Denver Law Review

Volume 60
Issue 2 *Tenth Circuit Surveys*

Article 13

February 2021

Labor Law

Michael T. Pennington

LABOR LAW

OVERVIEW

During the period covered by this survey, most of the cases considered by the Tenth Circuit Court of Appeals were actions arising under the National Labor Relations Act. In one of its more notable decisions, the Tenth Circuit court ruled that appropriate bargaining units in the health care industry may no longer be determined by the National Labor Relations Board's traditional community of interests test, but must be based upon the disparity of interests between employee groups. This survey will discuss twenty-six of the more significant and interesting cases decided by the court of appeals.

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

A. *Jurisdiction*

The jurisdiction of the National Labor Relations Board (Board or NLRB) was challenged on two grounds in *R.W. Harmon & Sons, Inc. v. NLRB*.[2] Harmon, a provider of school bus transportation services to public school districts in nine states, first claimed that its activities were essentially local and did not affect interstate commerce.[3] Second, Harmon contended it shared the school district's governmental exemption from NLRB jurisdiction.[4] In asserting this claim, Harmon argued that it was prevented from participating meaningfully in collective bargaining with its employees because the school district had authority to reject job applicants and recommend dismissal of Harmon's employees.[5] The Board rejected these arguments and ordered a representation election, which was won by the union. When Harmon refused to bargain,[6] the union filed charges and the Board found Harmon in violation of subsections 8(a)(1) and 8a(5) of the National Labor Relations Act (NLRA or Act).[7]

---

1. 29 U.S.C. §§ 141-144, 151-169, 171-188 (1976 & Supp. IV 1980).

2. 664 F.2d 248 (10th Cir. 1981).

3. *Id.* at 250. 29 U.S.C. § 160(a) (1976) provides that: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce."

4. 29 U.S.C. § 152(2) (1976) provides, *inter alia*, that "any State or political subdivision thereof," is not subject to the Board's jurisdiction.

5. 664 F.2d at 250. "Courts have interpreted section [152(2)] to prohibit the Board from asserting jurisdiction over private employers that perform services for exempt governmental entities if the employer does not 'retain sufficient control over the employment relationship to engage in meaningful collective bargaining.' " *Id.* at 251 (citing Board of Trustees of Memorial Hosp. v. NLRB, 624 F.2d 177, 185 (10th Cir. 1980); NLRB v. Pope Maintenance Corp., 573 F.2d 898, 902 (5th Cir. 1978)).

6. An employer seeking judicial review of Board representation election decisions must refuse to bargain with the union after the election in order to precipitate an unfair labor practice proceeding which will be reviewable in the federal courts. Magnesium Casting Co. v. NLRB, 401 U.S. 137, 139 (1971). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 43, 60 (1976).

7. 29 U.S.C. § 158(a)(1), (5) (1976). Section 158(a)(1) prohibits acts of interference, re-

On appeal to the Tenth Circuit, Harmon's contention that the essentially local nature of its business precluded Board jurisdiction was rejected. The court pointed out that the Board's jurisdiction encompasses even a local business if interstate commerce is affected.[8] With respect to Harmon's second argument that it lacked sufficient control over the employment relationship to bargain meaningfully, the court ruled that Harmon's control over wages and benefits was sufficient to satisfy the jurisdictional test.[9] An employer is not required "to control all terms and conditions of employment, but only enough . . . to bargain effectively."[10] The court, therefore, enforced the Board's order.

Harmon also argued that the Board abused its discretion by abandoning part of its earlier jurisdictional test for school bus operators without following the rulemaking procedures of the Administrative Procedure Act.[11] Prior to *National Transportation Services, Inc.*,[12] the Board refused to exercise jurisdiction over private school bus transportation companies because they were intimately connected with a statutorily exempt governmental unit. In *National Transportation*, however, the Board rejected the "intimately connected" test and decided to assert jurisdiction over school bus companies so long as they retain sufficient control over employment conditions to bargain meaningfully.[13] The Tenth Circuit court refused to address this issue of informal rulemaking because it had not been raised in the court below.[14]

B. *Federal Preemption and Exclusivity of Remedies*

One issue considered by the Tenth Circuit court in *Peabody Galion v. Dollar*[15] was whether an Oklahoma statute[16] prohibiting discharge of employees for filing workers' compensation claims was preempted by the NLRA. The collective bargaining agreement between the company and the union provided that employees who became disabled due to an occupational injury or illness could be placed on workmen's compensation leave until suitable low-risk jobs became available. Pursuant to this provision, thirty-four employees who had filed workers' compensation claims were laid off in a two-month period because Peabody claimed no suitable positions were vacant. The employees felt they were, in effect, wrongfully discharged and filed grievances

straint, or coercion by an employer with the rights of employees (guaranteed in § 157) to organize, form, join, or assist a labor organization, to bargain collectively, or to refrain from any of these activities. Section 158(a)(5) provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.

8. 664 F.2d at 250.

9. *Id.* at 251.

10. *Id.*

11. *Id.* at 251-52. The Administrative Procedure Act rulemaking provision is codified at 5 U.S.C. § 553 (1976).

12. 240 N.L.R.B. 565 (1979).

13. *Id.* at 566.

14. 664 F.2d at 252. The Board's reluctance to use formal rulemaking procedures has been criticized, but its policy of announcing rules in adjudicatory proceedings has been upheld. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). *See generally* Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

15. 666 F.2d 1309 (10th Cir. 1981).

16. OKLA. STAT. tit. 85, §§ 5-7 (Supp. 1980).

seeking binding arbitration under the collective bargaining agreement. Two cases reaching arbitration resulted in awards for the company, so the employees filed a diversity action in federal court seeking a remedy under Oklahoma law. The trial court rejected Peabody's contention that the statutory cause of action was barred by federal labor policy and denied its motion for summary judgment.[17]

On interlocutory appeal, the Tenth Circuit court asserted that "the preemption doctrine is not turned on by simply shouting preemption or by pressing a button."[18] The court noted the following two rationales that apply to the invocation of the preemption doctrine: the supremacy clause and the theory of primary jurisdiction.[19] According to the court in *Peabody*, these rationales have been utilized in the formulation of three preemption tests in the area of labor relations. The first of these tests, enunciated in *San Diego Building Trades Council v. Garmon*,[20] requires preemption of state regulation when the activity regulated is protected by section 7[21] or prohibited by section 8 of the NLRA.[22] When the activity is only arguably subject to those sections "the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[23] Supplementing *Garmon*, the second test, based on the supremacy clause, requires that where the activity is not arguably subject to the NLRA, preemption may still be justified if "the absence of federal regulation is indicative of a congressional determination to leave the challenged conduct available" and if state regulation would upset "the balance of power between labor and management expressed in national labor policy."[24] The third test, known as the frustration test, demands preemption of a state law if it would frustrate the Act's effective implementation.[25]

In applying the *Garmon* test, the appellate court in *Peabody* determined that discharging employees for claiming workers' compensation was not conduct subject to the Act since it was not related in any way to union organization or collective bargaining.[26] Furthermore, the activity provoking the disputed discharges did not have a tendency to conflict with federal labor

17. 666 F.2d at 1312.

18. *Id.* at 1314.

19. *Id.*

> The supremacy clause focuses on the extent to which Congress has occupied the field of labor relations by extending protection to certain conduct. The primary jurisdiction theory requires preemption where the conduct at issue is subject to the unfair labor practice jurisdiction of the National Labor Relations Board.

Id. (citing Sears, Roebuck & Co. v. Council of Carpenters, 436 U.S. 180, 198-200 (1978)).

20. 359 U.S. 236 (1959).

21. 29 U.S.C. § 157 (1976) provides that employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities.

22. 29 U.S.C. § 158 (1976) prohibits certain unfair labor practices of employers and labor organizations, including interference with § 157 rights.

23. *Peabody*, 666 F.2d at 1314.

24. *Id.* at 1315 (citing Local 20, Teamsters Union v. Morton, 377 U.S. 252, 260 (1964)).

25. 666 F.2d at 1315 (citing *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 270 & n.46 (1979)).

26. 666 F.2d at 1316. The court futher noted that the *Garmon* test does not require preemp-

law.[27] Regarding the second test, the court concluded that preemption was not justified because the absence of federal regulation did not indicate a congressional intention to leave the challenged conduct available; Congress has never considered workers' compensation related discharges.[28] The *Peabody* court also noted that permitting state regulation in the area would not upset the balance of power between labor and management because the objective of such regulation is unrelated to the goals of organized labor.[29] The frustration test also failed to convince the court that the preemption doctrine should be applied. Since workers' compensation is primarily a state concern, "enforcement of the Oklahoma statute does not create any hazard of interference with federally protected activity."[30] Moreover, the statute applies to all Oklahoma employees, not just union members, and hence, it is more difficult to find a congressional intent to preempt than if it applied specifically to concerted union activity.[31]

Finally, the court reasoned that even if the Oklahoma statute did not withstand the preemption tests, it would nevertheless qualify as a "state concern" exception to the preemption requirement.[32] Therefore, the Tenth Circuit court upheld the trial court's assertion of jurisdiction.

