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LABOR LAW

INTRODUCTION

Two hundred and eighty-four cases involving labor law issues were filed in the court of appeals during fiscal year 1975.[1] This figure represents a 21 percent increase in such cases over fiscal year 1974.[2] This increase is accounted for in part by approximately fifty labor law cases decided by the Ninth Circuit during the survey period. Many of these cases were, of course, concerned with procedural points (such as failure to exhaust administrative remedies) or a specific factual situation (such as construction of a particular clause in a collective bargaining agreement). There were, however, some cases decided during the survey period in which the court broke new ground or departed from its previous position on certain legal issues. There were other cases which, although they did not represent a change in the law, contained interesting facts or language in the court's opinion which would be of interest to the general practitioner. Each of these types of cases are included in this article.

A significant number of the cases reaching the Ninth Circuit were decided under the National Labor Relations Act (NLRA).[3] Some of the issues involved in these cases include the discretion of the NLRB in awarding back pay and reinstatement to an employee who has been discharged in violation of the NLRA,[4] the requirement of union membership in a "union shop" situation and the prerequisites that a union may place on such memberships,[5] and the union's duty of fair representation under the NLRA.[6] The construction of "hot cargo" clauses in collective bargaining agreements between unions and employers in the construction industry was also considered by the court during the

1. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR XI-17 (Table 4).

2. *Id.*

3. The NLRA is codified at 29 U.S.C. §§ 141-87, 401-531 (1970).

4. *See* NLRB v. Apico Inns of Cal., 512 F.2d 1171 (9th Cir. Mar., 1975) (per Trask, J.).

5. *See* NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. Apr., 1975) (per Wallace, J.); NLRB v. Kaiser Steel Corp., 506 F.2d 1057 (9th Cir. Nov., 1974) (per Carter, J.).

6. *See* Kling v. NLRB, 503 F.2d 1044 (9th Cir. Jan., 1975) (per Burns, D.J.).

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survey period.[7] One panel dealt with whether federal courts have jurisdiction to grant specific performance and/or damages for breach of no raiding agreements made between unions.[8] In addition, the right of a union member to bring a private tort action against a union official for union election misconduct was considered and upheld by the court this past term.[9]

The Railway Labor Act (RLA)[10] and the Fair Labor Standards Act (FLSA)[11] were also sources of litigation during the survey period. The requirement for an explicit compensation agreement between an employer and his employees for work weeks in excess of forty hours was stated emphatically by the court in two cases which arose under the FLSA.[12] A union's duty of fair representation under the RLA in light of the Supreme Court case of *Vaca v. Sipes*[13] was also explored by the court.[14]

The Occupational Safety and Health Act of 1970 (OSHA)[15] was involved in at least two cases heard by the Ninth Circuit during the survey period. These cases involved the burden of proof for the Secretary of Labor in proceedings under the Act.[16] In addition, one decision[17] concerned the right of an employee to maintain a private action against his or her employer for unlawful discharge under the Consumer Credit Protection Act.[18]

Although claims arising under Title VII of the Civil Rights Act of 1964[19] do involve issues relevant to labor law, last term's Title

7. *See* Associated Gen. Contractors of Cal., Inc. v. NLRB, 514 F.2d 433 (9th Cir. Mar., 1975) (per Solomon, D.J.); ACCO Constr. Equip., Inc. v. NLRB, 511 F.2d 848 (9th Cir. Jan., 1975) (per Choy, J.).

8. *See* Local No. 1547, IBEW v. Local No. 959, Teamsters, 507 F.2d 872 (9th Cir. Nov., 1974) (per Goodwin, J.).

9. *See* Ross v. IBEW, 513 F.2d 840 (9th Cir. Mar., 1975) (per Merrill, J.).

10. The RLA is codified at 45 U.S.C. §§ 151-63 (1970).

11. The FLSA is codified at 29 U.S.C. §§ 201-19 (1970).

12. *See* Brennan v. Elmer's Disposal Serv., Inc., 510 F.2d 84 (9th Cir. Jan., 1975) (per Lucas, D.J.); Brennan v. Keyser, 507 F.2d 472 (9th Cir. Nov., 1974) (per Choy, J.).

13. 386 U.S. 171 (1967).

14. *See* Duggan v. International Ass'n of Machinists, 510 F.2d 1086 (9th Cir. Jan., 1975) (per Goodwin, J.).

15. The OSHA is codified at 29 U.S.C. §§ 651 *et seq.* (1970).

16. *See* California Stevedore & Ballast Co. v. Occupational Safety & Health Review Comm'n, 517 F.2d 986 (9th Cir. May, 1975) (per curiam); Brennan v. Occupational Safety & Health Review Comm'n, 511 F.2d 1139 (9th Cir. Feb., 1975) (per Markey, J.).

17. *See* Stewart v. Travelers Corp., 503 F.2d 108 (9th Cir. Sept., 1974) (per King, D.J.).

18. The Consumer Credit Protection Act is codified at 15 U.S.C. §§ 1601-81 (1970).

19. Title VII is codified at 42 U.S.C. § 2000e-2 (Supp. III, 1973). For a helpful recent discussion of Title VII see Casey & Slaybod, *Procedural Aspects of Title VII Litigation: Pitfalls for the Unwary Attorney*, 7 U. TOLEDO L. REV. 87 (1975).

VII cases are discussed in Part Two of the article on constitutional law. Title VII, which forbids discrimination in employment practices, is frequently invoked in conjunction with constitutional claims.

I. NATIONAL LABOR RELATIONS ACTS

The original National Labor Relations Act (NLRA)[20] was enacted on July 5, 1935, for the purpose of correcting the marked disparity in bargaining positions which then existed between labor and management.[21] The Act was amended by the Labor Management Relations Act of 1947 (Taft-Hartley Act) (LMRA),[22] and by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).[23]

Most of the cases which arose under the NLRA during the survey period involved alleged violations of section 8 of the Act.[24] This section defines activities by either employers or labor unions that are deemed to be unfair labor practices and thus subject to the proscriptions of the Act. Actions under the LMRA were generally brought under section 301;[25] this section confers federal jurisdiction on suits for violations of contracts between an employer and a labor union or between labor unions without requiring diversity or a certain amount in controversy. Section 302 of the Act,[26] concerned with unlawful transfers of funds or other property between employers and unions, union officers, or other employee representatives, was also a source of litigation. Section 401 of the LMRDA[27] contains provisions for the terms of office and election procedures for union officials. Section 402 of the Act[28] provides that the Secretary of Labor shall enforce the provisions of section 401; both of these sections were a source of litigation this past term.

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20. The National Labor Relations Act is codified at 29 U.S.C. §§ 151-68 (1970).

21. *Id.* § 151. For holdings by the Supreme Court as to the purpose and scope of the Act see Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936).

22. The LMRA is codified at 29 U.S.C. §§ 141 *et seq.* (1970). The LMRA includes the amended NLRA as subchapter II. For a discussion of the history and scope of the LMRA see 48 AM. JUR. 2d *Labor* §§ 391 *et seq.* (1970).

23. The LMRDA is codified at 29 U.S.C. §§ 153, 158-60, 164, 186, 187, 401 *et seq.* (1970).

24. 29 U.S.C. § 158 (1970).

25. *Id.* § 185.

26. *Id.* § 186.

27. *Id.* § 481.

28. *Id.* § 482.

A. Employee-Employer Relations

Section 8(a) of the NLRA[29] defines those activities of an employer which are considered to be unfair labor practices and thus subject to remedial action by the National Labor Relations Board (NLRB) as provided in section 10 of the Act.[30] Two cases, one involving alleged employer coercion of employees before and after a representation election,[31] and one concerning the right of an illegally discharged employee to reinstatement and back pay,[32] are worthy of note.

In *Hertzka & Knowles v. NLRB*[33] the NLRB had determined that certain statements made by management representatives to employees on the eve of a union certification election[34] were in violation of section 8(a)(1) of the NLRA,[35] which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title."[36] In considering the alleged violation, the court first pointed out that section 8(a)(1) is limited by section 8(c),[37] which protects an employer's first amendment rights by permitting him or her to speak out on the issue of union representation "if such expression contains no threat of reprisal or force or promise of benefit."[38] The court looked to the Supreme Court case of *NLRB*

29. *Id.* § 158(a).

30. *Id.* § 160. Section 10(a), *id.* § 160(a), provides in part as follows: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce."

31. Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. Sept., 1974) (per Choy, J.).

32. NLRB v. Apico Inns of Cal., Inc., 512 F.2d 1171 (9th Cir. Mar., 1975) (per Trask, J.).

33. 503 F.2d 625 (9th Cir. Sept., 1974) (per Choy, J.), *cert. denied*, 44 U.S.L.W. 3205 (U.S. Oct. 7, 1975).

34. Those statements attributed to the management representatives consisted of the following:

> a. In courting a union, employees were "playing with a loaded stick of dynamite." 503 F.2d at 628.
> b. ". . . we don't have to put up with this; we can close down." *Id.*
> c. A company official made the statement that employment at the company was transitory, and union members would have a tough time finding other work. The same official also stated that if the office turned union, it would be more difficult to find business, implying that fewer employees would be needed. *Id.*

35. 29 U.S.C. § 158(a)(1) (1970).

36. *Id.* § 157 (1970). Section 7 gives employees the right to organize and bargain collectively and to join the labor union of their choice or to refrain from doing so.

37. *Id.* § 158(c).

38. *Id.*

v. Gissel Packing Co.[39] to provide the standard for distinguishing between protected and unprotected speech under these two sections. *Gissel* permits an employer to make predictions as to the effect of unionization; however, the predictions must be based on objective fact and must convey an employer's good faith belief as to the probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.[40]

Applying the *Gissel* standard, the court found the statements in question not to be protected speech.[41] Furthermore, the fact that all employees did not hear the statements was unimportant; employee free choice might be impaired if *any* heard the statements.[42] Finally, the fact that some of the statements were not intended to be heard by the employees did not matter, in view of their coercive effect on the employees who did hear them.[43]

After the election, in which the majority of employees voted against unionization, the employer instituted a collective bargaining system comprised of five committees, with one management representative and five employees on each committee. The NLRB found this system to be in violation of section 8(a)(2),[44] which requires that an employer not dominate or interfere with the formation or administration of any labor organization. In reversing the Board, the court stated that a distinction must be drawn between employer cooperation, which is encouraged by the NLRA, and employer domination of labor groups, which the Act condemns.[45] Before a violation of section 8(a)(2) can be found, it must be shown that the employees' free choice, either in type of labor organization or in the assertion of demands, is stifled by the degree of employer involvement at issue. That degree of involvement, said the court, was not shown in this case.[46]

39. 395 U.S. 575 (1969).

