Golden Gate University Law Review

Volume 10
Issue 1 *Ninth Circuit Survey*

Article 13

January 1980

Labor Law

Kevin G. Robinson

Robert Haden

Lyn Woollard

Kevin S. Robinson

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggulrev

Part of the Labor and Employment Law Commons

Recommended Citation

Kevin G. Robinson, Robert Haden, Lyn Woollard, and Kevin S. Robinson, *Labor Law*, 10 Golden Gate U. L. Rev. (1980).
http://digitalcommons.law.ggu.edu/ggulrev/vol10/iss1/13

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

LABOR LAW

I. LOCAL UNION AFFAIRS AND THE FEDERAL COURTS

A. Introduction

In *Stelling v. International Brotherhood of Electrical Workers Local Union Number 1547,*[1] the Ninth Circuit affirmed the judgment of the District Court of Alaska[2] in a suit filed against a local union (Local 1547 or the Local), the International Union (International Brotherhood of Electrical Workers (IBEW)), and various union officers.[3] The complaint by local members first sought district court enforcement of a provision of the union constitution that plaintiffs claimed required a membership vote on a new agreement negotiated by the International President. The district court dismissed this part of the complaint on the grounds that it had no authority to enforce union constitutions;[4] the Ninth Circuit agreed, but for somewhat different reasons.[5] Second, the complaint attempted to show a breach of fiduciary responsibility to members by various union officials. The Ninth Circuit concurred in the district court's grant of summary judgment against plaintiffs on this portion of their complaint, finding that the duty did exist but was not breached.[6] The district court also discussed the plaintiffs' failure to join the employer group, and dismissed the injunctive prayer, finding the employer group an indispensible party.[7] The Ninth Circuit never reached this issue, finding the merits properly disposed of in the summary judgment portion.[8]

The *Stelling* plaintiffs asserted that jurisdiction existed under section 301[9] of the Labor-Management Relations Act

1. 587 F.2d 1379 (9th Cir. Dec., 1978) (per Wright, J.; the other panel members were Kennedy and Tang, JJ.), *cert. denied*, 99 S.Ct. 2890 (1979).
2. Reported as Case v. IBEW, 438 F. Supp. 856 (D. Alaska 1977).
3. 587 F.2d at 1381.
4. 438 F. Supp. at 859.
5. 587 F.2d at 1381.
6. *Id.* at 1389.
7. 438 F. Supp. at 859.
8. 587 F.2d at 1389.
9. Section 301 of the LMRA, 29 U.S.C. § 185 (1976) reads, in relevant part:

   (a) Suits for violation of contracts between an employer and a labor organization . . . or between any such labor organiza-

(LMRA) because a union constitution is enforceable as a "contract between labor organizations" in district court. The plaintiffs alleged that various sections of the Labor-Management Reporting and Disclosure Act (LMRDA)[10] were also involved when the various union officers misinterpreted the union constitution. Although the LMRDA claim certainly merits extensive analysis, it will be discussed only briefly. This Note will focus on the Ninth Circuit's jurisdictional decision under section 301 of LMRA.

The district court dismissed the section 301 claim because plaintiffs grounded their complaint on provisions of the union constitution. The district court, interpreting a previous Ninth Circuit opinion,[11] decided that section 301's grant of federal jurisdiction for labor contract violations does not also authorize suits for breaches of union constitutions. The court of appeals agreed with the dismissal, but not the analysis. The appellate court held that suit for breach of a union constitution is within the jurisdiction of the district court when a sufficient relationship between the constitution and labor-management relations exists.[12] The court of appeals recently applied its *Stelling* decision in *Studio Electrical Technicians Local 728 v. International Photographers of the Motion Picture Industries,*[13] and though it followed the "nexus analysis," requiring a significant relationship between the union constitution and labor-management relations, it appeared to also agree with a district court's statement that union constitutions are not contracts under section 301 and hence there can never be jurisdiction under that section.[14]

> tions, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The district court ruled that this section did not authorize suits for violations of a union constitution between labor organizations, a parent and its local. 438 F. Supp. at 858.

10. 29 U.S.C. §§ 411, 412, 415, 501 & 609 (1976).

11. Hotel & Restaurant Employees v. Svacek, 431 F.2d 705 (9th Cir. 1970).

12. 587 F.2d at 1384.

13. 598 F.2d 551 (9th Cir. June, 1979) (per Wright, J.; the other panel members were Trask, J., and Callister, D.J.).

14. The *Studio* circuit panel summarized the *Stelling* § 301 rule by stating:

> We addressed this question recently in *Stelling v. International Brotherhood of Electrical Workers,* . . . and concluded that, while a suit for breach of a union constitution could be cognizable under § 301, jurisdiction is not conferred "if [the] controversy is related only to a union dispute which will not

Stelling accepted the Alaska District Court's analysis of the LMRDA, with the modification that the indispensable party analysis was superfluous.[15] In reaching this outcome, the court of appeals adopted the district court's analysis of section 501 of the LMRDA,[16] taking the "broad" or majority view of that section.[17] The Ninth Circuit's view of a union official's fiduciary duty to members under LMRDA section 501 is not limited to monetary responsibilities, but extends broadly to all matters entrusted to

> affect external labor relations." . . . Applying this standard, we held jurisdiction was lacking under § 301 when local members alleged that the international and local unions violated the union's constitution by denying them the right to vote on the ratification of a collective bargaining agreement.

Id. at 553 (footnote and citation omitted).

The problem arises because of a statement earlier in the *Studio* opinion where the court seemed to note with approval that the district court had decided: "The union constitution was not a contract and therefore that it lacked jurisdiction under LMRA § 301. . . . [W]e agree with the district court's conclusion . . . ." *Id.* at 552 n.1. Based on the reliance on *Stelling,* the "district court's conclusion" with which *Studio* agrees is not that the Union Constitution was not a contract, but that it was insufficiently related to external labor relations to render it a contract under § 301.

15. 587 F.2d at 1385. The district court had separated the prayers for injunction and declaratory relief under the LMRDA. In its analysis of the injunctive claim, it assumed that the plaintiffs would prevail and then noted that without the joinder of the employer group, whose contract was to be voided if the relief was granted, no adequate remedy could be crafted. Therefore, under the FED. R. CIV. P. 19(b) and Lomayatawa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975), that part of the charge must be dismissed. 438 F. Supp. at 859-60.

16. Section 501 of the LMRDA, 29 U.S.C. § 501(a) (1976) provides:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such . . . a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

17. This decision had been left undetermined in Kerr v. Shanks, 466 F.2d 1271, 1275 n.2 (9th Cir. 1972).

Published by GGU Law Digital Commons, 1980

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

the care of that official.[18] However, the courts evaluating claims of breach of those duties give great weight to the union officer's interpretations of those obligations, if they are reasonable and not arbitrary.[19] In dealing with various other issues, the *Stelling* court concluded that: 1) section 101 of the LMRDA[20] is activated only during union elections and does not give union members the right to vote on specific issues[21] 2) union members must exhaust internal union procedures before bringing federal suit,[22] and 3) though attorney's fees may be appropriate for successful plaintiffs under section 101 of the LMRDA,[23] the district court did not abuse its discretion when it denied those expenses to these plaintiffs either because it felt them inappropriate, or because the plaintiffs were not successful.[24]

B. Facts and Legal Issues Presented

In 1946, the IBEW entered into a national pension plan agreement with the National Electrical Contractors Association (NECA) for the benefit of all IBEW members.[25] The NECA, a

---

18. 587 F.2d at 1387.

19. *Id.* at 1388, *quoting with approval* Vestal v. Hoffa, 451 F.2d 706, 709 (6th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972).

20. Section 101(a)(1), 29 U.S.C. § 411(a)(1) (1976) provides:

> Equal Rights — Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

21. 587 F.2d at 1385.

22. *Id.* at 1390-91. The court relied on § 101(a)(4), 29 U.S.C. § 411(a)(4) (1976) which provides:

> Protection of the right to sue — No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency . . . *[p]rovided,* [t]hat any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . . .

23. Hall v. Cole, 412 U.S. 1 (1973); Kerr v. Screen Extras Guild, Inc., 466 F.2d 1267 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1976).

24. 587 F.2d at 1390. Plaintiffs also asserted jurisdiction under § 101, 29 U.S.C. § 411 (1976), and under § 609, 29 U.S.C. § 609 (1976), which prohibits discipline by the labor organization against members who had asserted rights under LMRDA. The § 609 claim was declared moot and dismissed.

25. Actually, only the 374 U.S. locals of IBEW were covered by the International Construction Agreement (ICA). The Canadian locals were not party to the ICA. 438 F.

national association of employers and the IBEW International President (the President) renegotiated that agreement, with the President acting on the authority of a resolution of the 1976 IBEW convention. In December, 1976, the President and the NECA entered into the International Construction Agreement (ICA). As a part of the ICA, NECA increased its contributions to the pension plan from $30,000,000 to $90,000,000.[26] The President ordered all 374 affected locals to incorporate the ICA into their local agreements. All of the locals did so, except Local 1547 (the Local), which rejected the agreement. Upon notifying the President of the membership vote, the Local's Business Agent was directed to incorporate the ICA into the agreement with the Alaska Chapter of NECA, which he did. The plaintiffs filed this action in March 1977, seeking an injunction to halt the intended implementation of the ICA on July 1, 1977, pending a ratification vote of the affected locals.[27]

Various members of the Local, including John Stelling, wrote to the President requesting that his instructions to incorporate the ICA be rescinded on the grounds that Article IV, section 3(13) of the union constitution[28] mandated a membership ratification vote before such agreement could be incorporated. They were unsuccessful. Plaintiffs Darby and Hix asked officers of the Local to sue IBEW to force the ratification vote, but they were also unsuccessful. Darby and Hix were both disciplined but continued to work for reforms. Both appealed the discipline

---

Supp. at 858.

26. Though the record doesn't indicate the bargaining posture of the President, the district court stated "the terms admittedly and obviously involved some concession by the IBEW." *Id.*

27. 587 F.2d at 1382.

28. There are actually two critical sections of the IBEW Constitution, Art. IV, §§ 3(12) and 3(13). Plaintiffs alleged that § 3(13) required a ratification vote on the ICA; defendants asserted that § 3(13) was reached only if § 3(12) didn't apply, which they asserted did so. The sections state:

> 3(12) The International President is empowered as follows: To enter into . . . agreements with any . . . association of employers . . . to cover the entire jurisdiction of the IBEW.
>
> 3(13) The International President . . . shall not enter into agreements affecting wages, hours and conditions of employment where local union agreement, covering such employment, already exists, without first notifying at least thirty (30) days in advance of such agreements, the local unions so concerned or affected, in a district, and then only by procuring consent of a majority of the local unions in the district or the individual local unions affected by this agreement.

587 F.2d at 13[illegible]

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

through intra-union procedures and in August, 1977, the IBEW dismissed all charges against them.[29]

Plaintiffs filed suit in the Alaska District Court on March 28, 1977, asking the court to enforce Article IV, section 3(13) of the IBEW Constitution; the plaintiffs specifically refused to attack the ICA directly[30] and asserted that section 301 of the LMRA gave the district court jurisdiction to enforce the constitution. The district court determined that under *Hotel & Restaurant Employees v. Svacek,*[31] section 301 will not support a cause of action where a union member sues for breach of the union constitution, even if the constitutional rights are related to a collective bargaining agreement.[32] The court of appeals disagreed, finding that in certain instances a union constitution will support a section 301 suit when the issues raised have "traumatic industrial and economic repercussions, . . . or significantly affected labor-management relations."[33] Since in *Stelling,* plaintiffs refused to attack the ICA directly, the court of appeals ruled that there was an insufficient nexus between the labor-management relations and the constitutional dispute to warrant taking jurisdiction.[34] It is significant to note, however, that plaintiffs got their day in court, for the merits of the LMRDA section 501 claim were heard. The plaintiff's position, however, did not withstand a summary judgment motion.[35] The significance of the fact that plaintiffs did not lack a forum under *Stelling* on the section 301 suit will be discussed below.[36]

C. SECTION 301 OF THE LMRA

Section 301 of the LMRA was adopted by the Taft-Hartley Congress of 1947 to eliminate certain technical obstacles to suits

29. This factual pattern is distilled in 587 F.2d at 1381-82 and 438 F. Supp. at 858.

30. As to why the plaintiffs refused to atack the ICA directly, thereby placing their constitutional claim in a self-imposed isolation, the record is silent. Several reasons suggest themselves. Perhaps plaintifs were attempting to avoid the necessary party analysis (*see* note 15 *supra*), or perhaps they were attempting to have a union constitution held to be a "contract" under § 301 in its own right.

31. 431 F.2d 705 (9th Cir. 1970).

32. 438 F. Supp. at 859.

33. 587 F.2d at 1383, *quoting* Parks v. IBEW, 314 F.2d 886, 916 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963).

34. 587 F.2d at 1384.

35. *Id.* at 1389.

36. *See* notes and accompanying text.

in federal court for breach of a collective bargaining agreement.[37] It states:

> (a) Suits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[38]

The obstacles to federal jurisdiction that Congress attempted to correct arose partially from the common law requirement that before a union could be sued, all of the members of the union had to be joined in the action. Another contributing factor was the Norris-LaGuardia Act of 1932[39] that had apparently deprived federal courts of jurisdiction over conflicts arising in the labor-management area. One of the major problems with section 301 (besides the dearth of legislative history) was that Congress neglected to repeal the contradictory sections of other federal labor laws (for example, Norris-LaGuardia) or to explain the relative functions of each in light of these contradictions.[40]

---

37. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II.*, 59 COLUM. L. REV. 269 (1959). *See* Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027, 1034-40 (1963), and Epstein, *The Expanding Coverage of Section 301 of the Labor-Management Relations Act*, 26 LAB. L.J. 439 (1975).

38. 29 U.S.C. § 185(a) (1976).

39. 29 U.S.C. §§ 101-115 (1976).

40. A profitable comparison can be made between § 301 and the following sections of the Norris-LaGuardia Act:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of the Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

29 U.S.C. § 101 (1976).

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

The history of section 301 is replete with problems of judicial interpretation, with the major interpretive difficulties arising from the language of the statute. For example, what items are included in the term "contracts"? How is the term "labor organization" to be interpreted? Who is bound by the contract, the parties negotiating it or the employees it was negotiated for, or both? Who has standing to bring a section 301 suit? Once the jurisdictional criteria are established, preemption and conflict of law problems also arise: 1) what law is to be used to interpret the contracts? 2) what is the effect of overlapping or contradictory provisions of other labor laws?, and 3) what is the role of the National Labor Relation Board (NLRB) and the state courts, who apparently have parallel jurisdiction of many of the same issues?[41] While the *Stelling* court never got past the first four jurisdiction questions, the preemption and conflicts areas are both fascinating and largely unresolved.[42] They are, however, beyond the scope of this Note, which will focus on the jurisdictional problem presented to the *Stelling* panel.

The *Stelling* court dealt primarily with the jurisdictional questions of what constitutes a "contract" and who can sue whom under it, and determined that a union constitution is a section 301 contract when it is sufficiently related to external labor-management relations.[43] A sufficient relationship exists when the controversy arising under the constitution has a clear nexus to labor-management relations and is not confined to internal union affairs.[44] In establishing the necessity of a "nexus" test to determine jurisdiction, the Ninth Circuit created procedural rules for the federal district courts of the Ninth Circuit. This power to establish a common law for the federal courts is drawn from an analysis of policy considerations implicit in the federal labor laws and the state court case law on internal union affairs. Exercise of this power will profoundly impact on which disputes shall be substantively analyzed in the Ninth Circuit. To facilitate an understanding of this impact, first the judicial history of section 301 will be discussed. Then, the influences that

29 U.S.C. § 105 (1976). For text of § 301(a), see text accompanying note 38 *supra*, and for § 301(b), see note 49 *infra*.

41. See Meltzer, *supra* note 37, at 270 for a slightly different formulation of the interpretive difficulties of § 301.

42. *Id.* at 276-81.

43. 587 F.2d at 1383.

44. *Id.* at 1384.

culminated in the *Stelling* decision will be noted. Though a major part of section 301 case law has dealt with judicial enforcement of arbitration provisions and no-strike clauses, that body of law is only marginally relevant.[45]

Judicial History of Section 301

The first time the Supreme Court faced an issue arising under the provisions of section 301, it was unable to reach a consensus. In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,[46] the Court reviewed an Illinois decision holding that section 301 would not support a suit by a union on behalf of its members for wages believed due the employees under the terms of a collective bargaining agreement. Three justices[47] strongly implied that section 301 was unconstitutional for it gave federal courts the right to apply state law and therefore conflicted with the provisions of Article III of the United States Constitution.[48] However, by determining that the union had no standing to bring a suit for uniquely personal rights of employees, (thereby ignoring the express language of section 301(b)[49]) the three justices dismissed the claim without reaching the constitutional issues.[50] Another three justices[51] con-

45. Duhau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 432 (1969); Rains, Boys Market *Injunctions: Strict Scrutiny of the Presumption of Arbitrability*, 28 LAB. L.J. 30 (1977); Note, *Some Problems Relating to Judicial Protection of the Right to Have Arbitration Agreements Enforced Under Subsection 301(a) of the Taft-Hartley Act*, 59 COLUM. L. REV. 153 (1959); Note, *Employer Remedies for Breach of No-Strike Clauses*, 39 IND. L.J. 387 (1964). *See generally* C. MORRIS, THE DEVELOPING LABOR LAW, Ch. 17 (1971 & Cumm. Supp. 1971-75 & Supp. 1976, 1977, 1978).

46. 348 U.S. 437 (1955).

47. *Id.* at 439. (Frankfurther, Burton and Harlan, JJ.).

48. *Id.* at 449-59. Article III, § 2 of the United States Constitution grants jurisdiction to the federal courts. *See* note 59 *infra* and accompanying text.

49. Section 301(b), 29 U.S.C. § 185(b) (1976) states:

> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Chapter and any employer whose activities affect commerce as defined in this Chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

50. 348 U.S. at 453.

51. *Id.* at 461 (Warren, Clark and Reed, JJ.).

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

curred on the dismissal, but not on the constitutional dicta.[52] Justice Douglas, joined by Justice Black, dissented, arguing that the union had standing to sue, and that section 301 was more than merely a jurisdictional grant to apply state law. Justice Douglas argued that Congress had intended to grant authority to the federal courts to develop federal rules to interpret collective bargaining agreements.[53]

The Douglas-Black position ultimately prevailed, when in *Textile Workers Union v. Lincoln Mills,*[54] Justice Douglas, writing for a majority, stated that section 301 is more than jurisdictional: "[Section 301] expresses a federal policy that federal courts enforce these agreements on behalf of or against labor organizations and that industrial peace can best be established only in that way."[55]

Lincoln Mills arose in the context of a union suit against an employer for specific performance of an arbitration clause in their collective bargaining agreement. The union had filed a grievance. The employer refused to submit to final and binding arbitration as the contract arbitration clause required. Justice Douglas noted that the Norris-LaGuardia Act barred federal courts from granting equitable relief such as specific enforcement, but he found the Norris-LaGuardia provisions inapplicable because they were not directed toward the abuses raised in *Lincoln Mills.*[56] This creative reading of the statutory language was apparently not palatable to Justices Burton and Harlan who preferred the logic of the Court's *inherent* equitable jurisdiction "nurtured by a congressional policy to encourage and enforce labor arbitration in industries affecting commerce."[57] Justice Frankfurter filed a strong dissent, questioning the authority of federal courts to create a body of federal common law, whether accomplished through an inherent equitable power of the courts or through legislative fiat.[58] The question of where the federal law is to be derived from is left decidedly unclear by *Lincoln*

---

52. *Id.* at 465.
53. *Id.*
54. 353 U.S. 448 (1957).
55. *Id.* at 455.
56. *Id.* at 458-59. Assuming that the Norris-LaGuardia Act was aimed at a particular goal (*see* note 40 *supra*) by attaching stringent conditions on § 301 jurisdiction, the *Stelling* court is probably reflecting the remnants of that influence.
57. *Id.* at 460 (Burton, J., concurring).
58. *Id.* at 480-81 (Frankfurter, J., dissenting).

Mills,[59] and the *Stelling* court's decision is but the latest in a long series of cautious judicial footsteps in the molding of the new law.

Justice Traynor, of the California Supreme Court, emphasized many of the unresolved areas of the *Lincoln Mills* decision. In *McCarroll v. Los Angeles County District Council of Carpenters*,[60] he stated that the recent *Lincoln Mills* decision did not remove from the purview of state courts, all disputes that concern issues arguably covered by the language of section 301. He noted that the new "federal common law" had no substance as yet and questioned the impact of this amorphous area on state court determinations in deciding claims grounded in collective bargaining areas.[61] As one commentator pointed out, Justice Traynor was probably unduly concerned, as this federal common law would probably be developed from the state courts' case law:

> [E]xcept for a narrow range of issues, neither the LMRA nor other national labor laws supply a meaningful guide for the development of a new body of jurisprudence to govern the enforcement of collective agreements. It thus seems likely that the new federal law will be distilled largely from state court doctrines, which in turn are derived largely from commercial law analogies reshaped to some extent to reflect the distinctive elements of the collective bargaining relationship.[62]

59. About the only question clearly resolved in *Lincoln Mills*, was the constitutional one. Justice Douglas stated that every complaint grounded in § 301 stated a federal question under Art. III of the Federal Constitution:

> There is no constitutional difficulty. Article III, § 2, extends the judicial power to cases "arising under . . . the Laws of the United States . . . ." The power of Congress to regulate these labor-management controversies under the Commerce Clause is plain. . . . A case or controversy arising under § 301(a) is, therefore, one within the purview of judicial power as defined in Article III.

Id. at 457 (citations omitted). *See also* Meltzer, *supra* note 37, at 274.

60. 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958). Justice Traynor virtually predicted the outcome in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), which established that "[w]hen an activity is arguably subject to [29 U.S.C. §§ 157 or 158 (1976)] of the [LMRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245. The ramifications of federal presumption are beyond the scope of this paper. *See generally* C. MORRIS, *supra* note 45, at Ch. 32.

61. 49 Cal. 2d at 57-64, 315 P.2d at 328-33.

62. Meltzer, *supra* note 37, at 278.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

The year following *Lincoln Mills* was productive insofar as judicial construction of section 301 was concerned. Two district courts extended section 301's language to include a union's constitution within the definition of "contract,"[63] sparking some desperate pleas to limit 301 disputes between international unions.[64] The Supreme Court decided that the district courts could look to state law to interpret collective bargaining agreements provided such state law was not inconsistent with the federal labor law policies.[65] The Seventh Circuit grappled with some of the difficulties of section 301 in *United Textile Workers v. Textile Workers Union.*[66] The Textile Workers Union (TWU) filed for an election in a unit represented by the United Textile Workers (UTW) and UTW complained to the AFL-CIO, the parent body of both the international unions. Under the AFL-CIO no-raiding agreements, an impartial umpire heard the issue and decided in favor of UTW and ordered TWU to withdraw its request with the NLRB for an election.[67] When TWU refused, UTW brought a 301 suit to enforce the umpire's decision. Meanwhile, the NLRB ordered an election. A district court issued a temporary restraining order (TRO) against the NLRB,[68] and the dispute proceeded to the court of appeals. The Seventh Circuit issued an interim order dissolving the TRO and reviewed the dispute, de novo, refusing both to be bound by the umpire's decision and to allow NLRB participation in the process.[69] The court eventually agreed with the umpire and TWU withdrew its election request. The NLRB allowed TWU to withdraw its request, but stated that it did not agree with the court's presumption of jurisdiction.[70] The Second Circuit had decided that 301 not only covered written "contracts" but if past practices and policies were definite enough, they would assume jurisdiction to enforce them under section 301; the court then affirmed that decision in 1961.[71]

63. Burlesque Artists Ass'n v. American Guild of Variety Artists, 187 F. Supp. 393 (S.D.N.Y. 1958); Carpenter's Local 2608 v. Millmen's Local 1495, 169 F. Supp. 765 (N.D. Cal. 1958). *See also* Epstein, *supra* note 37, at 444-45.

64. Note, *Applying the "Contracts Between Labor Organizations" Clause of Taft-Hartley Section 301: A Plea for Restraint,* 69 YALE L.J. 299 (1959).

65. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

66. 258 F.2d 743 (7th Cir. 1958). *See* Epstein, *supra* note 37, at 440; Meltzer, *supra* note 37, at 296-97.

67. UTW v. TWUA, 30 Lab. Arb. 244 (1958) (Cole, Arb.).

68. UTW v. TWUA, 42 L.R.R.M. 2066 (N.D. Ill. 1958).

69. Meltzer, *supra* note 37, at 296-97.

70. *Id.* at 297; Personal Prod. Corp., 122 N.L.R.B. 563 (1958).

