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OVERVIEW

During the 1985-86 survey period, the Tenth Circuit Court of Appeals decided cases in a variety of areas of labor and employment law. The court decided a workmen's compensation case based upon Utah law involving the dual capacity exception[1] to the exclusive remedy principle.[2] In another decision, the Tenth Circuit denied enforcement of a Board order reinstating non-union employees who were allegedly discriminated against by union activities. The court held that the Board's decision was not supported by substantial evidence.[3] This contrasts with the 1984-85 survey period in which the court enforced all Board orders.[4]

The court construed Kansas wage statutes and determined that an employee terminated for cause was not entitled to stock option benefits because they were held not to be wages.[5] Also, the Tenth Circuit analyzed the rejection of collective bargaining agreements in bankruptcy court and remanded the case for further findings of fact. It concluded that the bankruptcy judge had failed to make the factual findings required to reject collective bargaining agreements.[6]

A dispute involving the timeliness of a grievance hearing raised the issue of procedural versus substantive arbitration. The Tenth Circuit distinguished between the two in a well-reasoned decision that affirmed the lower court's summary judgment for the employer.[7] Although not new law, this decision merits discussion in light of the United States Supreme Court's recent reaffirmation of the principles of the Trilogy.[8]

I. DUAL CAPACITY DOCTRINE EXCEPTION TO EXCLUSIVITY OF WORKMEN'S COMPENSATION

The Tenth Circuit decided a Utah case which turned upon whether Utah recognized the dual capacity doctrine exception to the exclusive remedy of workmen's compensation. The court upheld the lower court's findings that the doctrine was inapplicable to the case at bar and refused to certify the question of the dual capacity doctrine's acceptability to the Utah Supreme Court.

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1. *See* Worthen v. Kennecott Corp., 780 F.2d 856, 857 (10th Cir. 1985) (for a defintion of the dual capacity exception); *see also infra* text accompanying note 13.
2. *Worthen*, 780 F.2d 856.
3. Glaziers Union 558 v. NLRB, 787 F.2d 1406 (10th Cir. 1986).
4. *See* Beyerle, *Labor and Employment Law*, 63 DEN. L. REV. 395 (1986).
5. Weir v. Anaconda Co., 773 F.2d 1073 (10th Cir. 1985).
6. International Bhd. of Teamsters v. IML Freight, Inc., 789 F.2d 1460 (10th Cir. 1986).
7. Denhardt v. Trailways, Inc., 767 F.2d 687 (10th Cir. 1985).
8. AT&T Technologies, Inc. v. Communication Workers of America, 106 S. Ct. 1415 (1986), *see infra* note 157 and accompanying text.

A. *Dual Capacity Doctrine:* Worthen v. Kennecott Corp.

In *Worthen v. Kennecott Corp.*,[9] Mr. Worthen was injured while working at Kennecott's Magna Concentrator plant when a hook from an overhead crane fell and struck him. Worthen was given emergency medical treatment by his fellow employees and was transported to the hospital in a company-owned ambulance. Unfortunately, the events had a "keystone cop" quality and Mr. Worthen died at about the time he arrived at the hospital. Mrs. Worthen brought an action alleging that the attempted rendering of medical services by Kennecott's employees caused Mr. Worthen's death.

The district court granted Kennecott's motion for summary judgment on the ground that Worthen's action was barred by the exclusive remedy provisions of the Utah Workmen's Compensation Act.[10] The primary issue raised on appeal was whether the trial court erred in ruling that Utah law does not accept the dual capacity doctrine as an exception to the exclusive remedy provisions of the Utah Workmen's Compensation Act.[11] A second issue raised on appeal was whether appellant's motion to certify the dual capacity question to the Utah Supreme Court should be granted.[12]

1. The Dual Capacity Issue

a. *Background and the Tenth Circuit's Decision*

The Tenth Circuit stated that under the dual capacity doctrine "an employer normally shielded from tort liability by the exclusive remedy principle [based on Workmen's Compensation Laws] may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independ-

9. 780 F.2d 856 (10th Cir. 1985).

10. UTAH CODE ANN. § 35-1-60 (1953) provides:

> The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer based upon any accident, injury or death of an employee.

UTAH CODE ANN. § 35-1-62 (Supp. 1986) provides:

> When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in the case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person.

11. *Worthen*, 780 F.2d at 857.

12. *Id.* at 860.

ent of those imposed on him as employer."[13] Although the Utah Supreme Court has never adopted the dual capacity doctrine, the court discussed it in *Bingham v. Lagoon Corp.*[14] The court set forth the test of applicability of the doctrine as follows:

> The decisive test to determine if the dual capacity doctrine is invokable is not whether the second function or capacity of the employer is different and separate from the first. Rather, the test is whether the employer's conduct in the second role or capacity has generated obligations that are unrelated to those flowing from the company's or individual's first role as an employer. If the obligations are related, the doctrine is not applicable.[15]

The *Bingham* court concluded: first, that the doctrine did not apply to the facts before it, and second, that the court did not decide that the doctrine could ever be applied in Utah due to the restrictions of sections 35-1-60 and -62.[16]

The Tenth Circuit, in *Worthen v. Kennecott Corp.*, pointed out that the dual capacity doctrine, which the Utah Supreme Court cited in *Bingham*, was subsequently restricted in other jurisdictions.[17] The Tenth Circuit noted that Illinois had restricted the dual capacity doctrine to cases where the second role "involved a separate legal entity or persona."[18] Furthermore, the court stated that the only judicially created exception to the exclusive remedy provisions, recognized by the Utah Supreme Court involved deliberate, willful injuries inflicted on an employee.[19] The Tenth Circuit, construing relevant sections of the Utah Workmen's Compensation Act,[20] found that the clear intent of the Utah legislature was to hold employers immune from common law liability coterminous with their liability under the Act.[21]

The court found that Kennecott's employees did not deliberately or willfully aggravate the injuries of their co-worker. Additionally, the dual capacity doctrine exception was not applicable to the case at bar because Kennecott's Magna Concentrator plant was not a separate legal entity. Finally, the court found no merit in Mrs. Worthen's argument that there was an unresolved factual question of whether her husband was injured in the course and scope of his employment which would preclude summary judgment. The Tenth Circuit held that the trial court had no alter-

13. *Id.* at 857 (quoting 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.80 (1976)).

14. 707 P.2d 678 (Utah 1985). In *Bingham*, a minor employee, injured at his employer's amusement park, was covered by the Workmen's Compensation Act and therefore barred from recovering against the employer in tort.

15. *Id.* at 680 (quoting McCormick v. Caterpillar Tractor Co., 85 Ill. 2d 352, 423 N.E.2d 876, 878 (1981)).

16. *Id.*; *see supra* note 10.

17. *Worthen*, 780 F.2d at 858 n.1.

18. *Id.* at 858 (quoting Sharp v. Gallagher, 95 Ill. 2d 322, 447 N.E.2d 786, 788 (1983)).

19. *See* Bryan v. Utah Int'l, 533 P.2d 892 (Utah 1975) (holding that a fellow employee may be sued for intentional misconduct that causes injuries).

20. *See supra* note 10.