40. *Id.* at 618.

41. 503 F.2d at 628.

42. *Id.* The court cited NLRB v. Clapper's Mfg. Co., 458 F.2d 414 (3d Cir. 1973), in support of this position.

43. 503 F.2d at 628. The court cited NLRB v. Kaiser Agricultural Chems., 473 F.2d 374 (5th Cir. 1973), in support of this statement. For a case involving a different type of employee coercion see NLRB v. Forest City-Tecon Pac., 522 F.2d 1107 (9th Cir. Sept., 1975) (per curiam). There, the court held that an employer's premature recognition of a union and subsequent signing of a collective bargaining agreement containing a union security clause (see note 64 *infra* and accompanying text for a discussion of union security agreements), was coercive as to subsequently hired employees.

44. 29 U.S.C. § 158(a)(2) (1970).

45. 503 F.2d at 630.

46. *Id. See* NLRB v. Wemyss, 212 F.2d 465 (9th Cir. 1954) (question of whether inde-

Section 8(a)(3) of the NLRA[47] makes it an unfair labor practice for an employer to discharge an employee for engaging in protected union activities. Section 10(c) of the Act[48] empowers the NLRB to order reinstatement and back pay for employees discharged in violation of section 8. In *NLRB v. Apico Inns of California, Inc.*,[49] the court held that the remedies of reinstatement and back pay may be withheld, even in the face of a section 8(a)(3) violation, if the policies underlying the NLRA are not furthered by granting such relief. In *Apico Inns*, the administrative judge had found that the employer, an innkeeper, discharged her employee, a bartender, because the employee had filed a grievance with his union. Such action on the part of the employer was a violation of section 8(a)(3). However, in issuing its order for the employer to cease such activity, the judge refused to grant the employee reinstatement and back pay, stating: "He was profane, lewd, disrespectful, uncooperative and disruptive . . . . It would not suit the purpose of the act to direct his reinstatement."[50] The NLRB amended the order to provide for reinstatement and back pay. It was the opinion of the Board that the employer, by failing to discharge the employee until after he complained to the union, impliedly condoned his prior misconduct, and thus her sole reason for discharging the employee was his complaint to the union.[51]

The court found that the Board had abused its discretion in amending the order. In so holding, the court relied on decisions

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pendent union is employer-dominated depends on the states of mind of the employees, and the fact that employer gave preferential treatment to one union to exclusion of other union during pre-election organizational activities was insufficient to establish employer domination).

47. 29 U.S.C. § 158(a)(3) (1970).

48. *Id.* § 160(c).

49. 512 F.2d 1171 (9th Cir. Mar., 1975) (per Trask, J.).

50. *Id.* at 1174.

51. Apico Inns of Cal., Inc., 212 N.L.R.B. No. 46, 86 L.R.R.M. 1520 (1974). An employer condones an employee's action which would otherwise merit discharge when he (1) forgives the action and (2) places the offending employee in the position he/she would have occupied but for the offense. 2 J. JENKINS, LABOR LAW § 7.54 (1974). For a discussion of the doctrine of condonation as applied to employee misconduct during a strike see NLRB v. Marshall Car Whell & Foundry Co., Inc., 218 F.2d 409 (5th Cir. 1955). The NLRB has been criticized for failing to understand and correctly apply this doctrine. *See* 2 J. JENKINS, *supra*, §§ 7.54-.59.

from the Fifth,[52] Seventh,[53] and Tenth[54] Circuits[55] to support its finding that no reinstatement should be granted if the policies of the NLRA are not furthered by doing so.[56] Since the evidence "clearly" showed that the employee was unfit for his job, and considering the small size of the business and the need for cooperation among the employees, the purposes of the Act would not be served by ordering reinstatement and back pay in this instance.[57] Under this approach, the focal point is not the employer's attitude toward the employee's pre-discharge misconduct, but whether this misconduct was such as to make the employee's reinstatement contrary to the purposes of the Act.[58]

B. Employee-Union Relations

Section 8(b) of the NLRA[59] defines those activities by labor organizations which are deemed to be unfair labor practices. The cases in this area fell into two broad categories—the denial or

52. NLRB v. Big Three Indus. Gas & Equip. Co., 405 F.2d 1140 (5th Cir. 1969); NLRB v. R.C. Can Co., 340 F.2d 433 (5th Cir. 1965).

53. NLRB v. National Furniture Mfg. Co., 315 F.2d 280 (7th Cir. 1967).

54. NLRB v. Breitling, 378 F.2d 663 (10th Cir. 1967).

55. An Eighth Circuit decision also supports the court's position. *See* Iowa Beef Packers, Inc. v. NLRB, 331 F.2d 176 (8th Cir. 1964).

56. For a statement of the policies to be furthered by the Act see 29 U.S.C. § 151 (1970).

57. 512 F.2d at 1175-76. Although the court did not discuss the matter in its opinion, it appears that the motive of the employee in filing the grievance was considered. The court apparently felt that the filing of the grievance was part of a campaign by the employee to harass and undermine his supervisor. *See id.* at 1173-75.

58. *See* 1 Lab. Rel. Rep., Analysis (vol. 88), at 60 (April 14, 1975). *See also* NLRB v. Magnusen, 523 F.2d 643 (9th Cir. Sept., 1975) (per curiam). *But see* NLRB v. Princeton Inn Co., 424 F.2d 264 (3d Cir. 1970) (holding that it is a violation of § 8(a)(3) for an employer to discharge an employee for union activities even if there were other valid reasons for the discharge); NLRB v. Challenge-Cook Bros., 374 F.2d 147 (6th Cir. 1967). Compare the result in *Apico Inns* with the court's statement in Newspaper & Periodical Drivers & Helpers Union, Local No. 921 v. NLRB, 509 F.2d 99 (9th Cir. Dec., 1974) (per curiam), decided three months earlier. In *Newspaper & Periodical Drivers*, the NLRB had found that the company and the union had acted illegally in terminating the independent contractor status of the company's newspaper distributors and requiring them to work as employees (and members of the union). The board, however, refused to award the distributors back pay and compensatory damages. In upholding the board's decision, the court stated: "When, and to what extent, damages may serve the policy of the National Labor Relations Act in a given case, is a complex problem for the board to decide in the light of its administrative experience and knowledge." *Id.* at 100. It appears that the court will more readily defer to the board's findings when the issue involves only monetary damages rather than reinstatement of an employee.

59. 29 U.S.C. § 158(b) (1970).

revocation of membership by a union,[60] and activities by a union affecting the seniority rights of one or more of its members.[61]

Denial or Revocation of Union Membership

Sections 8(a)(3)[62] and 8(b)(2)[63] of the NLRA prohibit employers and unions from engaging in job discrimination which would serve "to encourage or discourage membership in any labor organization." There is, however, an exception to this prohibition in section 8 which provides for "union security agreements" which make membership in a union a condition for continued employment—the so-called "union shop" agreement.[64] One limitation to this exception prohibits discharge of an employee (and prohibits a union from seeking such discharge) for nonmembership in a union where such membership was denied or withdrawn for reasons other than failure to tender "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."[65]

In *NLRB v. Kaiser Steel Corp.*,[66] the court held that a second initiation fee assessed against a prior union member who attempted to transfer back into the union was not "periodic dues or initiation fees uniformly required," and it was therefore an unfair labor practice to demand payment of such fee as a condition of continued employment. In *Kaiser Steel*, an employee of a company which had five unions within its bargaining unit transferred from the Laborer's union to the Teamster's union as a result of a job promotion. Later, fearing a lay-off in his new job, he attempted to

60. NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. Apr., 1975) (per Wallace, J.); NLRB v. Kaiser Steel Corp., 506 F.2d 1057 (9th Cir. Nov., 1974) (per Carter, J.).

61. Kling v. NLRB, 503 F.2d 1044 (9th Cir. Jan., 1975) (per Burns, D.J.).

62. 29 U.S.C. § 158(a)(3) (1970). Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage a membership in any labor organization . . . ."

63. 29 U.S.C. § 158(b)(2) (1970). Section 8(b)(2) makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee . . . with respect to when membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

64. 29 U.S.C. § 158(a)(3) (1970). For a discussion of union security agreements under the LMRA and the Railway Labor Act (RLA) see Haggard, *A Clarification of the Types of Union Security Agreements Affirmatively Permitted by Federal Statues*, 5 RUTGERS-CAMDEN L.J. 418 (1974). For a discussion of union security agreements and their relationship with right-to-work laws see Essinger, *The Right-To-Work Imbroglio*, 51 N. DAK. L. REV. 571 (1975).

65. 29 U.S.C. § 158(a)(3) (1970).

66. 506 F.2d 1057 (9th Cir. Nov., 1974) (per Carter, J.).

transfer back to the Laborer's union,[67] but was assessed a second initiation fee as a condition for readmittance to the union. The employee refused to pay the fee and was subsequently terminated. The NLRB found that second initiation fee to be in violation of sections 8(b)(1)(A)[68] and 8(b)(2). In an opinion by Judge Carter granting enforcement of the NLRB's order against the company and the union for reinstatement and back pay, the court differentiated six situations where the assessment of additional fees against union members may arise.[69] Although in most of these situations the fees were permissible, the second initiation fee in the present case was obviously designed to discourage intra-unit transfers, and therefore too closely resembled the "improper penalties" disapproved by the Ninth Circuit in an earlier case.[70]

The degree of involvement in union affairs required to constitute "membership" in a union is of primary importance in the

67. Transfer between unions was permitted by the collective bargaining agreement then in effect.

68. 29 U.S.C. § 158(b)(1)(A) (1970). Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 [dealing with the right of employees to organize] . . . ."

69. The six situations discussed by the court were as follows:

> (1) A single lump sum initiation fee assessed against employees upon entering the bargaining unit. Since this is a fee "uniformly required," it is permissible.
>
> (2) Fees for transfers between unions, where the unions are not part of the same bargaining unit. [The court did not discuss the appropriateness of such fees, but simply listed them as "another category"].
>
> (3) Upon transfer into a higher paying classification an employee may be required to pay the difference between the initiation fee in his old classification and the initiation fee for the new classification. *See* Aluminum Workers Trade Council 185 N.L.R.B. 69, 70 (1970).
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> (4) Initiation fees which differentiate between recently discharged veterans and non-veterans are permissible. Food Mach. & Chem. Corp., 99 N.L.R.B. 1430 (1952).
>
> (5) A fifty cent per month addition to dues for non-attendance at union meetings is impermissible. NLRB v. Electric Auto-Lite Co., 196 F.2d 500 (6th Cir. 1952).
>
> (6) Reasonable reinstatement fees may be charged to an employee who has left the union and now seeks to return. NLRB v. Fishermen & Allied Workers Union, Local 33, 448 F.2d 255 (9th Cir. 1971).

