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Ninth Circuit Review—Labor Law in the Ninth Circuit: Recent Developments

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LABOR LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS*

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* The cases surveyed herein were decided by the Ninth Circuit between July 1976 and September 1977.

I. PROCEEDINGS UNDER THE NATIONAL LABOR RELATIONS ACT

A. Powers, Functions and Jurisdiction of the Board

Under section 10(a) of the National Labor Relations Act (the Act),¹ "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce"² By passing the Act, "Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause."³ Thus, only when the volume of business affecting commerce is *de minimis* will courts refuse to uphold the Board's assertion of jurisdiction.⁴ However, because of limitations on time and money, the Board has never exercised its statutory jurisdiction to the fullest extent.⁵ Instead, from the time of its inception in 1935, the Board has consistently exercised jurisdiction only over those "enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce."⁶ Prior to 1950, jurisdiction was determined on a case by case basis.⁷ In October, 1950, the Board started to define in its decisions those classes and categories of employers over which it would decline to assert jurisdiction.⁸ Congress implicitly acknowledged the propriety of this Board practice by adding subsection 14(c)(1)⁹ to the Act in 1959.

1. 29 U.S.C. § 160(a) (1970).

2. *Id.* The terms "commerce" and "affecting commerce" are defined in *id.* § 152(6) and (7), respectively.

3. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). *See* U.S. CONST. art. I, § 8, cl. 3. Therefore, it is not necessary that an employer actually be engaged in interstate commerce for the Board to have jurisdiction over the employer's operations. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 7 (1937).

4. *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939).

5. *HPO Serv., Inc.*, 122 N.L.R.B. 394, 394, 43 L.R.R.M. 1127, 1127 (1958). *See Tropicana Prods., Inc.*, 122 N.L.R.B. 121, 123, 43 L.R.R.M. 1077, 1078 (1958); *Jonesboro Grain Drying Coop.*, 110 N.L.R.B. 481, 482, 35 L.R.R.M. 1038, 1039 (1954).

6. *Jonesboro Grain Drying Coop.*, 110 N.L.R.B. 481, 482, 35 L.R.R.M. 1038, 1039 (1954). *See HPO Serv., Inc.*, 122 N.L.R.B. 394, 394, 43 L.R.R.M. 1127, 1127 (1958).

7. *HPO Serv., Inc.*, 122 N.L.R.B. 394, 394, 43 L.R.R.M. 1127, 1127 (1958).

8. *Id.* *See, e.g.*, *Federal Dairy Co.*, 91 N.L.R.B. 638, 26 L.R.R.M. 1938 (1950); *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 26 L.R.R.M. 1543 (1950); *Dorn's House of Miracles, Inc.*, 91 N.L.R.B. 632, 26 L.R.R.M. 1545 (1950); *Stanislaus Implement & Hardware Co.*, 91 N.L.R.B. 618, 26 L.R.R.M. 1548 (1950).

9. 29 U.S.C. § 164(c)(1) (1970). This subsection was added to the Act as part of the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 701(a), 73 Stat. 541 (1959), and reads in pertinent part:

The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to

The Ninth Circuit dealt with jurisdictional issues in two cases during the survey period: *NLRB v. Anthony Co.*¹⁰ and *NLRB v. Timberland Packing Corp.*¹¹ In *Anthony*, the Board asserted jurisdiction over a card parlor which operated pursuant to local ordinances in Gardena, California, and it found the parlor operator guilty of several unfair labor practices.¹² When the Board petitioned the court for enforcement, the operator argued that the Board had abused its discretion in asserting jurisdiction over the gaming establishment. It was conceded that, by virtue of section 10(a) of the Act,¹³ the Board possessed the *power* to assert jurisdiction over the operator. Instead, the argument revolved around the propriety of the Board's assertion of its 14(c)(1)¹⁴ discretionary jurisdiction. The operator pointed out that the Board has consistently refused to assert jurisdiction over racetracks.¹⁵ He then contended that, for jurisdictional purposes, card parlors and racetracks are indistinguishable.

The court rejected this argument. It pointed out that the Board is free to exercise its statutory jurisdiction as it sees fit,¹⁶ unless the assertion of jurisdiction over one industry and not another results in substantial prejudice or unjust discrimination.¹⁷ In light of the significant differences between racetracks and the card parlor in question,¹⁸ the court ruled that the Board's assertion of jurisdiction over Anthony Company's establishment was neither unjust nor prejudicial.

assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

Id.

10. 557 F.2d 692 (9th Cir. 1977).

11. 550 F.2d 500 (9th Cir.), *cert. denied*, 98 S. Ct. 397 (1977).

12. The Board's decision and order are reported at 220 N.L.R.B. 886, 90 L.R.R.M. 1373 (1975).

13. 29 U.S.C. § 160(a) (1970). *See* notes 1-3 *supra* and accompanying text.

14. 29 U.S.C. § 164(c)(1) (1970). *See* note 9 *supra*.

15. *See* 29 C.F.R. § 103.3 (1976). *See, e.g.*, Walter A. Kelley, 139 N.L.R.B. 744, 51 L.R.R.M. 1375 (1962); Meadow Stud, Inc., 130 N.L.R.B. 1202, 47 L.R.R.M. 1467 (1961); Hialeah Race Course, Inc., 125 N.L.R.B. 388, 45 L.R.R.M. 1106 (1959).

16. 557 F.2d at 695. *See* *NLRB v. Timberland Packing Corp.*, 550 F.2d 500, 501 (9th Cir.), *cert. denied*, 98 S. Ct. 397 (1977); *NLRB v. Carroll-Naslund Disposal, Inc.*, 359 F.2d 779, 780 (9th Cir. 1966).

17. *NLRB v. Harrah's Club*, 362 F.2d 425, 427 (9th Cir. 1966), *cert. denied*, 386 U.S. 915 (1967).

18. The following differences were noted or implied by the court: (1) the card parlor in question was operated in conjunction with a restaurant engaged in interstate commerce, whereas racetracks have little impact on interstate commerce; (2) the "work force" employed by the company was stable in comparison with those employed by racetracks; thus, the assertion of jurisdiction over the card parlor would, arguably, contribute to stability in labor relations, whereas an assertion of jurisdiction over racetracks would not; and (3) the local regulations which governed the operation of the card parlor did not

In *NLRB v. Timberland Packing Corp.*,¹⁹ a controversy arose concerning the Board's computation of Timberland's annual purchases and sales. This computation was necessary to determine whether the Board should assert jurisdiction over the company.²⁰ The company argued that the Board's selection of the company's most recent fiscal year as the sample by which the Board would determine the annual volume of Timberland's interstate business was unjust and discriminatory. Business during that year was abnormally prosperous and, consequently, not representative of the company's usual volume of interstate transactions.

The court quickly disposed of this argument by declaring that the use of an objective test (*i.e.*, interstate business volume during the most recent fiscal year), rather than one resting upon a company's subjective prediction of future or normal sales volume, is not arbitrary or discriminatory.²¹ To the contrary, "The representative year standard used by the Board was in conformity with its current practice and was not discriminatorily applied."²²

Under section 10(b) of the Act,²³ the Board has no power to issue a complaint based upon an unfair labor practice that occurred more than six months before a charge was filed with the Board and a copy of the charge was served upon the alleged wrongdoer. *NLRB v. Local 30, International Longshoremen's & Warehousemen's Union*²⁴ involved the question of

"address the matter of labor relations, and thus they [did] not render the Board's involvement unnecessary or redundant." 557 F.2d at 695.

19. 550 F.2d 500 (9th Cir.), *cert. denied*, 98 S. Ct. 397 (1977).

20. Present Board standards declare that jurisdiction will be asserted over non-retail establishments, such as Timberland Packing Corp., when they have annual inflow (purchases) or outflow (sales) of at least \$50,000. *See* Andover Protective Serv., Inc., 225 N.L.R.B. 435, 92 L.R.R.M. 1512 (1976); Siemons Mailing Serv., 122 N.L.R.B. 81, 43 L.R.R.M. 1056 (1958).

21. 550 F.2d at 502.

22. *Id.* *See* McSweeney & Sons, Inc., 119 N.L.R.B. 1399, 1401, 41 L.R.R.M. 1309, 1310 (1958) (proper for Board to use calendar year as opposed to fiscal year); Burton Beverage Co., 116 N.L.R.B. 634, 635, 38 L.R.R.M. 1311, 1311 (1956) ("The Board bases its jurisdictional standards on an employer's business during the most recent calendar or fiscal year . . ."); Aroostock Fed'n of Farmers, Inc., 114 N.L.R.B. 538, 539, 36 L.R.R.M. 1611, 1611 (1955) ("[T]he Board . . . has heretofore uniformly relied on the experience of an employer during the most recent calendar or fiscal year . . .").

23. Section 10(b), 29 U.S.C. § 160(b) (1970), reads in pertinent part:

Whenever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof . . . : *Provided*, 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 and the service of a copy thereof upon the person against whom such charge is made

Id.

24. 549 F.2d 698 (9th Cir. 1977).

when that six-month period begins to run.

The facts of the case were as follows:²⁵ Livingston was an employee of U.S. Borax and Chemical Corporation at the Boron, California plant. He was a member of Local 30 when the latter began an economic strike against Borax on June 14, 1974. On June 27, 1974, the union began picketing all plant entrances, including one designated "Restricted—Contractors Gate." That gate was used only by independent contractors engaged in construction work at the plant and not by Borax's regular employees. Borax filed an unfair labor practice charge with the Board, alleging that the union was in violation of the secondary boycott provisions of the Act.²⁶ The Board obtained an order enjoining²⁷ the union from picketing in front of the contractors' gate. The union began to comply on July 23, 1974, and the unfair labor practice charge was dismissed. Prior to July 23, 1974, however, the requirements of Livingston's interim employment made it necessary for him to utilize the contractors' gate and cross the union's picket line there. In August, 1974, Livingston resigned from the union and returned to work at Borax.

On September 17, 1974, the union voted to impose a fine of \$3,150 upon Livingston for crossing its picket line the previous spring. Notice of the fine was mailed to Livingston the next day. He claimed, however, that the notice was never received and that he did not learn of the imposition of the fine until the following March, when the union's counsel demanded payment. Shortly thereafter, on March 18, 1975, Livingston filed an unfair labor practice charge against the union alleging that the imposition of the fine violated section 8(b)(1)(A) of the Act²⁸ in light of the fact that the picket line had been illegal. The union was notified of the charge by registered mail the next day.

The Board issued an order requiring the union to revoke the fine,²⁹ and the union petitioned the court for review. It argued that under the Supreme Court's holding in *Local 1424, International Association of Machinists v. NLRB*,³⁰ the six-month time period specified in section

25. A complete recitation of the facts may be found in the Board's decision, reported at 223 N.L.R.B. 1257, 92 L.R.R.M. 1282 (1976).

26. 29 U.S.C. § 158(b)(4) (1970). Under this section, it is unlawful for a union to exert pressure upon individual employees or employers with the objective of effecting an unlawful hot cargo agreement, secondary boycott or work assignment. *See, e.g.*, *Local 761, Int'l Union of Electrical Radio & Mach. Workers v. NLRB*, 366 U.S. 667 (1961); *Nashville Bldg. & Constr. Trades Council*, 172 N.L.R.B. 1138, 68 L.R.R.M. 1397 (1968).

27. The Board is empowered to seek and obtain injunctive relief in secondary boycott cases. *See* 29 U.S.C. § 160(1) (1970).

28. *Id.* § 158(b)(1)(A).

29. 223 N.L.R.B. at 1264, 92 L.R.R.M. at 1282.

30. 362 U.S. 411 (1960). In *Local 1424*, the Court held that where an otherwise lawful

10(b) of the Act commenced on September 17, when the union voted to impose the fine. Thus, it was argued, service of the charge upon the union on March 19, 1975 was not timely.³¹

The court, adopting the reasoning of the Second Circuit in *Local 1104, Communications Workers of America v. NLRB*,³² held that when the imposition of a union penalty constitutes an unfair labor practice, the section 10(b) statute of limitations begins to run not when the penalty is imposed, but when "the laborer was [first] in a position to file the unfair labor practice charge,"³³ *i.e.*, when the laborer receives actual or constructive notice of the penalty.³⁴ The court pointed out that, were it to hold otherwise, a union could simply impose a penalty, wait six months before notifying the penalized member, and be assured that its action would be immune from Board scrutiny.³⁵

act (*e.g.*, a union disciplinary fine) is imbued with illegality only when considered in conjunction with a prior unfair labor practice (*e.g.*, a picket line constituting a secondary boycott), then the six-month period within which a complaint based upon the otherwise legal act may be issued commences with the occurrence of the unfair labor practice. *Id.* at 419. Thus, in *Local 1424*, the date upon which the illegal collective bargaining agreement was executed triggered the six-month period within which complaints based upon the subsequent enforcement of that agreement could be issued.

It is not clear just how the union in *Local 30* relies on *Local 1424*, since the latter would not seem to apply to situations where the otherwise legal act *itself* occurred more than six months prior to the service of a complaint based thereon. Indeed, section 10(b) clearly bars complaints in such situations. The court's terse discussion of *Local 1424* sheds no light on the union's strategy.

31. In computing the beginning and ending dates of the six-month period, the day upon which the act or event commencing the period occurs is not included. The last day of the period is included, unless it falls on a Sunday or a legal holiday. 29 C.F.R. § 102.114 (1976). See *Environmental Control Sys.*, 190 N.L.R.B. 594, 594 n.2 (1971). The union apparently argued that the last day on which it could have been served with notice of the charge was March 18, 1975.

32. 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

33. 549 F.2d at 700-01.

34. In *Local 1104*, the receipt by the complainant of notice of the union's action against him (its refusal to admit him as a member) played no part in the decision. But the general approach taken by the court, that the six-month period does not commence until the complainant is *in a position to complain* of the unfair labor practice, supports the ruling in *Local 30*. See *NLRB v. Plumbers & Pipe Fitters Local 214*, 298 F.2d 427 (7th Cir. 1962) (although union committed unfair labor practice when it requested employer to discharge non-union member, six-month statute did not commence until member was in position to complain, *i.e.*, when he learned of the union's action at his discharge). *Cf.* *Local 1424*, *Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960) (complainant was in position to file charge from the moment the unfair labor practice occurred and continuously thereafter).

35. In another case, it was held that an employer's statement that he would comply with a collective bargaining agreement on union jobs but not on non-union jobs constituted only a partial repudiation of the contract and was insufficient to start the section 10(b)

In *Mt. Vernon Tanker Co. v. NLRB*,³⁶ a key issue presented was the extent to which the Board is empowered to prevent and remedy unfair labor practices occurring during the course of a ship's voyage. The controversy arose when the ship's captain required Lial, a member of the crew, to take part in a "logging"³⁷ without the presence of a union representative. The administrative law judge ruled that the captain had violated section 8(a)(1) of the Act,³⁸ and the Board, relying on the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*,³⁹ agreed.⁴⁰

The court of appeals distinguished *Weingarten*⁴¹ and denied enforcement of the Board order. Additionally, it declared that even if the logging was characterized as an investigatory interview as that term is used in *Weingarten*,⁴² the captain still would not have been guilty of a section 8 violation since the section 7 right to union representation at such an interview "cannot be said to exist in the maritime context that we have here."⁴³ The court observed that the usual employer-employee relationship does not exist during the course of a ship's voyage.⁴⁴ Consequently, the Board's power to regulate labor relationships existing during such a voyage is limited:

statute of limitations. *NLRB v. R.O. Pyle Roofing Co.*, 560 F.2d 1370, 1372 (9th Cir. 1977).

36. 549 F.2d 571 (9th Cir. 1977).

37. "Logging" is a statutorily mandated proceeding in which a seaman is given notice of entries in the ship's log relating to the misconduct with which he is charged. *See* 46 U.S.C. § 702 (1970).

38. 29 U.S.C. § 158(a)(1) (1970).

39. 420 U.S. 251 (1975). In *Weingarten*, the Court upheld a Board interpretation of § 7 of the Act, 29 U.S.C. § 157 (1970). Specifically, the Board had construed the clause granting employees the right to engage in "concerted activities for . . . mutual aid or protection." The Court interpreted § 7 to provide for the "right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline . . ." 420 U.S. at 256.

40. The Board's decision and order are reported at 218 N.L.R.B. 1423, 89 L.R.R.M. 1793 (1975).

41. The court noted that the *Weingarten* right applied only in those situations where the employee reasonably believed that the investigatory interview to which he was subjected would result in disciplinary action. 549 F.2d at 574. *See* *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 257. Thus *Weingarten* was not applicable to the case at hand since "[a] logging is not an interview instigated for the purpose of ascertaining whether an offense has been committed. It occurs after that question has been settled to the captain's satisfaction." 549 F.2d at 575. *See also* 46 U.S.C. § 702 (1970). Logging was characterized as a notification proceeding; *Weingarten* is applicable only to investigatory and disciplinary proceedings. 549 F.2d at 575.

42. *See* note 41 *supra*.

43. 549 F.2d at 575.

44. *Id.*

A charge of seaman disobedience during the course of a voyage is not an assertion of "economic power" on the part of an employer; it does not involve the ongoing struggle between labor and management in which the Board appropriately can intervene in an effort to redress perceived imbalances. . . . The unquestioned imbalance in favor of the master of the ship . . . exists in the public interest and pursuant to statute, and *it does not lie with the Board to seek to achieve equality of power under these circumstances.*⁴⁵

The court effectively buttressed its position by quoting from the Supreme Court's decision in *Southern Steamship Co. v. NLRB*,⁴⁶ a case which involved a sit-down strike on board a United States vessel docked in a United States port. The Supreme Court, in holding that the strike was not protected under the Act, stated that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."⁴⁷ Thus, as between the right to representation delineated in *Weingarten* and the necessity of maintaining safety and order aboard United States vessels, "the policies reflected by the provisions of title 46 with reference to the relationship between master and seaman during the course of a sea voyage must be held to control."⁴⁸ The Board has no power to rule otherwise.

B. Board Procedure

The NLRB is free to fashion its own procedures so as to achieve the goals of the National Labor Relations Act, *i.e.*, so as to afford protection from unfair labor practices.⁴⁹ Thus, the Board has the responsibility, in the first instance, of determining whether full discovery is appropriate in unfair labor practice hearings.⁵⁰ The Board's discovery rules formed the basis of the controversy in *Harvey's Wagon Wheel, Inc. v. NLRB*.⁵¹ In that case, the Ninth Circuit joined the First,⁵² Second,⁵³ Third,⁵⁴ and

45. *Id.* (emphasis added).

46. 316 U.S. 31 (1942) (5-4 decision).

47. *Id.* at 47.

48. 549 F.2d at 576.

49. *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944).

50. *North Am. Rockwell Corp. v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir.), *cert. denied*, 368 U.S. 823 (1961).

51. 550 F.2d 1139 (9th Cir. 1976).

52. *See, e.g.*, *Goodfriend W. Corp. v. Fuchs*, 535 F.2d 145 (1st Cir.), *cert. denied*, 429 U.S. 895 (1976).

53. *See, e.g.*, *Title Guar. Co. v. NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976).

54. *See, e.g.*, *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80 (3d Cir. 1976).

Tenth⁵⁵ Circuits in ruling that employees' statements obtained by the Board are exempt from disclosure during enforcement proceedings⁵⁶ under section (7)(A) of the Freedom of Information Act (FOIA).⁵⁷

The plaintiffs-employers were several Nevada hotels, restaurants, and casinos which were being investigated by the Board following the filing of unfair labor practice charges by the employees' union. The Board, following its usual procedure, interviewed and took affidavits from various union members, many of whom were employees of the plaintiffs. The plaintiffs then sought disclosure of these affidavits under the FOIA.⁵⁸

The court noted that the Board maintains a practice of investigating unfair labor practice charges by securing affidavits from witnesses, including employees. It recognized that most witnesses, particularly employee-witnesses, are reluctant to provide information absent guarantees of strict confidentiality. Therefore, the court found a basis for concluding that "disclosure of employee statements, at least, would 'interfere with enforcement proceedings' and that such statements therefore are exempt from the FOIA under exemption (7)(A)."⁵⁹ The court declared:

[T]here can be no doubt that revelation of the employees' statements . . . would harm the Board's case by causing a retarding effect on open and frank Board investigations of alleged unfair labor practices. This would undermine labor policy as well as unduly broaden the scope of the FOIA. To prevent, this result, employees' statements must be protected in their entirety under exemption (7)(A).⁶⁰

55. *See, e.g.*, *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63 (10th Cir. 1976).

56. *Compare Harvey's Wagon Wheel with Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976) (statements of employees and witnesses exempt from disclosure but can be obtained for cross examination of witness after he has testified). *See also Deering Milliken, Inc. v. Irving*, 548 F.2d 1131, 1135 & n.6 (4th Cir. 1977) (*Harvey's Wagon Wheel* distinguished on grounds that it involved enforcement proceedings as opposed to back pay proceedings).

57. 5 U.S.C. § 552(b)(7)(A) (Supp. V 1975). This subdivision provides in pertinent part: "This section [requiring disclosure of agency documents] does not apply to matters that are—(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings" *Id.*

58. Under Board rules, all disclosure is forbidden except certain public documents and case records, formal depositions of witnesses, statements of witnesses after they have testified, and disclosure mandated by the provisions of the Freedom of Information Act. 29 C.F.R. §§ 102.30, 102.117, 102.118 (1976). It is the responsibility of the Board to formulate its own discovery rules. *Harvey's Wagon Wheel*, 550 F.2d at 1141 n.3; *Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631, 635 (9th Cir. 1969). Thus, under the circumstances, reliance on the FOIA was the employers' only hope of obtaining pre-hearing disclosure of affidavits.

59. 550 F.2d at 1142.

60. *Id.*

Pursuing the same line of reasoning, the court suggested that, in addition to the protection against disclosure of employees' statements, "[s]tatements of union representatives and agents of the employee . . . should normally be protected from disclosure as a matter of law."⁶¹ However, the court refused to rule that statements by all non-employees should, as a matter of law, also be exempt from disclosure.⁶² Instead, the case was remanded for a determination of whether, under the circumstances, such statements also fell within one of the subsection 552(b)(7) exemptions.

In *NLRB v. International Association of Bridge Workers Local 433*,⁶³ the court held that the findings of a proceeding under section 10(k) of the Act⁶⁴ may be used as evidence, subject to refutation, in a subsequent hearing to determine whether a section 8(b)(4)(D)⁶⁵ violation has occurred. "When these findings are not contradicted . . . they may be the sole basis for a subsequent finding."⁶⁶

The union had argued that the use of findings from the 10(k) proceeding as an evidentiary basis for a subsequent determination that section 8(b)(4)(D) was violated was improper for two reasons: (1) it was in violation of section 554 of the Administrative Procedure Act⁶⁷ because no hearing was held before an administrative law judge prior to the Board's finding; and (2) the different standard of proof applicable to the 10(k) hearing precluded the use of its findings in the subsequent unfair labor

61. *Id.* at 1143.

62. *See* note 56 *supra* and accompanying text.

63. 549 F.2d 634 (9th Cir.), *cert. denied*, 98 S. Ct. 116 (1977).

64. 29 U.S.C. § 160(k) (1970). Essentially, this section empowers and directs the Board to conduct a hearing within 10 days of the time a charge under § 158(b)(4)(D) (*see* note 65 *infra*) is filed. The purpose of this hearing is to quickly resolve the jurisdictional dispute giving rise to the § 8(b)(4)(D) charge. *NLRB v. Radio & Television Broadcast Eng'rs Local 1212*, 364 U.S. 573 (1961). If the parties in disagreement voluntarily resolve the dispute prior to the Board's issuance of a 10(k) decision, the § 8(b)(4)(D) charge must be dismissed. *International Typographical Union*, 125 N.L.R.B. 759, 759-60, 45 L.R.R.M. 1184, 1184 (1959). If there has been no resolution, the Board is *required* to solve the dispute (affirmatively award the work to one of the competing unions). *Id.*

65. 29 U.S.C. § 158(b)(4)(D) (1970). This section makes it an unfair labor practice for a union to use threats, coercion or restraint to compel an employer to assign particular work to employees represented by that union rather than to employees represented by another union (subject to an exception not relevant to the present discussion).

66. 549 F.2d at 638. *Cf.* *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 122 n.10 (1971) (findings and conclusions in a 10(k) proceeding are not res judicata on the unfair labor practice issue in the later § 8(b)(4)(D) determination). *See also* *International Typographical Union*, 125 N.L.R.B. 759, 761, 45 L.R.R.M. 1184, 1185 (1959) (same).

67. 5 U.S.C. § 554 (1970). This section requires an "opportunity for an agency hearing" in all cases involving an adjudication by the agency.

practice proceeding.⁶⁸ In deciding against the union's first objection, the court followed the Fifth Circuit⁶⁹ and the District of Columbia Circuit⁷⁰ by holding that when no new evidence on an issue is presented at the section 8(b)(4)(D) hearing, reliance on the findings of the 10(k) proceeding is proper.⁷¹ This holding is in conformity with the modern trend, which frowns upon "relitigating matters already resolved in a prior setting."⁷² Quoting from an earlier Ninth Circuit case, the court observed:

It is settled law that when no fact question is involved or the facts are agreed, a plenary adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory—even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks⁷³

In meeting the union's second objection (*i.e.*, that the standard of proof which had been utilized in the 10(k) hearing precluded a subsequent adoption of the findings and determinations made therein), the court examined the language of the Board's decision and order.⁷⁴ This examination revealed that "the Board did not simply rely on its previous adjudication at the § 10(k) stage, but rather re-examined the record and

68. At a 10(k) proceeding, the Board need only find that there is *reasonable cause* to believe that a section 8(b)(4)(D) violation has occurred. The level of proof required at a subsequent section 8(b)(4)(D) violation hearing is a *preponderance of the evidence*. *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 122 n.10 (1971).

69. *See NLRB v. International Longshoremen's Ass'n Local 1576*, 409 F.2d 709 (5th Cir. 1969).

70. *See Bricklayers Int'l Union v. NLRB*, 475 F.2d 1316 (D.C. Cir. 1973).

