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LABOR LAW

OVERVIEW

The Tenth Circuit Court of Appeals' opinions in the area of labor law during the past year dealt with fairly standard issues. The court's decisions were, generally, in conformity with settled principles of law. This survey will examine the Tenth Circuit's labor law cases as an aid to the practitioner in the field. Particularly noteworthy are the labor law decisions wherein the Tenth Circuit court departs from the traditional analysis.

I. NATIONAL LABOR RELATIONS ACT—LABOR MANAGEMENT RELATIONS ACT[1]

A. *Protected Concerted Activity*

In *NLRB v. Modern Carpet Industries, Inc.*,[2] three maintenance employees were discharged after refusing to work with lead which they believed to be dangerous. The lead had been obtained from a hospital which used it to store radioactive materials. When asked to check the lead for radioactivity, the supervisor on the job replied that an unnamed person had assured him that the material was safe.[3] The employees were unsuccessful in their repeated attempts to obtain the name of the person who reportedly had said that this substance was safe. When these workers continued to refuse to work with the material, they were fired.[4]

The Tenth Circuit Court of Appeals upheld the decision of the National Labor Relations Board (Board), which had determined that the company violated section 8(a)(1) of the National Labor Relations Act (NLRA) (Act)[5] by firing the three employees.[6] The court found that the discharge of the men was based solely upon their refusal to work with what they believed to be dangerous material. Such action on the part of employees has been held to be concerted activity for the purpose of mutual aid or protection, activity explicitly allowed employees in section 7 of the Act.[7] Whether an employee's good faith belief in the existence of dangerous working conditions is enough to bring his refusal to work within the protection of section 8(a)(1) of the Act depends upon the facts of each case.

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1. 29 U.S.C. §§ 141-144, 151-169, 171-188 (1976).
2. 611 F.2d 811 (10th Cir. 1979).
3. *Id.* at 813.
4. *Id.*
5. 29 U.S.C. § 158(a)(1) (1976) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their right to self-organization or any other protected activity.
6. 611 F.2d at 815.
7. 29 U.S.C. § 157 (1976) provides that employees have the right to self-organization, to form, join, or aid labor organizations, to bargain collectively, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection. *See also* 611 F.2d at 813.

In *Gateway Coal v. United Mine Workers*,[8] the United States Supreme Court held that a good faith fear of the existence of abnormally dangerous working conditions was not sufficient to allow workers to refuse to work.[9] In that case, however, the employees were members of a union and were working under a valid collective bargaining agreement.[10] The Court held that the employee's refusal to work was a violation of an implicit no-strike clause in the agreement.[11] Other cases involving similar activity by unorganized workers have held differently.[12]

In the *Modern Carpet* opinion, there was no mention of whether the discharged employees were union members. The court discussed *NLRB v. Washington Aluminum Co.*,[13] another United States Supreme Court case, in which unorganized employees who had walked off the job in protest of frigid working conditions were held to be engaged in protected activity.[14] In the *Modern Carpet* decision, the Tenth Circuit emphasized the good faith belief of the workers in determining whether their action was protected. In light of the company's refusal to name its source of information about job safety, the court felt justified in sustaining the Board's conclusion that the workers, in refusing to work with the lead, acted out of a genuine fear for their health.[15]

B. *Discrimination Based Upon Union Membership*

In *NLRB v. Borg-Warner Corp.*,[16] the Tenth Circuit court upheld the Board's finding that an employer violated section 8(a)(1) and (3) of the NLRA[17] when he withdrew existing employment benefits because of union activities on the part of employees.[18] In this case, six test technicians had

8. 414 U.S. 368 (1974).

9. *Id.* at 386-87 (the fear must be based upon objective facts).

10. *Id.* at 374.

11. *Id.* at 387. Union members are not always denied such protection. *See* NLRB v. Belfry Coal Corp., 331 F.2d 738 (6th Cir. 1964) (per curiam), *enforcing* 139 N.L.R.B. 1058 (1962) (two miners refusing to work in area "dangered off" by state mine inspector); G.W. Murphy Indus., Inc., 183 N.L.R.B. 97 (1970) (employees walking off job because of excessive smoke and heat); Associated Divers & Contractors, Inc., 180 N.L.R.B. 62 (1969) (workers refusing to work because of unsanitary conditions on barge); Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV. 647 (1975); 7 AKRON L. REV. 508 (1974); 86 HARV. L. REV. 447 (1972).

12. *See generally* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (section 7 of NLRA protects employees with no bargaining representative); Trustees of Boston Univ. v. NLRB, 548 F.2d 391 (1st Cir. 1977) (NLRA protection extends to unorganized employees); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) (protection for concerted activities extends to non-union employees); Ashford & Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety & Health Act*, 52 NOTRE DAME LAW. 802 (1977); Johnson, *Protected Concerted Activity in the Non-Union Context: Limitations on the Employer's Rights to Discipline or Discharge Employees*, 49 MISS. L.J. 839 (1978).

13. 370 U.S. 9 (1962).

14. *Id.* at 14-15.

15. 611 F.2d at 814-15.

16. 608 F.2d 1344 (10th Cir. 1979).

17. 19 U.S.C. § 158(a)(1), (3) (1976). For an explanation of § 158(a)(1), *see* note 5 *supra*. Section 158(a)(3) provides that it will be an unfair labor practice for an employer to discriminate in hiring or tenure of employment, or any term or condition of employment because of union membership.