506 F.2d at 1060.

70. NLRB v. Fishermen & Allied Workers Union, 448 F.2d 255 (9th Cir. 1971). In *Fishermen*, the court held that excessive "reinstatement" fees were improper when the excessive portion of the fee "represents either the amount of back dues not properly owing or a penalty for not paying such dues." *Id.* at 257.

"union shop" type of collective bargaining agreement discussed above.[71] In *NLRB v. Hershey Foods Corp.*,[72] the court applied the narrow construction of a membership requirement advanced in the Supreme Court case of *NLRB v. General Motors Corp.*[73] in determining that such a requirement did not necessitate formal union membership on the part of the employee. In *Hershey Foods*, the employer and the union had a collective bargaining agreement calling for a "union shop." When fees required by the union were tendered by an employee who had previously been a member of the union, but who had resigned when the union went on strike for a new collective bargaining agreement, the tendered money was refused. The union demanded that the employee withdraw his resignation, but he refused to do so, claiming that he did not have to belong to the union, but only had to pay the periodic dues.[74] The union then requested that the company terminate the employee for lack of union membership, and he was subsequently discharged. The NLRB found that the company had violated section 8(a)(3), and that the union had violated section 8(b)(2). The court, in upholding the Board, stated that, while section 8(a)(3) of the Act permitted collective bargaining agreements similar to the one in the present case, the requirement of union "membership" was to be narrowly construed in accordance with *NLRB v. General Motors Corp.*[75] Thus, for purposes of the NLRA, all that is required to meet the "membership" requirement is tender of all dues and initiation fees uniformly required of all employees. This obligation, purely a financial one, is all that can be imposed by a union as a condition of employment.

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71. For a discussion of the membership requirement of union security agreements and an analysis of the Board's decision in NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. Apr., 1975), see Haggard, *supra* note 64, at 433.

72. 513 F.2d 1083 (9th Cir. Apr., 1975) (per Wallace, J.).

73. 373 U.S. 134 (1963).

74. Joining the union would have made the employee subject to union disciplinary proceedings. Some commentators have suggested the possibility that the Supreme Court's opinion in NLRB v. General Motors, 373 U.S. 734 (1963), may permit the exercise of disciplinary power by a union over all employees (whether formal members of the union or not) under a valid union security agreement. *See* Haggard, *supra* note 64, at 433.

75. 373 U.S. 734 (1963). The primary issue in the *General Motors* case was the legality of an "agency shop" arrangement whereby union membership was optional with the employees, but each non-union employee was required to pay fees equal to the initiation fees and periodic dues paid by union members. In upholding the legality of such an arrangement the Court also stated that "[u]nder the second proviso to § 8(a)(3), the burdens of membership [in a union] upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." 373 U.S. at 742.

This construction of the membership requirement is in accord with other circuits that have decided the matter.[76]

Seniority Rights

The NLRA permits a union to have exclusive control over the collective bargaining machinery.[77] To counterbalance the potential harm to nonmembers and minority groups which might result from such monopoly control by a union, the courts have developed the doctrine of the duty of fair representation—that is, unions must not act arbitrarily or in bad faith as to the individuals they represent.[78] Employees who feel that they have been treated unfairly by their union may, under some circumstances, bring suit against the union in federal court for breach of its duty of fair representation.[79] The holding of the court in *Kling v. NLRB*[80] created a possible conflict with the Second Circuit on the issue of whether the NLRB may also have jurisdiction under section 8 of the NLRA to hear and consider allegations founded on a union's breach of its duty of fair representation. In *Kling*, the employee had returned from an extended leave of absence to find that he had been stripped of all seniority rights by the union. The court found that the reasons given by the union for its action were "flimsy," and that there was evidence of undue pressure by fellow employees and the shop steward to take this action. In finding that the union had engaged in an unfair labor practice in withdrawing seniority rights from the employee, the court found support in *Miranda Fuel Co.*,[81] an NLRB decision, for the proposition that:

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76. *See* Boilermakers Local No. 749 v. NLRB, 466 F.2d 343, 344-45 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); NLRB v. Zoe Chem. Co., 406 F.2d 574, 579 (2d Cir. 1969). For cases decided prior to *General Motors*, but reaching the same result, see NLRB v. Spector Freight System, Inc., 273 F.2d 272, 275-76 (8th Cir.), *cert. denied*, 362 U.S. 962 (1960); NLRB v. Broderick Wood Prod. Co., 261 F.2d 548, 558 (10th Cir. 1958) (alternate holding); J.A. Utley Co. v. NLRB, 217 F.2d 885, 886 (6th Cir. 1954); NLRB v. Pape Broadcasting Co., 217 F.2d 197, 199-200 (5th Cir. 1954); NLRB v. Philadelphia Iron Works, Inc., 211 F.2d 937, 941, 943 (3d Cir. 1954).

77. 29 U.S.C. § 159(a) (1970) grants the representative of the majority of employees in a bargaining unit the right to be the exclusive bargaining agent for all employees within the unit.

78. *See, e.g.*, Syres v. Oil Workers International Local 23, 350 U.S. 892 (1955) (per curiam) (overruling Fifth Circuit finding of no duty on the part of a union under federal law); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (fair representation under the Railway Labor Act).

79. *See* Retana v. Elevator Operators Union, Local 14, 453 F.2d 1018 (9th Cir. 1972); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 1151, 1169 (1957).

80. 503 F.2d 1044 (9th Cir. Jan., 1975) (per Burns, D.J.).

81. 140 N.L.R.B. 181 (1962).

> It is an unfair labor practice in violation of §§ 8 (b)(1)(A) and 8(b)(2) of the National Labor Relations Act for a bargaining representative to act in an unreasonable, arbitrary, or invidious manner in regard to an employee.[82]

The court noted that the Second Circuit had denied enforcement of the Board's order in the *Miranda Fuel Co.* case.[83] Nevertheless, it was felt that a favorable quotation of the Board's opinion by the Supreme Court in *Vaca v. Sipes*[84] indicated that it was the correct approach.[85]

C. Employer-Union Relations

A "hot cargo" clause in a collective bargaining agreement stipulates that the contracting employer will not conduct business or deal in the goods of a non-union or struck employer.[86] Subsec-

82. 503 F.2d at 1046.

83. NLRB v. Miranda, 326 F.2d 172 (2d Cir. 1963). Only one judge on the Second Circuit panel, Judge Medina, actually held that there was no duty of fair representation under section 8. *Id.* at 175. Judge Lumbard concurred with Judge Medina's opinion, but on the alternative ground that the NLRB's decision in the case was based on insufficient evidence. *Id.* at 180. Judge Friendly dissented. *Id.* For a brief discussion of the holding in *Miranda* see Vaca v. Sipes, 386 U.S. 171, 198 n.1 (1967).

84. 386 U.S. 171 (1967). In *Vaca*, the Supreme Court overruled the Supreme Court of Missouri, and held that an employee had failed to prove a breach of the duty of fair representation by his union simply by proving that the union refused to process the employee's valid grievance. *Id.* at 190-93. The Court held that, although the duty of fair representation applies to the grievance process, the employee had failed to establish a prima facie case for its breach. To show a breach of the duty of fair representation, the Court said it is necessary to show not only that the employee had a valid grievance, but also that the union had acted arbitrarily or in bad faith in refusing to process it. In its opinion, the Court also stated that the Board's decision in *Miranda* did not preclude state and federal courts from hearing suits for breach of the duty of fair representation (*i.e.*, the NLRB, the federal courts, and the state courts have concurrent jurisdiction in this matter). Thus, the *Vaca* Court impliedly upheld the Board's *Miranda* decision. For an extended discussion of the *Miranda* and *Vaca* holdings and a review of the problem in general see Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and A Proposed Change in the Duty Owed to the Employee*, 8 Suffolk U.L. Rev. 1096 (1974).

85. 503 F.2d at 1046. For a similar holding regarding an employee who was deregistered as a result of the personal animosity of the union president see NLRB v. Longshoreman's Union, 514 F.2d 481 (9th Cir. Apr., 1975). Although the employee was formally deregistered by a joint union-management committee, the administrative judge found that the management representatives had simply acquiesced to the union's discharge demand in order to appease the union president, who had been verbally abused by the employee. The court held that such action by the union was a violation of sections 8(b)(2) and 8(b)(1)(A). For a discussion of sections 8(b)(2) and 8(b)(1)(A) see notes 63 & 68 *supra*.

86. ABA Section of Labor Relations Law, The Developing Labor Law 645-74 (J.

tion (e) of section 8 of the NLRA[87] prohibits such clauses. The subsection, however, contains a proviso that "nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work."

In two cases decided during the survey period the court committed the Ninth Circuit to a narrow construction of the construction industry on-site exception to section 8(e).[88] In both cases, the union had assessed fines against the employers (who were in the construction industry) for violations of a hot cargo clause of a valid collective bargaining agreement. In both cases, the court found the union's actions to be in violation of section 8(e) and section 8(b)(4)(ii)(B),[89] and not within the construction industry on-site exception.

In *ACCO Construction Equipment, Inc. v. NLRB*,[90] the employers used the dealers for post-warranty repair work on heavy equipment despite a provision in the collective bargaining agreement prohibiting the employer from employing non-union persons for such repair work. The union subsequently levied fines against the employer in accordance with the grievance procedures of the collective bargaining agreement.[91] The NLRB found the

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Morris ed. 1971). For a brief discussion of the history and construction of the prohibition of such agreements by the NLRB see CCH GUIDEBOOK TO LABOR RELATIONS ¶ 1106 (14th ed. 1974).

87. 29 U.S.C. § 158(e) (1970).

88. Associated Gen. Contractors of Cal., Inc. v. NLRB, 514 F.2d 433 (9th Cir. Mar., 1975); ACCO Constr. Equip., Inc. v. NLRB, 511 F.2d 848 (9th Cir. Jan., 1975).

89. 29 U.S.C. § 158(b)(4)(ii)(B) (1970). Section 8(b)(4)(ii) makes it an unfair labor practice for a union to

> threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

So-called "secondary boycotts" by unions are thus prohibited.

90. 511 F.2d 848 (9th Cir. Jan., 1975) (per Choy, J.).