71. Hamilton Foundry & Mfg. Co. v. Moulders & Foundry Workers, 193 F.2d 209 (2d Cir.), *cert. denied,* 343 U.S. 966 (1952) (oral collective bargaining agreement enforced

Robinson et al.: Labor Law

The Supreme Court entered the fray again in 1962, issuing three major decisions, *Atkinson v. Sinclair Refining Co.,*[72] *Retail Clerks v. Lion Dry Goods,*[73] and *Smith v. Evening News.*[74] *Atkinson* decided that "labor organization" was to be interpreted similarly to section 152(5)[75] of the LMRA (thereby resurrecting the NLRB's expertise in labor relations). *Lion Dry Goods* upheld the expansive reading of "contracts" to include no-raiding agreements between international unions. *Evening News* continued the expansion of 301, by specifically overruling *Westinghouse* and by holding that unions have standing to bring suit to enforce "uniquely personal rights" of the employees it represents.[76] The Court's intent in overruling *Westinghouse* was to give a broad reading to section 301.[77]

By 1962, section 301 had assumed an imposing stature in the interpretation of disputes in all aspects of labor-management relations and labor relations in general. "Contracts" included collective bargaining agreements between unions and employers and these agreements could be enforced on behalf of individual employees and/or their unions.[78] "Contracts" also included no-raiding agreements between international unions.[79] The Court had not spoken directly on whether "contracts" extended to such things as union constitutions, though there were strong hints that as long as the decision was not inconsistent with federal labor policies, the federal courts could enforce provisions of union constitutions and charters through state law rules.[80] Neverthe-

---

without mentioning § 301); *accord,* Hod Carriers Local 33 v. Mason Tenders, 291 F.2d 496 (2d Cir. 1961).

72. 370 U.S. 238 (1962), *rev'd in part,* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) (Norris-LaGuardia Act does not bar injunctive relief for breach of no-strike clause in collective bargaining agreements).

73. 369 U.S. 17 (1962).

74. 371 U.S. 195 (1962).

75. The NLRB has broadly interpreted this section to include trustees of a pension plan, NLRB v. General Precision, Inc., 381 F.2d 61 (3d Cir. 1967), *cert. denied,* 389 U.S. 974 (1968), or a group of unorganized workers protesting wages, NLRB v. Kennametal, Inc., 183 F.2d 817 (3d Cir. 1950). This part of the *Atkinson* decision goes a long way towards expanding the scope of § 301. *See* Epstein, *supra* note 37, at 442; Carpenters Local 1219 v. United Bhd. of Carpenters & Joiners, 493 F.2d 93 (1st Cir. 1974).

76. 371 U.S. at 199.

77. "Section 301 is not to be given a narrow ruling." *Id.*

78. Smith v. Evening News, 371 U.S. 195 (1962).

79. Retail Clerks v. Lion Dry Goods, 369 U.S. 17 (1962).

80. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), where the Supreme Court affirmed a state court determination that a union constitution was a contract under which wrongfully expelled members of a union could sue for reinstatement.

less, except in the area of arbitration,[81] the Supreme Court has bowed out of the area covered by section 301,[82] thus allowing the circuits to grapple, relatively unaided, with the parameters of the federal law fashioned to cover contracts in the labor area.

Since *Evening News*, the circuits have primarily dealt with who may sue under section 301 and what constitutes "contracts" covered by that section. Both of these concerns were apparent in the *Stelling* decision and have formed a large area in the developing federal common law of labor relations. The preemption areas, insofar as the problems of choice of law and forum, are potentially explosive.[83] In interpreting conduct that arguably transgresses both the area of sections 301 of the LMRA, and provisions administered by the NLRB, there are three forums available: the state courts, the NLRB and the district courts. The state courts are preempted if the dispute is arguably an unfair labor practice and subject to the exclusive concern of the NLRB. But if a collective bargaining agreement or union constitution is disputed, there are strong arguments for the state courts to assert jurisdiction, if only to create principles for the federal common law to incorporate.[84] The NLRB is likely to defer to any grievance provisions in the contract[85] and if deference is accorded, the district courts are likely to become the appropriate forum for litigation of contract disputes.

Proper Parties under Section 301

The *Stelling* court's statement that "jurisdiction [under section 301] depends on the nature of the action rather than the status of the parties"[86] represents the broad consensus of the circuits[87] that virtually anyone can bring suit under section 301 as long as the controversy involves a contract between labor organizations. The days of the *Westinghouse* decision when "uniquely

81. *See* text accompanying note 65 *supra*.

82. Stelling v. Local 1547, IBEW, 587 F.2d 1379 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2890 (1979); Local 657, United Bhd. of Carpenters & Joiners v. Sidell, 552 F.2d 1250 (7th Cir.), *cert. denied*, 434 U.S. 862 (1977); Sabolsky v. Budzanoski, 457 F.2d 1245 (3d Cir.), *cert. denied*, 409 U.S. 853 (1972); Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971); Parks v. IBEW, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963).

83. *See* text accompanying notes 40 to 41 *supra*.

84. *See* notes 60 to 62 *supra* and accompanying text.

85. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

86. 587 F.2d at 1383, *citing* Rehmar v. Smith, 555 F.2d 1362, 1366 (9th Cir. 1976).

87. *Id.*

personal rights" of employees were not enforceable by the unions representing those employees are long gone. In *Hines v. Anchor Motor Freight,*[88] one of the few Supreme Court signposts since 1962, this point was specifically emphasized. The trend has extended so far as to allow a suit against individual employees for personal breaches of a collective bargaining agreement negotiated on their behalf.[89]

The consensus of the circuits is also indicated by the uniform interpretation of "labor organization," to include sister locals involved in inter-union disputes. This reading of labor organizations is drawn from LMRA, section 152(5)[90] as defined by the NLRB.[91]

"Contracts" Covered by Section 301

After deciding, in *Lion Dry Goods,* that "contracts" includes more than collective bargaining agreements,[92] the Supreme Court established in *Smith v. Evening News* that "[s]ection 301 is not to be given a narrow reading."[93] Prior to *Stelling,* there were two major lines of analyses in interpreting what "contracts" were subject to section 301; one line was represented by the Fourth Circuit's decision in *Parks v. IBEW;*[94] the other was represented by the Ninth Circuit's decision in *Hotel & Restaurant Employees v. Svacek.*[95]

The Fourth Circuit, in a well reasoned opinion, decided that contracts include union constitutions. After noting that the Supreme Court had not addressed the question, the *Parks* court looked to legislative history for guidance. They decided that, at best, Congress had not foreseen the question.[96] The *Parks* court concluded that "[i]t is also possible, however, to conclude that Congress would have deemed it appropriate for federal courts to exercise jurisdiction over such disputes because, as the present

88. 424 U.S. 555 (1976). *See also* Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971).
89. New York State United Teachers v. Thompson, 459 F. Supp. 677 (N.D.N.Y. 1978).
90. 29 U.S.C. § 152(5) (1976).
91. *See* note 75 *supra* and accompanying text.
92. 369 U.S. at 25-28.
93. 371 U.S. at 199.
94. 314 F.2d 886 (4th Cir.), *cert. denied,* 372 U.S. 976 (1963).
95. 431 F.2d 705 (9th Cir. 1970).
96. 314 F.2d at 916.

one, they have *traumatic industrial and economic repercussions.'*[97] In accepting jurisdiction, the *Parks* court did not require a showing of traumatic industrial and economic consequences. Congress, they said, could have considered disputes arising around union constitutions to be of serious consequence to labor-management relations.[98] The *Parks* court determined that the preemption doctrine was inappropriate to section 301 disputes.[99] In rapid succession, the First,[100] Second[101] and Seventh Circuits[102] followed the *Parks* court lead.

The other major theory had been announced in the Ninth Circuit's *Svacek* decision. In that decision, the union had sued under section 301 to collect a fine levied against one of their members for crossing a picket line. In a per curiam decision, the Ninth Circuit dismissed the claim for lack of jurisdiction. The *Svacek* court stated the general federal policy that internal union affairs were not subject to district court interference; however, they also issued a blanket statement that section 301 does not confer jurisdiction over internal disputes of unions.[103] The Tenth[104] and the Third Circuits[105] agreed with the Ninth, and those courts that attempted to reconcile *Parks* with *Svacek* and *Smith v. United Mine Workers*[106] declined to follow *Svacek* insofar as the blanket "internal union affairs" language.[107] One commentator attempted to reconcile the decisions and concluded:

---

97. *Id.* (emphasis added).

98. *Id.* at 915.

99. *Id.* at 914.

100. Carpenters Local 1219 v. United Bhd. of Carpenters & Joiners, 493 F.2d 93 (1st Cir. 1974).

101. Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971). Though the *Abrams* court reluctantly accepted jurisdiction, it left open the question of whether a union charter, standing alone, is a § 301 contract. *Accord,* Santos v. United Bhd. of Carpenters & Joiners, 547 F.2d 197 (2d Cir. 1977). The Second Circuit resolved any questions left open by *Abrams* by accepting jurisdiction over a union constitution in a § 301 context.

102. Local 657, United Bhd. of Carpenters & Joiners v. Sidell, 552 F.2d 1250, 1256 (7th Cir.), *cert. denied,* 434 U.S. 862 (1977).

103. 431 F.2d at 706.

104. Smith v. UMW, 493 F.2d 1241 (10th Cir. 1974). *But cf.* Adams v. International Bhd. of Boilermakers, 262 F.2d 835 (10th Cir. 1959) (in a non-301 context, the Tenth Circuit stated that a union constitution was a contract).

105. Antal v. Budzanoski, 320 F. Supp. 161 (W.D. Pa. 1970), *modified sub nom.,* Sabolsky v. Budzanoski, 457 F.2d 1245 (3d Cir.), *cert. denied,* 409 U.S. 853 (1972). It is important to note that in this fact pattern, plaintiffs also received their day in court through the LMRDA claims. *See* Epstein, *supra* note 37, at 450.

106. 493 F.2d 1241 (10th Cir. 1974).

107. Keck v. Employees Independent Ass'n, 387 F. Supp. 241 (E.D. Pa. 1974).

Robinson et al.: Labor Law

> While [*Svacek* and *Smith v. United Mine Workers*] seem to be directly in conflict with [*Parks*], it may be possible to at least partially reconcile them by taking a closer look into the nature of the disputes involved and the role played by the judicial policy against interference in internal union affairs.[108]

In *Svacek* and *Smith*, the dispute could be characterized as purely internal to the workings of the unions involved and lacking the traumatic industrial and economic repercussions of *Parks*. The commentator continued:

> While this distinction between purely internal disputes and those intraunion disputes which have an effect on labor-management relations goes some distance toward reconciling these cases, *there still remains a tension. This is due to the fact that the courts in both* Svacek *and* Smith v. United Mine Workers of America *make blanket statements to the effect that section 301 does not confer jurisdiction over intra-union disputes.*[109]

Clearly, it was this tension that led the District Court of Alaska, when confronted with the *Stelling* fact pattern, to conclude that it had no jurisdiction. The *Stelling* appellate court decided that the district court would have had jurisdiction if the plaintiffs had alleged facts that demonstrated some nexus to labor-management relations, such as directly attacking the International Construction Agreement.[110] However, since the plaintiffs were unable to do so, the court decided that the federal common law of section 301 mandated that union constitutions could only be considered section 301 contracts if the underlying dispute was substantially related to labor-management relations, and hence the dismissal was affirmed.[111] Although the bland assertion that this is consistent with *Svacek* is farfetched,[112] the partial reconciliation with the *Parks* position is heartening to those seeking predictability in the area.[113]

108. Epstein, *supra* note 37, at 445.

109. *Id.* at 446 (emphasis added).

110. 587 F.2d at 1384.

111. *Id.*

112. *Id.* at 1383.

113. *See* 1199 DC, Nat'l Union of Hosp. & Health Care Employees v. National Union of Hosp. & Health Care Employees, 533 F.2d 1205 (D.C. Cir. 1976), for an earlier indication of the course the *Stelling* court is attempting to chart.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

The Status of Section 301 Suits after Stelling

The tension between the *Parks* and *Smith* courts is narrowed by the *Stelling* decision. The First and Second Circuits seem the most receptive to accepting 301 suits over disputes marginally related to labor management relations.[114] The Tenth and Third Circuits' positions represent the strictest stances on disputes that can be characterized as internal union affairs, and perhaps the most consistent with the policies of the Norris-LaGuardia Act.[115] Now, the District of Columbia Circuit and the Ninth Circuit are steering a middle course, accepting jurisdiction,[116] but demanding more than conclusary allegations of substantial labor-management relations impact.[117] Until the Supreme Court clarifies the area, the federal common law of labor-management relations will be fashioned with a great deal of local variance.

D. THE IMPACT OF THE LMRDA ON THE 301 ISSUES

In *Stelling,* it is critical to note that the court, in denying jurisdiction under section 301 did reach the issue on the merits as presented under the LMRDA.[118] Plaintiffs asserted in the 301 context that the Union Constitution mandated a ratification vote on the ICA, and in the LMRDA context that certain union officials had breached their fiduciary duty to the membership by denying that vote. Although plaintiffs were unsuccessful in pressing their claims, the court, through the process of expansive reading of section 501 of the LMRDA, was able to relegate section 301 of the LMRA to areas not involving intra-union matters.[119]

The Scope of Section 501 of the LMRDA

Other circuits have split on the issue of whether a union officer's fiduciary obligations under section 501 of the LMRDA

114. *See* Local Union 1219, United Bhd. of Carpenters & Joiners v. United Bhd. of Carpenters & Joiners, 493 F.2d 93 (1st Cir. 1974); New York State United Teachers v. Thompson, 459 F. Supp. 677 (N.D.N.Y. 1978).

115. *See* cases cited at notes 104 and 105 *supra.*

116. While neither circuit has actually accepted jurisdiction yet, they threaten to do so. *See* cases cited at notes 95 and 113 *supra* and accompanying text.

117. 587 F.2d at 1384.

118. "The allegation that appellees have denied the membership of the union the constitutionally guaranteed right to vote is a sufficient assertion of a breach of trust on the part of t h e appelleesinvoke the jurisdiction of § 501." *Id.* at 1387.

119. *See* Epstein, *supra* note 37, at 449-50.

Robinson et al.: Labor Law

encompasses more than monetary obligations. The district court in *Stelling,* after analyzing the majority[120] and minority[121] positions, noted that the Ninth Circuit had expressly left the question open.[122] The lower court then opted for the majority view that a union official's fiduciary duty to members should be broadly construed and the Ninth Circuit approved. The Second Circuit remains the only adherent of the minority view that fiduciary duty is to be confined to monetary matters.[123] The narrow, or minority view of section 501 is basically indefensible, insofar as it derives from legislative history.

This narrow view of the fiduciary obligations of union officials imposed by section 501 was first espoused in *Gurton v. Arons.*[124] The *Gurton* court was called upon to interpret a union's constitution and bylaws to assess the depth of the obligations imposed on the officers of the union. To aid in the interpretation, the court looked to the union's own interpretation of the constitution. Finding that interpretation not unreasonable or arbitrary, the court found no breach of the fiduciary obligation. The classic rationale of the LMRDA then appeared in the opinion:

120. The Eighth Circuit first announced the majority position in Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963). *Accord,* Pignotti v. Local 3, Sheet Metal Workers' Int'l Ass'n, 477 F.2d 825 (8th Cir. 1973); Sabolsky v. Budzanoski, 457 F.2d 1245 (3d Cir.), *cert. denied,* 409 U.S. 853 (1972); Cefalo v. Moffet, 449 F.2d 1193 (D.C. Cir. 1971); McCabe v. Local 1377, IBEW, 415 F.2d 92 (6th Cir. 1969); Parks v. IBEW, 203 F. Supp. 288 (D. Md. 1962), *aff'd,* 314 F.2d 886 (4th Cir.), *cert. denied,* 372 U.S. 976 (1963).

121. Gurton v. Arons, 339 F.2d 371 (2d Cir. 1971). *Accord,* Head v. Brotherhood of Ry. Clerks, 512 F.2d 398 (2d Cir. 1975); Yanity v. Benware, 376 F.2d 197, 201 (2d Cir.), *cert. denied,* 389 U.S. 874 (1967).

122. Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972). *Kerr* states that the question had been left undecided, *but see* Comment, *Fiduciary Duties of Union Officers Under Section 501 of the LMRDA,* 37 LA. L. REV. 875 (1977) for a strong argument that the *Kerr* court had, by the circuitous route of attaching monetary obligations to every duty of union officials, already adopted the majority position.

123. Gurton v. Arons, 339 F.2d 371 (2d Cir. 1971).

124. *Id.* In *Gurton,* the Second Circuit stated:

> It is clear . . . that Section 501 of the L.M.R.D.A. has no application to the present controversy. A simple reading of the section shows that it applies to fiduciary responsibility with respect to the money and property of the union and that it is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them. If further corroboration for this position be needed it will be found in the legislative history and in the law review articles cited by Judge Tenney in his opinion in the district court.

Id. at 375 (footnote omitted).

> The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.[125]

The *Stelling* court's fiduciary analysis of the underlying dispute may be subject to some criticism, because it adopts a per se approach: if the union's interpretation is reasonable, then there is no breach.[126] A more defensible position would examine the underlying dispute.[127] While criticism is well grounded in theory,

---

125. *Id.* However, the *Gurton* court went on to base its reading of § 501 on legislative history. *Id.* at 376. *See* Kratzke, *Fidiciary Obligations in the Internal Political Affairs of Labor Unions Under Section 501(a) of the Labor-Management Reporting and Disclosure Act*, 18 B.C. INDUS. & COM. L. REV. 1019 (1977). Professor Kratzke pointed out that the *Gurton* court arrived at their legislative history analysis by relying on Judge Tenney's analysis below:

> Judge Tenney's reading of the legislative history is open to some criticism. In Judge Tenney's discussion of the legislative history of section 501(a), he comments that:
>
> > The legislative history of the Section would appear to also be in accord with defendants' position that the Section relates solely to questions of financial dealings. Thus, during the course of debate, Senators McClellan and Ervin made it quite clear that the Section would relate solely to matters of money and property. See II Leg. History 1129-31 (1959).
>
> Unfortunately, the debate to which Judge Tenney refers concerned the Senate version of the bill . . . which was never passed.

Id. at 1026 n.37 (citations omitted). *See also* Comment, *supra* note 122, at 875; Beaird, *Union Trusteeship Provisions of the Labor-Management Reporting and Disclosure Act of 1959*, 2 GA. L. REV. 469, 518 (1968).

126. 587 F.2d at 1388-89.

127. According to Professor Kratzke, the proper fiduciary analysis in *Stelling* would be to examine the union officers constitutional basis for his or her actions, and then, if

Robinson et al.: Labor Law

had the *Stelling* court adopted a standard fiduciary analysis, the probable outcome would have been identical,[128] and the actual approach, deferring to the unions' own interpretation, recognizes the political autonomy of the labor organization.[129]

Title I of the LMRDA

The plaintiffs in *Stelling* asserted that defendants violated section 101(a)(1)[130] when they denied the membership a ratification vote. Jurisdiction is granted district courts over section 101 disputes by section 102.[131] The court held that, "although the LMRDA guarantees members the right to vote in union elections, it does not guarantee them the right to vote on a particular question."[132]

The *Stelling* decision, relying on *Calhoon v. Harvey*,[133] and

---

that is weak, to look to the underlying dispute to discover what would be in the best interest of the union members as a whole.

> When a court does choose to intervene in the affairs of a labor organization, it must be prepared to make a determination of the interests of the union as a group, since without such a determination the court is unable to examine the nature of the fiduciary obligation of union officials under section 501(a). Moreover, if the fiduciary obligation *is* defined in this manner, it becomes at least conceivable that the best interests of the labor organization and its members might not be those expressed in a vote taken at any particular meeting. Hence the conclusion is compelling that even an apparent infringement on the voting rights of union members should not be *conclusive* proof that fiduciary obligations to the labor organization guaranteed under section 501(a) have been breached.
>
> Yet even in circuits adopting the broad view of fiduciary responsibilities under section 501(a), the courts have exhibited a propensity toward per se analysis. Such per se analysis is not suitable when the interest of the labor organization is properly considered.

Kratzke, *supra* note 125, at 1032 (footnotes omitted) (emphasis in original). Applying this formula, the district court noted the *Stelling* fact pattern was subject to a weak constitutional justification. 438 F. Supp. at 861-62. Therefore, according to Professor Kratzke, the lower court should have examined the underlying dispute. Nevertheless, even had it done so, with 373 out of 374 affected locals approving the pact, it would have been difficult if not impossible for the *Stelling* plaintiffs to show that a ratification vote would be in their best interest.

128. *Id.*
129. 587 F.2d at 1389.
130. For the text of § 101(a)(1), see note 20 *supra*.
131. 29 U.S.C. § 412 (1976); 587 F.2d at 1385.
132. *Id.*
133. 379 U.S. 134 (1964).

its progeny,[134] reiterates the well-settled rule that section 101(a)(1) is not violated unless plaintiffs were treated disparately. Here the plaintiffs could allege no discrimination because all IBEW locals had been denied the ratification vote by the President's interpretation of the union's constitution. Thus, the members' only forum is the IBEW internal procedures of appeal.[135]

Plaintiffs also alleged that the various union officers failed to inform the membership of the provisions of Title I of the LMRDA, the bill of rights for union members.[136] However, section 101(a)(4) suggested an exhaustion of remedies requirement which the *Stelling* court adopted.[137] Since plaintiffs had never exhausted any internal union remedies, but merely filed suit, the court dismissed the complaint.[138]

The district court also denied attorneys' fees for plaintiffs. The exact theory for upholding the denial was not clear, however. The district court, citing *Hall v. Cole,*[139] stated that there was no evidence to support such an award.[140] In *Hall,* the Supreme Court ruled that when a plaintiff prevails under section 102, a court may award attorney's fees.[141] The Ninth Circuit stated that the lower court considered attorney's fees, and denied them. What appears to have happened is that the district court considered that plaintiffs were not prevailing parties in the sense of *Hall v. Cole.* When the Ninth Circuit affirmed, it chose to view the district court's action as within that court's discretion and not an application of case law.[142]

E. CONCLUSION

In *Stelling,* the Ninth Circuit announced that internal union affairs are subject to judicial supervision through section 301 of

134. Lux v. Blackmun, 546 F.2d 713 (7th Cir. 1976); Fritsch v. District Council No. 9, 493 F.2d 1061, 1063 (2d Cir. 1974; Smith v. UMW, 493 F.2d 1241 (10th Cir. 1974).

135. For a summary of the IBEW internal structure, see Parks v. IBEW, 314 F.2d 886, 916 (4th Cir.), *cert. denied,* 372 U.S. 976 (1963).

136. Section 105 of the LMRDA provides: "Every labor organization shall inform its members concerning the provisions of this Act." 29 U.S.C. § 415 (1976).

137. *See* note 22 *supra.*

138. 587 F.2d at 1391.

139. 412 U.S. 1 (1973).

140. "As to the issue of attorney's fees there has been no evidence to support such an award under the rationale of *Hall v. Cole*. . . ." 438 F. Supp. at 862 (citation omitted).

141. 412 U.S. at 9.

142. 587 F.2d at 1390, *distinguishing* Kerr v. Screen Extras Guild, Inc., 466 F.2d 1267 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1973).

the LMRA *only* when the underlying dispute is sufficiently related to labor-management relations.[143] Conclusory allegations of a nexus to labor-management relations will not be sufficient to state a cause of action; facts calling into question some agreement between labor and management will have to be alleged. The source of the procedural and substantive rule is the federal common law crafted by the Ninth Circuit under the rule of *Lincoln Mills* and the policies of various federal labor laws.

The *Stelling* court also adopted a broad interpretation of section 501 of the LMRDA, holding that a union officer's fiduciary duty to union members extends beyond monetary matters, to a spectrum of duties and responsibilities placed in the care of that officer. However, in interpreting the scope of those duties to determine if a breach has occurred, the Ninth Circuit will look to the union hierarchy's interpretation of the scope of their duties. If their interpretation is reasonable and not arbitrary, then the court will defer to it.

By this juxtaposition of the LMRA and LMRDA in *Stelling,* the theory of judicial interference in internal union affaris in the Ninth Circuit is elucidated. If the plaintiffs object to internal decisions by their officers and union and they are prepared to challenge the agreement reached with management through those internal procedures, the Ninth Circuit will accept jurisdiction under either the agreement or the union constitution. If plaintiffs

143. By tying § 301 to a sufficient nexus between the beneficiaries of the *Stelling* pension fund, the employees and the signatories of the agreement (the unions and employers), the Ninth Circuit may be forestalling judicial intervention into internal union affairs but the delay should only be considered temporary. The applications of the *Stelling* decision in non-pension fund situations, such as in Studio Electrical Technicians Local 728 v. International Photographers of the Motion Pictures Industries, 598 F.2d 557 (9th Cir. 1979), relegates locals to their own internal proceedings of appeal. Individual employees attacking the use of pension fund dollars for political purposes are going to assert rights that need a forum. The close ties of § 301 to § 501 of LMRDA, as represented in *Stelling,* is perhaps a harbinger of things to come, confining employees to LMRDA rather than LMRA in assessing pension fund obligations. *See* Raskin, *Pension Funds Could Be The Union's Secret Weapon,* Fortune, Dec. 31, 1979, at 17. Mr. Raskin prophetizes that unions will take over investment of their huge pension funds from conservative investment committees and invest only in labor sympathetic businesses. Since pension fund committees are "labor organizations," NLRB v. General Precision, Inc., 381 F.2d 61 (3d Cir.), *cert. denied,* 389 U.S. 974 (1968), and this step would relate these agreements to labor-management relations, a strong argument is available to union members wishing to question this proposed practice under § 301 of LMRA.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

are primarily concerned about the internal machinations that led to the agreement, they are relegated to internal appeal and claims under the LMRDA.