21. *Worthen*, 780 F.2d at 859.

native but to grant summary judgment in favor of the employer due to the sweeping, inclusive construction of the Utah Workmen's Compensation Act and the absence of exceptions to the exclusivity principle of the Act.[22]

b. *Other Jurisdictions' Reactions to the Dual Capacity Doctrine*

States allowing dual capacity to serve as grounds for recovery include California, Illinois, Michigan, and Ohio.[23] States rejecting the dual capacity exception include Alaska, Indiana, Kentucky, Louisiana, Mississippi, New York, North Dakota, Pennsylvania, Tennessee, and Texas.[24] Courts rejecting the doctrine have been generally suspicious that the dual capacity doctrine may be used as a vehicle to undermine the exclusivity of workmen's compensation. Other courts allow the doctrine to be used on a restricted basis.[25]

Attempts by employees to hold their employers liable in tort on the basis of ownership of property or the unsafe maintenance of the work facilities have been rejected. The employer's duty to maintain a safe place to work has been held inseparable from the employer's general duties as an employer.[26] The dual capacity doctrine has been recognized, however, in the areas of medical malpractice where the doctor or hospital is also the injured patient's employer.[27] Products liability, where the employer manufactured the product which injured the employee, is another area in which the dual capacity doctrine has been fa-

22. *Id.* at 859-60.

23. *See* Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952) (where a chiropractor was found liable for malpractice in the negligent aggravation of his employee's injury which occurred during the course of her employment). *See also* Sharp v. Gallagher, 95 Ill. 2d 322, 447 N.E.2d 786 (1983); McCormick v. Caterpillar Tractor Co., 85 Ill. 2d 352, 423 N.E.2d 876 (1981); Panagos v. North Detroit Gen. Hosp., 35 Mich. App. 554, 192 N.W.2d 542 (1971); Grey v. Arthur H. Thomas Co., 55 Ohio St.2d 183, 378 N.E.2d 488 (1978). *See generally* Comment, *Workmen's Compensation and Employer Suability: The Dual-Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974); Note, *Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553 (1979).

24. *See* State v. Purdy, 601 P.2d 258 (Alaska 1979); Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 359 N.E.2d 544 (1977); Borman v. Interlake, Inc., 623 S.W.2d 912 (Ky. Ct. App. 1981); Herbert v. Gulf States Utils. Co., 369 So. 2d 1104 (La. Ct. App.), *cert. denied*, 369 So. 2d 466 (La. 1979); Trotter v. Litton Sys., Inc., 370 So. 2d 244 (Miss. 1979); Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980); Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466 (N.D. 1978); Kohr v. Raybestos-Manhattan, Inc., 522 F. Supp. 1070 (E.D. Pa. 1981); McAlister v. Methodist Hosp. of Memphis, 550 S.W.2d 240 (Tenn. 1977); Mott v. Mitsubishi Int'l Corp., 636 F.2d 1072 (5th Cir. 1981) (applying Texas law).

25. Annotation, *Dual Capacity Doctrine—Tort Cases*, 23 A.L.R.4th § 2[a] (1983).

26. *See* Kottis v. United States Steel Corp., 543 F.2d 22 (applying Indiana law), *cert denied* 430 U.S. 916 (7th Cir. 1976); Stone v. United States Steel Corp., 384 So. 2d 17 (Ala. 1980) (in both decisions the courts held that, in addition to benefits already received under the Workmen's Compensation Act, an employee could not hold an employer liable in tort for breach of a duty to discover defects or dangerous conditions in the workplace).

27. *See* D'Angona v. County of Los Angeles, 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980) (a physical therapist was allowed to bring a tort action against a county hospital, for physicians' malpractice, after she received workmen's compensation benefits); Duprey v. Shane, 38 Cal. 2d 781, 249 P.2d 8 (1952) (where a nurse, employed by a chiropractor, was allowed to sue the chiropractor in tort for aggravating a work related injury through negligent treatment).

vorably received.[28]

2. Certification Issue

The Tenth Circuit upheld the trial court's decision and denied appellant Worthen's motion to certify the dual capacity doctrine to the Utah Supreme Court. At the time of the trial, no such procedure was available under Utah law. The Tenth Circuit stated that certification of state law should have been appealed to the Utah Supreme Court before the case had been fully submitted and argued. The court held that the clarity of the issue in the *Worthen* case and the amount of time that had elapsed since the matter was first raised made the case inappropriate for certification to the Utah Supreme Court.[29]

B. *Analysis: Effect of Court's Decision in* Worthen v. Kennecott Corp.

No Utah case has directly addressed the dual capacity question crucial to the resolution of the *Worthen* case. Utah remains without guidance as to the applicability of the dual capacity doctrine. This is due to the Tenth Circuit's refusal to certify appellant's question and the doctrine's inconsistent application in outside jurisdictions. The court also gave short shrift to the argument that there was an unresolved question of fact as to whether Worthen was injured in the course and scope of his employment. The court assumed with minimal explanation that the botched medical aid by fellow employees did occur within the course and scope of employment.

II. The NLRB's Failure to Follow Its Own Case Law

The Tenth Circuit refused to enforce the National Labor Relations Board's cease and desist order against the Glaziers Union for violations of section 8(b)(2)[30] and derivatively section 8(b)(1)(A)[31] of the National

28. *See* Bell v. Industrial Vangas, Inc., 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981) (a salesman was allowed to sue his employer in tort when product he was delivering exploded); Mercer v. Uniroyal, Inc., 49 Ohio App.2d 279, 361 N.E.2d 492 (1976) (an employer was held liable in tort for a defective tire supplied to employee's delivery truck).

29. *Worthen*, 780 F.2d at 860; *see* Cantwell v. University of Mass., 551 F.2d 879, 880 (1st Cir. 1977) (*Cantwell* involved an injury to member of university gymnastics team, where case was correctly decided on basis of sovereign immunity. The First Circuit held that the purpose of certification is not to change state law and that one who chooses federal court is in a poor position to seek certification.); Buehler Corp. v. Home Ins. Co., 495 F.2d 1211, 1214 (7th Cir. 1974) (The court held that retention of insurance premiums, after a violation by insured of condition which renders entire policy voidable, constitutes waiver of the violation by the insurer. The Seventh Circuit held that where no controlling state precedent can be found, the appellate court must give great weight to the opinion of the district judge experienced in the law of the state.); *cf.* United States v. Criterion Insurance Co., 587 F.2d 39, 40 (10th Cir. 1978) (In *Criterion*, questions of state law regarding the Colorado Automobile Accident Reparations Act were certified to the Colorado Supreme Court because the Tenth Circuit found no controlling state precedents.); Krutsinger v. Mead Foods, Inc., 546 F.2d 328, 331-32 (10th Cir. 1976) (*Krutsinger* hinged upon the unconstrued Oklahoma Fair Trade statute prompting the court to certify an interrogatory to the Oklahoma Supreme Court.).

30. 29 U.S.C. § 158(b)(2)(1959) provides:

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

Labor Relations Act. The court found that the Board's presumption of illegal Union conduct was not supported by substantial evidence as required by the Board's own case law.[32] The court's refusal to enforce the Board's order contrasts with the 1984-1985 survey period in which all Board orders were enforced.[33]

A. *The Board's Specious Argument:* Glaziers Local 558 v. NLRB

1. Facts

In *Glaziers Local* 558 v. NLRB,[34] Kenneth Orr, a temporary permit holder hired during a shortage of journeymen glaziers, filed a complaint with the National Labor Relations Board charging the Glaziers Local Union 558 with unfair labor practices in violation of sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act. Orr alleged that the Union caused PPG Industries to fire him and another nonunion employee, Gooch, when Union employees walked off the job. Orr contended that the walkout was designed to pressure PPG into terminating the nonunion temporary employees.[35]

Customarily, permit men were issued permits for only thirty days and were replaced with Union journeymen as they became available for referral. Orr and Gooch commenced their temporary work in August, 1981. When they were still on the job in October, the Union repeatedly requested that the permit men be replaced with available journeymen. PPG refused to replace Orr and Gooch despite the Union employees' growing dissatisfaction. On January 7, 1982, Union employees walked off the job site even though the Union business representative told them that the Union could not instigate a walkout or strike. The next day, PPG decided to terminate the permit men and attempted to recall the union employees. Within a week, glaziers began returning to the PPG job site.[36]

2. Administrative Proceedings

The case was brought before an Administrative Law Judge (ALJ) who found that there was no persuasive evidence to support the allegation that the walkout was caused by the Union. The ALJ further held that even if the Union was responsible for the job site walkout, the evi-

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

31. 29 U.S.C. § 158(b)(1)(1959) states that:

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

(1) to restrain or coerce (A) employees in the exercise of rights guaranteed in Section 7 . . . .