91. The court also found that these fines were in violation of section 8(b)(4)(ii)(B); this section limits those means which can be employed to enforce valid hot cargo agreements to judicial remedies, and forbids any type of economic coercion as a means of enforcement. *Id.* at 852.

union in violation of section 8(e) and section 8(b)(4)(ii)(B).[92] In upholding the Board, the court noted that the repairmen worked alongside other laborers at the job site infrequently and only for brief periods. Thus, the court reasoned that the purpose of the exception to section 8(e), which is to prevent on-site job tension between union and non-union employees forced to work alongside each other, would not be furthered by its application in this instance.[93]

The "right-to-control" doctrine states that "if an employer is not legally empowered to meet his employees' demand then they cannot lawfully strike him for his failure to accede."[94] In *Associated General Contractors of California, Inc. v. NLRB*,[95] the court decided that the right-to-control doctrine prevented the application of a clause in a collective bargaining agreement requiring all plumbing to be fabricated and installed by union members. In *Associated General Contractors*, the employer, a subcontractor engaged in the construction of a hospital, had installed prefabricated "scrub stations," supplied by the prime contractor. The union had demanded that the employer dismantel the stations and reinstall the plumbing pursuant to the above-mentioned clause. An arbitration board assessed a fine against the employer for violating the contract provision. The court held that the clause, as applied in this instance, violated sections 8(e) and 8(b)(4)(ii)(B)[96] despite the construction industry on-site exception. Although work preservation is a valid union objective, the employer in this case had no control over the fabrication of the stations and was in fact neutral

92. Operating Engineers, Local 112, 204 N.L.R.B. 742 (1973).

93. The court felt that the potential for conflict would arise only when non-union laborers were in close contact with union laborers for relatively long periods of time. Since in the present case major repair work on the machinery was done in the dealer's shop and on-site minor repairs were generally done after other employees had gone home for the day, there was little, if any, potential for conflict and the purposes of the section 8(e) exception would not apply. 511 F.2d at 851. *But see* Comment, *Hot Cargo Agreements in the Construction Industry: The Effect of ACCO Equipment*, 15 B.C. IND. & COM. L. REV. 1292 (1974), in which the author contends that the real purpose behind section 8(e) was work preservation for unions, and that the Board's decision (and presumably the Ninth Circuit opinion) is inconsistent with this purpose.

94. George Koch Sons, Inc. v. NLRB, 490 F.2d 323, 326 (4th Cir. 1973).

95. 514 F.2d 433 (9th Cir. Mar., 1975) (Solomon, D.J.).

96. *Id.* at 439. The court cited ACCO Constr. Equip., Inc. v. NLRB, 511 F.2d 848 (9th Cir. Jan., 1975), in support of its finding that the fact that the clause in question was part of a valid collective bargaining agreement did not preclude a finding that a violation of section 8(b)(4)(ii)(B) had occurred. Collective bargaining agreements cannot authorize violation of section 8(b)(4)(B). 514 F.2d at 438; NLRB v. IBEW, 405 F.2d 159 (9th Cir. 1968).

in the matter. The real controversy was between the union, the prime contractor, and the manufacturer of the stations. The union was not engaged in primary labor activity intended to change the employer's labor practices, but was instead attempting to coerce the employer into pressuring others to change their employment practices. Such a secondary objective is illegal under the NLRA.[97]

In its reliance on the right-to-control test, the court agreed with the reasoning of the Fourth Circuit's opinion in *George Koch Sons, Inc. v. NLRB*.[98] Prior to the *George Koch* decision, courts of appeals had generally held that union activities aimed at preserving work traditionally done by union members were protected under the NLRA, and union coercion of an otherwise neutral employer for the purpose of work preservation was proper.[99] The employer's "right-to-control" was given little, if any, weight in such situations.[100] Previously, the Ninth Circuit had held that the right to control was only one of the "surrounding circumstances" to be considered in determining whether a union boycott was primary or secondary in nature.[101] Although the court in *Associated General Contractors* impliedly agreed that other factors were to be considered, it elevated the right-to-control test to a level of primary importance, and thus strictly limited the work preservation doctrine.[102]

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."[103] An employer who withdraws from a multi-employer bargaining unit after bargaining has commenced, and then refuses to sign a collective bargaining agreement reached between the union and the bargaining unit, may be held to be in violation of section 8(a)(5).[104] It is the position of the NLRB that once collective bargaining has commenced, only "unusual circumstances" or union acquiescence will permit

97. *See* note 89 *supra*.

98. 490 F.2d 323 (4th Cir. 1973).

99. *See Annual Survey of Labor Relations Law*, 15 B.C. IND. & COM. L. REV. 1105, 1171 (1974) [hereinafter cited as *1973-1974 Annual Survey*]. The Supreme Court established work preservation as a valid union objective in National Woodworking Ass'n v. NLRB, 386 U.S. 612 (1967).

100. *1973-1974 Annual Survey*, *supra* note 99, at 1171.

101. *See* Western Monolithics Concrete Prods., Inc. v. NLRB, 446 F.2d 522, 526 (9th Cir. 1971).

102. 514 F.2d at 438.

103. 29 U.S.C. § 158(a)(5) (1970).

104. *See, e.g.*, NLRB v. Strong, 386 F.2d 929 (9th Cir. 1967).

an employer to withdraw from the bargaining unit.[105] This strict limitation on an employer's right of withdrawal was seriously questioned by the court in dicta in *NLRB v. Associated Shower Door Co.*[106] In that case, three employers withdrew from the bargaining unit after an impasse had been reached in negotiations and the union had called a strike against the association members. The union consented to these withdrawals and subsequently entered into separate agreements with these companies. When Associated Shower Door Co. (Associated) attempted to withdraw, the union refused its consent. When Associated refused to sign the agreement subsequently reached between the union and the other employers of the bargaining unit, the union charged it with violating section 8(a)(5). Although holding that Associated, by its actions after its purported withdrawal had retracted its withdrawal and was thus bound by the agreement, the court also stated that under some circumstances such a withdrawal would be permitted. The court enumerated three prerequisites to such withdrawal: (1) an impasse is reached in the collective bargaining process; (2) the union permits some of the employers to withdraw from the bargaining unit and enters into separate agreements with them; and (3) the union engages in selective picketing of the remaining members of the unit.[107] Since the NLRB had permitted a union to withdraw from a multi-employer unit with respect to one or more of the employers involved and still continue to bargain with the rest of the employers in the bargaining unit,[108] it was only fair that the reverse also be permitted, at least under the enumerated circumstances. Although the *Associated Shower Door* opinion still places severe restrictions on the right of employers to withdraw from such bargaining units after collective bargaining has begun, it is somewhat more flexible than the Board's position.[109]

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105. Retail Associates, Inc., 120 N.L.R.B. 388, 395 (1958). The Board has narrowly defined "unusual circumstances" to mean a realistic threat of closure of the business, such as bankruptcy. A severe competitive disadvantage is an insufficient excuse. *1973-1974 Annual Survey, supra* note 99, at 1153.

106. 512 F.2d 230 (9th Cir. Feb., 1975) (per Koelsch, J.), *cert. denied*, 44 U.S.L.W. 3229. (U.S. Oct. 14, 1975) (No. 127).

107. *Id.* at 232.

108. *See* Pacific Coast Ass'n of Pulp & Paper Mfrs., 163 N.L.R.B. 892 (1967).

109. *See* Hi-Way Billboards, Inc., 206 N.L.R.B. 22 (1973) (negotiating impasse between union and bargaining unit does not constitute "unusual circumstances" sufficient to permit withdrawal by employer).

D. Section 301 and the Right of Private Actions

Section 301(a) of the LMRA[110] permits suits involving breach of a contract between union and employer or between labor unions to be brought in federal court without regard to diversity or amount in controversy requirements. In two cases decided during the survey period,[111] the court broke new ground in determining the extent of the jurisdiction of federal courts under section 301. The jurisdiction under section 301 was restricted as to the specific enforcement of so-called "no-raiding" agreements in *Local No. 1547, IBEW v. Local No. 959, Teamsters*.[112] At the expiration of Local 1547's collective bargaining agreement with ITT Arctic Services, Inc., Local 959 petitioned the NLRB[113] for certification as the representative of the employees of the company. Local 1547 and Local 959 had previously agreed that neither union would attempt to organize or represent employees already represented by the other union. Local 1547 intervened at the NLRB hearing, objecting to Local 959's petition on the basis of the "no-raiding" agreement. The NLRB nevertheless ordered that a certification election be held. Local 1547 then brought an action against Local 959 under section 301 in district court for injunctive relief and damages for breach of contract. The NLRB intervened in the action and moved for summary judgment, claiming that the court had no jurisdiction under section 301 to review election certification procedures. The district court granted summary judgment for the NLRB.

After refusing to review the action of the NLRB in ordering the certification election because of the plaintiff union's failure to exhaust its administrative remedies,[114] the court turned to the issue of specific performance of the "no-raiding" agreement. The question of whether a union could be enjoined from breaching such an agreement was found to be one of first impression in the Ninth Circuit.[115] The issue basically involved a conflict between

110. 29 U.S.C. § 185(a) (1970).

111. Alvares v. Erickson, 514 F.2d 156 (9th Cir. Mar., 1975); Local 1547 Electrical Workers v. Teamsters Local 959, 507 F.2d 872 (9th Cir. Nov., 1974).

112. 507 F.2d 872 (9th Cir. 1974) (per Goodwin, J.).

113. Section 9(c) of the NLRA (19 U.S.C. § 159(c) (1970)) establishes the procedure to be followed in determining the need for a certification election.

114. For a discussion of the exhaustion of remedies doctrine and the rationale behind it see United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 36 (1952).

115. 507 F.2d at 875.

section 301(a) of the LMRA, permitting such actions as the present, and section 7 of the NLRA,[116] which guarantees to employees the right to organize and bargain collectively through a union of their choice. The court felt that the strong national labor policy embodied in section 7 must take precedence over the right of contracting parties to have their agreements enforced. Furthermore, since section 9 of the NLRA[117] specifically granted jurisdiction to the NLRB over representational disputes, the jurisdiction of federal courts in such matters was limited to the usual scope of review of administrative actions.[118] Therefore, such an agreement cannot be enforced if such enforcement would conflict with valid action taken by the Board.[119]

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116. Section 7 is codified at 29 U.S.C. § 157 (1970). Section 7 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

117. Section 9 is codified at *id.* § 159. Section 9 provides in part:

> Whenever a petition [for certification as exclusive bargaining representative] shall have been filed in accordance with such regulations as may be prescribed by the Board, . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

118. For a discussion of the federal courts' scope of review of administrative decisions see K. DAVIS, ADMINISTRATIVE LAW §§ 29-30 (3d ed. 1972).