Kevin G. Robinson

III. PRELIMINARY INJUNCTIONS AGAINST TRUSTEESHIPS: *BENDA V. GRAND LODGE OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS*

A. INTRODUCTION

In *Benda v. Grand Lodge of the International Association of Machinists and Aerospace Workers (Benda),*[1] the Ninth Circuit reviewed a district court's grant of a preliminary injunction[2] enjoining a trusteeship imposed by an international union on its local union under the Labor Management Reporting and Disclosure Act (LMRDA or the Act).[3] *Benda* joins a long line of cases

---

1. 584 F.2d 308 (9th Cir. Aug., 1978) (per Sneed, J., the other panel members were Trask, J. and Skopil, D.J.), *cert. dismissed,* 99 S. Ct. 2065 (1979).

2. 442 F. Supp. 431 (N.D. Cal. 1977) (per Schwartzer, D.J.).

3. Landrum Griffin Act, 29 U.S.C. §§ 461-466 (1976). For general background and discussion of the trusteeship provisions of the LMRDA, see Beaird, *Union Trusteeship Provisions of the Labor Management Reporting and Disclosure Act of 1959,* 2 GA. L. REV. 469 (1968); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 MICH. L. REV. 819, 845-51 (1960); Note, *The Trusteeship Provisions of the Labor Management Reporting and Disclosure Act: A Review of Judicial Developments,* 42 U. CIN. L. REV. 77 (1973); Note, *Landrum Griffin and the Trusteeship Imbroglio,* 71 YALE L. J. 1460 (1962);

Section 462 of the Act provides several proper purposes for trusteeships:

> Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

29 U.S.C. § 462 (1976).

Section 464 provides in pertinent part:

> (a) Upon the written complaint of *any member or subordinate body* of a labor organization alleging that such organization has violated the provisions of this subchapter . . . the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of

that have addressed the issue of whether a trusteeship has been imposed for a proper purpose under the Act.[4] What sets *Benda* apart from these cases is the standard of review used by the Ninth Circuit and the manner in which the court applied its standard. The appellate court affirmed the trial court grant of injunctive relief, asserting that the key element to be considered in granting such relief is the relative hardship to the parties. The *Benda* court utilized a balancing test which provides that as the balance of harm tips toward the moving party, that party's burden of showing likely success on the merits lessens.[5] While the result in *Benda* is arguably justifiable, the court failed to clearly explicate its rationale and paid little, if any, attention to the statutory presumption of validity accorded trusteeships by the LMRDA.[6]

The importance of the issue of trusteeships is illustrated by the statutory framework created by Congress. In 1959, Congress enacted the LMRDA for the purpose of regulating internal union affairs in order to promote union democracy.[7] To achieve this

---

> the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. *Any member or subordinate body* of a labor organization affected by any violation . . . may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate.
>
> . . .
>
> (c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 462 of this title.

29 U.S.C. § 464 (1976) (emphasis added).

4. Proper purposes are set forth in 29 U.S.C. § 462 (1976); for the relevant language of § 462, see note 3 *supra*. For case law interpreting the section see, e.g., Gordon v. Laborers Int'l Union, 490 F.2d 133 (10th Cir. 1973); Executive Bd. Local 1302 v. United Bhd. of Carpenters and Joiners, 477 F.2d 612 (2d Cir. 1973); National Ass'n of Letter Carriers, AFL-CIO v. Sombrotto, 449 F.2d 915 (2d Cir. 1971); McVicker v. International Union of Dist. 50, 327 F. Supp. 296 (N.D. Ohio 1971).

5. 584 F.2d at 314-15.

6. The provision for a statutory presumption of validity is contained in 29 U.S.C. § 464(c) (1976). For text of the statute, see note 3 *supra*.

7. R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 6 (1976).

purpose, the Act provides for various civil and criminal enforcement proceedings and for systematic disclosure via reporting.[8] The Act further regulates the imposition of trusteeships by parent labor organizations over their subordinate local unions.[9] Trusteeship is defined in the Act as any method of control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.[10] Acknowledging that trusteeships are among the most effective devices which responsible international officers have to ensure order within their organizations,[11] Congress provided that properly imposed trusteeships are entitled to a presumption of validity.[12]

In *Benda,* the Ninth Circuit held that: 1) federal courts have jurisdiction over the subject matter of the dispute notwithstanding the fact that unfair labor practice charges are pending before the National Labor Relations Board (NLRB); 2) District Lodge 508, represented by plaintiff Benda, was entitled to injunctive relief because the balance of hardships tipped decidedly in its favor, and it had some chance of success on the merits; and 3) the district court had abused its discretion by awarding the district lodge attorney's fees.[13]

B. Facts of the Case

Benda was President of District Lodge 508,[14] which represented employees of Lockheed Missile and Space Corporation (LMSC), one of several wholly owned subsidiaries of Lockheed Aircraft. Prior to this dispute, the Grand Lodge of the International Association of Machinists and Aerospace Workers (International) had coordinated bargaining between district lodges and four regional subsidiaries of Lockheed Aircraft, but employees in each region had voted separately on whether to accept or reject a contract. In 1977, employees at three plants[15] rejected contract

8. *Id.*

9. 29 U.S.C. §§ 461-466 (1976).

10. 29 U.S.C. § 402(h) (1976).

11. H.R. REP. No. 741, 86th Cong., 1st Sess. *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2424, 2437.

12. 29 U.S.C. § 464(c) (1976).

13. 584 F.2d at 319.

14. District Lodge 508 was composed of smaller local unions from two California counties. It acted as the collective bargaining agent for LMSC employees. *Id.* at 311.

15. The four regional subsidiaries were LMSC, Lockheed General Company (GELAC), Lockheed California Company (CALAC), and Lockheed Air Services Company (LAS). The three plants which rejected the contract were LMSC, GELAC, and CALAC.

proposals and went on strike. The International then informed the district lodges that it intended to engage in corporate-wide joint unified bargaining,[16] thereby requiring a majority vote of all employees to accept a contract.[17]

When the management of three of the subsidiaries made their final offer, two of the regional district lodges[18] decided not to present the contract to the membership for a vote. The International ruled that this response was tantamount to a rejection of the offer for all subsidiaries. LMSC union representatives nevertheless voted to present the offer to their membership. Upon learning that LMSC employees would vote on the contract despite the International's decision, the International President wired Benda, advising him that it had been determined that an emergency existed and, that the district lodge representatives were suspended immediately for "endangering the good and welfare of the Grand Lodge, its local lodges and district lodges as well as the good and welfare of the organization and the membership."[19] The International, in conformity with its constitution and bylaws, thereby placed District Lodge 508 in trusteeship.[20] However, before the International's representatives arrived to take over the district lodge, LMSC employees met and voted to accept their employer's final contract offer and return to work. Still, the International attempted to continue the strike against LMSC in order to force Lockheed to continue corporate-wide bargaining.[21] After taking over operation of the district lodge, the International distributed strike funds and later filed unfair labor practice charges against Lockheed for refusal to bargain.[22]

---

16. 584 F.2d at 311. Authority for the International's action was derived from International Circular No. 596, published in 1958, which permitted the International President or an authorized committee to determine whether all bargaining units affected by multiunit agreements with the same employer, company or corporation should be combined for voting purposes or vote separately or in combination. *Id.*

17. *Id.*

18. GELAC and CALAC.

19. 442 F. Supp. at 435.

20. The International did not label its action as the imposition of a trusteeship. 584 F.2d at 312 n.l. However, as the court points out, the Act broadly defines trusteeship to include "[a]ny receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws." 29 U.S.C. § 402(h) (1976).

21. Employees were thus faced with a dilemma: they could return to work and risk union discipline or they could honor the picket line and risk dismissal by their employer. Though the Ninth Circuit makes much of this dilemma, 584 F.2d at 312, it is precisely the situation faced by many striking workers.

22. The International charged that LMSC violated § 8(a)(5) of the National Labor

Three weeks after the trusteeship was imposed, the district court issued a preliminary injunction against it. Thus, by court order, the International was effectively precluded from continuing its bargaining efforts on behalf of LMSC employees. In addition, the injunction signaled an end to corporate-wide bargaining, and the International was forced to negotiate separate agreements with each of the Lockheed subsidiaries. For all practical purposes, the underlying dispute between the International and the district lodge ended once the trusteeship was preliminarily enjoined.[23] The International could only appeal to the Ninth Circuit to assert its legal right to impose a future trusteeship on a district lodge under similar circumstances.

C. THE LEGAL ISSUES: PREEMPTION, ATTORNEY'S FEES, INJUNCTIVE RELIEF

Two of the issues dealt with by the Ninth Circuit, jurisdiction and attorney's fees, were relatively unimportant. *Benda* adds little to current law on these issues. The affirmance of injunctive relief, on the other hand, raises serious legal questions that were largely left unanswered by the *Benda* court. These questions include when and under what circumstances a trusteeship may be imposed, and, once a trusteeship is imposed, what legal and factual showing must be made to enjoin it.

The first minor issue addressed by the *Benda* court was whether federal courts were precluded from deciding disputes under the LMRDA when the underlying issues were pending before the NLRB as part of an unfair labor practice charge.[24] The preemption doctrine requires that courts defer to NLRB jurisdiction where the activity which is the subject of the court action is either "arguably protected" by the National Labor Relations Act or "arguably prohibited" by it.[25] The International, relying on

Relations Act, 29 U.S.C. § 158(a)(5)(1976), by refusing to bargain in good faith. The NLRB issued a complaint based on this unfair labor practice charge, but took no further action pending appeal. Since this litigation has effectively resolved the underlying dispute it appears that the International is no longer pursuing this action.

23. No request for a permanent injunction has been filed. Benda v. Grand Lodge of Int'l Ass'n, Etc., No. C-77-2761-WWS (N.D. Cal. 1977) (on file at the offices of Golden Gate University Law Review).

24. For a general discussion of the preemption doctrine, see R. GORMAN, *supra* note 7, at 766-86; Cox, *Labor Law Pre-emption Revisited,* 85 HARV. L. REV. 1337 (1972); Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COLUM. L. REV. 469 (1972); Note, *Preemption: A Judicial Headache,* 7 N.C. CENT. L.J. 358 (1976).

25. R. GORMAN, *supra* note 7, at 766.

San Diego Building Trades v. Garmon,[26] argued that because they had filed unfair labor practice charges, only the NLRB had jurisdiction over the trusteeship dispute. The court found this argument unpersuasive because the LMRDA specifically provides that any member of a labor organization placed in trusteeship may bring an action for appropriate relief in federal district court.[27] The Ninth Circuit noted that the clear statutory language was controlling and thus joined the Fifth Circuit[28] in holding that the preemption doctrine was not applicable to actions brought pursuant to the LMRDA.[29]

The second minor issue presented in *Benda* was whether the district court abused its discretion by awarding attorney's fees to the district lodge. The court first noted that the grant of preliminary injunctive relief was not a decision on the merits.[30] Thus, in a strict sense, the district lodge was not a prevailing party.[31] Accordingly, the Ninth Circuit held that the district lodge was not entitled to attorney's fees at this stage of the litigation and reversed the district court.[32]

The major legal issue in *Benda,* and the sole topic of the remainder of this note, is the propriety of granting preliminary injunctive relief to District Lodge 508. Two questions arise: whether the standard of review used by the court was appropriate in view of the factual setting of *Benda* and whether the court's application of this standard rendered a just result consistent with the provisions of the LMRDA. In order to place these issues in

26. 353 U.S. 26 (1957).

27. 29 U.S.C. § 464(a) (1976).

28. MacDonald v. Oliver, 525 F.2d 1217 (5th Cir. 1976).

29. 584 F.2d at 314. Apparently, the NLRB agreed for they declined to intervene in the International's appeal of the district court's grant of a preliminary injunction. *Id.* at 312.

30. *Id.* at 318.

31. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Significantly, the Ninth Circuit noted that attorney's fees would be appropriate if "the grant of a preliminary injunction was the primary relief sought and effectively terminated the action." 584 F.2d at 318. In making such a determination the Ninth Circuit indicated that a federal court should look to the "practical results" of the grant of relief sought. Yablonski v. United Mine Workers, 466 F.2d 421 (D.C. Cir. 1972). However, the *Benda* court then sidestepped this very issue; they did not analyze the practical results of their decision, but merely noted that the International was "actively pursuing this litigation . . ." 584 F.2d at 319. Indeed, at no point in their opinion did the Ninth Circuit discuss the effect of the grant of the preliminary injunction on the International's efforts to conduct corporate-wide bargaining.

32. 584 F.2d at 318.

Published by GGU Law Digital Commons, 1980

context, this note begins with the statutory background of the LMRDA and proceeds to analyze the court's reasoning regarding the appropriate standard of review and its application.

D. Discussion and Critique

The LMRDA: Statutory Background

The LMRDA was enacted in 1959 following two years of congressional investigation of abuses in internal union management.[33] The Senate Select Committee on Improper Activities in the Labor Management Field, headed by Senator John McClellan, brought to light a wide variety of instances in which labor officials had misused union funds, undermined democratic procedures, imposed improper trusteeships, and entered into collusive agreements with employers.[34] The LMRDA implemented the recommendations of the McClellan Committee by: 1) establishing a "bill of rights" for union members; 2) requiring periodic reports from unions and their officers; 3) regulating union election procedures; 4) regulating misappropriation of union funds; 5) prohibiting communists and persons convicted of certain crimes from holding union office; and 6) regulating trusteeships over local unions.[35] The Act sets forth specific guidelines for the imposition of trusteeships, requires reports on trusteeships, and provides a mechanism for local unions or their members to attack a trusteeship.[36]

Section 462 of the Act provides that trusteeships must be imposed in accordance with the constitution and bylaws of the international organization and further sets forth the permissible purposes for establishing a trusteeship.[37] Those purposes are "correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization."[38] Section 464 provides that if a trusteeship is established in conformity with procedures set forth in the organization's con-

33. R. Slovenko, Symposium on the Labor-Management Reporting and Disclosure Act of 1959, at 443-47 (1961).

34. R. Smith, L. Merrifield & T. St. Antoine, Labor Relations Law 47 (1974).

35. *Id.* at 48.

36. 29 U.S.C. §§ 461-466 (1976).

37. For pertinent text of § 462, see note 3 *supra*.

38. *Id.*

stitution and bylaws, it is entitled to a presumption of validity for eighteen months and is not subject to attack except upon clear and convincing proof.[39] This statutory presumption of validity, when viewed in light of the open-ended nature of the proper purpose of "otherwise carrying out the legitimate objects of such labor organization," indicates that Congress, in attempting to draw a line between the rights and duties of a local union and those of the international labor organization, intended to defer somewhat to the judgment and integrity of the superior organization.[40] Finally, section 464 provides that any union member or subordinate body may challenge a trusteeship by filing a written complaint with the Secretary of Labor or by seeking relief in federal district court.[41] Federal courts may, under their general equitable powers, grant injunctive relief to enjoin a trusteeship.[42]

Injunctive Relief in the Trusteeship Context

Federal courts have granted injunctive relief in two contexts. First, injunctions have been issued to prevent[43] or terminate[44] trusteeships. Second, relief has been granted to enforce the legal right of an international to impose a trusteeship on a subordinate body.[45]

The grant of a preliminary injunction is usually seen as temporary, not final, relief.[46] Quite often there is another step to the litigation process: the aggrieved party will seek a permanent injunction. Thus, some courts, including the Ninth Circuit, state that the grant or denial of injunctive relief is not a decision on the merits.[47] The *Benda* court took such a position, repeatedly

39. For pertinent text of § 464, see note 3 *supra*.

40. *See* S. REP. No. 187, 86th Cong., 1st Sess. *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2334.

41. 29 U.S.C. § 464(a) (1976): for pertinent text, see note 3 *supra*.

42. *Id.*

43. Daye v. Tobacco Workers Int'l Union, 234 F. Supp. 818 (D.D.C. 1964).

44. Schonfeld v. Raftery, 381 F.2d 446 (2d Cir. 1967); United Bhd. of Carpenters and Joiners v. Brown, 343 F.2d 872 (10th Cir. 1965).

45. National Ass'n of Letter Carriers, AFL-CIO v. Sombrotto, 449 F.2d 915 (2d Cir. 1971).

46. Ohio Oil Co. v. Conway, 279 U.S. 813, 814 (1929); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808-09 (9th Cir. 1963).

47. Courts have recognized the necessity of addressing the merits. *See, e.g.*, Gordon v. Laborers Int'l Union, 490 F.2d 133 (10th Cir. 1974); Bailey v. Dixon, 451 F.2d 160 (5th Cir. 1971); National Ass'n of Letter Carriers, AFL-CIO v. Sombrotto, 449 F.2d 915 (2d Cir. 1971); Atlanta Fed. and City Serv. Employees Local Union 554, v. Service Employees Int'l Union AFL-CIO, 441 F.2d 1115 (5th Cir. 1971); Jolly v. Gorman, 428 F.2d 960 (5th

stating that its decision was not on the merits and that the litigation was continuing even though no permanent injunction was ever sought.[48]

The Standard of Review

Traditionally, the standard of review for injunctive relief has consisted of a four-part test.[49] The four factors to be considered are: 1) the likelihood of success on the merits; 2) the likelihood of irreparable harm; 3) how injunctive relief will affect the rights of the parties involved; and 4) whether granting or denying the injunction would be in the public interest.[50] Such a test requires that a court engage in a searching analysis of the underlying dispute and its ramifications; hence, under this traditional test, injunctive relief is not easily obtained.[51] Recently, however, some courts, including the Ninth Circuit, have significantly relaxed the standard of review.[52] This newer standard focuses on balancing the hardships to the parties resulting from a grant or denial of relief.[53] "One moving for a preliminary injunction assumes the

---

Cir. 1970); Schonfeld v. Raftery, 381 F.2d 446 (2d Cir. 1967). There is one situation in which a court may justifiably decline to reach the merits. When a court refuses to grant preliminary injunctive relief enjoining a trusteeship and the local union will have another opportunity to litigate on a motion for a permanent injunction, a court may correctly decline to delve into the merits of the case. *E.g.*, International Bhd. of Electrical Workers Local 1186 v. Eli, 307 F. Supp. 495 (D. Hawaii 1969). In *Eli*, the International's decision to establish a trusteeship and assume the legal defense of the local union in a twenty million dollar suit was

> obviously a "legitimate object". While the case law dealing with permissible purposes under § 302 [now § 462] does not specifically answer the question presented in this case, the ultimate answer must depend on factual considerations developed at the hearing on a permanent injunction. Meanwhile, this court declines to substitute its judgment over International's own officers as to whether this particular objective of International was "legitimate".

Id. at 506-07. But *Benda* is clearly dissimilar. Once the district court enjoined the trusteeship there were no further hearings.

48. 584 F.2d at 318; *see* note 23 *supra*.

49. 7 J. MOORE FEDERAL PRACTICE ¶ 65.04, at §§ 65-39 to 69-45 (2d ed. 1975); *accord*, Virginia Petro. Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). For a discussion of the various standards, see Mulligan, *Preliminary Injunctions in the Second Circuit*, 43 BROOKLYN L. REV. 831, 836 (1977).

50. Mulligan, *supra* note 49.

51. Wing v. Arnall, 198 F.2d 571, 574-75 (Emer. Ct. App. 1952).

52. The Second and the Ninth Circuits are the most consistent in applying a relaxed standard of review. *See, e.g.*, Richter v. Department of Alcoholic Beverage Control, 559 F.2d 1168 (9th Cir. 1977); Motor Vessels Theresa Ann v. Kreps, 548 F.2d 1382 (9th Cir. 1977); Charlies Girls v. Revlon, 483 F.2d 953 (2d Cir. 1973); Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247 (2d Cir. 1973).

53. Mulligan, *supra* note 49, at 831.

burden of demonstrating either a combination of probable success and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips strongly in his favor . . ."[54] Under the lenient test, injunctions are more readily available.

The *Benda* court chose thé modern, more lenient standard set forth in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*[55] The court noted that as the balance of hardships tipped more decidedly toward one party, that party's need for demonstrating probable success or the existence of serious questions lessened.[56] Thus, the court asserted that there were not two separate tests of hardship and probable success, but rather a "single continuum."[57] Finally, the court noted some "irreducible minimum" must be shown: either a "fair chance of success on the merits" or "questions . . . serious enough to require litigation."[58]

There are two major differences between the traditional and modern standards of review. First, the newer standard strongly emphasizes the hardships to the parties, a relatively subjective factor. The likelihood of success, a factor more prone to objective legal analysis, is deemphasized. Second, the newer standard eliminates both the public policy concerns and inquiry into how granting relief will effect the respective rights of the parties.

In certain circumstances, like *Benda,* the newer standard of review, making injunctive relief more available, is not appropriate because the grant of injunctive relief effectively terminates the litigation.[59] In considering injunctive relief, courts should be careful to create or preserve the status quo so that a court will be able, upon conclusion of a fair trial, to render a meaningful decision for either party.[60] When, as in *Benda,* the preliminary injunc-

54. Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975) (emphasis added).

55. *Id.*

56. 584 F.2d at 315. However, on the issue of hardships, it seems that a showing of "irreparable injury" must always be made. In *Benda,* the district court made such a finding. *Id.*

57. *Id.*

58. *Id.*

59. Leubsdorf, *The Standard for Preliminary Injunctions,* 91 HARV. L. REV. 525, 546 (1978).

60. Chappell v. Frankel, 367 F.2d 197 (2d Cir. 1966).

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

tion will dispose of the case, the more searching traditional analysis should be employed.[61]

In *Benda,* the court simply did not consider whether its decision would dispose of the case. Instead, the Ninth Circuit repeatedly stated that its decision was not on the merits and that the litigation was continuing.[62] In reality, however, the preliminary injunction effectively ended the underlying dispute—once the trusteeship was enjoined, the International was precluded from bargaining on behalf of LMSC employees and had lost the battle to engage in corporate-wide bargaining with Lockheed. Thus, the *Benda* court's insistence that its decision was not on the merits is baffling.

Conflict with the LMRDA

Section 464(c) of the Act provides that a trusteeship established in conformity with an international's constitution and bylaws and ratified after a fair hearing shall be presumed valid for eighteen months subject to attack only upon clear and convincing proof.[63] In *Benda,* the court noted that the trusteeship had been properly established. It also noted the existence of the presumption and concluded that "the presumption of validity applies here."[64] However, the court then proceeded in its analysis as if the presumption was inoperative when the merits of the case were not before the court. Had the court applied the more stringent test, the presumption could have been accorded its proper weight.

The standard of review utilized by the *Benda* court conflicts with the presumption of validity. While the standard of review simply calls for balancing the hardships and a showing of some chance of success on the merits, the Act itself provides a presumption of validity rebuttable only upon clear and convincing

61. Only one other trusteeship case has been decided using the modern standard of review. San Filippo v. United Bhd. of Carpenters and Joiners, 525 F.2d 508 (2d Cir. 1975). However, *San Filippo* is distinguishable from *Benda.* In *San Filippo,* the district court, using the traditional four-part standard of review, denied a local union injunctive relief because it had failed to show irreparable injury. The Second Circuit, noting that the standard of review placed too heavy a burden on the local union, nonetheless affirmed because a showing of irreparable injury was a core requirement of injunctive relief. Thus, neither the district court nor the Second Circuit felt compelled to discuss the question of the likelihood of success on the merits.

62. 584 F.2d at 318.

63. 29 U.S.C. § 464(c) (1976); for text of § 464(c), see note 3 *supra.*

64. 584 F.2d at 316 n.4.

proof.[65] This conflict or anomaly is brought into sharp focus by the *Benda* decision because the court refused to consider the merits. Thus, the court virtually ignored the legal problem posed by the apparent conflict between the relaxed standard of review and the strict statutory presumption.[66]

Application of the Hardships—Probable Success Balance

After explaining the *Inglis* test, the *Benda* court began to apply it by discussing the relative hardships to the parties created by the trusteeship. Because the International was dispensing strike funds from the district lodge's treasury, and because the lodge was losing members, the Ninth Circuit agreed with the district court's finding that continued imposition of the trusteeship would cause the district lodge irreparable injury.[67] The harm to the International resulting from failure to pursue corporate-wide bargaining, and to its entire membership, was never adequately considered. The court "recognized that maintenance of control over subordinate groups is a reasonable concern."[68] However, the court rejected this factor as not "the kind of irreparable injury with which equity is concerned,"[69] thus concluding that any injury to the International was far outweighed by by the harm to the district lodge.

Far more important than the court's discussion of hardships was its novel approach to the issue of probable success on the merits (i.e., that the injunction against the trusteeship would be upheld). In its application of this part of the test, the court never clearly elucidated what factors would constitute either a fair chance of success on the merits or an important question requiring litigation. Rather, the court applied a hybrid standard: was there a "good faith doubt" that this trusteeship had been imposed for a proper purpose?[70]

The Act provides that the proper purposes of a trusteeship

65. 29 U.S.C. § 464(c)(1976).

66. 584 F.2d at 316 nn.4 & 5.

67. *Id.* at 315.

68. *Id.*

69. *Id.*

70. *Id.* at 316. It is unclear how the court's analysis of a "good faith doubt" corresponds to the "clear and convincing evidence" standard required to rebut the statutory presumption of validity.

include "correcting corruption or financial malpractice, assuring performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization."[71] The International contended that the *Benda* trusteeship fit within both the "collective bargaining" and "legitimate objects" rubrics.