32. *See infra* note 50 and accompanying text.

33. *See* Beyerle, *supra* note 4.

34. 787 F.2d 1406 (10th Cir. 1986).

35. *Id.* at 1411.

36. *Id.* at 1407.

dence established that the Union's motive was to protect its apprenticeship and referral program and not to cause PPG to discriminate against nonunion employees. Orr's complaint was dismissed.[37]

The National Labor Relations Board ("the Board") reversed the ALJ, concluding that the Union illegally caused PPG to dismiss Orr and Gooch. Contrary to the findings of fact by the ALJ, the Board determined that there was sufficient evidence that the Union caused or attempted to cause PPG to terminate Orr and Gooch. The Board emphasized in support of its conclusion, requests by Union agents to replace the permit employees with available journeymen, threats to union members that they would have to quit if dissatisfied with conditions at the PPG job site, and provisions in the Union bylaws for fines against members working with the permit men beyond thirty days. The Board found that the Union encouraged its members to quit the job site and concluded that the Union, by making no effort to fill the vacant positions after the walk-out, ratified the employees' actions.[38]

Satisfied that causation had been established, the Board applied the presumption that a union acts illegally any time it prevents an employee from being hired or causes an employee to be discharged and reached the conclusion that the Union violated Section 8(b)(2).[39] A union may rebut this presumption by providing "evidence of a compelling and overriding character"[40] establishing that its conduct "was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or other matters with which the Act is concerned."[41] The Board did not specifically dispute the ALJ's findings that the Union's actions were motivated by its desire to protect its traditional journeymen apprentice system, but it determined that such a motivation was an insufficient justification to overcome the presumption of illegality. The Board ordered the Union to cease and desist from violations of section 8(b)(2) and derivatively section 8(b)(1)(A). Additionally, the Union was required to compensate Orr and Gooch for any loss of earnings that resulted from the discrimination and to contact PPG in writing to request their reinstatement.[42]

3. Issues on Appeal

The case came before the Tenth Circuit on the Union's petition for review and the Board's cross-application for enforcement of its cease

37. *Id.*
38. *Id.* at 1411.
39. *Id.* at 1410-11.
40. *See* Local 1102, United Bhd. of Carpenters and Joiners (Planet Corporation), 144 N.L.R.B. 798 (1963) (holding that it was not unlawful discrimination by union to attempt to persuade employer to discharge employee who refused benefits under collective bargaining agreement).
41. *See* International Union of Operating Eng'rs, Local 18 v. NLRB, 204 N.L.R.B. 681 (1973) (ruling that removing employee from job-referral list for having been suspended for bad conduct was not permissible union conduct), *enf. denied on other grounds*, 496 F.2d 1308 (6th Cir. 1974).
42. *Glaziers*, 787 F.2d at 1411.

and desist order. The Union contended on appeal that the Board's presumption of illegality ignored the true purpose or motive for hiring or firing an employee.[43] Additionally, the Union argued that requiring compelling and overriding evidence to rebut the presumption of illegality was an impermissible burden.[44] Thus, the primary issue on appeal was whether the Board correctly applied a presumption that a union acts illegally any time it causes an employee to be discharged in violation of section 8(b)(2). The court closely examined the record to determine whether the presumption of illegality was supported by substantial evidence.[45]

4. Examining the Presumption of Illegality: The Tenth Circuit's Opinion

A reviewing court may reverse a decision of the Board if the court cannot conscientiously find substantial evidence supporting the Board's decision. Such a reversal can only be made after a complete examination of the record, including the body of evidence that opposes the Board's decision.[46] Findings of the ALJ, whether contrary to or in support of the Board's decision, are part of the record to be fully considered by the reviewing court.[47] The standard of review does not change, even if the ALJ and the Board reach opposite conclusions.[48]

The Tenth Circuit stated that it recognized the Board's authority to apply general presumptions.[49] According to the court, however, only rational presumptions may be sustained. The presumption must also follow statutory guidelines and the application of the presumption must be based on substantial evidence.[50]

The validity of the Board's presumption of illegality was then considered by the court in light of other guidelines and criteria espoused by the Supreme Court. *Local 357, International Brotherhood of Teamsters v. NLRB*[51] set forth that for a court to find a section 8(b)(2) violation, it must analyze the "real motive" or "true purpose in hiring or firing." The court also noted that certain employer actions contain an intent to discriminate and that the consequences of those actions warrant such an

43. *Id.* (the Union cited Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961) (holding that the true purpose or motive in hiring or firing is the test of a section 8(b)2 violation)).

44. *Id.* at 1411.

45. *Id.* at 1408.

46. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (involving a Board order reinstating an employee who was discharged because he gave testimony in another proceeding).

47. *See id.* at 492-96.

48. *See* Pennypower Shipping News, Inc. v. NLRB, 726 F.2d 626, 629 (10th Cir. 1984) (company sought to set aside Board order reinstating nine employees after company terminated their employment due to participation in strike).

49. *Glaziers*, 787 F.2d at 1412-13.

50. *Id.*; *see also* NLRB v. American Can Co., 658 F.2d 746, 752-53 (10th Cir. 1981) (upholding Board order against employer and union for applying a superseniority clause to union officers).

51. 365 U.S. 667 (1961).

inference.[52] The Supreme Court has divided such employer's conduct, which is equally applicable to union conduct,[53] into two categories:

> Some conduct is so "inherently destructive of employee interests" that it carries with it a strong inference of impermissible motive. In such a situation, even if an employer comes forward with a nondiscriminatory explanation for its actions, "the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." On the other hand, if the adverse effect on employee rights is " 'comparatively slight', an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."[54]

The Tenth Circuit, in *Glaziers* found that the Board had apparently classified the Union's conduct in the first category, conduct which "carries a strong inference of impermissible motive."[55] The court noted that the Board cut off its inquiry into the Union's motivation by summarily rejecting the Union's assertion that it acted out of a desire to protect its apprenticeship program when it requested the replacement of the permit employees. The court concluded that the Board's application of the presumption of illegality lacked rationality and was not supported by substantial evidence.[56]

The court came to this conclusion for several reasons. The record did not indicate any expectation on the part of permit workers that they enjoyed anything other than a temporary status. The Union's efforts to replace permit men could not have "so dramatically demonstrated its power over employees and their livelihood that the effect was to encourage union membership among employees witnessing the exercise of power."[57] There was no evidence presented that the Union acted in bad faith in seeking to replace Orr and Gooch. Evidence was presented that the Union informed members that it could not instigate a walk-out and that it would not impose fines on members working with the temporary employees. As the ALJ stated, if the Union wanted to encourage union membership, it could have invoked the union security clause in its contract.[58] The Tenth Circuit concluded that the Union met its burden in rebutting the presumption.[59]

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52. *Id.* at 675.