71. The court stated that the "findings of a 10(k) proceeding *may* be used as evidence in a subsequent hearing . . ." 549 F.2d at 638 (emphasis added). This language suggests that the court is leaving unanswered the question of whether the 10(k) findings *must* be relied upon in the subsequent unfair labor practice proceeding. *Cf. NLRB v. Plasterers' Local 79*, 404 U.S. 116, 122 n.10 (1971) ("The findings and conclusions in a 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination."); *International Typographical Union*, 125 N.L.R.B. 759, 761, 45 L.R.R.M. 1184, 1185 (1959) (same). *But cf. NLRB v. International Longshoremen's Ass'n Local 1576*, 409 F.2d 709, 710 (5th Cir. 1969) (decision of trial examiner that determinations of prior 10(k) hearing would control § 8 proceeding was proper); *Local 3, IBEW*, 206 N.L.R.B. 423, 424, 84 L.R.R.M. 1371, 1372 (1973) (issues raised and litigated in 10(k) hearing "may not be relitigated [in an 8(b)(4)(D) proceeding] absent newly discovered or previously unavailable evidence or special circumstances").

72. 549 F.2d at 638. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161-62 (1941); *NLRB v. Air Control Prods.*, 335 F.2d 245, 251 (5th Cir. 1964).

73. 549 F.2d at 638 (quoting *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971)).

74. The Board's decision and order are reported at 218 N.L.R.B. 848, 89 L.R.R.M. 1894 (1975).

made independent findings with regard to the commission of unfair labor practices by Respondent [the union]."⁷⁵ Thus, the court concluded that the Board had not simply accepted the findings of the 10(k) proceeding without question, but had in fact reexamined those findings in light of the stricter burden of proof applicable to unfair labor practice proceedings.⁷⁶

C. Nature and Purpose of Board Orders

The Board's power to remedy unfair labor practices and formulate orders which "effectuate the policies" of the National Labor Relations Act is a broad one, subject to only limited review by the courts.⁷⁷ Nevertheless, the courts have articulated certain basic standards to which Board orders must conform. For example, the order must set forth the relationship between the pending case and the remedy ordered.⁷⁸ This requirement would seem to entail an explanation of the reasons behind the Board's orders; and the Ninth Circuit so held in *NLRB v. Pacific Southwest Airlines*.⁷⁹ In that case, the Board petitioned the court⁸⁰ for enforcement of a bargaining order⁸¹ issued against Pacific Southwest

75. 549 F.2d at 638.

76. The Board's language strongly suggests that the 10(k) findings were not simply accepted without question: "This undisputed evidence, which . . . is neither supplemented nor controverted in this proceeding, *likewise establishes*, and we find, that Respondent had engaged in the conduct with an object proscribed by Section 8(b)(4)(ii)(D) of the Act, in violation thereof." 218 N.L.R.B. at 849 (emphasis added). It was this language of the Board that led the court to conclude that the "preponderance of the evidence" test had been applied and satisfied in the unfair labor practice proceeding. 549 F.2d at 638. Nowhere in the Board's decision, however, is it *explicitly* announced that such a test had been applied. *Cf.* Local 3, IBEW, 206 N.L.R.B. 423, 425 n.8, 84 L.R.R.M. 1371, 1372 n.8 (1973) (in an 8(b)(4)(D) proceeding following a 10(k) hearing, the Board announced, "Implicit herein, as in all unfair labor practice proceedings, is that our findings are based upon a preponderance of the evidence."). One might conclude, however, that if the basis of the Board's findings was truly "implicit," an explicit announcement of that fact would have been unnecessary.

77. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215-16 (1969).

78. *Textile Workers Union v. NLRB*, 475 F.2d 973, 976 (D.C. Cir. 1973).

79. 550 F.2d 1148 (9th Cir. 1977).

80. The procedure by which the Board may petition a court of appeals for enforcement of a Board order is set forth in § 10(e) of the Act, 29 U.S.C. § 160(e) (1970). Essentially, the Board is empowered "to petition any court of appeals of the United States . . . for the enforcement of such order and for appropriate temporary relief or restraining order . . ." *Id.*

81. Under § 10(c) of the Act, 29 U.S.C. § 160(c) (1970), the Board is granted broad discretion in formulating remedies that will effectuate the policies of the Act with respect to labor relations. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). However, since the election process is generally preferable to a bargaining order based on authorization cards, the Board's discretion in issuing bargaining orders has been carefully circumscribed by the Supreme Court. *Id.* See note 85 *infra*.

Airlines (PSA).⁸² The order resulted from the Board's determination that PSA had engaged in activities violative of subsections 8(a)(1) and (3) of the Act.⁸³ These illegal activities began in June, 1971, when six of the eight persons employed at PSA's printing and publications shop signed authorization cards⁸⁴ designating the Lithographers and Photoengravers International Union as their bargaining representative.

After concluding that the Board's bargaining order was appropriate under the standards propounded by the United States Supreme Court in *NLRB v. Gissel Packing Co.*,⁸⁵ the court addressed itself to the problem of the format in which such orders are issued. The court posed the

82. The bargaining order is reported at 201 N.L.R.B. 647, 82 L.R.R.M. 1298 (1973).

83. 29 U.S.C. § 158(a)(1), (3) (1970). This section specifies the practices which, when engaged in by an employer (*id.* § 158 (a)) or by a labor organization (*id.* § 158(b)), constitute unfair labor practices. Under subsection (a)(1), it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in their exercise of rights guaranteed by § 7 of the Act, *id.* § 157. Under subsection (a)(3), so far as is here relevant, it is unfair labor practice for an employer "to encourage or discourage membership in any labor organization" through discriminatory treatment of employees with respect to hiring, tenure of employment or any other "term or condition of employment." Generally, any commission by an employer of a § 8(a)(3) unfair labor practice will constitute an unfair labor practice under the more broadly defined § 8(a)(1) as well.

84. For a thorough discussion of the validity of authorization cards as a means through which a labor organization may obtain recognition as an exclusive bargaining representative, see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595-600 (1969). See *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268, 54 L.R.R.M. 1233 (1963). See generally Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851 (1967); Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434 (1965).

85. 395 U.S. 575 (1969). In *Gissel*, the Court delineated the types of situations in which non-election bargaining orders might be appropriate. The Court recognized that the impact of an employer's unlawful conduct is frequently so severe that it cannot be dissipated, and that a representation election under such circumstances would be invalid. At the same time, bargaining orders based on authorization cards are ordinarily inferior to the election process since signatures on such cards may be procured through misrepresentation or coercion. With these competing concerns in mind, the Court recognized that an employer's wrongful conduct would fall into one of three categories. First, the conduct might be "exceptional," *i.e.*, it might constitute a blatant or outrageously unfair labor practice. In such cases, bargaining orders would certainly be warranted. Second, the employer's wrongful conduct might be "minor or less extensive" and have only a negligible impact on the election process. Bargaining orders would be inappropriate in such situations. Third, the conduct might be "less extraordinary" but nevertheless inhibitive of the election process. These cases, too, would warrant bargaining orders. The Court concluded:

If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue

...
Id. at 614-15.

question, "Must the Board make specific findings and articulate its reasons when issuing a bargaining order . . .?"⁸⁶ After acknowledging that other circuits have also had a problem in determining the extent to which the Board should be required, under the guidelines of *Gissel*, to articulate the reasoning behind its decision to issue a bargaining order,⁸⁷ the court adopted the rationale of the Seventh Circuit. The court quoted from *Peerless of America, Inc. v. NLRB*,⁸⁸ a case in which the Board was castigated for failing to give a satisfactory explanation of its decision to issue a bargaining order.⁸⁹ Since an election is generally preferable to the issuance of a bargaining order,⁹⁰ the Board must clearly articulate its reasons for concluding that, under the circumstances, an election would be inappropriate or invalid. In other words, the court must articulate the reasons behind its decision that the case falls within one of the *Gissel* categories which approves the issuance of a bargaining order in lieu of holding an election.⁹¹ The court concluded that "[e]ffective appellate review, as well as judicial and administrative accountability, requires that the Board clearly articulate the reasons behind any order, and particularly why other remedies were found to be inappropriate."⁹²

In *NLRB v. International Longshoremen's & Warehousemen's Local 13*,⁹³ the court enforced a Board supplementary order⁹⁴ against a union that had been operating a discriminatory hiring hall sponsorship program in violation of subdivisions 8(b)(1)(A), (b)(2) and (b)(3) of the Act.⁹⁵ Part of the Board's original order required the union to "[m]ake whole any and all applicants for employment for any loss of earnings they may have suffered by reason of [the union's] discriminatory exercise of its dispatch authority"⁹⁶ When the union objected to this portion of

86. 550 F.2d at 1151.

87. *Id.* at 1151-52.

88. 484 F.2d 1108 (7th Cir. 1973).

89. The court quoted the following language from *Peerless*:

We have consistently held that *Gissel* contemplates that the Board must make "specific findings" as to the immediate and residual impact of the unfair labor practices on the election process and that the Board must make "a detailed analysis" assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies.

550 F.2d at 1151 (quoting *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973)).

90. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

91. *Id.* at 616. See note 85 *supra*.

92. 550 F.2d at 1152.

93. 549 F.2d 1346 (9th Cir.), *cert. denied*, 98 S. Ct. 397 (1977).

94. The Board's supplementary order is reported at 210 N.L.R.B. 952, 86 L.R.R.M. 1716 (1974).

95. 29 U.S.C. § 158(b)(1)(A) and (b)(2)-(3) (1970).

96. 192 N.L.R.B. 260, 265 (1971).

the Board's order, the court reviewed the propriety of the remedy and availed itself of the opportunity to comment on the purpose of Board orders.

The court pointed out that section 10(c) of the Act⁹⁷ authorizes the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act,"⁹⁸ and that the Board has broad discretion in fashioning remedies under that section.⁹⁹ It was noted that while it is true that the Board's power to remedy violations of the Act does not include the power to adopt punitive measures,¹⁰⁰ "make whole" orders, that is, orders requiring employers to compensate employees damaged by the unfair labor practices, are not punitive in nature and are, thus, proper.¹⁰¹ In answering the union's argument that it could be destroyed by the Board's order requiring it to reimburse several million dollars, the court observed that the assertion was merely speculative. However,

even if the award did reach the total contemplated by the Union, that does not change its nature from remedial to punitive. The Board is simply requiring the Union to reimburse those who lost income as a result of the Union's illegal discrimination. . . . [T]he order merely removes the effects of the unfair labor practice by giving those who were its victims what they would have received absent the Union illegal practices.¹⁰²

Section 10(c) of the Act¹⁰³ expressly empowers the Board to prevent and remedy unfair practices by ordering "reinstatement of employees with . . . back pay, as will effectuate the policies of this subchapter"¹⁰⁴ In two cases decided in May, 1977, the Ninth Circuit examined the propriety of orders made pursuant to this section.

In *NLRB v. Dodson's Market, Inc.*,¹⁰⁵ the Board petitioned for enforcement¹⁰⁶ of back pay awards¹⁰⁷ made to three employees of Dodson's

97. 29 U.S.C. § 160(c) (1970).

98. 549 F.2d at 1355.

99. *Id.* See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

100. 549 F.2d at 1355 (quoting *NLRB v. Strong*, 393 U.S. 357, 359 (1969)). See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

101. 549 F.2d at 1355. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). In empowering the Board to take any affirmative action that will effectuate congressional policy with respect to national labor relations, Congress did not intend to differentiate between discrimination in denying employment and in unlawfully terminating employment. *Id.* at 188-89.

102. 549 F.2d at 1355.

103. 29 U.S.C. § 160(c) (1970).

104. *Id.*

105. 553 F.2d 617 (9th Cir. 1977).

106. The Board's decision is reported at 218 N.L.R.B. 1263, 89 L.R.R.M. 1543 (1975).

107. See note 110 *infra* and accompanying text.

Market, Inc. ("Dodson's").¹⁰⁸ The first employee, Wortley, suffered a reduction in hours when two senior employees were transferred into her department in retaliation for their union activities. As a result, a surplus of employees was created in that department, and Dodson's used this excuse to reduce Wortley's hours. After voluntarily giving back pay to the two transferred employees, Dodson's argued that if the two employees had actually worked the hours for which they had been compensated, Wortley, as a junior employee, would not have worked the hours for which the Board ordered reimbursement. The court, citing no authority, summarily dismissed this argument, observing that it

ignores the fact that the reduction in hours for Wortley was a direct result of Dodson's unfair labor practice. . . . If the senior employees had not been transferred to Wortley's department, her hours would not have been reduced. It is thus irrelevant that Dodson's has already paid back pay to the two senior employees.¹⁰⁹

Dodson's also argued that a forty-hour work week was not the appropriate measure of back pay for Wortley since her hours would have been reduced in any event, due to the seasonal nature of the company's business. The court adhered to the well-established rule that "[t]he Board has wide discretion in selecting an appropriate back pay formula, and once it has done so, the burden is on the employer to produce evidence to mitigate liability."¹¹⁰ In view of the fact that Wortley had worked a forty-hour week for several months prior to Dodson's unlawful reduction of her hours, the Board's computation of back pay was held to be reasonable and its order with respect to Wortley was enforced.

The court also approved the Board's order with respect to Gerber, the second employee who received a back pay award. After deferring to the Board's determinations regarding the credibility of the witnesses who testified at the proceedings,¹¹¹ the court ruled that the Board's order was "supported by substantial evidence on the record as a whole."¹¹²

108. In a prior proceeding, the Board had determined that Dodson's had violated the Act by reducing the hours of some of its employees in retaliation for their signing union representation cards. 194 N.L.R.B. 192, 78 L.R.R.M. 1628 (1971). The order stemming from that proceeding was enforced by the court. 83 L.R.R.M. 2987, 71 Lab. Cas. ¶13, 842 (9th Cir. 1973).

109. 553 F.2d at 618-19.

110. *Id.* at 619. See *NLRB v. International Longshoremen's Local 13*, 549 F.2d 1346 (9th Cir.), *cert. denied*, 98 S. Ct. 397 (1977); *Golden Gate Bottling Co. v. NLRB*, 467 F.2d 164 (9th Cir.), *aff'd*, 414 U.S. 168 (1972); *NLRB v. Carpenters Local 180*, 433 F.2d 934 (9th Cir. 1970).

111. The court stated: "We will not disturb findings on credibility unless 'a clear preponderance of the evidence convinces [us] that they are incorrect.'" 553 F.2d at 619 (quoting *NLRB v. International Longshoremen's Local 27*, 514 F.2d 481, 483 (9th Cir. 1975)).

112. 553 F.2d at 619. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

As for Assink, the third recipient of a back pay award, the court reached a different conclusion. Assink was hired by Dodson's for part-time employment in May, 1971, nine months after Dodson's illegal activities occurred. It had been the Board's opinion that "but for" Dodson's unfair labor practice, Assink's employment would have been full-time. However, the court ruled that "[t]his carries the 'but for' notion too far."¹¹³ The "but for" connection was declared to be necessary, but insufficient by itself, to establish liability for an unfair labor practice.¹¹⁴ The court, once again, declared that "[t]he purpose of a back pay order is 'to vindicate the public policy of the [National Labor Relations Act] by making the employees whole for losses suffered on account of an unfair labor practice.'"¹¹⁵ Since Assink suffered no loss by virtue of Dodson's unfair labor practice, there was no reason for the Board to have issued a "make whole" order. The order, then, did not effectuate the policies of the Act¹¹⁶ and, for that reason, was denied enforcement.

*United Association of Journeymen & Apprentices Local 525 v. NLRB*¹¹⁷ also involved the issuance of a back pay order. In this case, however, the order was levied against a union. The union petitioned for review of the Board's finding¹¹⁸ that it had violated section 8(b)(1)(A) of the Act¹¹⁹ by restraining and coercing the complaining member (Petrin) "in the exercise of his statutory right to refrain from union activity."¹²⁰ Specifically, the union had threatened Petrin with loss of employment and had coerced him into taking a leave of absence because of purported irregularities in his union status and membership book.¹²¹ Additionally, the union had informed Petrin that it was prepared to walk off the job if he didn't resolve the problem with his membership book, and Petrin communicated these threats to his employer. The union itself did not explicitly threaten the employer with a strike; however, through exten-

113. 553 F.2d at 619.

114. *Id.*

115. *Id.* at 620 (quoting *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952)).

116. *See* *Marriott Corp. v. NLRB*, 491 F.2d 367 (9th Cir.), *cert. denied*, 419 U.S. 881 (1974) (back pay should be used *only* to effectuate policies of subchapter II of the Act).

117. 553 F.2d 1202 (9th Cir. 1977).

118. The Board's findings and order are reported at 218 N.L.R.B. 451, 89 L.R.R.M. 1736 (1975).

119. 29 U.S.C. § 158(b)(1)(A) (1970).

120. 553 F.2d at 1204. Under 29 U.S.C. § 157 (1970), employees are granted the right to *refrain* from participating in union and related activities, except to the extent that they are required to become members of a union as a condition of employment. Such a requirement is authorized under *id.* § 158(a)(3).

121. Although Petrin was qualified as a building and construction trade journeyman, his membership book incorrectly designated him as a metal trades journeyman.

sive contact with the employer, the union made it clear that the matter was a serious one.

Conceding that the factual determinations of the administrative law judge,¹²² if upheld by the Board, would constitute a violation of the Act, the union nevertheless contended that the Board had no authority to award back pay to Petrin. In responding to this contention, the court first observed that in determining whether to issue a back pay order against a union, the Board has emphasized that under section 10(c) of the Act¹²³ its authority is limited to those cases in which the union has been responsible for unlawful discrimination against the employee.¹²⁴ Thus, the Board has distinguished between cases in which the employee is denied access to a place of employment, *e.g.*, by striking employees, and cases in which the union has interfered with the employer-employee relationship. It has stated that awards of back pay will not be made in the former case, even though the strike was ultimately declared unlawful.¹²⁵ The purpose of this policy is to prevent an indirect inhibition of the union's right to strike.¹²⁶ The policy has been implemented through the *Colonial Hardwood* interpretation¹²⁷ of section 10(c) of the Act.

After reviewing the Board's finding of fact, the court declared that the Board's conclusion that there was discrimination was amply supported, that the case was one in which the union had interfered with the employer-employee relationship,¹²⁸ and that the back pay award was, therefore, appropriate. The court concluded by observing that

122. See note 137 *infra*.

123. 29 U.S.C. § 160(c) (1970).

124. *United Furniture Workers*, 84 N.L.R.B. 563, 565, 24 L.R.R.M. 1302, 1306 (1949) [hereinafter *Colonial Hardwood*]; *National Maritime Union*, 78 N.L.R.B. 971, 988-91, 22 L.R.R.M. 1289, 1301-04 (1948). The language of the Act giving rise to this interpretation of the scope of Board authority reads: "[W]here an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . ." 29 U.S.C. § 160(c) (1970). See *Colonial Hardwood*, 84 N.L.R.B. at 565 n.6.

125. *Colonial Hardwood*, 84 N.L.R.B. 563, 565-66, 24 L.R.R.M. 1302, 1306 (1949). The Board reasoned that the language of 29 U.S.C. § 160(c) permitted the Board to compensate an employee for "losses in pay suffered by him because of severance of or interference with the tenure or terms of the employment relationship between him and his employer . . ." 84 N.L.R.B. at 565-66, 24 L.R.R.M. at 1306. But it did not permit an award of damages for interference with the employee's right of ingress to the plant. *Id.*

126. *Union de Tronquistas Local 901*, 202 N.L.R.B. 399, 399-400, 82 L.R.R.M. 1525, 1528 (1973).

127. 84 N.L.R.B. 563, 565, 24 L.R.R.M. 1302, 1306 (1949). See notes 124-25 *supra*. The validity of the *Colonial Hardwood* interpretation has been questioned by at least one court. See *National Cash Register Co. v. NLRB*, 466 F.2d 945, 965 (6th Cir. 1972).

128. The fact that the union did not explicitly threaten the employer with a strike or request that he not permit Petrin to work was not determinative: "We see no reason,

the policy rationale behind *Colonial Hardwood* does not compel a finding that back pay is an improper remedy. In this case, the union activity was directed at a single employee, and there is no danger that the award in this case would inhibit Local 525 in exercising its right to strike or to engage in other protected activities.¹²⁹

D. Deference to Arbitration

Collateral unfair labor practice issues frequently arise during the process of resolving contract disputes through arbitration.¹³⁰ When the arbitration process has led to an effective and satisfactory resolution of such issues, the Board may decline to hear the case and simply "defer" to the arbitral award.¹³¹ Illustrative of the procedures, problems and policy considerations involved in this practice of deference are two recent Ninth Circuit cases, *Hawaiian Hauling Service, Ltd. v. NLRB*¹³² and *Stephenson v. NLRB*.¹³³

In *Hawaiian Hauling Service*,¹³⁴ the court was called upon to review the Board's refusal to defer to an arbitral award.¹³⁵ The controversy centered around actions which took place at a grievance meeting between the company and a Mr. Richardson, one of the company's employees. The meeting was called in an effort to resolve problems regarding Richardson's absenteeism and his alleged refusal to follow the orders of the company's general manager. During the course of the meeting, as tempers began to flare, Richardson called the general manager a "liar." The executive responded by firing Richardson on the spot.

During subsequent arbitration to determine the legality of Richardson's discharge, the union contended that under section 7 of the Act,¹³⁶

however, to absolve the union of responsibility where an employer acts unilaterally to discriminate in response to union pressure, even though it received no specific union request." 553 F.2d at 1206. See *National Cash Register Co. v. NLRB*, 466 F.2d 945, 966 (6th Cir. 1972).

129. 553 F.2d at 1206.

130. See generally Note, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191 (1968).

131. See generally R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 734-43 (1976).

132. 545 F.2d 674 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977).

133. 550 F.2d 535 (9th Cir. 1977).

134. 545 F.2d 674 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977).

135. The Board's decision is reported at 219 N.L.R.B. 765, 90 L.R.R.M. 1011 (1975).

136. 29 U.S.C. § 157 (1970). This section enumerates the organizational and collective bargaining rights guaranteed to employees:

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

an employee's conduct at a grievance meeting is "protected activity," *i.e.*, conduct which an employer is powerless to control, restrict, or otherwise discipline. In an unexplained award, the arbitrator ruled that the discharge had been proper. Unfair labor practice proceedings were then instituted, wherein the administrative law judge¹³⁷ deferred to the arbitral award. The Board itself, however, overturned that ruling.¹³⁸ The company then petitioned the Ninth Circuit Court of Appeals, seeking to vacate the Board's order.¹³⁹

In discussing the propriety of the Board's decision not to defer, the court observed that "NLRB deference to an arbitration award is now an integral part of the administration of federal labor law, but Board deference is nonetheless discretionary."¹⁴⁰ It was also observed, however, that the Board has limited its own discretion in such matters by adopting specific criteria which it uses to guide its decisions regarding deference to arbitration.¹⁴¹ In light of these criteria, the court concluded that a Board decision deferring to an arbitral award will be upheld "unless the Board clearly departs from its own standards or its standards are themselves invalid."¹⁴²

The court held that the Board's refusal to defer was proper under the holding of *Crown Central Petroleum Corp. v. NLRB*.¹⁴³ In *Crown*, the Fifth Circuit concluded that shouting and profanity are protected activities within the setting of a grievance meeting.¹⁴⁴ The Ninth Circuit

requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id.

137. A hearing before an administrative law judge is a prerequisite to a hearing by the Board. *See* 29 U.S.C. § 160(a)-(b) (1970); 5 U.S.C. § 554 (1970).

138. 219 N.L.R.B. 765, 90 L.R.R.M. 1011 (1975).

139. Under 29 U.S.C. § 160(f) (1970), "Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals"

140. 545 F.2d at 675.

141. *See, e.g.*, *Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974); *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971); *International Harvester Co.*, 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

142. 545 F.2d at 676. *See, e.g.*, *Banyard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974); *House Workers Local 274 v. NLRB*, 493 F.2d 1249, 1249 (9th Cir.), *cert. denied*, 419 U.S. 828 (1974); *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 679 (2d Cir. 1971). In one recent case the Ninth Circuit found the Board's own criteria for deferral to be inadequate. *See Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977).

143. 430 F.2d 724 (5th Cir. 1970).

144. The *Crown* court stated:

It has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace. Grievance meetings arising out of disputes between employer and employee are not calculated to create an aura of total

further held that deferral to arbitration under the circumstances would have violated the deferral criteria established in *Spielberg Manufacturing Co.*¹⁴⁵ Those criteria provide that “deferral will be rejected if the arbitral award is repugnant to the purposes and policies of the National Labor Relations Act”¹⁴⁶ The court observed that

[t]he majority of the Board thought that the effect of the award “substantially dilute[d] an employee’s right to fully present his case during grievance and arbitration proceedings” . . . by upholding a discharge of an employee who used the epithet “liar” during the grievance proceeding. The Board did not abuse its wide discretion in thus characterizing the effect of the arbitral decision and in refusing to defer to the award.¹⁴⁷

Four months after its decision in *Hawaiian Hauling Service*, the court again dealt with the Board’s deferral policy in *Stephenson v. NLRB*.¹⁴⁸ The *Stephenson* decision should have a significant impact on labor relations in the Ninth Circuit.¹⁴⁹ The court ruled that the *Electronic Reproduction Service Corp.*¹⁵⁰ expansion of the *Spielberg* deferral

peace and tranquility where compliments are lavishly exchanged. . . . [W]e do not feel that the interests of collective bargaining will be served by the external imposition of a rigid standard of proper and civilized behavior.

Id. at 731, quoted in *Hawaiian Hauling Serv.*, 545 F.2d at 676 n.8.

145. 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). See note 151 *infra*.

146. 545 F.2d at 676.

147. *Id.* (footnote omitted).

148. 550 F.2d 535 (9th Cir. 1977).

149. For an extensive discussion of the *Stephenson* decision and its significance, see Casenote, *Stephenson v. NLRB*, 11 LOY. L.A.L. REV. 199 (1977).

150. 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974). Prior to *Electronic Reproduction*, the Board had established a policy of not deferring to arbitral awards, notwithstanding satisfaction of the *Spielberg* requirements, unless the unfair labor practice involved had been both presented to and acted upon by the arbitrator. *Yourga Trucking, Inc.*, 197 N.L.R.B. 928, 80 L.R.R.M. 1498 (1972); *Airco Indus. Gases*, 195 N.L.R.B. 676, 79 L.R.R.M. 1467 (1972). These latter two cases were overruled in *Electronic Reproduction*. In that case, the Board expressed concern over the fact that, in the wake of *Yourga* and *Airco*, parties to arbitration proceedings had been withholding evidence of an unfair labor practice in order to obtain a second hearing before the Board. Consequently, the Board declared that in the absence of “unusual circumstances,” it would defer to the arbitration award even when no indication existed as to whether the arbitrator had considered, or had been presented with, the unfair labor practice issue.

