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# 1983-1984 Annual Survey of Labor Relations and Employment Discrimination Law

# 1983-1984 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW

## LABOR RELATIONS LAW

EMPLOYMENT DISCRIMINATION LAW

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## I. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

### A. *Elections*

#### 1. **The Coercive Effect of Pro-union Supervision in Union Elections*: ITT Lighting Fixtures, Division of ITT Corp. v. NLRB[1]

The National Labor Relations Board (the Board), which is charged with the responsibility of overseeing union elections,[2] has stated that its function is one of ensuring that "employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from the interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice."[3] One way in which employees' free choice may be threatened is by a supervisor's participation in the union election.[4] The Board has noted that when a supervisor encourages employees to support the union during an election a two-fold threat exists: (1) the supervisor's pro-union stance may lead the employees to believe that the employer supports the union, and (2) employees might be coerced into supporting the union out of fear of retaliation by the pro-union supervisor.[5] Accordingly, if it can be shown that the supervisor's conduct tended to have a coercive effect on the employees' free choice, the election will be declared invalid.[6] Where the supervisor has not threatened the employees with retaliation, the Board will look at two factors to determine whether the supervisor's actions had a coercive effect: (1) the degree of supervisory authority, and (2) the extent, nature, and openness of the pro-union activity.[7]

In determining the authority possessed by the supervisor, the courts, as well as the Board, have focused on the supervisor's ability to affect adversely the employees' work conditions.[8] Yet the definition of "supervisor" found in the National Labor Relations Act includes the ability to reward as well as to retaliate.[9] Nevertheless, because most cases arise

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* By David P. Curtin, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 712 F.2d 40, 114 L.R.R.M. 2067 (2d Cir. 1983).

[2] 29 U.S.C. § 159(b) (1982).

[3] Sewell Manufacturing Co., 138 N.L.R.B. 66, 70, 50 L.R.R.M. 1532, 1534 (1962).

[4] Catholic Medical Ctr. of Brooklyn v. NLRB, 620 F.2d 20, 22, 104 L.R.R.M. 2186, 2187-88 (2d Cir. 1980); NLRB v. Handy Hardware Wholesale, Inc., 542 F.2d 935, 938, 93 L.R.R.M. 2881, 2883 (5th Cir. 1976).

[5] Turner's Express, Inc., 189 N.L.R.B. 106, 107, 76 L.R.R.M. 1562, 1563 (1971).

[6] Catholic Medical Ctr. of Brooklyn v. NLRB, 620 F.2d 20, 22, 104 L.R.R.M. 2186, 2187 (2d Cir. 1980); NLRB v. Alamo Express, Inc., 430 F.2d 1032, 1035, 74 L.R.R.M. 1562, 1563 (5th Cir. 1971).

[7] ITT Lighting Fixtures, Division of ITT Corporation, 658 F.2d 934, 937, 108 L.R.R.M. 2281, 2283 (2d Cir. 1981).

[8] *See* NLRB v. Handy Hardware Wholesale, Inc., 542 F.2d 935, 938, 93 L.R.R.M. 2881, 2883 (5th Cir. 1976); Delchamps, Inc., 210 N.L.R.B. 179, 180, 86 L.R.R.M. 1166, 1167 (1974); Flint Motor Inn Company, 194 N.L.R.B. 733, 734, 79 L.R.R.M. 1040, 1041-42 (1971).

[9] Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (1982), states: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees . . . or effectively recommend such actions . . . ."

from supervisors' punishment of employees,[10] the judicial emphasis has naturally been on supervisors' retaliatory powers.

During the *Survey* year, the United States Court of Appeals for the Second Circuit realigned the focus of determinations about whether the pro-union activities of a supervisor have affected the outcome of a union election by requiring the Board to consider the supervisor's ability to reward employees as well as punish them.[11] In *ITT Lighting Fixtures, Division of ITT Corp. v. NLRB*,[12] the Second Circuit held that pro-union activity during a union election by workers who possessed the authority to affect favorably the working conditions of fellow employees, constituted coercion sufficient to warrant vacating the results of the election.[13] As a result, courts called upon to measure the degree of coercion in a union election will now examine the participants' ability to make any significant change, beneficial as well as detrimental, in other employees' working conditions.

*ITT Lighting Fixtures* concerned a company's challenge of a union election on the grounds that some of the participants were supervisors within the meaning of the National Labor Relations Act (the Act).[14] An election had been held in which the UAW had been chosen as the exclusive bargaining representative of ITT's employees.[15] The company challenged the election, charging that the public, "pervasive," pro-union activities of a group of fifty-one supervisors ("the groupleaders") had tainted the election.[16] Following an evidentiary hearing, the Hearing Officer agreed that the groupleaders were all supervisors but held that they were "minor" supervisors who lacked sufficient coercive authority to affect the election.[17] The Regional Director, upon review of the findings of the Hearing Officer, sustained the company's challenges to eleven of the group but found the evidence inconclusive as to the others.[18] Nevertheless, the Director held that determining the status of the remaining groupleaders was unnecessary because their votes would not have changed the outcome of the election.[19] Moreover, he concluded that the Hearing Officer had been correct in holding that the groupleaders were "minor" supervisors and could not affect the employment status of the other employees.[20]

In reviewing the Regional Director's decision, the Board limited the scope of its review to the issue of whether the remaining groupleaders were supervisors.[21] The Board found four more groupleaders to be supervisors but agreed with the Regional Director that the votes of the groupleaders would not have altered the election results.[22] Accord-

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[10] *See* NLRB v. Handy Hardware Wholesale, Inc., 542 F.2d 935, 938, 93 L.R.R.M. 2881, 2883 (5th Cir. 1976); Delchamps, Inc., 210 N.L.R.B. 179, 180, 86 L.R.R.M. 1166, 1167 (1974); Flint Motor Inn Company, 194 N.L.R.B. 733, 734, 79 L.R.R.M. 1040, 1041-42 (1971).

[11] ITT Lighting Fixtures, Division of ITT Corporation v. NLRB, 712 F.2d 40, 44, 114 L.R.R.M. 2067, 2070 (2d Cir. 1983).

[12] 712 F.2d 40, 114 L.R.R.M. 2067 (2d Cir. 1983).

[13] *Id.* at 45, 114 L.R.R.M. at 2071.

[14] *Id.* at 41, 114 L.R.R.M. at 2068.

[15] *Id.* at 42, 114 L.R.R.M. at 2068-69.

[16] *Id.* at 42, 114 L.R.R.M. at 2069.

[17] *Id.*

[18] *Id.*

[19] *Id.* Of the 364 ballots cast, 175 were for the union, 153 were against the union, and thirty-four were challenged and not counted (of which thirty-one were cast by the groupleaders). *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

ingly, the Board certified the election.[23] The company subsequently refused to bargain with the UAW, and the Board issued an order to compel it to do so.[24]

The company then petitioned the court of appeals for review of the Board's order.[25] Upon review of the administrative proceedings, the court concluded that these proceedings had missed the crucial issue to be decided in the case: whether the employees' free choice in the election had been diminished by the pro-union activities of the groupleaders.[26] Emphasizing the coercive potential of the groupleaders' union support,[27] the court noted that neither the Board nor the Regional Director had explained by what criteria they had distinguished "major" from "minor" supervisors.[28] The court, therefore, remanded the case to the Board for a finding of whether the groupleaders' activities tended to have a coercive effect on the employees in a way that would have impaired free choice.[29]

On remand the Board issued a Supplemental Decision and Order that concluded that "[t]he type of day-to-day supervisory authority possessed by these groupleaders simply did not afford the opportunity for effective retaliation against anti-union employees . . . ."[30] Based on this finding, the Board affirmed its earlier decision that the groupleaders' activities did not sufficiently affect the other employees' freedom of choice to warrant setting aside the election.[31] ITT Lighting Fixtures, once again, petitioned the Court of Appeals for the Second Circuit to set aside the Board's order.[32]

The Second Circuit granted ITT's petition and set aside the election.[33] In so holding, the court criticized the Board's assessment of the groupleaders' coercive authority solely according to their ability to affect the other employees' working conditions *adversely*.[34] The court reasoned that supervisory authority consists of the power to reward in addition to the power to retaliate.[35] The court noted that this power to reward, that is, the power to give one employee an advantage over another, could have a coercive effect equal to the effect of the power to punish.[36] Accordingly, the court stated that the Board should also consider the supervisor's ability to grant or recommend transfer, favorable work assignments, and overtime assignments.[37] Moreover, the court found that both statutory authority[38] and the Board's prior decisions[39] support the inclusion of the power to reward in the criteria for determining supervisor status.

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[23] *Id.*

[24] *Id.* The Board found that ITT had violated sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1) (1982). 712 F.2d at 42, 114 L.R.R.M. at 2069.

[25] *ITT Lighting Fixtures*, 712 F.2d at 42, 114 L.R.R.M. at 2069. This earlier decision is reported at 658 F.2d 934, 108 L.R.R.M. 2281 (2d Cir. 1981).

[26] *ITT Lighting Fixtures*, 712 F.2d at 42, 114 L.R.R.M. at 2069. *See* ITT Lighting Fixtures, Division of ITT Corporation, 658 F.2d 934, 940, 108 L.R.R.M. 2281, 2284 (2d Cir. 1981).

[27] *ITT Lighting Fixtures*, 712 F.2d at 42-43, 114 L.R.R.M. at 2069.

[28] *Id.* at 43, 114 L.R.R.M. at 2069.

[29] *Id.* at 43, 114 L.R.R.M. at 2070.

[30] *Id.* (quoting the Board's decision, 265 N.L.R.B. 188, 112 L.R.R.M. 1136 (1982)).

[31] *Id.*

[32] *Id.* at 41, 114 L.R.R.M. at 2068.

[33] *Id.* at 45, 114 L.R.R.M. at 2071.

[34] *Id.* at 44, 114 L.R.R.M. at 2070.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* (citing section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (1982)).

[39] *Id.* (citing Delchamps, Inc., 210 N.L.R.B. 179, 86 L.R.R.M. 1166 (1974) and Flint Motor Inn Company, 194 N.L.R.B. 733, 79 L.R.R.M. 1040 (1971)).

Turning to the facts of the case, the court found that fifty-one employees could possibly have been influenced by the groupleaders' activities[40] — enough to reverse the outcome of the election.[41] The court noted that three of the groupleaders, together supervising thirty-one employees, possessed a significant degree of authority to reward subordinates[42] and that they had encouraged those subordinates to support the union.[43] In addition, the court found that another groupleader, who was in charge of twenty employees, had the authority to choose workers for overtime.[44] According to the court, the Board had recognized that she exerted a measure of authority but had dismissed the impact of that authority because it was subject to the approval of her supervisor.[45] The court disagreed, noting that the statutory definition of "supervisor" required only that she be able to exercise independent judgment in making her recommendations.[46] The court ruled that she had this ability and further noted that her supervisor generally approved her recommendations after only a cursory investigation.[47] Taken together, the court determined that these four groupleaders exercised enough authority over fifty-one employees to change the result of the election.[48] In light of the groupleaders' power to reward and punish their subordinates, the court found that the election could not be characterized as having been held in an atmosphere free from coercive influences.[49] Having given the Board two opportunities to demonstrate the validity of the election, the court concluded that the proper action was to vacate the Board's order and set aside the election.[50]

The Second Circuit's decision in *ITT Lighting Fixtures* is not a departure from prior law. Instead, the decision is a re-emphasis of the aspect of reward in considering a supervisor's influence. As the court noted, previous cases had included the power to reward in their determination of the supervisory power.[51] Moreover, the statutory definition of "supervisor" includes a specific reference to the power to reward.[52] Yet both the case law and the statute mention the supervisor's beneficient authority only in conjunction with the ability to affect other employees adversely.[53] The court in *ITT Lighting Fixtures*, however, separates these powers and emphasizes that the power to retaliate is not a necessary element of supervisory authority.[54] Instead, an individual can be found to be a supervisor solely on the basis of the ability to reward other employees.[55]

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[40] *Id.* at 45, 114 L.R.R.M. at 2071.

[41] *Id.* The court noted that the groupleaders' votes would not have affected the election results and, rather, regarded the proper issue as whether their union activity, combined with their authority, could have affected enough other votes to influence the election. *Id.* at 44, 114 L.R.R.M. at 2071.

[42] *Id.* at 44, 114 L.R.R.M. at 2071.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 44-45, 114 L.R.R.M. at 2071.

[46] *Id.* at 45, 114 L.R.R.M. at 2071.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See* NLRB v. Handy Hardware Wholesale, Inc., 542 F.2d 935, 938, 93 L.R.R.M. 2881, 2883 (5th Cir. 1976); Delchamps, Inc., 210 N.L.R.B. 179, 180, 86 L.R.R.M. 1166, 1167 (1974); Flint Motor Inn Company, 194 N.L.R.B. 733, 734, 79 L.R.R.M. 1040, 1041-42 (1971).

[52] *See* section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (1982).

[53] *See, e.g.*, NLRA section 2(11) ("layoff, recall, promote, discharge, assign, reward . . . ."); and Delchamps, Inc., 210 N.L.R.B. 179, 180, 86 L.R.R.M. 1166, 1167 ("the meat department managers . . . possess the authority to . . . reprimand, discipline, and recommend pay raises . . . .").

[54] *ITT Lighting Fixtures*, 712 F.2d at 44, 114 L.R.R.M. at 2070.

[55] *Id.*

Apart from having substantial support from the statute and case law, the *ITT Lighting Fixtures* approach to defining supervisory authority is especially meaningful within the context of a union election. To validate a union election, a court should be certain that the election was held in an atmosphere free from any coercive influences that would taint the results. An employee can be coerced as much by a promise of reward as by a threat of retaliation. Accordingly, to measure the degree of coercion in a union election, *ITT Lighting Fixtures* requires a court to examine the participants' ability to affect any significant alteration in other employees' terms of employment — whether the alteration is to the benefit or detriment of the employees.

### 2. **Exacerbation of Racial Tensions During Pre-Representation Election Period*: NLRB v. Eurodrive, Inc.[1]

Section 9(c)(1) of the National Labor Relations Act (the Act) provides that the authority to conduct representation elections for purposes of collective bargaining rests with the National Labor Relations Board (Board).[2] A party objecting to the validity of an election on grounds of improper pre-election conduct bears the burden of proving by specific evidence that the election was unfair.[3] Pursuant to Board rules and regulations, where the objecting party in a case involving a consent election[4] files exceptions to the election which raise substantial and material factual issues, the Board may order a hearing.[5] The evidence presented by the objecting party must present a prima facie case for setting aside the election.[6] The United States Supreme Court has noted that Congress has granted the Board a wide degree of discretion in establishing the requisite procedures and safeguards necessary to insure the fair and free choice by employees of bargaining representatives.[7] Section 10(e) of the Act limits judicial review to determining whether

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* By Cynthia Terzakis, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 724 F.2d 556, 115 L.R.R.M. 2361 (6th Cir. 1984).

[2] 29 U.S.C. § 159(c)(1) (1982).

[3] Harlan #4 Coal Co. v. NLRB, 490 F.2d 117, 120, 85 L.R.R.M. 2312, 2314 (6th Cir. 1974), *cert. denied*, 416 U.S. 986, 86 L.R.R.M. 2156 (1974) (company did not sustain burden where substantial evidence supported Board's findings). *Accord*, NLRB v. Basic Wire Products, Inc., 516 F.2d 261, 263, 89 L.R.R.M. 2257, 2258 (6th Cir. 1975).

[4] Under the Board's rules and regulations, two types of consent arrangements may be entered into to informally resolve representation disputes. 29 C.F.R. §§ 102.62(a), (b) (1983). In the first, a consent election agreement, upon the filing of a petition and with the consent of the Regional Director of the Board, the employer, any individual, or any labor organization representing a substantial number of employees involved may agree to an election waiving a hearing on all matters. 29 C.F.R. § 102.62(a). Under the consent election agreement, the parties agree to be bound by the rulings and determinations made by the appropriate regional director. *Id.* His conclusions have the same force and effect as if issued by the Board. *Id.*

In the second, the parties may enter into a stipulation for certification agreement which waives only the right to a hearing before the election. 29 C.F.R. § 102.62(b). In the stipulation for certification agreement, the Board, not the Regional Director, makes the final determination of disputes under an appeal procedure. *Id.* In *Eurodrive*, the parties entered into a Stipulation for Certification Upon Consent Election, thereby affording them Board review. *Eurodrive*, 724 F.2d at 557, 115 L.R.R.M. at 2361. For objection procedures *see infra* note 32.

[5] 29 C.F.R. § 102.69(e)(1) (1983). *See, e.g.*, NLRB v. Tennessee Packers, Inc., Frosty Morn Division, 379 F.2d 172, 177-78, 65 L.R.R.M. 2619, 2622 (6th Cir. 1967).

[6] *See, e.g.*, NLRB v. Silverman's Men's Wear, Inc., 656 F.2d 53, 55, 107 L.R.R.M. 3273, 3274 (3d Cir. 1981); Anchor Inns, Inc. v. NLRB, 644 F.2d 292, 296, 106 L.R.R.M. 2860, 2863 (3d Cir. 1981).

[7] NLRB v. A.J. Tower Co., 329 U.S. 324, 330, 19 L.R.R.M. 2128, 2131 (1946) (Board properly refused to accept employer's post-election challenge to eligibility of voter who participated in consent election).

there is substantial evidence on the record as a whole to support the Board's findings.[8]

Although the Board in conducting representation elections strives to achieve "laboratory" conditions as nearly ideal as possible to enable employees to express their uninhibited desires,[9] courts have recognized that "clinical asepsis" in union organization efforts is not a practical or attainable goal.[10] Consequently, the Board and the reviewing courts have allowed some degree of propagandizing.[11] Generally, the Board considers exaggeration, inaccuracies, half-truths and name calling to be legitimate propaganda.[12] Although the Board recognizes that some appeal to prejudice is inevitable, campaign propaganda which seeks to overemphasize and exacerbate racial feelings may be deemed grounds for setting aside an election.[13]

In *Sewell Manufacturing Company*,[14] the Board adopted a standard for determining the acceptability of racially related election propaganda. According to that standard, the Board will not set an election aside where a party limits itself to truthfully setting forth another party's position on racial matters and does not deliberately seek to exacerbate racial feelings.[15] The Board declared in *Sewell* that the burden of establishing that a racial

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[8] 29 U.S.C. § 160(e) (1982). Courts recognize that in reviewing the Board's conclusions, they may not consider the issues involved de novo and cannot choose between conflicting inferences, even if they would have arrived at a different result. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 27 L.R.R.M. 2373, 2378 (1951); NLRB v. Tennessee Packers, Inc., Frosty Morn Division, 379 F.2d 172, 180, 65 L.R.R.M. 2619, 2624 (6th Cir. 1967) (substantial evidence supported Board's finding that employer's adoption and clarification of work rules conferred benefits and was not merely a routine decision).

[9] General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948) (interrogation of employees by foreman concerning union involvement destroyed laboratory conditions). *Accord*, Sewell Manufacturing Co., 138 N.L.R.B. 66, 70, 50 L.R.R.M. 1532, 1534 (1962).

[10] NLRB v. Sumter Plywood Corp., 535 F.2d 917, 920, 92 L.R.R.M. 3508, 3510-11 (5th Cir. 1976), *cert. denied*, 429 U.S. 1082, 94 L.R.R.M. 2643 (1977) (racial orientation of campaign which appealed to ethnic pride and unity did not warrant refusal to certify union).

[11] *Id. See also* EDM of Texas, 245 N.L.R.B. 934, 936, 102 L.R.R.M. 1405, 1405-06 (1979); Hollywood Ceramics Co., Inc., 140 N.L.R.B. 221, 224 n.6, 51 L.R.R.M. 1600, 1601 n.6 (1962).

[12] EDM of Texas, 245 N.L.R.B. 934, 936, 102 L.R.R.M. 1405, 1405-06 (1979) (fact that director of manufacturing did not intentionally utter deprecatory anti-union remarks not a defense to section 8(a)(1) violation) (citing Hollywood Ceramics Co., Inc., 140 N.L.R.B. 221, 224 n.6, 51 L.R.R.M. 1600, 1601 n.6 (1962)). *Accord*, Baker Canning Co. v. NLRB, 505 F.2d 574, 576, 87 L.R.R.M. 3142, 3143 (7th Cir. 1974).

[13] Sewell Manufacturing Co., Inc., 138 N.L.R.B. 66, 71, 50 L.R.R.M. 1532, 1534 (1962) (second election warranted because racial comments not germane to any legitimate issue of election and served only to exacerbate racial tensions).

[14] 138 N.L.R.B. 66, 50 L.R.R.M. 1532 (1962). In *Sewell*, two weeks before the election the employer mailed to employees a picture of a black man and a white woman dancing. *Id.* at 66, 50 L.R.R.M. at 1532. The picture had a bold face caption indicating the union's endorsement of racial integration and equality. *Id.* The employer also sent its employees a reproduction of a newspaper article and accompanying photo of a white union leader dancing with a black woman. *Id.* at 66-67, 50 L.R.R.M. at 1532. The company president enclosed a letter setting forth reasons why he would vote against the union if permitted to do so. *Id.* at 67, 50 L.R.R.M. at 1532. Included among his reasons was his objection to paying assessments to a union to promote political objectives such as the NAACP and the Congress of Racial Equality. *Id.*

The Board in *Sewell* recognized that some racial statements are to be tolerated because they are true and because they pertain to matters, such as the union's position on racial integration, which employees are entitled to know. *Id.* at 71, 50 L.R.R.M. at 1534. Finding that the conduct in the case was not germane to any legitimate issue and only served to exacerbate racial tensions, the Board in *Sewell* directed that a second election be held. *Id.* at 72, 50 L.R.R.M. at 1535.

[15] *Id.* at 71-72, 50 L.R.R.M. at 1535.

message is truthful and germane rests with the party making the statement.[16] Where there is doubt as to whether the total conduct of the party falls within permissible bounds, the doubt will be resolved against him.[17]

During the *Survey* year, the Sixth Circuit Court of Appeals in *NLRB v. Eurodrive, Inc.* denied enforcement of a Board order requiring the company to bargain with the union.[18] The court found that the undisputed facts were sufficient to establish that a union organizer had engaged in a subtle, but deliberate, attempt to exacerbate existing racial tension.[19] Such conduct, the court held, was likely to have affected appreciably the employees' decision to vote for or against union representation.[20] Although the distinction between permissible and impermissible racial statements has never been an easy line to draw,[21] courts evaluate the context in which the statements were made[22] and the total conduct of the party involved.[23] *NLRB v. Eurodrive, Inc.* indicates that the threshold level of tolerability may be lower where parties have knowledge of pre-existing racial tension in the work environment.

The dispute in *Eurodrive* involved statements made by a Teamster organizer at two pre-election meetings held for employees.[24] Eight days prior to the election, the organizer suggested that the union was necessary to safeguard the rights of white employees who, unlike black employees, were not covered by equal protection laws.[25] In support of his contention, the union organizer referred to the recent dismissal of a white employee who was discharged for racially harassing the company's only black employee.[26] Claiming that this incident exemplified the "white's need for protection," the organizer promised that the union could and would obtain the discharged employee's reinstatement with back pay.[27] During the employee meeting, the organizer singled out the black employee and stated that were he to sign a statement provided by the union, the discharged employee's reinstatement would be assured.[28] At a second meeting held on the eve of the election, the union organizer repeated his promise to obtain the reinstatement of the discharged employee.[29]

Subsequently, in the Board-conducted election, the union received fifteen of the twenty-eight ballots cast.[30] The company, claiming that the union's appeal to the racial

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[16] *Id.* at 72, 50 L.R.R.M. at 1535.

[17] *Id.*

[18] NLRB v. Eurodrive, Inc., 724 F.2d 556, 560, 115 L.R.R.M. 2361, 2364 (6th Cir. 1984).

[19] *Id.*

[20] *Id.*

[21] *See, e.g.*, Bancroft Manufacturing Co., Inc., 210 N.L.R.B. 1007, 1007, 86 L.R.R.M. 1376, 1378 (1974) (statement, "If blacks did not stay together as a group and the Union lost the election all the blacks would be fired," constituted neither appeal to racial prejudice nor attempt to inflame racial hatred and, therefore, did not warrant setting aside election).

[22] *See, e.g.*, NLRB v. General Telephone Directory Co., 602 F.2d 912, 915, 102 L.R.R.M. 2487, 2488 (9th Cir. 1979) (prior to determining whether an employer's pre-election statements are protected, a court will consider the context in which they were made).

[23] *See, e.g.*, Sewell Manufacturing Co., 138 N.L.R.B. 66, 71, 50 L.R.R.M. 1532, 1534 (1962).

[24] NLRB v. Eurodrive, Inc., 724 F.2d at 557, 115 L.R.R.M. at 2362.

[25] *Id.*

[26] *Id.* Despite repeated warnings from the employer, the harassing employee continued to make racial slurs, jokes, and insults. *Id.* Eurodrive consequently fired the harassing employee. *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 557, 115 L.R.R.M. at 2361.

prejudice of the electorate interfered with the employees' ability to make a reasoned choice in the election,[31] requested that either the election be set aside or a hearing be held.[32] After investigating the company's allegations, the Regional Director of the Board recommended that the employer's objections be dismissed.[33] Adopting the Regional Director's recommendations, the Board certified the union as the bargaining representative and denied the employer's subsequent motion for reconsideration.[34] The company, however, refused to bargain with the newly elected union.[35] The union then filed an unfair labor practice charge with the Board.[36]

The Board held that because the union had been certified as the exclusive bargaining representative of the employees, the employer had an obligation to bargain with the union.[37] The Board rejected the employer's challenge to the validity of the union's certification, finding that it was an attempt to relitigate issues raised and determined in the underlying representation case.[38] In view of the employer's failure to present any newly discovered or previously unavailable evidence or any special circumstances which would warrant the reconsideration of the decision made in the representation proceeding, the Board granted the union's motion for summary judgment.[39] The Board determined that the employer's refusal to bargain with the union constituted an unfair labor

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[31] *Id.* at 557 n.1, 557-58, 115 L.R.R.M. at 2361 n.1, 2362.

[32] *Id.* at 557, 115 L.R.R.M. at 2361. The company initially raised four objections to the election, but only appealed the Board's decision with respect to the racial issue. *Id.* at n.1.

The Board's rules and regulations provide that any party may file objections and present evidence to the Regional Director with regard to the conduct of the election or to conduct affecting the results of the election, stating the reasons for the objections. 29 C.F.R. § 102.69(a) (1983). If timely objections are filed, the Regional Director conducts an investigation of the objections or challenges to the election. 29 C.F.R. § 102.69(c)(1) (1983). If a stipulation for certification agreement has been entered into, as in *Eurodrive*, *see supra* note 4, the Regional Director presents to the parties a report on the objections, including his recommendations. 29 C.F.R. § 102.69(c)(2) (1983). The parties may file exceptions to the report and supporting documents with the Board in Washington. *Id.* An opposing party may then file an answering brief and supporting documents with the Board in Washington. *Id.*

If the Board determines that the exceptions to the report do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the election upon the record or may make other disposition of the case. 29 C.F.R. § 102.69(f). If, however, it appears to the Board that the exceptions do raise substantial and material factual issues, it may direct the Regional Director or other Board agent to serve a notice of hearing on the parties concerning the exceptions. *Id.*

If the Board denies the request for review, the denial serves as an affirmance of the Regional Director's action and also precludes relitigation of any issues in any related subsequent unfair labor practice proceeding. 29 C.F.R. §§ 102.67(f), 102.69(f) (1983). Where review is granted, the Board will consider the entire record in light of the grounds relied upon for review. 29 C.F.R. § 102.67(g) (1983).

[33] NLRB v. Eurodrive, Inc., 724 F.2d at 557, 115 L.R.R.M. at 2361.

[34] Eurodrive, Inc., 260 N.L.R.B. 1466, 1467, 109 L.R.R.M. 1344, 1344 (1982).