119. 507 F.2d at 877; *accord*, Local 33 Hod Carriers v. Mason Tenders Dist. Council, 291 F.2d 496, 503 (2d Cir. 1961) (dicta); Great Lakes Industries, Inc. (Cadmium and Nickel Plating Div.). 124 N.L.R.B. 353 (1959). *Contra*, United Textile Workers v. Textile Workers Union, 258 F.2d 743 (7th Cir. 1958) (granting specific enforcement to no-raiding agreement). The court in *Local 1547* found support for its position in the Supreme Court decision of NLRB v. Magnavox Co., 415 U.S. 322 (1974), which held that an employee representative cannot waive the rights of employees guaranteed under section 7. *But see* Retail Clerks Locals 128 & 633 v. Lion Dry Goods, Inc., 369 U.S. 17, 26 (1962), wherein the Supreme Court cited United Textile Workers v. Textile Workers Union, *supra*, as an example of a permissible contract under section 301. As to situations in which the board has not taken any action, there is some authority to the effect that in such cases federal courts could specifically enforce a compulsory arbitration clause in a no-raiding agreement. However, if the Board should later decide to act on the matter, it would not be bound by the arbitrator's decision. *See* 89 HARV. L. REV. 440, 445 n.30 (1975), *citing* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

The question of money damages for breach of a "no-raiding" agreement was, however, a different matter than specific enforcement of such agreements. Where the breach was accomplished through the predatory tactics of the raiding union (rather than simply in response to an invitation of the raided union's employees), monetary damages might be in order. Such a determination was a question of fact to be determined at the trial court level.[120]

The *Local No. 1547* court's refusal to grant specific performance of the "no-raiding" agreement was in accord with the policy of the NLRB regarding such agreements.[121] In so holding, the court was also following the general principles enunciated by the Supreme Court in *NLRB v. Magnavox Corp.*[122] However, that portion of the *Local No. 1547* court's opinion dealing with the award of damages for breach of the agreement is somewhat vague about when such an award is appropriate and about the measure of damages that is to be employed.[123] The court apparently requires a finding of active solicitation by the raiding union which involves "bad faith or predatory organizing practices which are . . . patently offensive to the orderly resolution of interunion competition. . . . "[124] If the union is there by invitation of the

120. As stated by the court, "The decision ought to be reached by balancing the conduct of the parties against their agreement." 507 F.2d at 879.

121. The Board has a long-standing policy of ignoring the existence of no-raiding pacts in considering petitions for certification as collective bargaining representatives. *See, e.g.*, E.W. Coslett & Sons, 122 N.L.R.B. 961 (1959); Personal Prods. Corp., 122 N.L.R.B. 503 (1958); North Am. Aviation, Inc., 115 N.L.R.B. 1090 (1956). *See also* 89 HARV. L. REV. 440, 444 (1975). Although there is some authority to the contrary, *see* Cadmium & Nickel Plating Div., 124 N.L.R.B. 353 (1959), the Board apparently will not object to voluntary compliance with such agreements. *See* Amalgamated Meat Cutters, Local 158, 208 N.L.R.B. 58 (1974) (permitting union to withdraw as the certified bargaining representative of two bargaining units in order to comply with the "no-raid" provisions of the AFL-CIO constitution).

122. 415 U.S. 322 (1974). In *Magnavox*, the Supreme Court upheld the Board's finding that a collective bargaining agreement prohibiting employees from distributing union literature and soliciting new members on company property was ineffective as a violation of the employee's rights under section 7. Although certain employee rights (such as the right to strike) may be waived by the union during contract negotiations in return for other concessions by the employer, the right of employees to exercise their choice of a bargaining representative may not be waived. If the rule were otherwise, the Court felt that unions might use such agreements for their own self-perpetuation. *Id.* at 325.

123. The court, in fact, made no mention of the correct measure of damages. *But see* 49 WASH. L. REV. 1095 (1974), asserting that the proper measure of damages in this case would have been the "reasonable election campaign costs" of the incumbent union. *Id.* at 1121.

124. 507 F.2d at 878.

raided employees, there is no liability. The situations in which liability would attach are somewhat hazy, and the court did not attempt to clearly define them. At least one commentator has asserted that the court's opinion was erroneous in regard to the damage issue, since the breaching union won the certification election, indicating that the employees were dissatisfied with their present union and desired another bargaining representative.[125] Assessing damages in such a situation would have a chilling effect on employee's section 7 rights. It is difficult to reconcile the court's opinion regarding damages with its rationale for refusing specific performance of the agreement.

The court in *Alvarez v. Erickson*[126] provided an expansive approach as to the permissible parties to an action under either section 301 or section 302[127] of the Act. In *Alvarez*, a suit was instituted in district court by members of a local union which had withdrawn from a statewide collective bargaining unit against the trustees of the state welfare trust for that portion of the trust funds allocable to them.[128] The trustees claimed that the court lacked jurisdiction under section 301 because neither a union nor an employer was a party to the lawsuit. However, the court purported to follow *Smith v. Evening News Association*,[129] in which the Supreme Court held that section 301 refers to *contracts* between an employer and a labor union and not necessarily to *suits* between them. Thus, the courts have jurisdiction as long as the subject matter of the suit involves a contract between the employer and a

125. 89 HARV. L. REV. 440 (1975). *But see* 49 WASH. L. REV. 1095 (1974), criticizing the district court's dismissal in this case (356 F. Supp. 636 (D. Alaska 1973)) and asserting that the federal courts have jurisdiction to grant specific enforcement of arbitration clauses in such agreements or damages for breach.

126. 514 F.2d 156 (9th Cir. Mar., 1975) (per Duniway, J.), *cert. denied*, 44 U.S.L.W. 3205 (U.S. Oct. 6, 1975) (No. 1540).

127. 29 U.S.C. § 186 (1970). Section 302(e) (*id.* § 186(e)) vests jurisdiction in the federal courts for actions arising from alleged violations of section 302. For a discussion of section 302 see text accompanying note 131 *infra*.

128. The local union was not made a party to the action because the right to the trust fund benefits accrued to the individual members and not to the union as an entity. 514 F.2d at 159.

129. 371 U.S. 195 (1962). *Smith* involved a suit by employees against their employer for breach of the collective bargaining agreement. The employer argued that section 301 limited permissible action to suits between unions and employers. As to this argument, the Court stated: "Neither the language and structure of § 301 nor its legislative history requires or persuasively supports this restrictive interpretation, which would frustrate rather than serve the congressional policy expressed in that section." *Id.* at 200.

labor union, and it is not necessary that either the union or the employer be a party.[130]

The court also found jurisdiction under section 302 of the Act.[131] Section 302 prohibits employers from making any payment of money (other than normal compensation for services rendered) to any representatives of its employees, and forbids employees or their representatives from demanding or accepting such payments. An exception is made for payments by an employer to a trust fund established by the employee representative "for the sole and exclusive benefit of the employees of such employer . . . ."[132] The court accepted the plaintiffs' argument that, since the funds paid into the trust by the employers of plaintiffs would now be used for purposes other than for the "sole and exclusive use of the employees of such employer," the alleged violations of section 302 gave the federal courts jurisdiction.[133]

There is a strong national policy favoring voluntary settlement of labor disputes.[134] Thus, great deference is paid to the

130. 514 F.2d at 162. Unlike *Alvarez*, *Smith* involved a suit between employees and their employer. Although no other federal appellate court had decided the particular issue of whether jursisdiction would lie if neither the union nor the employer were parties to the action, the court cited several district court cases in which jurisdiction under section 301 had been successfully invoked in cases involving employee pension and welfare funds where the union, the employer, or both, were parties to the action. *See* 514 F.2d at 156 n.3, and cases cited therein. The court, although indicating its reluctance to expand the jursidiction of federal courts, nevertheless found congressional justification for its actions in the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829, which vests jurisdiction in federal courts in cases involving welfare trusts. 514 F.2d at 160.

131. 29 U.S.C. § 186 (1970).

132. *Id.* § 186(c)(5).

133. 514 F.2d at 164-67. The court based the asserted jurisdiction on the fact that the action involved a "structural" as opposed to a mere "administrative" deficiency. This distinction was first expounded in Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 425 (1st Cir. 1968), which held that violation of the basic structure imposed upon such trusts by Congress are actionable under section 302, whereas violations involving only the day-to-day fiduciary administration of the trust are not. The *Alvarez* court noted that in the present case individual parties were not seeking individual specific benefits that might have been denied them. Rather, the plaintiffs represented a significant group of beneficiaries of the trust who were being denied the use and enjoyment of the trust funds. This, said the court, affected the basic structure of the trust. *Id.* at 165.

134. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). *See also* Labor Management Relations Act §§ 201(a)-(b), 203(d), 29 U.S.C. §§ 171(a)-(b), 173(d) (1970). For a discussion of the history and procedures of labor arbitration see CCH LAB. L. COURSE 4051 (22d ed. 1974).

decisions of arbitrators by the NLRB[135] and the federal courts.[136] Furthermore, courts are not reluctant to grant specific performance to arbitration clauses in collective bargaining agreements.[137] Enforcement of such clauses is usually sought by means of a suit filed in federal court under section 301.

Although the Ninth Circuit has firmly committed itself to this policy of deference to arbitration,[138] at least two cases decided during the survey period[139] illustrate the limits which the court will place on its respect for the results of arbitration. In *City Electric, Inc. v. Local 77 IBEW*,[140] the court was faced with the issue of whether an arbitrator could impose requirements on an employer that were beyond the terms of the collective bargaining agreement. In holding that such practice was improper, the court stated that the arbitrator's sole purpose is to interpret the existing contract between the employer and union, and any attempt on the arbitrator's part to modify that contract was "unauthorized and improper."[141] Thus, the court struck down that portion of the arbitrator's decision requiring the employer and union to negotiate the rate of travel allowance to be paid to workers at a certain job site, since travel allowances had not been provided for in the collective bargaining agreement.[142] Since the arbitrator's

135. *See, e.g.*, National Radio Co., 205 N.L.R.B. 1179 (1973); Collyer Insulated Wire Co., 192 N.L.R.B. 837 (1971); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). For a brief discussion of the NLRB's standard of review for arbitration awards see 41 TENN. L. REV. 751 (1974).

136. *See* authorities cited at note 105 *supra*. *But see* Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960) (discussing judicial hostility toward arbitration).

137. *See, e.g.*, Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

138. *See, e.g.*, United Steelworkers of America v. Amax Aluminum Mill Prods., Inc., 451 F.2d 740 (9th Cir. 1971); Holly Sugar Corp. v. Distillery R.W. & A. Workers Union, 412 F.2d 899 (9th Cir. 1969); San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327 (9th Cir. 1969). *See also* Local 77, IBEW v. Puget Sound Power & Light Co., 506 F.2d 523 (9th Cir. Nov., 1974), decided during the survey period and holding that an issue is not moot (and therefore unarbitrable) simply because the individual employee claiming to be aggrieved is no longer interested in the outcome of the arbitration. There was a "continuing and live controversy" between the employer and the union regarding the arbitrability of certain of the employer's practices, and arbitration was therefore in order. *Id.* at 524.