The “unusual circumstances” exception to the *Electronic Reproduction* rule would involve, for example, cases in which the arbitration clause is not broad enough to include the unfair labor practice issue, and cases in which the arbitrator deliberately excludes statutory issues from the proceedings. 213 N.L.R.B. at 761-62, 87 L.R.R.M. at 1216. The *Electronic Reproduction* extension of *Spielberg* has received unfavorable comment. See Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 909 nn.31&32 (1975); Simon-Rose, *Deferral Under Collyer by the NLRB of Section 8(a)(3) Cases*, 27 LAB. L.J. 201, 209-12 (1976).

criteria¹⁵¹ was invalid because it frequently enabled the Board to defer "to an arbitration decision when [the Board] is ignorant of the issues presented to and considered by that panel and of the basis for the latter's decision."¹⁵² The court expressly approved the addition of the two *Banyard*¹⁵³ prerequisites to the existing three-pronged *Spielberg* test.¹⁵⁴ Since, under the circumstances presented in *Stephenson*,¹⁵⁵ one of the two *Banyard* prerequisites had not been satisfied (the requirement that the arbitrator must have "clearly decided" the unfair labor practice issue to which the Board is urged to give deference),¹⁵⁶ the court held that the Board's decision to defer was erroneous. In so holding, the court rejected the *Electronic Reproduction* rule¹⁵⁷ as "contrary to Section 10 of the Act wherein the Board is empowered to prevent unfair labor practices."¹⁵⁸ Specifically, the court relied on language in section 10 which declares

151. A three-pronged test for determining when deferral to arbitration is proper was announced by the Board in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955):

[T]he [arbitration] proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will be best served by our recognition of the arbitrators' award.

While an informal policy of deferring to arbitration awards had existed prior to *Spielberg*, see, e.g., *Monsanto Chem. Co.*, 97 N.L.R.B. 517, 29 L.R.R.M. 1126 (1959); *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 18 L.R.R.M. 1370 (1946), *rev'd*, 161 F.2d 949 (6th Cir. 1947), the *Spielberg* opinion was largely responsible for establishing the deferral policy as a fixed doctrine.

152. 550 F.2d at 541.

153. *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974). In *Banyard*, the District of Columbia Court of Appeals suggested that, in addition to the *Spielberg* criteria, the following two prerequisites should be satisfied before deferral could be held proper: (1) the arbitral tribunal must have clearly decided the unfair labor practice issue to which the Board is later urged to give deference; and (2) the arbitral tribunal must have decided only issues within its competence.

154. See note 151 *supra*.

155. The record before the court did not indicate "whether the issue of discriminatory discharge under sections 8(a)(1) and (3) of the Act was presented to or considered by the arbitration panel." 550 F.2d at 539.

156. See notes 153 & 155 *supra*. In *Stephenson*, the court stated:

The "clearly decided" requirement means that the arbitrator's decision must specifically deal with the statutory issue. Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory issue. . . . [W]here, as here, there is no proof that the unfair labor practice issue or evidence was ever presented to the arbitrator and/or the arbitrator's decision is ambiguous as to the resolution of the statutory issue, then the "clearly decided" requirement has not been met.

550 F.2d at 538 n.4.

157. See note 150 *supra*.

158. 550 F.2d at 539 (footnote omitted). Section 10 of the Act is codified at 29 U.S.C. § 160 (1970).

that the Board's power to prevent unfair labor practices shall "not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise" ¹⁵⁹ Inasmuch as the Board bears this statutory responsibility for remedying unfair labor practices, the policy of permitting the Board to defer in the absence of evidence that the statutory issue had been "clearly decided" was characterized as "illogical." ¹⁶⁰ The flaw in such a practice is that it frequently permits frustration of congressional intent and judicial policy:

Because arbitrators are not sub-branch of the Board and arbitration is a contractual mechanism, arbitrators are obligated to effectuate the will of the parties to the contract. Thus, they are not bound to apply the Board's or the courts' definition of contractual standards, or to enforce rights under the Act. ¹⁶¹

Consequently, *Banyard* is adopted and *Electronic Reproduction* "is rejected as it permits the Board to base its deference upon mere presumption in total absence of any evidence." ¹⁶²

II. COLLECTIVE BARGAINING

A. Duty to Bargain in Good Faith

Section 8(d) of the Act ¹⁶³ imposes a "mutual obligation" on the employer and employee to demonstrate good faith in meeting and deciding the terms and conditions of employment. ¹⁶⁴ In general, it is not enough that a meeting takes place between an employer and the representative of his employees. Good faith bargaining also requires a serious intent to adjust differences and to reach an acceptable common ground. ¹⁶⁵ The requirement of good faith bargaining, therefore, is that both labor and management manifest a desire to reach agreement and enter into a collective bargaining contract. ¹⁶⁶ "Good faith bargaining" was the subject of significant litigation in the Ninth Circuit during the survey period.

In *Queen Mary Restaurants Corp. v. NLRB* ¹⁶⁷ two unions, the Culinary Workers and the Marine Cooks, were competing for the right to

159. 550 F.2d at 539 (quoting 29 U.S.C. § 160(a) (1970)).

160. 550 F.2d at 540.

161. *Id.*

162. *Id.* at 541.

163. 29 U.S.C. § 158(d) (1970).

164. *Id.* Section 8(d) of the Act states that the duty to bargain in good faith includes "the performance of the mutual obligation . . . to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment. *Id.*

165. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960).

166. *Id.*

167. 560 F.2d 403 (9th Cir. 1977).

represent the employees of a restaurant. Initially, the company entered into an agreement with the Culinary Workers, but this agreement was later set aside. Three representation elections followed and the Marine Cooks were certified after the final election. The Board had found that the company had committed thirteen unfair labor practices during and after the elections.¹⁶⁸ The improprieties included statements that a Marine Cooks victory would be futile because five years would pass before the company would agree to a collective bargaining agreement. A witness was offered money to leave town rather than testify against the company. Additionally, during the course of collective bargaining the Marine Cooks and the company held fourteen negotiating sessions, but in spite of the union's willingness to compromise, the company refused to agree to any form of union security or to any hiring hall proposal.

In order to determine whether conduct by a party during negotiations constitutes a refusal to bargain in good faith, the court must deal with two competing tensions: that parties should have wide latitude in their negotiations unrestricted by any governmental power to regulate the substantive solution of their differences;¹⁶⁹ and that parties are also obligated to deal with each other seriously in an attempt to resolve differences and reach a common ground.¹⁷⁰ Thus, while it is not the Board's job to judge the concessions, proposals, and counterproposals either party may or may not make,¹⁷¹ the Board is afforded flexibility in determining "whether a party's conduct at the bargaining table evidences a real desire to come into agreement."¹⁷² The test of an employer's good faith in bargaining is

whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an

168. These findings were included in the administrative law judge's intermediate report and were adopted by the Board on July 5, 1973. *Id.* at 406 & n.1. Since the parties filed no exceptions to the intermediate report, *Queen Mary Restaurants Corp.*, 219 N.L.R.B. 776, 776 n.1, 90 L.R.R.M. 1017, 1018 n.1 (1975), the Board's adoption thereof was a matter of course. See R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 8 (1976).

169. *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295-96 (1959).

170. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 486 (1960). The policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides promotes the overall design of achieving industrial peace. *Id.* at 488.

171. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). In addition, the Board may not regulate the choice of economic weapons that may be used as part of collective bargaining, as this would place it in the position of being able to exercise considerable influence upon the substantive terms of the parties' contract. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960). In fact, the Supreme Court has admitted that the reservation of economic weapons, and their actual exercise on occasion by the parties, is part and parcel of the system of labor relations. *Id.* at 489.

172. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 498 (1960).

elaborate pretense with no desire to reach an agreement if possible, or that it [*sic*] bargained in good faith but was unable to arrive at an acceptable agreement with the union.¹⁷³

In addition, findings pertaining to the parties' good faith in collective bargaining is a matter for the Board's expertise,¹⁷⁴ and inferences drawn from the facts by the Board will not be set aside merely because the court's inference seems more plausible or reasonable.¹⁷⁵

Applying these principles to the facts in *Queen Mary Restaurants Corp.*, the court affirmed the Board's finding that the employer had refused to bargain in good faith. It was held that based on the totality of the circumstances, the company had engaged in surface bargaining with the union. The court considered as "background" the unfair labor practices campaign waged against the Marine Cooks during and after the representation elections.¹⁷⁶ It also considered other independent unfair labor practices, such as bargaining directly with the employees on the issue of seniority,¹⁷⁷ raising the wages of the employees unilaterally without notice to the Marine Cooks¹⁷⁸ and refusing to supply information to the union relevant to the subjects of collective bargaining.¹⁷⁹ The court also affirmed the Board's finding that the company's refusal to negotiate on the issues of union security and hiring hall was an additional indication that the company had not bargained in good faith.

It is worthwhile to note that the company advanced several arguments to justify its refusal to negotiate on the issues of union security and hiring

173. *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). As the "Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take . . . cognizance of the reasonableness of the positions" of the respective parties. *Id.* Therefore, "while the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union" *Id.* at 134-35.

174. *NLRB v. Dent*, 534 F.2d 844, 846 (9th Cir. 1976).

175. *NLRB v. Millmen Local 550*, 367 F.2d 953, 956 (9th Cir. 1966).

176. Events which occur outside of the six-month statute of limitations provided in § 10(b) of the Act, 29 U.S.C. § 160(b) (1970), may be considered as evidence of that conduct taking place within the six-month period which is being challenged. *NLRB v. Longshoremen's Local 13*, 549 F.2d 1346, 1351 (9th Cir. 1977); *NLRB v. Carpenter's Local 745*, 450 F.2d 1255, 1256-57 (9th Cir. 1971).

177. Bypassing an exclusive bargaining agent to negotiate directly with employees violates the employer's duty to bargain collectively with the chosen representatives of his employees. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944).

178. A unilateral change in condition of employment during negotiations violates § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), since it is a circumvention of the duty to negotiate. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

179. *Emeryville Research Center v. NLRB*, 441 F.2d 880, 883 (9th Cir. 1971). The court stated: "Refusing to supply such information will support a finding by the Board of failure to bargain in good faith under § 8(a)(5) of the Act" *Id.*

hall, all of which were rejected by the court. The first was that the company represented those employees who had voted against the Marine Cooks and that any compromise would betray them. The court rejected this argument as contradictory to a basic tenet of collective bargaining: "a certified union is the exclusive bargaining representative of all of the employees in the bargaining unit, including those who voted against the union and those who are not union members."¹⁸⁰ As a corollary to this rule, the employer has a "duty to recognize the certified union as representing all the employees."¹⁸¹

The second argument presented by the company to justify its refusal to consider any form of union security or hiring hall was that it opposed both "as a matter of principle." However, the Board rejected this contention and the court affirmed on the basis that the company's parent operated five restaurants whose employees were unionized. Four of these restaurants had contracts with the Culinary Workers (the rival union which the Marine Cooks defeated), and each contract contained union security and hiring hall provisions. The court concluded that rejection of a contract provision as a "matter of principle" will support "an inference of bad-faith bargaining when the same provision is agreed to with another, favored union."¹⁸²

The company contended that the Board's finding that the company had refused to bargain in good faith, in effect, "forced the company to make concessions on substantive contract terms" The court did not agree. While the Supreme Court has held that the Board may not compel an employer to accept a specific contract term,¹⁸³ the propriety of a Board

180. 560 F.2d at 409. See *Radio Officers' Union v. NLRB*, 347 U.S. 17, 46-47 (1954).

181. 560 F.2d at 409. Section 9(a) of the Act, 29 U.S.C. § 159(a) (1970), read in conjunction with *id.* § 8(a)(5) (1970), announces both an affirmative and a negative mandate. It directs the employer to affirmatively "bargain" with the majority representative concerning all matters which can be classified as "rates of pay, wages, hours of employment, or other conditions of employment." Equally important, it directs the employer not to bargain on such matters with any person other than the majority representative. Thus, the Supreme Court held in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) that the employer could not bypass the bargaining agent and engage in negotiations regarding wages and other working conditions with individual employees in the plant, even though the employees initiated the negotiations and actually sought to deal directly rather than through the duly elected majority union.

182. In *United Steelworkers v. NLRB*, 390 F.2d 846, 852 (D.C. Cir.), *cert. denied*, 391 U.S. 904 (1968), the court was unimpressed by the employer's claim that he rejected a checkoff as a matter of principle. The court based its decision on the company's campaign literature which identified its refusal to checkoff as undermining the union's position, the lack of reliance on inconvenience or other business purpose, and the company's refusal to consider alternatives.

183. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). *Porter* held that a Board order compelling the employer to agree to a proposed checkoff clause "would violate the

finding that an employer has not bargained in good faith has never been questioned. Finally, the court was unimpressed by the company's argument that an inference of bad faith is not supported merely because a party insists on taking a certain bargaining position.¹⁸⁴ While conceding that this proposition was generally valid,¹⁸⁵ the court noted that as a precondition to applying this principle, there must be a lack of other "substantial evidence that a negotiating party's attitude is inconsistent with its duty to seek an agreement."¹⁸⁶ In this case there was other substantial evidence of the company's bad faith. Therefore, the company's uncompromising attitude supported an additional inference of bad faith and rendered the aforementioned general principle inapplicable.

*NLRB v. Cheese Barn, Inc.*¹⁸⁷ involved a company which insisted, to the point of impasse, upon a non-mandatory subject of bargaining throughout collective bargaining negotiations.¹⁸⁸ The company wanted a provision whereby the bargaining unit employees would ratify the agreement before it could become effective.¹⁸⁹

The court, in declaring the company's insistence an unfair labor practice, reviewed the landmark Supreme Court decision in *NLRB v. Borg-Warner Corp.*¹⁹⁰ *Borg-Warner* declared that there were two mutually exclusive categories of bargaining subjects: mandatory subjects and

fundamental premise upon which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 108.

184. See *Wal-Lite v. NLRB*, 484 F.2d 108, 111 (8th Cir. 1973); *NLRB v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26, 29-30 (9th Cir.), *cert. denied*, 393 U.S. 914 (1968).

185. One court has noted that if the insistence is genuine and sincere, it may be maintained forever. *NLRB v. Almeida Bus Lines, Inc.*, 333 F.2d 729 (1st Cir. 1964). "Deep conviction, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system . . . of free collective bargaining." *Id.* at 731.

186. 560 F.2d at 411 (quoting *Wal-Lite v. NLRB*, 484 F.2d 108, 111 (8th Cir. 1973)).

187. 558 F.2d 526 (9th Cir. 1977).

188. The employer and employee are obligated to negotiate in good faith with respect to mandatory subjects of bargaining—"wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1970). The duty is limited to these subjects. As to other non-mandatory matters, however, each party is free to bargain or not bargain, and to agree or not agree. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

189. Although this was a standard practice with the union, it was not required by the union's constitution or embodied in any previous collective bargaining agreement to which the union was a party. 558 F.2d at 527.

190. 356 U.S. 342 (1958). In *Borg-Warner* the employer refused to reach a settlement with the union unless the agreement contained two clauses: first, a "ballot clause," which required that in future negotiations the employer's last bargaining offer would be put to a secret vote of the employees in the unit (union and non-union) before a strike could be called; and second, a "recognition clause," recognizing as bargaining agent a local of the

non-mandatory subjects.¹⁹¹ The company or union may insist in good faith on a provision which is mandatory, even to the point of impasse.¹⁹² A party may also attempt to bargain for a provision governing a non-mandatory subject of bargaining, and if the provision is otherwise legal and the other party agrees to it, the provision becomes an enforceable part of the collective bargaining agreement. But if the other party refuses to agree to a non-mandatory provision, the proponent may not insist on its inclusion to the point of impasse.¹⁹³ Thus, in *Borg-Warner* the Court held that it was unlawful for an employer to condition its agreement with the union upon a provision which would require the union, in future negotiations, to submit the employer's last offer to a vote of all employees in the unit and which would authorize a strike only in the event the employees rejected the offer. This conclusion is justified since the particular clause in controversy dealt with the bargaining strategy of the union and the employees. In addition, "it substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative."¹⁹⁴

In *Cheese Barn*, the Ninth Circuit held that the ratification of a collective bargaining agreement by bargaining unit employees was a non-mandatory subject of bargaining. The court, quoting from a Sixth Circuit decision,¹⁹⁵ noted that by insisting that the contract be ratified by a

United Automobile Workers, rather than the International which had been certified by the NLRB. After the union finally acquiesced to the employer's demands, it charged that 29 U.S.C. § 8(a)(5) (1970) had been violated. The Supreme Court ultimately agreed with the union. The Court rejected the employer's claim that it was free to insist on the ballot and recognition clauses as a condition to an agreement, and held that such insistence was unlawful when the subject in question was not a "mandatory" subject of bargaining. The two contested clauses fell outside the range of § 8(d), which limits mandatory bargaining to "wages, hours and other terms and conditions of employment":

The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.

356 U.S. at 349.

191. 356 U.S. at 349.

192. *Id.*

193. *Id.*

194. *Id.* at 350.

195. *Houchens Mkt., Inc. v. NLRB*, 375 F.2d 208 (6th Cir. 1967).

majority of employees, the company "was attempting to bargain . . . with respect to a matter which was exclusively within the internal domain of the union."¹⁹⁶ Since the employees could delegate to the union the authority to make a binding contract without their ratification, the company could no more insist upon employee ratification than the union could insist that the contract be submitted to the company's board of directors. Since the union was empowered by its members to make agreements on their behalf without securing their approval, the company had no right to interfere with that relationship. The decision in *Cheese Barn* is consistent with the decisions of the other circuits¹⁹⁷ on this issue.

In *NLRB v. Abex Corp.*¹⁹⁸ the Board petitioned for enforcement of its order finding the company guilty of an unfair labor practice.¹⁹⁹ The controversy began when production and maintenance employees of the company voted to be represented by the union. This bargaining unit and the company thereafter reached an agreement covering these employees and excluding all others. One month later, the union petitioned for a representation election for certain salaried employees not covered under the previous agreement. However, since the Board's regional director found that the salaried employees shared a community of interest with the union members and performed similar functions, it was ordered that the salaried employees be permitted to vote on whether they wanted to join the existing bargaining unit.²⁰⁰ The company informed the salaried employees prior to the election that they would be covered by the existing collective bargaining agreement if they were added to the existing bargaining unit. After a majority of the workers voted to join the bargaining unit, the company started paying hourly wages and fringe benefits as designated in the existing contract.

With two members dissenting, the Board held that the company's notification to the employees before the elections and its acts thereafter

196. 558 F.2d at 530 (quoting *Houchens Mkt., Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967)).

197. See, e.g., *NLRB v. C & W Lektra Bat Co.*, 513 F.2d 200 (6th Cir. 1975); *American Seating Co. v. NLRB*, 424 F.2d 106 (5th Cir. 1970); *NLRB v. Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956).

198. 543 F.2d 719 (9th Cir. 1976).

199. The Board's order is reported at 215 N.L.R.B. 665, 88 L.R.R.M. 1157 (1974).

200. This type of election is called a "Globe election," taking its name from the Board's decision in *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294, 1-A L.R.R.M. 122 (1937). The election permits employees sharing the same community of interest as an already represented unit of employees to vote on whether to join the existing bargaining unit. See *NLRB v. Underwood Mach. Co.*, 179 F.2d 118, 120-21 (1st Cir. 1949). The device is also used where two unions are vying for the same group of employees, but one union seeks to represent them in a small unit while the competing union seeks to include them with other employees in a more comprehensive unit. *Federal-Mogul Corp.*, 209 N.L.R.B. 343, 345, 85 L.R.R.M. 1353, 1355 (1974).

were unfair labor practices in violation of subsections 8(a)(1) and (a)(5) of the Act.²⁰¹ The Ninth Circuit, in denying enforcement of the Board's petition, held that when a group of employees performing functions nearly identical to those performed by an existing bargaining unit is absorbed into the existing bargaining unit, the employer is free to apply the terms of an existing agreement to the formerly unrepresented employees. The court declined to follow the Board's decision in *Federal-Mogul Corp.*,²⁰² pointing out that not only was there a "community of interest" between the originally excluded members and those represented by the existing unit in the present dispute, but that the work performed by the excluded salaried employees was "functionally similar to that performed by certain employees within the existing bargaining unit."²⁰³ In addition, the court adopted the reasoning of the dissent in *Federal-Mogul* which emphasized that applying the existing contract terms to the formerly unrepresented group prevented a bifurcation of the bargaining unit for the duration of the existing contract; and that any inequities found to exist could be remedied when the next contract was negotiated.²⁰⁴

While the result reached by the court is correct, it should be carefully limited to situations where, as here, the formerly excluded employees perform work functionally similar to that performed by the existing unit employees. Otherwise, individuals not parties to an agreement could "vote themselves a share of the bargain which the other parties had agreed to between and for themselves."²⁰⁵ This in turn would require that both parties to a negotiation bargain for "groups of people whose identity and number would be totally unknown . . . by either party."²⁰⁶ However, where the formerly excluded employees are found to perform work functionally similar to existing unit employees, and where application for membership would involve only some readjustment of pay and benefits,

201. Subsection (a) makes it an unfair labor practice for an employer "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [permitting workers to join unions and bargain collectively] . . . ; (5) to refuse to bargain collectively with the representatives of his employees . . ." 29 U.S.C. § 158(a)(1), (5) (1970).

202. 209 N.L.R.B. 343, 85 L.R.R.M. 1353 (1974).

203. 543 F.2d at 721.

204. 209 N.L.R.B. at 347, 85 L.R.R.M. at 1357 (Members Kennedy and Pannelo, dissenting).

205. *Id.* at 344, 85 L.R.R.M. at 1354.

206. *Id.* Under this scheme, costs of wages and benefits under negotiation would become unpredictable, negotiations of benefits such as health and pension plans would be impossible to calculate, and bargaining in general would be severely handicapped. *Id.* However, where the terms of the existing agreement are applied to a group who performs work functionally similar to the existing unit, and whose package of wages and benefits remains substantially unchanged before and after union representation, there is no unfairness.

it is in the interest of industrial peace and fairness to apply the existing contract during the interim period before its expiration.

B. *Duty of Fair Representation*

The principle that a bargaining representative must represent all employees was first announced by the Supreme Court in *Steele v. Louisville & Nashville Railroad*.²⁰⁷ In declaring that the labor union must represent the interests of all workers in the bargaining unit, including blacks, the Court stated that

the fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.²⁰⁸

The Ninth Circuit addressed the issue of the union's duty of fair representation in the context of collective bargaining in *NLRB v. General Truck Drivers Local 315*.²⁰⁹ In that case, the union and the company had negotiated a collective bargaining agreement with a "bumping rights"²¹⁰ provision, but the union had not yet decided whether to exercise the provision. When the company announced its intention to terminate certain services, the union decided to conduct an election among its members to determine whether those employees who would lose their jobs should be reassigned with full seniority to another job classification. The employees voted twenty to eight against bumping rights, and one employee, Ted Holman, was terminated. Charges that the

207. 323 U.S. 192 (1944). See note 214 *infra* for a more complete discussion of *Steele*.

208. 323 U.S. at 202. The union has been held to have violated its duty of fair representation when it implements a policy of racial discrimination while negotiating a new contract, *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); when it refuses to process grievances, *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966); when it takes away work from employees outside the bargaining unit in order to preserve it for the unit members, *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); when it refuses to refer women applicants for jobs, *Pacific Maritime Ass'n*, 209 N.L.R.B. 519, 85 L.R.R.M. 1389 (1974); and when it refuses to allow a woman to "bump" into a position occupied by a less senior man, *Petersen v. Rath Packing Co.*, 461 F.2d 312 (8th Cir. 1972).

209. 545 F.2d 1173 (9th Cir. 1976).

210. "Bumping rights" allow a senior employee whose job or equipment is eliminated to be reassigned "to another classification with full seniority rights subject to employee qualifications." *Id.* at 1174.

union breached its duty of fair representation were then filed. The Board, with one member dissenting, held that "the Union had failed to represent Holman in a fair and impartial manner in violation of section 8(b)(1)(A) of the Act."²¹¹

The Ninth Circuit began its analysis of the legality of Holman's termination with a restatement of the *Vaca v. Sipes* doctrine.²¹² *Vaca* held that the exclusive bargaining agent has a statutory obligation to serve the interests of all members without hostility or discrimination. This obligation includes the duty to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct.²¹³ Although the duty of fair representation in *Vaca* required the union to process grievances against the employer, in *Local 315* the duty was one which involved collective bargaining.²¹⁴ Since the rationale behind the duty of fair representation is to compensate employees for their lost opportunity to bargain for themselves, *Local 315* required that the union give fair consideration to minority interests and adhere to a rational decision-making process.²¹⁵

211. *Id.* at 1175. Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) (1970), makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in § 7; namely, the right to join, form, or assist labor organizations, to bargain collectively, and engage in other concerted activities. *See* 29 U.S.C. § 157 (1970).

212. 386 U.S. 171 (1967).

213. *Id.* at 177.

214. Originally, the requirement that the bargaining representative must fairly represent all employees arose in the context of racial discrimination. In *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), a railroad company and the union representing its firemen negotiated several contract provisions which set a ceiling on the number of black employees to be assigned work within the bargaining unit, and restricted altogether the access of black workers to certain positions. An action was brought against both the railroad and the union on behalf of a number of black firemen who had lost their jobs because of the defendants' racially discriminatory agreement.

The Court stated that implicit in the Railway Labor Act was a duty to refrain from "hostile discrimination" against any minority group within the bargaining unit, and concluded that "discriminations based on race alone are obviously irrelevant and invidious" and therefore in violation of that Act. *Id.* at 202-03. Later, the duty of fair representation was extended to unions functioning as bargaining agents under the National Labor Relations Act, rather than the Railway Labor Act. *See Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). This duty was again extended to apply not only to the negotiations for a new agreement, but also to the administration and processing of grievances under an existing agreement. *See, e.g., Humphrey v. Moore*, 375 U.S. 335 (1964) (union representing two groups of employees in different locations was held to have duty to act in good faith in adjusting rights of these groups in event of merger).