[35] NLRB v. Eurodrive, Inc., 724 F.2d at 557, 115 L.R.R.M. at 2362.

[36] *Id.*

[37] Eurodrive, Inc., 260 N.L.R.B. 1466, 1467, 109 L.R.R.M. 1344, 1344 (1982).

[38] *Id.* The Board referred to Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146, 162, 8 L.R.R.M. 425, 431 (1941), where the Court held that a company or union desiring to relitigate an issue presented in a prior representation proceeding must indicate in some way that the evidence they wish to offer is more than cumulative. *Id.* Absent such a showing, a single trial of the issue suffices. *Id.* *See, e.g.*, Rules and Regulations of the Board, 29 C.F.R. §§ 102.67(f) and 102.69(c) (1983).

[39] Eurodrive, Inc., 260 N.L.R.B. at 1467, 109 L.R.R.M. at 1344.

practice in violation of Sections 8(a)(1) and (5).[40] Accordingly, the Board ordered the employer to cease its unfair labor practice and commence collective bargaining with the union.[41]

On appeal by the employer, the Sixth Circuit Court of Appeals denied enforcement of the Board's bargaining order.[42] Citing with approval the principle enunciated by the Board in *Sewell Manufacturing Company, Inc.*,[43] the court maintained that an election will be set aside when the objecting party demonstrates that pre-election conduct is an attempt to exacerbate racial feelings through a deliberate appeal to racial prejudice.[44] Applying the principle set forth in *Sewell* and subsequent case law,[45] the Sixth Circuit stated that an effective appeal to racial prejudice is material[46] and prima facie warrants setting aside an election.[47] Accordingly the court maintained that the union organizer's pre-election statements must be analyzed in terms of the atmosphere of racial tension that existed at the time the statements were made.[48]

In analyzing the pre-election atmosphere in *Eurodrive*, the court noted that racial tensions existed among employees prior to the election.[49] The court accepted the Board's conclusion that the racial tension did not result from the union's pre-election conduct.[50] The Sixth Circuit, however, stressed that the determination of whether pre-election

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[40] *Id.* Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1982).

Section 8(a)(5) of the Act states: "It shall be an unfair labor practice for an employer — (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5) (1982).

The rights of employees are detailed in Section 7 of the Act which reads in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1982).

[41] Eurodrive, Inc., 260 N.L.R.B. at 1467, 109 L.R.R.M. at 1344.

[42] NLRB v. Eurodrive, Inc., 724 F.2d 556, 560, 115 L.R.R.M. 2361, 2364 (6th Cir. 1984).

[43] *See supra* notes 14-17 and accompanying text.

[44] NLRB v. Eurodrive, Inc., 724 F.2d at 558, 115 L.R.R.M. at 2362 (quoting Sewell Manufacturing Co., 138 N.L.R.B. 66, 71, 50 L.R.R.M. 1532, 1534 (1962)).

[45] *See, e.g.*, NLRB v. Katz, 701 F.2d 703, 705, 112 L.R.R.M. 3024, 3026 (7th Cir. 1983) (company's allegation that pre-election racial and religious slurs were made at union organizational meeting established prima facie case for setting aside election); NLRB v. Silverman's Men's Wear, Inc., 656 F.2d 53, 58, 107 L.R.R.M. 3273, 3276 (3d Cir. 1981) (court stated that principle to be applied from *Sewell* is that effective appeal to racial prejudice prima facie warrants setting aside election).

[46] NLRB v. Eurodrive, Inc., 724 F.2d at 559, 115 L.R.R.M. at 2363 (citing Sewell Manufacturing Co., 138 N.L.R.B. 66, 71, 50 L.R.R.M. 1532, 1534 (1962)).

[47] NLRB v. Eurodrive, Inc., 724 F.2d at 558, 115 L.R.R.M. at 2363 (quoting NLRB v. Silverman's Men's Wear, Inc., 656 F.2d 53, 58, 107 L.R.R.M. 3273, 3276 (3d Cir. 1981)). In *Silverman*, the Third Circuit Court of Appeals evaluated a union secretary-treasurer's characterization of the company vice-president as a "stingy Jew." 656 F.2d at 57, 107 L.R.R.M. at 3276. The court in *Silverman* indicated that knowledge of the vice-president's religion was not relevant to the employees' right to make an informed choice for or against unionism, and condemned use of remarks which serve no purpose except to exploit religious prejudices. *Id.* at 58, 107 L.R.R.M. at 3276.

[48] NLRB v. Eurodrive, Inc., 724 F.2d at 559, 115 L.R.R.M. at 2363.

[49] *Id.* at n.5.

[50] *Id.*

conduct had an impact on employee free choice does not necessarily depend on who was initially responsible for the racial tension.[51] Deliberate attempts to exacerbate existing racial tensions prior to an election, the *Eurodrive* court asserted, render a party equally culpable as a party who creates the tension in the first instance.[52]

In examining the union organizer's statements of the "white's need for protection" in light of existing racial tensions, the court determined that the statements by themselves, without further reference to the incident culminating in the white employee's discharge, would not have been sufficient to establish an intent to aggravate racial feelings.[53] The court noted, however, that the union organizer did not simply inform employees of the benefits that would accrue under employment laws or as a result of unionization.[54] Instead, he explicitly referred to the racially-related discharge, singled out the black employee, and promised that if the harassed individual cooperated, the union could obtain the discharged white employee's reinstatement with back pay.[55] The *Eurodrive* court characterized the racial statements as "tangentially related" to legitimate campaign issues.[56] The court maintained, however, that both the context of the remarks and the total conduct involved placed undue emphasis on a racial issue which the union organizer "must have known" would exacerbate an already tense environment.[57] Finding that the deliberate appeal to racial prejudice raised a substantial and material issue which interfered with the employees' free choice,[58] the *Eurodrive* court held that the Board abused its discretion in denying the employer's request for a rehearing.[59]

The *Eurodrive* court, therefore, proceeded to determine the appropriate disposition of the case. The court recognized that the normal procedure for a review of a substantial and material question of fact is to remand to the Board for a hearing.[60] The court asserted, however, that a remand in this case would serve no useful purpose, since the evidence was undisputed that the pre-election statements were made in an existing atmosphere of racial tension.[61] Consequently, the court stated that the only remaining task was to determine the likely impact of the statements upon the electorate.[62] Pointing to the relatively small size of the proposed bargaining unit and the improbability that any employee would be unaware of the racial incident,[63] the court found that the statements were likely to have an appreciable impact on the employees' free choice in the election.[64]

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[51] *Id.*

[52] *Id.*

[53] *Id.* at 559, 115 L.R.R.M. at 2363.

[54] *Id.*

[55] *Id.* at 559, 115 L.R.R.M. at 2363-64.

[56] *Id.* at 559, 115 L.R.R.M. at 2364.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 560 nn.6 & 7, 115 L.R.R.M. at 2364 nn.6 & 7.

[62] *Id.* at 560, 115 L.R.R.M. at 2364 (quoting NLRB v. Gorbea, Perez & Morrell, S. en C., 328 F.2d 679, 680, 55 L.R.R.M. 2586, (1st Cir. 1964)) (an inducement is material if objectively it is unlikely to have an appreciable effect). *See also* NLRB v. Katz, 701 F.2d 703, 707, 112 L.R.R.M. 3024, 3028 (7th Cir. 1983) (pre-election racial and religious slurs made by a priest at union organizational meeting could have impaired employees' freedom of choice in election); Advertisers Manufacturing Co. v. NLRB, 677 F.2d 544, 546-47, 110 L.R.R.M. 2355, 2357 (7th Cir. 1982) (Board did not abuse its discretion in finding that union secretary-treasurer's characterization of company president as "liar" did not impair employee free choice in election).

[63] NLRB v. Eurodrive, Inc., 724 F.2d at 560, 115 L.R.R.M. at 2364.

[64] *Id.*

Moreover, the court noted that the effectiveness of the statements was multiplied by the already existing racial tension resulting from the harassing conduct and ultimate discharge of the offender.[65]

In addition, the court considered the timing of the statements. Because the statements were made twice within the eight day period preceding the election,[66] the court found that the employer did not have sufficient opportunity to respond.[67] The court stated, however, that even had the company been able to respond, it might only have further intensified the existing heated atmosphere.[68] Concluding that the undisputed facts were sufficient to establish that the union organizer engaged in a "subtle but deliberate attempt" to exacerbate existing racial tension,[69] and that this attempt was likely to have an appreciable impact on the electorate,[70] the Sixth Circuit denied enforcement of the Board's bargaining order.[71]

The *Eurodrive* case is significant for its furtherance of the general Board policy with respect to the conduct of representation elections and for its vehement condemnation of intentional appeals to racial prejudice in an emotionally charged working environment. *Eurodrive* exemplifies the efforts of courts to monitor the election process in order to avoid the undesirable result of workers being persuaded to vote for or against a union on the basis of invidious prejudices they might have against individuals of another background.[72] Consistent with existing case law,[73] *Eurodrive* demonstrates that messages sought to be conveyed during the pre-election period can legitimately be accomplished without appeals directed solely towards the racial prejudice of the electorate.[74]

Moreover, the *Eurodrive* decision remains within the bounds of the general Board policy of encouraging "laboratory" conditions as nearly ideal as possible for the conduct of representation elections.[75] While some degree of interference is inevitable in union organizational efforts,[76] the primary concern in the election process is to ensure that employees are free from any interference, restraint or coercion which would prevent or impede a reasoned choice.[77] In view of this standard, the court in *Eurodrive* determined that the subtle, but deliberate attempt by the union organizer to aggravate existing racial tension was likely to have had considerable effect on the employees' decision to vote for or against union representation.[78] Since the court found that the pre-election conduct destroyed the laboratory conditions by impeding employee free choice, its decision to deny enforcement of the Board's bargaining order[79] furthers the policy of the Act.

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See, e.g.*, NLRB v. Sumter Plywood Corp., 535 F.2d 917, 924-25, 92 L.R.R.M. 3508, 3514 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092, 94 L.R.R.M. 2643 (1974) (racial orientation of campaign which appealed to ethnic pride and unity did not warrant refusal to certify union).

[73] *See, e.g.*, NLRB v. Silverman's Men's Wear, Inc., 656 F.2d 53, 107 L.R.R.M. 3273 (3d Cir. 1981) discussed *supra* note 47.

[74] NLRB v. Eurodrive, Inc., 724 F.2d at 560, 115 L.R.R.M. at 2364.

[75] *See, e.g.*, General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948).

[76] *See, e.g.*, NLRB v. Sumter Plywood Corp., 535 F.2d at 920, 92 L.R.R.M. at 3510-11.

[77] Sewell Manufacturing Co., 138 N.L.R.B. at 70, 50 L.R.R.M. at 1534.

[78] NLRB v. Eurodrive, Inc., 724 F.2d at 560, 115 L.R.R.M. at 2364.

[79] *Id.*

Finally, the *Eurodrive* case establishes the relevance of the statement maker's knowledge of existing racial tensions. The court declared in *Eurodrive* that interference with the employees' ability to make a well reasoned choice does not depend solely upon the creation of the racial tension, but may result as well from the deliberate attempt to exacerbate an existing problem.[80] The court in *Eurodrive* explicitly stated that the challenged remarks in themselves were insufficient to establish any particular intent to intensify racial animosity.[81] At several points, however, the court indicated that it was the statement maker's knowledge of the previous racial incident and his "deliberate" attempt to exploit the situation to the union's advantage which rendered the conduct objectionable.[82] Moreover, regardless of whether the union organizer had knowledge of the effect of his statements, the court found that his awareness of the underlying racial animosity was sufficient to render him liable for the outcome of his conduct.[83]

As a result of *NLRB v. Eurodrive, Inc.*, parties involved in a representation election must exercise greater caution in using racially related statements when they are aware of existing racial tensions. The case demonstrates a lowering of the threshold requirement defining the boundary between permissible and impermissible conduct, at least in a working environment that is already racially charged. Remarks which by themselves might not warrant setting aside an election, may, when coupled with knowledge of underlying racial tension, cross the fine line of acceptability and render the election invalid.

### 3. **Provision of Alcoholic Beverages During Polling Hours for Representation Election:* NLRB v. Labor Services, Inc.[1]

Section 9(c)(1) of the National Labor Relations Act (the Act) vests the National Labor Relations Board (Board) with the power to conduct representation elections for purposes of collective bargaining.[2] Where the Board finds that a question concerning representation exists, it must then direct a secret ballot election of the employees and certify the results of the election.[3] In monitoring the conduct of the election process, the Board insists that "laboratory conditions as nearly ideal as possible"[4] be provided to insure employee free choice.[5] Where the requisite laboratory conditions are not present, as when

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[80] *Id.* at 559 n.5, 115 L.R.R.M. at 2363 n.5.

[81] *Id.* at 559, 115 L.R.R.M. at 2363.

[82] The court specifically adverted to the statement maker's knowledge of the existing racial tensions on at least two specific occasions. *See supra* notes 26-28, 48-52, 57.

[83] NLRB v. Eurodrive, Inc., 724 F.2d at 560, 115 L.R.R.M. at 2364.

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* By Cynthia Terzakis, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 721 F.2d 13, 114 L.R.R.M. 3259 (1st Cir. 1983).

[2] 29 U.S.C. § 159(c)(1) (1982).

[3] *Id.* Valid certification of a union is a prerequisite to an obligation to bargain with the elected union. NLRB v. Silverman's Men's Wear, Inc., 656 F.2d 53, 54 n.2, 107 L.R.R.M. 3273, 3274 n.2 (3d Cir. 1981) (citing Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146, 8 L.R.R.M. 425 (1941)). An employer who refuses to bargain collectively with a union which has been certified as the exclusive bargaining representative of its employees commits an unfair labor practice. 29 U.S.C. § 158(a)(5) (1982).

[4] General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948) (questioning by foreman as to possible resignation from union and interrogation as to whether employees signed union authorization cards destroyed laboratory conditions).

[5] *Id.* at 126, 21 L.R.R.M. at 1340. *Accord*, Rattan Art Gallery, Ltd., 260 N.L.R.B. 255, 256, 109 L.R.R.M. 1149, 1150 (1982) (laboratory conditions not present because Board's translation of its Notice of Election into Ilocano language confusing and incomplete).

pre-election conduct interferes with an employee's ability to make a reasoned choice for or against union representation, the Board must set aside the election and conduct a new one.[6]

In exercising its powers under the Act, the Board has broad, but not unlimited discretion.[7] Courts generally accord great deference to the determinations of the Board, setting aside its findings only for an abuse of discretion in determining that the election was fairly or not fairly conducted.[8] Where the Board's determination, however, is reasonable and is supported by substantial evidence, it normally will be sustained on review.[9] The party challenging the validity of the election proceedings bears a "heavy burden" of demonstrating that the Board has abused its discretion.[10]

The provision of refreshments and alcoholic beverages to employees during the election process has been the subject of litigation concerning possible election interference with employees' free choice.[11] The Board has held that the supplying of meals or alcoholic beverages at a *pre-election* event does not necessarily destroy employee free choice.[12] Absent the existence of an element of coercion, the Board views such activity as permissible electioneering.[13] In an illustrative case, the Board in *Lach-Simkins Dental Laboratories, Inc.*[14] found that a union-sponsored luncheon, consisting of sandwiches and soft drinks, which took place in the same building as the polls before and during polling hours did not interfere with the conduct or the results of the election.[15] In so finding, the

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[6] General Shoe Corp., 77 N.L.R.B. at 127, 21 L.R.R.M. at 1341.

[7] NLRB v. Klingler Electric Corp., 656 F.2d 76, 85, 107 L.R.R.M. 3011, 3018 (5th Cir. 1981) (Board did not abuse its discretion in refusing to set aside election where Board agent allowed a bitter, but brief confrontation between a pro-union employee and a company observer); Fall River Savings Bank v. NLRB, 649 F.2d 50, 53, 107 L.R.R.M. 2653, 2655 (1st Cir. 1981) (Board, which has "wide degree of discretion," held justified in determining that relatively limited power of managers involved, as well as absence of threatening conduct, not sufficient to set aside election on grounds of coercion); New England Lumber Division of Diamond International Corp. v. NLRB, 646 F.2d 1, 3, 107 L.R.R.M. 2165, 2166-67 (1st Cir. 1981) (Board held not to have abused "broad discretion" in finding that individual presence as an observer of union official did not warrant setting aside election); NLRB v. Gulf States Canners, Inc., 634 F.2d 215, 216, 106 L.R.R.M. 2270, 2271 (5th Cir. 1981) (Board did not abuse discretion in refusing to set aside election since objecting party failed to show that the misconduct involved interference with employees' exercise of free choice to extent that materially affected the results of the election).

[8] Collins and Aikman Corp. v. NLRB, 383 F.2d 722, 726, 729-30, 66 L.R.R.M. 2280, 2282-83, 2285 (4th Cir. 1967) (Board abused discretion in holding that union conduct in paying employee excessive amount to be union observer was not likely to influence unduly and mislead the electorate when casting its votes in a very close election).

[9] *See supra* note 7.

[10] *See supra* note 7.

[11] *See, e.g.*, Movsovitz & Son, Inc., 194 N.L.R.B. 444, 78 L.R.R.M. 1656 (1971) (alleged promise to purchase beer and whiskey for employees after union won election would not be sufficient basis for overturning election); Jacqueline Cochran, Inc., 177 N.L.R.B. 837, 71 L.R.R.M. 1395 (1969) (pre-election Christmas party held by union where food and alcoholic beverages were provided free of charge held not objectionable conduct); Lloyd A. Fry Roofing Co., 123 N.L.R.B. 86, 43 L.R.R.M. 1391 (1959) (union-supplied beer and soft drinks at pre-election meeting held not objectionable).

[12] *Lloyd A. Fry Roofing Co.*, 123 N.L.R.B. at 87-88, 43 L.R.R.M. at 1391-92 (beer and soft drinks supplied by union at pre-election meeting not objectionable). *Accord*, Zeller Corp., 115 N.L.R.B. 762, 765, 37 L.R.R.M. 1399, 1400 (1956) (serving of drinks and dinner as part of pre-election activities not improper).

[13] *See supra* note 12.

[14] 186 N.L.R.B. 671, 75 L.R.R.M. 1385 (1970).

[15] *Id.*

Board declined to make any sweeping prohibition against the provision of food and beverages during polling hours.[16] In *Lach-Simkins* the Board expressly stated that it would consider each situation on its own merits.[17]

During the *Survey* year, the First Circuit Court of Appeals in *NLRB v. Labor Services, Inc.*[18] denied enforcement of a Board determination which found that a union representative who purchased free alcoholic beverages for at least two-thirds of the electorate before, during, and after the election had not improperly influenced the election results.[19] The court stated that the Board's considerations neither withstood analysis nor reflected the exercise of any special expertise.[20] Moreover, the First Circuit in denying enforcement noted that serious implications existed in the case which rendered it different in kind from existing precedent.[21] The court was careful, however, to state that its decision should not be interpreted as detracting from the general principle of judicial deference to Board determinations in election proceedings.[22] Consequently, after the *Labor Services* case, unions or employers who wish to furnish employees with alcoholic beverages during the time the polls are open may meet with judicial resistance, unless they can adequately demonstrate that employee free choice is no more impaired by the provision of alcoholic beverages than it would be by the furnishing of sandwiches and soft drinks.

The election in question in *Labor Services* was held between 5:00 p.m. and 7:00 p.m. at a Howard Johnson Motor Lodge.[23] At approximately 4:15 p.m. the union's business manager and two other men entered the bar of the motor lodge.[24] Shortly thereafter, the union business manager greeted five or six other employees of the company when they entered the bar and told them their drinks would go on his tab.[25] The union business manager then instructed the bartender not to accept any money from the men involved.[26] When some of the men who had finished their drinks appeared to be leaving, the union representative loudly stated that there was still time for another drink before the men had to vote.[27] Once again he told them that their drinks would go on his tab.[28] After finishing their additional drinks, the five or six men started to leave and were told by the business manager, "[d]on't forget how to vote."[29] The men returned a few minutes later and continued to drink on the union agent's tab.[30] Eventually twelve to fifteen employees were furnished drinks compliments of the union business manager.[31]

The election resulted in a final vote of thirteen for the union and five against.[32] The

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[16] *Id.* at 672, 75 L.R.R.M. at 1385.

[17] *Id.*

[18] 721 F.2d 13, 114 L.R.R.M. 3259 (1st Cir. 1983).

[19] *Id.* at 14-15, 114 L.R.R.M. at 3260-61.

[20] *Id.* at 17, 114 L.R.R.M. at 3263.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 14, 114 L.R.R.M. at 3260. The court indicated there were slightly different versions of the incidents in question but used the factual version given by the employer's witnesses since that version was accepted by the Regional Director and the Board. *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 14-15, 114 L.R.R.M. at 3260.

[28] *Id.* at 15, 114 L.R.R.M. at 3260.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 14, 114 L.R.R.M. at 3260.

employer filed objections to the election alleging that the conduct of the business manager affected the election results.[33] The Regional Director of the Board overruled the employer's objections.[34] In concluding that the union business manager's conduct in furnishing alcoholic beverages during polling hours did not warrant setting aside the election, the Regional Director made five findings.[35] First, he determined that there was no indication that the union business manager induced the employees in advance to come to the bar or to vote for the union to get a free drink.[36] Second, the Regional Director found no evidence of coercive statements.[37] Third, he declared that there was no evidence that any employee was inebriated.[38] Fourth, he found that the value of the drinks was not sufficient to interfere with the employees' free choice.[39] Finally, he noted that the incident occurred outside of the polling area.[40]

The Board adopted without elaboration the Regional Director's findings[41] and certified the union as the exclusive collective bargaining representative of the employees.[42] When the employer refused to bargain with the union in an attempt to challenge the validity of the union certification, the union filed an unfair labor practice charge alleging violations of Sections 8(a)(1) and (5) of the Act.[43] The Board determined that all the issues raised by the employer were or could have been litigated in the prior representation proceedings and that the employer did not offer any newly discovered evidence.[44] The Board, therefore, granted the union's motion for summary judgment.[45] In granting the

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[33] *Id.* The Board's rules and regulations provide that any party may file objections with, and present evidence to, the Regional Director regarding the conduct of the election or conduct affecting the results of the election and state the reasons for the objections. 29 C.F.R. § 102.69(a) (1983). If timely objections are filed, the Regional Director conducts an investigation of the objections or challenges. 29 C.F.R. § 102.69(c)(1) (1983). If a stipulation for certification agreement has been entered into, the Regional Director presents to the parties a report on the objections, including his recommendations. 29 C.F.R. § 102.69(c)(2) (1983). The parties have ten days from the issuance of the report to file exceptions to the report and supporting documents with the Board in Washington. *Id.* An opposing party may file an answering brief and supporting documents with the Board in Washington. *Id.*

If the Board determines that the exceptions to the report do not raise substantial and material issues with respect to the conduct or result of the election, the Board may decide the election upon the record or make other disposition of the case. 29 C.F.R. § 102.69(f) (1983). If, however, it appears to the Board that the exceptions do raise substantial and material factual issues, it may direct the Regional Director or other Board agent to serve a notice of hearing on the parties concerning the exceptions before a hearing officer. *Id.*

If the Board denies the request for review, the denial serves as an affirmance of the Regional Director's action and also precludes relitigation of any such issues in any related subsequent unfair labor practice proceeding. 29 C.F.R. §§ 102.67(f), 102.69(f) (1983). Where review is granted, the Board will consider the entire record in light of the grounds relied upon for review. 29 C.F.R. § 102.67(g) (1983).

[34] NLRB v. Labor Services, Inc., 721 F.2d at 14, 114 L.R.R.M. at 3260.

[35] *Id.* at 15, 114 L.R.R.M. at 3261.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Labor Services, Inc., 265 N.L.R.B. 463, 111 L.R.R.M. 1650 (1982).

[42] The Board's Decision and Certification were issued on January 7, 1982. 259 N.L.R.B. 959, 109 L.R.R.M. 1049 (1982).

[43] *Labor Services, Inc.*, 265 N.L.R.B. at 463-64, 111 L.R.R.M. at 1650-51. *See supra* note 3.

[44] *Id.* at 463, 111 L.R.R.M. at 1650-51.

[45] *Id.* at 463, 111 L.R.R.M. at 1651.

motion, the Board determined that the employer had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the union as the exclusive representative of its employees in the appropriate unit.[46]

Finding no rational guidance in the Regional Director's conclusions to justify the Board's reliance on his determinations, the Court of Appeals for the First Circuit remanded the case to the Board for further proceedings.[47] Moreover, the court denied enforcement of the bargaining order due to the grave policy implications for future elections.[48] The court reasoned that by permitting the union to supply unlimited free drinks to voters before, during, and after the election, a similar privilege would have to be accorded the employer.[49] The First Circuit feared that such a "bibulous competition" would result in an "atavistic return" to voter inducement techniques through the discriminating distribution of alcohol.[50]

The court in *Labor Services* rejected the findings of the Regional Director on several grounds.[51] The court maintained that the absence of advance inducement or coercive statements cannot realistically make a difference in a case where the union manager supplied two-thirds of the electorate with alcoholic beverages.[52] Stressing that the *effect* of the union agent's activities, not his motives, must be evaluated,[53] the court concluded that the union business manager's conduct in buying drinks and reminding employees how to vote could not be justified merely by showing that he did not previously advertise the provision of free alcoholic beverages for the electorate.[54] Similarly, the court asserted that the absence of coercive statements is immaterial where the union's method of inducing electorate support involved friendly influence as opposed to intimidation.[55]

The court also found unpersuasive the Regional Director's reliance on his findings of the absence of inebriation.[56] The court stated that the Board's standard in evaluating conduct in representation elections is whether the activities involved reasonably tended to interfere with the employees' freedom of choice in the election.[57] Interference with employee free choice, the court reasoned, does not result merely from inebriation but may exist in other forms, including "induced fellowship."[58] Similarly, the court rejected the finding that the value of the drinks provided was insufficient to affect the free choice of the electorate.[59] The court maintained that the reality and appearance of impropriety

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[46] *Id.* at 464, 111 L.R.R.M. at 1650-51.

[47] NLRB v. Labor Services, Inc., 721 F.2d at 15, 114 L.R.R.M. at 3261.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 16-17, 114 L.R.R.M. at 3261-62.

[52] *Id.* at 16, 114 L.R.R.M. at 3261.

[53] *Id.* (citing Cross Baking Co. v. NLRB, 453 F.2d 1346, 1348, 78 L.R.R.M. 3059, 3060 (1st Cir. 1971)). In *Cross Baking*, the principal in-plant union advocate assaulted employees who refused to support the union. 453 F.2d at 1348, 78 L.R.R.M. at 3059. The court held that in determining whether certification was improper, it must not focus on whether the advocate was a paid union agent, but rather whether the incident in fact produced an atmosphere of fear and coercion preventing a fair election. *Id.*

[54] NLRB v. Labor Services, Inc., 721 F.2d at 16, 114 L.R.R.M. at 3261.

[55] *Id.*

[56] *Id.* at 16, 114 L.R.R.M. at 3261-62.

[57] *Id.*, 114 L.R.R.M. at 3262 (citing Weyerhaeuser Co., 247 N.L.R.B. 978, 978 n.2, 103 L.R.R.M. 1271, 1272 n.2 (1980)) (Board stated proper standard is whether conduct reasonably tends to interfere with employee freedom of choice in election).

[58] NLRB v. Labor Services, Inc., 721 F.2d at 16, 114 L.R.R.M. at 3262.