18. 608 F.2d at 1347.

enjoyed an early-in, early-out option whereby they could come to work early in the morning, and subsequently leave the job early that afternoon.[19] This option was not a plant-wide practice. When it became known to management that four of these six technicians were active in a union organizing campaign, their supervisor was told to keep a watch on them at all times and to try to keep them from going into other areas of the plant to speak to other workers.[20] As a result of this directive, the practice of early-in, early-out was discontinued so as to prevent the possibility of the technicians being in the plant at a time when the supervisor was not present.[21]

The court, in agreement with the Board, found that this change in practice was a direct result of the technicians' union activities. The NLRA clearly states that it is an unfair labor practice for an employer to restrain employees from exercising their right to self-organization.[22] Because the employer altered the conditions of employment in response to employees' union activities,[23] a prima facie violation of the NLRA existed.[24] Finding substantial evidence in the record to support the Board's decision, the court ordered reinstatement of the early-in, early-out practice.[25]

In *U.S. Soil Conditioning v. NLRB*,[26] the Tenth Circuit court was asked to review, and to deny enforcement of, an order of the Board concerning reinstatement of an employee. The employer argued before the Board that the employee was discharged because he took an unauthorized extra week of vacation.[27] The Board, however, found that the reason for the employee's discharge was his union activity.[28]

On appeal, the court looked to the record as a whole. Recognizing the Board's expertise in this area,[29] the court refused to prevent enforcement of the Board's order because there was substantial evidence in the record to support the Board's decision.[30] The court noted that the law requires the judiciary to uphold an administrative decision where substantial evidence supporting the administrative determination exists in the record.[31] Therefore, the court felt compelled to uphold the Board.

The issue involved in *Cartwright Hardware Co. v. NLRB*[32] was whether the actions of an employer resulted in a constructive discharge of three union employees. Cartwright, the employer, notified the union involved that it

19. *Id.* at 1346 n.4.
20. *Id.* at 1347 n.5.
21. *Id.* at 1347.
22. 29 U.S.C. § 157 (1976). *See* note 7 *supra*.
23. 29 U.S.C. § 158(a)(1), (3) (1976).
24. 608 F.2d at 1345 n.3.
25. *Id.* at 1349 n.10.
26. 606 F.2d 940 (10th Cir. 1979).
27. *Id.* at 942.
28. *Id.* at 948. *See* note 17 *supra*.
29. 606 F.2d at 948.
30. *Id.*
31. *Id.* at 943-45. 29 U.S.C. § 160(e) (1976) instructs a court to consider the Board's findings as conclusive if supported by substantial evidence in the record. *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); NLRB v. Central Mach. & Tool Co., 429 F.2d 1127 (10th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).
32. 600 F.2d 268 (10th Cir. 1979).

would no longer operate a union shop.[33] Having received no response from the union, Cartwright drafted wage and benefit proposals for the period following the expiration of the collective bargaining agreement then in existence.[34] The three union members on the job resigned, claiming constructive discharge by Cartwright. The Board found that Cartwright had violated section 8(a)(1), (3), and (5) of the NLRA.[35] On appeal, the Tenth Circuit supported the Board's findings of several violations,[36] but reversed the Board as to the verdict of constructive discharge.[37]

The court stated that a constructive discharge occurs "when an employer makes working conditions so intolerable as to force an employee to resign."[38] For such a discharge to be in violation of the Act,[39] the employer must have been motivated by a desire to discourage union activity or membership and, in addition, the employee's resignation must have been caused by intolerable conditions created by the employer.[40] Reviewing the record, the court found no evidence to show an antiunion animus on the part of Cartwright. Furthermore, the appellate court concluded that the employees had resigned, not because of any intolerable conditions created by Cartwright, but because of a certain "secret" provision of the union's bylaws. The employees and union leaders were convinced that this provision of the union's bylaws precluded union members from working in an open shop.[41] The court found no evidence indicating that Cartwright knew of this secret provision *before* notifying the union of his intention to run an open shop.[42]

Having earlier decided that Cartwright had evidenced no antiunion animus, the court emphasized that the employees resigned not because of Cartwright's proposals, but because of a provision in their own union's bylaws.[43] As these bylaws were something over which Cartwright had no control, the court ruled that it could find no constructive discharge of the union employees.

In *NLRB v. Pepsi-Cola Bottling Co.*,[44] the Tenth Circuit was presented with several issues. The labor dispute involved in this case arose when negotiations between employees and the predecessor employer reached an impasse, leading the employees to strike. The strike was later determined to be

33. *Id.* at 269.

34. *Id.*

35. 29 U.S.C. § 158(a)(1), (3), (5) (1976). Section 158(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.

36. The court upheld the Board with respect to the Board's findings of Cartwright's "refusal to bargain with the Union, its direct bargaining with employees, its unilateral institution of changed terms and conditions of employment, and its withdrawal of recognition from the Union." 600 F.2d at 270 (footnotes omitted).

37. *Id.*

38. *Id.* at 270, 272 n.7.

39. The discharge of an employee because of his union activity or membership is violative of 29 U.S.C. § 158(a)(3) (1976).

40. 600 F.2d at 270.

41. *Id.* at 271.

42. *Id.* at 273.

43. *Id.* at 272.