215. One court, in discussing the obligation of the union to make reasoned decisions, indicated that a union's conduct even "[w]ithout any hostile motive of discrimination" could be so "unreasonable and arbitrary as to constitute a violation of the duty of fair representation." *Griffin v. UAW*, 469 F.2d 181, 183 (4th Cir. 1972). In the context of a union handling a grievance, the court observed that while the union may refuse to process a grievance for any number of reasons, it could not do so "without reason, merely at the

The *Local 315* court affirmed the Board's finding that the union had failed to represent Holman's interests fairly. This conclusion was based on the fact that the union's decision against applying bumping rights was a result of a vote of the employees *after* an occasion for bumping had arisen; the ballot used for the election was tainted by a bias against the workers whose jobs were to be eliminated. Further, the union's decision had not been based on the views of its members as to whether the bumping principle should be approved prospectively, but on the views of its members as to whether Holman, and others faced with a layoff, should on *this* occasion be permitted to exercise a right to bump.²¹⁶ The court concluded that while it would not necessarily be improper for a union to use an election process under other circumstances, the facts in this situation indicated that the conduct of the union toward Holman was so arbitrary that the union had breached its duty to represent his interests fairly. Thus, even the use of democratic processes within the union could not shelter it against a finding of violation of the duty of fair representation. This is still particularly true where, as in *Local 315*, the members' decisions are made at a time when their votes for or against a change will not be based on the merits of the issue in the abstract, but rather on the preordained dictates of self-interest.²¹⁷

III. RECOGNITION OF BARGAINING REPRESENTATIVES

Section 8(a)(5) of the NLRA²¹⁸ declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with representatives of his employees, subject to the provisions of Section 9(a)." ²¹⁹

whim of someone exercising union authority. A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge—the industrial equivalent of capital punishment." *Id.* See Clark, *The Duty of Fair Representation*, 51 TEX. L. REV. 1119, 1131 (1973).

216. The Board had stated:

What is striking, however, is that the vote was taken after the layoff was announced, and whether or not the voters knew all the details of the layoff each presumably knew whether his own job was scheduled for elimination. Those not scheduled for layoff would naturally think twice before voting for bumping rights just then. And most importantly, the voting on this issue was limited to those, and only those, who would be adversely affected by a vote to permit the bumping.

NLRB v. General Truck Drivers Local 315, 545 F.2d at 1176 n.1.

217. *Cf. Truck Drivers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967). In that case the employer, whose workers were represented by one union, acquired a smaller company represented by the Teamsters. The two groups of employees were merged. In the context of a representation election, the established union made assurances that, if elected, it would discriminate against the Teamster employees in the determination of a seniority list. The court affirmed the Board's conclusion that this campaign promise was a violation of § 8(b)(1)(A) since it might have coerced members of both unions into voting for their current representation, solely on the basis of their fears concerning seniority placement.

218. 29 U.S.C. § 158(a)(5) (1970).

219. *Id.*

Section 9(a) provides:

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 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 employment²²⁰

*Alaska Roughnecks & Drillers Association v. NLRB*²²¹ presented a situation in which Mobil Oil Co. was charged with a refusal to bargain. The duty to bargain was allegedly imposed by Mobil's status as either a successor or joint employer. Mobil had operated an offshore drilling platform in Alaska and had subcontracted with Santa Fe Drilling Co. to perform drilling operations. Santa Fe worked on a cost-plus basis, with Mobil supervising Santa Fe's employees by directing the drilling operations. When Alaska Roughnecks & Drillers Association (the union) later organized the workers of all Santa Fe operations in Alaska, a representation petition was filed naming Santa Fe as the employer. The union stipulated that Santa Fe was the employer and Mobil took no part in the representation hearings. Later, after the union had been certified as the bargaining agent, Santa Fe and the union began negotiating. The negotiations were unsuccessful, however, and the employees instituted a strike. Meanwhile, as permitted in the contract, Mobil notified Santa Fe of its intention to terminate the contract. Upon learning of the impending termination, the union asked Mobil to bargain as a "successor employer."²²² Mobil refused to bargain. An administrative law judge, with the Board affirming, found that Mobil was guilty of an unfair labor practice for refusing to bargain as a joint employer.²²³

In refusing to enforce the Board's order, the Ninth Circuit concluded that Mobil had no duty to bargain since it had not had an opportunity to participate in the certification proceedings and had not been requested by the union to bargain until after Mobil had terminated its contract with Santa Fe. The court recognized that the application of due process in the context of administrative proceedings was not novel²²⁴ and that the

220. *Id.* § 159(a).

221. 555 F.2d 732 (9th Cir. 1977).

222. *See* *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 611 (9th Cir. 1977). *See also* notes 233-49 *infra* and accompanying text.

223. 555 F.2d at 734. The principal factors weighed by the Board in deciding whether sufficient integration exists to treat a specific separate concern as a single employer are: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv.*, 380 U.S. 255, 256 (1965).

224. *See* *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *NLRB v. Welcome-Am. Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971).

procedural requirements of due process were twofold. The first requirement is notice and opportunity to be heard.²²⁵ Implicit in this is the requirement that the hearing must be “granted at a meaningful time and in a meaningful manner.”²²⁶ Here, however, the first notice Mobil received that the union considered it to be an employer of Santa Fe’s employees was after the contract termination, when it was asked to bargain. Even then, Mobil was not asked to bargain as a *joint* employer. Instead, the union asked that it bargain as a *successor* employer. While it was possible that Mobil could have anticipated its duty to bargain, the court pointed out that no breach of that duty could be imposed upon an employer when the employees had not indicated their willingness to bargain.²²⁷

The second aspect of due process which the court discussed related to NLRB regulations for certification proceedings.²²⁸ The court noted that while Mobil may have been aware of the union’s activities before the union requested bargaining, Mobil was equally aware that it had not been asked to participate in the certification proceedings. Since Mobil was neither named as an employer nor given the opportunity to object,²²⁹ it was entitled to rely on the certification result that Santa Fe was the sole employer.²³⁰

225. *Goldberg v. Kelly*, 397 U.S. 254, 267-70 (1970). In *Kelly*, it was held that procedural due process under the fourteenth amendment required that welfare recipients be afforded an evidentiary hearing before termination of benefits by welfare authorities. As the Supreme Court had earlier stated in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), “An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 314.

226. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

227. 555 F.2d at 735-36. *See* *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297 (1939). Note, however, that an employer may not create artificial devices to avoid knowledge that a union has demanded to bargain with it. *NLRB v. Regal Aluminum, Inc.*, 436 F.2d 525 (8th Cir. 1971). That court stated that “the company cannot hide behind its own self-constructed wall of obstinance and thereby use its ignorance as a shield.” *Id.* at 527. In an analogous case, the Ninth Circuit stated that “[t]he manner in which an employer receives reliable information of union representation, whether by accident or by design, or even while the employer is seeking to avoid receiving it, is of no consequence” *Snow v. NLRB*, 308 F.2d 687, 692 (9th Cir. 1962).

228. 29 C.F.R. §§ 102.60-.72 (1976).

229. *Id.* § 102.63(b) requires that the employer receive notice of a hearing to determine a petition for representation.

230. The *Alaska Roughnecks* court noted that rules promulgated by administrative bodies should be followed since “[f]ailure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process.” 555 F.2d at 735 (quoting *NLRB v. Welcome-Am. Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971)).

Finally, the *Alaska Roughnecks* court concluded that even if Mobil had been a joint employer with Santa Fe, the fact that Santa Fe received notice of the certification proceedings was not the equivalent of Mobil's receiving adequate notice. The court conceded that under certain circumstances, joint employers could receive notice of their status as such by means other than the statutory notice required in representation proceedings.²³¹ The employer, however, must have received actual notice in order to be charged with a duty to bargain. The court also conceded that had Mobil actively intervened in Santa Fe's labor dispute with the union,²³² the court could have sustained a finding of joint employership. Since Mobil had neither received actual notice, nor intervened in the labor dispute, the court was unwilling to affirm a finding that Mobil was a joint employer. As a result, the court was unable to affirm the Board's finding of a refusal to bargain by Mobil.

*Pacific Hide & Fur Depot, Inc. v. NLRB*²³³ presented an important and heretofore unresolved issue of labor law regarding the successor employer. In *NLRB v. Burns International Security Services, Inc.*,²³⁴ the Supreme Court had held that when a company hires employees who had worked for a predecessor company, and when those employees continue to perform the same work in the same setting, the successor company is obligated to recognize and bargain with the predecessor's union for the period during which the predecessor would have been obligated to do so.²³⁵ This duty to bargain, however, does not arise until the former employees of the predecessor constitute a majority of the work

231. 555 F.2d at 736-37. See also *Ace-Alkire Freight Lines, Inc. v. NLRB*, 431 F.2d 280, 282 (8th Cir. 1970).

232. 555 F.2d at 737. See also *NLRB v. Long Lake Lumber Co.*, 138 F.2d 363, 364 (9th Cir. 1943).

233. 553 F.2d 609 (9th Cir. 1977).

234. 406 U.S. 272 (1972).

235. *Id.* at 281. This is based on the notion that "a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of the employees after the change of ownership or management were employed by the preceding employer." *Id.* at 279. See *NLRB v. Downtown Bakery Corp.*, 330 F.2d 921, 925 (6th Cir. 1964); *NLRB v. McFarland*, 306 F.2d 219, 221 (10th Cir. 1962); *NLRB v. Auto Ventshade, Inc.*, 276 F.2d 303, 307 (5th Cir. 1960). This is consistent with the working rules developed by the Board regarding the continued majority status of a union when the employer remains the same. *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954). *Cf. NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 n.3 (1972) ("A Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year."). After the one-year period there is a rebuttable presumption of majority representation. *Celanese Corp.*, 95 N.L.R.B. 664, 672, 28 L.R.R.M. 1362, 1366 (1951). See also *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir.), *cert. denied*, 98 S. Ct. 57 (1977) and text accompanying notes 250-62 *infra*.

force of the successor employer.²³⁶ In situations where the new employer does not retain all of the former employees of its predecessor, its duty to bargain will not be evident until it has hired its "full complement" of employees.²³⁷

In *Pacific Hide*, the Ninth Circuit addressed the problem of what is meant by a "full complement" of workers. Cahen Trading Company had operated a hide-curing facility with a staff which fluctuated between twelve and eighteen workers. Cahen had recognized a particular union as the collective bargaining representative of its employees for twenty years. The contract in effect in March, 1975, when Pacific Hide bought the business (without assuming its liabilities), contained no provision making it binding on Cahen's successors.²³⁸ On April 10, Cahen terminated all of its employees. Later that day, Pacific interviewed the Cahen workers and hired seven of them. Within eight days, four additional employees were hired, none of whom were former Cahen workers. On April 17, the union demanded recognition of and compliance with the former collective bargaining agreement, but Pacific refused on April 29. After April 29, Pacific hired eight more employees, none of whom were former Cahen workers. By June 6, Pacific had a total of nineteen employees in the unit, seven of whom were former Cahen employees and twelve of whom were not. There was no evidence that Pacific's hiring

236. *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 294-95 (1972). Thus, where "there is a change of employers, . . . and an almost complete turnover of employees, the certification may not bar a challenge if the successor employer is not bound by the collective bargaining contract, particularly if the new employees are represented by another union" *Id.* at 279 n.3.

237. *Id.* at 294-95. Even where the predecessor's employees represent a majority of the successor's work force, the successor employer's *only* duty is to bargain with the workers; it is *not* bound by the substantive provisions of the former employer's collective bargaining contract. *Id.* at 284. This interpretation is based on the strong policy implicit in the NLRA favoring voluntary establishment of contract terms by bargaining between the parties, free of governmental dictation of those terms. *Id.* at 287. The Supreme Court in *Burns* had emphasized the need for employers to rearrange physical and human resources in an effort to resuscitate ailing businesses:

A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm.

Id. at 287-88.

238. While it is true that "in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, [it might be found] as a matter of fact that the successor had assumed the obligations under the old contract," this is not true where "the successor employer is merely doing the same work in the same place with the same employees as his predecessor" *Id.* at 291.

policy was motivated by anti-union sentiment. The parties stipulated that Pacific had reached its full complement of nineteen employees as of June 6.

The court began its analysis with the observation that although Pacific continued in the same business as Cahen, utilizing the same facilities, equipment, and methods of production,²³⁹ it was not necessarily bound to bargain with the employees. An employer, like Pacific, who purchases the assets of a business is not bound to hire the employees of the predecessor in the absence of an agreement to the contrary.²⁴⁰ In order for the duty to bargain to arise, a majority of the work force must consist of former employees in that unit,²⁴¹ there being a presumption that the majority status of the union continues.²⁴² However, the successor employer has the right not to hire any of the former employees, and unless a majority of his work force consists of employees of the predecessor, there is no duty to bargain.²⁴³ The problem here was that if the controlling date for determining the majority status was April 11, when Pacific began to operate in the former Cahen plant, then Pacific was obligated to bargain, since on that date all seven employees had worked for Cahen. The majority also existed on April 17, when the union demanded recognition. If, however, the controlling date was June 6, the date on which it was stipulated that Pacific reached its "full complement," then Pacific

239. These factors are among those normally weighed by the Board in making a determination as to whether a new employer shall be considered a successor. *See, e.g., J-P Mfg., Inc.*, 194 N.L.R.B. 965, 968, 79 L.R.R.M. 1216, 1218 (1972).

240. *See* note 238 *supra*. *See also* *Howard Johnson Co. v. Detroit Local, Hotel & Restaurant Employees & Bartenders Int'l Union*, 417 U.S. 249, 261-62 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 n.6 (1973); *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 280-81 n.5 (1972).

241. *See* notes 235-37 *supra*.

242. 553 F.2d at 611. *See* *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 281 (1972); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3 (1st Cir. 1976); *NLRB v. Daneker Clock Co.*, 516 F.2d 315, 316 (4th Cir. 1975); *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162-63 (5th Cir. 1970).

243. 553 F.2d at 611. *See* *Howard Johnson Co. v. Detroit Local, Hotel & Restaurant Employees & Bartenders Int'l Union*, 417 U.S. 249, 261-63 (1974); *NLRB v. United Indus. Workers*, 422 F.2d 59, 62-63 (5th Cir. 1970); *NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F.2d 833, 836 (9th Cir. 1964). It is not necessary that the retained employees constitute a majority of the predecessor's work force. In *United Maintenance & Mfg. Co.*, 214 N.L.R.B. 529, 87 L.R.R.M. 1469 (1974), where the predecessor work force numbered thirty-eight and the successor, due to a strike, was able to recruit only fifteen employees (nine of whom had worked for the predecessor), the Board held that the successor was obligated to bargain: "[T]he standard for determining the new employer's obligations to bargain . . . is not . . . the percentage of the predecessor's total complement that the new employer retains, but the percentage of the new employer's work force which had previously worked for the predecessor in the bargaining unit." *Id.* at 533, 87 L.R.R.M. at 1473 (footnote omitted).

had no duty to bargain since at that time twelve of the nineteen workers were not holdovers and thus no majority existed.

In discussing the successor's duty to bargain, the Supreme Court in *Burns*²⁴⁴ had noted that in some cases it would be perfectly clear that the new employer planned to retain all of the former employees, and that it would be appropriate for him to bargain with them immediately.²⁴⁵ In other cases, however, the Court conceded that "it may not be clear until the successor employer has hired his *full complement* of employees that he has a duty to bargain with the union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit."²⁴⁶ In *Pacific Hide*, the Ninth Circuit noted that while the parties had stipulated that Pacific reached its full complement on June 6, when no majority existed, the more important inquiry was whether the principles underlying the *Burns* "full complement" test had been properly applied. Those principles make it implicit that the issue of union representation is to be determined by the majority, whose rights are considered paramount.

To achieve this aim, the *Pacific Hide* court had to define what was meant by a "full complement." Rejecting any sort of mathematical formula, it emphasized that determining the full complement could only be accomplished "by considering the facts of each case in light of the general goal which is sought—to assure majority rule within the new employer's unit as to whether and if so with what union there must be collective bargaining."²⁴⁷ The court observed that where the new employer does not hire a majority of his workers from the ranks of the former employees, there is no reason to presume that the new majority wishes to be represented by any one association. The new majority's right of choice would be violated by requiring the employer to bargain with the incumbent union. In that case, the employer is not a successor to the majority of the employees; rather, "[h]e is their original employer,"²⁴⁸ and the former bargaining relationship no longer exists.

Applying these principles to the facts, the court concluded that the Board erred in ordering Pacific to bargain. While not suggesting that the crucial date was June 6, the court concluded that considering such factors as the plant's method of operation and the level of output to be main-

244. *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972).

245. *Id.* at 294-95.

246. *Id.* at 295 (emphasis added).

247. *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 613 (9th Cir. 1977).

248. *Id.* at 613-14. See *NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F.2d 833, 836 (9th Cir. 1964).

tained, the "full complement" was nineteen, just one more than Cahen's complement when it ceased operations. And while Cahen's complement had fluctuated between twelve and eighteen, because Pacific had twelve other plants, it would require nineteen employees in the unit to maintain a steady output level.²⁴⁹

The interpretation of the *Burns* "full complement" standard adopted by the Ninth Circuit is consistent with the goal of upholding the rights of the majority of the workers. The decision is beneficial in that it averts the risk of imposing an unwanted union on a majority of the employees. Moreover, since the predecessor's union can test its strength in a representation election, its status as the bargaining representative is not completely foreclosed. In any event, the *Pacific Hide* decision is a reminder that the interests of the majority of the workers is paramount in ultimately determining the outcome of a bargaining representative's dispute.

The Ninth Circuit has also examined the issue of whether a particular union has majority status at the time of bargaining. In *NLRB v. Vegas Vic, Inc.*,²⁵⁰ the employer had challenged the incumbent union's majority status, basing its challenge on the fact that fourteen of the twenty-four members of the bargaining unit were not members of the union. Under the well-established rule of *Brooks v. NLRB*,²⁵¹ a union has the benefit of what is usually referred to as an "irrebuttable" presumption that its majority continues for a period of one year after it has been certified. The rationale behind this presumption is that it promotes responsibility in the election process, affords the union ample time to achieve results in bargaining without being "under exigent pressure to produce hot-house results or be turned out,"²⁵² minimizes inter-union raiding and encourages serious bargaining by the employer without attempting to undermine the union's majority status.²⁵³ Similarly, a union whose bargaining rights have been secured through informal recognition

249. 553 F.2d at 614.

250. 546 F.2d 828 (9th Cir.), cert. denied, 98 S. Ct. 57 (1977).

251. 348 U.S. 96 (1954). There, even though it was demonstrated that within days after the election the employees had unequivocally rejected the union, the fact that the employer had evidence that the workers no longer wished to be represented by the union did not justify the employer's refusal to bargain.

252. *Id.* at 100.

253. *Id.* at 99-100. Extraordinary exceptions to this general rule are: (1) where the certified union dissolves or becomes defunct; (2) where as a result of a schism substantially all the members and officers of the certified union transfer their affiliation to a new local or international; and (3) where the size of the bargaining unit fluctuates radically within a short time. *Id.* at 98-99. In these instances the representative status of the union is so subject to question that it is appropriate to free the employer of the duty to bargain and permit a fresh assessment of employee preference.

is entitled to a conclusive presumption of continued majority support "for a reasonable time."²⁵⁴ After the one-year period, the majority status is still presumed to exist, but that presumption becomes rebuttable.²⁵⁵ The burden of rebuttal is on the employer, and the governing rules were recently reiterated by the Board in *Bartenders, Hotel, Motel & Restaurant Employers Bargaining Association*.²⁵⁶

[O]nce the presumption is shown to be operative, a prima facie case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The prima facie case may be rebutted if the employer establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status.²⁵⁷

In addition, the good faith doubt asserted by the employer must be based upon objective considerations,²⁵⁸ even though "subjective evidence may be used to bolster the argument that such doubt existed at the relevant time."²⁵⁹

Applying these principles to the facts, the *Vegas Vic* court found that the mere fact that slightly more than half of the bargaining unit members did not belong to the union was not necessarily an indication of the union's loss of majority status, and that the company's defenses for its refusal to bargain were too "speculative and subjective" to give rise to a good faith doubt.²⁶⁰ An additional factor evidencing the company's lack of good faith doubt cited by the court was its twenty-five year bargaining history. The holding in *Vegas Vic* is consistent with decisions by the

254. *NLRB v. San Clemente Publishing Corp.*, 408 F.2d 367, 368 (9th Cir. 1969). That court said that "[t]o hold that only a Board-conducted election is binding for a reasonable time would place a premium on the Board-conducted election and would hinder the use of less formal procedures that . . . may be more practical and convenient and more conducive to amicable industrial relations." *Id. Accord*, *NLRB v. Universal Gear Serv. Corp.*, 394 F.2d 396 (6th Cir. 1968).

255. *See NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 n.3 (1972); *Automated Business Sys. v. NLRB*, 497 F.2d 262, 269 (6th Cir. 1974); *Terrel Mach. Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

256. 213 N.L.R.B. 651, 87 L.R.R.M. 1194 (1974).

257. *Id.* at 651, 87 L.R.R.M. at 1195 (footnotes omitted).

258. *Id.* The employer's doubt may not rest on unfounded speculation or on a subjective state of mind only. *NLRB v. Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966).

259. *See Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975).

260. 546 F.2d at 829. However, where evidence of a good faith doubt as to the continuing majority status is introduced, the presumption of majority status disappears and the burden shifts to the union to prove that it did represent a majority on the date in question. *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975); *accord*, *Automated Business Sys. v. NLRB*, 497 F.2d 262, 270 (6th Cir. 1974).

Board²⁶¹ and other circuits²⁶² which have reviewed similar challenges to majority status in this context.

The issue of employer recognition of an exclusive bargaining agent also arose in the context of an employer's relationship with competing bargaining units. In *Buck Knives v. NLRB*²⁶³ the employer was charged with violating subsections 8(b)(1) and (2)²⁶⁴ of the Act by prematurely extending recognition to and entering into a collective bargaining agreement with a rival employees association. Under the Board's doctrine established in *Midwest Piping and Supply Co.*,²⁶⁵ an employer violates the Act when it recognizes and enters into a contract with one union, after another union has made known its claim of majority support and has filed with the Board a petition for a representation election.²⁶⁶ Subsequently, the Board expanded this doctrine with its holding that when an insurgent union raises "a real question concerning representation" the employer is barred from bargaining with an incumbent union at the termination of a labor contract.²⁶⁷ A question of representation is raised whenever the claim of the rival union is not "clearly unsupportable and lacking in substance;" it is not necessary for the rival union to present a formal request for recognition.²⁶⁸

The *Buck Knives* court began its analysis with the acknowledgment that the *Midwest Piping* doctrine had been applied with different results in two distinct contexts. In a 1969 case, the Ninth Circuit was presented with a situation in which several unions had confronted a non-union employer; none of the unions had a history of collective bargaining with the employer.²⁶⁹ The Ninth Circuit held at that time that the employer could not rely upon a check of signature cards without giving the rival union the chance to demonstrate that the union recognized by the

261. See, e.g., *Bartenders, Hotel, Motel & Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651, 87 L.R.R.M. 1194 (1974), discussed at text accompanying note 256 *supra*.

262. See, e.g., *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 490 (2d Cir. 1975); *Terrell Mach. Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

263. 549 F.2d 1319 (9th Cir. 1977).

264. 29 U.S.C. § 158 (b)(1), (2) (1970).

265. 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945).

266. While the major rationale asserted by the Board is that such recognition delegates to the employer the task given by statute to the Board of resolving "questions involving representation," it was also held that by its recognition and contracting, the employer indicated its approval of the signatory union, accorded it unwarranted prestige, encouraged membership therein, and rendered it unlawful assistance, all of which interfered with the NLRA § 7 rights of the employees. *Id.* at 1069-70, 17 L.R.R.M. at 40-41.

267. *Shea Chem. Corp.*, 121 N.L.R.B. 1027, 1029, 42 L.R.R.M. 1486, 1487 (1958).

268. *Playskool, Inc. v. NLRB*, 477 F.2d 66, 69-70 (7th Cir. 1973).

269. *Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36 (9th Cir. 1969).

company did not occupy majority status.²⁷⁰ In the second context, courts have had to deal with situations in which several unions were competing for exclusive recognition, with one of the unions currently representing another bargaining unit of the same employer.²⁷¹ If the employer had extended recognition to one of the two competing unions on the basis of a "clear demonstration of majority support," the courts have generally refused to find a violation of the Act.²⁷²

Applying these principles to the *Buck Knives* facts, the court concluded that the union fell within the second classification. The union had an existing contract with the employer, and had clearly established its majority support by the employees' vote in its favor.²⁷³ Since there was no claim that the union's majority status was achieved as a result of the employer's coercion or deception,²⁷⁴ the company in recognizing the union was merely obeying its duty to recognize the bargaining agent represented by a majority of the employees; thus the employer could not be guilty of an unfair labor practice.

IV. UNFAIR LABOR PRACTICES

A. *Secondary Boycotts*

A secondary boycott may be defined as the application of economic pressure upon a person with whom the union has no dispute, in order to induce that person to cease doing business with another employer with

270. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court affirmed the rule that a union may establish its majority status by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes. That decision followed the Supreme Court's earlier holding in *UMW v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), that where the union had authorization cards from a majority of the employees, "[i]n the absence of any bona fide dispute as to the existence of the required majority . . . the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act." *Id.* at 69.

271. See *NLRB v. Inter-Island Resorts, Ltd.*, 507 F.2d 411 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *NLRB v. Peter Paul, Inc.*, 467 F.2d 700 (9th Cir. 1972).

272. See, e.g., *NLRB v. Inter-Island Resorts, Ltd.*, 507 F.2d 411, 413 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Suburban Transit Corp. v. NLRB*, 499 F.2d 78, 83 (3d Cir.), *cert. denied*, 419 U.S. 1089 (1974); *Playskool, Inc. v. NLRB*, 477 F.2d 66, 70 (7th Cir. 1973); *NLRB v. Peter Paul, Inc.*, 467 F.2d 700, 702 (9th Cir. 1972); *Moding Mfg. Co. v. NLRB*, 453 F.2d 292, 295 (8th Cir. 1971).