[59] *Id.*

of supplying complimentary alcoholic beverages is not contingent upon the expenditure of a specified dollar amount.[60] In support of its position, the court stated that neither state statutes which proscribe the furnishing of alcoholic beverages nor Board precedent make such distinctions.[61] The court did note that the Board has found unobjectionable the giving of money in return for services rendered or in furtherance of the election process provided the receipt of these items is not contingent on voter support in the election.[62] These precedents were inapplicable in the First Circuit's opinion, however, because it found no suggestion of any service rendered or any assistance given to the election process which would justify the free provision of alcoholic beverages.[63]

The court also found unconvincing the final finding of the Regional Director which condoned the business agent's conduct since the incident occurred outside rather than inside the polling area.[64] Since by definition, provision of drinks outside the polling place does not occur in the polling area, the court maintained that the significance of this determination was more "descriptive" than "exculpatory."[65] In so finding, however, the court recognized the tension between the Board's objective of providing an employee with a voting environment as free from interference as possible[66] and the practical consideration of evaluating the actual facts in light of "realistic standards" of conduct.[67] The court distinguished *Boston Insulated Wire and Cable Company*[68] in which union pamphleteering was permitted outside glass-paneled doors ten feet from the polling place.[69] The court reasoned that the effects of pamphleteering dissipate once the employees enter the building to vote, whereas the psychological and physical effects of rounds of drinks in an adjacent bar linger and enter the polling area.[70]

Following its rejection of all five of the Regional Director's findings as unsubstantiated, the First Circuit noted that there was no precedent concerning the furnishing of free liquor *during* an election.[71] The court indicated that the cases dealing with the provision of free alcoholic beverages all involved pre-election promises which were to have a post-election effect.[72] In the court's opinion, *Lach-Simkins Dental Laboratories, Inc.*, involving a complimentary lunch of sandwiches and soft drinks provided by the union in the polling building before and during the polling hours[73] was perhaps the closest precedent.[74] The *Labor Services* court noted that in determining that the luncheon did not

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[60] *Id.*

[61] *Id.*

[62] *Id.* at n.4.

[63] *Id.* at 16, 114 L.R.R.M. at 3262.

[64] *Id.* at 17, 114 L.R.R.M. at 3262.

[65] *Id.*

[66] *Id.* (citing Milchem, Inc., 170 N.L.R.B. 362, 69 L.R.R.M. 1395 (1968)) (Board held "the final minutes before an employee casts his vote shall be his own, as free from interference as possible.").

[67] NLRB v. Labor Services, Inc., 721 F.2d at 17, 114 L.R.R.M. at 3262 (citing Liberal Market, Inc., 108 N.L.R.B. 1481, 1482, 34 L.R.R.M. 1270, 1271 (1954)) (Board held that an election must be appraised "realistically and practically . . . and not . . . against theoretically ideal, but nevertheless artificial standards.").

[68] 259 N.L.R.B. 1118, 111 L.R.R.M. 1423 (1982), *enforced*, 703 F.2d 876, 113 L.R.R.M. 2241 (5th Cir. 1983).

[69] NLRB v. Labor Services, Inc., 721 F.2d at 17, 114 L.R.R.M. at 3262.

[70] *Id.*

[71] *Id.*

[72] *Id.* at n.6, 114 L.R.R.M. at 3262-63 n.6. *See supra* note 12 for examples of cases cited.

[73] 186 N.L.R.B. 671, 75 L.R.R.M. 1385 (1970). *See supra* notes 14-17 and accompanying text.

[74] NLRB v. Labor Services, Inc., 721 F.2d at 17, 114 L.R.R.M. at 3263.

interfere with the election, the Board in *Lach-Simkins* had relied on the fact that the luncheon was not held too close to the polling place and the value of the sandwiches and soft drinks were relatively insignificant.[75] The First Circuit in *Labor Services*, however, cautioned that reliance on the *Lach-Simkins* case without discussion or analysis is inappropriate, since it equates the likely effects of "a tuna on rye and Pepsi with a double scotch."[76] Since the Board affirmed the Regional Director's findings without further elaboration,[77] the court concluded that the considerations urged by the Board in *Labor Services* lacked an adequate analytical foundation and failed to demonstrate any special expertise of the Board warranting judicial deference.[78] The court, therefore, remanded the case to the Board for further proceedings and elaboration.[79] Moreover, the court acknowledged that the Board on remand may determine that substantial and material questions of fact created by non-employer witnesses may warrant resolution by a hearing and may be subject to significant change.[80]

The dissent in *Labor Services* maintained that this case poses the exact type of "minor, detailed, interstitial question of labor election policy" that Congress intended the Board and not the courts to resolve.[81] Since the Board had not violated the terms of its enabling act[82] or disregarded its own agency rules, the dissent was unable to find that the Board had abused its discretion and exceeded its statutory authority.[83] The dissent determined, therefore, that the Board had applied its policies in this area consistently,[84] having maintained in prior decisions that the provision of alcoholic beverages is permissible activity.[85] Moreover, contrary to the opinion of the majority, the dissent did not perceive an obvious difference between the provision of "lunch and soft drinks" as in the *Lach-Simkins* case and "no lunch but one or two hard drinks" as in the instant case.[86]

The dissent further maintained that in view of the Board's expertise in labor relations, the difficulties in policing strict rules prohibiting the purchase of alcoholic beverages by employees for one another, and the tendency to use such drink-buying activity as

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[75] *Id.* The election in *Lach-Simkins* was conducted in a room at the top of a twenty-six foot high stairway, whereas the luncheon was held in a room in the basement of the building. 186 N.L.R.B. 671, 75 L.R.R.M. 1385 (1970).

[76] NLRB v. Labor Services, Inc., 721 F.2d at 17, 114 L.R.R.M. at 3263.

[77] *Id.* at 14, 114 L.R.R.M. at 3261.

[78] *Id.* at 17, 114 L.R.R.M. at 3263.

[79] *Id.* at 18, 114 L.R.R.M. at 3263.

[80] *Id.* at 17-18, 114 L.R.R.M. at 3263.

[81] *Id.* at 18, 114 L.R.R.M. at 3263 (Breyer, J., dissenting).

[82] NLRB v. Labor Services, Inc., 721 F.2d at 18, 114 L.R.R.M. at 3263 (citing 29 U.S.C. § 159(c)(1)) (Breyer, J., dissenting).

[83] NLRB v. Labor Services, Inc., 721 F.2d at 18, 114 L.R.R.M. at 3263 (Breyer, J., dissenting).

[84] *Id.* (Breyer, J., dissenting).

[85] *Id.*, 114 L.R.R.M. at 3264 (citing Jacqueline Cochran, Inc., 177 N.L.R.B. 837, 839 n.1, 71 L.R.R.M. 1395, 1396 n.1 (1969)) (union pre-election Christmas party where food and alcohol served found not objectionable); Peachtree City Warehouse, Inc., 158 N.L.R.B. 1031, 1039-40, 62 L.R.R.M. 1169, 1169-70 (1966) (union conducted pre-election meeting where refreshments consisting of hot dogs, sandwiches, potato chips and soft drinks served, while employer held barbecue with dancing on the eve of election where alcoholic refreshments also available); Lloyd A. Fry Roofing Co., 123 N.L.R.B. 86, 87-88, 43 L.R.R.M. 1391, 1391-92 (1959) (pre-election union meeting where beer and soft drinks provided not objectionable); Albion Malleable Iron Co., 104 N.L.R.B. 225, 226-27, 32 L.R.R.M. 1084, 1084-85 (1953) (employer who purchased alcoholic drinks and made false promises prior to the election held not to have influenced voters in choice of bargaining representative); Cooper's Inc., 94 N.L.R.B. 1554, 1556, 28 L.R.R.M. 1212 (1951) (drinking which occurred after union meeting but prior to the date of the election held not to constitute undue influence).

[86] NLRB v. Labor Services, Inc., 721 F.2d at 18, 114 L.R.R.M. at 3264 (Breyer, J., dissenting).

an excuse to delay or prevent certification, the Board's decision was not unreasonable.[87] Moreover, the dissent asserted that the Board's decision did not run contrary to public policy.[88] Neither the Commonwealth of Massachusetts nor federal policy prohibit political committees from spending money on intoxicating liquors for delegates.[89] Consequently, the dissent contended that the court should observe the division of tasks between administrative agencies and the courts and should leave the regulation of election day conduct to the Board.[90]

*Labor Services* raises significant issues concerning the role of the courts in reviewing the Board's evaluation of election proceedings. First, the case questions the practical aspect of furnishing alcoholic beverages to employees during polling hours and the subsequent impact on the election results. Second, it further demonstrates the role of judicial review in ensuring that agency findings are supported by substantial evidence and are not arbitrarily made. Although the First Circuit declined to enforce the order in view of insufficient analysis in the Regional Director's conclusions,[91] the court itself stressed that the specific outcome of this case should not be interpreted as an erosion of the principle of judicial deference to Board discretion in representation election proceedings.[92] The court, troubled by substantial and material questions of fact,[93] acknowledged that the version of facts upon which its decision rested could be subject to change on remand.[94] The court sought to reaffirm that although deference to the expertise of the Board is a common practice, it is by no means absolute.[95] To warrant judicial deference, however, the court noted that the Board must set forth the reason for its determinations in sufficient detail to satisfy the court that the decision is reasonable, based on substantial evidence and does not constitute an abuse of discretion.[96]

In the *Labor Services* case, the court rejected the Board's decision not because no justification for the Board's decision existed, but rather because the Board failed to elaborate adequately the basis upon which it rested its conclusions.[97] The First Circuit's opinion in *Labor Services* repeatedly pointed to the potential interference with employee free choice which might result from the effects of alcohol consumption and "induced fellowship" during the time the polls are open.[98] The Board, however, either failed to consider the impact of alcohol on employee free choice at or around the time the employee casts his ballot, or it did not view this fact as having any substantial bearing upon the outcome of the election. Whatever the reason for the omission of this issue in its determination, the Board did not communicate these factors to the court. The omission was material in the First Circuit's opinion, since as a reviewing court, it was responsible for evaluating whether the Board's decision had an adequate basis in law. As the First Circuit indicated, the Board's mere reliance on *Lach-Simkins* without discussion, thereby equating

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[87] *Id.* (Breyer, J., dissenting).
[88] *Id.* (Breyer, J., dissenting).
[89] *Id.* at 18-19, 114 L.R.R.M. at 3264 (Breyer, J., dissenting).
[90] *Id.* at 19, 114 L.R.R.M. at 3264 (Breyer, J., dissenting).
[91] *See supra* notes 20-21, 77-78 and accompanying text.
[92] *See supra* note 22 and accompanying text.
[93] *See supra* note 80 and accompanying text.
[94] NLRB v. Labor Services, Inc., 721 F.2d at 17-18, 114 L.R.R.M. at 3263.
[95] *See supra* notes 7-8 and accompanying text.
[96] *See supra* note 9 and accompanying text.
[97] NLRB v. Labor Services, Inc., 721 F.2d at 15, 114 L.R.R.M. at 3261.
[98] *See supra* notes 53-59, 66-70, 75-76 and accompanying text.

the effects of a luncheon with non-alcoholic beverages to those of a gathering with alcoholic beverages consumed over a two-hour period, was simply an insufficient basis upon which to grant deference.[99]

After rejecting the Board's analytical approach, the court emphasized that it did not consider furnishing the missing analytical foundation to be in its province. The dissent contended that the difference between "lunch and soft drinks" and "no lunch but one or two hard drinks" appeared to be more "obvious" to his brethren than it was to him.[100] The dissent expressed concern that the result in the case will make future line-drawing a formidable task.[101] Such distinctions, in the dissent's view, should be left to the determination of the Board, thereby preserving the division of tasks between administrative agencies and the courts.[102] Precisely for this reason, however, the court did not undertake to supply the requisite analysis to support the Board's decision, but rather remanded the case to the Board for further proceedings.[103] The court in *Labor Services* alluded to the potential lingering effects of alcohol consumption on employees who are in the process of casting their ballots.[104] In so doing, the court indicated that a distinction exists between this situation and one in which alcoholic beverages are furnished at a pre-election event. In the latter case, the intoxicating effects of alcoholic consumption, if any, will have had ample time to dissipate, whereas in the former case, they might impair the employees' ability to think clearly when casting their ballots for or against unionization. Since interference with employee free choice destroys the laboratory conditions mandated by the standard used in testing the validity of representation elections, the distinction between pre-election consumption and concurrent consumption is significant. Such election interference is likely, therefore, to justify a policy discrepancy in future cases so that alcoholic beverages can be served at pre-election campaign events but not during polling hours.

In conclusion, as a result of *NLRB v. Labor Services, Inc.*, the division of tasks between the Board and the appeals courts remains intact. Primary responsibility for determining that the stringent laboratory conditions standard has been met in the conduct of representation elections rests with the Board. To be entitled to deference in its determination, however, the Board's findings must be reasonable and able to withstand analysis. Absent an adequate basis for determining the effects of particular activities — such as the furnishing of alcoholic beverages — which transpire during the time the polls are open, the Board's findings with respect to such activities may not survive judicial scrutiny.

### 4. **The Right of an Employer to an NLRB Investigatory Hearing Regarding Intimidation by Employees in a Representation Election*: NLRB v. Monark Boat Co.[1]

Under section 8(a)(5) of the National Labor Relations Act (the Act) an employer must bargain with the union selected by a majority of his employees to be their representative.[2]

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[99] *See supra* notes 76-78 and accompanying text.

[100] *See supra* note 86 and accompanying text.

[101] NLRB v. Labor Services, Inc., 721 F.2d at 19, 114 L.R.R.M. at 3264 (Breyer, J., dissenting).

[102] *See supra* note 90 and accompanying text.

[103] *See supra* note 79 and accompanying text.

[104] *See supra* note 70 and accompanying text.

* By Lloyd E. Selbst, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 713 F.2d 355, 113 L.R.R.M. 3749 (8th Cir. 1983).

[2] Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1982), provides: "It

A representation election, to be valid, must be the expression of the unfettered desires of the work force.[3] The Act authorizes the National Labor Relations Board (Board) to investigate allegations that the outcome of an election has been influenced by intimidation of employees or by other election misconduct prohibited by the Act.[4] In addition, the Act requires the Board to set aside any vote which the Board determines, on the basis of its investigation, has been affected by election misconduct.[5]

The Board has broad discretion to decide whether it will hold hearings as part of its inquiry into allegations that the fairness of an election was destroyed by proscribed activities.[6] Further, the Board generally has the discretion to decide the procedures that will be followed in any hearing that it does grant.[7] In some instances, however, the Board's freedom to deny a hearing is limited by Board rules or by court decisions.[8] For example, when either the union or the employer alleges that the outcome of an election has been affected by acts which generated an atmosphere of intimidation and fear among the work force, Board rules require that the Board grant the petitioner the opportunity to prove his allegations through an adversarial investigatory hearing.[9] Board rules, affirmed by the circuit courts, traditionally condition the grant of such a hearing on establishment of a prima facie case of election coercion.[10] A prima facie case, according to the Board and the circuit courts, is established when the petitioner has alleged and offered to prove incidents which would allow the determiner of facts reasonably to conclude that a significant number of employees did not vote freely because of intimidation.[11] If the Board determines that a prima facie case of election coercion has not been made, and consequently refuses to grant an investigatory hearing, the petitioner can request that the circuit court order the Board to hold a hearing.[12] Courts, however, will find that the Board has abused its discretion by not according the petitioner the opportunity to prove his charges at an investigatory hearing only where the petitioner has made a sufficient preliminary showing of a tainted election.[13]

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shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)." *Id.* Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1982), provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . ." *Id.*

[3] Methodist Home v. NLRB, 596 F.2d 1173, 1183, 101 L.R.R.M. 2139, 2146 (4th Cir. 1979); NLRB v. Southern Paper Box Co., 473 F.2d 208, 209, 82 L.R.R.M. 2482, 2484 (8th Cir. 1973).

[4] NLRB v. Griffith Oldsmobile, Inc., 455 F.2d 867, 869, 79 L.R.R.M. 2650, 2651-52 (8th Cir. 1972).

[5] *See supra* note 3.

[6] *See supra* note 4. *See also* Melrose-Wakefield Hospital Ass'n v. NLRB, 615 F.2d 563, 566-67, 570-71, 103 L.R.R.M. 2711, 2713, 2716-17 (1st Cir. 1980); NLRB v. Campbell Products, 623 F.2d 876, 879, 104 L.R.R.M. 2967, 2970 (3d Cir. 1980).

[7] *See* cases cited *supra*, note 6.

[8] Bauer Welding and Metal Fabricators v. NLRB, 676 F.2d 314, 316, 110 L.R.R.M. 2270, 2272 (8th Cir. 1982).

[9] *Id.*; NLRB v. Southern Paper Box Company, 473 F.2d 208, 211, 82 L.R.R.M. 2482, 2485 (8th Cir. 1973); *see also* Manning, Maxwell & Moore, Inc. v. NLRB, 324 F.2d 857, 858, 54 L.R.R.M. 2659, 2670 (5th Cir. 1963).

[10] *See* cases cited *supra* note 9.

[11] *See* cases cited *supra* note 9.

[12] 29 U.S.C. §§ 158(a)(5), 160(f) (1982). *See, e.g.*, Bauer Welding and Metal Fabricators v. NLRB, 676 F.2d 314, 316, 110 L.R.R.M. 2270, 2272 (8th Cir. 1982); Zeigler's Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1008, 106 L.R.R.M. 2331, 2339 (3d Cir. 1981).

[13] NLRB v. Griffith Oldsmobile, Inc., 455 F.2d 867, 869, 79 L.R.R.M. 2650, 2652 (8th Cir. 1972).

The Board has long taken the position that allegations by an employer of election misconduct involving only actions of rank and file employees who hold no union office will rarely establish a prima facie case of election coercion.[14] In cases establishing this position, the Board has reasoned that threats made by mere union sympathizers are far less intimidating to workers than threats made by union officials.[15] The Board has, therefore, held that an employer must make a much stronger showing of coercion to establish a prima facie case when his charges implicate mere union sympathizers than he would have to make if the charges implicated union officials.[16] Accordingly, the Board has rarely granted an investigatory hearing based solely on an employer's allegations of intimidation by pro-union workers.[17]

The Board's position, distinguishing between allegations of union and nonunion coercion in deciding whether to grant an employer a hearing on its claim of election coercion, has generally been upheld by reviewing circuit courts.[18] Finding that the Board's distinction between coercion that originates from union as opposed to nonunion personnel is reasonable, these circuit courts have deferred to the Board's discretionary power in granting an election coercion hearing.[19] In *NLRB v. Griffith Oldsmobile, Inc.*,[20] for example, the Eighth Circuit Court of Appeals upheld a Board ruling that an employer's allegations of threats by pro-union employees were not sufficient to establish a prima facie case of an atmosphere of coercion. The court found that the employer's petition did not allege that a sufficient number of workers had been influenced by the threats to actually affect the outcome of the election.[21] The court held that the employer must offer to prove that the alleged threats either originated with the union or actually intimidated a significant number of named employees to establish a prima facie case of a tainted election.[22] The court stated, however, that it would have been proper for the Board to find that the employer established a prima facie case on the facts presented if the employer had alleged that union officers had made the threats.[23] The court followed this reasoning in *Bauer*

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[14] NLRB v. ARA Services, 717 F.2d 57, 66, 114 L.R.R.M. 2377, 2383 (3d Cir. 1983) (en banc) ("[T]he Board, with judicial concurrence, has always accorded less weight to conduct which is attributable to neither the Union nor the employer. Threats of fellow employees are deemed to be less coercive than those of agents of a union or an employer who may have the wherewithal to effectuate them."). *See also* Zeigler's Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1006-07, 106 L.R.R.M. 2331, 2336-37 (3d Cir. 1981); Manning, Maxwell & Moore v. NLRB, 324 F.2d 857, 858, 54 L.R.R.M. 2659, 2660 (5th Cir. 1963) (appellate courts cited Board rulings).

[15] NLRB v. ARA Services, 717 F.2d 57, 66, 114 L.R.R.M. 2377, 2383 (3d Cir. 1983) (en banc).

[16] *Id.*

[17] *Id.*

[18] Tuf-Flex Glass v. NLRB, 715 F.2d 291, 296, 114 L.R.R.M. 2226, 2231 (7th Cir. 1983); NLRB v. Advanced Systems, Inc., 681 F.2d 570, 575, 110 L.R.R.M. 2418, 2422 (9th Cir. 1982); ATR Wire and Cable Co. v. NLRB, 671 F.2d 188, 190, 109 L.R.R.M. 2808, 2809-10 (6th Cir. 1982); NLRB v. Campbell Products, 623 F.2d 876, 879, 104 L.R.R.M. 2967, 2970 (3d Cir. 1980); Melrose-Wakefield Hospital Ass'n v. NLRB, 615 F.2d 563, 568, 571 n.6, 103 L.R.R.M. 2711, 2714, 2717 n.6 (1st Cir. 1980). A number of circuits, however, have criticized Board decisions for giving the union-nonunion distinction excessive significance. *See, e.g.*, Zeigler's Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1006-09, 106 L.R.R.M. 2331, 2336-39 (3d Cir. 1981); Cross Baking Co. v. NLRB, 453 F.2d 1346, 1348, 78 L.R.R.M. 3059, 3059 (1st Cir. 1971) ("It does not follow that fear would be less effective if it had an unofficial origin. Indeed, we can visualize situations where it might be more effective.").

[19] *See* cases cited *supra* note 18.

[20] 455 F.2d 867, 79 L.R.R.M. 2650 (8th Cir. 1972).

[21] *Id.* at 871, 79 L.R.R.M. at 2653.

[22] *Id.*

[23] *Id.*

*Welding and Metal Fabricators v. NLRB*.[24] In that case, the Eighth Circuit ruled that the Board had reasonably found that the allegation of a single threat made by a union representative established a prima facie case that an intimidating atmosphere existed during an election.[25]

During the *Survey* year, in *NLRB v. Monark Boat Co.*,[26] the Eighth Circuit abandoned its position in *Griffith Oldsmobile*. In so doing the Eighth Circuit became the first federal circuit court to reject the validity of the union-nonunion distinction for determining whether an employer has made a prima facie case of election coercion.[27] In *Monark*, the court ruled that the Board must now use the same test to determine whether an employer has established a prima facie case of an unfair election, irrespective of whether union officials or mere union sympathizers took the actions that provided the basis of the employer's complaint.[28] The Eighth Circuit's new test, to be applied when threats originate with union as well as nonunion personnel, is whether the act or acts alleged, even if relatively unimportant and nonthreatening in themselves, might have made a significant number of employees fearful of voting against the union.[29]

The dispute in *Monark* arose after the Board determined that the United Brotherhood of Carpenters and Joiners, AFL-CIO (UBC) had won a Board sponsored election.[30] Charging that employee supporters of the UBC had created an atmosphere of intimidation and fear which tainted the election, the Monark Boat Company refused to bargain with the union.[31] The Regional Director of the Board refused Monark's request for an investigatory hearing on the election.[32] Monark appealed to the Board, which upheld the Regional Director's decision.[33] The Board then petitioned the circuit court to enforce its bargaining order,[34] and Monark countered with charges that the election was unfair and requested the court to order the Board to hold a hearing on election coercion.[35]

Monark claimed that union supporters created a coercive atmosphere by a series of intimidating incidents.[36] First, Monark alleged that several union sympathizers threatened co-workers with violence and property damage if they did not support the union.[37] Second, the company charged that pro-union workers vandalized company property in an attempt to intimidate workers.[38] Finally, Monark claimed that an employee's dog was poisoned in reprisal for the employee's refusal to campaign for the union.[39]

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[24] 676 F.2d 314, 110 L.R.R.M. 2270 (8th Cir. 1982).

[25] *Id.* at 318-19, 110 L.R.R.M. at 2274-75.

[26] 713 F.2d 355, 113 L.R.R.M. 3749 (8th Cir. 1983).

[27] *Id.* at 360, 113 L.R.R.M. at 3753.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 356, 113 L.R.R.M. at 3750.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 357, 113 L.R.R.M. at 3571.

[37] *Id.* Monark alleged that: (1) on four occasions pro-union employees stated that if the union were elected and subsequently called a strike, employees crossing the picket line would be assaulted or have their cars damaged; (2) a union supporter told a co-worker that "people that don't join the union won't be here very long;" and (3) as employees were lining up to vote, an employee wearing a union T-shirt said to another employee "Just do what I told you . . . ." The second employee joined the line to vote. *Id.*

[38] *Id.*

[39] *Id.* at 358, 113 L.R.R.M. at 3752.

The court found that although no single incident was sufficiently threatening to raise a reasonable inference that a significant part of the work force was intimidated, the acts, taken together, did reach that level.[40] An investigatory hearing by the Board was, therefore, necessary to determine the extent of the coercion.[41] The court stressed that even acts which appear to be relatively unimportant when considered in isolation, could, in the totality of circumstances, lead to the conclusion that a significant number of employees may have been fearful of voting against the union.[42] As few as two minor incidents, the court asserted, could be sufficient to establish the prima facie case of a tainted election.[43]

Although the court observed that in the instant case fully half of the explicit and implied threats did not directly relate to the election[44] and that the employees who were threatened denied they had been frightened by the threats,[45] the court ruled that the employer's allegations, if true, established a substantial possibility that the work force was intimidated.[46] The court found the verbal threats, the vandalism, and the poisoning of the dog were significant incidents that might, when considered together, have intimidated a number of employees.[47] Observing that there had been an unusually large number of abstentions from the voting — more than enough to affect the outcome[48] — the court reasoned that sufficient evidence existed to create an inference of coercion.[49] Thus, the court declared, since a preliminary showing of a tainted election required no more than allegations of incidents and facts which suggest that there was a substantial degree of intimidation among the work force, the employer had met his burden and a hearing was in order.[50]

The court noted that union supporters rather than union officers allegedly committed the coercive acts.[51] Moreover, the court observed that employees possibly may not be as intimidated by a threat made by a co-worker as they would be by an ominous statement made by a union agent.[52] In the court's view, however, the pivotal question was whether the incidents alleged could have spawned fear among the employees, not whether union officers took part in the incidents.[53] Noting that although a threat made by a union officer might be more suggestive of coercion than a threat made by an employee, the court nonetheless found that the latter could still be intimidating.[54] In the instant case, the court stated, the employer offered to prove the kind of acts which may have produced the atmosphere of fear and reprisal that the employer alleged existed during the election.[55] Therefore, the court ruled, Monark had a right to an investigatory hearing despite the apparent lack of union participation.[56]

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[40] *Id.*
[41] *Id.*
[42] *Id.* at 359, 113 L.R.R.M. at 3752.
[43] *Id.*
[44] *Id.* at 358, 113 L.R.R.M. at 3752.
[45] *Id.* at 359, 113 L.R.R.M. at 3752.
[46] *Id.*
[47] *Id.* at 358, 113 L.R.R.M. at 3752.
[48] *Id.* at 359, 113 L.R.R.M. at 3752.
[49] *Id.* The court here appears to have inferred coercion from the high number of abstentions.
[50] *Id.*
[51] *Id.* at 359, 113 L.R.R.M. at 3753.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

The Eighth Circuit in *Monark* lowered the threshold showing required of an employer to demonstrate the likelihood that the alleged acts of union sympathizers had influenced an election to the level that the Eighth Circuit traditionally required for an employer to show that alleged acts of intimidation committed by union agents influenced an election.[57] Prior to *Monark*, the Eighth Circuit had upheld the Board view, and demanded a greater showing that the alleged acts were coercive when they were committed by union supporters rather than by union officers.[58] In *NLRB v. Griffith Oldsmobile, Inc.*, for example, the Eighth Circuit required that an employer offer to prove that the alleged threats either originated with the union or actually intimidated a significant number of named employees to establish a prima facie case of a tainted election.[59] In *Monark*, by contrast, the Eighth Circuit concluded that the employer had established a prima facie case of election interference because of the coercive acts of certain employees, who acted independently of the union, even though all the threatened workers named in the employer's petition denied that they had been intimidated by the threats.[60]

*Monark* is significant in that prior to its decision in that case the Eighth Circuit had permitted a far lower threshold showing of intimidating conduct when the union participated in at least some of the threats made.[61] Thus in *Bauer Welding and Metal Fabricators v. NLRB*,[62] a single instance of a physical threat to an employee by co-workers, when taken together with a possibly intimidating letter sent by the union to plant supervisors, was held to be sufficient to establish a prima facie case of fear among a substantial number of workers.[63] Similarly, in *NLRB v. Payless Cashway Lumber Store of South St. Paul, Inc.*,[64] a single threat made by a union representative to an employee was determined to establish a prima facie case that an intimidating atmosphere existed during the election.[65]

The Eighth Circuit will apparently no longer uphold the Board's distinction between coercion originating with union as opposed to nonunion personnel in evaluating whether an employer has established a prima facie case of election misconduct. Under *Monark*, threats, even when they are not made by union agents, need not directly relate to the election and need not be explicit.[66] Instead, threats need only raise an inference that, when considered together, may have made a substantial number of employees fearful of voting against the union.[67] No employee need testify that his vote was influenced by the misconduct.[68] For a prima facie case, the significant impact of the alleged threats on the work force can be inferred from a comparatively large number of abstentions from the voting.[69] The Eighth Circuit in *Monark*, therefore, seems to reduce the distinction between misconduct by union agents and misconduct by union supporters to the point of having

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[57] *See supra* notes 51-56 and accompanying text.