Taking a narrow view of proper purpose, the *Benda* panel found that there was a good faith doubt that this trusteeship had a proper purpose. Specifically, the court rejected the International's argument that the proper purpose of the trusteeship was to ensure performance of the duties of the bargaining representative.[72] Rather, it concluded that the nature and scope of bargaining duties as between the district lodge and the International were unclear. Accordingly, it held that the trusteeship, imposed for the purpose of continuing corporate-wide bargaining, raised serious questions that could be litigated. Finally, the court rejected the International's contention that "union self-preservation" legitimized the trusteeship imposed upon the district lodge.[73]

Within the collective bargaining arena, the Act recognizes two distinguishable proper purposes for imposition of trusteeship.[74] First, the Act provides that enforcement of preexisting collective bargaining agreements is proper.[75] For example, if a local union indicates that it will strike even though the collective bargaining agreement contains a no strike clause, the international may respond by placing the local in trusteeship.[76] Second, the Act states that a proper purpose would be "assuring the performance of . . . other duties of a bargaining representative."[77] In *Gordon v. Laborers International Union of North America,*[78] the

71. 29 U.S.C. § 462 (1976).

72. 584 F.2d at 316. *See* 29 U.S.C. § 462 (1976).

73. 584 F.2d at 317.

74. *Id.*

75. Virtually all trusteeship cases involving collective bargaining have dealt with this issue. *See, e.g.,* Executive Bd. Local 1302 v. United Bhd. of Carpenters and Joiners, 477 F.2d 612 (2d Cir. 1973); National Ass'n of Letter Carriers, AFL-CIO v. Sombrotto, 449 F.2d 915 (2d Cir. 1971); Jolly v. Gorman, 428 F.2d 960 (5th Cir. 1970).

76. National Ass'n of Letter Carriers, AFL-CIO v. Sombrotto, 449 F.2d 915 (2d Cir. 1971).

77. 29 U.S.C. § 464(a) (1976).

78. 490 F.2d 133 (10th Cir. 1974).

Robinson et al.: Labor Law

local union refused to associate with a district council[79] and reached a separate agreement with the employer that failed to provide for health and welfare and pension benefits. The International imposed a trusteeship on the grounds that failure to provide for such benefits constituted failure to perform the duties of a bargaining representative. The Tenth Circuit agreed and upheld the trusteeship.[80]

The analogy to *Benda* is clear: the district lodge refused to join in continued corporate-wide bargaining, the apparent purpose of which was to establish standards applicable to all employees in the industry, and instead reached a separate agreement with the employer. The court never addressed the differences in the contracts obtained; rather it asserted that since the division of responsibilities between the district lodge and the International were unclear, a "good faith doubt" as to proper purpose existed.[81]

The *Benda* court, failing to adequately deal with the International's contentions regarding bargaining duties, established a new standard: the court would defer to an international's notion of such duties only when the international was attempting to enforce "reasonably definite and precise collective bargaining responsibilities."[82] Because the bargaining responsibilities in *Benda* were thought imprecise, the court noted that it would be "reluctant to allow a district court to rely solely on the collective bargaining rationale for imposing a trusteeship."[83]

However, in *Benda,* the International was not relying solely on the collective bargaining rationale; they also contended that their action furthered "other legitimate objects of a labor organization."[84] Here, too, the court narrowly construed the International's contentions and established another new standard. The court noted that because "legitimate objects" was not defined in

79. *Cf.* United Bhd. of Carpenters and Joiners v. Brown, 343 F.2d 872 (10th Cir. 1965) (refusal to associate with a district council was not, in and of itself, sufficient grounds for imposing a trusteeship on a local union).

80. 490 F.2d at 137. The *Gordon* court further noted that when imposition of a trusteeship turned on a question of the judgment of union officials, courts should be reluctant to intercede.

81. 584 F.2d at 317.

82. *Id.*

83. *Id.*

84. *Id. See* 29 U.S.C. § 462 (1976). For the text of the statute, see note 3 *supra*.

Published by GGU Law Digital Commons, 1980

the statute, "[a]n object of questionable legitimacy therefore subjects the trusteeship itself to good faith doubt."[85] Thus, under the Ninth Circuit's somewhat circular reading of the statute, virtually any trusteeship imposed under the "legitimate objects" rubic could be enjoined.[86]

The court's discussion of "legitimate objects" failed to correctly characterize the International's stated motive for imposing the trusteeship, which was to protect itself from impotence as a labor organization. The Ninth Circuit termed this contention "self préservation, standing naked and alone."[87] However, the goal of self preservation flows from the very nature of labor management relations. Indeed, the rationale behind the National Labor Relations Act was that employees must be able to band together and engage in concerted activity for their own self protection.[88] The *Benda* court ignored the self preservation rationale and further ignored the Senate report on the trusteeship provisions of the LMRDA, which seems to have recognized self preservation as being a legitimate object of a trusteeship.[89] By way of contrast, the Second Circuit in *National Association of Letter Carriers v. Sombrotto*[90] noted that "[t]he union is entitled to protect itself, and actions taken toward this end appear to us directed toward a 'legitimate object' within the meaning of 29 U.S.C. § 462."[91]

The *Benda* court dismissed *Sombrotto* on the grounds that it involved self-preservation in the context of "well defined collective bargaining responsibilities . . ."[92] But in doing so, the Ninth Circuit failed to recognize the relationship between collec-

85. 584 F.2d at 316.

86. The last statistical study of trusteeships indicates that fully 75% of them have been imposed under the rubric of "legitimate objects." Beaird, *supra* note 3, at 512.

87. 584 F.2d at 317.

88. Section 7, National Labor Relations Act, 29 U.S.C. § 157 (1976); Statement of Purpose, 29 U.S.C. § 141 (1976).

89. The Senate Report noted that trusteeships were proper "to preserve the integrity and stability of the organization itself." S. REP. No. 187, 86th Cong., 1st Sess. *reprinted in* [1959] U.S. CODE CONG & AD. NEWS 2318, 2333.

90. 449 F.2d 915 (2d Cir. 1971).

91. *Id.* at 922. *Accord,* Executive Bd. Local 1302 v. United Bhd. of Carpenters and Joiners, 477 F.2d 612 (2d Cir. 1973) (trusteeship imposed for the purpose of preventing the local union from petitioning the NLRB for disaffiliation and separate certification was among the legitimate objects within the meaning of section 462 of the Act); McVicker v. International Union of Dist. 50, 327 F. Supp. 296 (N.D. Ohio 1971) (district court upheld a trusteeship imposed for the purpose of preventing the local union from disaffiliation).

92. 584 F.2d at 317.

tive bargaining responsibilities and self preservation. In *Benda*, the International attempted to conduct corporate-wide collective bargaining in order to pressure Lockheed Aircraft into signing a contract that would uniformly benefit its members. District Lodge 508 undercut this attempt by refusing to accede to the parent body's judgment as to the necessity for such a bargaining posture. These facts tend to show the interrelation between self preservation and the fulfillment of collective bargaining responsibilities.

Additionally, the International's action can be viewed in the context of union discipline. Several cases involving trusteeships have dealt with the issue of union discipline under the "other legitimate objects" rubric.[93] These cases have focused on the relationship between the local and international union and the duties, responsibilities, and benefits flowing between the two. A local union, as part of a larger organization, gives up some of its rights in order to reap the benefits of concerted action.[94] Thus, where the local union wishes to stay within the international, it should not be immune from discipline by the international body.[95] Failure to comply with the reasonable demands of a parent body subjects a local to such discipline.[96] In *Benda,* the International constitution specifically provided that a trusteeship could be imposed. The need for such discipline, in the context of the International's attempt to deal with a large and powerful employer, should have tipped the balance in favor of the trusteeship. The court failed to recognize the possibility that international organizations have nation-wide collective bargaining responsibilities which may require local unions to accede to the necessity of common action. A trusteeship imposed to accomplish this end surely has as its purpose a "legitimate object."

E. Significance

Benda stands for the proposition that in granting preliminary injunctive relief to a local union in trusteeship the key ele-

93. Executive Bd. Local 1302 v. United Bhd. of Carpenters and Joiners, 477 F.2d 612 (2d Cir. 1973); National Ass'n of Letter Carriers, AFL-CIO v. Sombrotto, 449 F.2d 915 (2d Cir. 1971); McVicker v. International Union of Dist. 50, 327 F. Supp. 296 (N.D. Ohio 1971).

94. McVicker v. International Union of Dist. 50, 327 F. Supp. at 303.

95. National Ass'n of Letter Carriers, AFL-CIO v. Sombrotto, 449 F.2d at 923, *quoted in* Executive Bd. Local 1302 v. United Bhd. of Carpenters and Joiners, 477 F.2d at 615.

96. *See* Gordon v. Laborers Int'l Union, 490 F.2d at 137; McVicker v. International Union of Dist. 50, 327 F. Supp. at 303.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

ment is the relative hardships to the parties.[97] As the hardships tip more decidedly toward one party the necessity of showing a likelihood of success on the merits decreases. The statutory presumption will not weigh in that balance upon review of preliminary injunctive relief since the merits will not be reached until fully litigated at the permanent injunction hearing. This "merits" analysis will apply even where the grant of preliminary injunctive relief effectively terminates the dispute between the parties. In this respect, *Benda* is a unique decision, and therefore may be limited to its facts. No other decision involving trusteeships has skirted the merits when preliminary injunctive relief was the primary relief sought and effectively terminated the action.[98]

Benda also represents a narrow reading by the Ninth Circuit of the proper purposes for imposing a trusteeship. An attempt to adjust collective bargaining duties between a local and international will apparently subject any subsequent trusteeship to a good faith doubt that it was imposed for a proper purpose. *Benda* holds that a trusteeship will only be upheld when imposed to enforce "reasonably definite and precise collective bargaining responsibilities." Thus, *Benda* significantly limits an international's flexibility to adjust its bargaining posture to contend with changes in the industry.

The truly significant limitation of the purpose for which a trusteeship may properly be imposed results from the court's interpretation of "legitimate objects." Because the *Benda* court did not apply the statutory presumption, any trusteeship imposed under the legitimate objects rubric would seem to be subject to a good faith doubt that it was imposed for a proper purpose under the Act. Thus, under the Ninth Circuit's reading of the trusteeship provisions of the LMRDA, international unions would be prevented from placing local unions in trusteeship except in certain well defined situations.

Under *Benda*, international unions must meet stringent standards to impose trusteeships, absent clear-cut abuse by local unions. Also, international unions will not have the flexibility needed to deal with changing work patterns and rapidly evolving

97. *Benda* has been cited for its standard of review. City of Anaheim v. Kleppe, 590 F.2d 285, 288 (9th Cir. 1978).

98. *See* note 61 *supra* and accompanying text.

corporate structure. *Benda*'s implication that an international must rigidly adhere to outmoded collective bargaining patterns while the corporate employer may make adjustments is grossly unfair. Limiting an international's flexibility will only help shift the relative strength of the parties toward the corporate employer. To respond to this situation, international unions would be well advised to include authority for corporate-wide bargaining in their constitutions. Perhaps, if such authority were more specifically delegated to the international, courts might be more apt to approve intervention when a local refuses to accede to the reasonable demands of the international union.

F. Conclusion

The *Benda* court did not consider the practical realities underlying the dispute between District Lodge 508 and the International; it did not recognize that the grant of a preliminary injunction effectively terminated the litigation or that the International and District Lodge 508 had a unique collective bargaining relationship. As a result, it failed to reach the merits of the dispute or to fully confront the legal issues. Specifically, the court mistakenly failed to apply the statutory presumption of validity to the trusteeship and to require that the district lodge present clear and convincing evidence that the trusteeship was not imposed for a proper purpose. Finally, the *Benda* court narrowly construed the trusteeship provisions of the Act, virtually eliminating "legitimate objects" as a proper purpose.

Robert Haden

III. REPEATED VIOLATIONS OF OSHA REGULATIONS

A. Introduction

In *Todd Shipyards Corp. v. Secretary of Labor*[1] *(Todd)*, the Ninth Circuit affirmed an order of the Occupational Safety and Health Review Commission[2] (Commission) finding that Todd Shipyards Corp. (Todd or the employer) had "repeatedly" violated workplace safety regulations promulgated by the Commission pursuant to the Occupational Safety and Health Act[3]

1. 586 F.2d 683 (9th Cir. 1978) (per Choy, J.; the other panel members were Anderson, J. and Palmieri, D.J.)
2. OSARHRC Docket No. 12510 (Dec. 22, 1975), 3 OSHC 1813 (1975).
3. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976). For

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

(OSHA or the Act).

OSHA was enacted in 1970 in response to a very real crisis in American industry. In the years immediately preceding passage of the Act, over 14,000 job-related deaths were reported each year.[4] In addition, over two million workers were disabled annually through job-related accidents.[5] In purely economic terms, the impact of occupational accidents and diseases was overwhelming.[6] In human terms the cost was incalculable. Most private employers were not seriously addressing the problem;[7] far too often employers rationalized worker injuries as simply the cost of doing business.[8] As a result, at the time of the passage of the Act these problems were getting worse, not better.[9] It was in this context, after nearly three years of debate and intense private-employer opposition, that Congress passed the Act.[10]

The stated purpose of OSHA is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ."[11] To this end the Act empowers the Secretary of Labor (Secretary) to set standards to assure employees non-harardous working conditions.[12] Section 8(a) of OSHA authorizes the Secretary or his representatives to inspect workplaces for hazards or violations of OSHA regulations.[13] If hazards or violations are discovered, an inspector must issue a citation to the employer.[14] Thereafter, the employer is notified of the penalty, if any, that the Secretary proposes to assess.[15] The system

general information on OSHA, see M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW (1978); R. HOGAN & R. HOGAN, OCCUPATIONAL SAFETY AND HEALTH ACT (1977).

4. S. REP. No. 91-1291, 91st Cong., 2d Sess. 14-15 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5178.

5. *Id.*

6. Estimates of the economic cost, in terms of the annual loss to the Gross National Product, range upwards from $8 billion. *Id.*

7. D. BERMAN, DEATH ON THE JOB 54-61 (1978); Nader, *Forward* in J. PAGE & M. O'BRIEN, BITTER WAGES xiii (1973).

8. *Id. See generally* E. MISHAN, ECONOMICS FOR SOCIAL DECISIONS: ELEMENTS OF COST-BENEFIT ANALYSIS (1973). *See also* R. SMITH, THE OCCUPATIONAL SAFETY AND HEALTH ACT 34-37 (1976).

9. S. REP. No. 91-1291, *supra* note 4, at 5180.

10. J. PAGE & M. O'BRIEN, *supra* note 7, at 167-89.

11. 29 U.S.C. § 651(b) (1976).

12. *Id.* § 651(b)(3) (1976). Section 651(b)(3) further directs the Secretary to create a review commission to handle OSHA adjudicatory matters.

13. *Id.* § 657(a) (1976).

14. *Id.* § 658(a) (1976).

15. *Id.* § 659(a) (1976).

Robinson et al.: Labor Law

of penalties is designed to provide employers with an incentive to comply with the safety requirements of the Act.[16] For non-serious violations, penalties are discretionary;[17] for serious violations penalties are mandatory;[18] but in either case, the maximum penalty is $1,000.[19] A willful violation may involve a penalty of up to $10,000.[20] If an employer fails to prevent recurrences and a subsequent inspection turns up another violation involving a similar hazard to employees, the employer has repeatedly violated the standards and a penalty of up to $10,000 may be assessed.[21] The question of what constitutes "repeatedly" violating OSHA standards was the principal issue in the *Todd* decision.

The *Todd* Court held: 1) that the employer "repeatedly" violated the Act where the citation involved a recurrence at the same facility of a hazard similar to those described in earlier citations;[22] 2) that the citation for having repeatedly violated the Act provided sufficient notice to the employer even though it failed to specify the earlier violation upon which the repeat violation was based;[23] and 3) that the decision of the United States Supreme Court in *Marshall v. Barlow's Inc.*,[24] requiring a search warrant for a non-consensual OSHA inspection of an employer's premises, would not be retroactively applied so as to exclude evidence of violations obtained in a warrantless pre-*Barlow's* search.[25]

16. *See* S. REP. No. 91-1282, *supra* note 4, at 5192-93; CONF. REP. No. 91-1765, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5228, 5237-38.

17. 29 U.S.C. § 666(c) (1976).

18. *Id.* § 666(b) (1976).

19. *Id.* § 666(a), (b) (1976).

20. *Id.* § 666(a) (1976). If a willful violation results in the death of an employee, the employer may be fined up to $10,000, or, upon conviction, imprisoned for up to six months, or both. If the employer has previously been convicted under this section, the fine may be increased up to $20,000. *Id.*

21. *Id.* § 666(a) (1976). Penalty provisions for both willful and repeated violations are contained in this same subsection, which provides: "Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $10,000 for each violation." *Id.*

A repeat citation must be distinguished from a citation for failure to cure a prior violation. Section 17(d) of the Act, 29 U.S.C. § 666(d) (1976), provides penalties for failure to abate a violation in penalties of up to $1,000 "for each day during which such failure or violation continues." *Id.*

22. 586 F.2d at 687.

23. *Id.* at 688.

24. 436 U.S. 307 (1978).

25. 586 F.2d at 689.

Published by GGU Law Digital Commons, 1980

Although the holding in *Todd* is hardly startling, the Ninth Circuit's interpretation of "repeated" violations under OSHA highlights a split in the circuits.[26] Further, *Todd* is the first post-*Barlow's* case to deal with the retroactive application of the Supreme Court decision.[27]

B. Facts of the Case

Todd, a New York based corporation, operates a shipbuilding and ship repair facility in San Pedro, California.[28] On August 30, and October 29, 1974, Todd was cited for "repeat" violations of an OSHA regulation requiring employers to provide employees working more than five feet above a solid surface with a proper scaffold or ladder.[29] On January 30, 1975, Todd was again cited for a "repeat" violation of the same regulation. Todd contested the January 30 citation under section 10(c) of the Act.[30]

---

26. See notes 36 to 42 *infra* and accompanying text.

27. See notes 48 to 51 *infra* and accompanying text.

28. 586 F.2d at 684.

29. The regulation is contained in 29 C.F.R. § 1916.47(b) (1976), and provides in pertinent part:

> When employees are working aloft, or elsewhere at elevations more than 5 feet above a solid surface, either scaffolds or a sloping ladder, meeting the requirements of this subpart, shall be used to afford safe footing, or the employees shall be protected by safety belts and lifelines meeting the requirements of § 1916.84(b).

Todd did not contest these citations and, accordingly, they became final orders of the Commission pursuant to 29 U.S.C. § 659 (1976).

Unfortunately, the specific facts surrounding Todd's violations are not known. The inspector's citations merely described the general nature of the alleged violation. 586 F.2d at 684 n.3. In addition, the parties to this litigation stipulated to the facts. *Id.* at 685 n. 4.

Nevertheless, it should be noted that failure to provide scaffolding or other suitable safety equipment may subject workers to particularly serious injury. Thus, many states have enacted specific legislation requiring the use of scaffolding. See, *e.g.*, Ill. Rev. Stat. ch. 48, §§ 60-69 (1973). For a discussion of the Illinois Scaffold Act *see* Ring, *The Scaffold Act: Its Past, Present & Future*, 64 Ill. B.J. 666-80 (1976). California has had a similar code provision since 1913. See Cal. Lab. Code §§ 7150-58 (West 1971).

There is an apparent discrepancy as to inspection dates in the *Todd* opinion. The first inspection which revealed a violation of the scaffold regulation is noted to have occurred on August 30, 1974. 586 F.2d at 684. Later, on the same page of the opinion, the court mentions the date as having been August 27. *Id.*

30. 29 U.S.C. § 659(c) (1976). Todd was cited for other violations during the January 30 inspection but because these violations do not figure in the Ninth Circuit's resolution of *Todd*, further discussion of them has been omitted.

As a result of the January 30 inspection, Todd was also cited for a repeat violation of 29 C.F.R. § 1916.51(b) (1976), failing to maintain "good housekeeping conditions." The administrative law judge concluded that the "repeat" violations of the regulation should be struck from the January 30 citation and the Commission agreed. Because the Secretary

An administrative law judge found that the violations were not identical and did not occur on the same vessel.[31] The judge ruled that "repeat" violations must be committed "more than once" and "in a manner which 'flaunts' [*sic*] the requirements of the Act."[32] Because he found that the violations did not manifest a flouting of the Act, the judge concluded the January 30 violation could not be the basis of a repeat citation.[33]

The Secretary of Labor then petitioned the Commission to review the decision of the administrative law judge.[34] The Commission reversed and imposed a fine of $160 for the January 30 "repeat" violation.[35] Todd appealed.[36]

C. The Issues Presented

Repeat Violations

The *Todd* court dealt with three legal issues. The first issue involved interpreting the meaning of "repeatedly." Todd asked the Ninth Circuit to join the Third Circuit[37] in holding that penalties for repeatedly violating OSHA regulations should be imposed only when the employer had flouted OSHA standards through at least three violations of the same regulation. However, the *Todd* Court declined to adopt this interpretation.[38] Instead, the court held that penalties for repeatedly violating OSHA safety regulations could be assessed whenever a citation involved a recurrence at the same facility of a hazard similar to those described in earlier citation.[39] In support of this conclusion, the Court first noted that Congress authorized fines in order to encourage com-

---

did not cross appeal the Commission ruling, the repeat charge on the second housekeeping violation was not before the court in *Todd*. The repeat charge for violation of the scaffold regulation, 29 C.F.R. § 1916.47(b), resulted from a *third* violation of the standard. Therefore, the court's language, defining a repeat violation as a *second* occurrence, can arguably be considered dictum.

31. 586 F.2d at 684.

32. *Id.*

33. *Id.*

34. 29 U.S.C. § 659(c) (1976) provides authority for this review.

35. 3 OSHC 1813 (1975).

36. Authority for appeal of a Commission order is contained in 29 U.S.C. § 660(a) (1976).

37. Bethlehem Steel Corp. v. Occupational Safety and Health Review Comm'n, 540 F.2d 157 (3d Cir. 1976); Annot., 41 A.L.R. Fed. 146 (1977).

38. 586 F.2d at 686.

39. *Id.* at 687. Though this issue appears clear cut, there are limits to the *Todd* Court's holding vis-a-vis "repeated" violations. *See* notes 74 to 78 *infra* and accompanying text.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

pliance with OSHA regulations.[40] Thus, when those fines failed to achieve the desired result and employers continued to violate the same safety regulations greater penalties were needed to insure future compliance.[41] The Court further noted that the Secretary of Labor had cited Todd on several occasions. Because the penalties imposed had not proved adequate to deter another violation, the court concluded that the more severe sanctions for repeatedly violating the regulations were properly imposed. In sum, a second citation could trigger the enhanced penalty for repeated violations.[42]

Notice

Todd next contended that the Secretary's January 30 cita-

---

40. 586 F.2d at 686.

41. *Id.*

42. The Act does not mandate the Commission to impose enhanced penalties for repeat citations. 29 U.S.C. § 666(a) (1976); see note 21 *supra*. Nevertheless, if penalties are assessed the Commission must consider "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." 29 U.S.C. § 666(i) (1976). These factors must figure in every computation of a penalty under the Act. *Id.*

The OSHA Field Operations Manual, Part XI - C 8 b, c, and d, sets forth the following mandatory guidelines for inspectors assessing a penalty for repeat violations:

> b. Gravity and penalty factors.
>
> For repeated violations which are not willful, the gravity of each violation will be evaluated and new penalty determined as for serious and other violations. Although an alleged violation(s) is a repetition of a previous violation, it may differ in one factor or more relating to gravity; therefore, gravity must be reassessed for each repetition. Absent special circumstances, once the gravity based penalty is arrived at, it is doubled for the first repeated violation and quadrupled if the violation has been cited and repeated twice. If a third repetition of a previous violation occurs, multiply the gravity-based penalty by 10. For any further repetition the Areas Director should consult with the Regional Administrator who may in turn consult with the Regional Solicitor.
>
> c. No initial proposed penalty.
>
> If there was no initial proposed penalty assessed for a violation, the minimum gravity-based penalty, absent special circumstances, shall be $100 for a repeat violation.
>
> d. Adjustment factors.
>
> In calculating the adjusted penalty, the adjustment factors (except size) should be recalculated downward. Good faith would ordinarily not be applied since the employer has exhibited a lack of good faith by repeating the violation. The history factor shall take into consideration all previously cited violation(s).

U.S. Dept. of Labor, OSHA Field Operations Manual 87 (CCH ed. 1979).

tion contravened the Act's notice requirement because it did not "describe with particularity" the earlier violations which formed the basis for the "repeat" citation.[43] The *Todd* Court easily disposed of this issue.[44] First, the court noted that citations should be "liberally read."[45] Second, because all the citations referred to the same regulation number, "Todd could easily have determined which earlier citations were the basis for the repeat charge."[46] Finally, Todd could simply have requested more detailed information.[47]

Retroactive Application of Barlow's

Third, Todd contended that *Barlow's* should be retroactively applied and that all evidence seized in the warrantless search of its premises should be excluded as fruit of a violation of the fourth amendment. However, *Barlow's* involved an action for declaratory relief and merely held that non-consensual warrantless searches by OSHA inspectors were violative of fourth amendment rights.[48] *Barlow's* did not address the application of the exclusion-

---

43. The notice requirement contained in 29 U.S.C. § 658(a) (1976) provides that each citation "shall describe with particularity the nature of the violation, including a reference to the provisions of the chapter, standard, rule, regulation, or order alleged to have been violated."

44. This is not to imply that the notice issue is always so easy. In *Todd,* the Court limited its notice holding to the facts. 586 F.2d at 688.

45. *Id.* at 687. "Liberally read" refers to the liberal construction afforded administrative pleadings. "Enforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations issued by his inspectors." National Realty and Constr. Co. v. Occupational Safety and Health Review Comm'n, 489 F.2d 1257, 1264 (D.C. Cir. 1973).