Another issue considered in *Peabody* was whether the binding arbitration provision in the collective bargaining agreement precluded the employees from seeking other remedies. Peabody maintained that even if the Oklahoma statute was not preempted by federal labor law, the employees did not have a statutory cause of action because arbitration was the exclusive remedy for disputes arising under the collective bargaining agreement. The court of appeals agreed that the issue of whether Peabody's *conduct* violated the agreement's guidelines for placing workers on workers' compensation leave was arbitrable.[33] However, the dispute over Peabody's *motive* for placing the workers on leave was not arbitrable because it arose under the Oklahoma statute, not the collective bargaining agreement.[34] Since one "cannot be compelled to arbitrate a dispute which he did not contract to arbitrate,"[35] the court found the exclusivity rule inapplicable.

A significant aspect of the *Peabody* opinion was the court's recognition that federal policy favors binding arbitration, but that important exceptions apply to its exclusivity as a remedy. One of these exceptions, reviewed by the *Peabody* court, arose in *Alexander v. Gardner-Denver Co.*[36] and was extended in *Barrentine v. Arkansas-Best Freight Systems, Inc.*.[37] In *Gardner-Denver* the

tion where only a minor aspect of the controversy is arguably within the Board's jurisdiction. *Id.*

27. *Id.*
28. *Id.*
29. *Id.* at 1316-17.
30. *Id.* at 1317.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1320.
35. *Id.*
36. 415 U.S. 36 (1974).
37. 450 U.S. 728 (1981).

Supreme Court ruled that arbitration did not provide an adequate remedy for enforcement of Title VII[38] rights and, thus, the statutory right to trial could not be precluded by the initiation of arbitration procedures.[39] The Court expanded this ruling in *Barrentine* to include substantive rights arising under the Fair Labor Standards Act,[40] reasoning that such rights were individual, not collective.[41] Applying the Supreme Court's rationale in *Gardner-Denver* and *Barrentine*, the Tenth Circuit Court of Appeals in *Peabody* acknowledged that the alternative remedy arose under state rather than federal law, but held that such difference did not constitute a distinguishing factor.[42] Accordingly, the court rejected Peabody's claim that the arbitration remedy barred the statutory action.

C. *Interference With Employee Rights*

Husky Oil, N.P.R. Operations, Inc. v. NLRB[43] dealt with the question of an employer's right under the NLRA to deny non-employee union organizers access to a worksite for the purpose of encouraging employees to vote for union representation. Husky refused to give the union permission to visit personally its remote Alaskan worksite, and the union filed an unfair labor practice charge with the Board. The company contended that other reasonable means of communicating with the employees were available to the union. The Board rejected this contention and ordered Husky to allow the union to visit the worksite.[44]

On appeal, the Tenth Circuit applied *NLRB v. Babcock & Wilcox Co.*,[45] which held that nonemployee union organizers may be excluded from company property if two conditions are met. First, other means of communication must be available which permit the union, through reasonable efforts, to reach the employees.[46] Second, the no-access rule must not be applied discriminatorily against the union.[47] Relying on the Third Circuit's interpretation of *Babcock* in *NLRB v. Tamiment, Inc.*,[48] Husky maintained that the Board erred in evaluating the available channels of communication when the union had not shown that it made reasonable efforts to reach the employees. The Tenth Circuit court declined to follow the Third Circuit, declaring that the Board could evaluate the available channels without the union first having demonstrated its efforts to communicate with the employees.[49]

The court affirmed the importance of face-to-face contact between

38. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16 (1976) & Supp. IV 1980).
39. 415 U.S. at 51-52.
40. 29 U.S.C. §§ 201-219 (1976 & Supp. IV 1980).
41. 450 U.S. at 737-44.
42. 666 F.2d at 1321.
43. 669 F.2d 643 (10th Cir. 1982).
44. *Id.* at 645.
45. 351 U.S. 105 (1956).
46. *Id.* at 112.
47. *Id.*
48. 451 F.2d 794 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972).
49. 669 F.2d at 645.

union representatives and Husky employees, observing that such contact was possible only at the Anchorage airport or at the employee's homes when they were periodically on leave.[50] Finding substantial evidence on the record to support the Board's conclusion that these and other means of contact were unsatisfactory, the court of appeals enforced the Board's order.[51] Nevertheless, the Tenth Circuit did so with some reluctance, remarking that "this is a close case, especially because the employer was willing to give the union the names, home addresses, and telephone numbers of the employees."[52]

In an unpublished opinion, *Frank Paxton Lumber Co. v. NLRB*,[53] the Tenth Circuit court reviewed a Board finding that Paxton had violated section 8(a)(1) of the Act[54] by discharging Kirk for engaging in concerted activities protected by section 7 of the Act.[55] The company argued that Crownover, the manager who actually terminated Kirk, was not motivated by animus but by Kirk's excessive absenteeism and his failure to report his absences in a timely fashion after being warned that such conduct would no longer be tolerated.[56] Accepting the Board's finding that Sanchez, Kirk's immediate supervisor, had lied to Crownover about giving the warning, the court held that "even if the person actually making the termination decision acted in good faith, [section] 8(a)(1) is violated if the decision was based on conduct by a discriminatorily motivated supervisor."[57]

Paxton maintained that Sanchez's failure to give the warning could not have been discriminatorily motivated since Sanchez's neglect and subsequent lie occurred before he knew of Kirk's concerted activity.[58] The Board, however, found that prior to Sanchez's neglected warning, Kirk and other employees had begun discussing various job related safety problems and the lack of meaningful job classifications, and that Kirk had suggested to Sanchez that operations would be improved by assigning specific job duties to specific employees.[59] Curiously, the court suggested this was not concerted activity because it "was not clearly shown to have been a presentation of a group viewpoint, although it concerned all the employees of the warehouse . . . ."[60] Nevertheless, the court found other support in the record for the Board's conclusion that the discharge was discriminatorily motivated and, therefore, enforced the order.[61]

---

50. *Id.* at 647.

51. *Id.* at 648.

52. *Id.*

53. No. 78-1607 (10th Cir. June 29, 1981).

54. *See supra* note 7.

55. *See supra* note 21. The NLRA does not define the term "concerted activity," but for a general discussion of case law in this area, see R. GORMAN, *supra* note 6, at 296-325.

56. No. 78-1607, slip op. at 9.

57. *Id.* at 11 (citing Allegheny Pepsi-Cola Bottling Co. v. NLRB, 312 F.2d 529 (3d Cir. 1962)).

58. No. 78-1607, slip op. at 9.

59. *Id.* at 3.

60. *Id.* at 11. The statement that Kirk and other employees had been "discussing among themselves . . . the lack of meaningful job classifications," *id.* at 3, would seem to suggest that Kirk was indeed presenting "a group viewpoint."

61. *Id.* at 11-12. The Tenth Circuit supported its holding, *inter alia*, by noting that Kirk did engage in protected concerted activity after Sanchez's neglected warning and Kirk was discharged shortly thereafter. *Id.*

NLRB v. American Can Co.[62] arose from an NLRB order holding that application of a superseniority clause[63] to a union guard and trustee violated the NLRA by interfering with the rights of other employees and by encouraging participation in union activities.[64] The company decided to cease operations, and among the employees retained or recalled to assist in closing the plant were Schneider, a union guard, and Howard, a union trustee. These union officers were given preference over more senior employees solely due to the application of the superseniority clause. Charges were filed with the Board against the union and the employer by two former employees of the defunct company.

The Tenth Circuit court analyzed the application of the superseniority clause in the light of Supreme Court standards set forth in *NLRB v. Great Dane Trailers, Inc.*[65] Under *Great Dane*, an action which encourages or discourages union membership or activity is unlawful without proof of anti-union motivation, if it is inherently destructive of important employee rights.[66] When the adverse impact on these important employee rights is, however, comparatively slight, then proof of anti-union motivation is required if the employer has come forward with evidence that the conduct was motivated by legitimate and substantial business considerations.[67] The Tenth Circuit court held the superseniority clause was not inherently destructive of important employee rights, but did to some extent have an adverse impact on those rights. Thus, there was a burden on the employer and union to come forward with evidence of legitimate and substantial business justifications.[68] Since no justification was established, the appellate court affirmed the Board's conclusion that the superseniority clause violated the Act.[69]

The court in *American Can* also observed that Board decisions have held superseniority clauses are presumptively valid if they do not go beyond layoff and recall of union stewards.[70] This presumption rests on the belief that the steward's key role in the grievance procedure requires their continued presence on the job.[71] The court did not pass directly on this presumption. The

62. 658 F.2d 746 (10th Cir. 1981).