[58] *See supra* notes 51-56 and accompanying text.

[59] NLRB v. Griffith Oldsmobile, Inc., 455 F.2d 867, 871, 79 L.R.R.M. 2650, 2653 (8th Cir. 1973).

[60] *Monark*, 713 F.2d at 359, 113 L.R.R.M. at 3752.

[61] *See supra* notes 20-25.

[62] Bauer Welding and Metal Fabricators v. NLRB, 676 F.2d 314, 110 L.R.R.M. 2270 (8th Cir. 1982).

[63] *Id.* at 318-19, 110 L.R.R.M. at 2273-74.

[64] 508 F.2d 24, 88 L.R.R.M. 2067 (8th Cir. 1974).

[65] *Id.* at 28, 88 L.R.R.M. at 2070.

[66] *Monark*, 713 F.2d at 358, 113 L.R.R.M. at 3752.

[67] *Id.*

[68] *Id.*

[69] *Id.*

little practical importance in determining whether the employer has presented a prima facie case of a tainted election.[70]

Although the Eighth Circuit had noted in a number of earlier opinions that the test of whether an employer has made out a prima facie case of election intimidation should be the same irrespective of whether union agents or union supporters were the source of the threats,[71] *Monark* is the first case where the court required the Board to apply the same test.[72] *Monark* appears to be a productive turning point for the Eighth Circuit. Logically, little basis exists for the Board's presumption that a threat by a union agent is inherently more intimidating than a threat by a co-worker and is therefore stronger evidence that the pro-union side created an atmosphere of coercion. The cases on election misconduct amply demonstrate that employees can be extremely fearful of the vengeance of co-workers who expect them to support a union.[73] Indeed, intimidating acts by co-workers might seem more threatening than intimidating acts by union representatives since employees acting independently are not subject to the restraining influence that an organization can provide.[74] Rather than applying questionable presumptions about what sort of conduct employees find intimidating, courts should approach each case individually and determine the probable impact of threats based solely on the evidence and allegations before it as the *Monark* court did.[75]

In *Monark* the Eighth Circuit has reversed its own previous position and has become the first circuit to refuse to uphold the Board's union-nonunion distinction.[76] In so doing, the Eighth Circuit has taken a logical step since little empirical evidence supporting the Board's presumption seems to exist.[77] The *Monark* decision indicates that the pivotal question in determining whether an employer has established a prima facie case of election intimidation is not whether union officers were involved in the alleged incidents but whether it is plausible that the alleged incidents, taken together, could have caused fear among enough workers to have affected the outcome of the election.[78]

### B. *Organizational Activity*

#### 1. **Employer Restrictions on Union Buttons*: Burger King Corp. v. NLRB[1]

The right of employees to wear union buttons or other union insignia while at work has been well-established since its recognition by the Supreme Court in 1945 in *Republic Aviation Corp. v. NLRB*.[2] In that opinion, the Supreme Court indicated that in the absence

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[70] *Id.* at 359, 113 L.R.R.M. at 3752.

[71] *See* cases cited *supra* notes 20 and 24.

[72] *Monark*, 713 F.2d at 355-60, 113 L.R.R.M at 3749-53.

[73] *See, e.g.*, Zeigler's Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1009, 106 L.R.R.M. 2331, 2338 (3d Cir. 1981) (employees found to be fearful of threats of violence made by a co-worker); NLRB v. Southern Paper Box Company, 473 F.2d 208, 210-11, 82 L.R.R.M. 2482, 2483 (8th Cir. 1971) (threats of assault by co-workers held to be coercive).

[74] Cross Baking Company v. NLRB, 453 F.2d 1346, 1348, 78 L.R.R.M. 3059, 3060 (1st Cir. 1971).

[75] *Monark*, 713 F.2d at 355-60, 113 L.R.R.M. at 3749-53.

[76] *See supra* notes 26-27 and accompanying text.

[77] *See supra* notes 73-74 and accompanying text.

[78] *See supra* notes 40-56 and accompanying text.

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* By Ronald T. Gerwatowski, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 725 F.2d 1053, 115 L.R.R.M. 2387 (6th Cir. 1984).

[2] 324 U.S. 793, 802 n.7, 16 L.R.R.M. 620, 624 n.7 (1945)(quoting with approval the Board's

of "special circumstances," such as an employer's need for production and discipline, an employer violates section 8(a)(1)[3] of the National Labor Relations Act (the Act) when he prohibits an employee from wearing a union button or other similar insignia while on the job.[4] The Supreme Court also indicated that in determining whether or not an employer's ban on button wearing or any other form of communication is violative of the Act, courts should balance the employees' right to self-organize against the employer's right to maintain discipline.[5] As a result, in the cases where an employer's ban on union buttons has been at issue, the courts have traditionally examined the facts of each case, and determined whether the employer's asserted interest outweighs the employees' conflicting interest in self-organization before determining whether or not a "special circumstance" is present.[6] "Special circumstances" have since been found to exist in cases where the employer has asserted an interest in such areas as safety,[7] impact on hospital patients,[8] prevention of customer alienation,[9] and avoidance of discord and violence among personnel during a heated organization campaign.[10]

Another special consideration that has been raised as a justification for an employer's ban on union buttons has been the employer's interest in a uniform public image among its employees who have regular contact with the public.[11] The employer's interest in a uniform public image, however, like other asserted employer interests, has not given rise to an automatic finding of special circumstances.[12] In cases where the public image

decision, 51 N.L.R.B. 1186, 1187-88 (1943)). *See* C. MORRIS, THE DEVELOPING LABOR LAW 96 (1983)[hereinafter cited as C. MORRIS]; Derenshinsky, *The Solicitation and Distribution Rules of the NLRB*, 40 U. CIN. L. REV. 417, 444 (1971).

[3] Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1982).

29 U.S.C. § 157 (1982)[hereinafter cited as "section 7"] provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.*

[4] *See Republic Aviation*, 324 U.S. at 803-04 n.10, 16 L.R.R.M. at 625 n.10.

[5] *See id.* at 797-98, 16 L.R.R.M. at 622. *See also* Beth Israel Hospital v. NLRB, 437 U.S. 483, 491-92, 98 L.R.R.M. 2727, 2730 (1978).

[6] *See, e.g.*, Virginia Electric & Power Co. v. NLRB, 703 F.2d 79, 81-82, 112 L.R.R.M. 3099, 3101-02 (4th Cir. 1983); Davison-Paxon Co. v. NLRB, 462 F.2d 364, 372, 80 L.R.R.M. 2673, 2679 (5th Cir. 1972); NLRB v. Floridan Hotel of Tampa, Inc., 318 F.2d 545, 547, 53 L.R.R.M. 2420, 2422 (2d Cir. 1963); Caterpillar Tractor Co. v. NLRB, 230 F.2d 357, 358, 37 L.R.R.M. 2619, 2620 (7th Cir. 1956).

[7] *See, e.g.*, Andrews Wire Corp., 189 N.L.R.B. 108, 109, 76 L.R.R.M. 1568, 1570 (1971)(holding that the employee could enforce a ban on union insignia where such insignia was attached to safety hats and impaired employee safety).

[8] *See, e.g.*, George J. London Memorial Hospital, 238 N.L.R.B. 704, 708, 99 L.R.R.M. 1680, 1680 (1978)(stating that a rule prohibiting buttons only in the patient area of the hospital would have been presumptively invalid).

[9] *See, e.g.*, Davison-Paxon Co. v. NLRB, 462 F.2d 364, 370, 80 L.R.R.M. 2673, 2678 (5th Cir. 1972)(holding that an employer's ban on buttons was justified where the company was concerned that controversial buttons, worn in the selling area of the store, would antagonize customers).

[10] *See, e.g.*, Caterpillar Tractor Co. v. NLRB, 230 F.2d 357, 359, 37 L.R.R.M. 2619, 2620 (7th Cir. 1956)(holding that union "scab" buttons could be banned in order to avoid disruptions of employee harmony).

[11] *See, e.g.*, NLRB v. Harrah's Club, 337 F.2d 177, 180, 57 L.R.R.M. 2198, 2200 (10th Cir. 1964).

[12] *Compare* Pay'n Save Corp. v. NLRB, 641 F.2d 697, 701, 106 L.R.R.M. 3040, 3043 (9th Cir. 1981)(holding that the public image justification did not constitute a "special circumstance") *with* NLRB v. Harrah's Club, 337 F.2d 177, 180, 57 L.R.R.M. 2198, 2200 (10th Cir. 1964)(holding that an employer's interest in a uniform public image justified a ban on union buttons).

justification has been at issue, a balancing test of conflicting employer and employee interests has also been employed.[13] In one case, for example, the employees failed to assert any organizational purpose for button wearing.[14] As a result, the court found that the employer's interest in a uniform public image was a sufficient special circumstance to justify a ban on union buttons.[15] In another case, however, a different result was reached where the employees had been engaged in an organizing campaign.[16] In that case, the court stated that the employer's interest in employee appearance did not outweigh the interest of employees in self-organization.[17] As a result, the court rejected the employer's contention that his interest in a uniform public image constituted a special circumstance.[18] In the area of employer bans on union buttons, therefore, it has been the general rule that each case should be determined by weighing the relevant facts on the record, and reaching an accommodation of the conflicting interests of employers and employees.

During the *Survey* year, the Sixth Circuit, in *Burger King Corp. v. NLRB*,[19] faced the issue of whether an employer's rule against the wearing of union buttons by employees was in violation of the Act.[20] The Sixth Circuit held that "special circumstances" exist where an employer enforces a nondiscriminatory and consistent rule that requires employees to wear authorized uniforms when in contact with the public.[21] The case is significant in that the court found the employer's interest in a uniform public image sufficient to justify a ban on union buttons, even though the employees at the time were engaged in an organizational campaign.[22]

In *Burger King*, employees were required to wear identical uniforms as a matter of the fast food restaurant's written policy.[23] The policy additionally stated that only company-owned buttons and name tags would be permitted on the employees' uniforms.[24] On the morning of May 28, 1981, a union organizer and a number of off-duty Burger King employees took over a Burger King restaurant as a part of a union organizing drive.[25] The "takeover," which had been joined by some of the employees on duty, resulted in a confusing "melee" in the middle of the restaurant.[26] One and a half hours after the takeover and melee had subsided, a supervisor arrived at the restaurant and approached Cynthia Williams, one of the employees on duty who had joined the takeover, and asked

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[13] *See, e.g.*, Pay'n Save Corp. v. NLRB, 641 F.2d 697, 701 n.10, 106 L.R.R.M. 3040, 3043 n.10 (9th Cir. 1981); NLRB v. Harrah's Club, 337 F.2d 177, 180, 57 L.R.R.M. 2198, 2200 (10th Cir. 1964).

[14] NLRB v. Harrah's Club, 337 F.2d 177, 179, 57 L.R.R.M. 2198, 2200 (10th Cir. 1964).

[15] *Id.* at 180, 57 L.R.R.M. at 2200-01.

[16] Pay'n Save Corp. v. NLRB, 641 F.2d 697, 699, 106 L.R.R.M. 3040, 3041-42 (9th Cir. 1981).

[17] *Id.* at 701 n.10, 106 L.R.R.M. at 3043 n.10.

[18] *See id.* The court also determined that the rule against wearing union buttons in the case before it had been applied disparately, and therefore violated section 8(a)(1) on that basis. *Id.* at 701, 106 L.R.R.M. at 3043.

[19] 725 F.2d 1053, 115 L.R.R.M. 2387 (6th Cir. 1984).

[20] *Id.* at 1054-55, 115 L.R.R.M. at 2387-88.

[21] *Id.* at 1055, 115 L.R.R.M. at 2388.

[22] *See id.* at 1054, 115 L.R.R.M. at 2387.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 1054, 115 L.R.R.M. at 2387.

[26] *Id.* The circuit court did not describe the "takeover" in any detail. The court merely stated in part: "On Thursday morning, May 28, 1981, at about 11:30 a.m., a number of off-duty employees accompanied by a union organizer entered restaurant 768 and took over the restaurant." *Id.*

Nor did the court describe the "melee" in detail. The court merely referred to it as a "melee [that] ensu[ed] as a result of the takeover of the restaurant . . . ." *Id.*

her about the cause of the employees' anger.[27] During the conversation, the supervisor also asked Williams what a union could do for her.[28] At that point, the conversation was terminated.[29] In a subsequent conversation, however, the supervisor noticed that Williams was wearing a union button and asked her if she knew that wearing buttons was against company policy.[30] Williams thereupon removed her union button.[31] Another employee who was working at a drive-in window that served the public overheard this conversation and also removed the union button that she was wearing.[32]

Charges were subsequently filed with the Board.[33] The first charge related to whether the initial conversation that took place between the supervisor and Williams was coercive.[34] The second charge concerned the validity of the employer's rule prohibiting employees from wearing buttons while on duty.[35] In regard to the first charge, the administrative law judge held that the conversation between the supervisor and Williams was coercive, and therefore violated section 8(a)(1) of the Act.[36] The judge dismissed the charge relating to the wearing of buttons.[37] On consideration of the administrative law judge's decisions, the Board sustained the ruling on the first charge, but reversed the dismissal of the second charge, holding that the rule prohibiting button wearing also violated section 8(a)(1) of the Act.[38] Subsequently, the Board sought enforcement of its decision in the Sixth Circuit.[39]

In its very brief opinion, the Sixth Circuit initially examined the record and rejected the Board's determination that the conversation between the supervisor and the employee was coercive.[40] According to the court, a simple inquiry did not, by itself, constitute coercion.[41] The court next considered the validity of the employer's prohibition of union buttons as it applied to the employee who had direct contact with the public.[42] The court noted that the restaurant's prohibition on buttons had been, on rare occasions, inconsistently applied, but agreed with the administrative law judge's conclusion that these "rare departures from the norm" were insufficient to establish a company practice of deviating from the general prohibition.[43] The court then alluded to the business justification for the employer's general ban on buttons, stressing that the restaurant chain established much of its national recognition from its "uniform public image."[44] The court concluded that "special circumstances" justified the employer's rule, and refused to enforce the Board's

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 1054-55, 115 L.R.R.M. at 2387-88.
[36] *Id.* at 1055, 115 L.R.R.M. at 2388.
[37] *Id.*
[38] *Id.*
[39] *See id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* If the employer had banned only the union buttons, while consistently allowing buttons to be worn, the employer's rule could have been held unlawful on that basis alone. *See* C. MORRIS, *supra* note 1, at 97.
[44] *Burger King*, 725 F.2d at 1055, 115 L.R.R.M. at 2388.

order insofar as it applied to employees who had contact with the public.[45] According to the court, when an employer has a nondiscriminatory and consistent policy that requires its employees who meet with the public to wear authorized uniforms, "a 'special circumstance' exists as a matter of law which justifies the banning of union buttons."[46]

Circuit Judge Merritt wrote an opinion that concurred in the majority's finding that the conversation between the supervisor and the employee was not coercive, but dissented on the issue of the rule regarding union buttons.[47] According to Judge Merritt, there was "ample case law" supporting the Board's finding of a section 8(a)(1) violation with respect to the ban on union buttons.[48] Judge Merritt recognized the "special circumstances" requirement regarding employer prohibitions on union buttons,[49] but concluded that the public image justification was only "arguably present" in the case before the court.[50] According to Judge Merritt, the buttons in *Burger King* were not only "innocuous and unprovocative," but there was also no evidence that the buttons could possibly damage the employer's public image.[51] In addition, Judge Merritt asserted that the employer's justification was insufficient because employees who had no contact with the public had been prohibited from wearing buttons.[52] Finally, Judge Merritt asserted that the decision in *Burger King* could not be distinguished "on any meaningful ground" from previous decisions that have rejected the public image justification for employer bans on union buttons.[53] Accordingly, Judge Merritt concluded that the employer had violated the Act by banning the union buttons.[54]

The dissent's assertion that the employer's ban on union buttons in *Burger King* had violated the Act has merit.[55] Although the enforcement of a rule prohibiting button wearing in some circumstances may be an entirely reasonable exercise of the employer's business judgment,[56] the determination of the reasonableness of such a rule has always been made on the basis of a balancing of the interests of the employer and employees.[57] The balancing of interests has consisted of weighing the employer's right to discipline his or her employees against the employees' right to engage in concerted activity for the purpose of self-organization.[58] In those situations where employee solidarity may be a

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 1056, 115 L.R.R.M. at 2389 (Merritt, J., concurring in part and dissenting in part). Another opinion, concurring in part and dissenting in part, was written by Circuit Judge Engel. *Id.* at 1055-56, 115 L.R.R.M. at 2388-89 (Engel, J., concurring in part and dissenting in part). Judge Engel, however, dissented on the issue of the alleged coercive conversation, and concurred on the issue of the ban on buttons. *Id.*

[48] *Id.* at 1056, 115 L.R.R.M. at 2389 (Merritt, J., concurring in part and dissenting in part).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See id.*

[56] *See* NLRB v. Harrah's Club, 337 F.2d 177, 180, 57 L.R.R.M. 2198, 2200-01 (10th Cir. 1964).

[57] *See* notes 3-5 and accompanying text. For a case that struck the balance on the same issue in favor of the employees' right to organize, see Pay'n Save v. NLRB, 641 F.2d 697, 701 n.10, 106 L.R.R.M. 3040, 3043 n.10 (9th Cir. 1981).

[58] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98, 16 L.R.R.M. 620, 622 (1945). *See also* C. MORRIS, *supra* note 1, at 96-97.

necessary prerequisite to a union's organizing efforts, the mere wearing of a union button may be an important element in securing that solidarity. In such circumstances, the employees' wearing of union buttons is an activity with an organizational purpose that should not be interfered with unless an employer can show a more pressing justification that outweighs that employee right.[59] On the other hand, if an employee is unable to justify his or her wearing of a union button as an important element in the exercise of employee section 7 rights, then an employer's ban on union buttons for the purposes of projecting a uniform public image may be upheld as a reasonable exercise of business judgment.[60]

Under the facts of the *Burger King* case, there is a strong argument that the wearing of the union buttons during the highly confrontational organizing efforts of the union was a valid exercise of the employees' right to self-organize.[61] The *Burger King* court, however, concluded that the important interest of Burger King Corporation in maintaining its uniform public image was a special circumstance that justified a ban on union buttons.[62] In ruling as it did, the court failed to mention in its opinion that the employees had an equally compelling interest in self-organization.[63] Because there was an organizational campaign in progress at the time of the controversy,[64] the employees' interest in wearing union buttons as a part of their organizing drive could arguably have outweighed the employer's interest in employee appearance.[65] The court, however, did not acknowledge such an employee interest. Instead, the court chose to declare, "as a matter of law," that the uniform public image justification constitutes a special circumstance.[66]

After the *Burger King* decision, employees who wear authorized uniforms while meeting regularly with the public would be taking a risk in wearing a union button against company policy. Even where employees are engaging in a union organizing campaign, the protected interest in self-organization may not be enough to outweigh the employer's interest in projecting a uniform image to the public. As a result, the *Burger King* decision may have the effect of eliminating the right of uniformed employees who have contact with the public to wear union buttons.

*Burger King* establishes the principle that an employer may ban union buttons where that ban is in connection with a consistent, nondiscriminatory policy requiring employees who meet regularly with the public to wear authorized uniforms.[67] The rule in *Burger King* is one that is easy to apply and facilitates prediction of the outcome of labor law suits relating to employer prohibitions on the wearing of union buttons. The rule has the potential, however, of infringing upon uniformed employees' rights to self-organize and, as a consequence, defeating the purposes of the Act.

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[59] 29 U.S.C. § 157 (1982), quoted *supra* note 2.

[60] *See* NLRB v. Harrah's Club, 337 F.2d 177, 180, 57 L.R.R.M. 2198, 2200 (10th Cir. 1964).

[61] *See Burger King*, 725 F.2d at 1054, 115 L.R.R.M. at 2387.

[62] *Id.* at 1055, 115 L.R.R.M. at 2388.

[63] *See id.*

[64] *See id.* at 1054, 115 L.R.R.M. at 2387.

[65] *See, e.g.*, Pay'n Save Corp. v. NLRB, 641 F.2d 697, 701 n.10, 106 L.R.R.M. 3040, 3043 n.10 (9th Cir. 1981)(where the court, in a case involving a similar dispute, found that the employee interest in self-organization outweighed the employer's interest).

[66] 725 F.2d at 1054, 115 L.R.R.M. at 2388.

[67] *Id.* at 1055, 115 L.R.R.M. at 2388.

### 2. *Interrogation of Employees by Employers During Union Organizing Periods*: Ajax Tool Works Inc. v. NLRB[1]

During the initial stages of union organizing within a plant, the employer has a natural curiosity about the progress of the union activity among his employees.[2] This curiosity is a legitimate interest if the employer is confronted with a union claim of majority status.[3] The organizing employees, on the other hand, have a right to be protected from any employer activity tending to interfere with, restrain, or coerce employees in the exercise of their rights to form a union.[4] Because employer knowledge of union activity has often led to reprisals, even the most innocuous employer questioning may be suspect[5] and may tend to inhibit employees in the exercise of their right to organize.[6] Consequently, the National Labor Relations Board (Board) originally took the position that for an employer to interrogate employees concerning any aspect of union activity was a per se unfair labor practice.[7]

In 1954, the Board reversed its per se position on interrogation, and, in *Blue Flash Express, Inc.*,[8] held that interrogations are only unlawful when "*under all the circumstances* the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the [National Labor Relations] Act."[9] In evaluating the circumstances, the Board considered whether the employees gave false answers, whether the employer communicated the purpose of the questioning, whether the employees were assured that no reprisals would take place, and whether a background of employer hostility existed.[10] The Board listed five additional factors to be considered in evaluating

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* By Andrea Petersen, Staff Member, Boston College Law Review.

[1] 713 F.2d 1307, 113 L.R.R.M. 3762 (7th Cir. 1983).

[2] *See* Address by Howard Kleeb, "Employer Rights and Their Limitations During Union Organizational Campaigns," (January 29, 1964), *reprinted in* 55 L.R.R.M. 114, 115 (1968), under the title of *Taft-Hartley Rules During Union Organizing Campaigns* [hereinafter cited as Address by Howard Kleeb].

[3] Struksnes Constr. Co., 165 N.L.R.B. 1062, 1062, 65 L.R.R.M. 1385, 1386 (1967).

[4] 29 U.S.C. § 158(a)(1) (1982).

[5] Address by Howard Kleeb, *supra* note 2, at 115.

[6] Struksnes Constr. Co., 165 N.L.R.B. at 1063, 65 L.R.R.M. at 1386.

[7] *In re* Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358, 1359, 24 L.R.R.M. 1575, 1575 (1949). The Board held that "section 8(a)(1) of the Act is violated when an employer interrogates his employees concerning any aspect of union activity." *Id. See* 29 U.S.C. § 158(a)(1). This section provides in relevant part: "(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ."

[8] Blue Flash Express, Inc., 109 N.L.R.B. 591, 592, 34 L.R.R.M. 1385, 1386 (1954). The Board noted that numerous courts had explicitly or by implication condemned the rationale of *Standard-Coosa-Thatcher Co. Id. See, e.g.*, NLRB v. England Bros., Inc., 201 F.2d 395, 398, 31 L.R.R.M. 2319, 2322 (1st Cir. 1954) (citing Sax v. NLRB, 171 F.2d 769, 773 (7th Cir. 1948)) (the *England Bros.* court held that "mere words of inquiry" were not sufficient to constitute "coercion" absent a finding of an illegal anti-union attitude or background on the part of the employer); Jacksonville Paper v. NLRB, 137 F.2d 148, 152, 12 L.R.R.M. 812, 816 (5th Cir. 1943). In *Jacksonville Paper*, the court held that the employer "is not precluded by the Act from inquiring or being informed as to the progress of the efforts at unionization. He has a right to inquire if the Union was organized or if it has 'washed up' . . ." provided he does not do so threateningly or coercively.

[9] Blue Flash Express, Inc., 109 N.L.R.B. 591, 593, 34 L.R.R.M. 1385, 1386 (1954) (emphasis in the original).

[10] *Id.*

the legality of an interrogation: the time, the place, the personnel involved, the information sought, and the employer's conceded preference.[11]

In cases of isolated employer questioning of employees concerning union activity, the Board generally continues to use the approach of evaluating all the circumstances adopted in *Blue Flash*.[12] While the Board has not developed a clear set of rules, it generally has found, barring de minimus situations, that employee interrogations are illegal absent a showing by the employer that a valid purpose in determining union strength existed, that such purpose was communicated to the employees, and that the employees were assured no reprisals would result.[13] The courts, on the other hand, have often used the less stringent standard developed by the Second Circuit Court of Appeals in *Bourne v. NLRB*.[14] According to the *Bourne* court, the five relevant inquiries are: (1) whether there is a history of employer hostility and discrimination; (2) what the interrogator wanted to know; (3) who the interrogator was; (4) where the interrogation took place; and (5) whether the reply was truthful.[15]

During the *Survey* year, in *Ajax Tool Works v. NLRB*,[16] the United States Court of Appeals for the Seventh Circuit considered what constituted unlawful interrogation under section 8(a)(1) of the National Labor Relations Act (the Act),[17] and what factors qualified someone for the title of supervisor under the terms of section 2(11) of the Act.[18] After first determining that an employee who was put in charge of the night shift fit the statutory definition of supervisor,[19] the court concluded that this employee, together with an admitted supervisor, had violated section 8(a)(1) of the Act by repeatedly questioning small, informal groups of employees about their union activities.[20] In reaching this

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[11] *Id.*

[12] C. MORRIS, THE DEVELOPING LABOR LAW 102 (2d ed. 1983) [hereinafter cited as C. MORRIS]. The Board, in response to the courts' impatience with the vagueness of the *Blue Flash* standard, developed a more precise standard that could be applied in cases where the employer was presented with a union claim of majority status and wanted to poll the employees to test the legitimacy of the claim. Struksnes Constr. Co., 165 N.L.R.B. at 1062, 65 L.R.R.M. at 1386. The *Struksnes* test stated by the Board is:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

*Id.*

[13] Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 107 (1964) [hereinafter cited as Bok].

[14] 332 F.2d 47, 48, 56 L.R.R.M. 2241, 2243 (2d Cir. 1964). *See* Bok, *supra* note 13, at 107 n.197.

[15] 332 F.2d at 48, 56 L.R.R.M. at 2243.

[16] 713 F.2d 1307, 113 L.R.R.M. 3762 (7th Cir. 1983).

[17] 29 U.S.C. § 158(a)(1) (1982).

[18] 29 U.S.C. § 152(11) (1982). The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. *Id.*

[19] *Ajax*, 713 F.2d at 1309, 113 L.R.R.M. at 3763. Because section 8(a)(1) of the Act only applies against employers, 29 U.S.C. § 158(a)(1) (1982), the court had to decide who was a supervisor and therefore acting as an agent of the employer before the court could reach the issue of whether the employee interrogations constituted violations of section 8(a)(1).