46. 586 F.2d at 687.

47. 29 U.S.C. § 661(f) (1976) provides that Commission records shall be open and available to the public.

48. 436 U.S. at 325. To date the most complete treatment of *Barlow's* is contained in Note, Marshall v. Barlow's, Inc.: *Administrative Inspections and the Fourth Amendment,* 9 ENVT'L L. 149 (1978). For briefer treatment of *Barlow's* see Note, *Search Warrants,* 7 AM. J. CRIM. L. 79 (1979); Note, Marshall v. Barlow's Inc.: *OSHA Needs a Warrant,* 57 N.C. L. REV. 320 (1979); Note, *OSHA Warrantless Unconsented Administrative Inspections of Business Premises Held Unconstitutional,* 55 N.D. L. Rev. 95 (1979); Note, *Warrant Requirement for OSHA Inspections,* 46 TENN. L. REV. 446 (1979); Note, *Propriety of Warrantless Searches by OSHA Inspectors,* 1979 WIS. L. REV. 815 (1979) Note, *Administrative Searches,* 92 HARV. L. REV. 210 (1978); Note, Marshall v. Barlow's, Inc. *and the Warrant Requirement for OSHA "Spot Check" Inspections,* 15 IDAHO L. REV. 187 (1978); Note, *Administrative Searches,* 14 NEW ENGL. L. REV. 119 (1978).

The Supreme Court in *Barlow's* also set forth probable cause guidelines for obtaining warrants for OSHA searches. The Court did not require probable cause in the criminal law sense, but rather mandated a variable standard. For purposes of an administrative search such as this probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable

ary rule to OSHA searches.

The *Todd* court had little difficulty with this issue. The court began by noting that the Supreme Court had never applied the exclusionary rule in a civil proceeding.[49] Also, the exclusionary rule has not been retroactively applied in many criminal cases.[50] Because OSHA inspectors were acting "pursuant to apparent congressional authority" under "then-prevailing constitutional norms" neither the deterrent effect of the exclusionary rule nor the imperative of judicial integrity would be served by excluding evidence of the dangerous condition discovered on Todd's premises.[51]

---

legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." 436 U.S. at 320, *citing* Camara v. Municipal Court, 387 U.S. 533, 538 (1967).

But these guidelines are hardly specific. Thus, lower courts have been left with the task of fleshing out probable cause requirements under *Barlow's*.

In California, the State Court of Appeal for the Fifth District recently held that because criminal sanctions permeated the penalty provisions of California OSHA (Cal/OSHA), CAL. LAB. CODE § 6300-6708 (Deering Supp. 1979) (enacted in 1973), inspection warrants must meet criminal probable cause requirements. Salwasser Mfg. Inc. v. Municipal Court, 94 Cal. App. 3d 223 (1979). The California Legislature reacted to *Salwasser* by enacting legislation defining probable cause criteria for CAL/OSHA inspection warrants as follows:

> Cause for the issuance of a warrant shall be deemed to exist if there has been an industrial accident, injury, or illness reported, if any complaint that violations of occupational safety and health standards exist at the place of employment has been received by the division, or if the place of employment to be inspected has been chosen on the basis of specific neutral criteria contained in a general administrative plan for the enforcement of this division.

1979 Cal. Legis. Serv. ch. 241, § 1(b) (West 1979) (enacted July 10, 1979) (to be codified as CAL. LAB. CODE § 6314(b)).

A nation-wide survey of post-*Barlow's* litigation on the issue of the warrant requirement and probable cause is beyond the scope of this case note. Since there is no apparent consensus on its interpretation, it seems inevitable that the Supreme Court will be called upon to more clearly define its holding in *Barlow's*.

49. 586 F.2d at 689.

50. *Id.* at 689-90.

51. *Id.* at 690. There are two rationales for the exclusionary rule. First, excluding illegally seized evidence is designed to deter police misconduct. Mapp v. Ohio, 367 U.S. 643 (1961). Second, exclusion of illegal evidence is said to further "the imperative of judicial integrity." United States v. Peltier, 422 U.S. 531, 536 (1975). The *Todd* Court's analysis of retroactive application of the exclusionary rule to OSHA searches was followed in Savina Home Industries v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979). In *Savina*, the Tenth Circuit defined the issue thus: "[A]ssuming that the exclusionary rule would be available in any event, the issue is whether the rule is retroactively applicable to a pre-Barlow's inspection." *Id.* at 1363. The court concluded that retroactive application would neither further the imperative of judicial integrity nor deter police misconduct.

Of the three issues presented, only the interpretation of "repeatedly" makes new law. Retroactive application of the exclusionary rule presented the Todd Court with a "novel" subject for discussion;[52] nevertheless, this issue was rather simple in view of the precedent. The more important issue revolved around the definition of "repeatedly." Accordingly, the remainder of this note addresses that topic alone.

D. Discussion and Critique

Todd was not the first case in which the Ninth Circuit was called upon to interpret the meaning of "repeatedly." In a similar case one year prior to *Todd,* the Court affirmed a Commission ruling assessing, against the *same* employer, a penalty for repeatedly violating OSHA regulations. In *Todd Shipyards v. Secretary of Labor (Todd Shipyards),*[53] the Ninth Circuit held that "violations which were identical in character, occurred on the same ship and took place within three months of each other" were properly classified as repeated.[54] However, in *Todd Shipyards* the Court limited its holding to the facts of that case; the Ninth Circuit did not address the general question of what constitutes a repeat violation.[55] Nonetheless, in *Todd Shipyards* the Court rejected the Third Circuit's definition of a repeat violation as set forth in *Bethlehem Steel Corp. v. Secretary of Labor (Bethlehem Steel).*[56]

The Third Circuit's definition of "repeatedly" hinged on a narrow reading of the Act. First, the Third Circuit, using a dictionary definition of the term, determined that "repeatedly," the adverbial form of the noun, meant "again and again."[57] Thus, the Court concluded that the second violation of a regulation could never form the basis of a citation for repeatedly violating OSHA standards.[58] Next, the Third Circuit equated "repeatedly" with "willfully" because both terms formed the basis for the same

Therefore, the court held that the rule, if applied at all, should only be applied prospectively. *Id.*

52. 586 F.2d at 688.

53. 566 F.2d 1327 (9th Cir. 1977) (per Ely, J.; the other panel members were Kennedy, J. and Ferguson, D.J.).

54. *Id.* at 1331.

55. *Id.* at 1331 n. 6.

56. *Id.* at 1331. 540 F.2d 157 (3d Cir. 1976).

57. *Id.* at 160.

58. *Id.* at 162.

penalty under the Act: civil fines of up to $10,000.[59] Accordingly, the court held that in order to assess a penalty for repeatedly violating OSHA standards, the employer would have had to violate the same standard more than twice, in a manner which evidenced a flouting of the Act.[60]

In *Todd Shipyards,* the Ninth Circuit wisely rejected this analysis.[61] First, they noted that the dictionary definition of "repeatedly" did not comport with the legislative history of the Act.[62] Indeed, the Conference Committee on OSHA used the terms "repeatedly" and "repeated" interchangeably.[63] Thus, the Court found that a strict interpretation of the word, based on its adverbial form in the Act, was not required. Second, the Ninth Circuit emphasized that the terms "repeatedly" and "willfully" were joined by the disjunctive "or."[64] Therefore, there was no evidence that Congress intended that the terms have the same meaning.[65]

In *Todd,* the Court reiterated these criticisms of the Third Circuit's test for repeated violations.[66] The court did not limit this holding to the facts of the case, but rather joined the Fourth Circuit in establishing a general standard for repeat citation:[67] a "recurrence at the same facility of a hazard similar to those described in the earlier citation," will expose the employer to penalties for repeatedly violating an OSHA standard.[68]

59. *Id.* at 161.

60. *Id.* at 162.

61. 566 F.2d at 1331.

62. *Id.* at 1330-31 n.5.

63. CONF. REP. No. 91-1765, *supra* note 16, at 5237-38.

64. 566 F.2d at 1331.

65. *Id.* at 1331 n.5. As to penalties, the court noted that OSHA vested the Secretary with discretion to assess appropriate fines that would help insure future compliance with OSHA standards. As the *Todd Shipyards* court viewed the Act, willful violations were in general more serious than repeated violations but it was nonetheless important that the Secretary have the discretion to enforce OSHA as he saw fit, taking into consideration the peculiarities of each individual case.

66. 586 F.2d at 686. In addition, the *Todd* court noted that the Third Circuit's view of repeated violations would result in virtual elimination of repeat violation penalties. This fear had also been voiced in *Todd Shipyards*. 566 F.2d at 1331 n.6.

67. George Hyman Constr. Co. v. Occupational Safety and Health Review Comm'n, 582 F.2d 834 (4th Cir. 1978). However, the *Todd* Court declined to adopt the Fourth Circuit's more sweeping definition of "repeatedly." The *Hyman* Court held that only "a single prior infraction need be proven to invoke the repeated violation sanctions authorized by the Act." *Id.* at 839.

68. 586 F.2d at 687.

Robinson et al.: Labor Law

The split in the circuits over the definition of "repeatedly," combined with OSHA's venue provisions, creates a curious anomaly that will undoubtedly affect future litigation of other OSHA provisions. The Act provides that an employer may raise legal issues concerning OSHA in one of three places: the circuit where a violation occurs, the circuit where the employer has its principal office or in the District of Columbia Circuit.[69] With the split in the circuits, an employer could conceivably obtain relief in its principal office's circuit even though it would be denied relief in the circuit where the violation occurred. For example, the repeat violation which formed the basis of the Third Circuit's holding in *Bethlehem Steel* actually occurred at the San Pedro, California shipyard, the situs of the *Todd* case.[70] However, because Bethlehem was a Delaware corporation, with its principal place of business in that state, it brought its action in the Third Circuit and obtained relief. Todd, a New York corporation, sought relief in the Ninth Circuit, where the violation occurred, and was denied relief. The problems of OSHA enforcement caused by this forum shopping opportunity are obvious: an OSHA inspector will not know what standard to apply when inspecting two employers with side-by-side facilities.

Nevertheless, it is somewhat surprising that so much litigation should occur over the definition of "repeatedly." Perhaps this results from general employer opposition to OSHA or fear that the Commission will assess larger penalties in the future.[71] But even so, neither Congress nor the courts should escape blame for this situation. The use of the term "repeatedly" without statutory definition in the Act is clearly a case of poor drafting.[72] Fur-

69. 29 U.S.C. § 660(a) (1976).

70. 540 F.2d at 158-59.

71. The penalty imposed in *Todd* was $160. 586 F.2d at 685. In *Todd Shipyards*, two separate repeat violations resulted in total fines of $1,050. 566 F.2d at 1329. The fine in *Bethlehem Steel* was only $60. 540 F.2d at 159. Obviously, these large corporations were not litigating over the definition of repeatedly because of the fines imposed. Perhaps this willingness to engage in expensive litigation can be better characterized as an attempt to limit OSHA in any way possible. *See, e.g.*, D. BERMAN, *supra* note 7, at 187.

72. This is not surprising given the circumstances surrounding enactment of OSHA. There was intense pressure on Congress from every side, the Executive, business, and labor. For an interesting description and discussion of OSHA's birth, see J. PAGE & M. O'BRIEN, *supra* note 7, at 167-89. Congress could perhaps have prevented this plethora of litigation by placing the penalty provisions for willful and repeat violations in separate subparagraphs, and by using the adjectival form of each word. The Commission would still have the authority to develop a more precise working definition of the terms and could ameliorate harshness through discretionary use of penalty enhancement.

Published by GGU Law Digital Commons, 1980

ther, the courts only invite relitigation of identical legal issues when they limit their holding to the facts of claim that they "need not dispose" of core issues.[73] In this light, Todd can hardly be faulted for asking the Ninth Circuit to reconsider the very arguments made one year earlier in *Todd Shipyards*.

Unfortunately, *Todd* does not seem to provide a final answer on the meaning of "repeatedly." The Ninth Circuit strongly hinted that there are limits to its holding. First, the *Todd* court held that a repeat citation must be based on a recurrence of a similar hazard.[74] However, the court did not explain the meaning of a "similar" hazard, but merely noted that a similar hazard was involved in *Todd*.[75] Second, the Ninth Circuit reiterated its holding in *Brennan v. Occupational Safety and Health Review Commission*[76] that a penalty may only be assessed if the employer "knew or should have known of the existence of an employee violation."[77] Finally, the *Todd* Court expressly left open the question of whether a repeat citation could be vitiated by the passage of time.[78] Thus it would seem that Todd or others may relitigate these issues.[79] The Ninth Circuit holding in *Todd* is that a "repeat" citation, with concomitant penalties, may be founded upon a recurrence of a hazard similar to that described in earlier citations, and that the exclusionary rule will not be retroactively applied to a pre-*Barlow's* warrantless search.

E. Conclusion

Citations for repeat violations of OSHA standards are an important part of the scheme for achieving employer compliance

73. 566 F.2d at 1331 n.6.
74. 586 F.2d 687.
75. *Id.* at 686 n.7.
76. 511 F.2d 1139 (9th Cir. 1976).
77. *Id.* at 1145.
78. 586 F.2d at 687 n.8.
79. The Court's method of dismissing issues that it feels are not germane to *Todd* invites further litigation. For example, the court sidestepped the question of how similar the hazards must be by limiting its holding to the particular facts in *Todd*. *Id.* at 686 n.7. Similarly, the Court expressly refused to address the issue of whether "the passage of some length of time between citations would prevent basing a repeat citation on the earlier occurrence" because the three violations in Todd occurred within a five-month period. *Id.* at 687 n.8. Perhaps the Ninth Circuit could prevent needless litigation by noting that resolution of these issues is within the final purview of the Commission. Such an approach might add needed weight to Commission interpretations; it also might help convince future litigants that United States Circuit Courts of Appeal should not be looked to as the sole and final authority on the Act.

with safety standards.[80] The Ninth Circuit's holding in the context of the overall structure and intent of the Act should be clear. By interpreting "repeatedly" as "any recurrence" the Ninth Circuit has put employers on notice that more severe penalties will be imposed unless hazardous working conditions are eliminated after the first citation. When the dangerous condition is one creating a serious risk of harm to workers, it is particularly important that the employer immediately correct the violation *and* prevent its recurrence. Congress has mandated that employers must provide a safe place of employment for all workers. *Todd,* as far as it goes, helps to further that goal.

Robert Haden

IV. SINGLE EMPLOYER'S DUTY TO BARGAIN AFTER WITHDRAWAL FROM MULTIEMPLOYER UNIT

A. Introduction

In *NLRB v. Tahoe Nugget,*[1] the Ninth Circuit considered the effect of the timely withdrawal of two employers from a multiemployer bargaining unit on their duty to bargain with the union which they had previously recognized upon joining the multiemployer unit. In the first of a number of factually similar labor cases decided this term, the Court held that the withdrawing employers had a duty to bargain within their respective single-employer units based on the presumption of the union's continuing majority status.

B. Facts of the Case

In 1959, a voluntary combination of restaurant and casino employers formed the Reno Employers Council (the Council) and engaged in multi-employer bargaining with the Hotel-Motel & Restaurant Employees & Bartenders' Union (the Union). Upon joining the Council, each employer voluntarily recognized the Union as the bargaining representative of its employees. Representation elections were never held in either the single employer

80. *Id.* at 685.

1. NLRB v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir. 1978) (per Anderson, J.; the other panel members were Trask, J. and Grant, D.J.), *cert. denied,* 99 S.Ct. 2847 (1979).

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

units or in the multi-employer unit.[2] The employers, Nevada Lodge and Tahoe Nugget[3] (the Employers), who had never bargained with the Union on an individual basis, joined the Council in 1959 and 1962, respectively, and became parties to a series of three-year contracts, the last of which was to expire in November, 1974. In September of that year, these Employers withdrew from the Council in a timely manner and subsequently refused to recognize or to bargain with the Union.[4]

The Union filed unfair labor practice charges with the National Labor Relations Board (the Board) alleging a refusal to bargain in violation of section 8(a)(5) of the National Labor Relations Act[5] (the Act). The Union contended that the employers had a duty to bargain within the newly created single employer units based upon the Union's presumed continuing majority status.[6] The Board found that the presumption of continuing majority status arising from an employer's voluntary recognition of a union as the exclusive bargaining representative of its employees continues after the employer withdraws from a multi-employer unit.[7] In addition, the Board found that the employers failed to prove that their refusal to bargain was predicated on a reasonably grounded good faith doubt as to the Union's continuing majority status.[8] The Board ordered the employers to bargain with the union.

In *NLRB v. Tahoe Nugget*,[9] the Board petitioned the Ninth Circuit Court of Appeals for enforcement of its bargaining order. Again, the Employers contended that the presumption of majority status was inapplicable after a timely withdrawal from a multi-employer unit, and that, even if it were applicable, a reasonable doubt as to the union's majority status had been proved.

2. 584 F.2d at 296.

3. *Tahoe Nugget* and *Nevada Lodge* were consolidated on appeal. In addition to the refusal to bargain violation, *Nevada Lodge* also involved an independent 8(a)(1) violation which will not be considered in this note. Nevada Lodge, 227 N.L.R.B. 368 (1976).

4. 584 F.2d at 296. For the basic principles relating to a timely withdrawal, *see* note 29 *infra* and accompanying text.

5. Section 8(a)(5) of the National Labor Relations Act provides that "(a) [i]t shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 159(a) of this title." 29 U.S.C. § 158(a)(5) (1976).

6. 584 F.2d at 296.

7. Tahoe Nugget, Inc., 227 N.L.R.B. 357 (1976).

8. *Id.* at 357-58.

9. 584 F.2d at 296.

The Ninth Circuit rejected the Employers' arguments and granted enforcement.[10] This note will focus on the Ninth Circuit's application of the presumption of continuing majority status to a single employer bargaining unit following an employer's timely withdrawal from a multi-employer unit. In addition, it will analyze the "good faith doubt" defense as affected by the court's extension of the *Bryan Manufacturing*[11] rule precluding the use of events occurring more than six months prior to the filing of the unfair labor practice charge as evidence of an employer's good faith doubt.

C. THE PRESUMPTION OF CONTINUING MAJORITY STATUS

To sustain a refusal to bargain charge against an employer, the Board's General Counsel must prove that the union involved represented a majority of that employer's employees on the refusal to bargain date.[12] The majority status of an incumbent union is generally proven by evidentiary presumptions, which are sufficient, if unrebutted, to establish an employer's duty to bargain.[13]

The usual justification for use of presumptions is that such a degree of probability exists that the fact presumed reflects reality that the presumption is an appropriate procedural substitute for evidence.[14] The basis for the presumption of an incumbent union's continued majority status, however, is "primarily policy . . .; it is a vehicle for maintaining industrial peace."[15] The use

10. *Id.* at 308.

11. Local Lodge #1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960). *See* note 60 *infra* and accompanying text.

12. This requirement is mandated by § 9(a) of the Act which provides, in part, that:

> Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees in a unit* appropriate for such purposes, shall be the exclusive bargaining representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a) (1976)(emphasis added).

13. Komatz Constr., Inc. v. N.L.R.B., 458 F.2d 317, 326 (8th Cir. 1976); Terrell Mach. Co., 173 N.L.R.B. 1480 (1969), *enforced*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970); Bartenders, Hotel-Motel and Restaurant Employers Bargaining Ass'n of Pocatello, Idaho, 213 N.L.R.B. 651 (1974).

14. NLRB v. Tragniew, Inc., 470 F.2d 669, 674 (9th Cir. 1972); Ref-Chem Co. v. NLRB, 418 F.2d 127, 130-31 (5th Cir. 1969); C. MCCORMICK, EVIDENCE 807 (1972); 29 AM.JUR.2D *Evidence* § 165 (1967).

15. NLRB v. Tahoe Nugget, Inc., 584 F.2d at 303. Section 1 of the Act sets forth the preservation of industrial peace as a primary goal of labor legislation: "Experience has

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

of this presumption to achieve stability in established bargaining relationships can be a source of conflict with another major goal of the Act—that of ensuring employee freedom of choice in the selection of a bargaining representative.[16] The tension in the Act between these two goals is apparent from an analysis of the rights guaranteed employees under section 7 of the Act.[17] This section guarantees employees the right to bargain collectively through representatives of their own choosing. Implicit in this section is the right to change representatives or, as spelled out by the Taft-Hartley Amendments to section 7, "the right to refrain from" being represented by any labor organization at all.[18] In spite of the policy favoring freedom of choice, "[t]he presumption that a bargaining relationship, lawfully established, lawfully continued is embedded in the statute and precedent. Unrepresented and represented employees are both presumed to desire continuation of the existing status in the absence of proof to the contrary."[19] This "common expectation of continuity"[20] has been embodied in

---

proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . ." 29 U.S.C. § 151 (1976).

16. The preamble to the Act provides, in part, that:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976).

17. Section 7 of the Act 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.

29 U.S.C. § 157 (1976).

18. Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961 (1972-73).

19. Tahoe Nugget, 227 N.L.R.B. at 358 n.8.

20. *Id.*

the rule that both Board-certified[21] and voluntarily recognized[22] unions enjoy an irebuttable presumption of majority status for either one year after the Board certifies the union, or for a reasonable time, generally one year, after an employer voluntarily recognizes the union. In addition, after the expiration of the year, a rebuttable presumption of continuing majority status is employed.[23]

Although these presumptions are normally applied within the context of union recognition, they have been applied outside the original relationship. The most notable example of this is in the "successorship" context where the Supreme Court has held that successor employers who hire a majority of a predecessor's employees must recognize and bargain with the incumbent union.[24] In *NLRB v. Tahoe Nugget*, the Ninth Circuit extended the application of the presumption of continuing majority status to a new context when it held that the presumption survives an employer's timely withdrawal from a multi-employer unit and that, in this context, employee freedom of choice must "subserve the goal of industrial peace."[25]

---

21. Brooks v. NLRB, 348 U.S. 96 (1954); Pioneer Inn Assoc. v. NLRB, 578 F.2d 835 (9th Cir. 1978); Retired Persons Pharmacy v. NLRB, 519 F.2d 486 (2d Cir. 1975); Celanese Corp. of America, 95 N.L.R.B. 664 (1951), *rev'd on other grounds*, Hawaii Meat Co., Ltd., 139 N.L.R.B. 966, 968 (1962).

22. Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944).

23. NLRB v. Dayton Motels, Inc., 474 F.2d 328 (6th Cir. 1973); NLRB v. Gallaro, 419 F.2d 97 (2d Cir. 1969); Bartenders, Hotel Motel Restaurant Employers Bargaining Ass'n of Pocatello, Idaho, 213 N.L.R.B. 651 (1974); Terrell Mach. Co., 173 N.L.R.B. 1480 (1969), *enforced*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970).

24. NLRB v. Burns Int'l. Sec. Serv., Inc., 406 U.S. 272 (1972). *Burns* "recognizes that in at least some circumstances, the democratic principle embodied in § 9 of the National Labor Relations Act is not offended by procedures which leave some doubt as to the actual, immediate desires of employees with respect to representation." Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1138 (7th Cir.), *cert. denied*, 419 U.S. 838 (1974).

25. No prior cases were found which applied the presumption of continuing majority status to an employer who timely withdrew from an employer association. However, cases in a parallel context imply that the presumption was not employed after timely withdrawal of a union from multi-employer bargaining. Because a union has the same right to withdraw from a multi-employer bargaining unit as does an employer, employers have been required to bargain with unions on a single-employer basis following the union's timely withdrawal from the multi-employer unit. Decisions and bargaining orders issued in this context, however, have not been predicated on the presumption of the union's continuing majority status within the single-employer unit. For example, in Adams Furnace Co., Inc., 159 N.L.R.B. 1792 (1966), the Board held that the union was entitled to an election at each employer member's separate unit since the union had given the employer association and each member written and timely notice of its intent to abandon multi-employer bargaining and to negotiate on an individual basis. In Publishers' Ass'n of New York City v. NLRB, 364 F.2d 293 (2d Cir. 1966), the court enforced the Board's

Background and Court's Analysis

Although multi-employer units are nowhere mentioned in the Act, the Supreme Court has recognized that this type of bargaining mechanism is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."[26] Unlike other bargaining units,[27] the multi-employer unit is consensual.

> Essential to the establishment of such a unit is the unequivocal manifestation by the employer members of the group that all of them intend to be bound in future collective bargaining by group rather than individual action. The formation of the multi-employer unit, moreover, must be entirely voluntary, the assent of the union having representative status also being required. The Board will not sanction the creation of such a unit over the objection of any party union or employer.[28]

While an employer's decision to participate in multi-employer bargaining is essentially voluntary, withdrawal from group bargaining is permitted only under certain conditions. Once negotiations have begun, a member of a multi-employer bargaining group cannot withdraw and avoid the results of group bargaining without the consent of both the participating union and the employer group. An untimely withdrawal attempt will not relieve the employer from the obligation to abide by whatever

---

bargaining order and held that the union's withdrawal was timely and that individual units were appropriate. In that case, however, it was conceded by the court that the union had a majority of employees in each individual unit. Finally, in Evening News Association, 154 N.L.R.B. 1494 (1965), *enforced*, 372 F.2d 569 (6th Cir. 1967), the Board found that the employer had violated the Act by refusing to bargain individually with the union which had effectively withdrawn from multi-employer bargaining. It held that there was no basis for treating unions differently from employers:

> [i]n either case [after the employer's or the union's timely withdrawal] . . ., the union may be faced with the possibility of having to demonstrate that it has been designated by a majority of the employees in the individual employer units resulting from the breakup of the multi-employer unit, if it is to retain its status as the bargaining representative of such employees.