273. Cf. *NLRB v. Fishermen's & Allied Workers' Union Local 33*, 483 F.2d 952, 953 (9th Cir. 1973) (*per curiam*) (employer committed unfair labor practice when it signed contract with minority union competing for representation).

274. This is the exception to the rule that an employer may recognize a union on the basis of a clear demonstration of support. See, e.g., *NLRB v. Inter-Island Resorts, Ltd.*, 507 F.2d 411, 412 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Playskool, Inc. v. NLRB*, 477 F.2d 66, 70 (7th Cir. 1973); *NLRB v. Indianapolis Newspapers, Inc.*, 210 F.2d 501, 503 (7th Cir. 1954).

whom the union has a dispute.²⁷⁵ Thus, a union's attempt to induce employees of Company A to engage in a work stoppage to extract economic benefits during negotiations would be "primary" concerted activity; if the union attempts to coerce Company B to cease doing business with A, and that coercion takes the form of appealing to employees of B to engage in a work stoppage, the union's pressure becomes "secondary." The attempted withdrawal of services from B pressures a person with whom the union has no underlying dispute, and whose employment relations it does not seek to alter. The pressure is therefore illegal. While in many cases it will be clear whether a secondary boycott exists, often the latent ambiguity of the text of the Act requires the ultimate resolution to be guided by the legislative object of outlawing the common law secondary boycott. *Griffith Co. v. NLRB*²⁷⁶ illustrates this process well.

Griffith Co. v. NLRB presented, as the court described, "a fairly novel and important issue of labor law."²⁷⁷ The *Griffith* court had to decide whether a collective bargaining agreement which prohibited "an employer from subcontracting work to any other signatory employer who is delinquent in required payments to common employee fringe benefit trusts"²⁷⁸ constituted an illegal secondary agreement or was protected under the doctrine of *National Woodwork Manufacturers Association v. NLRB*.²⁷⁹ *Griffith*, a general contractor, had negotiated a master labor agreement through a construction industry trade association. Under the terms of the agreement each employer was required to contribute to certain employee fringe benefit trust funds.²⁸⁰ An employee's eligibility for benefits depended upon hours worked, but had nothing to do with whether his employer actually made contributions to the trust. If an employer failed to make his contribution, all beneficiaries suffered reduced benefit levels but no employees were denied benefits altogether. Over the years the trusts had experienced difficulty with delinquent employer payments, and to counter this problem the union succeeded in placing a clause in the master labor agreement which provided that no contractor could subcontract work to a subcontractor who was delinquent in trust payments.²⁸¹ Any employer who did so was then liable for the

275. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

276. 545 F.2d 1194 (9th Cir.), cert. denied, 98 S. Ct. 171 (1977).

277. *Id.* at 1195.

278. *Id.*

279. 386 U.S. 612 (1967).

280. The trust funds were created pursuant to 29 U.S.C. § 186(c)(5) (Supp. V 1975).

281. Paragraph 15 of the agreement provided:

The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each

delinquency of the subcontractor.²⁸² If the employer failed to make the payments the union had a right to withhold services from him.²⁸³ The trustees learned that Griffith was subcontracting work to a delinquent subcontractor, and they demanded that Griffith pay the delinquency. Griffith refused, and charged that the clauses constituted an agreement to cease doing business with another in violation of section 8(e) of the National Labor Relations Act,²⁸⁴ and that certain threats to strike violated section 8(b) of the Act.²⁸⁵

In reaching its decision, the *Griffith* court traced the distinction between primary²⁸⁶ and secondary agreements,²⁸⁷ but found that the agreement here fell neither under the rules established for "union standards"

month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.

545 F.2d at 1196 n.1.

282. Paragraph 16 of the agreement read in part: "In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall pay the sums over to the Trust Funds." *Id.*

283. Subsection (a) of Paragraph 16 provided: "Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor." *Id.*

284. Section 8(e) of the NLRA provides in part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter, containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting and subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work

29 U.S.C. § 158(e) (1970).

285. Section 8(b)(4) of the NLRA provides in part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or an industry affecting commerce to engage in, a strike . . . ; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . : *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing

29 U.S.C. § 158(b)(4) (1970).

286. Where the union pressures an employer for an agreement regulating relations between him and his own employees it is deemed to be lawful "primary activity." *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620 (1967).

287. 545 F.2d at 1199. The "core concept" behind a secondary boycott is "union

clauses²⁸⁸ nor under a new exception for “fringe benefit protection” clauses.²⁸⁹ Therefore, in order to determine the legality of this agreement, the court turned to the standard established by the Supreme Court in *National Woodwork Manufacturers Association v. NLRB*²⁹⁰ for distinguishing between primary and secondary boycotts. That case directs a court to inquire “whether, under all the surrounding circumstances, the union’s objective was preservation of work for [primary] . . . employees, or whether the agreement and boycott were tactically calculated to satisfy union objectives elsewhere.”²⁹¹ The Court concluded that the “touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer” or whether it seeks to benefit those “other than the boycotting employees or the employees of the primary employer.”²⁹²

Applying the *National Woodwork* standard, the *Griffith* court focused first upon the tactical object of the boycott, and concluded that its object was to interfere with the labor relations of the boycotted subcontractor and not those of the primary employer, Griffith. The union’s dispute with the subcontractor was over alleged delinquencies to trust contributions, and Griffith’s only offense was doing business with that subcontractor.

Next, the court emphasized that primary activity must confer benefits on the members of the relevant “work unit,” and not on some larger group such as members of the union in general.²⁹³ The court reasoned that since employees of many work units were beneficiaries of the trust

pressure directed at a neutral employer the object of which [is] to induce or coerce him to cease doing business with an employer [who is] engaged in a labor dispute.” *National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 622 (1967) (footnote omitted). An example would be where the union puts pressure on a separate employer, so that it will cease doing business with the union’s employer and “bend his knee to the union’s will!” *Id.* at 637.

288. A typical union standards clause prohibits subcontracting of unit work to any employer whose wages, hours, and working conditions are less favorable than those enjoyed by the union. These clauses have been held primary because they serve to protect the union by removing an employer’s incentive to subcontract unit work to “substandard” contractors in order to avoid paying union wages. 545 F.2d at 1202 n.12.

289. *Id.* at 1198-99.

290. 386 U.S. 612 (1967). There, the Supreme Court considered a challenge under § 8(e) of the Act to a provision in a labor contract which authorized carpenters to refuse to handle doors which were pre-fitted (made ready for immediate installation) prior to shipment to the jobsite; the object of this “product boycott” was held to be primary since its purpose was to preserve the fitting work for the bargaining unit employees.

291. *Id.* at 644 (footnote omitted).

292. *Id.* at 645.

293. The court rejected the Board’s finding that the relevant work unit was equivalent to the respective bargaining unit. 545 F.2d at 1201 n.11.

funds, by withholding services from delinquent subcontractors with the object of eliminating those deficiencies, the union sought to benefit all of its members. Thus, since the agreement was not substantially for the benefit of the employees in the relevant work unit, it could not be considered a lawful primary agreement.²⁹⁴

Thus, the Ninth Circuit refused to carve out another exception to section 8(e) for secondary boycotts to collect overdue fringe benefit trust contributions. The case is important for a number of other reasons. First, it exemplifies the court's difficulty in distinguishing primary and secondary activity, due to the latent ambiguity of primary and secondary activity in the Act itself. Second, it points to the difficulty in applying a test of the "substantiality" or "directness" of benefits to work units²⁹⁵ to distinguish primary activity and secondary activity, where as here, the trust fund benefits both the members of the relevant work unit and the union at large. Although the Court in *National Woodwork* admonished the courts that the distinction between primary and secondary activity "will not always be a simple test to apply,"²⁹⁶ clearer guidelines are required.²⁹⁷

B. Discrimination by Employers

The NLRA provides that it is an unfair labor practice for an employer to discriminate in regard to "any term or condition of employment to encourage or discourage membership in any labor organization."²⁹⁸ *NLRB v. Electro Vector*²⁹⁹ involved a charge by the union that the company had discriminated against striking employees, who were later reinstated, by denying them year-end bonuses.³⁰⁰ Reversing the order of the Board, the court found that no violation of subsections 8(a)(1) and (3) of the Act³⁰¹ could lie because it had not been shown that there was

294. The court stated that "the benefits sought to be achieved by the clauses extend far beyond the relevant work unit and . . . the benefits conferred on the work unit are no more 'direct' or substantial than those conferred on other units." *Id.* at 1202 (footnotes omitted).

295. For a discussion of a suggested test to be used, see Note, *A Rational Approach to Secondary Boycotts and Work Preservation*, 57 VA. L. REV. 1280, 1297-300 (1971).

296. 386 U.S. at 618 (footnote omitted).

297. See note 295 *supra*.

298. 29 U.S.C. § 158(a)(3) (1970).

299. 539 F.2d 35 (9th Cir. 1976), *cert. denied*, 98 S. Ct. 64 (1977).

300. The National Labor Relations Act provides in § 8(a):

It shall be an unfair labor practice for an employer

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

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

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

301. *Id.*

employer discrimination with respect to "any term or condition of employment" as required by section 8(a)(3) of the Act.³⁰²

In reaching this conclusion, the Ninth Circuit emphasized that while a regularly paid bonus may come to be relied upon by employees as part of total compensation,³⁰³ and thus it may become a term or condition of employment, a bonus must "have been paid over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, part of their anticipated remuneration."³⁰⁴ Here the court found that since the cash bonus had only been given for two years and was agreed to by the owner informally, the bonus was a gift rather than a wage. Therefore, any refusal to pay the bonus could not be employer discrimination with respect to any term or condition of employment.

*NLRB v. Tayko Industries*³⁰⁵ involved a situation where shortly after an election petition had been filed with the Board,³⁰⁶ the employer granted raises to seven members of the bargaining unit. It was charged that this action violated section 8(a)(1) of the Act.³⁰⁷ The president of the company had testified that he was aware of the pending election when he authorized the wage increases, but that this knowledge did not influence the wage increase. Despite his denials of anti-union sentiment, the court found that the "increases could not avoid having an influence upon the pending election."³⁰⁸ The court based its decision on *NLRB v. Exchange Parts Co.*,³⁰⁹ a Supreme Court case holding that an actual grant of benefits during an election campaign, given with the intention of inducing employees to reject the union, is unlawful; the employees might interpret such a gesture as a demonstration of employer economic power

302. See note 300 *supra*. See also *E.I. DuPont De Nemours & Co. v. NLRB*, 480 F.2d 1245, 1248 (4th Cir. 1973).

303. 539 F.2d at 37. See also *Century Elec. Motor Co. v. NLRB*, 447 F.2d 10, 14 (8th Cir. 1971); *NLRB v. Harrah's Club*, 403 F.2d 865, 874 (9th Cir. 1968).

304. 539 F.2d at 37 (quoting *NLRB v. Nello Pistorosi & Son, Inc.*, 500 F.2d 399, 400 (9th Cir. 1974)).

305. 543 F.2d 1120 (9th Cir. 1976).

306. Section 9 of the Act generally describes the procedures and rules regarding representatives and elections. 29 U.S.C. § 159 (1970).

307. Section 8(a) provides in part: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . ." 29 U.S.C. 158(a) (1970). Section 157 provides in part 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 . . ." *Id.* § 157.

308. 543 F.2d at 1122.

309. 375 U.S. 405 (1964).

held in reserve, which could just as readily be used for reprisals.³¹⁰ The Ninth Circuit and other courts have generally held that absent a showing by the company of a proper business purpose or necessity, the announcement of a wage or benefit increase during the pendency of an election is itself evidence of unlawful motive.³¹¹ Therefore, while the inference of an illicit employer motive may be dispelled if the employer demonstrates that the grant was compelled by business necessity or by consistent past practice,³¹² the position of the courts, as illustrated by the instant case, is that finding anti-union sentiment is not essential to a determination that there was an unfair labor practice when the employer actually implements improvements in the course of an election campaign.

In *Queen Mary Restaurants Corp. v. NLRB*³¹³ the petitioners had raised the wages of their employees unilaterally, without prior notice, while the union and the company were engaging in collective bargaining negotiations. The union charged that this activity violated section 8(a)(5) of the Act³¹⁴ since it circumvented the duty of the company to negotiate the terms of the work agreement directly with the union representative.³¹⁵ The company defended its action on the ground that the raise was consistent with a long-standing practice and thus a continuation of the

310. *Id.* at 409-10. The Court said:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Id. at 409 (footnote omitted).

311. *See, e.g.,* *NLRB v. Styletek*, 520 F.2d 275, 281 (1st Cir. 1975); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 493 (4th Cir. 1972); *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 485 (10th Cir. 1967).

312. One court held that a prima facie violation was established by showing that the benefits were granted while an election was pending, writing: "It is obvious that the closer a wage benefit comes to the day of the election, the harder it will be for the union to answer, and the greater the danger that the benefit will be manipulated to sway the election." *NLRB v. Styletek*, 520 F.2d 275, 281 (1st Cir. 1975). *See also* *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 493 (4th Cir. 1972) (wage increase held lawful when all other business competitors had granted increase). *Cf. NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306 (1st Cir. 1969) (where employer demonstrates proper business purpose for pay increase prior to election, burden on NLRB to show primary motivation was anti-union sentiment).

313. 560 F.2d 403 (9th Cir. 1977). Other aspects of this case are discussed at notes 167-86 *supra* and 353-54 *infra* and accompanying text.

314. Section 8(a)(5) provides that "(a) It 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 section 159(a) of this title." 29 U.S.C. § 158(a) (1970).

315. In declaring this practice unlawful, the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962), pointed out that the practice serves to disrupt the position of the union negotiators, inhibit the discussion of the issues at the bargaining table, and that "such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union." *Id.* at 745 (footnote omitted).

status quo.³¹⁶ The company maintained that it did not attempt to avoid bargaining collectively with the union or attempt to interfere with the collective bargaining process. The company's corporate parent claimed it had a policy of paying non-union employees of its subsidiaries according to the wage scale of a rival union.

The court found that although the practice may have been long-standing with respect to other bargaining units, it was not a bargaining policy firmly established for the Queen Mary employees. Since there existed no status quo within *this* bargaining unit, the pay raise did interfere with the rights of the employees to bargain collectively. Thus, in determining whether a change in terms of employment during collective bargaining is a departure from the status quo, the test is whether it is a departure from the prior policy of the particular bargaining unit, and not the policy of the employer with respect to other bargaining units.

In *Mt. Vernon Tanker Co. v. NLRB*³¹⁷ the question presented was whether it is an unfair labor practice to require a seaman, without the presence of a union representative, to take part in a "logging," a procedure in which the seaman is given notice of an entry in the ship's log relating to misconduct with which he is charged. The court distinguished the case of *NLRB v. J. Weingarten, Inc.*³¹⁸ and held that due to the special master-servant relationship aboard a ship, coupled with the inherent nature of a "logging," it was not an unfair labor practice for seamen to be denied a union representative during a "logging" procedure.

In *Weingarten*, a clerk who had been suspected of taking food from a lunch counter was called in by a store detective for questioning. She requested the presence of a union representative, but her request was denied. In finding a violation of section 8(a)(1) of the Act,³¹⁹ the

316. The employer is free to grant general wage increases while negotiating if they are consistent with past company policy. As was stated in *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058 (8th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971): "Where there is a well-established company policy of granting certain increases at specific times, which is a part and parcel of the existing wage structure, the company is not required to inform the union and bargain concerning these increases." *Id.* at 1062.

Thus, in *State Farm Mut. Auto. Ins. Co.*, 195 N.L.R.B. 871, 79 L.R.R.M. 1621 (1972), the Board upheld an employer's unilateral grant during contract negotiations of a cost-of-living pay increase, where the increase was consistent with a known company policy and was tied objectively to government statistics. A wage increase during contract negotiations is also lawful if it follows a pattern of automatic increases at fixed intervals. *NLRB v. Southern Coach & Body Co.*, 336 F.2d 214 (5th Cir. 1964).

317. 549 F.2d 571 (9th Cir. 1977). See also notes 36-48 *supra* and accompanying text.

318. 420 U.S. 251 (1975).

319. Section 8(a)(1) prohibits an employer from interfering with the rights of employees to engage in collective bargaining, organization, and other mutual aid or protection procedures. 29 U.S.C. § 158(a)(1) (1970).

Supreme Court upheld the Board's conclusion that section 7 of the Act "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline."³²⁰ The basis of that right was founded upon the national labor policy which protects the exercise by workers of their freedom to associate, organize, and choose representatives for mutual aid and protection.³²¹

In *Mt. Vernon*, however, the Ninth Circuit found that the logging procedure was *not* an investigatory interview reasonably likely to result in discipline as that term is used in *Weingarten*. A "logging" is a proceeding in which a seaman is given formal notice of charges against him, and, since the proceeding is mandated by law, the captain cannot choose to dispense with the interview. The court also based its decision on the grounds that the section 7 right to engage in concerted activities for the purpose of mutual aid and protection is largely inapplicable to a ship at sea, due to the peculiar role of the captain as master of the ship.³²² While conceding that an order of the captain during the course of a voyage might form the basis of an unfair labor practice charge, the court emphasized that the captain's need for absolute authority, in order to preserve the lives of passengers and crew, as well as the safety of ship and cargo, made this particular section 7 right inapplicable during the course of a ship's voyage.³²³

C. Discrimination by Labor Organizations

The NLRA provides that it is an unfair labor practice for a union to discriminate against any employee on any ground other than the mem-

320. 420 U.S. at 256. The contours and limits of the statutory right were stated by the Court to be:

First, the right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection. . . . *Second*, the right arises only in situations where the employee requests representation. . . . *Third*, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes that the investigation will result in disciplinary action. . . . *Fourth*, exercise of the right may not interfere with legitimate employer prerogatives. . . . *Fifth*, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. *Id.* at 256-59.

321. *Id.* at 261-62 (citing 29 U.S.C. § 151 (1970)).

322. The court noted that many ordinary labor practices were inappropriate at sea and that "it may be doubted that concerted activities of seamen for mutual aid or protection, when in opposition to the directions of the ship's master, are to be tolerated at all during the course of a voyage." 549 F.2d at 575.

323. *Id.* The court also noted that workers at sea have been the beneficiaries of ameliorative legislation to protect their well-being at sea. *Id.* at 576 (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 38-39 (1942)). See 46 U.S.C. §§ 651-692 (1970).

ber's failure to tender periodic membership dues,³²⁴ or for a union to cause an employer to discriminate against an employee with respect to any term of employment.³²⁵

In *H.C. Macaulay Foundry v. NLRB*,³²⁶ an employee who was officially on leave to recover from injuries received a letter from the union stating that he would be discharged if his back dues were not paid on or before "the first pay day."³²⁷ The employee interpreted the letter as requiring him to pay his dues on the first payday after his return to work. The union, however, was unaware of the employee's absence from work and when payment did not come immediately, it requested the employer to discharge him for non-payment of dues. Since the employer and the union had a valid security clause requiring employees covered by the agreement to become and remain members of the union, the company discharged the employee as per the agreement.

The court held that due to the fiduciary duty that a union owes to an employee,³²⁸ where the union creates an ambiguity concerning an employee's payment of dues which results in the employee's discharge, the union bears the responsibility for the ambiguity. Since it was reasonable for the employee to assume that the deadline for payment of dues was the first payday after his return, rather than the first payday after receipt of the letter, the union violated section 8(b)(2) of the Act by initially requesting the employee's termination.³²⁹

The court further held that the employer violated the Act³³⁰ by failing to inquire into the circumstances behind the union's demand that the employee be discharged. This duty arises where the employer knows of circumstances that would cause him to question the propriety of the

324. 29 U.S.C. § 158(b)(2) (1970).

325. *Id.*

326. 553 F.2d 1198 (9th Cir. 1977).

327. *Id.* at 1200.

328. See *NLRB v. Hotel, Motel & Club Employees' Local 568*, 320 F.2d 254, 258 (3d Cir. 1963).

329. 553 F.2d at 1201. Section 8(b)(2) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . .
(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

29 U.S.C. § 158(b)(2) (1970).

330. Section 8(a)(3) provides, in part:

[N]o employer shall justify any discrimination against an employee for non-membership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership

29 U.S.C. § 158(a)(3) (1970).

discharge.³³¹ In determining this duty, the factors to be considered are the nature of the facts known to the employer and the degree of doubt that they would raise as to the legality of the union's action; the burden that further inquiry would impose on the employer; and the likelihood that an investigation would lead to prompt and certain resolution of the employer's uncertainty.³³²

Since it would have been a minimal burden for the company to investigate the requested discharge by simply telephoning the union officials, the company violated its duty to investigate imposed by the Act.³³³ The court held that the union terminated its liability when it requested that the company reinstate the employee.³³⁴

*NLRB v. International Longshoremen's and Warehousemen's Union Local 13*³³⁵ involved several charges of unfair labor practices against the union. Under a hiring hall agreement for longshoremen, registered "Class A" longshoremen were given first preference in dispatch to longshore jobs; second preference was given to limited registered men who were "Class B." Class A registrants were normally union members, while Class B registrants generally were not. The union's policy for several years required that applicants for Class B membership be sponsored by Class A registrants. The practical consequences were that virtually all sponsors were union members.

The court held that the union's requirement that all applicants for Class B hiring hall status be sponsored by Class A members, almost all of whom were union members, constituted an unfair labor practice in violation of the National Labor Relations Act.³³⁶ The court found that since the "natural effect of this sponsorship practice would be to encourage membership in the union by creating a discrimination in hiring in favor of Class B registrants who had been sponsored by Union members,"³³⁷ the union sponsorship plan unlawfully encouraged union mem-

331. 553 F.2d at 1202. See *NLRB v. Zoe Chem. Co.*, 406 F.2d 574, 580 (2d Cir. 1969).

332. 553 F.2d at 1202.

333. See note 330 *supra*.

334. 553 F.2d at 1202.

335. 549 F.2d 1346 (9th Cir.), *cert. denied*, 98 S. Ct. 397 (1977). See also text accompanying notes 93-104 *supra*.

336. It was found that the union had violated subsections 8(b)(1)(A) and 8(b)(2) of the Act. 549 F.2d at 1350. Subsection 8(b) provides in part: "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(b) (1970). Subsection 8(b)(2) makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . ." *Id.* § 158(b)(2). Subsection 8(a)(3) prohibits an employer from discriminating in a manner which encourages or discourages membership in a union. *Id.* § 158(a)(3).

337. 549 F.2d at 1352-53.

bership in violation of the Act.³³⁸ Further, it was found that the union violated its duty of fair representation by giving a referral preference to Class B members over non-registered workers.³³⁹ By insisting upon the sponsorship system, the union violated its duty to represent fairly all of the employees in the unit, including those Class B applicants who were without sponsors.

*NLRB v. Local 30, International Longshoremen's & Warehousemen's Union*³⁴⁰ involved a union petition for review of a Board finding that the union was guilty of an unfair labor practice. A former member of the union was found to have crossed the union's picket line, and was assessed a fine of \$3,150. The picket line was subsequently declared illegal. When the union threatened to bring suit to collect the fine, the member filed unfair labor practice charges. The union defended its conduct on the grounds that its action in fining its former member was exempt under section 8(b)(1)(A) of the Act³⁴¹ as intra-union discipline. In reiterating the internal affairs exemption postulated by the Supreme Court in *Scofield v. NLRB*,³⁴² the *Local 30* court pointed out that the union discipline for refusing to honor an illegal picket line violated two of the requirements announced by the Supreme Court: first, that the union discipline reflect a legitimate union interest; and second, that the disciplinary action impair no national policy Congress has embodied in the labor laws.³⁴³

338. For a discussion of subsections 8(a)(3) and 8(b)(1), (2), see *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

339. Under the duty of fair representation the exclusive bargaining agent has a statutory obligation to "serve the interests of all members without hostility or discrimination toward any," to exercise its discretion with "complete good faith and honesty," and to avoid arbitrary conduct. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). Later, the Supreme Court held that the union's obligation in determining whether to process or settle a grievance was not merely to refrain from patently wrongful conduct such as racial discrimination or personal hostility. Rather, the Court held that even "arbitrary" decisions by the union in the context of grievance processing were wrongful. *Vaca v. Sipes*, 386 U.S. 171, 190-91 (1967). See also notes 212-13 *supra* and accompanying text.

340. 549 F.2d 698 (9th Cir. 1977).

341. *Id.* at 702. Section 8(b)(1)(A) provides, in part, that a labor organization shall have the right "to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1)(A) (1970).

342. 394 U.S. 423 (1969). The Court stated that section "8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Id.* at 430.

343. 549 F.2d at 702. This decision is consistent with the position taken by the other circuits, *i.e.*, that union discipline will be invalidated where it operates to impair national labor policy. See, *e.g.*, *Verville v. International Ass'n of Machinists*, 520 F.2d 615 (6th Cir. 1975); *Local 1104, Communication Workers v. NLRB*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

D. Labor Organization Requests for Information

As an incident to the duty to bargain collectively with the union, an employer is required to furnish relevant information so that the union can bargain effectively on behalf of its members.³⁴⁴

In *San Diego Newspaper Guild Local 95 v. NLRB*,³⁴⁵ the union had requested information on certain employees being trained by the company to replace union members in the sole event of a strike. The company refused on the grounds that those employees were not doing any work within the covered work unit. The issues presented were whether the union was entitled to this information, and whether the company's refusal to furnish it constituted an unfair labor practice under subsections 8(a)(1) and (5) of the Act.³⁴⁶

Recognizing that an employer has a duty to furnish sufficient information to the union to enable it to engage in informed collective bargaining,³⁴⁷ the *Local 95* court focused upon the initial requirement that the information requested must always be relevant to the bargaining process.³⁴⁸ Since this request was for information concerning employees outside of the bargaining unit,³⁴⁹ the union had the burden of showing that the requested information was relevant to legitimate bargaining issues.³⁵⁰ Since the requested information was only relevant for the union to determine if the company had violated the collective bargaining agreement, the issue arose as to how great a showing the union must

344. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967).

345. 548 F.2d 863 (9th Cir. 1977).

346. Subsections 8(a)(1) and (5) provide:

It shall be an unfair labor practice for an employer—

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

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

29 U.S.C. § 158(a) (1970).

347. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *Standard Oil Co. v. NLRB*, 399 F.2d 639, 642 (9th Cir. 1968). The duty is based upon the belief that a union is unable to perform its essential function as bargaining agent without such information and without it no meaningful bargaining could take place.

