief in the legality of his actions, which was based on his conviction that the Nuremberg Charter Principles mandated that he be subject to prosecution under international law if he did not withdraw his support from the war effort in Vietnam, negated the element of willfullness.[42] A definition of willfullness which included the phrase "bad purpose" would have allowed the defendant to argue that he was subject to two different laws, only one of which could be complied with in the same action, and that noncompliance with one could not be said to have been with bad purpose since he had acted in compliance with the other. However, since the court found that defendant's motives were not relevant or an acceptable legal defense to a violation of section 7205, the court was able to dispose summarily of defendant's Nuremberg defense as being inapplicable.[43] The court specifically noted that it did not consider or decide the validity of such a defense in another context.[44] However, it might be suggested that the court, in refusing to require the existence of bad purpose for a violation of section 7205, sought to avoid recognizing a viable utilization of the Nuremberg defense which might then be urged in subsequent actions.

By defining willfullness as it did, the court sought to avoid the possibility of the jury confusing "belief in a good cause although acting illegality" with "belief that one is acting lawfully." It should be noted that the defendant's suggested jury charge offered the court an alternative definition of willfull which would arguably have avoided that problem while also including bad purpose as a requirement. The charge included within its definition of willfull that the act be committed "without a ground for believing that the act was lawful."[45] Such a restriction, if read strictly, would have limited the "bad purpose" ingredient. It would appear that had the defendant's requested charge been used, a jury could

39. 472 F.2d at 856.
40. *Id.* at 854 n.4.
41. *Id.* at 855.
42. *Id.* at 856 n.7.
43. *Id.*
44. *Id.*
45. *Id.* at 853.

have found him guilty on the grounds that he had no reasonable basis for believing that his action was lawful.

The future application of the *Malinowski* decision may be limited in light of the subsequent Supreme Court decision in *United States v. Bishop*.[46] The *Bishop* Court held specifically that the tax offenses set forth in sections 7206[47] and 7207[48] require the same "bad purpose" standard of willfullness, and found the same to be true of the other offenses set forth in sections 7201–7205 inclusive.[49] The Court concluded that:

> Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in *Murdock* . . . .[50]

However, it should be noted that the Court, prior to reaching that conclusion, also stated that "the word 'willfully' generally connotes a voluntary, intentional violation of a known legal duty."[51]

While it is possible to distinguish *Bishop* on the grounds that it was a pure tax fraud case, and while *Bishop* does contain some apparently contradictory language, it would appear that much of the broad language of that decision does detract from the *Malinowski* opinion. It is significant, however, that the Third Circuit in *United States v. Braun*,[52] considered *Bishop* and its own decision in *Malinowski* in affirming a conviction under section 7205 in a situation which was factually identical to that in the instant case.[53] Apparently the Third Circuit regards the requirement of a specific intent to do that which the law forbids as comporting with the "bad purpose" requirement specified in *Murdock*, and reaffirmed in *Bishop*, and will continue to apply the *Malinowski* standard, at least in cases where the underlying presence of a volatile issue, such as legality of the Vietnam War, might increase the confusion potentially created by use of the phrase "bad purpose." The *Malinowski* decision not only points out but increases the semantic confusion surrounding the proper definition of willfully — a confusion which may be alleviated if

46. 412 U.S. 346 (1973).

47. This section provides in pertinent part that:

> Any person who . . . [w]illfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . . .

INT. REV. CODE of 1954, § 7206.

48. Section 7207 is a misdemeanor statute which states that:

> Any person who willfully delivers or discloses to the Secretary or his delegates any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

INT. REV. CODE of 1954, § 7207.

49. 93 S. Ct. at 359–61.

50. *Id.* at 361. *See* Bender, *Supreme Court's Bishop Decision: A Useful Clarification of "Willfull" in the Fraud Area*, 39 J. TAX 188 (1973).

51. 93 S. Ct. at 360.

52. 485 F.2d 682 (3d Cir. 1973).

53. Petitioner's Brief for Rehearing En Banc at 7, United States v. Braun, 485 F.2d 682 (3d Cir. 1973).

legislation now pending in Congress, which would eliminate the phrase "willfully" in sections 7201–7207 of the Code, is adopted.[54]

54. S. 1400, 93d Cong., 1st Sess. §§ 1401–02 (1973); H.R. 6046, 93d Cong., 1st Sess. §§ 1401–02 (1973). The two bills would make the standard of culpability for the offenses of disregarding a tax obligation or falsely claiming an exemption "knowingly." Knowingly is defined as:

> A person acts knowingly . . . with respect to his conduct when he is aware of the nature of his conduct. A person acts knowingly . . . with respect to circumstances surrounding his conduct when he is aware or believes that circumstances exist, or is aware of a high probability of their existence, or intentionally avoids knowledge as to their existence. A person acts knowingly . . . with respect to a result of his conduct when he is aware or believes that his conduct is substantially certain to cause the result.

S. 1400, 93d Cong., 1st Sess. § 302(b) (1973); H.R. 6046, 93d Cong., 1st Sess. § 302(b) (1973).

V. J. K.