[20] *Ajax*, 713 F.2d at 1309, 113 L.R.R.M. at 3763.

decision, the court expressed its concern that the *Bourne* factors may be too lenient.[21] Consequently, the court expanded the *Bourne* test. In *Ajax*, the appeals court combined the five *Bourne* factors with two of the elements of the Board's test and then added one element of its own. In combining the two existing tests, the court attempted to effect a compromise between the courts' standard and the Board's stricter standard. The result, however, may well be that by adding more factors, the court has only added more loopholes for the employer.

Ajax Tool Works, Inc., a chisel manufacturer, had two shifts in both the machine shop and the forge shop.[22] David Shea, foreman of the forge shop, and Joe Capriotte, foreman of the machine shop, were in charge of the day shift.[23] Peter Piotrowski was the single "leadman" on the night shift for the two departments.[24] During the night shift, Piotrowski set up the machines, made adjustments in setting as needed, attempted to repair broken machines, and reassigned workers when necessary.[25] When not involved in those duties, Piotrowski sat at his desk and read.[26] He also disciplined workers and made recommendations about personnel, though he did not have the authority to hire or fire employees on his own initiative.[27]

During April and May of 1980, an employee, Luis Diaz, began to organize the Ajax employees on behalf of the United Auto Workers (UAW).[28] Ajax was a small company of about 100 employees, and the word of the organizing activity spread rapidly among the workforce and aroused the attention of management.[29] On one occasion when Diaz and several other co-workers were having coffee in the company cafeteria, Piotrowski approached them and asked: "What is happening? Are you forming the union?"[30] Diaz denied the existence of any union activity and maintained that the employees were discussing baseball.[31] Seven similar incidents involving Piotrowski and Shea were reported within the next two weeks.[32] In addition, it was reported that Shea read a notice of a union meeting posted on the bulletin board and said to several employees standing around at the time: "That is garbage. If you want to go, go. But that won't help you."[33]

Based on these facts, the UAW filed charges against Ajax claiming that the interrogations constituted an unfair labor practice. At the ensuing administrative hearing, the Administrative Law Judge (ALJ) found, first, that Piotrowski was a supervisor within the meaning of the Act and, second, that the interrogations by Piotrowski and Shea were violative of section 8(a)(1) of the Act.[34] The Board upheld the findings of the ALJ, and

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[21] *Id.* at 1314, 113 L.R.R.M. at 3767. Although the court does not cite to *Bourne*, the five factors used by the *Ajax* court are the same as the factors listed in *Bourne*. *See supra* note 15 and accompanying text.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 1310, 113 L.R.R.M. at 3764.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1313, 113 L.R.R.M. at 3766.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1311, 113 L.R.R.M. at 3763.

Ajax petitioned the court for review.[35] The Board cross-appealed for enforcement of its order.[36]

In determining the status of Piotrowski, the appeals court stated that it was well established that the presence of any one of the indicia of supervisory status referred to in section 2(11) of the Act[37] is sufficient to render an employee a statutory supervisor as long as the individual in question has the authority to exercise independent judgment.[38] The court found that even if Piotrowski were only implementing orders when he made his initial assignments of employees, he was acting on his own when he reassigned workers who had finished their jobs or whose machines had broken down. Accordingly, the court noted that Piotrowski acted with managerial judgment as to the best interests of the employer.[39] The court reasoned that Piotrowski's exercise of managerial judgment was a sufficient basis for a finding of supervisory status.[40] Nonetheless, the court went on to point out that the record was replete with other indicia of Piotrowski's supervisory status: first, he was responsible for maintaining discipline; second, he effectively recommended that an employee be discharged; third, he was responsible for locking up at night; fourth, he did not do the same work as the other workers but sat and read when he was not engaged in supervisory duties; and finally, the court noted, if Piotrowski, who was the highest ranking employee on the night shift, was not the supervisor, then the night shift, which was comprised of thirty men, would have been without a supervisor.[41] The court agreed with the Board that these facts suggested a finding of supervisory status even though they were not necessarily determinative.[42]

After deciding the supervisory issue, the court considered the legality of Piotrowski's and Shea's practices. The court started from the premise that interrogations are only violative of section 8(a)(1) when the questions asked, viewed from the perspective of the employee, "could reasonably tend to coerce or intimidate the employee with respect to union activities."[43] The court then listed five factors relevant to determining whether the employer's conduct reasonably could have tended to intimidate or induce fear of reprisals in the employees: (1) the existence of employer anti-union animus; (2) the questioner's status in the company hierarchy; (3) the nature of the information sought; (4) the place where the information was sought and the method by which the information was sought; and (5) the truthfulness of the reply.[44] These five factors were a modification of the *Bourne* factors used by other circuit courts.[45] The court also noted that it was obliged to consider all relevant circumstances and included two of the factors relied upon by the Board: whether the employer offered a legitimate explanation for the questions, and whether the employer gave assurances that no reprisals would follow the employee's response.[46]

The court acknowledged that the enunciated test was not foolproof.[47] According to

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[35] *Id.* at 1309, 113 L.R.R.M. at 3763.

[36] *Id.* at 1315, 113 L.R.R.M. at 3768.

[37] *See supra* note 18.

[38] *Ajax*, 713 F.2d at 1312, 113 L.R.R.M. at 3764.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1313, 113 L.R.R.M. at 3766.

[43] *Id.* (quoting NLRB v. Rich's Precision Foundry, Inc., 667 F.2d 613, 109 L.R.R.M. 2143, (7th Cir. 1981)).

[44] *Id.*

[45] *See supra* notes 14-16 and accompanying text.

[46] *Ajax*, 713 F.2d at 1313, 113 L.R.R.M. at 3766. *See also supra* note 13 and accompanying text.

[47] *Ajax*, 713 F.2d at 1313, 113 L.R.R.M. at 3766.

the court, all seven factors could weigh in favor of the employer, even though the challenged interrogations were in fact intimidating to employees and did actually interfere with their protected rights.[48] To avoid such a result, the *Ajax* court introduced an eighth factor to be weighed: the number of employee interrogations.[49] Suggesting that seemingly harmless inquiries could become coercive if repeated often enough,[50] the *Ajax* court found that the point at which repeated questioning became intimidating could be determined by measuring the size of the workforce and the number of people who witnessed each incident.[51] The court concluded that because the Ajax workforce consisted of 100 employees and several employees overheard each incident of questioning, it was reasonable to infer that seven incidents were sufficient to intimidate the whole workforce.[52] According to the court, the Ajax supervisors not only interrogated certain employees repeatedly, but they always did so in the presence of other employees, thereby ensuring that the rest of the workforce was aware of management's repeated and pointed questioning.[53]

Having thus decided that the repetitious nature of the employer's interrogations was a factor to be considered in this case, the court went on to apply the first seven factors to the *Ajax* facts.[54] While the court found no evidence of a history of anti-union animus on the part of Ajax,[55] it nevertheless concluded that the questions were coercive.[56] The court also found that the lack of explanation for the supervisor's interest,[57] combined with the absence of any assurances that no reprisals would be given,[58] contributed to the coercive impact of the questioning. Next, the court noted that the untruthfulness of the responses indicated a fear of reprisal.[59] Finally, although the court found that the time and place of the inquiries were not intimidating,[60] it concluded that because the employees perceived Shea and Piotrowski as agents of management, the coercive and intimidating nature of their questioning was significantly enhanced.[61] In sum, the court found that the Board was justified in finding that the Ajax method of interrogation violated the law.[62]

An analysis of the *Ajax* opinion reveals the court's concern that, under current law, employers are permitted to use methods of interrogation that intimidate employees who are in the process of organizing a union.[63] The court acknowledged the argument made by Professor Derek Bok[64] that even if the *Bourne* factors used by the courts to measure the legality of employer interrogation "cut in favor of the employer," intimidation of the

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[48] *Id.*

[49] *Id.* The *Ajax* court cited to Peerless of America Inc. v. NLRB, 484 F.2d 1108, 1114, 83 L.R.R.M. 3000, 3004-05 (7th Cir. 1973) for this eighth factor. In *Peerless*, the court looked only to the number of inquiries and did not consider the *Bourne* factors at all. *Id.*

[50] *Ajax*, 713 F.2d at 1313, 113 L.R.R.M. at 3766.

[51] *Id.* at 1314, 113 L.R.R.M. at 3767.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 1314, 113 L.R.R.M. at 3767-68.

[55] *Id.* at 1314, 113 L.R.R.M. at 3767.

[56] *Id.*

[57] *Id.* at 1314-15, 113 L.R.R.M. at 3767-68.

[58] *Id.*

[59] *Id.* at 1315, 113 L.R.R.M. at 3768.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1315, 113 L.R.R.M. at 3767.

[64] *See* Bok, *supra* note 13, at 107.

employees may still occur.[65] Bok argued that the Board's *Blue Flash* standard[66] for legal interrogation more effectively restrained employers from engaging in unfair labor practices.[67] Even though the *Blue Flash* evaluation of all the circumstances did not result in clear rules, it did, according to Bok, assure that employer interrogation was illegal absent a showing from employers that they had a valid purpose for obtaining information concerning union strength, that they communicated this purpose to the employees, and that they gave assurances that no reprisals would follow.[68] Thus, while Bok acknowledged that the courts' standard protected employers who might inadvertently commit an unfair labor practice, he questioned whether such added protection was worth the cost of allowing employees to be coerced by inquiries permissible under the *Bourne* approach.[69]

In the *Ajax* decision, the court appeared to be answering Bok[70] by offering a compromise standard for measuring the legality of isolated instances of employer interrogation. In *Ajax*, the court first applied the five factors of the *Bourne* test.[71] The court emphasized that these factors were not exclusive and included two of the Board factors in its evaluation of the situation presented in *Ajax*.[72] If, after the application of these seven factors, the employer's questions did not amount to a violation of the Act, the court suggested that one more factor — an evaluation of the repetitious nature of the inquiries — then should be applied.[73]

By the use of this eight-factor test, the court appears to be suggesting that the addition of the repetitiousness factor should both protect the employer from inadvertently committing an unfair labor practice, and protect the employee from being intimidated by seemingly innocuous inquiries. The court's compromise standard, however, is confusing for two reasons. First, the court did not indicate what weight should be given to each factor. Second, the repetitiousness part of the test itself is confusing.

In applying the first seven factors, the court in *Ajax* found that five factors weighed against the employer.[74] Nonetheless, the court suggested that the incidents of questioning did not amount to a violation.[75] The court also did not give dispositive weight to the factor relating to communicating a legitimate purpose for questioning, or to the factor relating to assurances against reprisals that the Board has given in other cases.[76] Thus, ascertaining what weight the court gave each factor is difficult, because even though the majority of the first seven factors weighed against the employer, the court indicated that the employer would not have been found to be in violation of the Act. Only when the court considered the repetitious nature of the inquiries did the scale tip decisively in favor of the employee.

In addition to the difficulty in predicting how each of the eight factors in the *Ajax* test will be weighted by the courts, it is also difficult to understand exactly how the repetitiousness test will be applied. According to the court, questions that are innocuous when

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[65] *Id.* at 109.
[66] *See supra* note 13 and accompanying text.
[67] Bok, *supra* note 13, at 110.
[68] *Id.* at 107.
[69] *Id.* at 110.
[70] *Ajax*, 713 F.2d at 1314 n.5, 113 L.R.R.M. at 3767 n.5.
[71] *Id.* at 1314, 113 L.R.R.M. at 3767-68. *See also supra* notes 43-44 and accompanying text.
[72] *Id. See also supra* note 45 and accompanying text.
[73] *Id.*
[74] *See supra* notes 52-57 and accompanying text.
[75] *Ajax*, 713 F.2d at 1314, 113 L.R.R.M. at 3767.
[76] *See* Bok, *supra* note 13, at 107.

viewed as isolated incidents can become coercive if repeated too often.[77] The *Ajax* court concluded that the point at which repeated questioning becomes intimidating can be determined by evaluating the size of the workforce, the number of incidents, and the number of people who witness each incident.[78] The court's reasoning implies that the larger the workforce, the greater the number of innocuous questions the employer is permitted to ask. In *Ajax*, however, the court did not consider that most of the reported incidents which formed the basis of the union's claim involved Luis Diaz, the primary organizer.[79] Even if the Ajax workforce numbered 1,000 employees, seven incidents of innocuous questioning may have intimidated Diaz. Interrogation that intimidates one employee is sufficient to constitute an unfair labor practice.[80] Given these problems it is unclear exactly how courts will measure the coercive effect of repeated incidents of questioning.

The *Ajax Tool Works* decision was an attempt to consolidate the confusing list of factors that the courts apply in determining the legality of employer interrogations. The *Ajax* court may have been motivated by a desire to prevent employers from using legal means of interrogation to restrain employees in the exercise of their rights to organize. Future litigation, however, will be necessary to determine the effect — if any — that this eight factor test may have on the analysis of employer interrogation cases.

3. **The NLRB and No Solicitation Rules — A Return to Pre-1981 Policy*: Our Way, Inc.[1]

Section 7 of the National Labor Relations Act[2] (the Act) provides employees with the rights to self-organize, form labor unions, and bargain collectively.[3] Section 8(a) of the Act makes it an unlawful labor practice for an employer to interfere with those rights.[4] These provisions have furnished the grounds for challenges to the validity of rules, promulgated by employers, which are designed to prohibit employee solicitation on work premises.[5] In 1943, the National Labor Relations Board (Board) held, in *Peyton Packing Co.*,[6] that rules

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[77] *Ajax*, 713 F.2d at 1314, 113 L.R.R.M. at 3767.

[78] *Id.*

[79] *Id.*

[80] NLRB v. Gladding Keystone Corp., 535 F.2d 129, 130, 76 L.R.R.M. 2099, 2101-02 (2d Cir. 1970).

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* By Kenneth Lamb, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 268 N.L.R.B. No. 61, 115 L.R.R.M. 1009 (1983).

[2] 29 U.S.C. §§ 151-169 (1982).

[3] 29 U.S.C. § 157 (1982).

[4] 29 U.S.C. §§ 158(a)(1), (3) (1982). Section 8 provides that:

> (a) It shall be an unfair labor practice for an employer — -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

*Id.*

[5] *See, e.g.*, Our Way, Inc., 268 N.L.R.B. No. 61, 63, 115 L.R.R.M. 1009, 1009 (1983); T.R.W. Bearings, 257 N.L.R.B. 442, 442, 107 L.R.R.M. 1481, 1481 (1981); Essex International, Inc., 211 N.L.R.B. 749, 749, 86 L.R.R.M. 1411, 1412 (1974); Stoddard-Quirk Mfg., 138 N.L.R.B. 615, 615, 51 L.R.R.M. 1110, 1111 (1962); Peyton Packing Co., 49 N.L.R.B. 828, 828, 12 L.R.R.M. 183, 183 (1943).

[6] 49 N.L.R.B. 828, 12 L.R.R.M. 183 (1943).

prohibiting solicitation during working time were presumptively valid because "working time is for work."[7] By contrast, non-working time such as lunch and break periods is, according to the Board, an employee's own time.[8] Thus, the Board determined that rules prohibiting solicitation on the employee's own time were presumptively invalid, even if applied only to work premises.[9] The Supreme Court subsequently upheld these conclusions in *Republic Aviation Corp. v. NLRB*,[10] stating that any rules prohibiting solicitation outside of working time were unreasonable impediments to the right to self-organization, even when those rules prohibit solicitation only on work premises.[11]

In the years following *Republic Aviation*, the Board further developed these principles by distinguishing between two types of no-solicitation rules: those prohibiting solicitation during "working time" and those prohibiting solicitation during "working hours."[12] In *Essex International, Inc.*,[13] the Board held that rules prohibiting solicitation during working time are presumptively valid under *Peyton Packing* because "working time" refers to that time when actual job duties are performed.[14] Similarly, under *Republic Aviation* rules prohibiting solicitation during working hours are presumptively invalid because "working hours" refers to the whole period from the beginning to the end of an employee's workshift.[15] This period includes non-working time such as lunch and break periods during which an employee may solicit or be solicited because his own time is involved.[16]

This distinction between "working hours" and "working time" was abandoned by the Board, however, in 1981. In *T.R.W. Bearings*,[17] the Board held that prohibitions against solicitation during "working time" as well as prohibitions against solicitation during "working hours" are presumptively invalid.[18] The Board reasoned that there was no meaningful distinction between the phrases "working hours" and "working time."[19] Both phrases are ambiguous, according to the Board, so that employees might erroneously interpret either one to mean that they could not solicit during parts of the work day, such as break periods, that are their own time.[20] The Board thus concluded that both terms unlawfully interfered with the employee's exercise of organizational rights under section 7 of the Act.[21] The Board did not, however, create an irrebuttable presumption. According to the Board, any rule prohibiting solicitation during either "working hours" or "working time" could be rendered lawful by the inclusion of an explanation that the restriction on organizational activity did not apply to those periods of the day when employees are not performing their work tasks.[22]

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[7] *Id.* at 843, 12 L.R.R.M. at 183.

[8] *Id.*

[9] *Id.* Such rules are discriminatory absent proof of special circumstances furnished by the employer that the rules are necessary to preserve discipline or maintain production. *Id.* at 843-44, 12 L.R.R.M. at 183.

[10] 324 U.S. 793, 16 L.R.R.M. 620 (1945).

[11] 324 U.S. at 803 n.10 (citing Peyton Packing Co., 49 N.L.R.B. 828, 843-44, 12 L.R.R.M. 183, 183 (1943)).

[12] *See, e.g.*, Campbell Soup Company, 159 N.L.R.B. 74, 81-82, 62 L.R.R.M. 1352, 1352 (1966).

[13] 211 N.L.R.B. 749, 86 L.R.R.M. 1411 (1974).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] 257 N.L.R.B. 442, 107 L.R.R.M. 1481 (1981).

[18] *Id.* at 443, 107 L.R.R.M. at 1482.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

From 1981 until 1983, the principles enunciated in *T.R.W. Bearings* governed the validity of no-solicitation rules. During the *Survey* year, however, in *Our Way, Inc.*[23] the Board abruptly overruled *T.R.W. Bearings* and held that an employer's rules prohibiting solicitation during working time were facially valid.[24] In *Our Way, Inc.*, the International Brotherhood of Firemen and Oilers challenged the validity of the work rules and employee handbook of the employer, Our Way, as violating section 8(a) of the Act.[25] Work rule number seven prohibited solicitation during the working time of the soliciting employee or the working time of the employee being solicited.[26] The handbook stated that solicitation for any cause was prohibited during working time.[27] Applying the principles of *T.R.W. Bearings*, the administrative law judge held that both work rule seven and the employee handbook were facially invalid.[28] On appeal, the Board rejected the administrative law judge's conclusions, overruled *T.R.W. Bearings*, and held that Our Way's rules were facially valid.[29]

The Board began its analysis by reiterating the basic principle that rules prohibiting solicitation during non-working times are presumptively invalid, while those prohibiting solicitation during actual working times are presumptively valid.[30] According to the Board, the distinction is based on the fact that non-working time involves an employee's own time, while actual working time is the employer's time and is meant for work only.[31] The Board noted that from 1943 until 1981, the period between *Peyton* and *T.R.W. Bearings*, it had respected this distinction consistently by holding that rules prohibiting solicitation during "working time" were presumptively lawful.[32] Likewise, according to the Board, the further distinction drawn in *Essex International, Inc.* between "working hours" and "working time" was consistent with the basic principle of allowing solicitation on the employee's own time.[33] "Working hours" rules are presumptively invalid, the Board stated, because such rules imply that an employee's own time during the work day may not be used for solicitation.[34] On the other hand, the Board pointed out that, in *Essex*, "working time" rules were held to be presumptively valid because such rules implied that

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[23] 268 N.L.R.B. No. 61, 115 L.R.R.M. 1009 (1983).

[24] *Id.* at 5, 115 L.R.R.M. at 1010.

[25] 268 N.L.R.B. No. 61, appendix at 2 (1983).

[26] *Id.* at 3, 115 L.R.R.M. at 1009. Work rule seven provided that: "In order to make our company a better place to work, the following are *Prohibited*: . . . . 7. Soliciting, collecting or selling for any purpose during the working time of the soliciting employee or the working time of the employee being solicited." *Id.*

[27] *Id.* The handbook provided that:

> *SOLICITATION/DISTRIBUTION* — - In order to prevent disruption in the operation of the plant, interference with work and inconvenience to other employees, solicitation for any cause, or distribution of literature of any kind, during working time, is not permitted. Neither may an employee who is not on working time, such as an employee who is on lunch or on break, solicit an employee who is on working time for any cause or distribute literature of any kind to that person. Whether on working time or not, no employee may distribute literature of any kind in any working areas of the plant.

*Id.*

[28] *Id.* at 2, 115 L.R.R.M. at 1009.

[29] *Id.* at 4-5, 115 L.R.R.M. at 1010.

[30] *Id.* at 3-4, 115 L.R.R.M. at 1009-10.

[31] *Id.*

[32] *Id.* at 3, 115 L.R.R.M. at 1009.

[33] *Id.* at 3-4, 115 L.R.R.M. at 1009-10.

[34] *Id.*

solicitation was prohibited only during those times when the employee was supposed to be working.[35] According to the Board, Our Way's rules satisfied the standard enunciated in *Essex*.[36]

The Board then considered the practical impact on employers of its *T.R.W. Bearings* decision.[37] Prior to *T.R.W. Bearings*, according to the Board, the distinction drawn in *Essex* between rules prohibiting solicitation during "working hours" and those prohibiting solicitation during "working time" had been understood by both unions and employers.[38] The Board noted that employers had relied on the *Essex* principles when drafting rules, and unions had relied on *Essex* when explaining organizational rights to their members.[39] Describing *T.R.W. Bearings* as an unnecessary departure from an otherwise settled area of the law, the Board overruled it to the extent that it conflicted with *Essex*.[40]

The Board also took note of criticisms by both management and unions of the inconsistencies in the Board's opinions.[41] According to the Board, its return to *Essex* will have no ill effects on existing no-solicitation rules because any rules written to comport with *T.R.W. Bearings* would also be valid under *Essex*.[42] The Board concluded that its reversal of *T.R.W. Bearings* is simply a return to the principle that no-solicitation rules need only indicate that employees may solicit on their own time to be valid under section 7 of the Act.[43]

One member of the Board dissented from those parts of the majority opinion overruling *T.R.W. Bearings*.[44] According to the dissent, the majority was correct in stating that employees may engage in solicitation during the work day only when they are not supposed to be performing their work duties.[45] The dissent, however, rejected the

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[35] *Id.* at 4, 115 L.R.R.M. at 1010.

[36] *Id.* The Board added that Our Way's no-solicitation rules also complied with those standards laid out in Stoddard-Quirk Mfg., 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962). *Our Way*, 268 N.L.R.B. No. 61 at 4, 115 L.R.R.M. at 1010. In *Stoddard-Quirk*, the Board drew a distinction between oral and written solicitation and employed a balancing test weighing the respective interests of employer and employee. 138 N.L.R.B. at 616-21, 51 L.R.R.M. at 1111-14. As regards written solicitation, the Board held that the employer's interest in cleanliness in work areas outweighed the necessity of employees having access to those areas to distribute written materials. *Id.* at 620, 51 L.R.R.M. at 1113. The Board added, however, that the employer's interest was not substantial enough to outweigh the employee's need to solicit in other employer-owned areas, such as company parking lots, because employee intrusion on employer rights was minimal and the employees' need for access to these areas was great. *Id.* Thus, the Board held that employees may solicit with written materials only in nonworking areas of the premises on nonworking time. *Id.* at 621, 51 L.R.R.M. at 1113.

As regards oral solicitation, the Board in *Stoddard-Quirk* found that because of the absence of the littering problems that accompanied written solicitation, the employer's interest in keeping oral solicitation out of working areas was minimal. *Id.* at 620, 51 L.R.R.M. at 1113. Accordingly, the Board held that the only allowable restriction on oral solicitation was that it be on nonworking time. *Id.* at 621, 51 L.R.R.M. at 1113.

[37] 268 N.L.R.B. No. 61 at 4, 115 L.R.R.M. at 1010.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 5, 115 L.R.R.M. at 1010.

[41] *Id.*

[42] *Id.*

[43] *Id.* Although the *Our Way* Board reversed the administrative law judge's holding that the no-solicitation rules were facially invalid, it agreed with the judge's finding that Our Way's rules had been unlawfully applied in practice. *Id.* at 5-6, 115 L.R.R.M. at 1010.

[44] 268 N.L.R.B. No. 61 at 7, 115 L.R.R.M. at 1012 (Zimmerman, Member, dissenting).

[45] *Id.*

majority's conclusion that Our Way's no-solicitation rules, as published, were valid.[46] Those rules, according to the dissent, were so broad and ambiguous as to mislead employees into concluding that they could not solicit on their own time.[47] Such a conclusion, the dissent stated, unlawfully restricted employees' full exercise of their section 7 rights.[48]

The dissent first focused on the reasoning in *T.R.W. Bearings*, that both "working time" and "working hours" were inherently ambiguous phrases subject to misconstruction by employees.[49] In neither the present case nor in *Essex*, the dissent stated, had the Board offered a convincing explanation of how employees would be able to distinguish between the phrases "working hours" and "working time."[50] Absent such an explanation, the dissenting member concluded that he would adhere to the rule of *T.R.W. Bearings* in order to ensure the protection of employee interests under section 7 of the Act.[51]

The dissent also disagreed with the majority's contention that from 1943 until 1981, the period between *Peyton* and *T.R.W. Bearings*, the Board had held that no-solicitation rules containing the phrase "working time" were presumptively lawful.[52] According to the dissenting member, from at least 1966 through 1974, the Board had held such rules to be presumptively unlawful.[53] To support this contention, the dissent cited *Campbell Soup*,[54] a 1966 decision by the Board. According to the dissent, in *Campbell Soup* the Board had found two challenged no-solicitation rules to be unlawful: one expressed in terms of "working time," the other in terms of "working hours."[55] Thus, the dissent concluded that from 1966, when *Campbell Soup* was rendered, until 1974, when *Essex International* was decided, rules containing both phrases were presumptively unlawful.[56]

The Board's reversal of the principles enunciated in *T.R.W. Bearings* is unfortunate because it fundamentally misconstrues the purpose of section 7 of the Act. The United States Supreme Court has stated that analyses under the Act should balance the competing interests of the employer and employee.[57] The employer has an interest in maintaining discipline on the work premises, and employees have the undisputed right to self-organization.[58] A proper balancing of these interests had been reached in *T.R.W. Bearings*. In that case, the Board held that the ambiguity of the phrases "working time" and "working hours," without more explanation, would render no-solicitation rules containing those phrases presumptively invalid because they were likely to be misconstrued by employees, to the employees' disadvantage.[59] The Board did not abandon the interests of

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[46] *Id.*

[47] *Id.* at 7-8, 115 L.R.R.M. at 1012 (Zimmerman, Member, dissenting).

[48] *Id.*

[49] *Id.* at 11, 115 L.R.R.M. at 1013, (Zimmerman, Member, dissenting).

[50] *Id.* at 11-12, 115 L.R.R.M. at 1013 (Zimmerman, Member, dissenting).

[51] *Id.* at 12, 115 L.R.R.M. at 1013 (Zimmerman, Member, dissenting).

[52] *Id.* at 8, 115 L.R.R.M. at 1012 (Zimmerman, Member, dissenting).

[53] *Id.* at 9, 115 L.R.R.M. at 1013 (Zimmerman, Member, dissenting). The dissenting member cited and analyzed Peyton Packing Co., 49 N.L.R.B. 828, 12 L.R.R.M. 183 (1943), Campbell Soup Co., 159 N.L.R.B. 74, 62 L.R.R.M. 1352 (1966), and Avon Convalescent Center, 200 N.L.R.B. 702, 82 L.R.R.M. 1233 (1972) to support his contention. 268 N.L.R.B. at 8-11, 115 L.R.R.M. at 1012-13 (Zimmerman, Member, dissenting).