348. As noted in *Emeryville Research Center v. NLRB*, 441 F.2d 880, 883 (9th Cir. 1971): "The first question [is] . . . always one of relevance. If the information requested has no relevance to any legitimate union collective bargaining need, a refusal to furnish it could not be an unfair labor practice."

349. Where the requested information is intrinsic to the core of the employer-employee relationship such as wage data, the information is considered presumptively relevant. *Id.* at 887. In that instance the employer has the burden to prove a lack of relevance. *Prudential Ins. Co. v. NLRB*, 412 F.2d 77 (2d Cir.), cert. denied, 396 U.S. 928 (1969).

350. See, e.g., *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969).

make in order to obtain the information. The court answered that "the showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful" but less than "an initial, burdensome showing."³⁵¹ The solution "is to require some initial, but not overwhelming, demonstration by the union that some violation is or has been taking place."³⁵² Since the union failed to make any initial showing that the company had violated the labor contract, the company's refusal to give the information was lawful.

In a related case, *Queen Mary Restaurants Corp. v. NLRB*,³⁵³ the Ninth Circuit held that the employer had committed an unfair labor practice when it delayed fulfilling its duty to supply the union during contract negotiations with the company's current health and welfare plans and seniority information. Since the information was relevant to the issues being negotiated,³⁵⁴ the company's failure to supply the information promptly constituted an unlawful refusal to bargain in good faith.

E. Employer Liability for Actions of Agents

The NLRA defines "employer" as any person acting as an agent of an employer, directly or indirectly,³⁵⁵ and "supervisor" as an individual who is required to exercise independent judgment in his control over the employment of others.³⁵⁶

In *NLRB v. Pacific Southwest Airlines*,³⁵⁷ the employer attempted to avoid a finding of an unfair labor practice by arguing that two of its shop managers who had pursued a course of illegal anti-union conduct were not "supervisors" within the meaning of the Act.³⁵⁸ Relying on a similar Ninth Circuit case,³⁵⁹ the court held that whether an employee is a "supervisor" is irrelevant where the employer acted through the employee.³⁶⁰ The decision in *Pacific Southwest Airlines* regarding the responsi-

351. 548 F.2d at 868-69.

352. *Id.* at 869.

353. 560 F.2d 403 (9th Cir. 1977).

354. *See* note 349 *supra*.

355. 29 U.S.C. § 152(2) (1970).

356. *Id.* § 152(11).

357. 550 F.2d 1148 (9th Cir. 1977).

358. 29 U.S.C. § 152(11) (1970) states:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

359. *NLRB v. L.B. Foster Co.*, 418 F.2d 1 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

360. This is consistent with the intent of Congress, which in 1947 declared in substance

bility of the acts of the employer for employees is consistent with decisions in other circuits.³⁶¹

V. LABOR ORGANIZATION LIABILITY TO MEMBERS

A. *Improper Discipline of Members*

In general, a union is free to enforce internal rules which reflect a legitimate union interest and are enforced only against members who are free to leave the union and escape the rules.³⁶² However, any coercion used to discourage a member's access to the NLRB or the courts is considered beyond the legitimate interests of a labor organization.³⁶³ The Labor Management Reporting and Disclosure Act (LMRDA)³⁶⁴ protects the right of a union member to bring suit against a union for its wrongful acts.

The Ninth Circuit recently decided two cases involving alleged violations of the LMRDA.³⁶⁵ In the first case, *Ross v. International Brotherhood of Electrical Workers*,³⁶⁶ a union official, Ross, had won reelection, but the regional vice president of the union ordered a new election and refused to install him. Ross then filed suits in state and federal court seeking to enjoin the new election, order his installation, and receive damages in tort against the union. Eventually Ross won the new election, but, as a result of his state and federal court suits, he was subjected to internal union charges of violating the IBEW's constitution, which required its members to exhaust internal union remedies for four months before resorting to the courts.³⁶⁷ He was found guilty and assessed a fine of \$10,000, but the assessment was subsequently enjoined.

that the usual principles of vicarious liability under the law of agency are to be applied to both the union and to the employee. Section 101(2) of the NLRA was amended to include within the term "employer" any person "acting as an agent" of an employer. National Labor Relations Act Amendment, Pub. L. No. 80-101, 61 Stat. 136, 137 (codified at 29 U.S.C. § 152(2) (1970)). In addition, § 152(13) was added, providing: "In determining whether any person is acting as an 'agent' of another person so as to make such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 152(13) (1970).

Section 152(13) permits the Board to impute to the employer not only actions expressly authorized but also those which are impliedly authorized. *J.S. Abercrombie Co.*, 83 N.L.R.B. 524, 24 L.R.R.M. 1115 (1949), *enforced*, 180 F.2d 578 (5th Cir. 1950).

361. *See, e.g.*, *Donovan v. NLRB*, 520 F.2d 1316, 1319 (2d Cir. 1975), *cert denied*, 423 U.S. 1053 (1976); *NLRB v. Broyhill Co.*, 514 F.2d 655, 658 (8th Cir. 1975); *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 331 (6th Cir. 1973).

362. *Scofield v. NLRB*, 384 U.S. 423 (1969).

363. *NLRB v. Industrial Union of Marine Workers*, 391 U.S. 418 (1968).

364. 29 U.S.C. §§ 401-531 (1970).

365. *Id.*

366. 544 F.2d 1022 (9th Cir. 1976).

367. *Id.* at 1023-24 n.1.

The issue presented to the court was whether the IBEW had the right to discipline Ross for bringing suit against it. Section 411(a)(4) of the LMRDA, the so-called "bill of rights" of union members,³⁶⁸ provides:

No labor organization shall limit the rights of any member thereof to institute an action in any court . . . : *Provided*, That 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 thereof³⁶⁹

The statute indicates that union members "may be required to exhaust reasonable hearing procedures" for up to four months. However, the court noted that this language was not intended to abrogate case law which holds that the "reasonableness," and thus the propriety of requiring exhaustion of intra-union remedies, depends on the circumstances of each case.³⁷⁰ Therefore, while unions are authorized to have hearing procedures for up to four months, the courts may in their discretion entertain a complaint, even though these procedures have not been exhausted.³⁷¹ The court refused to sustain the union's challenge based on the four-month provision, and entertained jurisdiction under section 412 of the LMRDA.³⁷²

The *Ross* court also rejected the union's claim that Ross was precluded from bringing suit under section 411(a)(4) because section 482 provided the exclusive remedy to actions concerning election disputes.³⁷³ Relying on a previous Ninth Circuit decision³⁷⁴ the court held that section 411(a)(4) was not limited by the nature of the member's suit,³⁷⁵ and that the

368. 29 U.S.C. § 411(a)(4) (1970).

369. *Id.*

370. *See* NLRB v. Industrial Union of Marine Workers, 391 U.S. 418, 427-28 (1968).

371. *Id.* at 428. The Supreme Court noted that while in some cases the four-month allowance may be required, it was not intended to be a grant of authority for unions to police their members more stringently, but rather a statement of policy that the courts may in their discretion "stay their hands for four months, while the aggrieved person seeks relief within the union." *Id.* at 426.

372. The right to sue for violations of § 411 is provided in § 412, which reads in part: "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412 (1970).

373. Section 482 provides that a member challenging the validity of an election shall follow internal union remedies for three months; if he has not obtained a final decision within that time he may file a complaint with the Secretary of Labor, who will investigate the charges. 29 U.S.C. § 482 (1970). Section 483 makes this remedy for challenging an election exclusive. *Id.* § 483.

374. *Operating Eng'rs Local 3 v. Burroughs*, 417 F.2d 370 (9th Cir.), *cert. denied*, 397 U.S. 916 (1969).

375. Under facts essentially similar to those in the instant case, the court in *Burroughs*

section's protection for a union member applies even when that member has brought a suit that will be dismissed for failure to follow the procedure required by sections 482 and 483.³⁷⁶ That Ross' actions were predicated upon his interest in retaining his office was immaterial, for the Supreme Court in *Hall v. Cole*³⁷⁷ had made it clear that title I of the LMRDA "was specifically designed to protect the union member's right to seek higher office within the union."³⁷⁸ The alleged distinction between the rights of a member and the rights of an officer was similarly rejected, as the protection afforded under section 411 applies equally to both.³⁷⁹ Finally, the court found no merit in the union's contention that Ross was not "assessed," rather than "fined," since the levy, no matter how it was labeled, served to limit Ross' right to sue in contravention of LMRDA mandates.

The second Ninth Circuit decision concerning a union member's rights under the LMRDA was *Phillips v. International Association of Bridge Workers Local 118*.³⁸⁰ In that case, a dispute³⁸¹ had arisen between the plaintiffs, union members, and defendants, the union and several of its officers. As a result, plaintiffs filed suit in Nevada, the state where the dispute had arisen. Defendants responded by bringing actions against plaintiffs in California state court as well as in federal court for the Eastern District of California. Plaintiffs then filed another suit against defendants, alleging malicious prosecution³⁸² and asserting federal rights under, *inter alia*, title I, section 101 of the LMRDA.³⁸³ The trial court dismissed the plaintiffs' action on the grounds that the complaint failed to

noted that the word "action" in § 411(a)(4) "is in no way limited and there is nothing in the Act which distinguishes between suits involving member as opposed to employee rights, [or] between suits involving internal as opposed to external union problems." *Id.* at 373 (footnote omitted).

376. *Amalgamated Clothing Workers Rank & File Comm. v. Amalgamated Clothing Workers Joint Bd.*, 473 F.2d 1303, 1306 (3d Cir. 1973).

377. 412 U.S. 1 (1973).

378. *Id.* at 14.

379. *See Cooke v. Orange Belt Dist. Painters No. 48*, 529 F.2d 815, 818 (9th Cir. 1976); *Sewell v. Grand Lodge of Int'l Ass'n of Machinists*, 445 F.2d 545, 550 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972); *Grand Lodge of Int'l Ass'n of Machinists v. King*, 335 F.2d 340, 343-44 (9th Cir.), *cert. denied*, 379 U.S. 920 (1964).

380. 556 F.2d 939 (9th Cir. 1977).

381. The nature of the disputes is not revealed by the court.

382. Plaintiffs alleged, *inter alia*, that

the [defendants'] actions were brought to cause [plaintiffs] to expend their financial resources in defense and thus make it difficult for them to pursue their Nevada actions; and that the actions were brought "to punish and reprimand plaintiffs for daring to bring action in the courts of the United States and the State of Nevada against these defendants"

556 F.2d at 940.

383. 29 U.S.C. § 411 (1970). A right to sue for violations of § 411 is provided by *Id.*

§ 412. *See* note 372 *supra*.

state a claim upon which relief could be granted,³⁸⁴ and the plaintiffs appealed.

The Ninth Circuit noted that under section 411(a)(5) of the LMRDA: No member of any labor organization may be fined, suspended, expelled, or *otherwise disciplined* except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written, specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.³⁸⁵

Thus, the question, as the court saw it, was "whether malicious prosecution of a civil suit by a labor organization or its officers acting in their official capacity against a member constitutes 'discipline.'" ³⁸⁶ The court noted that section 411(a)(5) does not prohibit all union discipline but only prohibits "improper disciplinary action," *i.e.*, disciplinary action undertaken in the absence of the specific safeguards prescribed by the section.³⁸⁷

Drawing on the reasoning of a recent Second Circuit opinion,³⁸⁸ the court decided that when the alleged disciplinary action is in fact an invocation of a legal process, such as the institution of a civil suit, then the safeguards of section 411(a)(5) will necessarily be provided. The judicial proceedings themselves provide a union member with notice of the specific charges underlying the union's suit qua disciplinary action, time to prepare a defense, and a full and fair hearing.³⁸⁹ Further, "if the judicial process was invoked improperly against the union member, he will have the full range of remedies provided by law."³⁹⁰ Thus, the court concluded that "malicious prosecution is not 'discipline' within the meaning of § 411(a)(5) and thus cannot constitute a violation of that subsection."³⁹¹

However, the court arrived at a different result when it considered section 411(a)(4) of the LMRDA. That section provides, in pertinent part:

384. See FED. R. CIV. P. 12(b)(6).

385. 556 F.2d at 941 (quoting 29 U.S.C. § 411(a)(5) (1970) (emphasis in original)).

386. 556 F.2d at 941. See generally Beard & Player, *Union Discipline of Its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 GA. L. REV. 383 (1975); Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727 (1969).

387. 556 F.2d at 941. See note 386 *supra* and articles cited therein.

388. See *Morrissey v. National Maritime Union*, 544 F.2d 19 (2d Cir. 1976) (union procured arrest of member on charges of criminal trespass and disorderly conduct).

389. 556 F.2d at 941.

390. *Id.*

391. *Id.* at 942.

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, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding³⁹²

In deciding whether the malicious prosecution of a civil suit by a union against a member serves to "limit the right" of that member to institute actions, the court relied on the case of *Operating Engineers Local 3 v. Burroughs*.³⁹³ In *Burroughs*, the Ninth Circuit held that the disciplining of a member for bringing suit against the union without first exhausting the union's internal hearing procedures constituted a violation of subsection 411(a)(4).³⁹⁴ While the discipline in *Burroughs* was in the nature of a union-imposed fine, the court in *Phillips* saw no reason to distinguish such fines from malicious prosecution of civil suits, inasmuch as they both tend to inhibit the member's exercise of his right to institute civil suits.³⁹⁵ As the court explained, "If a union member's right to sue is to have any meaning, courts must be ever vigilant in protecting that right against indirect and subtle devices as well as against direct and obvious limitations."³⁹⁶ Consequently, the court held that the plaintiffs had stated a legally cognizable claim under subsection 411(a)(4).³⁹⁷ The district court's ruling was reversed, and the case was remanded.³⁹⁸

B. Duty of Fair Representation

Although the Labor Management Relations Act does not expressly establish a duty on the part of unions to fairly represent all employees within the bargaining unit for which the union is certified, such a duty has been held to be implicit in that act.³⁹⁹ The union breaches its duty

392. 29 U.S.C. § 411(a)(4) (1970).

393. 417 F.2d 370 (9th Cir.), *cert. denied*, 397 U.S. 916 (1969).

394. *Id.* at 373-74. *Accord*, *Ross v. IBEW*, 544 F.2d 1022, 1024-25 (9th Cir. 1976). The *Ross* court also relied on *Burroughs* in ruling that despite an employee's failure to invoke internal union procedures for resolving election disputes, as required by 29 U.S.C. § 482 (1970), and despite his institution of a civil suit, the union's action in disciplining him for bringing the suit was nevertheless violative of § 411(a)(4). The *Ross* court cited *Burroughs* for the rule that § 411(a)(4) is not limited by the nature of the member's suit. 544 F.2d at 1024. Thus, "[s]ection 411(a)(4) establishes protection for a union member that applies even when that member has brought a suit that will be dismissed for failing to following [*sic*] the procedure required by §§ 482 and 483." *Id.* See text accompanying notes 366-79 *supra*.

395. 556 F.2d at 942. See *IBEW Local 1186 v. Eli*, 307 F. Supp. 495, 500 (D. Hawaii 1969) (§ 411(a)(4) protects "against reprisals as well as against more formal limits" on right to sue).

396. 556 F.2d at 942.

397. *Id.*

398. *Id.*

399. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Ford Motor Co. v. Huffman*, 345 U.S.

only when its manner of dealing with a member is "arbitrary, discriminatory, or in bad faith."⁴⁰⁰ In two cases within the survey period the Ninth Circuit held that while fair representation precludes complicity between a union and an employer to ignore valid grievances, it does not require the union to pursue claims which the union reasonably judges to be without merit.

In *Hughes v. International Brotherhood of Teamsters Local 683*,⁴⁰¹ union member Hughes claimed his employer had assigned him to the "lowest paying and most arduous tasks" because of his insistence that the employer comply with the strict letter of the collective bargaining agreement. Shortly thereafter he was fired, allegedly for poor performance. When his union refused to bring the matter of his discharge to arbitration, Hughes filed suit. The district court granted summary judgment⁴⁰² in favor of the union, finding that the union had acted on the basis of relevant considerations and without arbitrariness, capriciousness or discriminatory motivation.⁴⁰³

On appeal, the Ninth Circuit observed that "[i]n order to state a claim for breach of fair representation an employee need only show 'arbitrary or bad-faith conduct on the part of the Union in processing his grievance.'"⁴⁰⁴ He or she need not allege that the union participated in fraud or deceitful conduct.⁴⁰⁵

Acknowledging the issue to be "a close one,"⁴⁰⁶ the court concluded that the pleadings and affidavits presented below "raised an inference of complicity between [the union] and [the employer] . . . sufficient to withstand the motion for summary judgment."⁴⁰⁷ Among the factors the court cited in support of its conclusion were: (1) affidavits from Hughes' fellow employees and employees of companies engaged in similar work stating that "employees who stood firm on enforcing the collective bargaining agreement were fired at the first opportunity their employers had to 'legitimately' discharge or demote them;"⁴⁰⁸ (2) evidence that the union had frequently responded to members' complaints by telling them

330, 337 (1953). See also *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 199 (1944) (Railway Labor Act).

400. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

401. 554 F.2d 365 (9th Cir. 1977).

402. See FED. R. CIV. P. 56.

403. 554 F.2d at 367.

404. *Id.* (quoting *Vaca v. Sipes*, 386 U.S. 171, 193 (1967)).

405. 554 F.2d at 367. See *Duggan v. International Ass'n of Machinists*, 510 F.2d 1086, 1088 (9th Cir.), *cert. denied*, 421 U.S. 1012 (1975); *Beriault v. Local 40, Super Cargoes & Checkers*, 501 F.2d 258, 264 (9th Cir. 1974).

406. 554 F.2d at 367.

407. *Id.*

408. *Id.* at 368.

“not to rock the boat,” or by promising action and then doing nothing;⁴⁰⁹ and (3) the perfunctory nature of Hughes’ interview with the union’s attorney.⁴¹⁰ Since Hughes “raise[d] an inference as to [the union’s] improper motivation in refusing to arbitrate his discharge,”⁴¹¹ the district court’s grant of summary judgment was reversed and the case was remanded for further proceedings.⁴¹²

In *Fountain v. Safeway Stores, Inc.*,⁴¹³ plaintiff was a clerk at a local Safeway store who refused to wear a tie on the job, as required by Safeway’s dress code. He claimed that such a requirement constituted sex discrimination.⁴¹⁴ As a result, he was suspended from work and, in due course, fired. When he complained to his union, it advised him to return to work wearing a tie and informed him that it would not pursue his claim because, in the opinion of the union’s counsel, he had a “bad case.”⁴¹⁵ Plaintiff filed suit alleging, *inter alia*, that the union had wrongfully refused to process the grievance stemming from his discharge. The district court granted summary judgment in favor of the union, and plaintiff appealed.⁴¹⁶

The Ninth Circuit noted that plaintiff’s claim against the union was inextricably tied to the merits of his case against Safeway.⁴¹⁷ Declaring that the characterization of plaintiff’s action as a “bad case” was “perhaps generous,”⁴¹⁸ the court ruled that regulations requiring male employees to conform to different dress and grooming standards than female employees do not constitute sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964.⁴¹⁹ Having so found, the court held that the union’s refusal to pursue appellant’s grievance was not a breach of its duty of fair representation.⁴²⁰ “To refuse to process a bad case is in itself not arbitrary. Such a refusal is most reasonable and in fact essential to the grievance and arbitration system.”⁴²¹

409. *Id.*

410. “Ostensibly an effort to gather the facts, the interview merely consisted of [the union attorney] asking appellant to admit or deny [the employer’s] charges against him without giving appellant sufficient opportunity to qualify his answers.” *Id.*

411. *Id.*

412. *Id.* at 369.

413. 555 F.2d 753 (9th Cir. 1977).

414. *Id.* at 755.

415. *Id.*

416. *Id.*

417. *Id.* at 756.

418. *Id.* at 755.

419. *Id.* See *Baker v. California Land Title Co.*, 507 F.2d 895, 896-98 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975).

420. 555 F.2d at 757.

421. *Id.* at 756-57. See *Vaca v. Sipes*, 386 U.S. 171, 191 (1967).

VI. INJUNCTIONS

In 1932 Congress enacted the Norris-LaGuardia Act,⁴²² in part to protect the growing labor movement from the debilitating effect of injunctions.⁴²³ Language contained in the subsequently enacted Labor Management Relations Act,⁴²⁴ however, seemed to run counter to both the policy and rules that had been set forth in the Norris-LaGuardia Act.⁴²⁵ This apparent conflict in congressional intent and its attendant problems were resolved by the Supreme Court in *Boys Markets, Inc. v. Retail Clerks Union Local 770*,⁴²⁶ decided in 1970. Today, when a court is requested to provide injunctive relief against a labor organization, its task is no longer one of reconciling inconsistent legislation but one of determining whether *Boys Markets* is applicable to the situation.⁴²⁷

Injunctions against management, on the other hand, have not been plagued by the difficulties described above. Nevertheless, they frequently give rise to special problems of their own. The recent Ninth Circuit case of *Amalgamated Transit Union Division 1384 v. Greyhound Lines, Inc.*⁴²⁸ is illustrative. In its original opinion⁴²⁹ the Ninth Circuit affirmed the issuance of a preliminary injunction under section 301 of the Labor Management Relations Act⁴³⁰ compelling the employer, Greyhound Lines, Inc. (Greyhound), to maintain the status quo pending arbitration of a dispute concerning Greyhound's right under the collective bargaining agreement to unilaterally change the work cycles of bus drivers.⁴³¹ This judgment was vacated by the Supreme Court⁴³² and the case was remanded for further consideration in light of *Buffalo Forge Co. v. United Steelworkers*.⁴³³

422. 29 U.S.C. §§ 101-115 (1970).

423. See *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 250-51 (1970); 29 U.S.C. § 102 (1970).

424. 29 U.S.C. § 185 (1970).

425. See note 460 *infra*.

426. 398 U.S. 235 (1970). See note 460 *infra*.

427. See *Alyeska Pipeline Serv. Co. v. International Bhd. of Teamsters Local 959*, 557 F.2d 1263, 1266 (9th Cir. 1977) (discussed at notes 459-474 *infra* and accompanying text). See generally Note, *Federal Labor Policy and the Scope of the Prerequisites for a Boys Market Injunction*, 19 St. LOUIS L.J. 328 (1975).

428. 550 F.2d 1237 (9th Cir. 1977).

429. *Transit Union, Div. 1384 v. Greyhound Lines, Inc.*, 529 F.2d 1073 (9th Cir.), vacated, 429 U.S. 807 (1976).

430. 29 U.S.C. § 185 (1970).

431. Greyhound desired to "change the work cycles of bus drivers operating the Vancouver-Seattle and Seattle-Portland runs from their existing cycles of six days on, three days off, and four days on, three days off, respectively, to a straight weekly regimen of five days on and two days off." 529 F.2d at 1075.

432. *Greyhound Lines, Inc. v. Transit Union Div. 1384*, 429 U.S. 807 (1976).

433. 428 U.S. 397 (1976). See note 464 *infra*. In *Buffalo Forge*, the Court ruled that a

On reconsideration, the Ninth Circuit reached a different result. In a brief but significant decision, the court declared that “[w]hile a promise [by an employer] to submit a dispute to arbitration may justify a finding of an implied duty not to strike . . . , such a promise [by a union] does not imply a duty on the part of the employer to preserve the status quo pending arbitration.”⁴³⁴ The difference, according to the court, stems from the fact that a union’s strike pending arbitration will generally interfere with and disrupt the arbitration process to which the parties have bound themselves, while an employer’s alteration of the status quo will not. “The implication of a duty not to strike may be ‘essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract.’”⁴³⁵ In addition, the court noted that in the event the arbitrator ruled against Greyhound, “the situation can be restored substantially to the status quo *ante*.”⁴³⁶ For these reasons, the court held that the injunction had been improperly entered.⁴³⁷

VII. JUDICIAL REVIEW OF LABOR DECISIONS

A. Arbitration Decisions

There is a strong federal policy favoring peaceful resolution of labor disputes through binding arbitration.⁴³⁸ In furtherance of this policy, the courts have consistently refused to review the merits of a dispute which the parties have submitted to arbitration under an agreement binding them to the award.⁴³⁹ Only when the arbitrator exceeds his authority, as defined by the parties in their collective bargaining agreement or in their

preliminary injunction could not properly issue against a union engaged in a sympathy strike in support of sister unions, despite the presence of a no-strike clause in the collective bargaining agreement and the arbitrability of the question of whether the union’s actions were in violation of that agreement. The *Boys Markets* exception to the Norris-LaGuardia Act (*see* note 460 *infra*) did not apply since “the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract.” *Buffalo Forge*, 428 U.S. at 407. The Court reasoned that, under the circumstances, the quid pro quo for the union’s promise not to strike, *i.e.*, the employer’s promise to arbitrate labor disputes, was absent. *See* note 463 *infra*. Consequently, an injunction enforcing the no-strike provisions of the collective bargaining agreement was not permissible. *Cf.* *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 237-38 (1970) (grievance within arbitration agreement) (discussed in note 460 *infra*).

434. 550 F.2d at 1238.

435. *Id.* at 1239 (quoting *Buffalo Forge*, 428 U.S. at 411).

436. 550 F.2d at 1239. *Cf.* *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 254 (1970) (finding of irreparable injury) (discussed in note 460 *infra*).

437. 550 F.2d at 1239.

438. *See, e.g.*, *Gateway Coal Co. v. UMW*, 414 U.S. 368, 377 (1974); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). *See also* 29 U.S.C. § 171 (1970).

439. *See, e.g.*, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593,

stipulation of issues to be resolved,⁴⁴⁰ or when the arbitration proceedings fail to meet requirements of fundamental fairness (*e.g.*, notice, a full and fair hearing),⁴⁴¹ will the courts refuse to uphold the arbitration award.