53. *See id.*; *American Can*, 658 F.2d 746 (both decisions involved discrimination by union).

54. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967) (quoting NLRB v. Brown, 380 U.S. 278, 287, 289 (1965); NLRB v. Erie Resister Corp., 373 U.S. 221, 229 (1965)).

55. *Glaziers*, 787 F.2d at 1413-14.

56. *Id.* at 1414.

57. *Id.*

58. *Id.* at 1416.

59. *Id.*

B. *Analysis: The Swinging Pendulum: The Current Board's Attitude Toward Labor*

There has been much recent discussion about the direction taken by the Board under President Reagan. Labor has charged that Chairman Dotson's Board has gutted employee rights.[60] Management has countered that the Board has restored the appropriate balance between labor and management.[61] How does the Board's presumption of illegality and its holding in *Glaziers* fit into this debate?

Justice Frankfurter stated that the Board moves "incrementally" towards the solution of problems in the light of accumulated experience.[62] Frankfurter warned us to be wary of sudden shifts in doctrine for they suggest the rejection, rather than the accumulation, of wisdom.[63] By ignoring evidence of the Union's real motive the Board's holding in *Glaziers* is a rejection of years of accumulated case law on evidentiary standards which marks a move toward instability. Dramatic shifts in the Board's positions lead to speculation that decisions are result-oriented, rather than the result of logically applied principles of law. Apparently, the Tenth Circuit heeded Justice Frankfurter's advice by rejecting the Board's dramatic shift.

III. Stock Options are Held Not to be Wages

In *Weir v. Anaconda Co.*,[64] a former employee brought an action against his employer alleging that he was improperly denied benefits due under his employer's stock option and savings fund plans. The lower court granted summary judgment for the employer on the stock option claim and the Tenth Circuit affirmed.[65] The contested stock option benefits were held not to be "wages,"[66] but a benefit subject to a condition precedent which the plaintiff had not fulfilled.

A. *Stock Option Rights are Not Absolute:* Weir v. Anaconda

1. Facts

In *Weir v. Anaconda Co.*, plaintiff Robert Weir, an Anaconda employee for 22 years, was the marketing manager for telephone cables and small wire sales. In 1978, Jerry White became Weir's supervisor. Weir and White did not have a good working relationship, and in January, 1979, White gave Weir a poor performance evaluation. The

60. *See* Phalen, *The Destabilization of Federal Labor Policy Under the Reagan Board*, 2 Lab. Law. 1 (1986).

61. *See* Batten, *Recent Decisions of the Reagan Board: A Management Perspective*, 2 Lab. Law. 33 (1986).

62. Rabin, *Editor's Page*, 2 Lab. Law. (1986).

63. *Id.*

64. 773 F.2d 1073 (10th Cir. 1985).

65. *Id.* at 1075.

66. *Id.*; *see* Lawson & Robison, *Incentive Stock Options: An Area of Change and Opportunity — But Potential Problems Exist*, 12 Tax'n for Law. 40 (1983); McDonnell, *Incentive Stock Options*, 10 Colo. Law. 2835 (1981) (for information regarding stock option plans); Note, *Kast v. Commissioner: Disposition Rules for Statutory Stock Options*, 3 Va. Tax. Rev. 385 (1984).

problems between the two men continued until Weir was terminated effective November 30, 1979.

Anaconda's stock option plan gave Weir the right to purchase Anaconda stock at a fixed price per share for ten years, and if his employment terminated, for three months after termination. The agreement also stated that: "If, however, you are dismissed from the employ of the company or a subsidiary for cause, of which the Committee shall be the sole judge, this option shall forthwith expire."[67] Weir attempted to exercise his option on January 23, 1980. The Compensation Policy Committee denied the exercise of the option, holding that Weir was terminated for cause.

2. The District Court Opinion

Weir brought an action against Anaconda to recover benefits under the stock option plan and savings fund plan, alleging four counts. Under Count I, the plaintiff asserted a claim for benefits under the stock option plan. In Count II he claimed some savings plan benefits were unjustly withheld. In Count III he claimed tortious interference with contractual rights. Count IV averred that benefits under the stock option plan and savings plan were wages under Kansas law.[68]

Both parties moved for summary judgment. The court granted Anaconda summary judgment on Counts I, III and IV. Weir was granted summary judgment on Count II.[69] The savings fund benefits were paid to Weir after a remand to the Committee and its subsequent ruling that he was contractually entitled to savings benefits.

As to the other three counts, the lower court stated that it must uphold the action of Anaconda's Compensation Policy Committee in denying Weir's attempt to exercise his stock option unless it acted arbitrarily, in bad faith, or fraudulently.[70] Since Weir had offered no evidence to establish such behavior, the district court granted Anaconda's summary judgment motion.[71] The court found that there was sufficient evidence for the Committee to determine that Weir was terminated for cause. An affidavit attached to Anaconda's motion for summary judgment stated that the committee had relied upon a memorandum written by Weir's supervisor which stated that Weir was hostile, argumentative, and unable to provide the necessary level of professional management.[72]

The district court also rejected Weir's arguments under Count IV that stock option and savings fund benefits were wages under Kansas law and that Anaconda's failure to pay violated section 44-315 of the

67. *Weir*, 773 F.2d at 1076.
68. *Id.* at 1075-76.
69. *Id.* at 1076.
70. *Id.* at 1078; *see* M. Melbinger, *Negotiating a Profit-Sharing Plan: A Survey of the Options*, 10 EMPLOYEE REL. L.J. 684, 697-98 (1984) (for a discussion regarding the inapplicability of grievance procedures to Compensation Policy Committee decisions).
71. *Weir*, 773 F.2d at 1076.
72. *Id.* at 1077.

Kansas Statutes.[73] Kansas law defines wages as "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis less authorized withholding and deductions."[74] The lower court refused to hold benefits under the stock option plan equivalent to commissions or vacation pay, which were both clearly within the definition of wages.[75]

3. Issues on Appeal

On appeal, Weir challenged only the district court's decision granting Anaconda summary judgment on his stock option claim under Count I and his Count IV claim that benefits under the stock option and savings fund plans were statutory wages. Weir argued that public policy should require that the equivalent of due process safeguards constrain Anaconda from denying him stock option benefits. The plaintiff alleged that the district court should have reviewed the Committee's decision de novo due to the lack of due process safeguards. He further contended that benefits under the stock option and savings plans were wages under Kansas law and that he was entitled to payment for stock option benefits and penalties for delay in payment of savings benefits.[76]

B. *The Tenth Circuit's Decision*

1. The Compensation Policy Committee's Decision: Evidence of Termination for Cause

The Tenth Circuit quickly disposed of the plaintiff's due process argument, disagreeing that he was entitled to a de novo hearing in the district court. The court, citing abundant case law,[77] held that Kansas courts do not favor de novo review in such cases. The court endorsed the lower court's ruling that the Committee decision must be upheld unless arbitrary, in bad faith, or fraudulent.[78]

The Tenth Circuit stated that Weir did not present any evidence to show that the Committee had acted fraudulently or in bad faith. On the

73. KAN. STAT. ANN. § 44-315(a) (1981) provides that when an employee quits, resigns or is terminated, "the employer shall pay the employee's earned wages not later than the next regular payday." If an employer knowingly fails to pay an employee wages as required under § 44-315(a), the employer is liable for statutorily specified penalties "except that such penalty shall apply only in the event of a willful violation" as provided in KAN. STAT. ANN. § 44-315(b) (1981).