63. The clause in the collective bargaining agreement provided that up to 10 union officers would have preference in case of layoff or recall, regardless of their seniority. *Id.* at 749. Concerning superseniority, see generally Note, *Superseniority: Post*—Dairylea *Developments*, 29 CASE W. RES. 499 (1979); Note, *Superseniority: Latitudes and Limitations*, 49 U. CIN. L. REV. 832 (1980).

64. The Board charged the union with violation of 29 U.S.C. § 158(b)(1)(A), (b)(2) (1976) which provide, *inter alia*, that it shall be an unfair labor practice for a labor organization to interfere with employees' rights to refrain from union activities or to cause an employer to discriminate against an employee in an attempt to encourage or discourage membership in any labor organization. In addition, the employer was charged with violation of 29 U.S.C. § 158(a)(1), (3) (1976). Section 158(a)(1) is summarized in *supra* note 7. Section 158(a)(3) provides that it shall be an unfair labor practice for an employer to discriminate in hiring, tenure, or any other condition of employment in order to encourage or discourage union membership.

65. 388 U.S. 26 (1967).

66. *Id.* at 34.

67. *Id.*

68. *American Can*, 658 F.2d at 756-57.

69. *Id.* at 757.

70. *Id.* at 755.

71. *Id. See generally* Note, *Union Steward Superseniority*, 6 N.Y.U. REV. L. & SOC. CHANGE 1 (1976).

Tenth Circuit court did, however, agree with the Board's holding that superseniority for union officers other than stewards requires the union to prove that such officers have "duties which relate directly to the effective and efficient functioning of the bargaining unit."[72] The exact proof needed depends on the circumstances and should be left to the NLRB, but the court suggested as a minimum requirement that the union officer receiving superseniority benefits should be one who "help[s] to implement the collective bargaining agreement in a meaningful way."[73]

The Tenth Circuit court in *NLRB v. Wilhow Corp.*[74] considered the appropriateness of a Board bargaining order[75] as a remedy for an employer's refusal to bargain when notified of majority union support[76] and the employer's subsequent unfair labor practices. The court agreed that Wilhow violated section 8(a)(1) of the Act[77] by interrogating employees about the attempted unionizing[78] and also found substantial evidentiary support for the determination that section 8(a)(3)[79] was violated by discriminatory discharge of two union supporters.[80] Conceding that the employer's evidence of a nondiscriminatory motive for the firings shifted the burden of proof to the Board, the court of appeals nevertheless held that circumstantial evidence is sufficient to meet that burden where "the record in its entirety allows a fair inference of discriminatory motivation."[81]

Accepting the administrative law judge's determination that prior to the unfair labor practices a majority of the Wilhow employees supported the union, the court proceeded to consider the propriety of the bargaining order under the guidelines of *NLRB v. Gissel Packing Co.*,[82] the leading Supreme Court decision on the issue. The *Gissel* Court held that the Board could use a bargaining order if the union at one point had majority support and the employer's unfair practices made a fair election unlikely if only the traditional remedies were used.[83] The court in *Wilhow* upheld the Board's bargaining order because of the following factors: the smallness of the plant, the employer's inflexible attitude toward bargaining, and the residual effect of terminations due to union activity.[84] Wilhow claimed that the rights of its

72. 658 F.2d at 757.

73. *Id.*

74. 666 F.2d 1294 (10th Cir. 1981).

75. The Supreme Court has affirmed the authority of the Board to go beyond the statutory cease-and-desist order and require the employer to bargain with a union as a remedy for unfair labor practices. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). *See generally* Lankford, *Nonmajority Bargaining Orders: A Study in Indecision*, 46 ALB. L. REV. 363 (1982); Wortman & Jones, *Remedial Actions of the NLRB in Representation Cases: An Analysis of the* Gissel *Bargaining Order*, 30 LAB. L.J. 281 (1979).

76. Out of 17 eligible employees, 12 signed cards authorizing the union to represent them for purposes of collective bargaining. 666 F.2d at 1298-99.

77. *See supra* note 7.

78. 666 F.2d at 1300 (interrogations found to be coercive, threatening, and a restraint on unionizing activity).

79. *See supra* note 64.

80. 666 F.2d at 1301.

81. *Id.*

82. 395 U.S. 575 (1969).

83. *Id.* at 614.

84. 666 F.2d at 1305.

current employees would be violated by a bargaining order since only one of the twelve employees who signed authorization cards was still employed. The court, however, rejected this argument stating that employee turnover does not justify withholding a bargaining order since "the validity of such an order depends on evaluating the situation as of the time of the unfair labor practices."[85]

At issue in *NLRB v. Carbonex Coal Co.*[86] was whether the company had a duty to bargain over certain unilateral actions following a representation election that the union won.[87] In a three-week period immediately after the election, the company laid off eighteen employees and subcontracted its truck hauling operations. Carbonex contended that these actions were necessitated by economic conditions[88] and that it had no legal duty to bargain with the union concerning these decisions since they had occurred before the union's certification by the Board.[89]

Even if the actions were motivated by economic conditions, the Tenth Circuit court concluded that the company, nevertheless, had a duty to notify the union before making changes so the union could have a meaningful opportunity to suggest alternatives and make counter-arguments.[90] Relying on *King Radio Corp. v. NLRB*[91] and cases from other circuits,[92] the court stated: "It is well settled that unilateral action affecting working conditions taken by an employer following a union victory at a representation election violates section 8(a)(5), even if such unilateral action occurs prior to the union's certification as the collective bargaining agent."[93]

In addition to making unilateral changes in working conditions, the company also discharged three employees for refusing to cross a picket line during a strike. Carbonex maintained that the discharges did not violate the Act because the strike was unlawful. The court, however, found substantial support for the NLRB's determination that the strike was a lawful unfair labor practice strike and, therefore, the discharges violated the employees rights.[94]

The court of appeals also declined to follow the company's suggestion that the case should be re-evaluated under the NLRB's new standard set forth in *Wright Line*.[95] First, the court refused to apply a new test to a case

85. *Id.* at 1304 (citing Highland Plastics, Inc., 256 N.L.R.B. No. 28 (1981)).

86. 679 F.2d 200 (10th Cir. 1982).

87. The Board also found that the company had committed numerous unfair labor practices *prior* to the election, but these findings were not challenged on appeal. *Id.* at 202.

88. *Id.* at 203.

89. *Id.* at 205. After an election is held the Board evaluates any challenges to the validity of the election. If these challenges are found to be groundless, the Board certifies the results of the election. 29 U.S.C. § 153(b) (1976). *See also* R. GORMAN, *supra* note 6, at 46-49.

90. 679 F.2d at 204.

91. 398 F.2d 14 (10th Cir. 1968).

92. *Accord* NLRB v. Allied Prod. Corp., 629 F.2d 1167, 1171 (6th Cir. 1980); NLRB v. McCann Steel Co., 448 F.2d 277 (6th Cir. 1971); NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966).

93. 679 F.2d at 205.

94. *Id.* at 204.

95. 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The *Wright Line* standard for allocating the burden of proof involves dual motive discharges in which an employer arguably has both an illegal and a legitimate business reason

decided by the NLRB prior to the change, but heard on appeal after the change.[96] Second, the *Carbonex* case, unlike *Wright Line*, did not involve a *dual* motive for the discharge since the Board found Carbonex's claim of a legitimate business motive to be not only pretextual, but also fabricated.[97]

D. *Appropriate Bargaining Units*

In *Presbyterian/St. Luke's Medical Center v. NLRB*[98] the Tenth Circuit court announced an important decision affecting the health care industry. The case resulted from a medical center challenge of the appropriateness of a bargaining unit[99] limited to registered nurses at one facility. The medical center claimed that the bargaining unit should include all professionals, except physicians, at all three of its facilities. The appeal was based on the Center's allegation that the Board had refused to consider the congressional admonition that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry."[100] This warning was issued during the passage of the 1974 Health Care Amendments[101] which brought non-profit hospitals under the coverage of the NLRA.

The Tenth Circuit relied on the Third, Seventh, and Ninth Circuits in deciding that the NLRB's determination of the bargaining unit's scope and composition was not in conformity with the intent of Congress.[102] In regard to unit scope, the Board has continued to apply a rebuttable presumption that single facility units are appropriate. The Board defends this presumption by arguing that the congressional admonition is concerned only with

---

for the discharge of one of its employees. Once the general counsel for the Board has established a prima facie case that protected conduct was a motivating or substantial factor in the discharge, the burden of production shifts to the employer to show that the discharge would have occurred in the absence of the protected conduct. *See generally* Note, Wright Line: *The NLRB Adopts the* Mt. Healthy *Test for Dual Motive Discharge Cases Under the LMRA*, 32 MERCER L. REV. 933 (1981).