44. 613 F.2d 267 (10th Cir. 1980).

an economic one, and therefore, not an unfair labor practice strike.[45] After the strike, the employees filed for reinstatement but found that all of their jobs had been filled. They were told by the predecessor employer to fill out new applications. This employer then sold his business. The successor refused to bargain with the union, claiming doubt that the union represented the majority of employees.[46]

The union filed charges against the predecessor employer, alleging that by requiring the employees to fill out new applications for reinstatement, the predecessor employer had discriminated against the strikers.[47] The Board found that this application requirement, in effect, treated the strikers as new workers, denying them their rights as continuing employees.[48] On appeal, the Tenth Circuit court reviewed the record but could not find sufficient evidence to uphold the Board's ruling.[49] Rather, the court found that the predecessor employer's request that the strikers make a formal application for reinstatement to their jobs was not necessarily evidence that these workers were being treated as new, rather than as continuing employees.[50]

The union also filed charges against the successor employer,[51] claiming that the successor employer was guilty of both an unlawful refusal to bargain and discrimination in hiring. As the union had been certified as the bargaining representative of employees only four months prior to the sale of the business to the successor employer, the court upheld the Board's order to bargain. The Tenth Circuit court restated the general principle that a certification should be honored for a reasonable time, usually for a term of one year.[52] Though a certification may be challenged within the one year period if there are unusual circumstances, the court asserted that the change in ownership of a company is not sufficient grounds for a challenge to the certification, particularly when the successor employer hires a majority of his predecessor's employees.[53] Therefore, since the successor employer in this case carried forward a majority of his predecessor's workers, he did have a duty to bargain with the union.

In respect to the discrimination in hiring charge against the successor employer, though the Board held for the union,[54] the Tenth Circuit court

45. *Id.* at 270.

46. *Id.*

47. *Id.* at 271. Treating returning strikers as new employees would be discrimination against the employees in violation of 29 U.S.C. § 158(a)(1) (1976).

48. 613 F.2d at 272.

49. *Id.*

50. *Id.* at 271. *See also* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) (economic strikers retain their status as employees unless and until they find other regular employment that is substantially the same).

51. 613 F.2d at 270.

52. *Id.* at 272; *see* Brooks v. NLRB, 348 U.S. 96 (1954) (recognizing the doctrine announced in Celanese Corp., 95 N.L.R.B. 664 (1951), that a union certified by the NLRB as a bargaining representative enjoys an irrebuttable presumption of majority status for one year after certification); Terrell Mach. Co., 173 N.L.R.B. 1480 (1969), *enforced in* 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); Morales, *Presumption of Union's Majority Status in NLRB Cases*, 29 LAB. L.J. 309 (1978).

53. 613 F.2d at 270, 272.

54. *Id.* at 273.

found that due process of law required a different result.[55] When the discrimination charge was considered at the Board hearing, the union's claims centered upon the successor's refusal to reinstate *unfair labor practice* strikers.[56] It was later determined, however, that the strikers were *economic* strikers.[57] The court felt, therefore, that the parties had not had the opportunity to present appropriate evidence to either support or defend a charge of discrimination in hiring.[58] Since the Board had found for the union on this count, the court denied the Board's order of enforcement against the successor employer on the grounds that due process was denied the employer on the discrimination in hiring charge.[59]

In *Osteopathic Hospital Founders Association v. NLRB*,[60] the Tenth Circuit upheld the decision of the Board, finding that the hospital in question had violated section 8(a)(1), (3), and (5) of the NLRA.[61] The hospital clearly had violated section 8(a)(3) of the Act by refusing to promote one employee, and by refusing to hire two other persons, based solely upon the individuals' status as union members.[62] Other issues presented in the appeal included the hospital's refusal to bargain with the union and the propriety of the bargaining unit represented by the union.

The hospital discharged all the members of the stationary engineers employee unit after an unlawful refusal by the union to perform work.[63] After the discharge, the hospital replaced the members of this bargaining unit and claimed that the hospital was no longer obligated to bargain with the union. The hospital asserted that it had a good faith doubt as to whether the union continued to represent a majority of the members of the stationary engineers unit.[64] The Board reasoned, and the court affirmed, that even if a good faith doubt existed,[65] the incumbent union had a presumption[66] of majority status for the life of the collective bargaining agreement.[67] Since the agreement had two remaining months at the time the hospital withdrew its recognition, the hospital's refusal to bargain was illegal.[68]

As for the hospital's challenge to the legitimacy of the bargaining unit, the court agreed with the Board that the hospital failed to make its objections at the appropriate time. Though the unit was indeed a mixed unit,[69] the unit was determined by the Board more than two years before the con-

55. *Id.* at 275.
56. *Id.* at 273.
57. *Id.*
58. *Id.* at 274.
59. *Id.* at 275. The court stated that the parties, especially the employer, lacked sufficient notice to prepare for such a charge. *Id.*
60. 618 F.2d 633 (10th Cir. 1980).
61. 29 U.S.C. § 158 (a)(1), (3), (5) (1976).
62. 618 F.2d at 637-38.
63. *Id.* at 637 n.3.
64. *Id.* at 638.
65. Here, there was no "good faith" doubt, since any loss in the union's majority status was at least partly attributable to the unfair labor practices of the hospital. *Id.* at 638-39.
66. *Id.* at 638.
67. *Id. See also* note 52 *supra*.
68. 618 F.2d at 638.
69. A mixed unit is one which contains both professionals and nonprofessionals.

troversy arose. The court noted that the time of unit determination was the proper time for the hospital to challenge the unit's makeup.[70] Since the hospital did not pursue its challenge at that time, the court refused to allow a protest at the later date.[71] Thus, the unit was ruled appropriate.