154 N.L.R.B. at 1499. For cases which have held that the presumption does not survive an employer's withdrawal from a Board-certified multi-employer unit, *see* note 45 *infra*.

26. NLRB v. Truck Drivers Local Union #449 (Buffalo Linen), 353 U.S. 87, 95 (1957).

27. Generally, the determination of the appropriate unit for the purposes of collectively bargaining is the responsibility of the Board. 29 U.S.C. § 159(b) (1976).

28. C. MORRIS, THE DEVELOPING LABOR LAW at 238-39 (1971) (footnote omitted).

contract terms are ultimately negotiated.[29]

Unions which participate in multi-employer bargaining may be either certified or voluntarily recognized and the usual irrebuttable and rebuttable presumptions of continuing majority status apply.[30] In *Tahoe Nugget*, the court employed three additional presumptions in reaching its conclusion that the presumption of continuing majority status survives an employer's timely withdrawal from a multi-employer unit and subjects the single employer who is unable to rebut that presumption to a duty to bargain.

The first presumption was that majority status existed within the single employer unit prior to the employer's entry into the multi-employer bargaining unit,[31] since the Employers would not have violated the law by recognizing a minority union. That Employers would not recognize a minority union stems from the major limitation on an employer's freedom to enter into a multi-employer unit: the consent requirement. An employer cannot unilaterally, without the express or implied consent of a majority of its employees, bind them to representation in a multi-employer unit. At the time an employer joins a multi-employer unit, the relevant group of employees for determining a union's majority status as bargaining representative is the employees of the single employer unit.[32] A violation of this consent requirement would subject employers to a charge of restraining or interfering with the employees' section 7 rights.[33] Because the court presumed that

29. NLRB v. Sheridan Creations, Inc., 357 F.2d 245 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967). The basic principles relating to withdrawal are as follows: (1) the notice of withdrawal from the multi-employer unit must be sent to both the employer association and to the union and must be received "before the date set by the contract for notice of modification or termination or before the agreed-upon date to begin multi-employer negotiations, whichever occurs sooner. (2) The withdrawal must be unequivocal, and subsequent participation in the group negotiations or de facto compliance with the resulting contract absent indepeneent negotiations may nullify an otherwise effective withdrawal. (3) Withdrawal may be accomplished at any time, if both the employer group and the union *clearly* consent." Kirshman, *Withdrawal from Multi-Employer Bargaining*, 46 L.A. B. BULL. 220, 225 (1971).

30. *See* notes 18 to 23 *supra* and accompanying text.

31. 584 F.2d at 303.

32. C. MORRIS, *supra* note 28, at 240.

33. Two cases which hold that employers violate § 8(a)(1), (2) and (3) where they bind their employees to representation in a multi-employer unit without the express or implied consent of their employees are Dancker & Sellew, Inc., 140 N.L.R.B. 824 (1963), *aff'd sub nom.*, NLRB v. Local 210, 330 F.2d 46 (2d Cir. 1964); Mohawk Business Mach. Corp., 116 N.L.R.B. 248 (1956).

the Employers would not have violated the law, they inferred that a majority of the single unit employees expressly or impliedly gave their consent to representation in the multi-employer unit.[34]

The court's second presumption was that this initial majority status within the single employer unit "subsisted" throughout the employer's participation in the multi-employer unit.[35] Once an employer has joined the multi-employer unit, the relevant majority for determining representation status switches from the employees in the single-employer unit to the aggregate employees in the multi-employer unit.[36] At this point, loss of majority support within the single employer unit becomes irrelevant to the union's status as the bargaining representative of the employees within the multi-employer unit. Despite this fact, the court stated that continuing membership in the larger unit "does nothing to negate" the presumption of majority status within the single employer unit.[37]

The third presumption relied upon was that this "subsisting" presumption was revived upon the employers' withdrawal from the multi-employer unit.[38] Specifically, it was triggered when the employer who had timely withdrawn from the larger unit refused to bargain with the incumbent union on a single employer basis.

These three presumptions, coupled with the policy of maintaining stability in established bargaining relationships, led the court to conclude that the presumption of continuing majority status had survived the employers' timely withdrawal from the multi-employer unit.

Direct-Derivative Analysis

In his dissent to the Board's *Tahoe Nugget* decision, Member Walther argued that the presumption of continuing majority status should not be applied to a single-employer unit after withdrawal from a multi-employer unit because of the distinctions

34. 584 F.2d at 303.
35. *Id.*
36. C. MORRIS, *supra* note 28, at 240; Sheridan Creations, Inc., 148 N.L.R.B. 1503 (1964), *enforced*, 357 F.2d 245 (2d Cir. 1966); Mor Paskesz, 171 N.L.R.B. 116 (1968), *enforced*, 405 F.2d 1201 (2d Cir. 1969).
37. 584 F.2d at 303.
38. *Id.*

between presumptions applicable to single-employer and to multi-employer units.[39] Under his analysis, the critical factor, ignored by the Board and subsequently by the Ninth Circuit, is that the relevant majority for determining a union's status as the exclusive bargaining representative in a multi-employer unit "is the majority of employees within the entire multi-employer unit."[40] Consequently, a majority of the employees of a single-employer unit need not be in favor of the bargaining representative of the multi-employer unit. In fact, once an employer joins a multi-employer unit it does not violate the law by continuing to bargain with a union which does not have majority status among its own employees. As a result, "the presumption of continued majority in a multi-employer situation provides no basis in fact or in law for a presumption of majority in the single-employer unit, since the former presumption exists regardless of, or even contrary to, actual majority status on a single-employer basis."[41] He concluded that since presumptions are "essentially legal fictions," they should not be employed where "they fail utterly to mirror reality (as when the probability of the fact presumed to be in existence diminishes to nothingness) . . . ."[42]

The Ninth Circuit responded to this analysis by stating that the presumption of continued majority in a single-employer unit after an employer withdraws from a multi-employer unit is not based upon majority status within the multi-employer unit. On the contrary, it is directly inferrable from the employer's previous action in joining the multi-employer association. This conduct by the employer created a presumption that majority status existed within the single-employer unit at the time the employer joined the multi-employer unit. Because membership in the larger unit does nothing to erode this presumption, withdrawal merely entails a return to the status quo ante.[43] By asserting that the employer's own initial conduct is the basis for the "continued majority" presumption, the court precluded the employer from arguing that majority status never existed within the single-employer unit at the time the employer joined the association. This argument was previously rejected by the Board, relying on the rule that one may not defend against a refusal to bargain charge on the ground

39. Tahoe Nugget, 227 N.L.R.B. at 358-59.
40. *Id.* at 359.
41. *Id.*
42. *Id.*
43. 584 F.2d at 302-03.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

that the initial recognition was unlawful, when recognition occurred more than six months before the charges were filed.[44]

In rejecting the Walther analysis, the Ninth Circuit distinguished several cases which have held that the continuing majority presumption does *not* survive the dissolution of a multi-employer unit. These cases were distinguished on the grounds that they did not involve an employer's voluntary recognition but rather were based upon Board-certified elections within the entire multi-employer units. Because an election within a multi-employer unit does not prove that the union ever had majority support of the employees within any single-employer unit, the employer had reasonable grounds to doubt the union's majority status.[45]

Although the primary reason for applying the presumption following withdrawal from a multi-employer unit is the maintenance of stability in established bargaining relationships, the Ninth Circuit's holding does not consistently effectuate that policy. The practical result of the Court's analysis is that the presumption will apply when an employer withdraws from a multi-employer association which voluntarily recognized its bargaining representative, but will not apply when an employer withdraws from a multi-employer association which recognized its bargain-

44. Tahoe Nugget, 227 N.L.R.B. at 363-64.

45. Two Sixth Circuit opinions which applied the "derivative" analysis and thus refused to extend the presumption, evolved out of the same factual circumstances. In NLRB v. Downtown Bakery Corp., 330 F.2d 921 (6th Cir. 1964) and NLRB v. Richard W. Kaase Co., 346 F.2d 24 (6th Cir. 1965), employers who had previously recognized the Bakery and Confectionary Workers union (BCW) joined a multi-employer association which voted to recognize the American Bakery and Confectionary Workers union (ABC). After ABC's certification year had expired, the successor employer in *Downtown* refused to bargain with ABC and voluntarily recognized BCW on the basis of authorization cards. Although the court found Downtown to be a successor employer subject to the presumption of continuing majority status, it accepted the employer's argument that a reasonable doubt was proved. The basis for the reasonable doubt was the fact that a Board election for ABC within the multi-employer unit did not prove that this employer's employees supported ABC. The court concluded that the dissolution of the multi-employer unit of which the predecessor employer's employees composed a relatively small segment served as a reasonable ground for the belief that the union had lost its majority status among those employees.

In *Kaase*, the employer recognized BCW after termination of the existing agreement with ABC. Again, the court refused to enforce the bargaining order. It distinguished the general rule that there is a rebuttable presumption of majority status after a certification year has expired by noting that "the ambiguity inherent in the multi-employer election relied on vitiates its efficacy to prove a majority as to any single employer. Before continuance of the fact of majority can be presumed, the original existence of that fact must be established." 346 F.2d at 31.

ing representative after a Board-certified election within the multi-employer unit.[46]

D. Rebutting the Presumption of Majority Support

One year after union certification or recognition,[47] an employer may rebut the presumption by showing either: (1) that the Union, in fact, had no majority on the date of the refusal to bargain or (2) that the employer had a good faith, reasonable doubt about the union's continuing majority status.[48] The first defense is essentially a "straightforward factual question"[49] and was not considered by the court, which instead focused on the good faith doubt defense.

Prior to the Ninth Circuit's decision in *Tahoe Nugget*, there were no time limitations on the evidence employers could introduce to substantiate their good faith doubts of a union's majority status. In *Tahoe Nugget*, however, the Ninth Circuit placed severe time limitations on the evidence which can be introduced in defense of a refusal to bargain charge. The court held that section 10(b) of the Act,[50] which states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board," functions as an evidentiary bar when employers attempt to substantiate their good faith doubt by offering evidence of knowledge of pre-10(b) unfair labor practices.[51] In effect, the court held that the objective facts on which employers may base their good faith doubt are only those which have occurred within the six months immediately preceding the filing of a refusal to bargain charge.[52]

46. Although this result seems likely under the analysis employed by the court, the Ninth Circuit may apply the presumption in the context of withdrawal from a Board-certified multi-employer unit. The court stated that the inference of majority status in a single-employer unit from a union's victory in a multi-employer election is "reasonable" despite the fact that other courts have deemed the inference to be too attenuated. 584 F.2d at 303.

47. *See* notes 21 and 22 *supra*.

48. NLRB v. Morse Shoe, Inc., 591 F.2d 542, 546 (9th Cir. 1979); NLRB v. Vegas Vic, Inc., 546 F.2d 828, 829 (9th Cir. 1976) *cert. denied*, 434 U.S. 818 (1977); Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489 (2d Cir. 1975); Laystrom Mfg. Co., 151 N.L.R.B. 1482 (1965), *enforcement denied on other grounds*, 359 F.2d 799 (7th Cir. 1966).

49. 584 F.2d at 298.

50. 29 U.S.C. § 160(b) (1976).

51. 584 F.2d at 301. As used in this note, the term "pre-10(b) unfair labor practice" means an alleged unfair labor practice which occurred more than six months prior to the filing of the current unfair labor practice charges.

52. A previous Ninth Circuit case held that evidence of an unfair labor practice which occurred beyond the 10(b) period could not be admitted in defense of a refusal to bargain

In reaching this decision, the court distinguished issues requiring proof of subjective motivation from those of refusal to bargain. According to the Ninth Circuit, section 10(b) is not an evidentiary bar when a showing of subjective motivation is necessary to disprove an unfair labor practice charge. But that section is an evidentiary bar in a refusal to bargain situation, however, since "[s]ubjective motivation is not . . . an element of the reasonable doubt defense."[53] The court stated that the Sixth Circuit had misperceived the good faith criterion when it held in *NLRB v. Dayton Motels*[54] that section 10(b) does not act as an evidentiary bar where employers attempt to prove their good faith doubt of majority status. The Ninth Circuit stated that the focus of the good faith criterion is empirical and objective.[55] Relying on the Supreme Court's de-emphasis on employer motivation in *NLRB v. Gissel Packing Co.*,[56] the court held that employers are free to act on the objective grounds before them, regardless of their subjective motivation, and that because a refusal to bargain charge is unconcerned with subjective motivation, evidence of a pre-10(b) unfair labor practice is inadmissible.[57]

Bryan Manufacturing *and the Good Faith Defense*

The use of section 10(b) as an evidentiary bar originated in the Supreme Court's decision in *Local Lodge #1424 v. NLRB (Bryan Manufacturing).*[58] That case concerned the continued enforcement of a union security clause in a collective bargaining agreement which was executed more than six months previously, at a time when the union did not represent a majority of the employees covered by the agreement. The agreement contained both a recognition clause naming the union exclusive bargaining representative of all the employees and a union security clause requiring employees to become and remain union members.[59] Both sides agreed that section 10(b) barred charges relating specifically to the execution of the agreement. The Board contended

charge, but that case dealt only with the "no majority in fact" defense. NLRB v. Tragniew, Inc., 470 F.2d 669 (9th Cir. 1972). As a result, the court in *Tahoe Nugget* was presented with an open question as to whether such evidence could be used to show that the employer entertained a good faith doubt of the union's majority.

53. 584 F.2d at 301.
54. 474 F.2d 328 (6th Cir. 1973).
55. 584 F.2d at 299.
56. 395 U.S. 575 (1969).
57. 584 F.2d at 300-01.
58. 362 U.S. 411 (1960).
59. *Id.* at 412.

that the complaint was timely since it was based upon the parties *continued* enforcement, within the period of limitations, of the union security clause.[60] Because enforcement of the clause was tainted only by the now time-barred unlawful recognition clause, the employers argued that to accept the position that section 10(b) is only a statute of limitations and not a rule of evidence would prevent the running of the statute of limitations in a case of this kind.[61]

The Supreme Court accepted the employer's view and held the complaints barred by section 10(b).[62] Although section 10(b) does not prevent all use of evidence of events which transpired more than six months before the filing of a charge, due regard for the policies and purposes of 10(b) requires that two situations be distinguished:

> The first is one where occurrences within this six month limitations period in and of themselves constitute, as a substantive matter, unfair labor practices. There, earlier events are utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself

60. *Id.* at 415. This continuing enforcement violated Board principle, evolved under sections 7 and 8 of the Act, that it is an unfair labor practice for each party to enter into a collective bargaining agreement which contains a union security clause if the union did not represent a majority of unit employees when the agreement was executed. Maintaining the agreement in force was considered a continuing violation of the Act. The majority status of the union at any subsequent date was immaterial because it was presumed that subsequent acquisition of majority status was attributable to the earlier unlawful assistance derived from the original agreement. The same doctrine applied to an agreement containing only a recognition clause. *Id.* at 414-15.

61. *Id.* at 415-16.

62. *Id.* at 416. As a result of its holding, the enforcement, as distinguished from the execution of such an agreement, constitutes an actionable unfair labor practice for only six months following the making of the agreement. *Id.* at 423.

Published by GGU Law Digital Commons, 1980

> to be so used in effect results in reviving a legally defunct unfair labor practice.[63]

In analyzing whether the decision to bar the Employers' evidence in *Tahoe Nugget* was a correct interpretation of *Bryan Manufacturing*, the threshold question is whether the defense of the refusal to bargain charge was "inescapably grounded on events predating the limitations period."[64] If it was so grounded, the evidence would have been excluded under the express language of the Supreme Court; thus, the line drawn between subjective and non-subjective motivation—for determining when section 10(b) functions as an evidentiary bar—would have been unnecessary to the Ninth Circuit's decision. Although a showing of lack of majority status on the date of the Union's initial recognition, for the limited purpose of revealing the Employers' subsequent good faith doubt, would undermine the validity of the presumptions employed, the defense was not "inescapably grounded" on pre-10(b) events. The majority support needed to prove a refusal to bargain violation is that existing on the refusal to bargain date.[65] Had the pre-10(b) evidence been admitted, then, the Employers would have to show objective facts of reasonable doubt of majority status on the refusal to bargain date.[66]

A further question is whether the line drawn in *Tahoe Nugget* comports with the two situations distinguished in *Bryan Manufacturing*. The *Bryan* Court stated that reference to pre-10(b) unfair labor practices was ordinarily permissible to "shed light" on the character of matters occurring within the limitations period.[67] The *Tahoe Nugget* court, on the other hand, said it is permissible to shed light only where motivation is at issue.[68] This analysis, however, precludes the use of evidence which the Supreme Court would arguably have allowed. Even where an

---

63. *Id.* at 416-17 (footnote omitted).

64. The Court expressed no view on the problem raised by cases which have held § 10(b) a bar in circumstances where the evidence marshalled from within the six month period is not substantial, and the merit of the allegation in the complaint is shown largely by reliance on the earlier events, other than to say that a violation which is "inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso." *Id.* at 421-22.

65. 584 F.2d at 297.

66. Pioneer Inn Assoc. v. NLRB, 578 F.2d 835 (9th Cir. 1978).

67. 362 U.S. at 416. Presumably, "ordinarily" permissible refers to situations such as the one the court specifically did not address, i.e., where a court refuses to "shed light" by admitting substantial evidence of pre-10(b) events in a case where there is insubstantial evidence within the 10(b) period.

68. 584 F.2d at 301.

employer's motivation is not at issue, pre-10(b) events can be a valuable tool for revealing the "true character of matters occurring within the limitations period . . . ."[69] One example would be where employees file a valid decertification petition seven months prior to a union's refusal to bargain charge against the employer. Under *Bryan Manufacturing*, evidence of the employer's knowledge of the decertification petition would have been permitted to show the employer's good faith doubt of the union's continuing majority status. However, under *Tahoe Nugget*, it would not be permitted.

Because of the confusion and conflicts resulting from the court's rigid adherence to the two situations distinguished in *Bryan Manufacturing*, one commentator has suggested that section 10(b) be used as an evidentiary bar only after a full consideration of whether its use would be consistent with 10(b)'s underlying policies.[70] These policies are first, preventing stale claims by barring litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused",[71] and second, preserving stability in existing bargaining relationships.[72]

The effectiveness of the Ninth Circuit's decision in *Tahoe Nugget* in implementing those policies is illustrated by an analysis of the case history of *Dayton Motels*, the Sixth Circuit case criticized by the Court for misperceiving the good faith criterion. In *Dayton*, the Sixth Circuit denied enforcement of the Board's bargaining order and remanded the case to receive evidence on the circumstances surrounding the procurement of union authorization cards three years earlier and to consider that evidence on the issue of the employer's good faith defense.[73] The court concluded that the employer's defense was not dependent on the time-barred unfair labor practice. The court held that pre-10(b)

69. Local Lodge # 1424 v. NLRB (Bryan Mfg.), 362 U.S. at 416.

70. Note, *The Labor Statute of Limitations: The* Bryan Manufacturing Co. *Case Revisited*, 55 B.U. L. REV. 598, 620 (1975).

71. H.R. REP. No. 245, 80th Cong., 1st Sess. 40 (1947) (Labor Management Relations Act, 1947).

72. Local Lodge # 1424 v. NLRB (Bryan Mfg), 362 U.S. at 419. "[T]he legislative history contains affirmative evidence that Congress was specifically advertent to the problem of agreements with minority unions, had previously been at pains to protect such agreements from belated attack, and manifested an intention, in enacting § 10(b), not to withdraw that protection." *Id.* at 426.

73. NLRB v. Dayton Motels, Inc., 474 F.2d 328, 335 (6th Cir. 1973).

Published by GGU Law Digital Commons, 1980

events are admissible as background evidence reflecting on the mental attitude or good faith doubt of the company officials that the union ever represented a majority of employees. It further stated that "[i]n no way does this constitute an attack on the validity of the expiring agreement or on the presumption created thereby, which attack was barred by Section 10(b) of the Act."[74] Following remand, the Board took additional testimony but did not modify its original conclusion that the employer had refused to bargain.[75]

On application for enforcement, the Sixth Circuit held that there was substantial evidence to support the conclusion of the Board that, although the union's original majority status had been tainted by the pro-union activities of a female supervisor, that conduct did not enter into the employer's subsequent decision to withdraw recognition from the union and to refuse to bargain.[76] The dissent argued that the union had received substantial assistance from a supervisor in its solicitation of membership, that it therefore never had a bona fide majority status and that it "ought not to be representing the company's employees."[77]

Considering the "stale claims" policies of section 10(b), the reopening of the *Dayton* record for consideration of events of more than three years ago was likely plagued by missing witnesses and the confused recollections which Congress considered in enacting section 10(b). Furthermore, as revealed by the *Dayton* dissent, a consideration of evidence of an employer's subjective state of mind has great potential for disrupting the industrial stability that was to be secured by foreclosing attack on the majority status of a union six months after its initial recognition.[78] To open that status to allow proof of an employer's "good faith" in refusing to bargain could result indirectly in that which the Act directly prohibits. Viewed against this background, the Ninth Circuit's *Tahoe Nugget* opinion effectuates the policies of section 10(b) more fully than does the Sixth Circuit in *Dayton.*

74. *Id.* at 333.

75. NLRB v. Dayton Motels, Inc., 525 F.2d 476 (6th Cir. 1975).

76. *Id.* at 477.

77. *Id.*

78. "The debates show that the issue of representation by minority unions was in the forefront of legislative concern." Bryan Mfg., 362 U.S. at 426 n.16.

E. Practical Effect

The line drawn in *Tahoe Nugget* for the use of section 10(b) as an evidentiary bar is a reasonable one in cases in which proof of motivation is necessary. It presents problems, however, for the employer who refuses to bargain and then defends on the basis of a good faith doubt in the union's continuing majority status. The good faith doubt defense originally depended largely on the employer's subjective motivation, so that the true majority status of the union on the refusal to bargain date was irrelevant.[79] Subsequent cases place much greater emphasis on the need for objective facts sufficient to create a reasonable doubt of that status.[80] The employer must show "by clear, cogent, and convincing"[81] evidence that there is sufficient reliable evidence to case a serious doubt on the union's majority status. Good faith is now shown by the employer's knowledge, at the time of the refusal, of sufficient objective facts to raise a reasonable doubt, but excluding knowledge of facts which occurred more than six months prior to the filing of the charge. In addition, the refusal must have occurred in a context otherwise free of employer unfair labor practices.[82]

79. In Celanese Corp. of America, 95 N.L.R.B. 664 (1951), *rev'd. on other grounds*, 139 NLRB 966, 968 (1962), the Board stated that whether an employer violates § 8(a)(5) depends not on whether there was sufficient evidence to rebut the continuing majority presumption or to demonstrate that the union in fact did not represent the majority of employees, but rather depends upon whether the employer in good faith believed that the union no longer represented the majority of the employees. Prerequisites to a finding of good faith were that there must have been "some reasonable grounds" and the issue of majority status must not have arisen in a context of illegal anti-union activities. 95 N.L.R.B. at 673. The dissent stated that although the Board asserted that a presumption of continuing majority status existed, in using the subjective good faith standard, it ignored the question of whether there was sufficient evidence to rebut that presumption. *Id.* at 675.

80. The shift from a subjective good faith doubt standard to greater reliance on objective evidence of majority status has been attributed to the difficulty of proving an employer's subjective state of mind. Seger, *supra* note 18, at 984. In Komatz Constr., Inc. v. NLRB, 458 F.2d 317, 326 (8th Cir. 1972), the court stated that "[i]n view of the demise in *Gissel Packing* of the subjective test of an employer's good faith doubt . . ., the proper test for rebuttal of the presumption is whether there is objective evidence sufficient to warrant a good faith doubt of the union's majority . . . ." *See also* NLRB v. Vegas Vic, Inc., 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1978); NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 811 (2d Cir. 1978); Laystrom Mfg. Co., 151 N.L.R.B. 1482, 1484 (1965), *enforcement denied on other grounds*, 359 F.2d 799 (7th Cir. 1966).

81. Pioneer Inn v. NLRB, 578 F.2d 835, 839; Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489-90 (2d Cir. 1975).

82. Good faith is only demonstrated where "employer misconduct did not contribute to the loss of support." 584 F.2d at 300.

Published by GGU Law Digital Commons, 1980

In view of the high quantum of evidence needed to rebut the presumption, the practical effect of the court's extension of the *Bryan Manufacturing* rule is to severely limit the good faith defense. Where the facts relied upon by the employer are equivocal—i.e., not clearly referable to a decline in union support—no single factor will be sufficient to sustain the defense.[83] Although the cumulative force of the evidence will be weighed against the force of the presumption,[84] the court did not consider the evidence presented in *Tahoe Nugget* to have sufficient cumulative impact to override the presumption.[85]

Thus the Board and the court in deference to the Board, place a high burden of proof[86] on the party seeking to disrupt an established bargaining relationship.