In *International Brotherhood of Teamsters Local 117 v. Washington Employers, Inc.*,⁴⁴² the Ninth Circuit upheld an arbitration award based on state statutes despite a possible conflict with federal labor law. In this case a group of Washington fish wholesalers entered into a collective bargaining agreement with the Teamsters Union. Six days after the agreement was signed, the Federal Pay Board put into effect certain regulations which set a ceiling of 5.5 percent on wage increases in new labor agreements.⁴⁴³ Since the wage increases under the collective bargaining agreement were in excess of Pay Board guidelines, the employers informed the union that they would seek a ruling from the Pay Board as to the propriety of the increases. The employers further stated that the increases would be withheld pending the Pay Board's decision, but that they would be implemented retroactively if approval was obtained.⁴⁴⁴ The union argued that the employers were obligated to pay the increases and demanded that the issue be settled through the grievance and arbitration procedures set forth in the collective bargaining agreement.⁴⁴⁵ In addition, the union claimed that, under Revised Code of Washington sections 49.52.050⁴⁴⁶ and 49.52.070,⁴⁴⁷ the employers would have to pay double damages to those employees affected by the withholding of the wage increases. These statutes provide that where an employer has willfully paid an employee a wage lower than the one specified by contract between the parties, the employer is guilty of a misdemeanor and may be held liable to the employee in a civil action for an amount equal to twice the total of the wages withheld.

When the employers refused to arbitrate the dispute, the union filed suit in federal district court to compel arbitration under the collective

596 (1960); *Meat Cutters Local 540 v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817, 819 (5th Cir. 1973); *Henderson v. Eastern Gas & Fuel Assocs.*, 290 F.2d 677, 680 (4th Cir. 1961); *Woolley v. Eastern Air Lines, Inc.*, 250 F.2d 86, 90 (5th Cir. 1957); *Bower v. Eastern Airlines, Inc.*, 214 F.2d 623, 625 (3d Cir. 1954).

440. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Meat Cutters Local 540 v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817, 819 (5th Cir. 1973).

441. *See Bower v. Eastern Airlines, Inc.*, 214 F.2d 623, 626-27 (3d Cir. 1954).

442. 557 F.2d 1345 (9th Cir. 1977).

443. 36 Fed. Reg. 21,790 (1971).

444. 557 F.2d at 1346-47.

445. *Id.* at 1347. The agreement provided for the resolution of any dispute or grievance between the union and the employer through a series of internal adjudicatory steps, culminating in "final and binding" arbitration to resolve disputes not settled internally. *Id.* at 1347 n.1.

446. WASH. REV. CODE § 49.52.050 (1974).

447. *Id.* § 49.52.070.

bargaining agreement.⁴⁴⁸ Shortly thereafter, the Pay Board approved the wage increases and they were implemented retroactively. Thus, the only remaining issue was the union's claim that its employees were entitled to double damages under Washington law. The union dismissed its suit without prejudice in exchange for the employers' stipulation to arbitrate this issue.⁴⁴⁹ The arbitrator found that the employers had willfully withheld the wages due the employees and that the relevant statutes made the award of double damages mandatory.⁴⁵⁰ When the employers refused to comply with the award, the union filed suit to enforce it under section 301 of the Labor Management Relations Act (LMRA).⁴⁵¹

On appeal from a district court decision against the union,⁴⁵² the employers argued that the arbitrator had exceeded his jurisdiction by basing his award on state statutes in conflict with, and preempted by, federal law. In particular, they contended that, in light of the need for uniformity in the law governing collective bargaining agreements, section 301 of the LMRA preempted all state legislation in that area.⁴⁵³

448. 557 F.2d at 1347. Suits by and against labor organizations, including suits to compel arbitration under collective bargaining agreements, are authorized by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970). *See* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 449-56 (1957); *Haig Berberian, Inc. v. Cannery Warehousemen*, 535 F.2d 496, 498 & n.1 (9th Cir. 1976); *Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F.2d 133, 134-35 (2d Cir. 1957).

449. 557 F.2d at 1348.

450. *Id.* The arbitrator based his conclusion on the Pay Board regulations which, he declared, made it "abundantly clear" that implementation of the wage increases was permitted unless and until the Pay Board acted favorably on the employers' challenge. *Id.*

451. *See* note 448 *supra*.

452. The district court held for the employers on two grounds: (1) that WASH. REV. CODE § 49.52.070 (1974) was preempted insofar as it applies to collective bargaining agreements governed by federal law (*see* note 453 *infra*); and (2) that the award was unenforceable since federal labor policy under 29 U.S.C. § 185 (1970) precluded an award of punitive damages. 557 F.2d at 1349. In fact, the courts are divided on the issue of whether and when such damages may be awarded. *See, e.g.,* *Hotel & Restaurant Employees v. Michelson's Food Servs., Inc.*, 545 F.2d 1248, 1254 (9th Cir. 1976); *Butler v. Yellow Freight Sys., Inc.*, 514 F.2d 442, 454 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975); *Holodnak v. Avco Corp.*, 514 F.2d 285, 291-92 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975); *Williams v. Pacific Maritime Ass'n*, 421 F.2d 1287, 1289 (9th Cir. 1970).

453. 557 F.2d at 1349-50. *See* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). When Congress has unmistakably declared that its enactments alone are to regulate a particular aspect of interstate commerce, state laws regulating that aspect of commerce are preempted. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. at 525; *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. at 633. Of course, regardless of whether Congress has manifested an intention to preempt *all* state legislation in the field, congressional enactments override all state laws with which they directly conflict. U.S. CONST. art. VI.

The Ninth Circuit held that a ruling on whether the Washington statutes conflict with section 301 was unnecessary since the employers had waived any objections to the arbitrator's authority when they agreed to submit the issue of their liability under those statutes to arbitration.⁴⁵⁴ The court noted the employers' stipulation that the "sole issue" upon which the arbitrator was to rule was whether the employers' actions violated the relevant statutes.⁴⁵⁵ "[H]aving agreed to submit the issue of their liability under [the statutes] to binding arbitration, the Employers may not now be heard to challenge the applicability of those statutes."⁴⁵⁶

The court also rejected the employers' argument that enforcement of the punitive damage award would be inconsistent with federal labor policy and, thus, contrary to public policy. Acknowledging the possibility that "the application of state statutes such as those at issue would frustrate the federal interest in a uniform federal law of collective bargaining agreements,"⁴⁵⁷ the court nevertheless viewed the effect of enforcement in this particular case as *de minimis*: "[W]e think that the strong federal policy in favor of the peaceful and speedy resolution of industrial disputes through binding arbitration far outweighs any possible adverse impact."⁴⁵⁸

*Aleyska Pipeline Service Co. v. International Brotherhood of Teamsters Local 959*⁴⁵⁹ involved several important questions regarding an arbitrator's jurisdiction vis-a-vis that of the federal courts. Of particular interest was the issue of whether a federal court's refusal to issue a *Boys Markets* injunction⁴⁶⁰ against a striking and picketing union has any

454. 557 F.2d at 1350 (citing *Ficek v. Southern Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965)).

455. 557 F.2d at 1347.

456. *Id.* at 1349. *Accord*, *Santos v. District Council of Carpenters*, 547 F.2d 197, 201 (2d Cir. 1977) (one who loses in arbitration may not ask court to redetermine the merits of his claim); *Meat Cutters Local 195 v. Cross Bros. Meat Packers, Inc.*, 518 F.2d 1113, 1121 (3d Cir. 1975) (loser in arbitration proceeding not permitted to raise, for the first time, objection to arbitration panel after award has been made).

457. 557 F.2d at 1350. This language suggests that the Ninth Circuit might have been willing to overturn the Washington statutes if the question of their validity had properly been before the court.

458. *Id.* at 1350-51.

459. 557 F.2d 1263 (9th Cir. 1977).

460. In a landmark case, *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970), the Supreme Court sought to reconcile the explicit language of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970), with § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970). Section 4 of the Norris-LaGuardia Act provides, in part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing . . . any of the following acts:

effect upon an arbitrator's jurisdiction to assess the propriety of that picketing under the parties' collective bargaining agreement.⁴⁶¹

Aleyska Pipeline Service Co. (Aleyska) is a consortium of eight oil companies responsible for building the Trans-Alaska Pipeline System (TAPS). Aleyska entered into a comprehensive collective bargaining agreement with the International Brotherhood of Teamsters and its local affiliates, including Local 959. This agreement, entitled the TAPS Agreement, took effect on April 29, 1974 and covered work and occupations relevant to the pipeline project.

On August 4, 1976, Local 959 set up a picket line on the only road leading to the Valdez terminal, a key project construction site. The picketing grew out of a dispute between Local 959 and a subcontractor performing services at the Valdez site, over the assignment of certain "backhaul" work. In response to this union action, Aleyska filed suit in district court seeking both injunctive relief and damages for breach of the TAPS Agreement no-strike provision.⁴⁶²

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, . . . by any . . . method not involving fraud or violence
29 U.S.C. § 104 (1970). Under this language, federal courts would appear to have no jurisdiction to enjoin a union from striking and/or picketing.

On the other hand, § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970) authorizes suits by and against labor organizations for the enforcement of collective bargaining agreements, which agreements frequently contain no-strike clauses. See note 448 *supra* and cases cited therein. A suit under § 301 against a union for the enforcement of a no-strike clause in a collective bargaining agreement is, in effect, a request to enjoin a union from striking. Such a request is potentially in conflict with the Norris-LaGuardia anti-injunction language.

In *Boys Markets*, the Court created a narrow exception to the Norris-LaGuardia Act. It held that injunctive relief against a striking union is permitted where: (1) the collective bargaining agreement between the parties contains a mandatory arbitration or adjustment procedure; (2) the court finds that the strike stems from a grievance which both parties are contractually bound to arbitrate; and (3) the court orders the employer to arbitrate as a condition to his obtaining an injunction against the strike. 398 U.S. at 253-54. In addition, such an injunction, like all injunctions, must be warranted under ordinary principles of equity. *Id.* at 254. The Court reasoned

that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.

Id. at 253. See generally Note, *Federal Labor Policy and the Scope of the Prerequisites for a Boys Market Injunction*, 19 St. Louis L.J. 328 (1975).

461. 557 F.2d at 1266.

462. Sections 1 and 3 of Article VII of the TAPS Agreement provided, in relevant part, as follows:

On August 6, 1976, the district court issued a temporary restraining order prohibiting picketing at the terminal site. However, Alyeska's motion for a preliminary injunction was subsequently denied on the grounds that the dispute underlying the picketing was not within the compulsory arbitration clause of the TAPS Agreement.⁴⁶³ The court ruled that the fact that the agreement contained a general no-strike provision could not, by itself, serve as the basis for a *Boys Markets* injunction.⁴⁶⁴

Alyeska then instituted arbitration proceedings, as authorized by the TAPS Agreement, for a determination of whether the union had violated the agreement's no-strike provision. The arbitrator ruled that a violation had in fact occurred and he ordered the union to stop picketing the Valdez site. Alyeska then obtained a permanent injunction enforcing the arbitrator's award.⁴⁶⁵ The union appealed and presented several arguments to the Ninth Circuit.

First, the union argued that the district court's initial refusal to issue a *Boys Markets* injunction deprived the arbitrator of jurisdiction to determine whether the picketing itself violated the TAPS Agreement. The

1. During the term of this Project Agreement, there shall be no strikes, picketing, work stoppages, slowdowns or other disruptive activity for any reason by the Union or by any employee, and there shall be no lockout by the Contractor.

3. The Union shall not sanction, aid or abet, encourage or continue any work stoppage, strike, picketing or other disruptive activity at the Project site and shall undertake all possible means to prevent or to terminate any such activity. No employee shall engage in activities which violate this Article. Any employee who participates in or encourages any activities which interfere with the normal operation of the Project shall be subject to disciplinary action, including discharge.

557 F.2d at 1265 n.1.

463. 557 F.2d at 1265. Cf. *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 237-38 (1970) (grievance within agreement) (discussed in note 460 *supra*). The Supreme Court has reasoned that since the union's promise not to strike is usually the quid pro quo for the employer's undertaking to submit grievance disputes to the process of arbitration, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Gateway Coal Co. v. UMW*, 414 U.S. 368, 382 (1974). Thus, a union may be enjoined from striking only when the court concludes that the dispute giving rise to the strike is one which both parties are contractually bound to arbitrate. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 228 (1962) (dissenting opinion, adopted in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 254 (1970)).

464. 557 F.2d at 1265. See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 409 (1976) (5-4 decision) ("[A]side from the enforcement of arbitration provisions . . . permitted by *Boys Markets*, the Court has never indicated that the courts may enjoin actual or threatened contract violations The allegation of the complaint that the Union was breaching its obligation not to strike did not in itself warrant an injunction."). *Buffalo Forge* is discussed in note 433 *supra* and accompanying text.

465. 557 F.2d at 1265-66. Under § 301 of the LMRA, 29 U.S.C. § 185 (1970), federal district courts have jurisdiction to hear suits seeking enforcement of arbitration awards. See, e.g., *La Mirada Trucking, Inc. v. Local 166, Int'l Bhd. of Teamsters*, 538 F.2d 286, 288 (9th Cir. 1976), cert. denied, 97 S. Ct. 787 (1977) (discussed in note 474 *infra*).

court pointed out that in assessing the propriety of an injunction under *Boys Markets*, the inquiry should focus on the nature of the *dispute giving rise to the picketing*.⁴⁶⁶ Such an inquiry does not concern itself with the question of whether the picketing *itself* constitutes a breach of contract.⁴⁶⁷ Thus, “[t]he propriety of the union’s picket was an issue reserved for the arbitrator.”⁴⁶⁸

Second, the union argued that the arbitrator had no authority to determine the validity of the picketing activity because the underlying dispute which caused the picketing was outside the scope of the TAPS Agreement.⁴⁶⁹ The court agreed that the subject of the dispute was not expressly covered by the agreement but declared that this fact did not eliminate the arbitrator’s jurisdiction over the picketing question. The court observed, “Authority or jurisdiction to arbitrate a grievance ‘should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.’”⁴⁷⁰ The court found that the arbitration clause of the TAPS Agreement⁴⁷¹ was susceptible of such an interpretation, and hence the arbitrator’s authority was properly exercised.

Finally, the union argued that it should not have been bound by the TAPS Agreement when representing the particular employees involved since it had not been representing them at the time it signed the agreement.⁴⁷² The court rejected this argument, pointing out that the arbitrator had already ruled on the issue. It reiterated that

[t]he interpretation of a collective bargaining agreement is a question for the arbitrator. . . . [S]o far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him An award is legitimate if it draws its essence from the

466. 557 F.2d at 1266 (citing *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976)). See note 463 *supra*.

467. Indeed, in a suit under § 301 of the LMRA, 29 U.S.C. § 185 (1970), judicial inquiry “must be *strictly confined* to the question whether the reluctant party did agree to arbitrate the grievance.” *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (emphasis added).

468. 557 F.2d at 1266.

469. *Id.* Article III, § 1 of the TAPS Agreement declared that the Agreement “shall apply to the new construction work performed by the Contractor.” 557 F.2d at 1266 n.3. The union argued that the “backhaul” work over which the dispute had arisen was not “new construction work.”

470. 557 F.2d at 1266 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

471. Article VII, § 4 of the TAPS Agreement. This section is not set forth in the opinion, but its provisions are described by the court. 557 F.2d at 1265.

472. 557 F.2d at 1267. The TAPS Agreement, which Local 959 had signed, went into effect on April 29, 1974. Thereafter, the employees of Chicago Bridge and Iron elected Local 959 as their bargaining agent. *Id.* at 1264.

agreement and only when the arbitrator's words manifest an infidelity to this obligation [to construe the agreement] may the courts refuse enforcement of the award.⁴⁷³

The court was not prepared to say that the arbitrator had "manifest[ed] an infidelity" to the TAPS Agreement when he found that it was binding on the employees. Consequently, the arbitration decision was upheld,⁴⁷⁴ and the district court's decision to issue a permanent injunction was affirmed.

473. *Id.* at 1267 (quoting *San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co.*, 407 F.2d 1327, 1327 (9th Cir. 1969)). See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). See also *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). But see *General Tel. Co. v. IBEW Local 89*, 554 F.2d 985, 987 (9th Cir. 1977) (Anderson, J., dissenting) (arbitration award enforced notwithstanding fact that "arbitrator's interpretation was gleaned from the parties' prior conduct and from an examination of their intent as evidenced in earlier negotiations."). Cf. *International Bhd. of Teamsters Local 117 v. Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977) (voluntary submission/stipulation to arbitration supplements arbitration clause in collective bargaining agreement and cures any defects therein) (discussed at notes 442-58 *supra* and accompanying text); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 809 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960) (same).

474. 557 F.2d at 1268.

Other recent Ninth Circuit cases in which an arbitration award was upheld include *General Tel. Co. v. IBEW Local 89*, 554 F.2d 985 (9th Cir. 1977) (see note 473 *supra*); *Krieter v. Lufthansa German Airlines, Inc.*, 558 F.2d 966 (9th Cir. 1977) (per curiam); and *La Mirada Trucking, Inc. v. Local 166, Int'l Bhd. of Teamsters*, 538 F.2d 286 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 787 (1977). In *Krieter*, the collective bargaining agreement provided for the resolution of disputes through referral to a system board of adjustment or, by mutual agreement, through submission to arbitration. When a dispute arose as to the validity of Lufthansa's discharge of Krieter, the parties agreed to submit the dispute to an arbitrator. The arbitrator ruled against the airlines, and his award was enforced by the district court. Lufthansa appealed, contending that because the arbitration procedures had not followed those outlined in the Railway Labor Act, 45 U.S.C. §§ 157-159 (1970) (see generally Part VIII, A *infra*) the award was impeachable (see 45 U.S.C. § 159 (1970)) (the airlines apparently argued that the arbitration procedure contravened *id.* § 157 which provides that disputes between carriers and their employees may be resolved by an arbitration board consisting of *three* persons). The court, relying on *Ficek v. Southern Pac. Co.*, 338 F.2d 655 (9th Cir. 1964), summarily dismissed this argument by pointing out that "[a] claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act." 558 F.2d at 968 (quoting *Ficek*, 338 F.2d at 657). *Accord*, *International Bhd. of Teamsters Local 117 v. Washington Employers, Inc.*, 557 F.2d 1345, 1346 (9th Cir. 1977) (discussed at notes 442-58 *supra* and accompanying text).

In *La Mirada Trucking*, the issue before the arbitrator was whether the work performed by several independent truck owner-operators was "on-site" work such as to bring them within the scope of the master agreement between the employers' association and the local unions. The arbitrator concluded that the work in question was "on-site," even though it involved the transportation of sand along a five-mile stretch of public highway. The court upheld the arbitrator's decision, declaring it "reasonable." 538 F.2d at 289. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Also, after examining the language of the arbitrator's memorandum, the court rejected the

B. NLRB Decisions

In those cases decided during the survey period which required the Ninth Circuit to review a decision of the National Labor Relations Board, the court rigorously adhered to well established judicial rules detailing the proper scope of such a review. The rule that a reviewing court will not disturb the Board's findings if, "on the record as a whole there is substantial evidence to support . . . [the] findings"⁴⁷⁵ resulted in the enforcement of Board decisions in numerous cases.⁴⁷⁶ Similarly, several cases⁴⁷⁷ applied the long-standing Ninth Circuit rule that Board determinations as to the credibility of witnesses appearing before it will not be disturbed "unless a clear preponderance of the evidence convinces that they are incorrect."⁴⁷⁸

In *NLRB v. STR, Inc.*,⁴⁷⁹ the court invoked the Ninth Circuit rule that, absent extraordinary circumstances, the Board's findings of fact

employers' contention that the arbitrator had exceeded the boundary of the submission made to him. See *International Bhd. of Teamsters Local 117 v. Washington Employers, Inc.*, 557 F.2d at 1346 (discussed at notes 442-58 *supra* and accompanying text); *Holly Sugar Corp. v. Distillery Workers Int'l Union*, 412 F.2d 899, 903 (9th Cir. 1969); *San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co.*, 407 F.2d 1327, 1328 (9th Cir. 1969).

There appears to have been no decision during the survey period in which enforcement of an arbitration award was denied. Cf. *Stephenson v. NLRB*, 550 F.2d 535, 541 (9th Cir. 1977) (NLRB decision to defer to arbitration award reversed) (discussed at notes 148-62 *supra* and accompanying text).

475. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). See 5 U.S.C. § 706 (1970).

476. See, e.g., *NLRB v. Goodsell & Vocke, Inc.*, 559 F.2d 1141, 1142 (9th Cir. 1977); *NLRB v. Squire Shops, Inc.*, 559 F.2d 486, 487 (9th Cir. 1977); *NLRB v. Timberland Packing Corp.*, 550 F.2d 500, 502 (9th Cir.), *cert. denied*, 98 S. Ct. 397 (1977); *NLRB v. Stockton Door Co.*, 547 F.2d 489, 490 (9th Cir. 1976) (per curiam), *cert. denied*, 98 S. Ct. 122 (1977); cf. *NLRB v. Tayko Industries, Inc.*, 543 F.2d 1120 (9th Cir. 1976) (portion of Board's order denied enforcement since Board's findings not supported by substantial evidence on the record as a whole) (discussed at notes 305-12 *supra* and accompanying text).

477. See *NLRB v. R.O. Pyle Roofing Co.*, 560 F.2d 1370, 1371-72 (9th Cir. 1977); *NLRB v. Anthony Co.*, 557 F.2d 692, 695 (9th Cir. 1977) (discussed at notes 12-18 *supra* and accompanying text); *Journeyman & Apprentices of the Plumbing & Pipe Fitting Indus. Local 525 v. NLRB*, 553 F.2d 1202, 1205 (9th Cir. 1977) ("Where the trier of fact has made explicit findings crediting the testimony of witnesses for one side and has given no credit to witnesses for the other side, we are especially reluctant to overturn his conclusions."); *NLRB v. Dodson's Market, Inc.*, 553 F.2d 617, 619 (9th Cir. 1977) (discussed at notes 105-16 *supra* and accompanying text).

478. *NLRB v. International Longshoremen's & Warehousemen's Local 27*, 514 F.2d 481, 483 (9th Cir. 1975). See *NLRB v. Luisi Truck Lines*, 384 F.2d 842, 846 (9th Cir. 1967); *NLRB v. International Longshoremen's & Warehousemen's Local 10*, 283 F.2d 558, 562 (9th Cir. 1960).

479. 549 F.2d 641 (9th Cir. 1977) (per curiam).

will be deemed uncontroverted unless the objecting party raises objections in a timely motion requesting the Board to reconsider its decision.⁴⁸⁰ Also, the court noted that the "extraordinary circumstances" exception to this rule applies only to circumstances that are exceptional because they cause the party to omit filing timely objections,⁴⁸¹ "not because the Board's order was itself extraordinary."⁴⁸²

Despite these deferential standards, however, the court concluded in *NLRB v. Pacific Southwest Airlines*,⁴⁸³ that the interests of effective appellate review require that the Board "clearly articulate the reasons behind any order, and particularly why other remedies [are] found to be inappropriate."⁴⁸⁴

VIII. PROCEEDINGS UNDER OTHER LABOR ACTS

A. *Railway Labor Act*

The Railway Labor Act (RLA)⁴⁸⁵ was originally enacted in 1926, almost a decade before passage of the National Labor Relations Act.⁴⁸⁶ It represents "a pioneer federal attempt to secure the peaceful settlement of employer-employee disputes."⁴⁸⁷ This initial legislation was, understandably, aimed at the railway and related industries⁴⁸⁸ which, at that time, were the principal carriers of goods and passengers in interstate commerce.⁴⁸⁹ As Congress viewed the situation in 1926, the primary cause of strikes and disruption in the railway industry was the inability of

480. *Id.* at 642 (citing *NLRB v. Selvin*, 527 F.2d 1273, 1276-77 (9th Cir. 1975)). See *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 387-88 (1946); 29 U.S.C. § 160(e) (1970) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances . . ."). The Board's regulations permit parties to file motions within 20 days after service of a Board decision for the purpose of seeking reconsideration of the decision. 29 C.F.R. § 102.48(d) (1976).

481. See, e.g., *NLRB v. Marshall Maintenance Corp.*, 320 F.2d 641, 643 (3d Cir. 1963); *NLRB v. Central Mercedita, Inc.*, 273 F.2d 370, 373 (1st Cir. 1959); *NLRB v. International Woodworkers Local 13-433*, 238 F.2d 378, 379 (9th Cir. 1956).

482. 549 F.2d at 642.

483. 550 F.2d 1148 (9th Cir. 1977) (discussed at notes 79-92 *supra* and accompanying text).

484. *Id.* at 1152.

485. Pub. L. No. 69-257, 44 Stat. 577 (1926) (now codified, as amended, at 45 U.S.C. §§ 151-188 (1970)).

486. Pub. L. No. 74-198, 49 Stat. 449 (1935) (now codified at 29 U.S.C. §§ 151-168 (1970) & Supp. V 1975)).

487. *O'Donnell v. Wien Air Alas., Inc.*, 551 F.2d 1141, 1145 (9th Cir. 1977).

488. See 45 U.S.C. § 151 (1970) (definition of "carriers").

489. *O'Donnell v. Wien Air Alas., Inc.*, 551 F.2d 1141, 1145 (9th Cir. 1977). In 1936, the Act was amended to cover air carriers and their employees. Pub. L. No. 74-487, 49 Stat. 1189 (1936) (now codified at 45 U.S.C. §§ 181-188 (1970)).

labor and management representatives to formulate equitable labor contracts.⁴⁹⁰ Thus, the RLA as originally enacted created procedures and federal administrative machinery geared to facilitate the process of selecting bargaining representatives and reaching labor agreements.⁴⁹¹

By 1934, however, Congress perceived another major source of conflict in the railway industry: disputes as to existing rights and interpretation of existing agreements.⁴⁹² When the RLA was amended that year,⁴⁹³ Congress created new administrative machinery to interpret and apply existing agreements in light of particular fact situations.⁴⁹⁴

The two types of disputes, those stemming from the creation and/or alteration of labor agreements and those arising from interpretations and/or applications of existing agreements, have traditionally been known as "major" and "minor" disputes, respectively.⁴⁹⁵ The importance of classifying labor-management disputes as major or minor lies in the fact that parties to minor disputes are compelled to arbitrate their grievances before the National Railroad Adjustment Board,⁴⁹⁶ or one of the other statutorily mandated boards of adjustment⁴⁹⁷ empowered to make binding awards which are reviewable and enforceable in the courts.⁴⁹⁸ On the other hand, parties to major disputes may, after having attempted in good faith to negotiate a resolution,⁴⁹⁹ employ the services of the National Mediation Board if they so choose,⁵⁰⁰ but they are free to resort to self-help measures if voluntary attempts at resolution prove futile.⁵⁰¹

490. *O'Donnell v. Wien Air Alas., Inc.*, 551 F.2d 1141, 1145 (9th Cir. 1977). See generally Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937).