[54] 159 N.L.R.B. 74, 62 L.R.R.M. 1352 (1966).

[55] 268 N.L.R.B. No. 61 at 10, 115 L.R.R.M. at 1013 (Zimmerman, Member, dissenting).

[56] *Id.*

[57] Republic Aviation Corp., 324 U.S. 793, 797-98, 16 L.R.R.M. 620, 622 (1944).

[58] *Id.*

[59] 257 N.L.R.B. 442, 443, 107 L.R.R.M. 1481, 1482 (1981).

the employers in *T.R.W. Bearings*, however, because it allowed no-solicitation rules to include the phrases as long as they were accompanied by an explanation that non-working portions of the day were not included within the prohibitions.[60] Thus, both the employer's interest in self-discipline on the work premises and the interest of employees in self-organization were protected.

In stark contrast to *T.R.W. Bearings*, the Board's decision in *Our Way, Inc.* does not appropriately balance the interests of employers and employees. The use of the phrase "working time" by employers is now presumptively lawful, even without an accompanying explanation.[61] This retreat by the Board will allow employers to draft ambiguous rules that do not clearly indicate when an employee has the right to solicit or be solicited. As a result some employees will erroneously conclude that they cannot solicit during certain periods of the day when, in fact, they are guaranteed that right under the Act. Thus, the Board's decision in *Our Way, Inc.* contravenes the underlying purpose of section 7 of the Act, and miscontrues the proper balance of the employer's interest in discipline on the work premises and the right of employees to self-organize.[62]

The Board in *Our Way, Inc.* has thus reversed its position concerning the presumptions which are to be applied to no-solicitation rules promulgated by employers. In the future, a prohibition against solicitation during "working time" will no longer create a presumption of invalidity. Rather, such rules will be presumed valid.[63] Rules prohibiting solicitation during "working hours" will continue to be presumed invalid.[64] The Board's decision to overrule *T.R.W. Bearings* defeats the principle underlying the Act, that employers' and employees' interests be balanced.

### 4. **The Necessity of Showing Coercive Effects of an Employer's Conduct Before Corporate-Wide Access Can Be Ordered*: Florida Steel Corp. v. NLRB[1]

Section 10(c) of the National Labor Relations Act (the Act) [2] empowers the National Labor Relations Board (Board) to remedy unfair labor practices by taking "such affirmative action . . . as will effectuate the policies of [the] Act."[3] Board remedies ordinarily consist of orders to cease and desist from the proscribed conduct or to compensate the aggrieved party for losses incurred as a result of the unfair labor practice.[4] In some cases, such as where the unfair labor practice is committed by a persistent violator, the Board may conclude that an extraordinary remedy is necessary to correct the violation.[5] Because

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[60] *Id.*

[61] 268 N.L.R.B. No. 61 at 5, 115 L.R.R.M. at 1010.

[62] *See* Republic Aviation Corp., 324 U.S. 793, 797-98, 16 L.R.R.M. 620, 622 (1944).

[63] Our Way, Inc., 268 N.L.R.B. No. 61 at 5, 115 L.R.R.M. 1009, 1010 (1983).

[64] *Id.* at 3-4, 115 L.R.R.M. at 1009-10.

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* By Scott A. Faust, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 713 F.2d 823, 113 L.R.R.M. 3625 (D.C. Cir. 1983).

[2] 29 U.S.C. § 160(c) (1982).

[3] *Id.*

[4] *See* United Steelworkers of America v. NLRB, 646 F.2d 616, 618; 106 L.R.R.M. 2573, 2574 (D.C. Cir. 1981).

[5] *Id.* at 630, 106 L.R.R.M. at 2583. For cases in which courts and the Board have expanded remedial measures beyond the actual locations at which unfair labor practices were found, see J.P. Stevens & Co. v. NLRB, 623 F.2d 322, 327, 104 L.R.R.M. 2573, 2577 (4th Cir. 1980), *cert. denied*, 449

the Board's powers are remedial and not punitive, however, its orders must be designed to remedy the effects of the violation at hand.[6] The Board may not justify an order solely on the ground that it will deter future violations of the Act or punish past unrelated actions.[7]

One type of extraordinary remedy which the Board may impose is an order requiring an employer to afford a union access to its work sites.[8] The most common form of access granted to a union is a grant of access to bulletin boards at the plant.[9] Another form would be a grant of access to the plant itself.[10] While the Board seems to be increasingly willing to order access to an employer's work sites as a remedial measure, the development of this remedy has not been marked by any consistent standard or theory.[11]

In *United Steelworkers of America v. NLRB*,[12] the Circuit Court of Appeals for the District of Columbia held that the Board had broad authority to order corporate-wide access as a remedial measure.[13] The court acknowledged that the imposition of remedies

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U.S. 1077 (1981); J.P. Stevens & Co. v. NLRB, 612 F.2d 881, 882, 103 L.R.R.M. 2221, 2222 (4th Cir. 1980), *cert. denied*, 449 U.S. 918 (1980); Gerry's Cash Markets, Inc. v. NLRB, 602 F.2d 1021, 1025, 101 L.R.R.M. 3116, 3119 (1st Cir. 1979); NLRB v. Jack La Lanne Management Corp., 539 F.2d 292, 295, 92 L.R.R.M. 3601, 3603 (2d Cir. 1976); J.P. Stevens & Co. v. NLRB, 406 F.2d 1017, 1021-22, 70 L.R.R.M. 2104, 2107 (4th Cir. 1968); J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 304, 65 L.R.R.M. 2829, 2835 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 (1967); Winn-Dixie Stores, Inc., 236 N.L.R.B. 1547, 1551, 98 L.R.R.M. 1437, 1438 (1978); Alberts, Inc., 213 N.L.R.B. 686, 698-99, 87 L.R.R.M. 1682, 1684 (1974), *enforced*, NLRB v. Alberts, Inc., 543 F.2d 417 (D.C. Cir. 1976).

[6] *See* Republic Steel Corp. v. NLRB, 311 U.S. 7, 11-12, 7 L.R.R.M. 287, 291 (1940); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36, 3 L.R.R.M. 646, 681 (1938); Decaturville Sportswear Co. v. NLRB, 406 F.2d 886, 889, 70 L.R.R.M. 2472, 2474 (6th Cir. 1969).

[7] *See* Bell & Howell Co. v. NLRB, 598 F.2d 136, 147 n.36, 100 L.R.R.M. 2192, 2198 n.36 (D.C. Cir. 1979), *cert. denied*, 442 U.S. 942 (1979).

[8] *See* United Steelworkers of America v. NLRB, 646 F.2d 616, 631, 106 L.R.R.M. 2573, 2583 (D.C. Cir. 1981).

[9] *See* Koval Press, Inc., 241 N.L.R.B. 1261, 1265, 101 L.R.R.M. 1086, 1087 (1979), *enforced*, NLRB v. Koval Press, Inc., 622 F.2d 579 (3d Cir. 1980). Access to bulletin boards is perhaps the least intrusive form of access to company property, yet such access provides the union with an important means by which to communicate with employees. *United Steelworkers*, 646 F.2d at 631-32, 106 L.R.R.M. at 2583. That communication is often essential to offset effects caused by the unlawful conduct of an employer. *See, e.g.*, John Singer, Inc., 197 N.L.R.B. 88, 90, 80 L.R.R.M. 1340, 1341 (1972).

[10] *See, e.g.*, Decaturville Sportswear Co. v. NLRB, 406 F.2d 886, 889, 70 L.R.R.M. 2472, 2472 (6th Cir. 1969). "As with access to bulletin boards, the general theory behind the use of this remedial tool is that greater communication between the union and employees is needed to dissipate the effects of fear and oppression that have been created by serious or repeated employer unfair labor practices." *United Steelworkers*, 646 F.2d at 633, 106 L.R.R.M. 2573, 2585.

[11] *United Steelworkers*, 646 F.2d at 631, 106 L.R.R.M. 2573, at 2584.

[12] 646 F.2d 616, 106 L.R.R.M. 2573 (D.C. Cir. 1981).

[13] *Id.* at 638, 106 L.R.R.M. at 2591. The court stated that such a remedial order did not conflict with the well-established rule of NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 L.R.R.M. 2001, 2007 (1956), that an employer may deny a union access to company property during an organizing campaign, unless the union meets a heavy burden of showing that no other reasonable means of communicating its organizational message to the employees exist. *United Steelworkers*, 646 F.2d at 637, 106 L.R.R.M. at 2589. The court in *United Steelworkers* stated that the principles of *Babcock*, which protect the employer's private property rights, did not apply to remedial access orders because access as a remedial measure may be necessary to offset coercive effects caused by an employer's unlawful conduct. *Id.* at 638, 106 L.R.R.M. at 2590. The employer should not be allowed to benefit from his unlawful conduct by invoking the talisman of private property rights. *Id.* at 639, 106 L.R.R.M. at 2590. If, however, such coercive effects do not exist, the above reasoning fails, and the *Babcock* rule applies. *Id.*

is a matter of special administrative competence and that the Board's remedies must stand unless the order is shown to be a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.[14] The court stated that when determining the effects of the current violation to be remedied, the Board may consider the violator's history of recalcitrance.[15] In the court's view, an extensive history of unlawful conduct alone, however, would not justify extraordinary relief.[16] The *United Steelworkers* court found that history deserves consideration only insofar as it exacerbates the effects of the violation at hand.[17] Unless such effects exist and extraordinary relief is necessary to cure them, the Board's extraordinary order will be punitive, not remedial, and therefore not enforceable under the policies of the Act.[18] As a result, under the rule of *United Steelworkers*, before the Board may impose an access remedy, it must cite evidence that the violation at issue produced coercive effects at the plant to which access is ordered, and that access is necessary, not merely useful, to undo these effects.[19]

During the *Survey* year, the United States Court of Appeals for the District of Columbia re-emphasized its requirement that the Board substantiate decisions to grant an extraordinary access remedy. In *Florida Steel Corp. v. NLRB*,[20] the court applied the principles of *United Steelworkers*[21] and, in so doing, clarified the burden which the Board must bear in order to justify extraordinary remedies. The court elaborated on the factors that the Board should consider in its determination of whether to grant an extraordinary remedy. Those factors, as originally set forth in *United Steelworkers*, are: 1) the seriousness of the violation at issue; 2) the knowledge of the violation at other plants; 3) the distance between plants; 4) the existence of organizing activity at other plants; and 5) the effect of the passage of time between violations.[22] The court also stated that an employer's extensive history of unlawful conduct could not, by itself, justify extraordinary relief.[23] After *Florida Steel*, the Board will have a clearer idea of what factors to consider in determining the necessity of granting extraordinary relief, and it will have to make certain that specific coercive effects arising from an unfair labor practice exist before granting corporate-wide relief.

The petitioner in *Florida Steel*, Florida Steel Corp. (FSC), by its own admission, is "an enterprise waging a tough, prolonged campaign" against the United Steelworkers Union.[24] The union has conducted organizational activity at only four of FSC's twenty-two locations.[25] At each location, the company's campaign against the union has included the commission of unfair labor practices.[26] In seventeen separate cases, the Board has found

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[14] *United Steelworkers*, 646 F.2d at 629, 106 L.R.R.M. at 2583 (citing Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540, 12 L.R.R.M. 739, 744 (1943)).

[15] *United Steelworkers*, 646 F.2d at 630, 106 L.R.R.M. at 2584.

[16] *Id.* at 639 n.45, 106 L.R.R.M. at 2591 n.45.

[17] *Id.*

[18] *Id.* at 638, 106 L.R.R.M. at 2590.

[19] *Id.*

[20] 713 F.2d 823, 113 L.R.R.M. 3625 (D.C. Cir. 1983).

[21] 646 F.2d 616, 106 L.R.R.M. 2573 (D.C. Cir. 1981). *See supra* notes 12-19 and accompanying text.

[22] 713 F.2d at 830, 113 L.R.R.M. at 3630.

[23] *Id.* at 829, 113 L.R.R.M. at 3630.

[24] *United Steelworkers*, 646 F.2d at 621, 106 L.R.R.M. at 2576.

[25] *Id.*

[26] 713 F.2d at 825 n.1, 113 L.R.R.M. at 3627 n.1. The history of FSC-Union relations has not been totally one-sided. *Id.* The Fifth Circuit in a related proceeding found that the Union has waged an aggressive campaign for many years by filing as many charges as possible against FSC. Florida

multiple violations of the Act by FSC.[27]

In 1979, the Board found that FSC had committed unfair labor practices in violation of Sections 8(a)(1) and (5) of the Act[28] by unilaterally changing the pay rates of two employees in the bargaining unit represented by the union at FSC's Indiantown, Florida plant without first bargaining with the union about the issue.[29] The Board neither alleged nor found any anti-union animus.[30] The Board stated, however, that FSC's "pattern of unlawful conduct" had evidenced a "rejection of the principles of collective bargaining," of which its most recent violation was only a continuance.[31] In light of this history, the Board concluded that the usual cease-and-desist and affirmative remedial orders for violations of this type would not adequately remedy the violations in this case.[32] The Board, therefore, provided for the issuance of a corporate-wide cease-and-desist order; corporate-wide posting of a Board notice;[33] the mailing and reading of the notice to all of FSC's employees; and publication of the notice in all appropriate publications.[34] In addition, the Board's order required FSC to afford the union access to any of FSC's plants if, within two years of the order, the Board conducted an election at the plant, or if FSC gave a speech concerning union representation to employees convened for such a purpose.[35]

FSC appealed the Board's order to the Circuit Court of Appeals for the District of Columbia.[36] The court remanded to the Board for further findings.[37] On remand, the Board amended its order to require that FSC afford the union access only to FSC's two other Florida plants at which the union had begun organizing activity, Tampa and Jacksonville.[38] FSC again brought an appeal, seeking review of the Board's order to provide corporate-wide notification and access to its Tampa and Jacksonville plants.[39] The Board filed a cross-application for enforcement of its order.[40]

The issue before the court on this second appeal was whether the Board had made findings sufficient to support its conclusion that corporate-wide remedies were necessary to offset coercive effects caused by FSC's unlawful conduct.[41] The court found that the Board had failed to justify its imposition of extraordinary remedies.[42] It refused to

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Steel Corp. v. NLRB, 587 F.2d 735, 743, 100 L.R.R.M. 2451, 2455 (5th Cir. 1979). The court characterized this process as a part of the union's strategy to build up a long history of antiunion activity on the part of FSC in order to discredit it before the Board. *Id.* Dozens of charges have been filed by the union and many of them, but not all, have been dismissed. *Id.*

[27] *See United Steelworkers*, 646 F.2d at 621 n.9, 106 L.R.R.M. at 2576 n.9, for a thorough list of the numerous cases in which these parties have met.

[28] 29 U.S.C. §§ 158 (a)(1), (5) (1982).

[29] 244 N.L.R.B. 395, 102 L.R.R.M. 1181 (1979).

[30] 713 F.2d at 824, 113 L.R.R.M. at 3627.

[31] *Id.*

[32] 262 N.L.R.B. 1460, 1460, 106 L.R.R.M. 2573, 2575 (1982).

[33] The text of the notice is appended to the Board's opinion. *Id.* at 1466, 106 L.R.R.M. at 2576.

[34] *Id.* at 1460, 106 L.R.R.M. at 2576.

[35] *Id.*

[36] United Steelworkers of America v. NLRB, 646 F.2d 616, 106 L.R.R.M. 2573 (D.C. Cir. 1981).

[37] *Id.* at 642, 106 L.R.R.M. at 2593. The court desired findings responsive to the five areas of inquiry which it had set forth in *United Steelworkers*. *See supra* note 22 and accompanying text.

[38] 262 N.L.R.B. at 1465-66, 106 L.R.R.M. at 2576.

[39] 713 F.2d at 824, 113 L.R.R.M. at 3628.

[40] *Id.*

[41] *Id.* at 828-29, 113 L.R.R.M. at 3629.

[42] *Id.* at 830, 113 L.R.R.M. at 3630.

enforce the notice and access provisions of the Board's order because the Board presented no evidence of coercive effects, choosing instead to rely on conclusory statements and assumptions, and on an "invocation of history with no link to any effect reasonably expected from the violation in the case."[43] The court thus enforced the "cease and desist" and the "make whole" provisions of the Board's order and denied enforcement of the corporate-wide notification and access provisions.[44]

The *Florida Steel* court reached its conclusion by analyzing the Board's opinion in light of the five factors set forth in *United Steelworkers of America v. NLRB*.[45] The court found that although the Board referred to each of the five factors set forth in *United Steelworkers*, it failed to point to any evidence in the record of the violation at issue that would support its extraordinary remedial order.[46] According to the court, the Board relied solely on historical events totally unrelated to the violation at issue.[47] In the court's view, the Board improperly relied on a recitation of prior history instead of providing the detailed factual analysis of the instant violations which the court had requested on remand.[48]

In rejecting the Board's total reliance on history to support the extraordinary order, the court insisted that the Board impose a remedy proportionate to the violation at hand and its effects.[49] The court acknowledged that effects of the present unfair labor practice, if established by evidence or record, may be evaluated in light of the employer's history, but absent any demonstration of the effects of the violation, mere historical recitations are not sufficient.[50] In the court's view, history is not a substitute for evidence of effects, and it cannot exacerbate effects which have not been shown to exist.[51]

The *Florida Steel* court concluded that the record before it established that the Board's order contained punitive measures designed to deter future violations of the Act.[52] As such, the order could not be said to effectuate the remedial policies of the Act.[53] The court, therefore, refused to enforce the corporate-wide notice and access provisions of the Board's order.[54]

Analysis of the relevant case law reveals that the court's refusal to enforce the Board's order is well founded. The court in *United Steelworkers*[55] noted that the Board's imposition of remedies is a matter of special administrative competence, subject to very limited judicial review.[56] Further, the United States Supreme Court has recognized that the administrative expertise of the Board in fashioning remedies derives from its unique understanding of the complex relationship between labor and management and the

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[43] *Id.* at 829, 113 L.R.R.M. at 3629.

[44] *Id.* at 836, 113 L.R.R.M. at 3636.

[45] *See supra* note 22 and accompanying text.

[46] 713 F.2d at 830, 113 L.R.R.M. at 3629.

[47] *Id.* at 831-33, 113 L.R.R.M. at 3630-35.

[48] *See supra* note 37.

[49] 713 F.2d at 830, 113 L.R.R.M. at 3629 (quoting Florida Steel Corp. v. NLRB, 648 F.2d 233, 240 n.20, 107 L.R.R.M. at 3048 n.20 (5th Cir. 1981)).

[50] 713 F.2d at 829, 113 L.R.R.M. at 3629.

[51] *Id.*

[52] *Id.* at 835, 113 L.R.R.M. at 3635.

[53] *Id. See supra* notes 6-7 and accompanying text.

[54] *Id.* at 836, 113 L.R.R.M. at 3636.

[55] 646 F.2d 616, 106 L.R.R.M. 2573 (D.C. Cir. 1981).

[56] *Id.* at 629, 106 L.R.R.M. at 2590.

policies incorporated in labor laws.[57] As stated by the Court, the Board's selection of remedies must stand unless the Board's order can be shown to be inconsistent with the policies of the Act.[58]

The Board's authority has certain bounds; its powers are remedial, not punitive.[59] The District of Columbia Circuit has noted, however, that application of this limitation on the Board's power is difficult.[60] This problem of application to specific facts, the court has observed, is most acute in cases in which the offending party has demonstrated an unyielding disregard for the Act by repeatedly committing unfair labor practices and ignoring Board orders to cease and desist from unlawful conduct.[61] The Board's use of broader and more stringent remedies against a persistent violator than those usually invoked against a first offender may appear "punitive" in the context of an individual violation, but may, in certain circumstances, be "remedial," and therefore proper, in the context of the total conduct of a persistent violator.[62] Such circumstances exist where the unlawful conduct at hand creates coercive effects which are exacerbated by a history of recalcitrance.[63]

Consequently, the critical inquiry in a court's review of the propriety of the Board's imposition of an extraordinary remedy is whether the conduct at hand has produced harmful effects which are exacerbated by a history of unlawful conduct.[64] Courts have recognized that the Board possesses unmatched expertise in distilling and identifying the coercive effects of unlawful conduct,[65] and that the Board may rely upon that expertise to presume that certain conduct will produce certain effects.[66] Absent findings of reasonably foreseeable effects, however, the Board's order cannot be justified as a remedial action, and therefore can only be explained as containing punitive measures intended to deter future violations of the Act.[67] A court may not enforce such a punitive order.[68]

The court in *Florida Steel* refused to enforce the Board's order because the Board presented no evidence of coercive effects.[69] The Board's order relied upon several assumptions derived from FSC's history of unlawful conduct.[70] Although the Board may

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[57] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32, 71 L.R.R.M. 2481, 2495 n.32 (1969); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216, 57 L.R.R.M. 2609, 2621 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348-49, 31 L.R.R.M. 2237, 2241 (1953); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 8 L.R.R.M. 439, 455 (1941).

[58] Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540, 12 L.R.R.M. 739, 745 (1943).

[59] *See supra* note 6 and accompanying text.

[60] *United Steelworkers*, 646 F.2d at 630, 106 L.R.R.M. at 2590.

[61] *Id.*

[62] *See* Containair Systems Corp. v. NLRB, 521 F.2d 1166, 1171, 89 L.R.R.M. 2685, 2688 (2d Cir. 1975) ("the Board has a duty . . . to employ broader and more stringent remedies against a recidivist than those usually invoked against a first offender . . . ").

[63] *United Steelworkers*, 646 F.2d at 630, 106 L.R.R.M. at 2590.

[64] *Id.* at 638, 106 L.R.R.M. at 2592.

[65] *See* Cook Paint & Varnish Co. v. NLRB, 648 F.2d 712, 719, 106 L.R.R.M. 3016, 3021 (D.C. Cir. 1981); United Steelworkers of America v. NLRB, 646 F.2d 616, 639, 106 L.R.R.M. 2573, 2592 (D.C. Cir. 1981).

[66] *United Steelworkers*, 646 F.2d at 639, 106 L.R.R.M. at 2592.

[67] *Id.* at 641, 106 L.R.R.M. at 2592.

[68] *Id.* at 630, 106 L.R.R.M. at 2583.

[69] 713 F.2d at 831, 113 L.R.R.M. at 3631.

[70] 262 N.L.R.B. 1460, 1465, 106 L.R.R.M. 2573, 2576 (1982) ("we are drawing inferences which we believe are reasonable in light of [FSC's] propensity to engage in unlawful conduct . . . . ").

rely upon its expertise to formulate such assumptions,[71] and courts should defer to the Board's expertise, such assumptions must be supported by evidence in the record.[72] The Board based its assumptions upon conclusory statements which the court found were not supported by any evidence in the record.[73] The court in *Florida Steel* was therefore correct in rejecting the Board's justification for its imposition of an extraordinary remedy.

After *Florida Steel*, a union seeking any form of access to an employer's work sites must present evidence that the violation at issue produced harmful effects at the sites to which access is sought and that access is necessary to cure those effects. Courts have recognized the difficulty of showing coercive effects,[74] but *Florida Steel* sets forth and applies guidelines to assist the charging party. In order to establish the existence of these effects, the union should therefore present evidence responsive to the five areas of inquiry which the court has set forth.[75]

The decision in *Florida Steel* re-affirmed that an employer's extensive history of unlawful conduct cannot by itself justify an extraordinary remedial order. In the case of a persistent violator, a history of unlawful conduct may be used to enhance the effects, but the *Florida Steel* court has clearly established that history is no substitute for evidence. A showing of coercive effects resulting from an employer's unlawful conduct thus will be absolutely essential to justify an access remedy.

### C. **Determining Bargaining Units in Health Care Settings:* Watonwan Memorial Hospital, Inc. v. NLRB[1]

The National Labor Relations Board (Board) has the task of determining which group of jobs will serve as the election constituency and bargaining unit for collective bargaining purposes.[2] As a rule, the Board is given wide discretion in making its determinations.[3] The National Labor Relations Act (the Act) has traditionally been interpreted to require only that the Board delineate an appropriate unit, not the most appropriate unit.[4]

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[71] *United Steelworkers*, 646 F.2d at 639, 106 L.R.R.M. at 2592.

[72] *Id.*

[73] For example, in the Board's discussion of the knowledge of the present violation at other FSC plants, it concentrated on FSC's conduct generally. The Board said nothing specifically directed to knowledge of the conduct at issue and cited no evidence that employees learned of *this* violation. 262 N.L.R.B. 1460, 1462-63, 106 L.R.R.M. 2573, 2575 (1982).

[74] *See United Steelworkers*, 646 F.2d at 639, 106 L.R.R.M. at 2592.

[75] *See supra* note 37.

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* By Kimberly M. Collins, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 711 F.2d 848, 113 L.R.R.M. 3481 (8th Cir. 1983).

[2] R. GORMAN, BASIC TEXT ON LABOR LAW 66 (1982) [hereinafter cited as GORMAN].

[3] GORMAN, *supra* note 2, at 67. Section 159(b) of the National Labor Relations Act provides few restrictions on the Board's exercise of this power. The statute provides: "The Board shall determine in each case whether in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b) (1982).

[4] GORMAN, *supra* note 2, at 66. *See Watonwan*, 711 F.2d at 848, 113 L.R.R.M. at 3482 (longstanding principle that the Board need only certify "*an* appropriate" bargaining unit, rather than "*the* most appropriate" one) (emphasis in original). Section 157(a) of the Act provides in pertinent part: "Representatives designated for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive bargaining representatives of all employees in such unit for the purposes of collective bargaining. . . ." 29 U.S.C. § 159(a) (1982). Watonwan Memorial Hospital did not argue that the traditional interpretation was incorrect generally but only as applied to health care units. 711 F.2d at 849, 113 L.R.R.M. at 3482.

In making its determinations, the Board's primary test for appropriateness of a bargaining unit is the "community of interests" test.[5] Under this test, the Board considers such factors as wages and working conditions, required skills and duties, and employee interaction and supervision.[6] As a general rule, the bargaining unit should exclude employees having a substantial conflict of economic interest.[7] In examining the Board's decision, courts have overturned the Board's determination of an appropriate bargaining unit only if it is arbitrary and capricious.[8]

Prior to 1974, nonprofit health care institutions were exempted from coverage under the Act.[9] The 1974 Amendments to the Act, however, brought these institutions and their employees under the jurisdiction of the Act.[10] Congress, while desiring to give all health care employees the benefits and protections provided by the Act, also recognized the special needs of the health care industry.[11] In the legislative history of the 1974 Amendments, Congress admonished the Board to prevent "the proliferation of bargaining units in the health care industry."[12] This admonition was included because Congress believed that a proliferation of bargaining units increased the likelihood of strikes that would possibly disrupt patient care.[13]

In recent years, health care employers have challenged the Board's bargaining unit determinations, arguing that the legislative history of the amendments requires the Board to find the largest appropriate unit.[14] The circuit courts have split in their responses to such challenges. Several of the circuits, such as the Second, Third, Sixth, and Seventh Circuits have instructed the Board to balance the community of interests factors with the congressional mandate and the public interest to avoid a proliferation of bargaining units.[15] The weight to be given to the proliferation factor by the Board in reaching its

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[5] GORMAN, *supra* note 2, at 67. *See also infra* note 19 and accompanying text.

[6] *Id.* at 69.

[7] *Id.*

[8] *See* May Dep't Stores Co. v. NLRB, 326 U.S. 376, 380, 17 L.R.R.M. 643, 647 (1945) (held judicial review is to "guarantee against arbitrary action by the Board," not to review and weigh the evidence presented to the Board). *See also* Presbyterian/St. Luke's Medical Center v. NLRB, 653 F.2d 450, 454, 107 L.R.R.M. 2955, 2956 (10th Cir. 1981).

[9] The 1974 Amendments to the Act excluded nonprofit hospitals from coverage under the Act. S. REP. NO. 93-766, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3948.

[10] GORMAN, *supra* note 2, at 25. Section 152(2) was amended in 1974 to eliminate the statutory exclusion for nonprofit medical institutions. *Id. See* 29 U.S.C. § 152 (1982).