74. KAN. STAT. ANN. § 44-313(c) (1981).

75. *Weir*, 773 F.2d at 1077 (citing Holder v. Kansas Steel Built, Inc., 224 Kan. 406, 582 P.2d 224 (1978)).

76. *Id.* at 1077.

77. *Id.* at 1078 (citing Brinson v. School Dist. No. 431, 223 Kan. 465, 576 P.2d 602, 606 (1978); Imler v. Southwestern Bell Tel. Co., 8 Kan. App. 2d 71, 72-73, 650 P.2d 712, 714-15 (1982); Moore v. Adkins, 2 Kan. App. 2d 139, 576 P.2d 245 (1978)).

78. *Id.*; *see* Pioneer Container Corp. v. Beshears, 235 Kan. 745, 747, 684 P.2d 396, 398 (1984) (district court's standard of review of administrative action is restricted to whether as a matter of law: (1) the tribunal acted fraudulently, arbitrarily or capriciously; (2) the administrative order was supported by substantial evidence; and (3) the tribunal's actions were within the scope of its authority); *see also* Brinson v. School Dist. No. 431, 223 Kan. 465, 576 P.2d 602 (1978).

other hand, the court found that White's single memorandum was sufficient evidence that Weir, an employee of 22 years, was terminated for cause and was therefore ineligible to exercise his stock option benefits. The Tenth Circuit defined "cause" as a "shortcoming in performance which is detrimental to the discipline or efficiency of the employer."[79] Plaintiff Weir failed to controvert Anaconda's affidavits showing that he was terminated for cause with affidavits as required by Rule 56(e) of the Federal Rules of Civil Procedure.[80] The Tenth Circuit concluded that the district court correctly granted summary judgment on Count I for Anaconda.[81]

2. Wages, Stock Options and Conditions Precedent

The Tenth Circuit next analyzed plaintiff's allegations in Count IV, that benefits under both the stock option and savings fund plans were "wages" under Kansas law.[82] The Kansas Supreme Court in construing Kansas wage statutes stated that "[in] determining the rights which occur under an employment contract, the entitlement thereto or eligibility therefore, the terms of the contract control so long as they are not unreasonable or illegal."[83] Kansas employers may impose a condition precedent on its obligation to pay an employee a benefit; however, once an employee's right to a benefit becomes absolute, a condition subsequent cannot impose a forfeiture.[84] The Tenth Circuit had to determine if the stock option agreement placed a condition precedent on entitlement to the benefit or whether it attempted to impose a condition subsequent. If a condition precedent existed, then the benefits could not be considered "wages" under Kansas law.

Kansas courts have defined a condition precedent under the Kansas wage statutes as follows:

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79. *Weir*, 773 F.2d at 1080.

80. FED. R. CIV. P. 56(e) provides in part:

> [A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affadavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

81. *Weir*, 773 F.2d at 1081.

82. *See* KAN. STAT. ANN. § 44-313 (1981); *see also* text accompanying note 74.

83. Weinzirl v. Wells Group, Inc., 234 Kan. 1016, 1020, 677 P.2d 1004, 1008 (1984) (holding that earned commissions cannot be withheld as liquidated damages).

84. *Weir*, 773 F.2d at 1084; *see Weinzirl*, 234 Kan. at 1020-21, 677 P.2d at 1008-09; Sweet v. Stormont Vail Regional Medical Center, 231 Kan. 604, 609-10, 647 P.2d 1274, 1279-80 (1982) (failure to give required notice was an unfulfilled condition precedent and employee was not entitled to payment for unused vacation time); Morton Buildings, Inc. v. Department of Human Resources, 10 Kan. App. 2d 197, 200, 695 P.2d 450, 453 (1985) (requirement that employee be on payroll at time of profit-sharing distribution upheld as enforceable condition precedent); Mid America Aerospace, Inc. v. Department of Human Resources, 10 Kan. App. 2d 144, 694 P.2d 1321 (1985) (where contract stated that no accumulation of vacation time allowed, no contractual right to vacation pay existed after discharge); Yuille v. Pester Marketing Co., 9 Kan. App. 2d 464, 469, 682 P.2d 676, 681 (1984) ("bonuses" were really wages wrongfully withheld; deductions from managers' bonuses for gas station losses were a condition subsequent and a "forbidden forfeiture"); Richardson v. St. Mary Hospital, 6 Kan. App. 2d 238, 627 P.2d 1143 (1981) ("earned time" not wages; right to earned time pay may be conditioned upon continuous employment).

> [S]omething that is agreed must happen or be performed before a right can occur to enforce the main contract. It is one without the performance of which the contract entered into between the parties cannot be enforced. A condition precedent requires the performance of some event after the terms of the contract, including the condition precedent, have been agreed on before the contract shall take effect.[85]

The Tenth Circuit found that the right to receive benefits under the stock option and savings fund plans was not absolute because both plans were subject to a condition precedent.[86] Under the terms of the agreement, an employee leaving the company must exercise the option within three months of termination and he or she must not have been discharged for cause.[87]

The court held that when Weir attempted to exercise his option, he was not eligible under the terms of the stock option agreement because he had been discharged for cause. His rights to receive benefits under the stock option plan were subject to a condition precedent with which he failed to comply. Moreover, the Tenth Circuit found that the condition precedent in Anaconda's stock option agreement was not unconscionable. A lump sum payment for a benefit of this kind may be conditioned on the giving of notice, length of service, or any other term which is not unconscionable.[88]

In reaching its decision the court discussed another Kansas case which held that a profit sharing benefit conditioned upon continuous employment was not an earned wage even though the employer had fired the employee before the distribution date.[89] The Tenth Circuit thereby concluded that the district court properly held that the stock option benefits were not "wages" under Kansas wage statutes.[90] Therefore, because the stock option benefits were not wages, Weir's claim for payment was rejected. Finally, the court denied Weir's claim for penalties under the Kansas wage statutes for delay in payment of his savings fund benefits. As with the stock option plan, the court held such benefits were not "wages" because they were subject to a valid condition precedent, the requirement of contribution to the savings fund plan.[91]

3. Other States' Views on Wages, Conditions Precedent and Forfeitures

In Colorado, a terminated employee has a right to immediate payment for "labor or service earned and unpaid at the time of . . . discharge."[92] Profit-sharing, bonus plans and other deferred

85. *Weinzirl*, 234 Kan. at 1020, 677 P.2d at 1008.
86. *Weir*, 773 F.2d at 1084-85.
87. *Id.* at 1085.
88. *Id.* at 1084 (quoting *Sweet*, 231 Kan. at 609-10, 647 P.2d at 1279-80).
89. Morton Bldgs., Inc. v. Dep't of Human Res., 10 Kan. App. 2d 197, 695 P.2d 450 (1985).
90. *Weir*, 773 F.2d at 1085-86.
91. *Id.* at 1086.
92. COLO. REV. STAT. § 8-4-104(1) (1986).

compensation plans are expressly excluded from statutory coverage. Commissions on sales which close after the employee's termination do not fall within the scope of the statutes.[93]

Colorado case law, however, displays a willingness to recognize an implied contractual right to commissions and benefits.[94] In *Montgomery Ward and Company v. Reich*,[95] the employee was a store manager who was contractually entitled to a percentage of the net profits of the store. The contract provided that in the event of termination, entitlement to the current year's bonus was entirely at the discretion of the Bonus Committee. When Reich voluntarily resigned, the Committee denied him his share of the bonus. The Colorado Supreme Court affirmed the trial court's award of the bonus by deciding that the payment was an uncalculated addition to salary not subject to forfeiture.[96]