96. 679 F.2d at 203.

97. *Id.* at 204. Although declining to apply the *Wright Line* rule, the court suggested that there may be problems with the Board's new rule. *Id.* at 203. *See also* Lewis & Fisher, Wright Line—*An End to the Kaleidoscope in Dual Motive Cases?*, 48 TENN. L. REV. 879 (1981).

98. 653 F.2d 450 (10th Cir. 1981), *modified*, 688 F.2d 697 (10th Cir.), *petition for cert. dismissed*, 103 S. Ct. 433 (1982).

99. 29 U.S.C. § 159(b) (1976) provides that "the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining . . . ."

100. 653 F.2d at 453 (quoting S. CON. REP. NO. 988, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3950).

101. Pub. L. No. 93-360, 88 Stat. 395 (1974) (codified in scattered sections of 29 U.S.C.). *See generally* Note, *The 1974 Health Care Amendments to the National Labor Relations Act: Jurisdictional Standards and Appropriate Bargaining Units*, 5 FORDHAM URB. L.J. 351 (1977); Comment, *Labor Relations in the Health Care Industry—the Impact of the 1974 Health Care Amendments to the National Labor Relations Act*, 54 TUL. L. REV. 416 (1980).

102. 653 F.2d at 455 (quoting NLRB v. West Suburban Hosp., 570 F.2d 213, 216 (7th Cir. 1978)); St. Vincent's Hosp. v. NLRB, 567 F.2d 588, 592 (3d Cir. 1977); 653 F.2d at 457 (quoting Mary Thompson Hosp. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980)); NLRB v. St. Francis Hosp., 601 F.2d 404, 419 (9th Cir. 1979). For a discussion of congressional intent concerning health care institution bargaining units, see Bumpass, *Appropriate Bargaining Units in Health Care Institutions: An Analysis of Congressional Intent and Its Implementation by the National Labor Relations Board*, 20 B.C.L. REV. 867 (1979).

unit composition within a particular facility, not with whether a unit's scope should include one facility or several.[103] Although concurring with the Board's literal reading of the legislative history, the court nevertheless perceived strong congressional concern for reducing unit fragmentation regardless of whether the source be from composition or scope.[104] Therefore, the court held that the Board's "traditional factors used in scope determinations 'must be put in balance against the public interest in preventing fragmentation in the health care field.' "[105] Moreover, the Board must specify " 'the manner in which its unit determination[s] . . . implement[] or reflect[] that admonition.' "[106]

In regard to unit composition, the NLRB's ruling that a unit restricted to registered nurses is presumptively appropriate was rejected by the court for two reasons. First, because the rebuttable presumption shifted both the burden of producing evidence *and* the burden of persuasion, the court reasoned that it violated Federal Rule of Evidence 301[107] and impermissibly relieved the Board of the burden to prove the occurrence of an unfair labor practice by a preponderance of the evidence.[108] Second, the court held that any use of a presumption which requires health care industry employers to produce evidence of the inappropriateness of a limited bargaining unit is contrary to the congressional admonition against proliferation of bargaining units.[109]

The Tenth Circuit court agreed with the Ninth Circuit court that to give effect to the congressional intent requires the Board to "focus on the 'disparity of interests between employee groups which would prohibit or inhibit fair representation of employee interests.' "[110] In other words, appropriate unit determinations in the health care industry should no longer be based on the Board's traditional community of interests test.[111] Instead, focusing on the disparity of interests requires determining whether the inter-

103. 653 F.2d at 454 (citing Memorial Medical, 230 N.L.R.B. 976, 978 n.5 (1977)). *See generally* Zimmerman, *Trends in NLRB Health Care Industry Decisions*, 32 LAB. L.J. 3 (1981).

104. 653 F.2d at 455.

105. *Id.* (quoting St. Vincent's Hosp. v. NLRB, 567 F.2d 588, 592 (3d Cir. 1977)).

106. 653 F.2d at 455 (quoting NLRB v. West Suburban Hosp., 570 F.2d 213, 216 (7th Cir. 1978)).

107. This reasoning was modified in Beth Israel Hosp. v. NLRB, 688 F.2d 697 (10th Cir. 1982). "On the question of which unit is appropriate for bargaining purposes, the NLRB has no burden of persuasion that might be shifted by use of a presumption." *Id.* at 699. Rather than a burden of persuasion, the court held that the NLRB relies on its expertise and experience in making such determinations. *Id.* Furthermore, the court stated, "in the face of congressional silence, we do not infer that Congress intended the NLRB to follow the Federal Rules of Evidence at the informal, nonadversarial representation proceedings." *Id.* at 700.

108. 653 F.2d at 456. Note, however, that this was modified in Beth Israel Hosp. v. NLRB, 688 F.2d 697, 700 (10th Cir. 1982), which held that in unfair labor practice proceedings, the NLRB's general counsel does not have to prove that the unit chosen at the representation hearing was appropriate by a preponderance of the evidence.

109. 653 F.2d at 457.

110. *Id.* (quoting NLRB v. St. Francis Hosp., 601 F.2d 404, 419 (9th Cir. 1979)). For an examination of the *St. Francis Hospital* case, see Note, *Registered Nurse Bargaining Units: Undue Proliferation?*, 45 MO. L. REV. 348 (1980).

111. Under the community of interests test, the Board considers such factors as similarity of earnings, benefits, hours, training, qualifications, and kind of work performed; also important are contact among employees, common supervision, bargaining history, employee preference, and extent of union organization. R. GORMAN, *supra* note 6, at 69.

ests of the registered nurses are sufficiently different from other professionals to justify a separate unit. Applying this approach, the court ruled that an all professional unit without physicians was an appropriate unit and remanded the case to the Board for reconsideration.[112]

The Tenth Circuit also expressed its disagreement with the Board's position that the community of interests and disparity of interests tests are essentially the same.[113] According to the court, the Board should start with a broad unit and eliminate employees with disparate interests, rather than begin with a narrow unit and add employees with similar interests.[114]

The differences between the respective tests espoused by the NLRB and the Tenth Circuit court appear to be primarily a question of semantics. In applying its community of interests test, the Board attempts to identify a group which neither includes employees with significant conflicting economic interests nor excludes employees with common economic interests.[115] Whether the Board begins with a narrow unit and adds employees or begins with a broad unit and deletes employees, the result should be approximately the same.[116] The court's approach favors the larger of two possible units and gives controlling significance to the public interest in non-proliferation of units. This is more than Congress was willing to do and gives the appearance of usurping the function of the Board. Perhaps a better approach would be to require employees in a proposed limited unit to possess a greater degree of community of interest when the unit is composed of health care employees.[117]

Following its holding in *Presbyterian/St. Luke's Medical Center*, the court denied enforcement of Board orders in two other cases with similar facts. In *Beth Israel Hospital and Geriatric Center v. NLRB*[118] the Board approved a bargaining unit limited to registered nurses employed at only one of the employer's facilities. Beth Israel urged that a unit including all professionals with whom the registered nurses worked would be more appropriate in view of the congressional mandate to avoid undue proliferation of bargaining units in the health care industry. The court decreed that a unit limited to registered nurses should no longer be considered presumptively appropriate[119] and remanded the case for further proceedings.

In *St. Anthony Hospital Systems v. NLRB*[120] the primary issue was again whether the Board erred in approving a bargaining unit composed exclu-

112. 653 F.2d at 456.

113. *Id.* at 457-58 n.6. The Board's position was announced in Newton-Wellesley Hosp., 250 N.L.R.B. 409 (1980).

114. 653 F.2d at 457-58 n.6.

115. *See* R. GORMAN, *supra* note 6, at 69.

116. It is often possible that the factors considered in determining a community of interest point to several units, any one of which could be an appropriate unit. *See* Black & Decker Mfg. Co., 147 N.L.R.B. 825 (1964); *see generally* Note, *Appropriate Bargaining Units in Non-Profit Hospitals*, 37 WASH. & LEE L. REV. 1221 (1980).

117. *See* Allegheny General Hosp., 239 N.L.R.B. 872, 884 (1978) (Penello, M., dissenting), *enforcement denied*, 608 F.2d 965 (3d Cir. 1979).

118. 677 F.2d 1343 (10th Cir. 1981), *modified*, 688 F.2d 697 (10th Cir. 1982).

119. 677 F.2d at 1345.