> This, of course, is consistent with the philosophy of American labor law of promoting industrial peace through the collective bargaining process. Moreover, the imposition of a high burden of proof on the party seeking to overcome the presumption of majority accorded to an incumbent union is a recognition of the principle that a status shown to exist is presumed to continue until shown to have ceased.[87]

In view of the fact that majority status in *Tahoe Nugget* was

---

83. NLRB v. Tahoe Nugget, Inc., 584 F.2d at 305.

84. Pioneer Inn v. NLRB, 578 F.2d at 840.

85. The following evidence was found to have insufficient cumulative impact to override the presumption: 1) reports of employee discontent which did not amount to a repudiation of the union, especially in the absence of a decertification petition; 2) high turnover, which is generally considered "insufficient to justify a refusal to bargain except when caused by employee discontent with the union" as a result of the Board's "presumption that new employees support the union in the same ratio as their predecessors . . ."; 3) union inactivity which is an objective ground on which the employer may rely but which was found to be de minimis; 4) low union membership in the Tahoe area which was considered to be only marginally relevant because it was never tied to respondent's employees and, in addition, employees may favor union representation but choose not to join, especially in a right-to-work state; 5) financial difficulties of the union which the court stated were irrelevant to the issue of union support; 6) prior amicable relations between the parties; 7) admissions by the employer's attorney which related only to credibility and were found to be insignificant here. 584 F.2d at 304-08.

86. The "clear, cogent and convincing" criteria is directed primarily at the type of evidence relied upon; the standard of proof is unchanged, to wit: whether there is sufficient reliable evidence to cast serious doubt on union's majority." 584 F.2d at 297. The court also said that placing the burden on the employer is fair because the employer assumed the self-appointed role of vicarious champion of employee rights. *Id.* at 301.

87. Morales, *Presumption of Union's Majority Status in NLRB Cases*, 29 LAB.L. J. 309, 315 (1978).

never shown to have existed, but rather was presumed to exist from the beginning, the application of this principle in this context is questionable.

F. Conclusion

The decision in *Tahoe Nugget* has been followed in a series of cases arising out of the same factual context: the withdrawal of individual employers from The Reno Employers Council followed by their refusal to bargain with the incumbent union.[88] The thrust of the Ninth Circuit's decision is to force employers to continue to bargain with incumbent unions after they withdraw from multi-employer units and to place the responsibility for asserting employee freedom of choice on the employees. Although the employers in *Tahoe Nuggett* argued that the application of the presumption of continuing majority status to a single employer after withdrawal of a multi-employer unit is destructive of the freedom of choice accorded employees in the selection of their bargaining representatives, it is not employee freedom of choice which is abridged by the court's decision. On the contrary, what the court is regulating is the ability of employers to vicariously assert their employees' rights. The Supreme Court has recognized that allowing employers to rely on their employees rights in refusing to bargain is inimical to achieving industrial peace.[89] When employers refuse to engage in collective bargaining in defense of their employees rights, the balance between industrial stability and employee freedom of choice is weighed differently than when employees themselves assert their rights and demand decertification.[90]

Employers are still free to petition the Board for an election after they withdraw from a multi-employer unit.[91] It is fairly

88. NLRB v. Carda Hotels, Inc., 604 F.2d 605 (9th Cir. 1979); NLRB v. Sierra Dev. Co., 604 F.2d 606 (9th Cir. 1979); Sahara-Tahoe Corp. v. NLRB, 581 F.2d 767 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2837 (1979); Ponderosa Hotel and Casino, Inc., 233 N.L.R.B. 92 (1978); Nevada Club, Inc., 229 N.L.R.B. 1186 (1977); Sparks Nugget, Inc., 230 N.L.R.B. 275 (1977); Barney's Club, Inc., 277 N.L.R.B. 414 (1976).

89. Brooks v. NLRB, 348 U.S. 96, 103 (1954).

90. Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 490 (2d Cir. 1975).

91. The Board has applied essentially the same criteria, however, to determine whether there is a "question concerning representation affecting commerce" where an employer files an election petition under section 9(c)(1)(B) of the Act as it does to determine whether the "objective considerations" claimed by the employer are sufficient to support a good faith doubt defense in a refusal to bargain case. Morales, *supra* note 87, at 310.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

clear, however, that absent unequivocal evidence of loss of majority support, employers must continue to bargain until the Board determines whether or not a question concerning representation exists. Because the Board generally "stays" election petitions pending resolution of unfair labor practice charges, once the union files a refusal to bargain charge, the employer will be confronted with the presumption and the necessity of producing sufficient timely and objective facts to rebut that presumption.

Lyn Woollard

V. COLLECTIVE BARGAINING AGREEMENTS AND THE DUTY TO BARGAIN IN GOOD FAITH

A. INTRODUCTION

In *Boeing Company v. National Labor Relations Board,*[1] the Ninth Circuit denied enforcement of the National Labor Relations Board (NLRB or the Board) order directing Boeing Company (the Employer) to abide by the terms of a contract that granted recognition to a craft union of welders, Local 286-W, International Union of Operating Engineers (the Union).[2] The NLRB found a breach of the contract and therefore, a violation of section 8(d) of the Labor Management Relations Act (LMRA or the Act).[3] Since 8(d) violations routinely imply violations of the

1. 581 F.2d 793 (9th Cir. Sept. 1978) (per Kunzig, D.J., sitting by designation; the other panel members were Duniway and Wright, JJ.).
2. The Boeing Co., 230 N.L.R.B. 696 (1977).
3. 29 U.S.C. § 158(d)(1970), which states in part:

> For the purposes of this section, to bargain collectively is the performance of mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . .
> *Provided,* That where there is in effect a collective-bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, . . .
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract . . .
> (3) notifies the Federal Mediation and Conciliation Service . . . and
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or

employer's duty to bargain in good faith, the Board deemed section 8(a)(5)[4] of the Act violated also. The NLRB determined that the recognition clause of the parties' collective bargaining agreement (CBA) placed the function "tack welding" within the Union's jurisdiction and the Employer violated its duty to bargain in good faith when it transferred that function to another bargaining unit. The Board's order directed the Employer to cease and desist[5] from this practice during the life of the agreement.[6] The Ninth Circuit refused to enforce the order, holding that since tack welding was not a term *expressly* contained in the contract, the Employer was free to transfer the work out of the Union's bargaining unit as long as it: 1) bargains in good faith to impasse over the decision, and 2) has no improper motive in taking its action.[7]

This holding seems to merely reiterate well settled law that decisions by employers in areas traditionally designated as management prerogative are subject to bargaining only insofar as they impact on wages, hours, and terms and conditions of employment.[8] However, implicit in the court's reasoning is the requirement of an *explicit* itemization in the CBA of every function normally alloted to a specific bargaining unit before work transfers can be found prohibited under section 8(d), no matter how explicit the parties' bargaining history on the issue. This denigration of the NLRB's expertise in labor relations and the potential destabilization of collective bargaining relationships may have a widespread effect on labor relations in unclear areas of management prerogative and union representation of its membership.

> until the expiration date of such contract, whichever occurs later . . . .

4. 29 U.S.C. § 158(a)(5)(1970) which states:

> It shall be an unfair labor practice for an employer (5) to refuse to bargain collectively with the representatives of his employees . . . .

Since both 8(d) and 8(a)(5) deal with the duty to bargain in good faith, an employer's violation of one is generally a violation of the other. *See generally* C. MORRIS, THE DEVELOPING LABOR LAW, Ch. 11 (1971, Cum. Supp. 1971-75, Supp. 1976, Supp. 1977).

5. The authority for Board cease and desist orders may be found in § 10(c) of the Act, 29 U.S.C. § 160(c) (1970).

6. 230 N.L.R.B. at 705.

7. 581 F.2d at 797.

8. *See* C. MORRIS, *supra* note 4, at ch. 15.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

B. FACTS AND LEGAL ISSUES PRESENTED

In 1959, the NLRB carved out a craft unit of welders from a larger bargaining unit then employed at Boeing and represented by the International Association of Machinists (IAM), ruling that the welders were more appropriately represented in a craft unit and had a similarity of skills that were substantially different from the other members of the bargaining unit.[9] Based on functional criteria, the Board twice modified the jurisdictional grant to the Union through the procedure of petitioning to clarify the unit.[10] Certain functions were determined to be welding and assigned to the Union; others were not considered welding and were, therefore, assigned to the larger unit represented by IAM. Each modification was adopted pro forma as the new recognition clause in the next CBA.[11]

In 1977, despite the previous bargaining history, the Em-

9. Boeing Airplane Co., 124 N.L.R.B. 689 (1959). In 1939, the Board determined that craft units would not be carved out of broad industrial units (as here) unless the industrial union failed to show that it adequately represented the crafts' interests and the past bargaining history showed successful representation of the broad unit. American Can Co., 13 N.L.R.B. 1252 (1939). In response, Congress added section 9(b)(2) to the then National Labor Relations Act (now Labor Management Relations Act) stating:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof: *Provided* That the Board shall not . . . (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation . . . .

29 U.S.C. § 159(b)(2)(1970).

In 1954, just prior to the creation of this welders' unit the Board interpreted section 9(b)(2) to grant free severance to craft units. American Potash & Chemical Corp., 107 N.L.R.B. 1418 (1954). *See* C. MORRIS, *supra* note 4, at ch. 9 (1971); J. ABODEELY, THE NLRB AND THE APPROPRIATE BARGAINING UNIT 87-92 (1976) (Labor Relations and Public Policy Series, Rep. No. 3, U. Pa.).

10. 230 N.L.R.B. at 698 n.7. Clarification is provided for by § 10(d), 29 U.S.C. §160(d), where the Board is authorized to modify or set aside any finding or order not made final. NLRB determinations of representation proceedings (29 U.S.C. § 159 *et seq.*) are not considered final orders within § 160 of the Act. Under rule 102.60(b) of the Board's Rules and Regulations, 29 C.F.R. § 1017 (1969), "[a] petition for clarification of an existing bargaining unit or petition for amendment of certification may be filed by a labor organization or by an employer."

11. "[F]rom 'February 20, 1959, to date, the applicable recognition clause in the [union's] (or its predecessor's) contracts with [the Company] were identical to the bargaining unit's description as found in the most recent NLRB certification.'" 230 N.L.R.B. at 698.

Robinson et al.: Labor Law

ployer decided that tack welding could be unilaterally reassigned and no unit clarification procedure would be necessary. Since the Union felt that tack welding was covered by the recognition clause and within its exclusive jurisdiction, it filed an unfair labor practice[12] charge with the NLRB charging unlawful erosion of its bargaining unit. Hence, this disagreement over the Union's jurisdiction arose in the arena of an unfair labor practice hearing rather than a unit clarification hearing.[13] In deciding whether or not tack welding was protected by the agreement, the Board adopted the reasoning of the Administrative Law Judge (ALJ), who determined that the bargaining history between the parties placed the tack welding function within the recognition clause of the contract. By transferring the work from the unit without the Union's consent, the Employer violated section 8(d) and derivatively sections 8(a)(1) and (5).[14] The ALJ determined that tack welding was within the terms of the contract's recognition clause[15] by looking at the past bargaining history between the parties: the parties had previously interpreted that recognition clause by de-

12. *Id.* at 696.

13. *See* note 10 *supra.* Since unit clarification proceedings are not final orders under 29 U.S.C. § 160, they are not generally reviewable by the courts except as incidental to unfair labor practices contained in 29 U.S.C. § 158. Hence, one possible defense to the Board's decision in *Boeing* was that tack welding is not an appropriate function of the craft unit. The *Boeing* Court does not address this issue. *See* J. ABODEELY, *supra* note 9, at 114-19.

14. 29 U.S.C. § 158(a)(1)(1970) states: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title." For the text of § 158(a)(5) *see* note 4 *supra.*

15. The recognition clause in the collective bargaining agreement describing the "unit covered" in this bargaining unit between the union and the employer states:

> All welders, including research, high strength, production, burner, gas and arc, maintenance A and maintenance B welders, welder leadmen, burners' apprentices and helpers, and including all employees operating machine welding equipment where, in the operation thereof and in the process of the weld, based on the employees' sight or sound observations, the equipment may require adjustment in variables such as travel speed, arc voltage, arc gap, current, amount of filler metal being fed into welding puddle, seam tracking or adjustment for variations in the thickness of material, mismatch or gap, in order to produce a satisfactory weld, employed by the Employer at its plant and operations located in the state of Washington, excluding automatic fusion welding machine operators, sheet metal worker and welder maintenance C employees, employees operating the Airco gas tungsten arc welding machine at the Employer's Auburn, Washington, plant, office clerical employees, professional employees, guards, all other employees, and supervisors are defined in the Act.

230 N.L.R.B. at 698 n.8.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

ferring to the NLRB's unit clarification procedure. Thus, he asserted that had the Board conducted unit clarification[16] involving tack welding, it would have properly determined that the function was more appropriate to a craft unit of welders than in the larger unit of machinists. Accordingly, the ALJ concluded:

> Therefore, the nature of the unit, the history of its evolution, and the parties' practice of assigning welding, including tack welding, pursuant thereto support the contention that the contractural unit did implicitly embody tack welding as one of the job functions to which employees represented by the Union were entitled.[17]

Despite the Board's reliance on the ALJ's conclusions, the Ninth Circuit reversed the Board, holding that the recognition clause could not legally be extended to cover functions, reserving that clause to a description of the people who were included in the unit.[18] Therefore, assigning tack welding exclusively to Union members could not be read as a term of the contract. Since the function was not *explicitly* protected by the collective bargaining agreement, there was no violation of section 8(d). Since there was a stipulation that the Employer had fulfilled all other bargaining duties,[19] there was no showing of bad faith bargaining by not discussing the Employer's decision to transfer this work. Therefore, the 8(a)(1) and (5) violations, which were based on bad faith bargaining, must also fail.

The Ninth Circuit's reasoning raises two important issues regarding the role of the NLRB in contract administration. First, when the NLRB creates a unit based on functional criteria, can

16. Board Unit determination is generally based on the following rationale: "[T]he Board's primary concern is to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment." 15 NLRB ANN. REP. 139 (1950). *See* C. MORRIS, *supra* note 4, at 217. The major criteria in determining a severance of a smaller group is at group's community of interest. Kennecott Corp., 176 N.L.R.B. 96 (1969); Kalamazoo Paper Box Corp., 136 N.L.R.B. 134 (1962). If that smaller group claims to be a craft unit, then the community of interest focuses on the skill and function of the persons in the unit. Beaunit Mills, Inc., 109 N.L.R.B. 651 (1954); Note, *Labor Law—Labor Management Relation Act-Section 9b(2)—Requirements for Severance of Craft Workers*—Mallinckrodt Chemical Works, 8 B.C. INDUS. & COM. L. REV. 988, 944 (1966-67).

17. 230 N.L.R.B. at 700.

18. 581 F.2d at 797.

19. "As all parties agree that . . . [the Employer] satisfied any bargaining obligation owed the Union absent the existence of a collective bargaining agreement, the obvious threshold question is whether it may be found that the current agreement embodies tack welding in the contractual unit." 230 N.L.R.B. at 698.

Robinson et al.: Labor Law

erosion of that unit be halted, and if so, how? Second, what is the role of the NLRB in resolving the dispute? Regarding the first issue, the Ninth Circuit is implicitly saying that the only way for a bargaining unit to remain intact during the life of a CBA is for the parties to write in explicit descriptions of every function that the union represents. Regarding the second issue, the Ninth Circuit has asserted its predominent role in contract interpretation, relegating the NLRB to the enforcement of clear and unambiguous terms and conditions and refusing to recognize Board expertise in the area of bargaining history interpretation.

C. Jurisdiction Over Functions Versus Recognition of Persons

In creating Boeing's craft unit of welders in 1959, the NLRB relied on normal indices of craft units, based on functional criteria: the employees involved "perform skilled work, subject to rigid inspection, and require a long period of on-the-job training and experience," thus qualifying as a "true craft" group.[20] Twice the Board modified the craft unit here, once in 1966 on a petition by the Employer and once in 1974 by request from the Union.[21] In determining whether certain classifications of employees should be added, the Board used the test outlined in *Mallinckrodt Chemical Works.*[22] There the Board itemized six factors for determining when it could appropriately create craft units from larger units, including:

> 1. Whether or not the proposed unit consists of a distinct and homogenous group of skilled journeymen craftsmen *performing the functions of their craft* on a non-repetitive basis, or of employees *constituting a functionally dis*tinct department.
>
> . . .
>
> 4. The history and pattern of collective bargaining in the industry involved.
>
> 5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the perform-

20. American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1422 (1954).

21. *See* note 9 *supra.*

22. 162 N.L.R.B. 387 (1966). *See also* Holmberg, Inc., 162 N.L.R.B. 407 (1966); E. I. Dupont de Nemours & Co., 162 N.L.R.B. 413 (1966); C. Morris, *supra* note 4, at Ch. 9, 225-31; J. Abodeely, *supra* note 9, at 94-106.

ance of the *assigned functions* of the employees in the proposed unit.[23] 139

Though the process of unit clarification differs from a determination of craft status in substantial procedural ways,[24] the use of the *Mallinckrodt* criteria is substantively appropriate since the substantive issues are identical. "Consequently, since 1959, the bargaining unit has remained a craft unit, the scope and composition of which has been governed under Board principles concerning such craft units."[25] Following each unit clarification the Employer and the Union have, apparently without discussion, conformed their recognition clause, to the Board's conception of the craft unit which was based largely on functional criteria.[26]

However, the Ninth Circuit, focusing on the lack of bargaining over the recognition clause, objected to the Board applying its job function analysis to a clause which normally identifies the people subject to the terms of the contract. Rather, the court urges that to properly protect the functions in a bargaining unit, the parties must negotiate a "jurisdictional clause." Such clause must, as far as possible, identify all of the possible functions that are to be represented by the Union. "Rather than stretching the meaning of a Recognitional Clause 'impliedly,' 'implicitly' or 'in effect' to cover 'functions' (as did the Board), a decision against the Board would encourage the parties affirmatively to negotiate an explicit 'Jurisdictional Clause' to be included in the next CBA."[27]

23. 162 N.L.R.B. at 397 (emphasis added).

24. In a unit clarification, the procedure involved is much more abbreviated as the relevant issues are proper classification of a particular job and/or accretions to bargaining units. Rather than a full scale investigation into all community interests, bargaining history and perhaps elections, the ALJ makes a determination on a single function. For a discussion of the job classification issue, see Westinghouse Elec. Corp., 142 N.L.R.B. 317 (1963); Boston Gas Co., 136 N.L.R.B. 219 (1962). For a discussion of the accretion issue, see Westinghouse Elec. Corp., 173 NLRB 310 (1968); Westinghouse Elec. Corp., 173 N.L.R.B. 319 (1968). For a discussion of the determination of an appropriate unit, see NLRB's Statement of Procedure, 29 C.F.R. §§ 101.17-21 (1979).

25. 230 N.L.R.B. at 698.

26. *Id.*

27. 581 F.2d at 798. This "encouragement" was specifically addressed by the Board and rejected as unworkable.

> It is, of course, true that the recognition clauses in the successive agreements in the instant case, as in *University of Chicago*, have not recited in detail all of the skills, functions, and duties which the employees encompassed thereby are to exercise and perform. Indeed, it was principally this omission which in that case led the Seventh Circuit to criticize the

The Ninth Circuit relied heavily on the Seventh Circuit decision, *University of Chicago v. NLRB*,[28] for the proposition that an explicit jurisdictional clause is desirable. However, the cases are distinguishable: first, the bargaining unit in the *University of Chicago* instance was not a craft unit, created on a functional basis; and second, the work that was transferred from the bargaining unit in the *University of Chicago* instance was bargained over extensively and the impacts were clearly minimized.[29] In *University of Chicago*, a decision against the Board was likely to encourage the parties to better protect their functional fiefdoms. In *Boeing*, however, because of the lack of bargaining, the craft unit founded on a functional basis, and the bargaining history of the parties establishing an intent to determine their recognition clause upon Board principles of craft units, the decision against the Board is only likely to inhibit parties whose contractual protection is eroded from seeking Board protection.

D. CONTRACT ENFORCEMENT: THE NLRB OR THE COURTS

Section 8(d) of the LMRA, which defines the duty to bargain, contains a proviso directed toward existing collective bargaining agreements that cover the area complained of by the union or

> Board's reasoning as a 'novel theory.' Yet, it is exceedingly rare to find either a collective-bargaining agreement or a certification which does recite every detail of every duty of every classification encompassed therein. To attempt to do so would generate recognition clauses of tome proportions, particularly where a number of classifications were encompassed or where the unit covered, as in the instant case where 300 pages of transcript plus a number of exhibits have been devoted to explaining welding duties, craft employees.

230 N.L.R.B. at 700. Perhaps what the Ninth Circuit wishes to encourage is the adoption of a catch-all phrase such as: "Jurisdiction: All functions presently performed by the above recognized union members are reserved to those union members." Since this would leave the Board in the same position as presented by the *Boeing* case, with the additional catch-all requiring the ALJ to interpret the recognition clause by functional criteria, little would seem accomplished by this phrase.

28. 514 F.2d 942 (7th Cir. 1975) (*enforcement denied*, University of Chicago, 210 N.L.R.B. 190 (1974)).

29. 514 F.2d at 946. Additionally, in *University of Chicago*, the Board found, similar to this case, the transfer of bargaining unit work functions to be specifically forbidden by the collective bargaining agreement between the parties. 210 N.L.R.B. 190, *enforcement denied*, 514 F.2d 942 (7th Cir. 1975). This decision was based upon an analysis of the bargaining history wherein the Board determined that the duties assigned to the bargaining unit were an "inextricable, albeit inexplicit, part of the bargaining history." 210 N.L.R.B. at 197. The Seventh Circuit viewed this past practice analysis of contractually established work assignments, as a "novel theory" and, therefore, denied enforcement. 514 F.2d at 944.

employer.[30] Neither party can alter or modify the terms of a contract during its terms except in certain instances or with the other parties' consent. In both *Boeing* and *University of Chicago,* the issue was framed as whether the employer can transfer work from a bargaining unit covered by a CBA. The Board, in both instances found that the work was an integral part of the recognition clause and hence, a transfer of work without the other parties consent was contrary to the 8(d) proviso.[31] In both instances, the circuits reversed the Board, finding that the work was not protected by the recognition clauses:

> As we read the cases, unless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer complies with . . . [the duty to bargain regarding transfers of work] by bargaining in good faith to impasse and (2) the employer is not motivated by anti-union animus, . . .[32]

The Ninth Circuit, by adopting the language of the Seventh Circuit, clearly holds that the transfer of work from the bargaining unit is a mandatory subject of bargaining, at least as far as the decision to transfer affects those mandatory subjects of bargaining, wages, hours, and terms and conditions of employment. However, also implicit in this reasoning is the prohibition that the Board may not direct an employer to maintain such work in the bargaining unit during the term of a CBA unless that agreement explicitly places the work in the bargaining unit. The effect of this logic is to further limit the NLRB's role in contract administration.

30. *See* note 3 *supra.*

31. 230 N.L.R.B. at 701.

32. 581 F.2d at 797, *quoting* University of Chicago v. NLRB, 514 F.2d 942, 949 (7th Cir. 1975) (citations omitted). The duty to bargain over the managerial decision stems from the well-known case, Fiberboard Paper Products v. NLRB, 379 U.S. 203 (1964), in which a plurality of the Supreme Court held that when an employer subcontracts its business or a part thereof, in certain instances the employer must agree to bargain over the manner in which that decision affects wage, hours and working conditions of affected employees. *See* note 8 *supra* and accompanying text. The anti-union animus portion of the court's test derives from Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965), where the Supreme Court held that an employer was free to close his business completely and reopen it elsewhere. Such a decision is not a mandatory subject of bargaining and is within a management's prerogative unless the decision is motivated solely by a desire to avoid union organizing at the former site and the implementation of that decision is subject to a request to bargain.

The relevant history of section 8(d) shows that it is closely tied with section 301 of the LMRA[33] which allows private enforcement of arbitration clauses in contracts and which defers to the contractually provided procedure for determining its scope.[34]

In 1971, the Board in *Collyer Insulated Wire*[35] determined that when a contract contains grievance and/or arbitration machinery that may cover the issues raised under the LMRA, the Board will defer to that machinery until it is exhausted or proven futile.[36] The Board will then have the discretion to review the settlement or decision. Section 301 of the LMRA allows private enforcement of the arbitration clauses of collective bargaining agreements, bypassing the Board's unfair practice proceedings. Now, in light of *Boeing* and *University of Chicago* and the circuit court's unwillingness to defer to Board expertise, the Board may find its authority in contract administration further impaired.

E. Conclusion

In *Boeing,* the Ninth Circuit held that as long as an employer bargains to impasse and does not act with improper movitation the decision to transfer work from a bargaining unit is not an improper contract modification violating either section 8(d), 8(a)(1) or (8)(a)(5). Further, to stop employers from freely transferring bargaining unit work, a union must negotiate an explicit jurisdictional clause, since explicit recognitional clauses, no matter what their bargaining history, are relegated to the protection of bargaining unit members and not duties. Such a jurisdictional clause must specifically establish that the disputed work assignment is a function reserved solely to the Union members. Further, the court will not allow the NLRB to enforce terms and conditions

33. 29 U.S.C. § 185 (1970).

34. *See* C. Morris, *supra* note 4, at ch. 17.

35. 192 N.L.R.B. 837 (1971).