C. *Duty to Bargain*

In *Newspaper Printing Corp. v. NLRB*,[72] the Tenth Circuit upheld an order of the Board which required an employer to bargain with an employee's union. The employer and the union had reached an impasse on the issue of a collective bargaining agreement's definition of the bargaining unit represented by the union.[73] Since the employer had insisted upon his suggested changes in the definition, to the point of impasse, both the Board and the court of appeals found that the employer was in violation of section 8(a)(5) of the Act.[74]

The court decided that the employer's insistence in changing the scope of the bargaining unit was a violation of the section 8(a)(5)[75] requirement that an employer bargain collectively with the representative of his employees. Section 9(a)[76] requires an employer to recognize the union as the bargaining agent of all employees in the appropriate unit.[77] The court pointed out that the union cannot bargain as to mandatory subjects of bargaining[78] without knowing whom it is representing.[79] The court further noted that the definition of the bargaining unit is not one of those areas subject to mandatory bargaining.[80] The court concluded that an unyielding insistence on a point of permissive bargaining is a violation of section 8(a)(5).[81] The court, therefore, upheld the Board's order directing the employer to bargain.[82]

An employer may be estopped from denying an association with a multiemployer bargaining unit if his actions imply membership.[83] Recently, however, the Tenth Circuit, in *NLRB v. J.D. Industrial Insulation Co.*,[84] overturned a finding of the Board which held that an employer had "engaged in

70. 618 F.2d at 640.
71. *Id.* at 641.
72. 625 F.2d 956 (10th Cir. 1980).
73. *Id.* at 961.
74. 29 U.S.C. § 158(a)(5) (1976). *See* note 35 *supra*.
75. 29 U.S.C. § 158(a)(5) (1976).
76. *Id.* § 159(a).
77. 625 F.2d at 963.
78. 29 U.S.C. § 159(a) (1976) provides for mandatory bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.
79. 625 F.2d at 963; *see* McQuay-Norris Mfg. Co. v. NLRB, 116 F.2d 748 (7th Cir.), *cert. denied*, 313 U.S. 565 (1940).
80. 625 F.2d at 963; *see* Newport News Shipbuilding & Dry Dock Co. v. NLRB, 602 F.2d 73 (4th Cir. 1979); National Fresh Fruit & Vegetable Co. v. NLRB, 565 F.2d 1331 (5th Cir. 1978).
81. 29 U.S.C. § 158(a)(5) (1976).
82. 625 F.2d at 965; *see* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).
83. NLRB v. Southwestern Colo. Contractors Ass'n, 379 F.2d 360 (10th Cir. 1967); Vin James Plastering Co., 226 N.L.R.B. 125 (1976).
84. 615 F.2d 1289 (10th Cir. 1980).

a course of conduct consistent with membership"[85] in a multiemployer bargaining unit. The Board observed that the employer had attended meetings of the association, had discussed proposed contract terms during negotiations, had paid dues to the association for three months, and had engaged in other activities suggestive of membership. In light of these activities, the Board found that the employer was "estopped from avoiding the responsibilities of association membership."[86] The employer was found to be in violation of section 8(a)(5) of the NLRA[87] for refusing to bargain with the union involved.

On appeal to the Tenth Circuit, the court reviewed the evidence presented to the Board and found that the facts dictated a different result. The court stressed that the employer had never applied for membership in the association, had never paid its initiation fee, and had never given written authority for the association to bargain with the union on his behalf.[88] Consequently, the court reasoned that there could be no basis for finding that an implied contract existed between the employer and the association.

Finding that no contract existed, the court turned to an examination of the doctrine of estoppel. Estoppel being an equitable principle, the court contended that equity warranted a determination that the employer should not be held bound in a situation where both sides had acted in an ambiguous manner. In this case, neither the employers' association nor the union ever attempted to have the employer clarify his position in regard to his purported association membership. In addition, the court noted that detrimental reliance, a necessary element of equitable estoppel, was not present in this situation because the union members who worked for the employer were receiving the same benefits they would have received had they been working under a negotiated collective bargaining agreement.[89] The court distinguished several of the cases relied upon by the Board, concluding that these holdings were inapposite as concerning situations in which it had not been necessary to rely upon the principles of estoppel.[90] In conclusion, the court held that since section 8(a)(5) of the Act[91] applies only in a situation involving a valid collective bargaining agreement, the employer did not violate the NLRA.[92]

At issue in *Western Distributing Co. v. NLRB*[93] was whether an employer's good faith doubt of a union's majority status is sufficient to allow a successor

85. *Id.* at 1291.
86. *Id.*
87. 29 U.S.C. § 158(a)(5) (1976).
88. 615 F.2d at 1292.
89. *Id.* at 1293.
90. *Id.* The court stated that the Board had relied upon cases decided on the basis of equitable estoppel principles, although the theory was never fully discussed in those opinions. *See* NLRB v. R.O. Pyle Roofing Co., 560 F.2d 1370 (9th Cir. 1977); NLRB v. Associated Shower Door Co., 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975); NLRB v. Southwestern Colo. Contractors Ass'n, 379 F.2d 360 (10th Cir. 1967); Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952); Vin James Plastering Co., 226 N.L.R.B. 125 (1976).
91. 29 U.S.C. § 158(a)(5) (1976).
92. 615 F.2d at 1294.
93. 608 F.2d 397 (10th Cir. 1979).