In *Steidtmann v. Koelbel and Co.*,[97] another Colorado decision, the employee was a real estate salesman under a contract which provided for yearly bonuses, conditioned upon continuing employment. Steidtmann voluntarily left the company in May, 1970 and was denied his 1969 bonus that was to be distributed in September 1970. The court of appeals affirmed the trial court's award of the bonus. The court held that the employer could not avoid bonus payments by setting the distribution date after the employee's termination.[98]

Where part of the consideration for deferred compensation is continued service by the employee, the Colorado employer's freedom to terminate at will is limited.[99] However, the employee may forfeit benefits if he voluntarily terminates or is discharged for cause.[100] The employer may not bring about a forfeiture by discharging the employee without cause.[101]

Conditions precedent have received similar treatment in other jurisdictions. Courts in the Sixth Circuit, Illinois, Michigan and Oregon have held that an employee will lose an earned bonus or incentive if he quits, is discharged for cause, or fails to satisfy a condition required for that benefit.[102] In *Compton v. Shopko Stores, Inc.*,[103] the Supreme Court of

93. COLO. REV. STAT. § 8-4-105(3) (1986).

94. *See* Branting, *Employees' Right to Compensation Accruing After Termination*, 13 COLO. LAW. 1643 (1984).

95. 131 Colo. 407, 282 P.2d 1091 (1955).

96. *Id.*

97. 32 Colo. App. 94, 506 P.2d 1247 (1973).

98. *Cf.* Morton Bldgs. Inc. v. Dep't of Human Res., 10 Kan. App. 2d 197, 695 P.2d 450 (the Kansas court refused to award a bonus to an employee fired before the distribution date).

99. Branting, *supra* note 94, at 1645 n.101.

100. *Id.*

101. *Id.*

102. DeGiuseppe, *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 63 (1981); *see* Hainline v. General Motors Corp., 444 F.2d 1250 (6th Cir. 1971) (employee who quit lost undistributed portion of previously awarded bonuses, but employee who is involuntarily terminated without cause is entitled to bonus); Keefner v. Super X Drugs of Ill. Inc., 21 Ill. App. 3d 394, 315 N.E.2d 35 (1974) (provision in employment contract that employee would lose bonus if discharged for cause or quits); Tobin v. General Motors Corp., 17 Mich. App. 475, 169

Wisconsin held that an executive who was discharged for cause prior to the eligibility date for a bonus was not entitled to the bonus. The court reasoned that he performed no services for the employer after the date of the discharge. His severance pay on the last day of the fiscal year did not extend his employment to the last day of the fiscal year as required for eligibility.[104]

C. *Analysis: Conditions Precedent and Termination for Cause*

The Tenth Circuit's reasoning was sound in its review of Kansas law and its application of the law to the particular stock option plan in question. The benefits were not absolute and the employment contract clearly stated that the departing employee must exercise his option within three months of termination and the employee must not have been discharged for cause. Conversely, the issue of whether Weir's termination was for cause is troublesome.

Weir, a 22-year employee, was found to have been discharged for cause on the basis of a single unsatisfactory memo written by an incompatible supervisor. It seems odd that the court found one document a sufficient basis for the Compensation Policy Committee's decision that termination was for cause. Perhaps the actual basis for the court's decision was Weir's failure to produce controverting affidavits.

IV. REJECTIONS OF COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY COURT

The Tenth Circuit reversed and remanded an order of the bankruptcy court permitting a Chapter 11 debtor-in-possession to reject his collective bargaining agreements without adequate factual findings. The court applied the United States Supreme Court's *NLRB v. Bildisco and Bildisco*[105] standards to the case at bar. Under *Bildisco*, the debtor must first show that the collective bargaining agreement burdens the estate.[106] Second, the equities must balance in favor of rejecting the labor contract.[107] Section 1113 of Chapter 11[108] was not applicable since the case was filed prior to its enactment.

N.W.2d 644 (1969) (employee who quit to work for rival auto manufacturer lost bonus where employer's stock option and bonus plan provided that employee would lose bonus if he engaged in competitive activities); Walker v. American Optical Corp., 265 Or. 327, 509 P.2d 439 (1973) (employee who quit was not entitled to semi-annual bonus under employer's "sales incentive plan").

103. 93 Wis. 2d 613, 287 N.W.2d 720 (1980).

104. *Id.* at 722 (the executive was discharged because "his performance was substandard," he "lacked leadership qualities," and his department's sales were below the company budget).

105. 465 U.S. 513 (1984); *see infra* text accompanying notes 112-117 & 121-123.

106. *Bildisco*, 465 U.S. at 527.

107. *Id.*; *see also* Comment, *The Collective Bargaining Agreement in Bankruptcy: Rejection and its Consequences*, 36 ARK. L. REV. 469 (1983); Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391 (1981) (for excellent discussions of pre-*Bildisco* case law and balancing of equities).

108. 11 U.S.C. § 1113 (1986) addresses the procedures required for a debtor-in-possession to reject a collective bargaining agreement. *See infra* note 131.

A. IBT v. IML Freight

In *International Brotherhood of Teamsters v. IML Freight, Inc.*,[109] IML filed a petition for voluntary reorganization under Chapter 11 on July 15, 1983. The bankruptcy court authorized the company to continue its business as a debtor-in-possession. IML also filed a petition to reject 33 collective bargaining agreements with 66 local unions. On August 11, 1983, the bankruptcy judge granted the petition to reject the executory collective bargaining agreements. The employees went on strike shortly thereafter and IML went into Chapter 7 liquidation. The district court affirmed the bankruptcy court's order on June 25, 1984.[110] Subsequently, the Teamsters appealed contending that the district court erred in affirming the rejection of the collective bargaining agreements.

1. Burdens to the Estate: The First Prong of *Bildisco*

Collective bargaining agreements are executory contracts within the meaning of 11 U.S.C. § 365 (1984). The bankruptcy court may permit rejection upon a showing by the debtor-in-possession that the agreement burdens the estate.[111] The Supreme Court's burden to the estate test is not the same test as the "business judgment"[112] test used to reject other types of contracts in bankruptcy.

Under the burden to the estate test, the debtor-in-possession must establish that he is acting in good faith as required by the National Labor Relations Act before the court will examine the contract as a burden to the estate.[113] *Bildisco* adopted the standard prescribed in *In re Brada Miller Freight System, Inc.*,[114] which represented a compromise between the lenient "business judgment" test and the stringent "reject-or-fail" test.[115] *Brada Miller* listed a number of factors to be considered by a bankruptcy court when considering a motion to reject: 1) the possibility of liquidation; 2) the claims that will result from the rejection of the collective bargaining agreement; 3) the cost-spreading abilities of the parties; and 4) the good faith of the unions and the debtor in seeking to resolve their mutual problems.[116]

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109. 789 F.2d 1460 (10th Cir. 1986).

110. *Id.* at 1462.

111. *Id.* (citing *Bildisco*, 465 U.S. at 525-26).

112. *Bildisco*, 465 U.S. at 523 (citing Group of Inst. Investors v. Chicago, Milwaukee, St. P. & Pac. R. Co., 318 U.S. 523, 550 (1943) (the rejection of a lease was a question of business judgment)).

113. *Id.* at 534.

114. 702 F.2d 890, 899 (11th Cir. 1983).