36. *Id.* at 843. Analagously, in Cal. Gov't Code § 3541.5 (Deering Supp. 1979), the California Legislature expressly adopted the *Collyer Insulated Wire* doctrine and ordered that the Public Employee Relation Board (PERB) shall not have authority to enforce CBA agreements. Since PERB has found NLRB precedent persuasive guidance in interpreting its function, *see* CSEA v. San Mateo County Community College Dist., P.E.R.B. Dec. No. 94 (Jun. 8, 1979); Pajoraro Valley Unified School Dist., P.E.R.B. Dec. No. 51 (May 22, 1978); Sweetwater Union High School Dist., P.E.R.B. Dec. No. 8 (Nov. 23, 1976), the impact of *Boeing* may be profound. Implying that it will only be an unfair labor practice if an express term of the contract is violated, *Boeing* may exclude bargaining history and other factors whenever the PERB is required to determine if a particular action by a public employer that is claimed to violate a CBA is also an unfair practice under Cal. Gov't Code § 3543.5 (Deering Supp. 1979).

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

contained in an agreement on the basis of an "implicit" provision, identified by the Board's interpretation of bargaining history. In other words, the Board may not use section 8(d) of the LMRA to enforce impliedly established jurisdictional clauses to contractually protect work assignments, even when that work assignment or function is clearly at the root of the recognition clause of the contract.

Kevin S. Robinson

VI. ILLEGAL ALIENS ARE EMPLOYEES ENTITLED TO PROTECTION UNDER THE LABOR MANAGEMENT RELATIONS ACT

A. INTRODUCTION

In *NLRB v. Apollo Tire Co., Inc.*,[1] the Ninth Circuit granted enforcement to a National Labor Relations Board (NLRB or the Board) order correcting unfair labor practices[2] by the Apollo Tire Company (the Employer). The Board's order directed the employer to cease and desist from threatening physical harm to employees who exercise their rights under the Labor Mangement Relations Act (LMRA, or the Act).[3] It further ordered reinstatement with back pay of those employees who were discharged or laid off because of their exercise of these rights. In enforcing this order, the court specifically affirmed the NLRB's refusal to hear evidence that may have established that some of the employees laid off or threatened were illegal aliens.[4] The Board determined,

---

1. 604 F.2d 1180 (9th Cir. Aug., 1979) (per Wright, J.; the other panel members were Kennedy, J. and Hall, D.J.).

2. The Board found violations of §§ 8(a)(1) and 8(a)(4) of the Labor Management Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(4)(1976).

Section 8 of the Act provides:

> (a) It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7 (29 U.S.C. § 157 of this title) . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

Id.

3. 29 U.S.C. § 157 (1976) provides in pertinent part: "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 . . . ."

4. 604 F.2d at 1181.

Illegal aliens are those aliens who would not be permitted to work in the United States

Robinson et al.: Labor Law

in accordance with its longstanding rule, that aliens are employees[5] as defined by section 2(3)[6] of the LMRA; therefore, even if the excluded evidence established the employees' unlawful status, it would be irrelevant to a determination of the issues involved. The Ninth Circuit agreed.[7]

---

under pertinent federal laws. *See* 8 U.S.C. § 1182(a)(14) (1976); CAL. LAB. CODE § 2805(a)(West 1971); Mathews v. Diaz, 426 U.S. 67, 79 n.13 (1976); DeCanas v. Bica, 424 U.S. 351, 353 n.2 (1976); NLRB v. Apollo, 604 F.2d at 1182. NLRB v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214, 217 n.4 (1976).

5. The first mention of this longstanding rule appears in Logan & Paxton, 55 N.L.R.B. 310 (1944), in dicta:

> While no direct issue was made at the hearings as to the inclusion in the units of non-citizen employees and their eligibility to participate in the elections, it is evident from the record that such an issue may arise at the time of the elections. The Act does not differentiate between citizens and non-citizens. In order to effectively carry out the purposes of the Act, we conclude that no distinction should be drawn on such a basis (*Cf. Matter of U.S. Bedding Co.*, 52 N.L.R.B. 382 (1944) for the analogous proposition that the Act does not distinguish between black and white employees). Non-citizenship of an employee shall not, consequently, constitute a disqualification for participation in the election.

Id. at 315, n.12. From this first mention of the rule and analysis of the purposes of the Act, the dicta became law. "[T]he Board has consistently held illegal aliens to be employees under the Act and entitled to its protection." Apollo Tire Co., 236 N.L.R.B. No. 215 (July, 1978), 1978 NLRB Dec. ¶ 19,571 n.1, *citing* Amay's Bakery & Noodle Co., Inc., 227 N.L.R.B. 214 (1976). *See also* Sure-Tan, Inc., 231 N.L.R.B. (1971); Seidmon, Seidmon, Henkin & Seidmon, 102 N.L.R.B. 1492 (1953); Cities Serv. Oil Co. of Penn., 87 N.L.R.B. 324, 331 (1949) ("The eligibility of aliens to cast ballots is too well established to warrant justification anew here."); Azusa Citrus Ass'n, 65 N.L.R.B. 1136, 1138 (1946); Allen & Sandilands Packing Co., 59 N.L.R.B. 725, 730 (1944).

6. Section 2(3) of the LMRA reads:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, (citation omitted) as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (1974).

7. 604 F.2d at 1181.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

The employer raised two defenses to the Board's order: (1) that the Board's longstanding rule conflicts with federal immigration laws, specifically the Immigration and Nationality Act (INA);[8] and (2) by ordering the reinstatement of workers known to be here illegally, the Board is forcing the employer to violate state law, specifically section 2805(a) of the California Labor Code.[9] The first argument was rejected by the court since granting employee status under the LMRA does not conflict with the INA and since the Board's interpretation of the LMRA best furthers the policies of the immigration laws.[10] The second argument was rejected by the court on the grounds that the scope and meaning of the state statute is unclear and may be constitutionally infirm as conflicting with the federal superintendence of immigration and naturalization. Therefore, until the law is interpreted to be enforceable, the Board acted properly in treating illegal aliens identically with other employees in awarding back pay and reinstatement.[11]

B. Factual Background

Apollo Tire Co., Inc. is a business enterprise located in Canoga Park, California, employing approximately twenty-five employees, for many of whom English is not their first language.[12] In early 1977, Mrs. Niz, whose husband and son were Apollo employees, complained to the general manager of the Employer about her son's unpaid overtime. Apollo's general manager told her husband that if she complained to the Department of Labor about the wage dispute, the manager would have her killed. Subsequently, the woman went to the Department of

8. 8 U.S.C. § 1101 *et seq.* (1952).

9. Cal. Lab. Code § 2805 (West 1971) provides:

> (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.
> (b) A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense.
> (c) The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a).

10. 604 F.2d at 1183. This holding reflects the rationale of N.L.R.B. v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978). " . . . [T]his certification and bargaining order are not inconsistent with federal immigration laws. . . . Thus by refusing to certify unions with a majority of alien members we would be giving employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws." *Id.* at 359, 360.

11. 604 F.2d at 1184.

12. The court fully describes the facts. 604 F.2d at 1181-82.

Labor and obtained several complaint forms that she passed out to other employees. Seven employees filed complaints with the Department of Labor and six of the seven were laid off; four were not rehired.[13] Despite the employer's protestations of economic necessity for layoffs, the trial examiner discounted this reason because of inconsistent testimony by the employer's witnesses, the testimony of the Department of Labor compliance officer who stated that the general manager knew the identity of six of the seven complaining employees, and the testimony of all six employees that the general manager told them that they would not be rehired because of their complaints.[14]

C. Illegal Aliens and the Federal Immigration Laws

In upholding the NLRB's longstanding rule that aliens are employees within the meaning of section 2(3) of the LMRA,[15] the Ninth Circuit found it unnecessary to decide whether or not the Board should enforce LMRA policies that conflict with policies of other adminstrative agencies. Rather than find the Board's rule regarding aliens in conflict with federal immigration laws, the Apollo court stressed the underlying policy: "Were we to hold the [LMRA] inapplicable to illegal aliens, employers would be encouraged to hire such persons in hopes of circumventing the labor

13. Apollo Tire Co., 236 N.L.R.B. No. 215 (July, 1978) (advance sheet statement of facts).

14. *Id.*

15. *See* note 3 *supra* for the history of this rule. The Ninth Circuit defers to the NLRB's interpretation partially because in statutory construction great deference is given to the interpretation by the agency charged with its administration, Udall v. Tallman, 380 U.S. 1, 16-17 (1965), and because that interpretation is so well established. "Because the Board's interpretation and application of the statute is well established, and has not been disturbed by Congress, we defer to its understanding of the statute unless it is clearly in error." N.L.R.B. v. Apollo, 604 F.2d at 1183 (citations omitted).

However, Judge Wood's dissent to N.L.R.B. v. Sure-Tan, Inc., stated: "I am not persuaded in this instance by the argument that since the Board's interpretation is one of long standing it is therefore entitled to great weight. I view it as only a case of the Board having been wrong for a long time." 583 F.2d at 362. *See* Comment, *Labor Law—Illegal Aliens Are Employees Under 29 U.S.C. § 152(3) And May Vote in Union Certification Elections*, 10 Rut.-Cam. L.J. 747 (1979), which also criticizes this rule on two bases: First, that the origin of the rule is dicta, and second, that the court never explains how this policy of allowing illegal aliens to vote will effectuate the purposes of the Act. *Id.* at 748 n.9, 751 n.34. However, the purposes of the Act are clearly set forth by the broad definition of 2(3) of the Act. By listing exceptions to 2(3), Congress intended to grant protection to all workers except a distinct few classifications. Illegal aliens are not within those classes. When the Board does not apply this rule of interpretation to § 2(3), it subverts the policies of the Act. *See* N.L.R.B. v. Apollo Tire Co., Inc., 604 F.2d at 1183; Cedars-Sinai Medical Center, 223 N.L.R.B. 251, 254 (1976) (Member Fanning, dissenting).

Published by GGU Law Digital Commons, 1980

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

laws."[16] By adopting the reasoning of the only other circuit to have dealt with the alien/employee[17] issue, the question of accommodation to other forums was sidestepped.[18] "We agree with the *Sure-Tan* majority that the Board's interpretation best furthers the policies underlying the immigation laws."[19]

However, in *NLRB v. Sure-Tan, Inc.* the majority reserved comment on the possibility of back pay and reinstatement orders by the Board, expressing no opinion as to whether or not such orders would conflict with the INA.[20] The only issue before the *Sure-Tan* court was the validity of allowing aliens to vote in NLRB representation elections.[21] The Ninth Circuit in *Apollo* implicitly approves the Board's extension of the *Sure-Tan* reasoning to back pay and reinstatement orders.[22]

D. ILLEGAL ALIENS AND CALIFORNIA LAW

California Labor Code section 2805 prohibits knowing employment of illegal aliens if such employment would adversely effect lawful resident workers and provides for fines against employers who violate its provisions.[23]

16. 604 F.2d at 1183.

17. N.L.R.B. v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978).

18. The *Sure-Tan* majority specifically declined to adopt the position, hotly disputed in cases questioning the certification of racially discriminatory unions, "that the Board should not enforce policies administered by other government agencies." *Id.* at 359 (citations omitted). The court found it unnecessary to adopt this policy because the Board ordered no affirmative action on the part of the employer except to bargain with a duly certified union. It expressly left open the question of whether back pay orders would be appropriate for illegal aliens. In Sure Tan, Inc. (*Sure-Tan II*), 234 N.L.R.B. 1187 (1978), the Board found that the illegal alien voters in *Sure-Tan* had been constructively discharged by the employer when he or she reported their illegal status to the Immigration and Naturalization Service. *Id.* at 1187. The Administrative Law Judge declined to order back pay and modified the normal back pay order because he found that the deported workers were unable to work. The Board rejected this part of the order and directed that a standard back pay and reinstatement order follow. *Id.* at 1188. The Board modified the trial examiner's proposed order in a similar fashion in Amay's Bakery & Noodle Co., Inc., 227 N.L.R.B. 214 (1976) and Apollo Tire Co., 236 N.L.R.B. No. 215 (July, 1978), *aff'd*, 604 F.2d 1180.

19. *Id.* at 1183.

20. 583 F.2d at 360 n.9. *See also* note 18 *supra*.

21. In *Sure-Tan*, the employer refused to bargain with the union and the Board found a violation of the Act. The employer argued to the Seventh Circuit that six of the seven voters in the union's certification election were illegal aliens, therefore, the union had no majority status. The employer also reported his workers to the Immigration Service and five were deported (discussed in *Sure-Tan II*). *See* note 18 *supra*.

22. 604 F.2d 1180 at 1183.

23. For text of CAL. LAB. CODE § 2805, *see* note 9 *supra*.

In *De Canas v. Bica,*[24] the Supreme Court unanimously reversed a California appellate court ruling that Labor Code section 2805(a) unconstitutionally legislates in an area pre-empted by federal regulation.[25] Justice Brennan, writing for the Court, indicated that states are not necessarily barred from regulating *employment* of illegal aliens.[26] The *Apollo* panel noted that the Supreme Court did not suggest that California was free to legislate in the area of immigration, rather it held that Congress had not expressly pre-empted the area. Thus, the California act is not per se unconstitutional.[27]

Implicit in this analysis by the Supreme Court is the rule that the California legislature cannot act in conflict with the federal immigration policies and regulations. By applying the Seventh Circuit's *Sure-Tan* analysis to the back pay reinstatement order, the Ninth Circuit, could by analogy have held that back pay with reinstatement also best furthers the underlying policies of Labor Code section 2805(a).[28] However, *Apollo* does not explicitly reach that conclusion; rather, it merely holds that as long as California law is unsettled and uninterpreted in certain crucial sections, the Board acts properly when it treats aliens in

24. 424 U.S. 351 (1976).

25. *Id.* at 354.

26. Power Power to regulate immigration is unquestionably exclusively a federal power . . . . But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised . . . . In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have *no federal right* to employment within the country; . . . [t]hus absent congressional action, § 2805 would not be an invalid state incursion on federal power. (emphasis added) (citations omitted).

Id. at 354-56.

27. "[T]here are questions of construction of Section 2805(a) to be settled before a determination is appropriate whether, as construed, Section 2805(a) can be enforced without impairing federal superintendence of the field covered by the INA." N.L.R.B. v. Apollo, 604 F.2d at 1184, *quoting* De Canas v. Bica, 424 U.S. 351, 363.

28. *See* note 26 *supra.* Justice Brennan notes that California is codifying federal policies and regulations by adopting them in an attempt to "strengthen its economy." Since the impact of § 2805 in immigration is speculative and indirect, it is not an unconstitutional infringement on congressional power. De Canas v. Bica, 424 U.S. 351 at 355. The Ninth Circuit, here, has stated that the Board's reasoning "best furthers the policies underlying the immigration laws." N.L.R.B. v. Apollo, 604 F.2d at 1183. It is arguable that Board policy would also not conflict with an interpretation of § 2805 which was constitutional.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

the same manner as other employees so defined by section 2(3) of the LMRA.[29] Additionally, both circuits expressly allow the employer the right to seek modification of the Board's orders should it become apparent in the future that the order conflicts with the policies of the various immigration acts.[30]

E. CONCLUSION

The LMRA boardly defines who is an employee by listing certain exceptions to that definition.[31] The NLRB has consistently determined that since illegal aliens are not listed among those exceptions, they are fully protected under the provisions of the LMRA.[32] The Ninth Circuit in *Apollo* joins the Seventh Circuit in affirming the Board's analysis. The Ninth Circuit now extends that analysis beyond representation proceedings to full remedial rights afforded employees by the Act, including reinstatement with back pay to remedy unfair labor practices. Neither the Seventh nor the Ninth Circuits have reached the question of whether the Board should conform its rules and practices to accomodate the underlying policies of other acts administered by other administrative agencies. It is not surprising that the circuits and the Board are in such agreement; but it is surprising that this rule has taken so long to be recognized.

The rationale of this case is best expressed by Judge Kennedy's concurrence: "If the [LMRA] were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case."[33] Hopefully, when *Apollo's* holding becomes widely known, these most exploited employees will find it possible to assert their rights without fear of losing their jobs or their lives.

Kevin S. Robinson

---

29. 604 F.2d at 1183.

30. *Id.* at 1184, *citing* N.L.R.B. v. Sure-Tan, Inc., 583 F.2d at 359.

31. *See* note 6 *supra.*

32. *See* notes 3 and 15 and accompanying text.

33. N.L.R.B. v. Apollo, 604 F.2d at 1184. (Kennedy, J., concurring). *See also* Ortega, *Plight of the Mexican Wetback,* 58 A.B.A.J. 251 (1972). Because of a fear of deportation and other reprisals, it is less likely that illegal aliens will be able to invoke the mechanisms of the Act to stop such exploitative employer practices. Mike Yuvosek & Sons, Inc., 225 N.L.R.B. 148 (1976); Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives,* 15 SAN DIEGO L. REV. 63 (1977).

VII. OTHER DEVELOPMENTS IN LABOR LAW

In *NLRB v. Machinist Local 1327, International Association of Machinists*, 608 F.2d 1219 (9th Cir. 1979), the Ninth Circuit held that union provisions imposing a continuing obligation on former members to honor a primary picket line is a valid restriction on members' rights to resign and fines may lawfully be imposed for violation of this obligation.

This case stemmed from the union's imposition of fines on its members who resigned during a strike and returned to work in violation of the union's constitution. The Ninth Circuit denied enforcement to the Board which found that the union had violated NLRA section 8(b)(1)(A),[1] 29 U.S.C. section 158(b)(1)(A). The constitution's provision stated that the acceptance of employment during a strike or lockout constituted improper conduct by a member. It further provided that resignation would not relieve that member of the obligation to refrain from accepting employment for the duration of the strike or lockout. Members were twice informed that the might be fined for violating the provision.

The Board, in a three to two decision, held that the provision did not justify the fine and, as a result, the union violated section 8(b)(1)(A) of the Act which provides that it is unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their organizational rights, including the right of a member to resign from the union. After an effective resignation, the union has no more control over the former member than it does over any other non-member. The Board thus found that the provision sought to unlawfully regulate the post-resignation conduct of former members.

A proviso to section 8(b)(1)(A), however, states that the section shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retnetion of union membership. It was this exception to section 8(b)(1)(A) that the

1. "These sections in brief provide that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their rights of self organization and collective bargaining, or to discriminate against employees on the basis of union membership; or to cause or attempt to cause an employer to discriminate against an employee." 583 F.2d 1095, 1095 n.1.

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

Ninth Circuit majority focused on in refusing to enforce the Board order. Drawing on the opinion of the Board's dissenting members, the Court found that the union's provision was a contractual restriction on the member's right to resign and not an unlawful regulation of post-resignation conduct.

Because the Supreme Court, in *Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB*, 412 U.S. 84 (1973), expressly declined to consider the allowable extent to which a union may restrict a member's right to resign, the Ninth Circuit considered the validity of the union constitution's provision. Although the provision permitted resignation by a member, it limited the effect of a resignation occurring during or immediately preceding a strike to protect the union against strikebreaking. Because the ability to discipline strikebreakers is essential to a union's effectiveness as bargaining agent, resignation does not relieve the resigner from the existing duty to refrain from strikebreaking.

The court found the union's provision enforceable as a reasonable regulation falling within the scope of the 8(b)(1)(A) proviso. Over a vigorous dissent, the majority relied on the fact that the proviso to 8(b)(1)(A) makes no distinction between acts done while a member and those acts done while not a member. Under the dissent's view, however, once membership is resigned, an employee again becomes fully protected by section 7 and any imposition of fines for working during a strike would violate section 8(b)(1)(A).

In *Lewis v. NLRB*, 587 F.2d 403 (9th Cir. 1978), the court held that the Board need not defer to an arbitration award which is repugnant to the purposes and policies of the Act; and employees do not violate the principle of exclusive representation when they file unfair labor practice charges to force an employer to fulfill its statutory duty to bargain.

Employees who were discharged as a result of the unilateral introduction of a production quota system filed unfair labor practice charges alleging that the company violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. These violations occurred because the employer imposed the quota system without first bargaining with the Union. Additionally, the

employer forbade union representation at counseling and disciplinary sessions, another unilateral change. The Ninth Circuit held that the Board did not abuse its discretion in refusing to defer to the arbitration process where the arbitrators ignored well-established principles relating to the duty to bargain collectively over terms and conditions of employment. Production quota systems and disciplinary sanctions come within mandatory subjects of bargaining. The court concluded that the union's access to the grievance procedure to challenge the quota system did not constitute adequate bargaining. Bargaining between the company and the union must *precede* the decision to take action relating to a mandatory subject of bargaining. Where, as here, there was *no* bargaining involved, the employees *did not* interfere with the union's bargaining position nor seek to bargain directly with the company in violation of the union's exclusive representation rights. The employers sought only to require the company to fulfill its statutory duty to bargain. Under these circumstances, NLRA section 9(a) does not forbid employees from filing unfair labor practice charges.

The Ninth Circuit upheld the Board's finding that the company's denial of union representation at employee "counseling" sessions constituted a violation of section 8(a)(1). However, it denied enforcement of the Board's order that the company allow union representation in a disciplinary session where an employee is merely *informed* of action to be taken. The right of representation arises when a significant purpose of the interview is to obtain facts from the employee to support disciplinary action which is being seriously considered. Where an employee is not subject to an interrogation but is merely investigated or informed of a disciplinary action, there is no right to union representation.

Finally, the court upheld the Board's reinstatement order since the loss of employment stemmed directly from an unlawful refusal to bargain.

In *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857 (9th Cir. Mar. 1979), the Ninth Circuit held that a trial court has authority to stay adjudication of Fair Labor Standards Act (FLSA) claims pending arbitration of related contract

claims where to do so would be efficient for its docket and where the arbitration is proceeding efficiently.

Based upon an employer's failure to pay time-and-a-half for work over forty hours per week, employees filed suit involving both a violation of the FLSA and a breach of the collective bargaining agreement. The Ninth Circuit held that the district court correctly stayed the action pending arbitration provided for in the collective bargaining agreement. The court held that the contract claim was arbitrable, but the FLSA claim was not, since the contract expressly limited recovery to six months while the statute allowed recovery for two years of prior violations.

The Ninth Circuit remanded to the district court for a determination of whether a stay of the FLSA claim would promote a just and efficient determination of the case, considering both the need to conserve judicial resources and the need for an expeditious resolution of the FLSA claims. In determining that the employer/appellee had no *right* to a stay under the federal Arbitration Act, the court distinguished a prior case, *Beckley v. Teyssier*, 332 F.2d 495 (9th Cir. 1964), which held FLSA claims arbitrable because they grow out of the employer-employee relationship and, therefore, necessarily involve application and interpretation of contract provisions. Unlike *Beckley*, the court felt that the substantial differences in coverage between the contract arbitration provisions in *Leyva* and the FLSA revealed that the parties did not intend to substitute arbitration procedures for the enforcement of statutory rights. Second, the court looked to the Supreme Court's emphasis on the distinction between statutory and contractual rights in *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972).

Thus, despite the general rule that arbitration clauses should be broadly construed, the court of appeal held that contracts which provide for arbitration of contract disputes should not be read to require arbitration of statutory claims absent express provision for such arbitration.

The court concluded that the district court might order a stay of such claims pending arbitration of the contract claims under its power to control its own docket and to provide for the prompt and efficient determination of its cases. The court declined to address the issue of whether it would be bound by the

arbitrator's conclusions. Additionally, the district court should consider conditioning any stay on satisfactory assurances that the arbitration is proceeding with diligence and efficiency.

In *NLRB v. International Assoc. of Bridge, Structural Reinforcing And Ornamental Iron Workers, Local 75,* 583 F.2d 1094 (9th Cir. Oct. 1978), possible discriminatory motive was held irrelevant where action taken by the union was a non-discretionary contractual duty and where prior breach of that duty was necessary to meet temporary, exigent circumstances.

This action arose out of a discrepancy in placement referral procedures allowed under local and international union contracts. An iron worker charged the local union with a violation of sections 8(b)(1)(A) and 8(b)(2) of the N.L.R.A., 29 U.S.C. § 158(b)(1)(A) and 158(b)(2), for its refusal to refer him to a job for which he had been requested by name. Under the international contract, employers could select ironworkers of their choosing, regardless of the worker's place on the local hiring hall's out-of-work list. Under the local contract, however, employers were required to hire workers from the top of the out-of-work lists, except for "Group A" workers who had been within the local jurisdiction for four years or longer. Appellee ironworker was a "Group B" worker who had been requested by name by a subcontractor subject to a local union contract, bound by the top-of-the-list referral policy. The union refused to refer appellee to the job, pursuant to the local contract.

The National Labor Relations Board found this refusal to be a violation of the Act, despite the contractual provisions because of possible animus by the union. It held that even though the union was not contractually required to refer appellee to the job, if the union used the contract as a pretext not to refer him, then it violated the Act.

The Ninth Circuit denied enforcement of the Board's order. Refusal to refer an employee on mere "arbitrary" or "irrelevant" grounds or because of animus toward an employee violates sections 8(b)(1)(A) and (b)(2) *only* where the action of the union is discretionary. A discretionary action becomes an improper exercise of discretion if based on an improper motive. Where a union is bound by a contract, no exercise of discretion is involved. Fur-

Golden Gate University Law Review, Vol. 10, Iss. 1 [1980], Art. 13

thermore, the contract provisions relating to "Group A" and "Group B" workers were not rights belonging to the local union which it could waive. On the contrary, they are non-waivable representative rights of the union's members. A "waiver" of these rights would constitute a violation of the union's duty to its members. Additionally, the union's allowing the employer to retain a crew for one month without use of the out-of-work list involved an emergency situation and such violations could not be the basis for requiring an additional breach.

http://digitalcommons.law.ggu.edu/ggulrev/vol10/iss1/13