employer[94] to refuse to bargain with the union. While, in general, a successor employer[95] does have a duty to bargain with the representative of the employees,[96] a good faith doubt as to the union's majority status is a defense to an unfair labor practice charge,[97] if that doubt is founded upon a rational basis in fact.[98]

After a hearing, the Board ruled that the employer was a successor employer and that he had a duty to bargain with the union from the date of the merger.[99] Reversing the Board, the Tenth Circuit court felt it unnecessary to determine whether the employer was a successor employer.[100] Instead, the court argued that even if the employer were a successor employer, no duty to bargain would exist unless, and until, the union made a formal request to bargain.[101] In this case, no formal request to bargain was made until more than four months after the merger.[102] The court further asserted that the employer's good faith doubt of the union's majority status should be judged in relation to the timing of the formal request. Under the facts of this case, the court held that, at the time the request to bargain was made, there had been a sufficient change in the bargaining unit to support the employer's claims of good faith doubt.[103]

In *NLRB v. Roger's I.G.A., Inc.*,[104] the Tenth Circuit, affirming a Board decision, ruled that once an employer voluntarily recognizes a union as the bargaining representative of employees, the union enjoys a presumption of majority status unless, and until, the employer acquires a good faith, reasonable doubt of that status, which doubt is grounded upon a rational basis in fact. Both the union and the employer involved in this case had agreed to withdraw from their longstanding relationship[105] with a multiemployer bargaining association. After this withdrawal, however, Roger's refused to bargain with the union, claiming a good faith doubt about the union's majority status. The Board found that Roger's refusal to bargain was a violation of section 8(a)(1) and (5) of the Act,[106] thus ruling that the union's presumptive majority status survived the employer's withdrawal from the bargaining as-

94. Whether Western Distributing Co. was in fact a successor employer was not decided here. *Id.* at 399.

95. A successor employer is one which maintains a "substantial continuity of identity in the business." John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964). The successor employer also has a "substantial continuity in the identity of the work force." Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 263 (1974). *See* 608 F.2d at 399.

96. *See* NLRB v. Burns Int'l Security Servs., 406 U.S. 272 (1972) (new employer hiring employees of predecessor employer has duty to bargain with union).

97. 608 F.2d at 399.

98. *Id.*

99. *Id.* at 398.

100. *Id.* at 399.

101. *Id. See also* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939); NLRB v. Eagle Material Handling, Inc., 558 F.2d 160 (3d Cir. 1977); NLRB v. Albuquerque Phoenix Express, 368 F.2d 451 (10th Cir. 1966).

102. The NLRB decreed that a duty to bargain arose at the time of the merger. The court, however, adjudged that a duty to bargain was imposed only upon the union's formal request to bargain. 608 F.2d at 399.

103. *Id.* at 400.

104. 605 F.2d 1164 (10th Cir. 1979).

105. *Id.* at 1165.

106. 29 U.S.C. § 158(a)(1), (5) (1976).

sociation.[107]

Upon appeal, the Tenth Circuit court agreed with the Board's reasoning and found that Roger's voluntary acceptance of the union as the bargaining representative of its employees created a presumption of the union's majority status.[108] The rationale for this presumption is based on the more fundamental premise that employers will normally act in accordance with the law. Since recognition of a union with less than majority status is an unfair labor practice,[109] it is presumed that any union recognized by an employer will have met the requisite majority status. The court then explained that the Board favors continuation of bargaining relationships after a withdrawal from a bargaining association[110] so as to discourage employers from quitting such associations.[111] To rebut the presumption that the union's majority status survived the withdrawal, the employer "must show a good faith belief, sustained by *objective facts*, that majority status did not survive . . . ."[112] Because Roger's failed to meet this standard of proof, the court decreed that the employer was obligated to bargain with the union.[113]

A violation of section 8(a)(1) and (5) of the NLRA,[114] because of noncompliance with a collective bargaining agreement, was asserted in *Arco Electric Co. v. NLRB*.[115] Though Arco was never a member of a multiemployer bargaining association, it did bind itself to contracts made between a bargaining association and an Arco employees' union.[116] Arco also engaged in conduct which, in the opinion of the Board, estopped the company from repudiating its current employment contract with the employees' union.[117]

The Tenth Circuit court, in upholding the Board's decision, reviewed the various claims of Arco and found them devoid of merit. Arco had argued that financial hardships necessitated its noncompliance with certain of the contract terms. The court, however, reasoned that "economic need does not justify contract repudiation."[118] Arco had also urged that the repudiation was justified because of the company's good faith doubt about the continued majority status of the union.[119] Arco's voluntary recognition of the union as the bargaining representative of its employees raised a presumption of majority status.[120] Though Arco may have been able to justify its refusal to bargain as based upon a good faith doubt of majority status, backed by a

107. 605 F.2d at 1165.
108. *Id.*
109. *Id. See also* International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann), 366 U.S. 731 (1961).
110. 605 F.2d at 1165 (citing NLRB v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979)).
111. 605 F.2d at 1166. The court also noted that the employees' freedom of choice in representation is not disturbed as they may demand a decertification election.
112. *Id.* (emphasis added).
113. *Id.*
114. 29 U.S.C. § 158(a)(1), (5) (1976).
115. 618 F.2d 698 (10th Cir. 1980).
116. Arco had bound itself to these contracts for 15 years. *Id.* at 698-99.
117. *Id.* at 699.
118. *Id.* at 700.
119. *Id.*
120. *See* NLRB v. Roger's I.G.A., Inc., 605 F.2d 1164 (10th Cir. 1979).