115. *See* Brotherhood of Ry., Airline, and S.S. Clerks, Freight Handlers, Express and Station Employees, AFL-CIO v. REA Express, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017, 1073 (1975) (under *REA Express* "reject or fail" standards, the debtor-in-possession must show by a preponderance of the evidence that forced liquidation is a certainty without the rejection of the collective bargaining agreement); *see also* Note, *Bankruptcy Law and Labor Law—Resolving the Conflict Between the Bankruptcy and Labor Laws in Rejecting Collective Bargaining Agreements: NLRB v. Bildisco & Bildisco*, 18 CREIGHTON L. REV. 191, 209 (1984).

116. *Brada Miller*, 702 F.2d at 899-900.

a. *Instant Case*

The Tenth Circuit stated that bankruptcy judges must make detailed findings to support the rejection of collective bargaining agreements. A " 'doomsday' argument," that the contracts are so burdensome that performance would result in liquidation, was held by the court not to be controlling.[117] The Tenth Circuit discussed factors which the bankruptcy judge must carefully consider: the consequences of liquidation for the debtor; the reduced value of the creditors' claims following affirmance; and the impact of rejection on the employees.[118]

The bankruptcy judge concluded that IML Freight's liquidation was inevitable without rejection of the contracts and that the presumed savings were the only available sources of relief for the debtor. The Tenth Circuit found this conclusion unsupported by the necessary findings of fact. For example, the court pointed out that no comparison was made between the amount of IML management's salary expense and the union employees' wages and benefits. Also, findings of fact showed that IML expended a disproportionate amount for supervisors' salaries, but the bankruptcy court made no reference to this fact in its decision. The finding that the debtor's management employees were paid below market value was insufficient to justify the conclusion that a reduction in their salaries would not assist IML's reorganization. Because the bankruptcy court's conclusions were not supported by the required detailed findings the Tenth Circuit found it necessary to remand the case to make the appropriate findings of fact.[119]

2. Balancing the Equities Among the Parties: The Second Prong of *Bildisco*

The standard announced in *Bildisco* is a modified *Kevin Steel*[120] standard, where the interests of the affected parties—debtors, creditors, and employees—are to be balanced. In *Bildisco*, Justice Rehnquist stated:

> The bankruptcy court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking a balance, the bankruptcy court must consider not only the degree of

117. International Bhd. of Teamsters v. IML Freight, 789 F.2d 1460, 1462 (10th Cir. 1986).

118. *Id.*

119. *Id.* at 1463.

120. Shopman's Local Union No. 455 v. Kevin Steel Products, 519 F.2d 698 (2d Cir. 1975). In *Kevin Steel*, the company filed for bankruptcy after its ironworkers' union filed unfair labor practice charges against it. The company was allowed to reject its collective bargaining agreement and the union appealed. The Second Circuit reversed the district court's affirmance of the rejection. It held that a test much stricter than "benefit to the estate" applied to collective bargaining agreements, and that rejection was permitted "only after thorough scrutiny and a careful balancing of the equities on both sides." *Id.* at 707 (quoting from In re Overseas Nat'l Airways, Inc., 238 F. Supp. 359, 361-62 (E.D. N.Y. 1965)).

> hardship faced by each party, but also any qualitative differences between the types of hardship each may face.[121]

The Supreme Court stated that the bankruptcy court must focus on the ultimate goal of Chapter 11 reorganization when considering these equities and relate the equities to the success of the reorganization.[122]

a. *Instant Case*

The Tenth Circuit held that the controlling question is whether the hardships imposed on the parties are outweighed by a reasonable expectation of successful reorganization.[123] The Tenth Circuit noted, however, that one of the unusual aspects of *IML Freight* is that the bargaining unit employees constituted a major class of creditors because the company owed them $11.7 million under wage loan programs. The very real possibility of a union strike against IML was dismissed by the bankruptcy court with the hope that the debtor would reach an agreement with its employees.[124] Nevertheless, the Tenth Circuit could not accept the bankruptcy judge's balance because the hope for a settlement between IML and employees, its creditors, appeared unrealistic.

The court concluded that the bankruptcy proceeding was fundamentally flawed by its narrow focus. Many factors must be considered when striking an appropriate balance among the important policies involved with labor agreements and bankruptcy.[125] Contrary to *Bildisco's* holding that the debtor-in-possession has a duty to bargain with the union under section 8(a)(5) of the National Labor Relations Act, the bankruptcy judge concluded that rejection would lead to negotiation. The bankruptcy court's decision was held to be inconsistent with the history of judicial intervention in labor disputes and with the court's duty to balance the equities. For this additional reason, the Tenth Circuit reversed and remanded the case for additional findings of fact.[126]

3. The *Bildisco* Dissent

Bildisco produced a heated dissent on the issue of whether a debtor-in-possession commits an unfair labor practice when he unilaterally changes the terms of an existing collective bargaining agreement after filing a bankruptcy petition but before the court has ruled on the rejection petition. Justices Brennan, White, Marshall, and Blackmun, in dissent, stated that "the Court has completely ignored important policies that underlie the NLRA . . . ."[127] The dissent argued that Congress did not intend the filing of a bankruptcy petition to affect the applicability of

121. NLRB v. Bildisco and Bildisco, 465 U.S. 513, 527 (1984).
122. *Id.*
123. International Bhd. of Teamsters v. IML Freight, 789 F.2d 1460, 1462 (10th Cir. 1986).
124. *Id.* at 1463.
125. *See Bildisco*, 465 U.S. 513 (1984) (for a complete discussion of the balancing of the conflicting policies of bankruptcy and labor agreements).
126. *IML Freight*, 789 F.2d at 1464.
127. *Bildisco*, 465 U.S. at 535 (Brennan, J., dissenting).

Section 8(d) of National Labor Relations Act and noted that Section 8(a)(5)[128] imposes the duty to bargain on a debtor in possession.[129]

4. Statutory Codification of The *Bildisco* Standards, 11 U.S.C. § 1113

Congressional response to *Bildisco* was swift. Section 1113 of chapter 11 was added to the Bankruptcy Code to codify *Bildisco's* standard for rejection of collective bargaining agreements and to eliminate the debtor in possession's ability to unilaterally reject such agreements.[130] In order for a proper rejection to occur, 11 U.S.C. § 1113(b) requires a two-step process to be performed within a strict time frame.[131]

The first step[132] requires the debtor, after he files the bankruptcy petition and before he petitions the court for rejection, to give the employees' authorized representative a proposal "based on the most complete and reliable information available at the time of such proposal."[133] The proposal is to provide for "those necessary modifications in the em-

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128. 29 U.S.C. § 158(d) (1982) provides that:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached . . . .

29 U.S.C. § 158(a)(5) (1964) provides that:

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

129. *Bildisco*, 465 U.S. at 547 (Brennan, J., dissenting).

130. 11 U.S.C. § 1113 (1984) provides:

> (a) The debtor in possession . . . , may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
>
> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—
>
> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.
>
> (2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.
>
> (c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—
>
> (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
>
> (2) the authorized representative of the employees has refused to accept such proposal without good cause; and
>
> (3) the balance of the equities clearly favors rejections of such agreement.

131. *See* Ehrenwerth & Lally-Green, *The New Bankruptcy Procedure For Rejection of Collective Bargaining Agreements: Is the Pendulum Swinging Back?*, 23 DUQ. L. REV. 939, 950-51 (1985) (for an excellent discussion of § 1113).

132. 11 U.S.C. § 1113(b)(1) (1984).