120. 655 F.2d 1028 (10th Cir. 1981), *modified*, 688 F.2d 697 (10th Cir.), *petition for cert. dismissed*, 103 S. Ct. 433 (1982).

sively of all nonsupervisory registered nurses at one of two facilities. Finding the case identical to *Presbyterian/St. Luke's*, the Tenth Circuit court ruled that the Board's application of a rebuttable presumption that the nurse unit was appropriate improperly relieved the NLRB's general counsel of the burden of proving the occurrence of an unfair labor practice. Thus, the Board's order was unenforceable and the case was remanded for further proceedings.[121]

Crane Sheet Metal, Inc. v. NLRB[122] presented the issue of whether two employers had delegated apparent authority to a multi-employer bargaining unit[123] for purposes of negotiating a binding agreement. The Tenth Circuit court applied the Board test for determining apparent authority. This test considers whether an employer clearly indicated an intention to be bound by group action, whether the union had notice of the group's existence and the delegation of bargaining authority to it, and whether the union agreed to and actually began negotiations with the representative of the group.[124] Agreeing with the Board that the last two elements of the test were satisfied, the appellate court nevertheless failed to find evidence on the record to indicate the employer intended to be bound by group action.[125] Despite association bylaws granting full authority to bind members,[126] the union was aware that at the time the two employers joined the association, they retained the right to disapprove any negotiated contract.[127] Stressing the clear evidence of an intention not to be bound, the court rejected the Board's apparent conclusion that the payment of membership fees to the association should be determinative of the employers' intent.[128] Consequently, the court in *Crane Sheet Metal* held that the contract was not binding on the two employers.

After negotiations have begun, withdrawal from a multi-employer unit is not permitted without consent of the opposing party unless unusual circumstances prevail.[129] Extreme financial hardship threatening the company's existence is one situation constituting an unusual circumstance.[130] In *NLRB v. Custom Sheet Metal & Service Co.*,[131] the court reviewed a Board determination that the threatened loss of the company's major customer did not justify withdrawal from a multi-employer bargaining unit. Disagreeing with the Board, the appellate court ruled that the threat of immediate loss of a customer purchasing three-fourths of the company's production and the

121. *Id.* at 1031. For modifications of this decision, see *supra* notes 107 and 108.

122. 675 F.2d 256 (10th Cir. 1982).

123. A multi-employer bargaining unit exists where several employers within a single industry or area join together to bargain as a group with a union representing employees at all of the companies. Although the NLRA does not specifically authorize multi-employer units, the Supreme Court has concluded that the practice has congressional approval. NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).

124. 675 F.2d at 259.

125. *Id.*

126. The employers were not aware of the bylaws until after the contract had been signed. *Id.*

127. *Id.* at 258.

128. *Id.* at 259 n.9.

129. NLRB v. Tulsa Sheet Metal Works, Inc., 367 F.2d 55 (10th Cir. 1966); Retail Assoc., Inc., 120 N.L.R.B. 388 (1958).

130. Spun-Jee Corp., 171 N.L.R.B. 557 (1968).

131. 666 F.2d 454 (10th Cir. 1981).

actual loss of several smaller customers did jeopardize Custom Sheet Metal's very existence.[132] The court also emphasized that the employer's withdrawal was apparently motivated solely by economic considerations.[133]

In a case of first impression, the Tenth Circuit in *Harding Glass Industries v. NLRB*[134] ruled that an impasse[135] in negotiations, by itself, is not an unusual circumstance justifying withdrawal by an employer from a multi-employer bargaining unit.[136] After numerous negotiating sessions had failed to produce an agreement, a union representative ended one session by angrily suggesting that Harding Glass was preventing agreement and that separate negotiations with that company might be better. At the next meeting, Harding withdrew because of the alleged impasse and the union's suggestion of separate negotiations. This attempted withdrawal was not consented to by the union and the court held that the angry remarks made at a bargaining session, and later modified, did not constitute consent; the court further held that these remarks could not be treated as a binding offer, even if accepted before withdrawn.[137]

In the absence of consent, Harding's withdrawal could be permitted only if unusual circumstances were present.[138] The appellate court carefully considered the decisions of other circuits[139] holding that impasse alone constitutes an unusual circumstance justifying withdrawal. The court in *Harding Glass*, however, declared that the better view is that withdrawal on impasse should be prohibited so long as continued membership would not be unfair because of other circumstances.[140] Agreeing with recent First and Fifth Circuit opinions,[141] the Tenth Circuit court noted that most of the concerns labelled by other courts as being connected with impasse are actually related to the issues of separate contracts and selective strikes.[142] Therefore, impasse alone should not trigger the right to withdraw especially since an impasse may be intentionally created by a party eager to withdraw. The court in *Harding Glass* also stated that insisting on continued participation after impasse is not futile because changed circumstances may result in eventual

132. *Id.* at 458.

133. *Id.* at 459.

134. 672 F.2d 1330 (10th Cir. 1982).

135. An impasse, or deadlock, exists when the parties no longer have any prospects of reaching an agreement and further discussion would be unproductive. *See* R. GORMAN, *supra* note 6, at 448.

136. 672 F.2d at 1335.

137. *Id.* at 1334.

138. *Id.*

139. H & D, Inc. v. NLRB, 633 F.2d 139 (9th Cir. 1980) (withdrawn from publication); NLRB v. Independent Ass'n of Steel Fabricators, 582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); NLRB v. Beck Engraving Co., 522 F.2d 475 (3d Cir. 1975); Fairmont Foods Co. v. NLRB, 471 F.2d 1170 (8th Cir. 1972).

140. 672 F.2d at 1335.

141. NLRB v. Marine Machine Works, Inc., 635 F.2d 522 (5th Cir. 1981); NLRB v. Charles D. Bonanno Linen Serv., Inc., 630 F.2d 25 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982). While relying on the First Circuit court's decision in *Bonnano*, the court in *Harding Glass* held publication of its opinion in abeyance pending the Supreme Court's ruling in *Bonanno*. After the Supreme Court in *Bonanno* held that impasse did not justify withdrawal in support of the decision in *Harding Glass*, the Tenth Circuit court published its opinion. 672 F.2d at 1339-40 n.4.

142. *Id.* at 1336.

agreement.[143] Accordingly, the court upheld the Board's finding that Harding committed an unfair labor practice by refusing to be bound by the collective bargaining agreement negotiated after it withdrew.[144]

The court also weighed a related issue arising from the remedy provided by the Board. Harding argued that the economic strike that was in progress at the time it withdrew from the bargaining unit did not become an unfair labor practice strike[145] merely because the withdrawal violated the NLRA. Therefore, Harding maintained, the strikers were not entitled to the Board's remedy of reinstatement and backpay because permanent replacements had been hired.[146] In upholding the Board's remedy, the court found that Harding's unlawful refusal to bargain became at least as important to the strikers as their effort to obtain economic goals. Therefore, the court in *Harding Glass* held that the Board could reasonably conclude that the refusal to bargain became a motivation for the strike,[147] thus converting the economic strike into an unfair labor practice strike and entitling the strikers to reinstatement and back pay.[148]

E. *Representation Elections: Conduct and Review*

The employer in *Crown Cork & Seal Co. v. NLRB*[149] asserted it did not have to bargain with the newly certified union because of improper conduct surrounding the election.[150] Noting that public policy favors *ex parte* resolution of election objections,[151] the court of appeals rejected the employer's demand for an evidentiary hearing because such factual disputes as existed would not require setting aside the union's victory even if resolved in the employer's favor. Regarding the first election objection[152] that a union campaign brochure containing a portion of an NLRB publication suggested Board endorsement of the union, the court found no disputed factual issue

143. *Id.* at 1337.

144. *Id.* at 1338.

145. A strike to obtain higher wages, better working conditions, or improvements in benefits is called an economic strike. An unfair labor practice strike is one precipitated or prolonged by an employer's unfair labor practices. An economic strike may be converted into an unfair labor practice strike by the intervening commission of an unfair labor practice. Economic strikers are not entitled to reinstatement if replacements are hired before the strikers unconditionally offer to return to work; unfair labor practice strikers are entitled to reinstatement regardless of whether replacements have been hired. *See generally* R. GORMAN, *supra* note 6, at 339-43.

146. 672 F.2d at 1338.

147. *Id.* at 1339.

148. *Id.*

149. 659 F.2d 127 (10th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982).

150. The refusal to bargain was resorted to as a means of contesting alleged election irregularities and the validity of the Board's certification of the union as the bargaining representative for the employees. *See supra* note 6. Either party may move, within five days of an election, to set aside the results on grounds that conduct attributed to the other party prevented a fair election. These objections are usually resolved by the regional director without an evidentiary hearing. *See generally* J. ATLESON, R. ROBIN, G. SCHATZKI, H. SHERMAN, E. SILVERSTEIN, LABOR RELATIONS AND SOCIAL PROBLEMS: COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT 153 (1978). *See also* Voegler, *Employer Objections to the Conduct of NLRB Elections*, 4 GLENDALE L. REV. 1 (1982).

151. 659 F.2d at 129.