rational basis for that belief, such reasoning does not justify repudiation of a contract that had already been negotiated.[121] The court warned that grave consequences would follow a decision which approved the unilateral repudiation of an existing contract merely because of a good faith doubt as to majority status.[122] After dismissing several other Arco arguments, the court ruled that Arco was bound by the contract to collectively bargain.[123]

When one employer succeeds another in essentially the same business,[124] the successor employer has a duty to consult with the bargaining representative of the retained employees.[125] In some cases, however, the determination of a duty to bargain must await a successor employer's hiring of a "full complement"[126] of employees so as to allow the employer to determine if the union actually represents a majority of the employees.[127] The "full complement" question was placed before the Tenth Circuit Court of Appeals in the case of *NLRB v. Pre-Engineered Building Products, Inc.*[128] Pre-Engineered Building Products, Inc. (company) assumed control over a plant two weeks after it had been closed down by the prior owner. When the company's predecessor was in full operation, the work force consisted of forty-one employees. Upon its acquisition of the plant, the company hired four employees, all of whom had been employees of the predecessor.[129] The company was summoned before the Board when it refused to bargain with the union representing those employees. The Board found that the company was a successor employer and that it thus had a duty to bargain with the union.[130]

On appeal of its case to the Tenth Circuit, the company argued that the Board erroneously refused to consider evidence pertaining to the change in the composition of the plant's work force. The company further averred that at the time of the Board's hearing, the company had not yet hired a full complement of workers.[131] The appellate court agreed with the company's contention that the Board acted precipitously in finding a duty to bargain. The major legal problem, according to the court, was determining at what point in time the composition of the work force was to be examined so as to ascertain the union's majority status. The court balanced the need to protect the employees' right to speedy representation against the need to insure that the representation truly reflects the wishes of a majority of the employees.[132] The court asserted that it is also necessary to take into account the employer's need to build up, to an efficient operating level, a business which

121. 618 F.2d at 700.
122. Majority status did, however, exist here. *Id.*
123. *Id.*
124. *See* note 95 *supra.*
125. NLRB v. Burns Int'l Security Servs., 406 U.S. 272 (1972).
126. The duty to bargain with the union may not become apparent until after the new employer has hired a full complement of workers. *Id.* at 295.
127. 29 U.S.C. § 159(a) (1976) requires that the bargaining agent must represent a majority of the employees in the unit.
128. 603 F.2d 134 (10th Cir. 1979).
129. *Id.* at 136.
130. *Id.* at 135.
131. *Id.*
132. Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609, 612-13 (9th Cir. 1977).

may have been defunct when taken over.[133]

The court determined that the Board should have considered all factors in deciding whether the company was a successor employer bound to bargain with the preexisting bargaining representative. Therefore, the order of the Board was denied enforcement and the case was remanded to allow the Board to hear further evidence on the issue of whether the company actually had acquired a full complement of workers. The Board was further instructed to decide whether, at the time of the company's refusal to bargain, the union represented a majority of that work force.[134]

D. *Exhausting Union Remedies*

When workers are represented by a collective bargaining agreement which provides grievance procedures to channel employee complaints, the employees are expected to follow the internal procedures before seeking the aid of outside factfinders, such as the courts.[135] The requirement that internal procedures be exhausted may be excused, but only in certain extraordinary circumstances.[136] In *Varra v. Dillon Cos.*,[137] the Tenth Circuit court was asked to consider a case in which an employee sued both her union and her employer without first complying with all of the internal union grievance procedures. The employee had initially filed a grievance with the union. After investigating the claim, the union decided not to carry the grievance to arbitration, a procedure permitted by the collective bargaining agreement. The employee, however, claimed that the union's decision was "arbitrary and capricious."[138] She therefore brought suit against the union, alleging that the union had breached its duty of fair representation. The employee filed suit against the employer as well, charging breach of the collective bargaining agreement.[139]

The Tenth Circuit court ruled that the lawsuit was premature. The court noted that the union's constitution provided a means by which an employee could appeal a union official's decision within the structure of the union.[140] Although in certain circumstances an employee need not exhaust internal union remedies,[141] the court found none of the exceptions to the exhaustion requirement applicable. Thus, the court held that the employee could not sue the union until those procedures provided in the union's constitution had been followed.[142]

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133. 603 F.2d at 136.
134. *Id.*
135. Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).
136. The employee need not exhaust internal procedures if it would be futile to do so, *id.* at 183; if the union wrongfully prevented access, Vaca v. Sipes, 386 U.S. 171, 185-86 (1967); if the union and the employer have engaged in racial discrimination, Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 330-31 (1969); or if the remedies have not provided for redress of the grievance involved, Fruit & Vegetable Packers Local 760 v. Morley, 378 F.2d 738, 745 (9th Cir. 1967).
137. 615 F.2d 1315 (10th Cir. 1980).
138. *Id.* at 1316.
139. *Id.*
140. *Id.*
141. *See* note 136 *supra*.
142. 615 F.2d at 1317.