[11] S. REP. NO. 93-766, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3948.

[12] *Id.* at 3950.

[13] *Id.* at 3948. *See also* NLRB v. HMO Int'l/Cal. Medical Group Health Plan, 678 F.2d 806, 808, 110 L.R.R.M. 2745, 2746 (9th Cir. 1982).

[14] *See, e.g.*, cases cited *infra* notes 15-18.

[15] See Husband, *Determining Appropriate Bargaining Units in Health Care Institutions — The Gap Widens*, 32 LAB. L.J. 780, 782 (1981) [hereinafter cited as Husband]. *See also* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1470-71, 113 L.R.R.M. 2336, 2342 (7th Cir. 1983) (court will uphold the Board's application of community of interests test if the Board's result does not lead to proliferation); NLRB v. Mercy Hospital Ass'n, 606 F.2d 22, 27, 102 L.R.R.M. 2259, 2262 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (sole use of community of interests test insufficient to meet congressional mandate); NLRB v. Sweetwater Hospital Ass'n, 604 F.2d 454, 458, 102 L.R.R.M. 2246, 2248 (6th Cir. 1979) (Board justified in weighing policy against disrupting existing bargaining relationships more heavily than policy against undue proliferation of bargaining units where Board's decision has not resulted in proliferation); St. Vincent's Hospital v. NLRB, 567 F.2d 588, 592, 97 L.R.R.M. 2119, 2122 (3d Cir. 1977) (legislative history of the amendments directed the Board to apply a non-traditional standard).

bargaining unit determination, however, was left unclear by these courts.[16] In contrast, the Ninth and Tenth Circuits have directed the Board to substitute a "disparity of interests" test for the community of interests test when determining bargaining units in the health care industry.[17] The disparity of interests test focuses on the conflicting interests of different employee groups that would prohibit or inhibit the representation of employee interests.[18] This test requires the Board to start with the largest possible unit and then eliminate only those groups of employees whose presence in the bargaining unit would be detrimental to fair representation of employee interests. Consequently, under the disparity of interests test, the Board would choose the largest unit that could be deemed appropriate.[19]

During the *Survey* year, in *Watonwan Memorial Hospital, Inc. v. NLRB*,[20] the United States Court of Appeals for the Eighth Circuit addressed the issue of what standard must be applied in health care bargaining unit determinations. In its opinion, the court considered Watonwan Hospital's (Hospital) argument that the concern of Congress regarding the proliferation of bargaining units in hospitals required the Board to apply a test other than its traditional community of interests test. The *Watonwan* court also reviewed the rulings of other circuit courts, and determined that the community of interests standard was appropriate in health care situations where the Board also demonstrated some consideration of the proliferation issue.[21]

The controversy in *Watonwan* arose when the Board certified the Minnesota Licensed Practical Nurses Association and Technical Employees Association of Minnesota (Union) as the exclusive bargaining representative of a bargaining unit consisting of all technical

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[16] In general, the courts have stated only that the proliferation factor must be considered by the Board. *See supra* note 15. *Cf.* St. Vincent's Hospital v. NLRB, 567 F.2d 588, 592, 97 L.R.R.M. 2119, 2122 (7th Cir. 1977) (proliferation issue such that will require Board to apply a non-traditional standard).

[17] NLRB v. HMO Int'l/Cal. Medical Group Health Plan, 678 F.2d 806, 808, 110 L.R.R.M. 2745, 2746 (9th Cir. 1982); Presbyterian/St. Luke's Medical Ctr. v. NLRB, 653 F.2d 450, 457, 107 L.R.R.M. 2953, 2957 (10th Cir. 1981).

[18] NLRB v. HMO Int'l/Cal. Medical Group Health Plan, 678 F.2d 806, 808, 110 L.R.R.M. 2745, 2746 (7th Cir. 1977).

[19] *Watonwan*, 711 F.2d at 848, 113 L.R.R.M. at 3482. In *St. Francis Hospital* the Board rejected its earlier decisions on health care bargaining units and adopted a refined version of the disparity of interests test. St. Francis Hospital, 271 N.L.R.B. No. 160, 1, 13-20, 116 L.R.R.M. 1465, 1470-71 (1984). Under the Board's new disparity of interests test, the appropriateness of the health care unit "is judged in terms of normal criteria but sharper than usual differences (or 'disparities') between the wages, hours, and working conditions, etc. of the requested employees and those in an overall professional or nonprofessional unit must be established to grant the unit." *Id.* at 13-16, 116 L.R.R.M. at 1470. In adopting this test the Board recognized and attempted to accommodate the Second and Eighth Circuits' criticisms of the Ninth Circuit's "rigid" disparity of interests standard. *Id.* at 13-20, 116 L.R.R.M. at 1470-71.

For decisions in which the Board applied a community of interests test *see, e.g.*, Extendicare of West Virginia, Inc., 203 N.L.R.B. 1232, 83 L.R.R.M. 1243 (1973) (LPN's — licensed practical nurses — have separate and distinct community of interests such that separate LPN unit is appropriate); Woodland Park Hosp., 205 N.L.R.B. 888, 84 L.R.R.M. 1075 (1973) (x-ray technicians do not have separate community of interests from that of other technical employees so that separate unit is not appropriate).

[20] 711 F.2d 848, 113 L.R.R.M. 3481 (8th Cir. 1983).

[21] 711 F.2d at 848, 113 L.R.R.M. at 3482. The court held that reference to its previous opinions in which it found that creation of a technical employees unit generally does not lead to undue proliferation was adequate consideration of the 1974 congressional doctrine. *Id.*

employees at Watonwan Hospital.[22] Thereafter, the Hospital refused to bargain with the Union, claiming the bargaining unit was not an appropriate one.[23] Following a hearing, the Board found that by refusing to bargain with the Union, the Hospital had violated section 8(a)(5) and (1) of the Act.[24] Consequently, the Board ordered the Hospital to bargain with the Union.[25]

The Hospital petitioned the United States Court of Appeals for the Eighth Circuit for review of the Board's decision.[26] The Hospital contended that in making the bargaining unit determination, the Board failed to comply with the non-proliferation requirements of the 1974 Amendments to the Act.[27] According to the Hospital's interpretation of the statute, the only appropriate unit was one which included all nonsupervisory, nonprofessional employees.[28] In response, the Board filed a cross-application for enforcement of its order.[29]

The Eighth Circuit affirmed the Board's finding that the Hospital had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and enforced the Board's order.[30] In its opinion, the court first rejected the Hospital's argument that the 1974 Amendments to the Act precluded the Board from applying its traditional "community of interests" test to resolve bargaining unit questions in health care settings.[31] The court recognized that the Ninth and Tenth Circuits had accepted this argument and required a "disparity of interests" test.[32] Nevertheless, the *Watonwan* court declined to adopt this test, noting that the test always requires the Board to select the largest

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[22] *Id.* The unit included licensed practical nurses, surgical technicians, and x-ray and laboratory technicians. *Id.*

[23] *Id.*

[24] *Id.* Section 8(a) of the Act provides, in pertinent part: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a) (1982).

[25] 711 F.2d at 848, 113 L.R.R.M. at 3481. The Board also ordered Watonwan to otherwise desist from violating the employees' section 7 rights and to "post appropriate notices." *Id.*

[26] *Id.* The Board's order was reported as 263 N.L.R.B. No. 99 (omitted from publication), 111 L.R.R.M. 1191 (1982).

[27] 711 F.2d at 849, 113 L.R.R.M. at 3482. In 1974 Congress amended the Act to extend its coverage to nonprofit hospitals, which had previously been exempted. At the time of the amendment, however, Congress expressed its concern that patient care not be disrupted by a proliferation of bargaining units. The House and Senate reports state:

> Due consideration shall be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection the committee notes with approval the recent Board decisions in *Four Seasons Nursing Center* . . . and *Woodland Park Hospital* . . . as well as the trend toward broader units enunciated in *Extendicare of West Virginia*. . . .

*Id.* (citations omitted). *See* S. REP. No. 93-766, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3950.

[28] 711 F.2d at 849, 113 L.R.R.M. at 3482. Such a unit would have consisted of technical, service, maintenance and office clerical employees. The Hospital conceded that if the Board had not erred it had violated section 8(a)(5) and (1) of the Act. *Id.*

[29] *Id.* at 848, 113 L.R.R.M. at 3481.

[30] *Id.* at 849, 113 L.R.R.M. at 3483.

[31] *Id.* at 849, 113 L.R.R.M. at 3482.

[32] *Id. See* NLRB v. HMO Int'l/Cal. Medical Group Health Plan, 678 F.2d 806, 110 L.R.R.M. 2745 (9th Cir. 1982); Presbytarian/St. Luke's Medical Center v. NLRB, 653 F.2d 450, 107 L.R.R.M. 2953 (10th Cir. 1981).

appropriate unit.[33] The disparity of interests test, the court determined, was not required by either the language of the 1974 Amendments or their legislative history.[34] The court stated that it would not eliminate, without clear congressional directive, the long standing principle that the Board need only certify an appropriate bargaining unit, not the largest or most appropriate unit.[35]

The court did observe, however, that the Board must, when applying the community of interests test, consider the congressional directive to avoid the proliferation of collective bargaining units in health care institutions.[36] The court determined that the Board had given appropriate consideration to the non-proliferation requirement. Consequently, the court concluded that, in this case, the Board had applied its community of interests test without error.[37]

The court found substantial evidence in the record to support the Board's finding that the Watonwan technical employees share a close and substantial community of interests which is separate and distinct from that of other hospital employees.[38] In addition, the court noted that the Board referred to prior opinions in which it articulated reasons for concluding that creation of a technical employees unit generally does not cause undue proliferation of bargaining units. Such references demonstrated to the court that the Board had adequately considered the directive concerning unit proliferation.[39] The court determined that the record in *Watonwan* contained no evidence that the Board's certification of the union would contribute to an undue proliferation of bargaining units.[40] Finally, the court stated that, although Watonwan Hospital employed few nonsupervisory employees, the separate unit for technical employees was appropriate.[41] The court concluded, therefore, that the Hospital committed an unfair labor practice by refusing to bargain with the Union.[42]

The Eighth Circuit's decision emphasizes the division of the circuits as to the weight that should be given the congressional mandate to avoid proliferation of bargaining units in the health care industry. The previous decisions by the Second, Third, Sixth, and Seventh Circuits instructed the Board to consider the congressional mandate. These decisions did not clarify, however, how this approach was to be balanced with the traditional community of interests analysis.[43] The *Watonwan* court made clear that although the Board must consider the congressional directive to avoid unit proliferation, the Board was not required to abandon its traditional community of interests test.

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[33] 711 F.2d at 849, 113 L.R.R.M. at 3482.

[34] *Id.*

[35] *Id. See also* GORMAN, *supra* note 2, at 66.

[36] 711 F.2d at 848, 113 L.R.R.M. at 3482.

[37] *Id.*

[38] *Id.* The court considered the training required for technical employees, as well as the fact that the salary scales for technical employees exceeded those for nontechnical and nonprofessional employees. Moreover, the court was mindful that, in contrast to the principal responsibilities of employees excluded from the unit, the job duties of technical employees generally involve direct contact with the patients. *Id.*

[39] 711 F.2d at 848, 113 L.R.R.M. at 3482. The Board cited Barnert Memorial Hosp. Center, 217 N.L.R.B. 795, 89 L.R.R.M. 1083 (1975) and Newington Children's Hosp., 217 N.L.R.B. 793, 89 L.R.R.M. 1108 (1975). *Watonwan*, 711 F.2d at 848, 113 L.R.R.M. at 3482.

[40] 711 F.2d at 849, 113 L.R.R.M. at 3483.

[41] *Id.*

[42] *Id.*

[43] *See supra* notes 15-16 and accompanying text.

Consequently, the Board remains free to select an appropriate bargaining unit, rather than the most appropriate unit.[44]

The *Watonwan* decision contrasts sharply with the decisions of the Ninth and Tenth Circuits.[45] These courts have not only found the traditional community of interests test inappropriate but have also imposed a judicially created test on the Board.[46] These circuit decisions seem inappropriate, however, in light of the discretion historically vested in the Board in making bargaining unit determinations.[47] Section 9(b), which instructs the Board to determine the appropriate unit, was left unaltered by the 1974 Amendments to the Act.[48] Had Congress desired to change the traditional level of discretion given the Board in unit determinations, it could have amended this section of the statute.[49] The discretion given the Board is an important aspect of national labor policy. Under the Act the Board must employ its expertise to certify the unit which will "assure to employees the fullest freedom in exercising rights guaranteed" by the Act.[50] Requiring the application of the disparity of interests test would force the Board to choose the largest appropriate unit.[51] This approach would not always be in the employees' best interest.[52] A large unit can make it difficult for the union to carry out its duty of fair representation, create conflicts within the unit, and reduce the benefits of unionization to those workers outside the majority coalition which dominates the unit.[53] Accordingly, the position adopted by the Ninth and Tenth Circuits diminishes the Board's ability to protect employee rights.

Had Congress intended to alter the Board's role in determining bargaining units, it would have amended the statute to reflect this intent.[54] Congress, however, did not so amend the statute. Instead, Congress limited itself to commentary admonishing the Board to avoid unit proliferation and approving of those Board decisions that favored larger units.[55] Given this limited congressional action, *Watonwan* provides the best approach to the issue.[56] The *Watonwan* court preserved the Board's function and discretionary role in determining bargaining units, while recognizing the important public interest the congressional admonition serves.

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[44] *See supra* notes 30-34 and accompanying text.

[45] *See supra* notes 17-19 and accompanying text.

[46] *Id.*

[47] *See* NLRB v. Res-Care, Inc., 705 F.2d at 1469, 113 L.R.R.M. at 2431.

[48] *Id. See supra* notes 3-4 and accompanying text.

[49] Although a lack of action by Congress alone may not indicate that it consciously chose not to alter the statute's language and the Board's discretion, at least one circuit has found the failure to change section 9(b) significant. *See* NLRB v. Res-Care,, Inc., 705 F.2d at 1469-70, 113 L.R.R.M. at 2341.

[50] 29 U.S.C. § 159(b) (1982).

[51] *Watonwan*, 711 F.2d at 849, 113 L.R.R.M. at 3482. It is possible that the Board will find more than one grouping of employees appropriate. The Board's discretion to choose among those units permits it to certify the unit which best serves the employees' interest. *See* GORMAN, *supra* note 2, at 66-67. The Board recognized the *Watonwan* court's criticism of the Ninth Circuit's disparity of interests test when it adopted a refined version of that test. St. Francis Hospital, 271 N.L.R.B. No. 160, 1, 13-20, 116 L.R.R.M. 1465, 1470 (1984).

[52] NLRB v. Res-Care, Inc., 705 F.2d at 1469, 113 L.R.R.M. at 2341.

[53] *Id.*

[54] *Id.*

[55] *See supra* note 27 and accompanying text.

[56] The Board has subsequently adopted the disparity of interests test but refined it to reflect the concerns of the Second and Eighth Circuits. *See supra* notes 19 and 51.

## II. Unfair Labor Practices

### A. *Employer Unfair Labor Practices*

#### 1. **Ability of Employer to Take Unilateral Action When an Impasse in Negotiations Has Occurred*: Saunders House v. NLRB[1]

The National Labor Relations Act (the Act)[2] imposes a duty on employers to engage in collective bargaining with employees regarding wages, hours, and other terms and conditions of employment.[3] As a general rule, an employer violates the Act if, during negotiations, it changes unilaterally some conditions of employment which are the subject of negotiations.[4] An exception to this rule is that an employer may make unilateral changes in employment conditions when negotiations have reached an impasse, as long as the employer has offered such changes in proposals advanced prior to the impasse.[5]

Neither the National Labor Relations Board (Board) nor the courts, however, have definitively stated what circumstances constitute an impasse, although both the Board and the courts have considered the issue.[6] In *Taft Broadcasting Co.*,[7] the Board suggested five general factors to be considered in determining the existence of an impasse.[8] Later, in *Alsey Refractories Company*,[9] the Board defined "impasse" as a situation in which one party is "warranted in assuming . . . that the [other party] had abandoned any desire for continued negotiations, or that further good-faith bargaining . . . would have been futile."[10] Although they are conceptually clear, these pronouncements have not provided

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* By Carolyn Dailey, Staff Member, Boston College Law Review.

[1] 719 F.2d 683, 114 L.R.R.M. 2977 (3d Cir. 1983).

[2] 29 U.S.C. §§ 151-169 (1982).

[3] 29 U.S.C. § 158(a)(5) (1982), which was section 8(5) of the original National Labor Relations Act, ch. 372, 49 Stat. 449 (1975), provides that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employers, subject to the provisions of section 9(a)." Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1982), added by the Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947), defines collective bargaining as: "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 conditions of employment."

[4] NLRB v. Katz, 369 U.S. 736, 743, 50 L.R.R.M. 2177 (1962).

[5] Huck Manufacturing Co. v. NLRB, 693 F.2d 1176, 1186, 112 L.R.R.M. 2245, 2252 (5th Cir. 1982); Taft Broadcasting Co., 163 N.L.R.B. 475, 478, 64 L.R.R.M. 1386, 1388 (1967) *enforced sub. nom.* AFTRA, Kansas City Local v. NLRB, 395 F.2d 622, 67 L.R.R.M. 3032 (D.C.Cir. 1968). *See generally* R. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining 445 (1976).

[6] For discussion of the problematic development of the definition of an "impasse," see Epstein, *Impasse in Collective Bargaining*, 44 Tex. L. Rev. 769 (1966) [hereinafter cited as Epstein]; Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1 (1977). *See also* Decker, *Pennsylvania's Public Employee Relations Act (Act 195) and Impasse — The Public Employer's Right to Make Unilateral Changes in Employment Conditions*, 86 Dick. L. Rev. 1, 4 (1982).

[7] 163 N.L.R.B. 475, 64 L.R.R.M. 1244 (1967), *enforced sub nom.* AFTRA, Kansas City Local v. NLRB, 395 F.2d 622, 67 L.R.R.M. 3032 (D.C. Cir. 1968).

[8] *Id.* at 478, 64 L.R.R.M. at 1244. The five factors are: the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement and the contemporaneous understanding of the parties as to the state of negotiations. *Id.*

[9] 215 N.L.R.B. 785, 88 L.R.R.M. 1071 (1974).

[10] *Id.* at 787, 88 L.R.R.M. at 1071.

administrative bodies and courts with concrete guidance for their application. For example, courts have debated whether an impasse can exist when there is a deadlock as to only one of several issues.[11] Consequently, the issue of what constitutes an impasse in negotiations continues to be litigated.[12]

During the *Survey* year, the United States Court of Appeals for the Third Circuit in *Saunders House v. NLRB*,[13] focused on the definition of impasse. Ruling on which factors should be considered to determine whether the circumstances in *Saunders House* constituted an "impasse," the court highlighted the importance of factors developed by the Board as aids in the judicial determination of whether an impasse exists.[14] Ultimately, the court held that in determining whether further attempts at negotiations would be futile, and whether any significant concessions are being made by either side, a court must take into account all negotiation discussions both on-the-record and off-the-record.[15]

In *Saunders House*, the employer, a nonprofit Pennsylvania health care corporation, and the union representing Saunders House employees conducted extensive negotiations on an initial collective bargaining contract.[16] In early September, 1980, the union first proposed a $40 per week wage increase with a cost-of-living adjustment, a full union security provision,[17] and a check-off[18] for union dues and initiation fees.[19] The employer's initial contract proposal contained neither a union security clause, nor a check-off provision, nor a wage provision.[20] Although Saunders House promised that wage proposals would be forthcoming, at the next meeting it asked to defer discussion of the issue.[21] The parties did not discuss wages at the following four meetings.[22]

Finally in late November, 1980, the union representative said that in order to further the negotiations, the employer had to take some action regarding wages, union security and a check-off provision.[23] The employer's representative promised to deliver a wage proposal at the next session, but said that the employer remained opposed to union security and a check-off provision.[24] The union responded that it could not proceed with further negotiations until the employer made concessions on all three issues.[25]

In early December, 1980, the employer's representative presented the employer's

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[11] Latrobe Street Co. v. NLRB, 630 F.2d 171, 179, 105 L.R.R.M. 2393, 2398 (3d Cir. 1980), *cert. denied*, 454 U.S. 821, 108 L.R.R.M. 2558 (1981).

[12] *See, e.g.*, Supak & Sons v. NLRB, 470 F.2d 998 (6th Cir. 1972); Wantagh Auto Sales, Inc., 177 N.L.R.B. 153, 72 L.R.R.M. 1541 (1969).

[13] 719 F.2d 683, 114 L.R.R.M. 2977 (3d Cir. 1983).

[14] *Id.* at 688, 114 L.R.R.M. at 2981.

[15] *Id.*

[16] *Id.* at 684, 114 L.R.R.M. at 2977.

[17] "Union security provisions" are agreements in a collective employment agreement compelling union membership. Such provisions are subject to limitation by the National Labor Relations Act and state law.

[18] "Check-off" refers to a provision in a collective employment agreement requiring the employer to deduct certain sums periodically from the worker's pay and remit the money to the union. In *Saunders* the check-off sum would equal union dues and initiation fees.

[19] *Saunders House*, 719 F.2d at 685, 114 L.R.R.M. at 2977. At the parties' first meeting on September 16, 1980, the company's representative had promised the union that the employer would submit a counterproposal at the next bargaining session. *Id.* at 684-85, 114 L.R.R.M. at 2977.

[20] *Id.*

[21] *Id.*

[22] *Id.* The parties held meetings on October 8, October 29, November 5 and November 12. *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

wage proposal which provided for a one year contract with a cost-of-living adjustment provision.[26] The union, on the other hand, modified its wage increase proposal from $40 to $20 per week for the first year of the contract — retroactive to September, 1980. In addition, the union proposed an $18 weekly increase for the next two years with a cost of living adjustment in the second year of the three year contract.[27] At their next three meetings during January and February the positions of the parties on the economic issues remained unchanged.[28] In early February, 1981, during the twelfth negotiating session, the representatives for the union and the employer agreed to meet privately.[29]

During the off-the-record meeting which followed two weeks later, the union representative indicated that a contract which contained a dues check-off, a modified union security clause, and a wage increase of 8% in each year of a three year contract would be acceptable.[30] Several weeks after the meeting, in early March, the employer's representative impliedly rejected the off-the-record offer, presenting an alternative proposal for a contract of less than one year with individual pay raises averaging 6 1/2%.[31] The contract contained no union security or check-off provisions.[32] The employer's representative declared that the contract proposal was the employer's final offer.[33]

In subsequent negotiating sessions and before a Federal Mediation and Conciliation Service fact-finding board hearing,[34] the union progressively lowered its on-the-record wage demands from its position asserted in early December, 1980.[35] The union continued to insist on a check-off provision and altered its position on union security from a demand for full union security to a proposal for modified union security.[36] During the last meeting in mid-April, 1981, the union representative submitted a written proposal which included a check-off provision and the modified union security proposal which the union had previously offered.[37] The union, in addition, modified its on-the-record wage increase proposals from $18-$20 per week, to a proposed annual 8% wage increase.[38] This on-the-record wage increase proposal matched the off-the-record offer made by the union representative two months earlier.[39]

The employer's representative informed the union that the union's proposal represented no change in position.[40] The employer's representative repeated the employer's

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* On March 16, 1981, the Federal Mediation and Conciliation Service set up a fact-finding board. At the hearing, the union representative proposed 8%, 10% and 16% increases *plus* a cost-of-living allowance (COLA). The union asked for a determination of seven issues: union security, check-off, union activity, grievance procedures, wages, contract duration, and reinstatement of two previously dismissed employees. The fact-finding board issued its nonbinding recommendations on March 20, 1981. It called for a contract termination date of August 3, 1982, modified union security, a check-off proviso, and an across-the-board 8% wage increase effective September 1, 1981. *Id.*
[35] *Id.* at 685-86, 114 L.R.R.M. at 2978.
[36] *Id.* at 686, 114 L.R.R.M. at 2978.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

final offer and stated that unless the union accepted the employer's final offer by April 22, the employer would implement its proposed wage increase.[41] In his response on April 20, the union representative argued that the union had in fact changed its position on wages, union security, and other issues.[42] As a result, the union representative objected to any unilateral wage increase which, he alleged, would constitute an unfair labor practice.[43] Nevertheless, on April 22, 1981, the employer's representative informed the union that because the parties remained at an impasse on key issues, the employer would implement its wage proposal.[44] On the same day, Saunders House raised employee wages an average of 6 1/2%.[45]

As a result of the unilateral wage increase, the union filed an unfair labor practice charge with the Board.[46] After reviewing the charge, the Board issued a complaint alleging that the employer had violated sections 8(a)(1) and (5) of the Act, which require an employer to bargain in good faith with employees regarding conditions of employment.[47] After an evidentiary administrative hearing, the administrative law judge (ALJ) found that the employer had violated sections 8(a)(1) and (5) of the Act.[48] Saunders House excepted to the ruling. In particular, Saunders House disagreed that it had failed to act in "good-faith" and sought a Board ruling.[49]

Upon review by the Board, the employer argued that it had not violated the Act's good faith requirement because it had taken unilateral action only after negotiations had reached an impasse.[50] The employer contended that the union's last wage proposal made in April was not new and was not a concession because the employer had been aware since the off-the-record meeting in February that such a proposal was acceptable to the union.[51] Because the wage issue was a key one, the employer argued that the deadlock over such an issue created an impasse which allowed it to take unilateral action.[52] The Board rejected the employer's position and affirmed the ALJ's conclusions.[53] The Board held that an impasse did not exist because the union's April 15th proposal demonstrated movement in its position.[54] According to the Board, the union's final wage offer, which it emphasized was now on-the-record and made in conjunction with other proposals, was a new offer and one showing a significant concession.[55]

On appeal, the Third Circuit rejected the reasoning of the Board.[56] The court of appeals held that an impasse did in fact exist because the union's final wage proposal was merely a reiteration of the proposal its representative had made in the off-the-record meeting in mid-February.[57] According to the court, the mere shift over a two month

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[41] *Id.* at 686, 114 L.R.R.M. at 2978-79.
[42] *Id.*, 114 L.R.R.M. at 2979.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 689, 114 L.R.R.M. at 2981.
[57] *Id.* at 688-89, 114 L.R.R.M. at 2981.

period from a position off-the-record to one on-the-record was not a concession sufficient to preclude a judicial finding that an impasse existed.[58] Therefore, the court concluded that, because the parties were at an impasse, the employer's unilateral wage increase did not constitute an unfair labor practice.[59]

In determining that an impasse existed, the court first set forth several factors it considered important in defining an impasse.[60] According to the court, an impasse exists where one party is justified in assuming that further negotiations would be futile.[61] The court acknowledged the five factors which the Board had in the past deemed important in determining whether negotiations have reached an impasse: (1) the bargaining history of the parties; (2) the good faith of the parties in negotiations; (3) the length of the negotiations; (4) the importance of the issue or issues over which there is disagreement; and (5) the contemporaneous understanding of the parties as to the state of negotiations.[62] Both parties, the court noted, argued that each of the five factors supported their case.[63] In the court's view, the only disputed factors at issue in this case were the importance of the issues over which there remained disagreement and the contemporaneous understanding of the parties as to the state of negotiations in view of the extent of movement of the parties toward a negotiated settlement.[64]

Having determined that these were the crucial factors, the court stated, as to the first, that a deadlock as to one key issue can create an impasse in the negotiations.[65] In support of its view, the court cited three appellate court decisions for the proposition that an impasse may exist when a breakdown occurs in negotiations over either one or several issues.[66] Because wages were a critical issue in the Saunders House negotiations, the court concluded that if it found a deadlock existed on wages, the court would consider that an impasse in negotiations existed.[67]

As to the second key factor, the court emphasized that the determination of the existence of an impasse was one particularly suited to the expertise of the Board.[68] Because the determination of the point after which further bargaining on an issue is futile often depends on the mental state of the parties, the court stressed that the Board as a fact finder is generally better suited than an appellate court to make such determinations, since the Board deals constantly with the evaluation of bargaining processes.[69] Conse-

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[58] *Id.* at 688, 114 L.R.R.M. at 2981.