491. *O'Donnell v. Wien Air Alas., Inc.*, 551 F.2d 1141, 1145 (9th Cir. 1977); see, e.g., 45 U.S.C. §§ 152, 154, 155, 157 (1970). See generally Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937).

492. *O'Donnell v. Wien Air Alas., Inc.*, 551 F.2d 1141, 1146 (9th Cir. 1977); see *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945).

493. Railway Labor Act, Pub. L. No. 73-442, 48 Stat. 1185 (1934).

494. See 45 U.S.C. §§ 153, 155 (1970); *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945).

495. *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 722-24 (1945). See *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 33 (1957).

496. See 45 U.S.C. § 153(i) (1970); *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 322 (1972); *Walker v. Southern Ry. Co.*, 385 U.S. 196, 198 (1966).

497. See 45 U.S.C. §§ 184, 185 (1970); cases cited note 496 *supra*.

498. See 45 U.S.C. § 153(p) (1970); *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 322 (1972).

499. *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 724-25 (1945).

500. See 45 U.S.C. § 155 (1970).

501. See *id.*; *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 725 (1945); *REA Express, Inc. v. Brotherhood of Ry. Clerks*, 459 F.2d 226, 230 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972).

Because the modes of resolution specified for major and minor disputes are different, the nature and extent of the judicial role in the resolution process depends upon the classification of the dispute.⁵⁰² Illustrative of the problems that tend to arise in this regard is the recent case of *O'Donnell v. Wien Air Alaska, Inc.*⁵⁰³ *O'Donnell* involved a dispute between an airline (Wien) and a pilots' union over the number of pilots to be assigned to each Boeing 737 flight.⁵⁰⁴ Prior to the commencement of the suit, the parties had entered into a number of short-term agreements specifying that each 737 flight would carry three pilots, but these agreements did not purport to represent a long-term resolution of the issue. To avoid being locked into a three-pilot commitment, Wien would assign newly employed pilots to third-pilot status and then discharge them within one year.⁵⁰⁵ The discharged pilots would thereafter be rehired for service on other aircraft. This practice became known as the "fire-hire" procedure.⁵⁰⁶

The union filed suit in district court seeking injunctive relief against the "fire-hire" procedure. Wien countered with a motion, apparently in the alternative, for dismissal or for summary judgment. The district court granted Wien's motion in its entirety, dismissing the action with prejudice and, at the same time, rendering summary judgment in favor of Wien.⁵⁰⁷ The union appealed.

Recognizing that the third-pilot issue was a major dispute,⁵⁰⁸ the Ninth Circuit formulated the issue as "whether the fire-hire policy is so intimately tied to the crew complement dispute . . . that the very nexus converts the entire context into a major dispute."⁵⁰⁹ The court then observed that if the fire-hire issue was a minor dispute, the district court

502. See 45 U.S.C. §§ 153-155 (1970); *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 325 (1972); *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945).

503. 551 F.2d 1141 (9th Cir. 1977).

504. *Id.* at 1142-43. The dispute arose in 1968 when Wien announced it would introduce the 737's into its service. The union argued that three pilots should have been assigned to each 737 flight, while Wien maintained that only two pilots were required. Similar disputes are apparently widespread in the airline industry. *Id.* at 1143 & n.1.

505. Under the basic agreement between Wien and the union, the terms of which were incorporated into the short-term agreements prior to suit, pilots employed for less than one year were on a probationary status and were not entitled to the benefit of the grievance and arbitration procedures set forth in the contract. *Id.* at 1143.

506. *Id.*

507. *Id.* at 1145. The appellate court observed that this result was "both inconsistent in itself and improper." *Id.* at 1145 n.4. See FED. R. CIV. P. 56.

508. Changes in rules and working conditions are regarded as major disputes, which may be submitted to the National Mediation Board. See 45 U.S.C. §§ 155, 156 (1970); *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945).

509. 551 F.2d at 1147.

should have dismissed the case for lack of jurisdiction;⁵¹⁰ and if it was a major dispute, an injunction preserving the status quo would have been required, if warranted by the situation.⁵¹¹ The court concluded that neither view adequately supported the grant of summary judgment.⁵¹²

To aid the district court in subsequent determinations, the court reiterated the Ninth Circuit test for distinguishing major from minor disputes: a dispute is minor if "the position of at least one of the parties [is] *arguably* predicated on the terms of an agreement."⁵¹³ The judgment was reversed and the case remanded.

*International In-Flight Catering Co. v. National Mediation Board*⁵¹⁴ involved the sensitive question of when, if ever, federal courts have jurisdiction to review the National Mediation Board's (NMB) action in certifying a bargaining representative under section 2, Ninth of the RLA.⁵¹⁵

In 1974, pursuant to a request by the International Brotherhood of Teamsters, Airline Division (Teamsters), the NMB conducted a section 2, Ninth investigation⁵¹⁶ and found a representation dispute among the

510. *Id.* at 1148. See notes 496-98 *supra* and accompanying text.

511. *Id.* at 1148. See 45 U.S.C. §§ 152, 155, 156, 181 (1970); *United Transp. Union v. Penn Cent. Transp. Co.*, 505 F.2d 542, 543 (3d Cir. 1974); *United Transp. Local 31 v. St. Paul Union Depot Co.*, 434 F.2d 220, 223 (8th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971). The basis upon which the status quo is to be determined for the purposes of RLA injunctions is set forth in *Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142, 152-59 (1969).

512. 551 F.2d at 1148.

513. *Id.* at 1146. The leading Ninth Circuit case on the major-minor distinction is *Switchmen's Union v. Southern Pac. Co.*, 398 F.2d 443 (9th Cir. 1968). It has been observed that every circuit that has addressed the issue has followed *Switchmen's*. *United Transp. Union v. Penn Cent. Transp. Co.*, 505 F.2d 542, 544 & n.5 (3d Cir. 1974). See *Local 1477, United Transp. Union v. Baker*, 482 F.2d 228, 230 (6th Cir. 1973); *IBEW v. Washington Terminal Co.*, 473 F.2d 1156, 1172-73 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 906 (1973).

514. 555 F.2d 712 (9th Cir. 1977).

515. 45 U.S.C. § 152, Ninth (1970).

516. Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth (1970) provides, in relevant part:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

Id. To aid the Board in the performance of these statutory duties, Congress authorized it "to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives." *Id.* An "appropriate method" is one that ensures that the election is free from "interference, influence, or coercion" by the carrier. *Id.* The NMB is free to establish its

employees of International In-Flight Catering Co. (IICC).⁵¹⁷ The NMB then held an election. When the vote did not disclose a majority in favor of representation, the NMB certified that the IICC's employees had no representative. In 1975, pursuant to another request to investigate, the NMB again found a representation dispute among the employees. This time the NMB did not hold an election, but simply certified the Teamsters as the employees' representative on the basis of cards signed by employees "who the record clearly show[ed] were merely requesting a new election."⁵¹⁸ IICC filed suit in district court seeking to enjoin the union and the NMB from enforcing the NMB's certification. The court granted summary judgment in favor of IICC.⁵¹⁹ On appeal, the union and the NMB raised two key labor issues: (1) "[w]hether the district court properly had jurisdiction to review the present dispute;" and (2) "[w]hether IICC had standing to maintain its action."⁵²⁰

With regard to the first issue, the defendants relied on the Supreme Court's opinion in *Switchmen's Union v. NMB*⁵²¹ for the proposition that an NMB certification under section 2, Ninth is not reviewable by the courts. The Ninth Circuit, however, distinguished *Switchmen's* on the ground that in that case, the NMB had fulfilled its statutory duty⁵²² to investigate the dispute: "We find that reviewing a certification after an investigation by the NMB and reviewing whether the NMB made its

own rules and procedures regarding employee elections, and its decisions with respect thereto will not be reviewed by the courts in the absence of a breach of statutory authority. *Brotherhood of Ry. & S.S. Clerks v. Association for Benefit of Non-Contract Employees*, 380 U.S. 650, 669 (1965).

517. IICC, a Hawaiian corporation, is a subsidiary of Japan Air Lines, which operates in the United States. 555 F.2d at 713. As a company wholly owned or controlled by a carrier engaged in interstate commerce, IICC is itself a "carrier" as the RLA defines that term. *Id.* at 713-14. See 45 U.S.C. §§ 151, 181 (1970). IICC is thus subject to the jurisdiction of the NMB. 555 F.2d at 714. See 45 U.S.C. §§ 152, Ninth, 181 (1970).

518. 555 F.2d at 716. The Teamsters solicited the employees by letter to sign the cards. The letter stated, in part:

In closing, a final reminder that also enclosed is a card entitled, "Request for Employees Representation Election Under the Railway Labor Act". *By signing this card it does not mean that you are voting for the Union.* It simply means that you are requesting the National Mediation Board to conduct a federally supervised election.

Id. at 715 (emphasis added by the court). The court recited additional facts which overwhelmingly supported the conclusion that the employees were told that the sole purpose of the cards was to get a representation election. *Id.* at 714-16.

519. *Id.* at 716.

520. *Id.* at 717.

521. 320 U.S. 297 (1943) (4-3 decision). In *Switchmen's*, a union that had lost a disputed election filed suit challenging the NMB's action in permitting all the employees to vote. The Court did not reach the merits of the controversy, but held that the final resolution rested with the NMB, not with the courts. *Id.* at 305-06. In reaching its conclusion, the Court considered, *inter alia*, the language of § 2, Ninth, its legislative history, and the fact that Congress had expressly provided for judicial review of administrative determinations under two sections of the RLA other than § 2, Ninth. *Id.* at 302-06.

522. See 45 U.S.C. § 152, Ninth (1970) (partially set forth in note 516 *supra*).

statutory investigation at all are two completely different matters. While we cannot, and do not, review the former, we can and do review the latter."⁵²³ The court pointed out that the question at hand, which was expressly left open in *Switchmen's*,⁵²⁴ was subsequently answered in *Brotherhood of Railway Clerks v. Association for Benefit of Non-Contract Employees*.⁵²⁵ In the latter case, the Supreme Court drew a distinction between matters of discretion and matters of statutory duty, and declared, "[T]he . . . [NMB's] action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute."⁵²⁶

The Ninth Circuit acknowledged that in the case before it, the NMB had conducted a nominal investigation, to wit, it had compared the employees' signatures on the cards to the signatures from IICC's payroll records. It noted, however, that section 2, Ninth requires that the NMB investigate *the dispute*.⁵²⁷ The IICC dispute involved the question of whether the cards represented votes for the union or requests for an election. "The actual investigation undertaken by the NMB in merely comparing the signatures assumes the disputed point, that the cards represented votes."⁵²⁸

In addition, the court was clearly irritated by the NMB's steadfast refusal to disclose any evidence as to the extent of its investigation beyond the signature check,⁵²⁹ and by "its pertinacious adherence to a position that flatly contradicts the intended meaning of the employees who had signed the Request for Election card, the plain language on the card itself, and the spirit of the RLA."⁵³⁰ This behavior, the court felt, supported the conclusion that "there was no investigation, for if there was, then the NMB would not have certified the Teamsters solely on the basis of the Request for Election Cards."⁵³¹

523. 555 F.2d at 717 (footnote omitted).

524. *Id.*

525. 380 U.S. 650 (1965).

526. 555 F.2d at 718 (quoting *Brotherhood of Ry. Clerks v. Association for Benefit of Non-Contract Employees*, 380 U.S. at 661). *Cf.* *Bishop v. NLRB*, 502 F.2d 1024, 1028 (5th Cir. 1974) (courts may review the NLRB's decisions in representation matters "where there is a 'plain' violation of an unambiguous and mandatory provision of the statute.").

527. 45 U.S.C. § 152, Ninth (1970) (partially set forth in note 516 *supra*). *See* *Brotherhood of Ry. Clerks v. Association for Benefit of Non-Contract Employees*, 380 U.S. at 661.

528. 555 F.2d at 718.

529. *Id.* The NMB maintained that under § 2 the scope and form of its investigations were matters within its discretion and, thus, not reviewable by the courts. *Id.* However, as Justice Reed noted in *Switchmen's*, "The special competence of the National Mediation Board lies in the field of labor relations rather than in that of statutory construction." 320 U.S. at 321 (Reed, J., dissenting).

530. 555 F.2d at 718-19.

531. *Id.* at 718. The quoted language makes it clear that the resolution of the statutory

On the issue of standing, the NMB argued that since the policy of the RLA sought to remove the employer from the bargaining representative selection process,⁵³² and since the employer has no interest in the question of which representative is selected,⁵³³ IICC lacked standing to sue.⁵³⁴ In response, the court pointed out that under section 2, Ninth the employer is required to "treat with" the certified bargaining representative. The employer's failure to do so exposes him to economic sanctions such as strikes and picketing. "IICC then is left with two choices, either 'treat with' an unlawfully and improperly certified bargaining representative or risk economic sanctions. This is hardly an adequate or fair choice."⁵³⁵ The court therefore concluded that the particular actions of the NMB "created in IICC standing to seek judicial review on the narrow issue decided in this case."⁵³⁶

B. Fair Labor Standards Act

*Hodgson v. Baker*⁵³⁷ was the only case decided by the Ninth Circuit during the survey period which involved wage and hour computations under the Fair Labor Standards Act (FLSA).⁵³⁸ The controversy in *Baker* centered on the defendant-employer's method of computing his employees' overtime wages.

Section 7(a)(1) of the FLSA⁵³⁹ requires that an employee receive compensation for hours worked in excess of forty per week "at a rate not less than one and one-half times the regular rate at which he is employed."⁵⁴⁰ Obviously, "the keystone of [section] 7(a) is the regular rate of compensation."⁵⁴¹

issue required consideration of the merits of the controversy. The court, however, is curiously silent on the extent to which the merits may properly be considered in resolving the statutory issue of whether the NMB did, in fact, investigate the dispute. It has been suggested that the merits may be considered only where necessary and only "where the error on the merits is as obvious on the face of the papers as the violation of specific statutory language." *International Bhd. of Teamsters v. Brotherhood of Ry. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968). *International In-Flight Catering* seems to be just such a case.

532. See 45 U.S.C. § 152, Ninth (1970). See also note 516 *supra*.

533. 45 U.S.C. § 152, Ninth (1970).

534. 555 F.2d at 719.

535. *Id.*

536. *Id.*

537. 544 F.2d 429 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1581 (1977).

538. 29 U.S.C. §§ 201-219 (1970 & Supp. V 1975).

539. *Id.* § 207(a)(1) (1970).

540. *Id.*

541. *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). See *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948); *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975); *Triple "AAA" Co. v. Wirtz*, 378 F.2d 884, 886 (10th Cir.), *cert. denied*, 389 U.S. 959 (1967).

In *Baker*, the owner of an automobile towing service had compensated several of his employee-drivers on a commission basis, with the drivers receiving forty-three percent of all commercial charges.⁵⁴² If a driver worked more than forty hours each week his total weekly commissions would not be supplemented pursuant to the overtime provisions of section 7(a)(1). Instead, the employer would start with the actual compensation paid to each employee, then work backwards to derive a regular rate and an overtime rate that would equal such compensation. When the regular rate thus calculated exceeded the statutory minimum wage, the employer would conclude that he had satisfied the requirements of the FLSA.⁵⁴³

The Ninth Circuit, relying on the Supreme Court's decision in *Walling v. Youngerman-Reynolds Hardwood Co.*,⁵⁴⁴ declared that the employer's method of compensating his employees was inconsistent with "the required method of computing the *regular rate* under the Act."⁵⁴⁵ According to the Ninth Circuit, the correct method for computing the regular wage for an employee paid on a commission basis is to divide the employee's total weekly commissions by the number of hours worked during that week. The employee should then receive overtime wages equivalent to one and one-half times the regular rate for each hour worked in excess of forty.⁵⁴⁶

The court thus made it clear that "the act was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the

542. 544 F.2d at 431.

543. For example, if an employee had been paid \$220.00 in commissions for a 50-hour work week, the employer would compute the regular and overtime rates for that employee by using the following formula: $40(x) + 10(1\frac{1}{2}x) = \220.00 . The employer would thus arrive at a regular rate (x) of \$4.00 per hour and an overtime rate ($1\frac{1}{2}x$) of \$6.00 per hour. Noting that the \$4.00 per hour regular rate was in excess of the minimum wage mandated by the FLSA (*see* 29 U.S.C. § 206 (1970 & Supp. V 1975)), the employer would assume that he had fully complied with the Act. 544 F.2d at 432.

544. 325 U.S. 419 (1945). In *Walling*, the Court held that when an employee's compensation is calculated by means of an "incentive pay" based on work actually completed, the "regular rate coincides with the hourly rate actually received for all hours worked during the particular workweek, such rate being the quotient of the amount received during the week divided by the number of hours worked." *Id.* at 424.

545. 544 F.2d at 432.

546. For example, employing the hypothetical described in note 543 *supra*, the employee's overtime earnings would be properly calculated as follows: $\$220.00 \div 50 \text{ hours} = \4.40 per hour (regular rate); $1\frac{1}{2} \times \$4.40$ (overtime rate) $\times 10$ hours = \$66.00. The employee's total compensation would be \$176.00 (regular time) plus \$66.00 (overtime) for a total of \$242.00. The employer would thus be required to supplement the employee's commissions by \$22.00.

minimum."⁵⁴⁷ This approach is consistent with that adopted by the Supreme Court in *Walling* and in *Overnight Motor Transportation Co. v. Missel*,⁵⁴⁸ and follows the course taken by other circuits that have addressed the issue.⁵⁴⁹

C. Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA)⁵⁵⁰ was enacted in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."⁵⁵¹ It has been described as "novel in approach"⁵⁵² and as "the most revolutionary piece of 'labor' legislation since the National Labor Relations Act."⁵⁵³ In essence, the Act empowers the Secretary of Labor to adopt standards regarding workplace safety and health conditions⁵⁵⁴ to which employers governed by the Act⁵⁵⁵ must adhere.⁵⁵⁶

The controversy in *Irvington Moore v. OSHRC*⁵⁵⁷ arose out of the apparently conflicting requirements of two such safety standards. Section 1910.212(a)(3)(ii) of 29 C.F.R. requires that "[t]he point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device . . . shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."⁵⁵⁸ Among the particular machines which "usually require point of operation guarding" are "power pres-

547. 544 F.2d at 433 (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942)).

548. 316 U.S. 572 (1942).

549. See, e.g., *Mumbower v. Callicott*, 526 F.2d 1183, 1187 (8th Cir. 1975) (employee paid on weekly salary basis); *Triple "AAA" Co. v. Wirtz*, 378 F.2d 884, 887 (10th Cir.), cert denied, 389 U.S. 959 (1967) (employee paid flat monthly salary for worksheet averaging more than 40 hours); *Moretti, Inc. v. Boogers*, 376 F.2d 27, 28 (5th Cir. 1967) (employee's work week fluctuated from 37-52 hours).

550. 29 U.S.C. §§ 651-678 (1970).

551. *Id.* § 651.

552. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1260 (D.C. Cir. 1973).

553. *White & Carney, OSHA Comes of Age: The Law of Work Place Environment*, 28 BUS. LAW. 1309, 1309 (1973).

554. See 29 U.S.C. § 655 (1970).

555. See *id.* § 652(5).

556. See *id.* § 654(a)(2). Courts have held that in enacting the OSHA Congress intended to exercise the full extent of its authority under the commerce clause of the Constitution. *Godwin v. OSHRC*, 540 F.2d 1013, 1015 (9th Cir. 1976). See U.S. CONST. art. I, § 8, cl. 3; 29 U.S.C. § 651 (1970). Consequently, the Act, with but a few exceptions, see 29 U.S.C. §§ 652(5), 653(b)(1) (1970), applies to every employer whose business affects interstate commerce. *Godwin v. OSHRC*, 540 F.2d at 1015.

557. 556 F.2d 431 (9th Cir. 1977).

558. 29 C.F.R. § 1910.212(a)(3)(ii) (1976). A machine's "point of operation" is "the area on a machine where work is actually performed upon the material being processed." *Id.* § 1910.212(a)(3)(i).

ses,"⁵⁵⁹ of which one type is the press brake.⁵⁶⁰ On the other hand, section 1910.217, which sets forth detailed safety standards governing "mechanical power presses,"⁵⁶¹ expressly excludes press brakes from its requirements.⁵⁶²

Following a routine OSHA plant inspection,⁵⁶³ Irvington Moore was cited for operating press brakes without point of operation guarding, in contravention of section 1910.212(a)(3)(ii). At a subsequent hearing before the Occupational Safety and Health Review Commission (OSHRC),⁵⁶⁴ Irvington Moore argued that the express exclusion of press brakes from the detailed requirements of section 1910.217 meant that press brakes were exempt from any point of operation guarding requirements whatsoever. In support of this position, the company cited section 1910.5(c)(1),⁵⁶⁵ which provides that an applicable "particular standard" governs over any "general standard" which might otherwise apply. The OSHRC, however, found the company in violation of the regulations. It held that section 1910.217(a)(5) excludes press brakes from the requirements of section 1910.217 only, and not from the coverage of section 1910.212(a)(3) which, by its terms, applies to power presses.⁵⁶⁶ Irvington Moore was fined \$350,⁵⁶⁷ and it petitioned the Ninth Circuit for review.⁵⁶⁸

Before the Ninth Circuit, the company again argued that section 1910.217 must override the less specific section 1910.212, and that section 1910.217's explicit exclusion of press brakes from its coverage meant that no point of operation guarding was required.⁵⁶⁹ The court, in a sensible and well-reasoned opinion, rejected this argument on several grounds. It first noted that the rule urged by the company "can hardly mean that a section from which press brakes are entirely excluded should

559. *Id.* § 1910.212(a)(3)(iv)(d).

560. 556 F.2d at 432-33. "A press brake is a machine that bends and shapes pieces of metal which are placed between the two dies." *Id.* at 432.

561. *See* 29 C.F.R. § 1910.217 (1976).

562. *See id.* § 1910.217(a)(5).

563. *See* 29 U.S.C. § 657 (1970).

564. The OSHRC was established under *id.* § 661.

565. 29 C.F.R. § 1910.5(c)(1) (1976).

566. *See* 3 O.S.H.C. 1018 (1975).

567. 556 F.2d at 434. Another company, Gem Top Mfg., Inc., was cited and fined for the same violations as Irvington Moore, and the two cases were consolidated before the Ninth Circuit. For convenience, in this discussion only Irvington Moore will be mentioned. The two companies presented the same arguments to the court.

568. *See generally* 29 U.S.C. § 660 (1970).

569. 556 F.2d at 435. The company's reliance on 29 C.F.R. § 1910.5(c)(1) (1976) in support of this argument was perhaps misplaced. That section provides that particular standards which are "*specifically applicable*" to a situation "shall prevail over any different general standard." (Emphasis added). Inasmuch as § 1910.217 specifically *ex-*

preempt a section under which press brakes are clearly covered."⁵⁷⁰ In support of this conclusion, the court cited section 655(a) of 29 U.S.C., "which mandates application of the standard that assures the greatest protection for employees."⁵⁷¹ In addition, the court relied on the "general canon of statutory construction that remedial statutes are to be liberally construed in favor of their beneficiaries."⁵⁷²

The company also argued that the existence of the conflicting standards was misleading and resulted in a lack of fair notice as to what conduct or equipment was required.⁵⁷³ The court declared that this complaint was "not credible"⁵⁷⁴ in light of section 654(a)(1) of 29 U.S.C. (the "general duty" clause) which requires each employer to furnish his employees with "employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees."⁵⁷⁵

Finally, the company argued that to interpret section 1910.212 as requiring point of operation guarding on press brakes when press brakes were specifically excluded from section 1910.217 was illogical, and would render the section 1910.217 exclusion meaningless.⁵⁷⁶ However,

cludes press brakes from its coverage, it can hardly be called *applicable* to such machines. The court, however, did not raise this point. Nor did the court cite 29 C.F.R. § 1910.5(c)(2) (1976), which provides that "any standard shall apply according to its terms . . . to the extent that none of [the] particular standards applies."

570. 556 F.2d at 435.

571. *Id.* (citing 29 U.S.C. § 655(a) (1970)). See *Brennan v. OSHRC*, 491 F.2d 1340, 1343 (2d Cir. 1974) (standards should be construed to effectuate purposes of OSHA). While the court's construction of § 655(a) is unquestionably consistent with the underlying policies of the Act, the court may have been reading too much into the section. By its language, the section deals not with application but rather with *promulgation* of standards by the Secretary of Labor.

572. 556 F.2d at 435. See *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *American Smelting & Ref. Co. v. OSHRC*, 501 F.2d 504, 511 (8th Cir. 1974).

573. 556 F.2d at 435. One court has stated: "An employer . . . is entitled to fair notice in dealing with his government. . . . [A]n occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority" *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

574. 556 F.2d at 435.

575. 29 U.S.C. § 654(a)(1) (1970). In *Irvington Moore*, evidence and testimony that had been presented to the Commission left no doubt that the operation of the company's press brake without a point of operation guard constituted a "recognized hazard." See 556 F.2d at 433. *Accord*, *Brennan v. OSHRC*, 501 F.2d 1196, 1201 (7th Cir. 1974) (employer must protect employees from recognized hazards); *cf.* *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017-18 n.1 (7th Cir. 1975) (specific promulgated standards preempt general duty clause, but only with respect to hazards expressly covered by the specific standards); *American Smelting & Ref. Co. v. OSHRC*, 501 F.2d 504, 512 (8th Cir. 1974) ("[T]he use of the general duty clause ordinarily should not be available when a specific standard has been promulgated.").

576. 556 F.2d at 435-36.

the court correctly observed that inasmuch as section 1910.217 "instructs the employer as to what safety devices he must install, [while] section .212 is a 'performance' standard which allows him more flexibility,"⁵⁷⁷ the inclusion of press brakes under one section but not the other was not unreasonable.

Judge Wright, in dissent, agreed with the company's argument that fair notice had been denied. However, his brief opinion failed to address the general duty clause cited by the majority.⁵⁷⁸

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577. *Id.* at 436.

578. *See* note 575 *supra* and accompanying text.