152. Of Crown Cork's 60 objections, the court discussed only the four that were actually briefed. *Id.* at 128.

and no abuse of discretion in the Board's inference that employees could not have been misled since union authorship of the brochure was clearly identified.[153] The company also argued that the balloting was conducted in such a manner that the voters' choices could be seen. The court decided this claim did not warrant a hearing because there was no evidence that voters actually had reason to believe their votes were observable.[154]

Crown Cork argued that the union's promise that employees would receive the same benefits as employees at other company plants already covered by a master contract distorted the election results. The court of appeals refused to analogize this admittedly truthful promise to an employer's improper pre-election promise of benefits if the union is defeated. The court reasoned that the union, unlike the employer, would have no opportunity to retaliate if defeated.[155] Likewise, the court declined to set aside the election on grounds that a union campaign poster materially misrepresented facts concerning hourly wages payable if the union was certified. The union's evidence that cost-of-living raises under the master contract would bring wages to the level stated in the poster was uncontested. Therefore, the court concluded that the regional director did not abuse his discretion in determining that the poster was not misleading.[156]

In *Bokum Resources Corp. v. NLRB*[157] the employer also refused to bargain with the Board certified union and defended against the resulting unfair labor practice charges[158] on the ground of election irregularities. The court of appeals denied the demand for an evidentiary hearing and summarily disposed of Bokum's other complaints. Bokum's contention that an incomplete election notice frustrated the purpose of the election was dismissed because a complete notice was posted twelve hours before the election.[159] Furthermore, Bokum failed to establish that the union or its representatives posted the incomplete election notice.[160] Concerning the company's allegation that campaign literature was misleading because it omitted certain important facts, the court pointed out that the Board does not require affirmative disclosure in campaign propaganda.[161] Finally, no merit was found in Bokum's assertion that the union violated Board rules[162] by discounting membership fees to supporters since this reduction was available to employees both before and after the election.[163]

The employer in *NLRB v. Slagle Manufacturing Co.*[164] attacked the valid-

153. *Id.* at 130.
154. *Id.* at 131.
155. *Id.* at 130.
156. *Id.* at 130-31.
157. 655 F.2d 1021 (10th Cir. 1981).
158. The employer was charged with violation of 29 U.S.C. § 158(a)(1), (a)(5) (1976). *See supra* note 7.
159. 655 F.2d at 1024.
160. *Id.*
161. *Id.*
162. *See* NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973) (union's offer to waive initiation fees for all employees who signed union authorization cards before certification election interfered with employees' statutory right to refrain from union activities).
163. 655 F.2d at 1024.
164. 658 F.2d 785 (10th Cir. 1981).

ity of an election on the basis of two theories of misconduct. First, the company alleged violation of the strict rule of *Milchem, Inc.*[165] prohibiting prolonged conversations between employees waiting to vote and representatives of parties to an election. The court found ample support for the Board's determination that Gann, the individual accused of misconduct, did not become a representative of the union merely by attending a pre-election conference and inspecting the polling area prior to the election.[166] Second, the company argued that even if Gann was not a union representative, his presence and conduct disrupted the election because of the pending charge that Gann's recent dismissal was an unfair labor practice.[167] Acknowledging that Gann's presence at the election carried the potential for affecting voter choice, the Tenth Circuit court nevertheless concluded that his conduct was not so clearly disruptive as to outweigh his right to be present at and vote in the election.[168] The court, therefore, refused to set aside the election.

In an unpublished opinion, *A.S. Horner, Inc. v. NLRB*,[169] the court considered issues of alleged election campaign misrepresentations and denial of due process by the Board's refusal to hear certain post-election objections. Horner maintained that its failure prior to the election to request review of both the bargaining unit determination and voter eligibility formula did not amount to a waiver. Furthermore, the company claimed the Board's failure to consider its objections constituted a denial of due process. The court of appeals recognized the harshness of the waiver rule, but found it consistent with the Board's legitimate need to prevent prolonged post-election bargaining delays. The court, therefore, declared that the Board's refusal to consider Horner's objections did not amount to a denial of due process.[170] Concerning the misrepresentation issue, the company claimed that a new election was warranted because the union misled employees into believing they would be allowed to join other craft unions.[171] The court affirmed the Board's ruling that the union's representations did not substantially misrepresent Board processes[172] and that they also did not have a material impact on the election.[173]

---

165. 170 N.L.R.B. 362 (1968).

166. 658 F.2d at 787.

167. *Id.* at 786.

168. *Id.* at 787.

169. No. 79-2185 (10th Cir. May 26, 1982), *cert. denied*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-696).

170. No. 79-2185, slip op. at 6-8.

171. *Id.* at 11.

172. *Id.* at 15. The regional director applied the standard of review announced in Shopping Kart Food Mkts., Inc., 228 N.L.R.B. 1311 (1977) (an election would not be set aside unless the misrepresentation involved the Board or its processes).

173. No. 79-2185, slip op. at 15. Subsequent to the regional director's decision, the Board announced in General Knit of Calif., Inc., 239 N.L.R.B. 619 (1978), the abandonment of the *Shopping Kart* standard and the reinstatement of the standard set forth in Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962). In *Hollywood Ceramics* the Board held that elections would be set aside where the misrepresentation had an impact on the election, the employees lacked knowledge to make their own determination, and there was no opportunity for rebuttal. *See generally* R. GORMAN, *supra* note 6, at 156. This vacillation in the Board's policy created a plethora of law review articles. *E.g.*, Cole, *Misrepresentations in Union Election Campaigns—What is the N.L.R.B.'s Rule:* Hollywood Ceramics *or* Shopping Kart?, 40 ALA. LAW. 414 (1979); Note, Gen-

F. *Enforcement of Collective Bargaining Agreements*

The issue involved in *Trustees of Teamsters Construction Workers Local No. 13 v. Hawg N Action, Inc.*[174] was whether the employer breached its contract with the union by failing to make contributions to various trust funds in connection with its use of independent contractors and subcontractors. Hawg N Action admitted that its subcontracts did not require the subcontractor to make contributions to the trust funds as provided in its agreement with the union. Hawg N Action, however, argued that it did not agree with the union to make such contributions if the subcontractor failed to do so.[175] The court of appeals dismissed this argument reasoning that acceptance of the argument would deny the trustees a remedy for an undisputed breach of contract.[176] Further, the employer could not avoid liability merely because the trust fund payments would not actually benefit the subcontractor's employees.[177]

The company leased equipment, which was operated by the lessor, to perform part of its work. In an attempt to circumvent liability under the agreement, the company characterized these lessors as independent contractors. The court, however, failed to find such characterization determinative under the terms of the agreement[178] and rejected this defense.[179] The employer's final argument was that it had repudiated the agreement by ceasing to make payments for its own employees and that recovery was therefore barred on the grounds of estoppel and laches. This claim was not resolved by the Tenth Circuit court because the employer raised it for the first time on appeal. Nevertheless, the court was careful to note that such disposition did not indicate any merit in the argument.[180]

In *United Food Workers International v. Gold Star Sausage Co.*,[181] the Tenth Circuit Court of Appeals reviewed an arbitrator's award in an enforcement action under section 301 of the NLRA.[182] The grievance submitted to arbitration as provided in the collective bargaining agreement arose after an employee was summarily discharged for violating the company's unilaterally promulgated no-fighting rule.[183] Arbitrator Linn decided that the termina-

eral Knit *Revives* Hollywood Ceramics; *The NLRB Again Prohibits Campaign Misrepresentations*, 7 PEPPERDINE L. REV. 185 (1979); Comment, *The* Hollywood Ceramics-Shopping Kart *Merry-Go-Round: Where Will it Stop?*, 20 SANTA CLARA L. REV. 157 (1980).

174. 651 F.2d 1384 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982).

175. 651 F.2d at 1387.

176. *Id.*

177. *Id.* Walsh v. Schlecht, 429 U.S. 401 (1977), held that such payments could be based on the hours worked by the subcontractor's employees and need not be for the benefit of such employees.

178. 651 F.2d at 1389. Article 25 of the agreement between the defendant company and the union, in pertinent part, states: "When a Contractor [defendant company] rents or leases from one Owner not more than two units of equipment, fully manned and operated . . . the following shall apply . . . [t]he Contractor shall pay all applicable contributions . . . ." *Id.*

179. *Id.* at 1388.

180. *Id.*

181. No. 80-1479 (10th Cir. July 13, 1981).

182. 29 U.S.C. § 185 (1976) provides, in pertinent part, that suits for breach of contract between an employer and a union may be brought in any district court having jurisdiction of the parties, without regard to the amount in controversy.