139. City Elec., Inc. v. Local 77 IBEW, 517 F.2d 616 (9th Cir. May, 1975); Los Angeles Newspaper Guild v. Hearst Corp., 504 F.2d 636 (9th Cir. Oct., 1974).

140. 517 F.2d 616 (9th Cir. May, 1975) (per Merrill, J.), *cert. denied*, 44 U.S.L.W. 3229 (U.S. Oct. 14, 1975) (No. 249).

141. *Id.* at 619.

142. The arbitrator had found that the site was a "job headquarters" within the context of the collective bargaining agreement, which provided that the employer was not

order was improper, the employer was justified in refusing to negotiate the matter.[143]

In *Los Angeles Newspaper Guild v. Hearst Corp.*,[144] the arbitrator had ruled that there was no arbitratible issue due to the failure of the union to bring the matter to arbitration in timely fashion.[145] The issue involved the claims of certain employees to benefits provided in the collective bargaining agreement. The employee's rights to these benefits had vested after the collective bargaining agreement had lapsed but before a new agreement was instituted. After finding that the terms of the expired collective bargaining agreement were controlling as to the issues presented, the court vacated the arbitrator's decision and issued an order permitting the parties to resubmit the issue for arbitration on the merits. In so holding, the court stated that although the decisions of arbitrators are entitled to great deference, the courts have jurisdiction to determine arbitrability and to compel arbitration.[146]

E. Labor-Management Reporting and Disclosure Act (LMRDA)

Section 401 of the LMRDA[147] provides guidelines governing the election of union officials. Section 402 of the Act[148] sets up a method for protecting the rights guaranteed to union members under section 401 by permitting an individual member to file a complaint with the Secretary of Labor alleging a violation of that section.[149] Should the allegations prove valid, the secretary is empowered to bring a civil action to set aside the election.[150]

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required to pay travel allowance or per diem to workers reporting to a job headquarters site. The arbitrator, however, felt that since employees of other contractors who were working on similar jobs and who were members of the same union were paid a travel allowance, the same provision should be made for the employees in the present action.

143. The court agreed with the lower court that since this was not a dispute with respect to the interpretation or application of any terms of the agreement, as required by the collective bargaining agreement as a prerequisite to institution of a grievance, the employer was jusitifed in ignoring it. *Id.* at 619-20.

144. 504 F.2d 636 (9th Cir. Oct., 1974) (per Moore, J.), *cert. denied*, 421 U.S. 930 (1975).

145. The union had attempted to negotiate with the company for two years before bringing the matter to arbitration.

146. 504 F.2d at 642, *citing* IUOE Local 150 v. Flair Builders, Inc., 406 U.S. 487 (1972).

147. 29 U.S.C. § 481 (1970).

148. *Id.* § 482.

149. *Id.*

150. *Id.* § 482(b). For a discussion of the scope of judicial review of the Secretary's actions under section 402 see Dunlop v. Bachowski, 421 U.S. 560 (1975).

The question on appeal in *Ross v. International Brotherhood of Electrical Workers*[151] was whether section 402 provided the exclusive remedy to a union member for union election misconduct. The court held that, at least when the election is not delayed or its outcome challenged, private tort actions would also be allowed.[152] In *Ross*, the officer of a local brought a tort action (based on diversity jurisdiction) against the vice-president of the International alleging his wilfull and malicious interference in a union election in which the officer was a candidate.[153] In reversing the district court's dismissal, the court found that the purpose of Congress in passing section 402 was to prevent the blocking or delaying of elections by actions brought by individual members. That purpose would not be served by prohibiting all civil actions where a challenge to the election results was not involved. In the present case, the court noted that the appellant, who won the union election, was not seeking any remedies that would interfere with the operation of the local in accordance with the election.[154]

The court found support for its holding in the Supreme Court case of *Calhoun v. Harvey*,[155] wherein the court stated that "[s]ection 402 of [the LMRDA], as has been pointed out, sets up an exclusive method of protecting [section 401] rights . . . ."[156] The key to the issue appears to lie in the fact that the rights asserted in this case were not section 401 rights, but common law rights which remained unchanged after the passage of the LMRDA.[157]

151. 513 F.2d 840 (9th Cir. Mar., 1975) (per Merrill, J.).

152. *Id.* at 843.

153. The appellant claimed that the vice-president purposefully delayed acting upon the recommendations of a hearing officer in an internal disciplinary hearing against him until the time of the election. The hearing officer's findings and recommendations were favorable to appellant, and he alleged that the vice-president withheld action on them to hinder his chances in the election. When the appellant won the run-off election, the vice-president, claiming certain voting irregularities, ordered that a new election be held. Although appellant sought to enjoin the new election in his district court suit, the election was held and appellant emerged the winner. *Id.* at 841-42.

154. *Id.* at 843.

155. 379 U.S. 134 (1964).

156. *Id.* at 140.

157. *See* Davis v. Turner, 395 F.2d 671 (9th Cir. 1968), wherein the court held that the district court had no jurisdiction over an individual union member's action to invalidate an election and have a new election called, since the exclusive remedy of setting aside a union election belonged to the Secretary of Labor. *But see* Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973), holding that although the district court had no jurisdiction under section 402 to hear an individual member's complaint for an injunction to restrain the ousting of a union official and the holding of an interim election, if the complaint alleged invasion by the union of the member's rights of free speech and assembly guaranteed under section 101(a)(2), 29 U.S.C. § 411(a) (2) (1970), jurisdiction would lie. 477 F.2d at 902-04.

II. RAILWAY LABOR ACT

The Railway Labor Act (RLA)[158] was enacted in 1926 to provide for the prompt and orderly settlement by means of arbitration and conferences of disputes between interstate carriers and their employees on issues relating to rates of pay, rules of work or working conditions.[159] The scope of the Act was extended in 1936 to apply to air carriers.[160] The Act does not provide governmental regulation of wages, hours or working conditions; rather, it provides a means for reaching voluntary agreement on these matters.[161]

One case[162] which arose under the Act during the survey period involved a union's duty of fair representation under the RLA. The case of *Duggan v. International Association of Machinists*[163] involved flight engineers who were qualified for piston engine aircraft but could not qualify for jet engine aircraft and were therefore discharged by the employer. They sued their labor union for breach of its duty of fair representaiton in regard to the collective bargaining agreement under which they were discharged. The district court dismissed for failure to state a claim upon which relief could be based.[164] Although the case was governed exclusively by the provisions of the RLA,[165] the court looked to decisions under the NLRA for guidance. The Supreme Court decision in *Vaca v. Sipes*,[166] decided under the NLRA, held that an employee can recover from his union only when its conduct towards him has been "arbitrary, discriminatory, or in bad faith."[167] Since

158. 45 U.S.C. § 151-63 (1970).

159. *Id.* § 151a.

160. *Id.* §§ 181-88.

161. Brotherhood of Locomotive Eng'rs v. Baltimore & Ohio R.R., 372 U.S. 284, 289 (1963). For a discussion of the purpose and scope of the Act see 48 AM. JUR. 2d *Labor* § 1131 (1970).

162. The only other case heard by the Ninth Circuit in this area during the term was Rossi v. Trans World Airlines, Inc., 507 F.2d 404 (9th Cir. Nov., 1974) (per curiam). In *Rossi* the court refused to review the finding of an arbitration board regarding an employee's dismissal.

163. 510 F.2d 1086 (9th Cir. Jan., 1975) (per Goodwin, J.), *cert. denied*, 421 U.S. 1012 (1975).

164. FED. R. CIV. P. 12(b)(6). The trial court also dismissed for want of prosecution under *Id.* Rule 41(b). However, since the court held that the case should be dismissed on its merits, it did not discuss the propriety of the Rule 41(b) dismissal. 510 F.2d at 1087.

165. Employers and employees covered by the RLA are specifically exempted from the LMRA and NLRA by 29 U.S.C. § 152(2), (3) (1970). *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).

166. 386 U.S. 171 (1967). For a discussion of *Vaca* see note 84 *supra*.

167. 510 F.2d at 1088, *citing* Vaca v. Sipes, 386 U.S. 171, 190 (1967).

the plaintiffs conceded that no such discrimination or bad faith had been directed against them, the *Vaca* standard would preclude a recovery. If the *Vaca* standard did not apply to RLA cases, then *Hardcastle v. Western Greyhound Lines*,[168] which was decided by the Ninth Circuit before *Vaca*, but which reached a similar conclusion, would continue to apply.[169] The court also held that there could be no recovery under a theory of quasi-contract, because there was no duty on the part of a union towards union members except as furnished by national labor law.[170]

III. FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA)[171] was enacted by Congress in 1938 with an avowed purpose to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" without substantially curtailing employment or earning power.[172] Specifically, it regulates the hours and wages of employees of business engaged in interstate commerce and prohibits oppressive child labor in such businesses.[173] The Act is adminis-

168. 303 F.2d 182 (9th Cir. 1962), *cert. denied*, 371 U.S. 920 (1962).

169. In *Hardcastle*, employees of a bus company brought an action for declaratory and injunctive relief in district court, claiming they were unlawfully deprived of their seniority rights. The rights had been lost as a result of a collective bargaining agreement entered into between the company and their bargaining unit. In upholding the trial court's summary judgment in favor of defendants, the court stated that, before such an action can be maintained, there must be shown "a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership." 303 F.2d at 185. The *Vaca* decision specifically rejected an identical standard for NLRA cases in favor of the broader standard. *See* text accompanying note 84 *supra*. *See also* Retana v. Elevator Operators Local 14, 453 F.2d 1018, 1023 n.8 (9th Cir. 1972). Thus actions by an employer which are not proscribed by the broad standard of *Vaca* would certainly fall outside the more narrow proscriptions of *Hardcastle*. At any rate, since the *Vaca* Court cited the RLA case of Steele v. Louisiville & Nashville R.R., 323 U.S. 192 (1944), as originating the doctrine of fair representation, which it then undertook to define, 386 U.S. at 171, 190, and since the congressional policies behind both the NLRA and the RLA are for all practical purposes identical, *compare* 29 U.S.C. § 151 (1970) *with* 45 U.S.C. § 151a (1970), it seems certain that the *Vaca* standard applies to both NLRA and RLA cases, and the *Duggan* court's equivocation on the issue would appear to be unnecessary. For a discussion of the courts' application of the same doctrine to both NLRA and RLA cases see Flynn & Higgins, *supra* note 84, at 1101-03.

170. 510 F.2d at 1088. The court felt that if contractual relief were grounded on a duty other than that defined by *Vaca*, the court would have to depart from the holding in *Vaca*, which it declined to do. *Id.*

171. 29 U.S.C. §§ 201-19 (1970).