The court of appeals also examined the suit against the employer. The employer had argued that the employee's failure to exhaust the union remedies was a defense to the employee's allegations against employer. Although the court recognized that some jurisdictions do not permit an employer to raise employee's failure to exhaust union remedies as a defense,[143] the Tenth Circuit decided that such a defense should be available to the employer.[144] Because the employee's suit against the employer was based upon its claims against the union,[145] the court declared that proof of the union's breach was a prerequisite to a judicial finding against the employer.[146] Thus, the employee could not succeed in its suit against either the union or the employer until all of the union's internal remedies had been exhausted.[147]

E. *Arbitration*

The courts have long recognized the federal policy favoring arbitration as the primary method for the settlement of disputes arising under collective bargaining agreements.[148] The preference for arbitration is evidenced by the fact that the courts have held an employer bound to arbitrate an underlying dispute even when the union has breached a no-strike clause of an agreement.[149] In *Reid Burton Construction, Inc. v. Carpenters District Council*,[150] however, the Tenth Circuit decided that an employer may legitimately refuse to arbitrate if the union's conduct is such as to establish an equitable defense to an arbitration demand.

The court of appeals noted that the right to arbitration, like any other contract right, may be waived.[151] Looking to the facts surrounding the case,[152] the court emphasized that the union had not asked for a stay of the court proceeding nor had it sought an order for arbitration. The union merely raised the arbitration clause as one of several defenses in its answer to the charges.[153] Furthermore, the union participated in pretrial hearings and

143. *Compare* Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977); Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972); Brady v. TWA, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) *with* Aldridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974), *cert. denied*, 423 U.S. 937 (1975); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974); Imbrunnone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971); Harrington v. Chrysler Corp., 303 F. Supp. 495 (E.D. Mich. 1969). *See also* Note, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers*, 55 CHI.-KENT L. REV. 259 (1979).

144. The national labor policy favors private resolution of disputes. The court felt that this policy was advanced by its decision allowing employers to raise this defense. 615 F.2d at 1317-18.

145. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

146. 615 F.2d at 1318. *See also* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

147. 615 F.2d at 1318.

148. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

149. *See* Packinghouse Workers v. Needham Packing Co., 376 U.S. 247 (1964).

150. 614 F.2d 698 (10th Cir. 1980).

151. *Id.* at 702.

152. This case had been heard at the trial court level, appealed, remanded, and appealed again. *Id.* at 700-01.

153. The employer charged the union with breach of a no-strike clause. *Id.* at 699-700.

discovery without seeking a stay or order for arbitration.[154] On appeal, the union claimed that its delay did not constitute a waiver of its right to arbitration because the employer suffered no prejudice as a result of its actions.[155] The court, through an examination of the facts, determined that the union's actions did result in a waiver.[156] The court found that the employer was prejudiced by the burdens of trial preparation.[157] Based upon these conclusions, the appellate court ruled that the employer was relieved of his contractual obligation to arbitrate.

In *Painters Local Union No. 171 v. Williams & Kelly, Inc.*,[158] the Tenth Circuit upheld an arbitrator's award as clearly within the authority of the arbitrator. A collective bargaining agreement between an employer and union provided that the employer would hire seventy-five percent of its work force from the local labor pool. It was provided that the remainder of the laborers would come from employer's work force in California.[159] The senior local employee entitled to work on the job was not hired. This employee filed a grievance against the employer. Upon a hearing before an arbitrator, it was determined that the employer had violated the agreement. The local employee was awarded back pay and fringe benefits.[160]

On appeal to the Tenth Circuit court, the employer alleged that whereas the arbitrator was limited to deciding whether there had been a contract violation, the arbitrator exceeded his authority by awarding back pay.[161] The court rejected this argument, noting that courts may not review the merits of an arbitrator's award which is within the scope of a collective bargaining agreement.[162] In addition, if an arbitrator's decision is within the bounds of the contract, the courts will recognize a broad arbitral discretion in fashioning an appropriate remedy.[163] As the employer attacked the arbitrator's remedy but did not challenge the underlying finding that a violation of the agreement had occurred, the court deferred to the decision of the arbitrator.[164]

Conversely, in another arbitration case, *Operating Engineers Local 670 v. Kerr-McGee Refining Corp.*,[165] the Tenth Circuit court refused to enforce an arbitrator's award on the basis that the arbitrator had overstepped his authority. The collective bargaining agreement involved in this case pronounced that the use of false statements to obtain sick leave benefits would

154. *Id.* at 703 n.8.
155. *Id.* at 702.
156. *Id. See also*, Cornell & Co. v. Barber & Ross Co., 360 F.2d 512 (D.C. Cir. 1966), *aff'g* 242 F. Supp. 825 (D.D.C. 1965).
157. 614 F.2d at 703.
158. 605 F.2d 535 (10th Cir. 1979).
159. Although the employer's home base was California, the agreement arose from a job to be performed in Colorado. *Id.* at 536.
160. *Id.* at 537.
161. *Id.* at 538.
162. *Id. See also* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
163. 605 F.2d at 538; *see* Campo Machining Co. v. Local Lodge No. 1926, 536 F.2d 330, 333 (10th Cir. 1976).
164. 605 F.2d at 538.
165. 618 F.2d 657 (10th Cir. 1980).

constitute grounds for discharge.[166] An employee who took off from work, claiming sick leave, presented the employer with a falsified doctor's note. Soon thereafter, the employee was dismissed for "using false statements to obtain sick leave, *and* a history of excessive absenteeism."[167] The employee's union challenged the dismissal and the matter went to arbitration.