183. No. 80-1479, slip op. at 2.

tion violated an implied provision of the contract requiring just cause for discharge. Linn reasoned that since the employee fought only in self-defense, she was not at fault. A rule that punishes an employee who is not guilty of misconduct cannot be said to be necessary for the conduct of the employer's business.[184] Under this reasoning, the rule was invalid under the agreement and the discharge was without just cause. Consequently, the arbitrator awarded reinstatement with back pay.

On appeal, Gold Star argued that the arbitrator exceeded his authority by finding an implied just cause provision in the contract.[185] The Tenth Circuit court disagreed with the company, emphasizing that courts are reluctant to interfere with an arbitrator's decision where the contract contains a broad arbitration provision. The court of appeals also found that an arbitrator is clearly permitted to go beyond the express provisions of the collective bargaining agreement and rely on the "industrial common law," so long as the award is not antagonistic to the express language of the agreement and has rational support.[186]

In another action arising under section 301 of the NLRA,[187] *New Mexico District Council of Carpenters v. Mayhew Co.*,[188] both parties appealed the district court's decision that the employer had breached the collective bargaining agreement and that damages should be limited to those amounts payable directly to the union. The company claimed the agreement was invalid because the union had not represented a majority of employees when the agreement was signed. The Tenth Circuit court rejected this defense because the NLRB has exclusive jurisdiction to hear unfair labor practice charges.[189] Thus, this defense did not constitute a ground on which the court could find an agreement unenforceable in a section 301 action.[190]

The union objected to the trial court's holding that damages should not include wages due the employee covered by the agreement because such amounts are not paid directly to the union. The appellate court found merit in this objection. Citing *UAW v. Hoosier Cardinal Corp.*,[191] the *Mayhew* court ruled that a union may recover wages and vacation pay due its members under the terms of the collective bargaining agreement.[192]

The court of appeals also addressed, in dicta, the issue of whether "prehire" agreements with a union, permitted under section 8(f) of the Act,[193] can be enforced against the employer before the union has actually

184. *Id.* at 5.
185. *Id.* at 3.
186. *Id.* at 4.
187. 29 U.S.C. § 185 (1976); *see supra* note 182.
188. 664 F.2d 215 (10th Cir. 1981).
189. *Id.* at 217. The recognition of a minority union constitutes a violation of § 158(a)(1), (2) by the employer and § 158(b)(1) by the union. International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961).
190. 664 F.2d at 217.
191. 383 U.S. 696, 699 (1966).
192. 664 F.2d at 218-19.
193. 29 U.S.C. § 158(f) (1976) allows employers engaged primarily in the building and construction industry to make an agreement with a labor organization before its majority status has been established. *See generally* Gaal, *Pre-Hire Agreements and Their Current Legal Status*, 32 SYRACUSE L. REV. 581 (1982); Note, *Prehire Agreements in the Construction Industry: Empty Promises or*

established majority status in the bargaining unit. Mayhew contended that the agreement was covered by section 8(f) and could not be enforced against it because of the ruling in *NLRB v. Local 103, International Association of Bridge Workers (Higdon)*.[194] In *Higdon*, the Supreme Court held that a union may not picket to enforce a prehire agreement when it does not represent a majority of the employees.[195] The Tenth Circuit court, following *Contractors Health & Welfare Plan v. Associated Wrecking Co.*,[196] distinguished *Higdon* and observed that an "employer who subjects himself to a § 8(f) agreement reaps the benefits of industrial peace at his worksite and should not complain when he is asked to honor the agreement that made such benefits possible."[197]

II. FAIR LABOR STANDARDS ACT

The question before the court in *Marshall v. Regis Educational Corp.*[198] was whether student resident-hall assistants at Regis College were "employees" within the meaning of the Fair Labor Standards Act of 1938 (FLSA).[199] The student assistants resided in the dormitory where they assisted the residence director by performing various administrative tasks, maintaining discipline and order, and encouraging involvement in campus activities. They were required to maintain a certain grade point average to retain their position and received compensation in the form of reduced room rates and a tuition credit. The Secretary of Labor, relying on *Walling v. Portland Terminal Co.*,[200] urged that these resident assistants were employees under the FLSA because of the "immediate economic impact" their services had on the business of the college.[201]

The Tenth Circuit court endorsed the district court's preference for the "economic reality" test set forth in *Rutherford Food Corp. v. McComb*,[202] a case decided subsequent to *Portland Terminal*. *McComb* held that employee status under the FLSA should depend upon the totality of circumstances, not on isolated factors.[203] The court in *Regis* stated that the government's view failed to consider the totality of the circumstances and, in particular, ignored the educational objectives of the resident assistant program.[204] These educational benefits were found to outweigh the mere fact that the college received

Enforceable Rights?, 81 COLUM. L. REV. 1702 (1981); Note, *Pre-Hire Agreements and Section 8(f) of the NLRA: Striking a Proper Balance Between Employee Freedom of Choice and Construction Industry Stability*, 50 FORDHAM L. REV. 1014 (1982).

194. 434 U.S. 335 (1978).

195. 664 F.2d at 219 (citing NLRB v. Local 103, Int'l Ass'n of Bridge Workers, 434 U.S. 335, 349 (1978)).

196. 638 F.2d 1128 (8th Cir. 1981) (benefit provisions of the prehire agreement could be enforced despite the labor organization's lack of majority status).

197. 664 F.2d at 220.

198. 666 F.2d 1324 (10th Cir. 1981).

199. 29 U.S.C. §§ 201-219 (1976 & Supp. IV 1980).

200. 330 U.S. 148 (1947) (railroad trainees were not employees under the FLSA because the railroad company received no "immediate advantage" from any work done by the trainees).

201. 666 F.2d at 1327.

202. 331 U.S. 722 (1947).

203. *Id.* at 730, *cited with approval in Regis*, 666 F.2d at 1326-27.

204. *Id.* at 1327.

some economic value from the program.[205] Finally, the court of appeals dismissed, as an unreasonable alternative, the government's argument that these services could have been provided by non-students[206] and concluded that the resident assistants should be treated the same as athletes and other financial aid recipients.[207]

Marshall v. Quik-Trip Corp.[208] primarily addressed the issue of whether an employer, under an obligation to pay back wages for FLSA violations, may retain those wages offered but refused by the employees. An investigation of Quik-Trip's wage practices led to a settlement agreement in which the company promised to pay back wages for overtime worked by certain employees. Six of the employees either tore up or refused to cash their back pay checks, under allegedly coercive circumstances.[209] The Tenth Circuit court found support[210] for the Secretary of Labor's position that regardless of whether the employees refused the payments voluntarily or involuntarily, the company had not satisfied its statutory obligation to pay the back wages.[211] The court stressed that the purpose of the FLSA would be nullified if employers were permitted to retain back wages that were refused by employees.[212] Such sums should be deposited with the United States Treasurer to be retained subject to claims of the employees.[213]

The payment of back wages for overtime work was also an issue in *Selman v. Chaval Upholstery Supply Co.*.[214] This was an interesting case in which the trial court found no FLSA violation because the employee's gross weekly wage exceeded minimum wage plus time and a half minimum wage for the overtime hours worked. Selman asserted section 7 of the FLSA[215] was violated when he was not paid overtime compensation for working nine hours a day, five days a week. The Tenth Circuit Court of Appeals agreed that overtime wages were due even though Selman's compensation was above the minimum wage.[216] Relying on *Overnight Motor Co. v. Missel*,[217] the court observed that "the statutory requirement for overtime pay is not satisfied merely because the salary exceeds minimum wage plus time and a half minimum wage for hours worked over forty per week."[218]

---

205. *Id.*

206. *Id.*

207. *Id.* at 1328.

208. 672 F.2d 801 (10th Cir. 1982).

209. *Id.* at 804. The division manager allegedly applied verbal pressure to some employees in an attempt to persuade them to tear up their checks. *Id.*

210. *Id.* at 807 (citing Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981)).

211. 672 F.2d at 806.

212. *Id.* at 807.

213. *Id.* The court adds a caveat that the funds should be so deposited "unless exceptional circumstances are demonstrated to the court justifying reversion of the funds to the employer." *Id.* at 808. The court found no exceptional circumstances in this case.

214. No. 78-1521 (10th Cir. Oct. 14, 1981).

215. 29 U.S.C. § 207(a)(1) (1976) provides that overtime rates of at least one and one-half times regular rates must be paid for hours worked in excess of 40 per week.

216. No. 78-1521, slip op. at 3.

217. 316 U.S. 572 (1942) (the FLSA was designed to require payment for overtime at 150% the regular pay where that pay is above the minimum as well as where the regular pay is at the minimum).