172. *Id.* § 202.

173. 48 AM. JUR. 2d *Labor* § 1537 (1970); Wykstra & Stevens, LABOR LAW AND PUBLIC POLICY 437-42 (1970).

tered through the Wage and Hour Division of the Department of Labor.[174]

A. Section 7: Overtime Requirements

Section 7 of the FLSA[175] requires employers covered by the Act to reimburse employees who work more than 40 hours per week at a rate of not less than one and one-half times the regular rate for the hours worked in excess of 40 per week. In a series of cases decided during the survey period, the court strictly construed this section and required employers to establish a regular rate of pay by explicit agreement with their employees, so that overtime compensation could be calculated. Employers who simply paid a flat rate for a workweek in excess of 40 hours were found in violation of the Act in the absence of an express agreement with their employees.

Brennan v. Elmer's Disposal Service, Inc.[176] involved an employer who paid his employees a fixed salary for a fifty hour (six day) workweek. He claimed that the salary had been determined on the basis of a specified hourly rate for the first 40 hours and one and one-half times that rate for the additional 10 hours. These components would meet the minimum wage and overtime requirements of the Act.[177] However, there was no express agreement with the employees regarding the specified hourly rate, and the court held that such a unilateral designation of a "regular" rate of pay by the employer was improper.[178] In the absence of an explicit agreement with the employees involved, the regular rate of pay will be determined by dividing the total salary paid by the total hours actually worked,[179] and back pay will be awarded for

174. 29 U.S.C. § 204(a) (1970).

175. *Id.* § 207 (Supp. IV, 1974).

176. 510 F.2d 84 (9th Cir. Jan., 1975) (per Lucas, D.J.).

177. *Id.* at 86. For minimum wage and overtime requirements see sections 6 and 7 of the FLSA, 29 U.S.C. §§ 206, 207 (Supp. IV, 1974).

178. 510 F.2d at 88.

179. *Id.* at 86. *See* 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 204 (1947). *Asselta* involved an express agreement which provided for a regular rate of pay for the first forty hours of work, and one and one-half times that amount for the remaining hours of the workweek. The Supreme Court, however, found the agreement to be inoperative and determined the regular rate by dividing the total wages paid by the total hours worked. For a different result see Mumbower v. Callicott, 77 CCH Lab. Cas. ¶ 33267 (E.D. Mo. 1975), wherein the court held that if, assuming the minimum wage under 29 U.S.C. § 206 to be the regular rate of pay, the wage plan met the minimum wage and overtime requirements of section 7 (29 U.S.C. § 207 (1970)), the plan would be acceptable.

the difference between this amount and the overtime rate required by the Act. The court looked to the policy of the overtime provisions of the Act which, it found, were to "spread employment throughout the work force by putting financial pressure on the employer, and to compensate employees for the burden of overtime workweeks."[180] The court held that neither of these policies would be furthered by an hourly salary that is fixed throughout a workweek exceeding 40 hours.[181]

B. Section 13(a)(2): Retail and Services Businesses Exemption

Section 13(a)(2) of the Act provides an exemption to the requirements of section 7 of the Act for employees of retail and services businesses.[182] In *Brennan v. Keyser*,[183] the court narrowly construed the exemption so that two employers remained within the scope of the Act. In *Keyser* the Secretary of Labor brought suit to enforce the overtime pay provisions of section 7 of the FLSA. The two companies involved were towing companies designated as "Official Police Garage" (OPG) by the Los Angeles Police Department. Although both companies offered their services to the public, the majority of their business came from police requests for towing.[184] Finding that the companies were engaged in in-

180. 510 F.2d at 87.

181. *See* Brennan v. Valley Towing Co., 515 F.2d 100 (9th Cir. Apr., 1975) (per Wright, J.). In *Brennan*, the court found that the employer's overtime compensation plan (for hours worked *beyond* the 47 hour workweek), was based on an explicit agreement between the employer and his employees and thus qualified as overtime pay under the Act. The hours worked and wages paid under this plan were therefore not to be used in calculating the regular rate of pay.

182. 29 U.S.C. § 213(a)(2) (1970). Section 13(a)(2) basically establishes a three-fold test which a business must meet before it can qualify for exemption:

> (1) Over 50 percent of the establishment's annual dollar volumes of sales or services must be made within the state in which the establishment is located.
> (2) At least 75 percent of the establishment's annual dollar volume of sales must be to purchasers who do not buy for resale.
> (3) At least 75 percent of the establishment's annual dollar volume of sales must be recognized in the particular industry as retail sales or services.

The section also specifically exempts certain specified industries even if they do not meet the above requirements. 1 CCH Lab. L. Rep., Wages Hours ¶ 25,220.03 (1975).

183. 507 F.2d 472 (9th Cir. Nov., 1974) (per Choy, J.), *cert. denied*, 420 U.S. 1004 (1975).

184. One company obtained "almost all" of its business from police calls, while the other company obtained "substantially more than half" of its business in this manner. 507 F.2d at 474.

terstate commerce,[185] the court then addressed the question of whether they qualified for the retail sales and services exemption. Although there was sufficient evidence to support the trial court's finding that towing services were recognized as retail by the industry, it was also necessary to determine whether the industry itself was of the type which Congress contemplated as falling within the "retail concept."[186] The court found that the section should be narrowly construed, since it is an exemption to humanitarian and remedial legislation. The purpose of section 7 was primarily to assist small retail businessmen who, in their day to day dealings with consumers, required greater flexibility in hours, wages and conditions of employment.[187] Due to the symbiosis existing between the towing services and the police, such flexibility was not required. The case was therefore remanded to district court for trial.[188]

The trial court's discretion in providing remedies for violations of the Act was considered in *Brennan v. Saghatelian*.[189] In that case the Secretary of Labor brought a civil action under section 17 of FLSA[190] to enjoin defendant, a small bakery employing approx-

185. The court relied upon Gray v. Swanney-McDonald, Inc., 436 F.2d 652 (9th Cir.), *cert. denied*, 402 U.S. 992 (1971), to support the proposition that tow truck drivers doing a portion of their work on interstate highways were engaged in interstate commerce. 507 F.2d at 474. Regarding the one company which did all its work on state highways, the trial court could have found that the area in question was so interconnected with interstate highways as to be an instrumentality of interstate commerce. *Id.* at 475.

186. 507 F.2d at 475. *See* Wirtz v. Idaho Sheet Metal Works, Inc., 335 F.2d 952, 956 (9th Cir. 1964), *aff'd*, 383 U.S. 190 (1966). *Idaho Sheet Metal* held that a company whose employees spent a substantial portion of their time fabricating large metal equipment for use by large enterprises engaged in commerce did not fall within the section 13(a)(2) exception.

187. 507 F.2d at 476.

188. For a different result see Dudley v. Thomas, 74 CCH Lab. Cas. ¶ 33097 (Fla. Dist. Ct. App., 3d Dist. 1970). In *Dudley*, the court held that an employee, whose duties included performance of a towing service and repair of the tow truck, was exempt from section 7 of the Act by reason of section 13(b)(1) (29 U.S.C. § 213(b)(1) (1970)); this section provides that the provisions of section 7 shall not apply to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service. Since the trial court found that the employee had duties affecting the safety of automobiles and the moving of interstate commerce, the Secretary of Transportation could establish qualifications and set maximum hours of service for him under the Motor Carrier Act of 1935 (49 U.S.C. §§ 301 *et. seq.* (1970)). He was therefore not covered by the provisions of the Act. Thus, it might be possible for a towing company itself to be within the scope of the Act although some or all of its employees are not subject to it.

189. 514 F.2d 619 (9th Cir. Mar., 1975) (per Barnes, J.).

190. 29 U.S.C. § 217 (1970). This section bestows jurisdiction on the district courts to restrain violations of section 215(a)(2) of the Act (making violation of section 7 of the

imately 30 people, from violating the Act's overtime and records requirements in the future and an injunction to require the defendant to make restitution of back overtime wages. The district court granted the injunction regarding future violations but refused to grant the restitutionary injunction. The primary issue, as the court saw it, was whether the Act deprived the trial courts of all discretion in providing remedies for violations of the Act. The *Brennan* court found that, although the congressional purposes underlying section 17 considerably circumscribed the trial court's discretion, "we cannot conclude that they force a court of equity to use its equitable powers to make an inequitable decree."[191] In considering the equities involved in the present case,[192] it was found that the trial court had not abused its discretion in refusing to issue the restitutionary injunction, and the lower court's judgment was affirmed.[193]

On a subsequent motion for reconsideration of denial of rehearing, the court in *Dunlap v. Saghatelian*[194] reconsidered its holding in *Brennan v. Saghatelian* in light of the Supreme Court opinion in *Albermarle Paper Co. v. Moody*,[195] dealing with a court's abuse of discretion in failing to award back pay in Title VII ac-

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Act unlawful) "including . . . the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this [Act] . . . ."

191. 514 F.2d at 622.

192. Among the equities cited by the court as supporting the trial court's refusal of a restitutionary injunction were the facts that the employer and employees mutually understood that overtime compensation would be at the straight time rate, the defendant bakery was paying wages higher than its competitors, no employee had ever taken action to recover back overtime wages, the defendant was then in current compliance with the Act, neither the employer nor its employees believed they were under the Act, the defendant was not willful in its violations of the Act, and the defendant's business might be jeopardized by the granting of an injunction. 514 F.2d at 621.

193. For a different result see Wirtz v. Malthor, Inc., 391 F.2d 1 (9th Cir. 1968), holding that good faith, lack of wilfullness, the small size of the business, or possible hardship to the defendant were inadequate reasons for denying a restitutionary injunction, and reversing the trial court on the issue. 391 F.2d at 3. The court in *Brennan* cited *Wirtz*, 514 F.2d at 621 n.3, but did not attempt to distinguish it. The courts in both cases have, in effect, simply applied the test of "balancing the equities," which is a touchstone of equitable relief in the common law. *See* H. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 144 (2d ed. 1948). As a result, both cases are probably limited to their facts.

194. 520 F.2d 788 (9th Cir. Aug., 1975) (per curiam).

195. 422 U.S. 405 (1975). In *Albermarle*, the district court had refused to order back pay for plaintiffs, who were victims of a discriminatory seniority system. In holding that the trial court had abused its discretion the court found that, although the trial court has some discretion in the matter, back pay should be awarded unless the purposes of the Act would not be furthered by doing so. 422 U.S. at 413.

tions. In a per curiam opinion the court held that *Albemarle* limited, but did not extinguish, the trial court's discretion in awarding back pay.[196] The trial court must exercise its discretion "in light of the large objectives of the act."[197] In the present case, since the employer gained no competitive advantage and accrued no gains to himself as a result of his violations,[198] the prophylactic objectives of the Act could be served without the use of a restitutionary injunction.[199] The motion for rehearing was denied.