133. *Id.* at § 1113(b)(1)(A).

ployees' benefits and protections that are necessary to permit the reorganization of the debtor"[134] and to assure that "all creditors, the debtor and all of the affected parties are treated fairly and equitably."[135] The debtor-in-possession is required to furnish the employees' representative with information necessary to evaluate the proposal[136] and is obligated to meet at reasonable times with the authorized representative to confer in good faith.[137] The second step, in seeking a valid rejection, requires the Bankruptcy Court to find that the debtor has complied with step one, that the employees' representative refused to accept the proposal "without good cause," and that a "balance of the equities clearly favors rejection."[138]

5. Analysis: Considerations in Future Bankruptcy Cases

The Tenth Circuit ably applied the *Bildisco* standards in *IML Freight* in a well-reasoned opinion. The Tenth Circuit will also have to apply section 1113 in future bankruptcy cases involving petitions filed after June 29, 1984, when debtors seek to reject their collective bargaining agreements.[139] The court will have to adhere to the procedural requirements of section 1113 and ascertain that the debtor-in-possession tried to reach a modified agreement with the labor union before rejection will be allowed.

Many questions of interpretation are bound to arise as this new congressional legislation is construed. For example, the courts may have to decide the meaning of the key terms in section 1113, such as "necessary modifications," "to confer in good faith," and "without good cause." Until these provisions of section 1113 have been analyzed by the judiciary, the validity of rejecting collective bargaining agreements will remain uncertain.

V. PROCEDURAL V. SUBSTANTIVE ARBITRATION

In *Denhardt v. Trailways, Inc.*,[140] an employee objected to a late grievance hearing and, after losing at the hearing and at arbitration, brought an action in Oklahoma District Court. He alleged that due to the company's failure to comply with the time requirements for the initial hearing, the case was forfeited and arbitration was inappropriate.[141] The trial court granted the company's request for summary judgment and the employee appealed.[142] The Tenth Circuit affirmed the lower court, finding that the procedural question was for the arbitrator alone and that the employee's sole remedy was contractual arbitration.

134. *Id.*
135. *Id.*
136. *Id.* at § 1113(b)(1)(B).
137. *Id.* at § 1113(b)(2).
138. *See supra* note 120 and accompanying text.
139. *See* Ehrenwerth & Lally-Green, *supra* note 131, at 939.
140. 767 F.2d 687 (10th Cir. 1985).
141. *Id.* at 688.
142. *Id.*

A. *Form Does Not Triumph Over Substance:* Denhardt v. Trailways

Denhardt, a bus driver, was suspended by Trailways and the union filed a grievance on his behalf. Under the terms of the collective bargaining agreement, Denhardt was entitled to a hearing within ten days after the filing of the grievance.[143] The hearing date was set after the ten day time limit by a mutual agreement between the company and the union due to the unavailability of a witness.[144] Denhardt asserted that the contract relieved him of the necessity of submitting his dispute to arbitration due to the failure to comply with the time requirements for the hearing.[145]

Trailways' representative rejected Denhardt's arguments at the initial hearing and rendered a decision in favor of Trailways. Although Denhardt asked the union not to arbitrate, the union submitted the case to arbitration. The arbitrator found that the grievant's discharge was for just cause and the union decided not to take the case to the next step in the arbitration process. Denhardt then brought an action in district court under 29 U.S.C. § 185(a) (1984).[146]

The only issue before the trial court was whether the time requirement in the contract was subject to arbitration.[147] The trial court found that the procedural issue was a matter for the arbitrator and granted summary judgment in favor of Trailways. The Tenth Circuit found that procedural matters are subject to arbitration to the same extent as substantive complaints, and affirmed the lower court's decision.

B. *Procedural and Substantive Arbitration Examined*

The Tenth Circuit found no evidence, in the contract, of any purpose to exclude procedural disputes from arbitration. The language of the arbitration clause was broad and the forfeiture provision contained in the time requirements section was for the arbitrator alone to apply.[148] Collective bargaining agreements are more than mere contracts and doubts will be resolved in favor of arbitration.[149] The court found that Denhardt had failed to acknowledge the interrelation of procedural and substantive issues in labor disputes. It is well-settled that procedural questions are arbitrable if the underlying substantive question is also

143. *Id.* The collective bargaining agreement, Article 16, § 8, provides: "Within ten (10) days after the written grievance has been delivered to the Company representative, the aggrieved Employee will be accorded a hearing, if requested . . . ."

144. *Denhardt*, 767 F.2d at 689.

145. *Id.* at 688. Article 16, § 12(A) of the contract provided:

> The failure of the Company or the Union to comply with the time limits as heretofore set out in Article 15 and this Article, unless the parties agree in writing to extend or waive the limitations, will result in the forfeit of the case and it will be deemed closed.

146. *Denhardt*, 767 F.2d at 688 (under 29 U.S.C. § 185(a), an employee has standing to bring an action in district court for an alleged violation of a collective bargaining agreement).

147. *Id.*

148. *Id.* at 689.

149. *Id.* (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 583 (1960)).

arbitrable.[150]

Procedural arbitrability addresses issues such as "whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate."[151] The Supreme Court in *Wiley* held that because procedural questions are often inextricably bound up with the merits of the dispute, they should also be decided by the arbitrator.[152] Secondly, the adjudication of the procedural issues by the court would greatly delay resolution of the dispute. The court's role is limited to determining whether the parties submitted the subject matter of the particular dispute to arbitration. If they did, any procedural issues are for the arbitrator to decide.[153]

The Tenth Circuit concluded that the procedural dispute concerning compliance with time limits for conducting a hearing was a matter for the arbitrator. The arbitration clause was broad and no specific exclusion exempted such procedural matters from arbitration. Denhardt's sole remedy was arbitration of his substantive and procedural claims under the collective bargaining agreement. The appellant could not ask the federal courts to resolve issues contractually reserved for the arbitrator.[154] The Tenth Circuit affirmed the trial court's grant of summary judgment in favor of Trailways.

1. The Trilogy Revisited: *AT&T Technologies, Inc. v. Communication Workers of America*

Although *Denhardt* is not new law, it is a well written opinion worth examining in light of *AT&T Technologies, Inc. v. Communication Workers of America*.[155] The Supreme Court's unanimous decision in *AT&T* held that questions of whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for determination by the court, and not by the arbitrator, unless the parties clearly and unmistakably provide otherwise. The opinion cited the Steelworkers Trilogy[156] cases and stated that:

> These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continu-

150. *See* International Union v. Folding Carrier Corp., 422 F.2d 47, 49 (10th Cir. 1970); Nelson v. Great W. Sugar Co., 440 F. Supp. 928, 929 (D. Colo. 1977).

151. *Denhardt*, 767 F.2d at 690 (quoting John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964)).

152. *Wiley*, 376 U.S. at 557.

153. *Denhardt*, 767 F.2d at 690 (quoting *Wiley*, 376 U.S. at 557).

154. *Id.*; *see also* Republic Steel v. Maddox, 379 U.S. 650 (1965); NLRB v. Northeast Oklahoma City Manufacturing Co., 631 F.2d 669, 673 (10th Cir. 1980).

155. 106 S. Ct. 1415 (1986).

156. *See* Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (for the three cases that are referred to as the Steelworkers Triology).

ing validity, or to eviscerate their meaning by creating an exception to their general applicability.[157]

2. Analysis: *Denhardt* and Procedural Arbitrability

The Tenth Circuit's opinion in *Denhardt* is a clear, well-written exposition on the potential applicability of both procedural and substantive arbitration that is worth reading carefully. The legal principles are not new, but contribute to a concise understanding of what is the province of the court as opposed to the province of the arbitrator. The reemphasis of Trilogy principles in the Supreme Court's *AT&T* case makes *Denhardt* timely reading.

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157. *AT&T*, 106 S. Ct. at 1418.