The arbitrator ruled that the employee should be reinstated. The arbitrator reasoned that as the employer had given two reasons for the discharge,[168] unless both charges were supported by evidence, the dismissal was improper. Although there was sufficient evidence to support the charge that the employee had made false statements, the company had presented no evidence to support its allegation of excessive absenteeism. Consequently, the arbitrator found for the employee.[169]

The employer argued, on appeal, that the arbitrator had exceeded his authority.[170] The court agreed. The reviewing court explained that an arbitrator's award may not be contrary to the express terms of the collective bargaining agreement.[171] The arbitrator recognized that the employee had violated the sick leave provisions of the contract, yet he seemingly ignored those terms in his decision. The provisions of the bargaining agreement clearly provided for the discharge of an employee guilty of making false statements. Finding that the arbitrator had no authority to "add to" the terms of the contract by also requiring proof of the excessive absenteeism,[172] the court vacated the arbitrator's award.

II. HYBRID JURISDICTION

In *Richins v. Southern Pacific Co.*,[173] the Tenth Circuit was presented with a case involving dual jurisdiction. Railroad employees charged that their employer was guilty of a violation of a collective bargaining agreement. These employees filed an additional claim against their union, alleging breach of the duty of fair representation. The federal district court dismissed the action upon the ground that the employees had failed to exhaust their administrative remedies before the National Railroad Adjustment Board (Adjustment Board).[174]

The Tenth Circuit court ruled that the district court could entertain the case under a hybrid jurisdiction. This hybrid jurisdiction was made neces-

166. *Id.* at 658.

167. *Id.* (emphasis added).

168. The two reasons given to explain the discharge were the employee's use of false statements to obtain sick leave and the excessive absenteeism. *Id.*

169. *Id.* at 658-59.

170. *Id.*

171. *See* Fabricut, Inc. v. Tulsa Gen. Drivers, 597 F.2d 227, 229 (10th Cir. 1979); Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692, 695 (10th Cir. 1977).

172. 618 F.2d at 659-60.

173. 620 F.2d 761 (10th Cir. 1980).

174. *Id. See also* Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978) (minor disputes go to the Adjustment Board, not to the courts); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (no suit permitted until the exhaustion of remedies through National Railway Adjustment Board); Note, *Labor Law—Preemption Doctrine and Exhaustion of Administrative Remedies Under the Railway Labor Act*—Magnuson v. Burlington Northern, Inc., 52 TEMP. L.Q. 198 (1979).

sary by the fact that, although the Adjustment Board had jurisdiction over the employees' charge against the railroad,[175] it lacked jurisdiction over the unfair representation claim against the union.[176] The court was unwilling to split the two complaints. Hearings by both the Adjustment Board and the district court would result in an undesirable duplication of effort, since the contract in dispute applied to both claims.[177]

Although some courts have argued that the Adjustment Board should have the authority to hear hybrid cases,[178] the Tenth Circuit Court of Appeals held that, absent express authorization from the Supreme Court or Congress, the Adjustment Board should not be given such broad power.[179] Because the appellate court felt that the federal courts should not relinquish fair representation cases, the court declared that the district court should take jurisdiction over both the case against the railroad and the case against the union.

III. FAIR LABOR STANDARDS ACT[180]

The Fair Labor Standards Act of 1938 (FLSA)[181] applies to certain "enterprises" defined by statute.[182] In *United States v. Elledge*,[183] the Tenth Circuit was asked to determine if a day care facility came under the coverage of FLSA. FLSA explicitly states that preschools, elementary schools, and secondary schools are covered by the Act. Although other enterprises are defined,[184] the statute, unfortunately, does not give a definition of the term "preschool."[185] The business in question was described as a day care facility, providing toys, meals, outdoor play, and occasional field trips, mainly for children of working mothers. The school had no certified teachers, and no lesson plans or progress reports were prepared.[186] The operator of the business argued that the facility was simply a day care center, not a preschool. The Secretary of Labor, however, asserted that the enterprise was a preschool subject to FLSA requirements.

The court looked to the legislative history of FLSA, but could find no guidelines to aid in the determination of whether a given facility is a preschool. The court noted that the Ninth Circuit, in considering the same question, held that operations "essentially custodial in nature"[187] for the

175. 620 F.2d at 762.
176. *Id.* at 762-63.
177. *Id.* at 763.
178. *See, e.g.*, Goclowski v. Penn Central Transp. Co., 571 F.2d 747 (3d Cir. 1978).
179. 620 F.2d at 763.
180. 29 U.S.C. §§ 201-219 (1976).
181. *Id.*
182. *Id.* § 203(s)(5) includes as enterprises: "a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education . . . ."
183. 614 F.2d 247 (10th Cir. 1980).
184. 29 U.S.C. § 203(v), (w) (1976).
185. The term "preschool" was added to the statute by amendment. Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(2), (3), 86 Stat. 375 (codified in 29 U.S.C. § 203(s)(5) (1976)).
186. 614 F.2d at 249.
187. Marshall v. Rosemont, Inc., 584 F.2d 319, 321 (9th Cir. 1978).

purpose of providing day care for children of working mothers were not preschools regulated by FLSA. The Tenth Circuit, however, rejected the Ninth Circuit precedent and instead looked to the common meaning of the word "preschool."[188] The court emphasized that expert testimony supported the contention that children can learn simply through exposure to other children and adults.[189] The appellate court considered the humanitarian and remedial purposes of the FLSA and decided that, in order to carry out the purposes of the legislation, the term "preschool" must be given a broad interpretation.[190] Accordingly, the court held that an operation which is open only for custodial purposes falls under the coverage of the FLSA.

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188. 614 F.2d at 250.
189. *Id.*
190. *Id.* at 251.