IV. OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act[200] was enacted in 1970 to assure (so far as possible) every working person in the nation safe and healthful working conditions and to preserve the nation's human resources.[201] The Act accomplishes its objectives in part by encouraging voluntary health and safety programs on the part of employer and employees, providing for occupational health and safety programs on the part of employer and employees, providing for occupational health and safety research, providing training programs and authorizing the Secretary of Labor to establish mandatory occupational standards. The Secretary of Labor was given powers to enforce the mandatory provisions of the Act.[202] The Act created the Occupational Safety and Health Review Commission (OSHRC), an independent agency charged with adjudicating disputes between employers and the Secretary of Labor regarding alleged violations.[203]

196. 520 F.2d at 789.

197. *Id.*, *quoting* Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975), which is discussed at note 195 *supra*.

198. This conclusion of the court was based on the fact that the employer was paying his employees a higher salary than his competitors were paying their employees. 520 F.2d at 790.

199. It may be be instructive to consider this holding in light of Brennan v. Elmer's Disposal Service, 510 F.2d 84 (9th Cir. 1975). *See* text accompanying note 176 *supra*. *Brennan* states that the purpose of the Act is to spread employment throughout the workforce and to compensate employees for overtime workweeks. 510 F.2d at 87. Presumably, the compensation aspect is somewhat offset in this case by the higher wages which were paid. Furthermore, the first enumerated purpose, that of spreading employment throughout the workforce, might actually be defeated by an award of back pay in this case, since the district court had found that such an award might result in the closing of the business.

200. 29 U.S.C. §§ 651 *et seq.* (1970).

201. *Id.* § 651.

202. *Id.* For such mandatory standards see 29 C.F.R. §§ 1910 *et seq.* (1975).

203. 29 U.S.C. § 661 (1970). For a discussion of the scope and administration of the Act see AM. JUR. 2d, *New Topic Service–Occupational Safety & Health Acts* §§ 3, 7 (1973). For a brief review of the major provisions of the Act see Spann, *The New Occupational Safety and Health Act*, 58 A.B.A.J. 255 (1972).

Since the Act has been in effect for only five years, the courts are still in the process of defining the jurisdictional interrelationships among the Secretary of Labor, OSHRC and the courts. One of the issues before the court in *California Stevedore & Ballast Co. v. Occupational Safety & Health Review Commission*[204] was the authority of OSHRC to increase penalties assessed by the Secretary against an employer who violated the Act. In holding that OSHRC had such authority, the court cited section 17(j) of the Act[205] giving OSHRC the authority to assess penalties. Thus, if the Secretary's proposed penalty is appealed to OSHRC, the Commission determines the matter de novo, and may affirm it, modify it, vacate it, or direct other appropriate relief.[206]

Violations of the Act for which an employer can be cited by the Secretary of Labor are divided into two categories: serious and nonserious violations. Under section 17(k)[207] of the Act, a serious violation is deemed to exist "if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." A second issue in *California Stevedore* involved the construction of the "substantial probability" requirement of section 17(k). Before a violation will be within that subsection, must it be shown that there is a substantial probability of an accident occur-

204. 517 F.2d 986 (9th Cir. May, 1975) (per curiam).

205. 29 U.S.C. § 666(i) (1970). This section reads as follows:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

206. *Accord*, Brennan v. Occupational Safety & Health Review Comm'n, 487 F.2d 438, 441 (8th Cir. 1973). *See also* National Realty & Construction Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1268 n.41 (D.C. Cir. 1973) (dicta). In Dale M. Madden Construction, Inc. v. Hodgson, 502 F.2d 278 (9th Cir. Oct., 1974) (per Skopil, D.J.), the employer appealed from the Secretary of Labor's finding that he was in violation of the Act, and, after considering the matter, OSHRC assessed a $650 fine. The Secretary agreed to a compromise for $150 in return for dismissal of the employer's petition for review to the district court. When the Secretary moved for court approval of the compromise, OSHRC intervened in opposition. The court found that, unlike the NLRB or the FTC, OSHRC had neither prosecution nor enforcement powers. Thus, it could not contest settlements made by the Secretary. The *California Stevedore* case and the *Dale M. Madden* case serve to illustrate the Ninth Circuit's attitude regarding the nature and scope of OSHRC's authority, which commences only upon appeal from the original finding by the Secretary, and ends upon the issuance of a finding by OSHRC as to an appropriate relief.

207. 29 U.S.C. § 666(j) (1970).

ring or only that if an accident, although improbable, did occur, there is substantial probability that death or serious physical injury would result? In *California Stevedore*, the court found that the latter interpretation was the correct one.[208] After criticizing section 17(k) as being "artlessly and ambiguously drafted,"[209] the court held that the Secretary was required only to show that the result of *any* accident which could result from violation of a regulation would have a substantial probability of resulting in death or serious physical harm. The court felt that Congress did not intend for an employer to have to guess at the probability of an accident which might result in death or serious physical injury in deciding whether to obey the regulation.[210]

The case of *Brennan v. Occupational Safety & Health Review Commission*,[211] decided prior to *California Stevedore* had also required the court to construe section 17(k). In that case the court was faced with the issues of whether the Secretary had the burden of proof regarding employer knowledge of the alleged violations, and whether such knowledge was an element of the prima facie case for the nonserious violations.[212] The employer was cited for several serious and nonserious violations resulting from conduct by individual employees which was contrary to instructions issued by the employer. There was no evidence that the instructions were a sham or that the employer had knowledge of the misconduct. The OSHRC vacated all of the alleged violations for lack of evidence and the Secretary appealed. The court held that the language of section 17(k), as quoted above, placed the burden

208. In *California Stevedore*, the employer was cited for a serious violation for failing to secure a hatch beam while unloading through the hatch of a ship. The evidence showed that it was improbable that the beam would become dislodged, but that if it did, death or serious injuries to employees would result. The Secretary had found this condition to be a serious violation as defined by section 17(k).

209. 517 F.2d at 988.

210. *See* Brennan v. Occupational Safety & Health Review Comm'n, 494 F.2d 460, 463 (8th Cir. 1974) (section 17(k) relates to reasonably foreseeable recognized hazards); Brennan v. Occupational Safety & Health Review Comm'n, 513 F.2d 1032, 1039 (2d Cir. 1975) (actual observed danger is not necessary for a violation to occur); Accu-Namics, Inc. v. Occupational Safety & Health Review Comm'n, 515 F.2d 828 (5th Cir. 1975) (violation is serious if there is a substantial probability of death or physical injury resulting from it). For a discussion of the various provisions of OSHA and the legislative intent behind them see Comment, *The Occupational Safety and Health Act of 1970: Its Role in Civil Litigation*, 28 Sw. L.J. 999 (1974). (hereinafter cited as OSHA Comment).

211. 511 F.2d 1139 (9th Cir. Feb., 1975) (per Markey, J.).

212. A nonserious violation is one which has "a direct relationship to job safety and health but probably would not cause death or serious physical harm." OSHA Comment, *supra* note 210, at 1001 n.20, *quoting* U.S. DEP'T OF LABOR, ALL ABOUT OSHA 10 (1973).

of proof on the Secretary when read in light of section 73(a) of the OSHRC's own rules, which provides that the burden of proof for all proceedings commenced by the Secretary shall be on the Secretary.[213] While the court found no express provision in the Act requiring employer knowledge of nonserious violations, use of such words as "wilfully" and "knowingly" in the various sections referring to persons who violate the provisions of the statute implied the requirement of such knowledge. If the Secretary was not required to show such knowledge, the employer would, in effect, be held strictly liable for employee noncompliance, and this result was not, the court felt, the intent of Congress.[214]

V. CONSUMER CREDIT PROTECTION ACT

Section 304(a) of Title III of the Consumer Credit Protection Act[215] reads as follows: "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."[216] Section 304(b)[217] provides for a $1,000 penalty or imprisonment of up to one year for persons violating section 304(a). Section 306[218] states that the Secretary of Labor shall be responsible for enforcing the provisions of the subchapter.

The issue in *Stewart v. Travelers Corp.*,[219] was whether private actions are available under section 304(a). In *Stewart*, the appellant had brought an action in district court against his employer for an alleged violation of section 304(a). His complaint, asking for reinstatement, back pay, punitive damages and attorney's fees was dismissed by the trial court. The Ninth Circuit, in reversing the trial court and remanding the case for trial, stated that the purpose of section 304(a) was "to protect against the hardships and disruptions resulting from employee discharges due to but

213. 29 C.F.R. § 2200.73(a) (1975).

214. If employers have properly instructed their employees on the proper standards, they will probably not be held liable for violations of the standards by their employees. However, employers have an affirmative duty to take all reasonable steps to assure compliance. *See* Comment, *The Occupational Safety and Health Act of 1970*, 34 LA. L. REV. 102, 103 n.15 (1973).

215. 15 U.S.C. § 1674(a) (1970).

216. *See* Hodgson v. Consolidated Freightways, Inc., 503 F.2d 797 (9th Cir. 1974)., (holding that an employer may discharge an employee for excessive garnishments, even though only one of the garnishments took place after July 1, 1970 (the effective date of the Act)).

217. 15 U.S.C. § 1674(b) (1970).

218. *Id.* § 1676.

219. 503 F.2d 108 (9th Cir. Sept., 1974) (per King, D.J.).

one garnishment of wages."[220] Since the criminal sanctions of section 304(b) were applicable only to wilfull violations, and the administrative sanctions were discretionary with the Secretary of Labor, such private actions were necessary to fully effectuate the purposes of section 304.[221]

J. Michael Hardy

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220. *Id.* at 113.

221. Although apparently no other circuit court has considered the issue, all district courts in other jurisdictions that have done so have found that there is no private right of action under these sections. *See, e.g.*, Western v. Hodgson, 359 F. Supp. 194 (D.C. W. Va. 1973), *aff'd on other grounds*, 494 F.2d 379 (1974); Simpson v. Sperry Rand Corp., 350 F. Supp. 1057 (W.D. La. 1972), *vacated on other grounds*, 488 F.2d 450 (1973); Oldham v. Oldham, 337 F. Supp. 1039 (N.D. Iowa 1972). For a different conclusion see Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act*, 47 S. CAL. L. REV. 383 (1974), cited with approval by the court in *Stewart*, 503 F.2d at 112 n.12, wherein the argument is made that a private cause of action under 15 U.S.C. section 1674 can be found either by applying the traditional methods of statutory analysis or by considerations of social policy.