218. No. 78-1521, slip op. at 3.

III. OCCUPATIONAL SAFETY AND HEALTH ACT

An Occupational Safety and Health Review Commission (OSHRC or Commission) decision upholding a citation of the employer for violating the general duty clause[219] of the Occupational Safety and Health Act of 1970 (OSHA)[220] was reviewed in *Baroid Division of NL Industries v. OSHRC*.[221] Baroid sells drilling mud used in the drilling of oil and gas wells. As part of the cost of the mud, Baroid also provides the consultation services of an on-site sales representative known as a "mud man." The citation in question arose when a mud man was injured at a drilling site by an explosion of gas that had accumulated near the drilling rig. Baroid argued that the Commission's decision was not supported by substantial evidence in the record and that it rested on theories not at issue at the administrative hearing.[222]

The court of appeals tested the validity of the OSHA citation against rigorous standards[223] for upholding a finding that the general duty clause has been violated. First, the court concluded that a substantial accumulation of gas around a drilling rig is a hazard since it increases the risk that employees will be killed or seriously injured.[224] Also, the court found that such hazard existed at a *citable* workplace; the injured mud man remained an employee of the cited employer because he was subject to Baroid's authority to remove him from the workplace.[225] The Tenth Circuit court also found *Brennan v. Butler Lime and Cement Co.*[226] persuasive in its holding that even where an employer does not control the worksite where a recognized hazard exists, the employer will remain liable if the employee could feasibly have been trained to avoid the hazard.[227]

Second, the court of appeals found substantial evidence to support the Commission's finding that the hazards of gas accumulation, fire, and explosion were "recognized hazards," either by the cited employer or generally within the industry.[228] The implication that the absence of a gas separator[229] is a recognized hazard, however, was not supported by evidence in the record.[230]

---

219. 29 U.S.C. § 654 (1976) imposes a general duty on employers to abate recognized hazards at the job site if they are likely to cause death or serious physical harm to employees.

220. 29 U.S.C. §§ 651-678 (1976 & Supp. IV 1980).

221. 660 F.2d 439 (10th Cir. 1981).

222. *Id.* at 444.

223. These standards required that:

> [T]he Secretary must show (1) that a hazard likely to cause death or serious bodily harm existed at a citable workplace; (2) that that hazard was recognized as such either by the cited employer or generally within the industry; and (3) that there was a feasible method by which the cited employer could have abated the "recognized hazard."

Id. (citations omitted).

224. *Id.*

225. *Id.* at 444-45.

226. 520 F.2d 1011 (7th Cir. 1975).

227. 660 F.2d at 445-46. The Seventh Circuit in *Butler Lime* stated that an employer would be held liable where the employee's conduct (causing the accident) "might have been precluded through feasible precautions concerning the hiring, training, and sanctioning of employees." Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975).

228. 660 F.2d at 446.

229. A gas separator would have vented the gas away from the drilling rig, substantially reducing the hazard. *Id.* at 442, 444.

230. *Id.* at 446.

Finally, the appellate court found some evidence to support the finding that Baroid had a feasible means of abating the recognized hazard. The mud men could possibly have been trained to monitor gas accumulations and instructed to evacuate if they smelled gas.[231] The case was, therefore, remanded to develop the record on the limited issue of whether it is technologically feasible to train employees to measure hazardous gas accumulation levels by sense of smell.[232]

In response to Baroid's contention that it did not receive adequate notice of the theories of recognized hazard and feasible abatement relied upon by the Commission, the court agreed that "[a]n OSHA citation must give reasonably particular notice so that the cited employer will understand the charge being made and will have a full and fair opportunity to prepare and present a defense."[233] Nevertheless, since citations are prepared by non-legal personnel required to act with dispatch, they should not be held to the same strict standards as other pleadings.[234] The court found that the citation could reasonably be construed to state that gas accumulation was one of the recognized hazards present.[235] The court, however, was not persuaded that Baroid received adequate notice of what abatement steps should have been taken. This inadequate notice, the court held, was further justification for remanding the case.[236]

IV. RAILWAY LABOR ACT

The Tenth Circuit Court of Appeals, in *St. Louis Southwestern Railway v. Brotherhood of Railroad Signalmen*,[237] reversed the district court's holding that the controversy between the railroad and union was a minor dispute suitable for compulsory arbitration and, therefore, not one over which the union could lawfully strike. The dispute arose when the railroad contracted out work because it was unable to hire enough signalmen to complete the rehabilitation of a newly acquired line. The union's threatened strike over the contracting out was enjoined by the trial court on the grounds that the dispute was a minor one since such contracting out had been permitted during World War II and because the collective bargaining agreement did not expressly prohibit such contracting out.[238]

The union argued that the dispute was a major one because contracting out involved an indirect attempt to introduce an employment practice not recognized by the agreement or past practices.[239] The Tenth Circuit court

231. *Id.* at 447.
232. *Id.* at 448.
233. *Id.*
234. *Id.*
235. *Id.* at 449.
236. *Id.* at 450.
237. 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2011 (1982).
238. 655 F.2d at 990. A minor dispute is one which involves either the meaning or application of a particular provision of an agreement and, therefore, the issue is whether an existing agreement controls the controversy. If minor, the controversy must be submitted to compulsory arbitration and a strike over the issue is unlawful. Brotherhood of R.R. Trainmen v. Chicago River & I.R.R. Co., 353 U.S. 30, 35-39 (1957).
239. 665 F.2d at 990. A major dispute involves an attempt to create new rights by creating

agreed with the union and found an "almost complete dearth of evidence in support of the trial court's determination . . . that the case involves a minor and not a major dispute . . . ."[240] The court found unjustified the railroad's reliance on World War II precedent to establish an implied right to contract out employment, noting that the union had consistently rejected the railroad's attempts to include amendments authorizing contracting out.[241]

Further support for the union's position was found in the Railway Labor Act (RLA)[242] and a Supreme Court decision.[243] The court concluded that certain provisions of the RLA[244] left no room for contracting out since contractor's employees would not be able to comply with the statutory requirements.[245] Citing *Detroit & Toledo Shore Line Railroad v. United Transportation Union*,[246] the Tenth Circuit court accepted the union's position that the railroad's attempt to change the existing contractual obligations by asserting an implied right to contract out employment constituted a major dispute.[247] The judgment of the district court was reversed and the case was remanded for further proceedings.

V. FEDERAL COAL MINE HEALTH AND SAFETY ACT[248]

In *Director, Office of Workers' Compensation Programs v. Gurule*[249] the Tenth Circuit Court of Appeals reviewed an order of the Benefits Review Board (Board) establishing a black lung benefits onset date different from that determined by the Department of Labor's hearing officer. The Board had concluded that benefits for claimant Gurule should begin the month his claim was filed, not the month medical evidence of total disability was first established.[250] On appeal, the Director of the Office of Worker's Compensation Programs contended that the Board had made the factual determination for the benefit onset date by relating back results of medical tests to the date of filing and, therefore, had exceeded its scope of review.[251]

The Tenth Circuit court determined that the Board had not made a factual determination in arriving at the onset date, but, instead, had reached that date by correctly applying the Secretary of Labor's regulations.[252] Following *Begley v. Mathews*[253] and *Paluso v. Mathews*,[254] the Board found the

---

or changing an agreement. Compulsory arbitration is not required and the right to strike remains. *Id. See* 45 U.S.C. § 155 (1976).

240. 665 F.2d at 998.

241. *Id.* at 991.

242. 45 U.S.C. §§ 151-188 (1976 & Supp. IV 1980).

243. 665 F.2d at 995 (citing Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142 (1969)).

244. 45 U.S.C. § 152 (1976).

245. 665 F.2d at 995.

246. 396 U.S. 142 (1969).

247. 665 F.2d at 998.

248. 30 U.S.C. §§ 801-960 (1976 & Supp. IV 1980).

249. 653 F.2d 1368 (10th Cir. 1981).

250. *Id.* at 1371.

251. *Id.* at 1370.

252. *Id.* at 1372.

253. 544 F.2d 1345 (6th Cir. 1976), *cert. denied*, 430 U.S. 985 (1977) (because black lung

hearing officer's onset date was not supported by substantial evidence since a single blood study was insufficient to establish such a date in view of the latent and progressive nature of the disease.[255] Accordingly, where the date of total disability cannot be determined, the regulations provide that benefits should begin with the month the claim was filed.[256] After careful review the court of appeals affirmed the Board's decision stating that "the Board correctly and cogently applied the entangled morass of regulations promulgated by the Secretary of Labor."[257]

Michael T. Pennington

disease is of a slow and progressive nature, medical evidence subsequent to the cut-off date is relevant to the determination of whether the miner had the disease as of the cut-off date).

254. 573 F.2d 4 (10th Cir. 1978) (medical evidence obtained after the cut-off date is relevant in ascertaining when black lung disease commenced, given the progressive nature of the disease and the difficulty in making accurate diagnosis).

255. 653 F.2d at 1371-72.

256. 20 C.F.R. § 725.503(b) (1982).

257. 653 F.2d at 1372.