[59] *Id.* at 689, 114 L.R.R.M. at 2981.

[60] *Id.*

[61] *Id.* at 686-87, 114 L.R.R.M. at 2979 (citing Alsey Refractories Company, 215 N.L.R.B. 785, 787, 88 L.R.R.M. 1071, 1072 (1974)).

[62] 719 F.2d at 687, 114 L.R.R.M. at 2979 (citing Taft Broadcasting Co., 163 N.L.R.B. 475, 478, 64 L.R.R.M. 1386, 1388 (1967) *enforced sub nom.* AFTRA, Kansas City Local v. NLRB, 395 F.2d 622, 67 L.R.R.M. 3032 (D.C. Cir. 1968)).

[63] 719 F.2d at 687, 114 L.R.R.M. at 2979.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 687, 114 L.R.R.M. at 2979-80 (citing NLRB v. Yama Woodcraft, Inc., 580 F.2d 942, 945, (9th Cir. 1978); NLRB v. Tomco Communications Inc., 567 F.2d 871, 97 L.R.R.M. 2660 (9th Cir. 1978); Latrobe Steel Co. v. NLRB, 630 F.2d 171, 179, 105 L.R.R.M. 2393, 2398 (3d Cir. 1980), *cert. denied*, 454 U.S. 821, 108 L.R.R.M. 2558 (1981)).

[67] 719 F.2d at 687, 114 L.R.R.M. at 2979-80.

[68] *Id.* at 687-88, 114 L.R.R.M. at 2980 (citing Dallas General Drivers, W. & H., Local No. 745 v. NLRB, 355 F.2d 842, 61 L.R.R.M. 2065 (D.C. Cir. 1966)).

[69] 719 F.2d 688, 114 L.R.R.M. at 2980.

quently, the court stated that in reviewing a Board decision, it would uphold the Board's conclusion if the Board's findings were supported by substantial evidence on the record as a whole.[70]

Turning to the facts of *Saunders*, the court approached the impasse question by analyzing each topic of negotiation individually. The court first pointed out that wages, union security, and a check-off provision were the three key issues in dispute between the employer and the union from the start of negotiations.[71] According to the court, the parties were clearly at an impasse on the check-off and union security provisions.[72] Thus, the central issue, the court concluded, was whether the parties were at an impasse as to wages.[73]

Analyzing the parties' bargaining on the wage increase issue, the court noted that during the off-the-record meeting in February, the union representative said that the union would accept a three year contract with provisions for 8% wage increases in each of the three years.[74] After the employer rejected this offer, the union progressively lowered its on-the-record demands in subsequent negotiations.[75] At the final mid-April negotiating session, the union proposed a three year contract calling for 8% wage increases each year.[76] Although this wage offer evidenced significant movement in the union's announced position, the court found that it was identical to the one the union proposed off-the-record in February.[77]

The court then considered whether these facts constituted substantial evidence to support the Board's finding of no impasse.[78] The court repeated the operative rule that a new proposal on a significant issue must be one that encourages the parties to believe that further negotiations will not be futile.[79] A concession, on a key issue, the court stated, precludes a finding of impasse because it indicates there is reason to believe that further bargaining might produce additional movement in the negotiations.[80] If the new proposal does not bring the parties any closer than they were previously, even off-the-record, a new announced position, the court maintained, would not encourage the parties to continue bargaining in the belief that they could reach an agreement.[81]

Applying this rule to the facts of *Saunders House*, the court concluded that a mere change from a position off-the-record to one on-the-record was not a concession sufficient to preclude a finding of impasse.[82] According to the court, there was no real movement in mid-April because the union had not presented anything it had not presented earlier.[83] Furthermore, the court emphasized that by notifying the union by letter that there had been no movement, the employer put the union on notice that unless it accepted Saunders House's final offer by April 22, the employer would put the proposed

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[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 688, 114 L.R.R.M. at 2980-81.
[75] *Id.* at 688, 114 L.R.R.M. at 2981.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 688-89, 114 L.R.R.M. at 2981.

wage increase into effect.[84] Finally, the court stated that, consistent with the requirement that a post-impasse unilateral change must have been offered before impasse, the wage increase subsequently implemented by the employee was not higher than the one offered at the negotiating sessions.[85] Accordingly, the court held that there was not sufficient evidence in the record to support the Board's finding that the parties were not at an impasse and that the employer's unilateral wage increase constituted an unfair labor practice.[86]

The *Saunders House* decision represents the Third Circuit's attempt to clarify the ill-defined concept of "impasse."[87] Although, as the *Saunders House* court noted, Board policy lists five general factors considered relevant in determining whether negotiations have reached an impasse, neither the Board nor the courts have given concrete guidance for applying these factors.[88] *Saunders House* provides insight into the proper application and weight of the factor which evaluates the understanding of the parties as to the status of negotiations based upon movement of the parties toward a negotiated settlement.[89]

Under *Saunders House*, a court evaluating the movement of negotiating parties in order to determine whether an impasse existed should consider all the circumstances of negotiation, not merely those on record, to surmise whether either party has made a true concession instead of a restatement of an earlier offer.[90] If the court can find any off-the-record union offer which is identical to the union's last announced offer before the employer's unilateral action, the last offer would not be viewed as a concession under *Saunders House*.[91] The existence of an impasse in the negotiations, however, would still depend on whether the subject in question was a central issue in the negotiations.[92] The major question remaining after *Saunders House* is the extent to which conversations between bargaining representatives may qualify as offers to be taken into account by a court in evaluating a union's final offer.[93]

### 2. **Agreement to Limit Strikers' Reinstatement Rights*: Hotel Holiday Inn de Isla Verde v. NLRB[1]

It is well settled that the illegal discharge of economic strikers is an unfair labor practice[2] in violation of sections 8(a)(1) and (3)[3] of the National Labor Relations Act (the

[84] *Id.* at 689, 114 L.R.R.M. at 2981.

[85] *Id.*

[86] *Id.*

[87] *See supra* notes 5-11 and accompanying text.

[88] The five factors were originally listed in Taft Broadcasting Co., 163 N.L.R.B. 475, 478, 64 L.R.R.M. 1386, 1388 (1967). *See supra* notes 54 and 83 and accompanying text.

[89] *See Saunders House*, 719 F.2d 683, 685, 114 L.R.R.M. 2977, 2979. *See also* Epstein, *supra* note 6, at 779.

[90] *Saunders House*, 719 F.2d at 685, 114 L.R.R.M. at 2978.

[91] *Id.* at 689, 114 L.R.R.M. at 2981.

[92] *Id.* at 689, 114 L.R.R.M. at 2979-80.

[93] *See id.* at 689, 114 L.R.R.M. at 2980. The court never defines what constitutes an off-the-record meeting for purposes of determining whether the union later made a concession.

* By Richard K. Stavinski, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 723 F.2d 169, 115 L.R.R.M. 2188 (1st Cir. 1983).

[2] NLRB v. International Van Lines, 409 U.S. 48, 53, 81 L.R.R.M. 2595, 2597 (1972).

[3] 29 U.S.C. §§ 158(a)(1), (3) (1982). The sections provide in pertinent part:

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an

Act). In *NLRB v. International Van Lines*,[4] the Supreme Court held that illegally discharged economic strikers are entitled to unconditional reinstatement.[5] Consequently, once a striker is found to have been illegally discharged he may regain his job immediately, even though the employer may have hired a "permanent" replacement for the striker.[6]

In addition, the Supreme Court has held that economic strikers who are not discharged during the strike period have a conditional right to reinstatement upon termination of the strike.[7] This conditional right to reinstatement continues for a presumably indefinite post-strike period,[8] during which time the workers may regain their employment if they have not obtained "other regular and substantially equivalent employment," jobs for which they are qualified have become available, and the employer is unable to show "legitimate and substantial business justifications" for refusing reinstatement.[9] In *United Aircraft Corp.*,[10] however, the National Labor Relations Board (Board) limited this principle, holding that a collectively bargained strike settlement agreement could legitimately place a time limitation upon the statutory reinstatement rights of economic strikers.[11] To date, neither the courts of appeals nor the Supreme Court have addressed the Board's holding on this issue.[12]

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> employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

*Id.*

[4] 409 U.S. 48, 81 L.R.R.M. 2595 (1972).

[5] *Id.* at 53, 81 L.R.R.M. at 2597.

[6] *Id.* at 50-51, 81 L.R.R.M. at 2596.

[7] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381, 66 L.R.R.M. 2737, 2739 (1967).

[8] Laidlaw Corp., 171 N.L.R.B. 1366, 1368, 68 L.R.R.M. 1252, 1257 (1968), *enforced*, 414 F.2d 99, 71 L.R.R.M. 3054 (7th Cir. 1969), *cert. denied*, 397 U.S. 920, 73 L.R.R.M. 2537 (1970). *Laidlaw* has been uniformly accepted by the courts of appeals. *See, e.g.*, Retail Stores Union v. NLRB, 466 F.2d 380, 388, 80 L.R.R.M. 3244, 3249 (D.C. Cir. 1972); H. & F. Binch Co. v. NLRB, 456 F.2d 357, 364, 79 L.R.R.M. 2692, 2697 (2d Cir. 1972).

No outer time limit has been placed upon the *Laidlaw* right to reinstatement. It has been held that this right can extend beyond one year from the commencement of the strike. NLRB v. Hartman Luggage Co., 453 F.2d 178, 182, 79 L.R.R.M. 1599, 1601 (6th Cir. 1971). The Board has held that the economic strikers' rights to reinstatement can continue for longer than one year after termination of the strike, or for longer than the recall period for laid-off employees in the labor contract. Brooks Research & Mfg. Inc., 202 N.L.R.B. 634, 636, 82 L.R.R.M. 1599, 1601 (1973). *Brooks Research* is discussed at 15 B.C. IND. & COMM. L. REV. 1143 (1974).

[9] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381, 66 L.R.R.M. 2737, 2739 (1967). The employer's hiring of permanent replacements for the strikers will suffice as a legitimate business justification. *Id.* at 379, 66 L.R.R.M. at 2738.

[10] 192 N.L.R.B. 382, 77 L.R.R.M. 1785 (1971), *enforced in part on other grounds, sub nom*, Lodges 743 and 1746, International Association of Machinists v. United Aircraft Corp., 534 F.2d 422, 90 L.R.R.M. 2272 (2d Cir. 1975), *cert. denied*, 429 U.S. 825, 93 L.R.R.M. 2363 (1976). The Board's decision is discussed at 13 B.C. IND. & COMM. L. REV. 1445 (1972).

[11] 192 N.L.R.B. at 388, 77 L.R.R.M. at 1793. On appeal, the Second Circuit held that the employees could not have knowingly waived their reinstatement rights, since those rights did not exist until the *Laidlaw* decision, which was eight years subsequent to the agreement. Lodges 743 and 1746, International Association of Machinists v. United Aircraft Corp., 534 F.2d 422, 451, 90 L.R.R.M. 2272, 2295 (2d Cir. 1975), *cert. denied*, 429 U.S. 825, 93 L.R.R.M. 2363 (1976).

[12] *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 n.8, 66 L.R.R.M. 2737, 2739 n.8 (1967) (reserving the question of whether a union may limit by agreement the reinstatement rights of economic strikers); NLRB v. Murray Products, 584 F.2d 934, 938, 99 L.R.R.M. 3269, 3273 (9th Cir.

During the *Survey* year, the validity of a strike settlement agreement which affected the reinstatement rights of economic strikers who had been illegally discharged came before the First Circuit in *Hotel Holiday Inn de Isla Verde v. NLRB*.[13] The situation presented in *Hotel Holiday Inn* involved a convergence of the principles enunciated in *International Van Lines* regarding the unconditional reinstatement rights of illegally discharged economic strikers, and those announced in *United Aircraft Corp.* regarding the effectiveness of collectively bargained strike settlement agreements restricting reinstatement rights. The court in *Hotel Holiday Inn* held that the rights of illegally discharged economic strikers to reinstatement only become unconditional after the strikers have proven that they were in fact illegally dismissed.[14] A strike settlement agreement entered into before a finding of illegal discharge has been made should be considered with regard to the effect it might have on the economic strikers' rights to reinstatement, the court found, because such agreements involve contested and as yet undetermined reinstatement rights.[15] The court did not hold that such agreements were *per se* valid, but concluded that it could find no reason why voluntary settlements of disputed claims to reinstatement should not be given effect.[16] Rather, the court held that the Board should determine, on remand, whether upholding the agreement would conflict with the Board's duty to prevent unfair labor practices.[17] If the Board intended to reject such agreements in all cases, however, the court stated that the Board would need to explain fully its reasons for establishing such a rule.[18]

The *Hotel Holiday Inn* case arose from a lawful economic strike by a hotel's union employees.[19] During the strike the hotel discharged several striking employees for alleged picketing misconduct.[20] Subsequently, union and hotel officials reached an agreement settling the strike.[21] The agreement provided that the hotel would withdraw all picketing misconduct charges, and reinstate the discharged employees, in return for a waiver by the employees of any charges they might have against the hotel.[22] In addition, the union agreed that the discharged employees would report for reinstatement on or before certain assigned dates[23] and would forego backpay between the dates of their discharge and reinstatement.[24] The agreement expressly provided that if the employees failed to

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1978) (same); Lodges 743 and 1746, International Association of Machinists v. United Aircraft Corp., 534 F.2d 422, 457, 90 L.R.R.M. 2272, 2299 (2d Cir. 1975), *cert. denied*, 429 U.S. 825, 93 L.R.R.M. 2363 (1976) (same).

The Eighth Circuit has, in dictum, accepted the Board's holding in *United Aircraft Corp.* that reinstatement rights may be limited by a strike settlement agreement. NLRB v. Vitrionic Div. of Penn Corp., 630 F.2d 561, 564 n.5, 102 L.R.R.M. 2753, 2755 n.5 (8th Cir. 1979).

[13] 723 F.2d 169, 115 L.R.R.M. 2188 (1st Cir. 1982).

[14] *Id.* at 172-73, 115 L.R.R.M. at 2190.

[15] *Id.*, 115 L.R.R.M. at 2190-91.

[16] *Id.*

[17] *Id.* at 173, 115 L.R.R.M. at 2190.

[18] *Id.*

[19] Hotel Holiday Inn de Isla Verde, 265 N.L.R.B. 1513, 1515 app. (Donnelly, A.L.J.), *findings affirmed by the Board*, 265 N.L.R.B. 1513, 112 L.R.R.M. 1191 (1982), *remanded*, 723 F.2d 169, 115 L.R.R.M. 2188 (1st Cir. 1983).

[20] 265 N.L.R.B. at 1515 app. (Donnelly, A.L.J.).

[21] *Id.* at 1516-17 app. (Donnelly, A.L.J.).

[22] *Id.*

[23] *Id.*

[24] Hotel Holiday Inn de Isla Verde v. NLRB, 723 F.2d 169, 172, 115 L.R.R.M. 2188, 2190 (1st Cir. 1983).

report by the agreed upon dates, they would not be rehired.[25] When three of the employees failed to report until after their assigned dates, the hotel refused to reinstate them.[26]

The three employees brought suit, alleging that by firing and refusing to reinstate them the hotel had violated section 8(a)(3) of the Act.[27] The Administrative Law Judge (ALJ) determined that the misconduct of two of the three employees was not so flagrant as to warrant their discharge during the strike.[28] Accordingly, the ALJ held that the hotel had unlawfully discharged the two employees in violation of section 8(a)(3) of the Act, and ruled that the employees were entitled to reinstatement.[29] The ALJ found that the third employee had been legally discharged for picketing misconduct and was not entitled to reinstatement.[30] The ALJ dismissed the contrary terms of the settlement agreement with the sweeping statement that "[a] Union and an employer may not restrict an individual's right to reinstatement by negotiating more stringent terms of reinstatement for them than those available under existing law."[31]

The Board affirmed the ALJ's holding without discussion, noting only in a footnote that since two of the employees were illegally discharged during the strike, the hotel had violated section 8(a)(1) as well as 8(a)(3) of the Act.[32] Accordingly, the Board held that the two employees were entitled to unconditional reinstatement under the rule of *NLRB v. International Van Lines*,[33] and that the settlement agreement did not govern their rights to reinstatement.[34] The Board also upheld the ALJ's determination that the third employee had been legally discharged and was not entitled to reinstatement.[35]

Chairman Van de Water dissented in part from the Board's decision, stating that all three employees had been legally discharged for violating the terms of the settlement agreement.[36] He argued that the ALJ had misstated the law with respect to settlement agreements restricting reinstatement rights.[37] Pointing out that the Board had upheld a settlement agreement restricting the reinstatement rights of economic strikers in *United Aircraft Corp.*, the Chairman argued that the settlement agreement in the present case should also be given effect.[38]

On appeal, the First Circuit held that the Board had not adequately considered the effect of the settlement agreement on the employees' claims for reinstatement.[39] The court stated that at the time the settlement agreement was entered into the employees had

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[25] *Hotel Holiday Inn de Isla Verde*, 265 N.L.R.B. at 1517 app. (Donnelly, A.L.J.).

[26] *Id.*

[27] *Id.* at 1515 app. (Donnelly, A.L.J.).

[28] *Id.* at 1517 app. (Donnelly, A.L.J.).

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1518 app. (Donnelly, A.L.J.).

[32] 265 N.L.R.B. at 1513 n.2, 112 L.R.R.M. at 1191.

[33] *See supra* notes 2-6 and accompanying text.

[34] 265 N.L.R.B. at 1513 n.3, 112 L.R.R.M. at 1191.

[35] *Id.* at 1513, 112 L.R.R.M. at 1191.

[36] *Id.*, 112 L.R.R.M. at 1192 (Van de Water, Chairman, dissenting in part).

[37] *Id.* at 1514, 112 L.R.R.M. at 1192 (Van de Water, Chairman, dissenting in part).

[38] *Id.* (Van de Water, Chairman, dissenting in part) (citing United Aircraft Corp., 192 N.L.R.B. 382, 388, 77 L.R.R.M. 1784, 1793 (1971), *enforced in part on other grounds, sub nom*, Lodges 743 and 1746, International Association of Machinists v. United Aircraft Corp., 534 F.2d 422, 90 L.R.R.M. 2272 (2d Cir. 1975), *cert. denied*, 429 U.S. 825, 93 L.R.R.M. 2363 (1976)).

[39] Hotel Holiday Inn De Isla Verde v. NLRB, 723 F.2d 169, 173, 115 L.R.R.M. 2188, 2190 (1st Cir. 1983).

not established any rights to reinstatement.[40] On the contrary, the court found that the employees' rights to reinstatement were contingent upon the Board subsequently finding that the hotel had acted illegally in discharging the striking employees.[41] The court noted that at the time of the settlement agreement it was uncertain whether the employees would ultimately prevail on their claim of illegal discharge or whether the hotel would be found to have acted lawfully in discharging the strikers.[42] Thus, the court opined that the parties were attempting, through the agreement, to settle a bona fide dispute over the employees' rights, if any, to reinstatement.[43] Reasoning that a fair and mutual settlement of contested claims is highly favored in the law, the court stated that the Board should give specific reasons if it intended to reject this principle in labor cases.[44] The court, therefore, remanded the case to the Board with instructions to reconsider its ruling that the settlement agreement did not control the workers' rights to reinstatement.[45] If the Board did not intend to enforce the settlement agreement, the court warned that the Board would need to state exactly how upholding the agreement would interfere with the Board's duty to prevent unfair labor practices.[46]

Circuit Judge Breyer dissented from the court's opinion, but did not dispute the majority's reasoning.[47] Judge Breyer agreed that the Board should give its reasons if it meant to adopt the ALJ's "overstatement" regarding restrictive settlement agreements.[48] He stated, however, that remand was not necessary since the Board had adequate reason to reject the settlement agreement on other grounds.[49]

The First Circuit's decision in *Hotel Holiday Inn* should have the beneficial result of encouraging the good faith settlement of strike disputes. By not allowing the Board to reject outright the settlement agreement, the court succeeded in effecting a difficult, but necessary, conciliation of the rulings in *International Van Lines* and *United Aircraft Corp.* Furthermore, the court's decision does not unwarrantedly diminish the reinstatement rights of illegally discharged strikers under *International Van Lines*, nor does it negate the policy of *United Aircraft Corp.* to accept voluntary settlement agreements.

The Board in the instant case evidently was concerned about cutting back on the unconditional right of an illegally discharged striker to reinstatement by allowing the union to bargain away this right.[50] Although the Board in *United Aircraft Corp.* allowed conditional rights of reinstatement to be restricted by a collective bargaining agreement which limited the duration of those rights,[51] the Board in *Hotel Holiday Inn* may have been concerned that the reinstatement rights of illegally discharged strikers demanded more protection. This concern was misplaced, however, because when the agreement was made the hotel had a legitimate claim that the workers had been legally discharged for strike

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[40] *Id.* at 172, 115 L.R.R.M. at 2190.

[41] *Id.*

[42] *Id.* at 172-73, 115 L.R.R.M. at 2190-91.

[43] *Id.*

[44] *Id.* at 173, 115 L.R.R.M. at 2190-91.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 173-74, 115 L.R.R.M. at 2191 (Breyer, J., dissenting).

[48] *Id.* at 174, 115 L.R.R.M. at 2191 (Breyer, J., dissenting).

[49] *Id.* at 174-75, 115 L.R.R.M. at 2192 (Breyer, J., dissenting); *see also infra* notes 68-71 and accompanying text.

[50] *See* 265 N.L.R.B. at 1513 n.3, 112 L.R.R.M. at 1191.

[51] *United Aircraft Corp.*, 192 N.L.R.B. at 388, 77 L.R.R.M. at 1793.

misconduct, and the workers' rights to reinstatement were at best uncertain.[52] Only as a result of the litigation did the strikers obtain an unconditional right to reinstatement.[53] Consequently, to hold, as the Board did, that reinstatement rights which might eventually be acquired through litigation could not be the subject of bargaining, would provide overprotection for reinstatement rights which might later be found not to exist. Such overprotection would be achieved at the expense of enabling the parties to bargain collectively for mutual concessions in order to reach a desirable settlement.[54]

Accordingly, the First Circuit's holding in *Hotel Holiday Inn*, that the Board should enforce the settlement agreement unless the agreement conflicts with the Board's duty to prevent unfair labor practices, does not erode the reinstatement rights of illegally discharged strikers as articulated in *International Van Lines*. As the court correctly stated in the present case, those rights could not be said to have been established at the time of the strike settlement agreement. A review of the workers' rights at the time the agreement was entered into is therefore the appropriate inquiry. Moreover, consistent with *United Aircraft Corp.*, settlement agreements restricting strikers' reinstatement rights would be subject to close review by the Board to determine that the terms of the agreement did not abrogate the policies of the Act.[55] If no genuine dispute regarding the legality of the strikers' discharge existed, or if an agreement placed unduly stringent restrictions on reinstatement rights, the agreement could be set aside by the Board pursuant to its duty to prevent unfair labor practices.[56]

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[52] Hotel Holiday Inn de Isla Verde v. NLRB, 723 F.2d 169, 172-73, 115 L.R.R.M. 2188, 2190 (1st Cir. 1983).

[53] *Id.*

[54] Holding that employees cannot bargain away *possible* rights to reinstatement, even if they so desire, is to ignore the fact that there are two sides to every dispute. Since each side knows that the other side has a potentially valid claim, both sides are encouraged to compromise. Quite apart from protecting the employees, the Board's refusal to allow the parties to negotiate with respect to reinstatement rights cuts both ways and may hinder the union's ability to extract a favorable settlement. While the Board's position protects an employee who may later be deemed to have been illegally discharged from limiting his reinstatement rights through agreement, it also prevents an employee who may have been legally discharged from acquiring a right to reinstatement through private agreement.

Moreover, the parties themselves are in the best position to know their needs and the attainable concessions. *United Aircraft Corp.*, 192 N.L.R.B. at 388, 77 L.R.R.M. at 1793. It is, therefore, equally likely the agreement will favor the union as the employer. Most likely, of course, the agreement will be mutually beneficial to the parties, even apart from saving each party the costs of litigating their dispute. The instant case can serve as an example. Through the agreement, the employees converted potential claims of unconditional reinstatement, which they may well have lost, into employer concessions of definite reinstatement. *See Hotel Holiday Inn de Isla Verde*, 265 N.L.R.B. at 1516-17 app. (Donnelly, A.L.J.). Even the third employee, who was found to have been legally discharged for flagrant misconduct, would have been entitled to reinstatement had he abided by the agreement and had the agreement been upheld. *See id.*

[55] *See United Aircraft Corp.*, 192 N.L.R.B. at 386-88, 77 L.R.R.M. at 1791-93. The Board in *United Aircraft Corp.* made clear that it had the exclusive responsibility to enforce the public policies of the Act of eliminating obstructions to commerce and preventing unfair labor practices, and that it was not bound by private agreement in so doing. *Id.* The Board noted, however, that the settlement of disputes through collective bargaining was also one of the principle policies of the Act and that it would be inclined to accept private strike settlement agreements as long as the agreements met Board standards. *Id.* With respect to agreements limiting the time period for the exercise of reinstatement rights, the Board stated that it would uphold such agreements provided they were the results of good-faith bargaining, not discriminatory, not used by the employer to undermine the union, and did not contain an unreasonably short time period. *Id.* at 388, 77 L.R.R.M. at 1793.

[56] *See supra* note 55.

The First Circuit's decision in *Hotel Holiday Inn* is also in accord with the policy announced by the Board in *United Aircraft Corp.* In that case, the Board held that freely negotiated strike settlement agreements containing terms mutually acceptable to the parties will be honored, subject to Board approval, even if the agreements restrict statutory reinstatement rights of the employees.[57] As Chairman Van de Water correctly noted in his dissent from the Board's order, the ALJ's statement that a strike settlement agreement is ineffective to limit the available reinstatement rights of employees is clearly in conflict with the *United Aircraft Corp.* holding.[58] The Board in *United Aircraft Corp.* sanctioned the restriction by agreement of definite and accrued statutory rights to conditional reinstatement.[59] Upholding the *Hotel Holiday Inn* agreement, however, only requires accepting that a disputed claim to reinstatement can be negotiated. Thus, the *Hotel Holiday Inn* court did not need to go as far as the Board did in *United Aircraft Corp.* to support the agreement in the present case. By remanding the case to the Board with instructions to reconsider the effect of the settlement agreement on the workers' claims to reinstatement, the First Circuit avoided severely restricting the principles of *United Aircraft Corp.* favoring the voluntary resolution of strike disputes.

Most importantly, by encouraging strike settlement agreements, *Hotel Holiday Inn* serves to promote one of the foremost objectives of the Act — the peaceful resolution of labor disputes through collective bargaining.[60] This position is entirely consistent with the view that unions are responsible parties and should honor their contractual obligations arising from good faith agreements with employers.[61] As the court in *Hotel Holiday Inn* pointed out, if the Board were to set aside all union commitments in strike settlement

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[57] *See supra* note 55.

[58] 265 N.L.R.B. at 1514, 112 L.R.R.M. at 1192 (Van de Water, Chairman, dissenting in part). Not only did the ALJ incorrectly state Board law, but his claim that the settlement agreement in the present case "may not restrict an individual's right to reinstatement [with] more stringent terms of reinstatement for [the employee] than those available under existing law," 265 N.L.R.B. at 1518 app. (Donnelly, A.L.J.), misconstrued the facts of the case. Even were this a correct statement of the law, it does not recognize that the employees in *Hotel Holiday Inn* did not have a right, but a contested claim, to reinstatement. *See supra* notes 52-54 and accompanying text. It is doubtful, therefore, that the terms negotiated by the union could be called "more stringent" than other recourse available to the employees at the time of the settlement. *See* 265 N.L.R.B. at 1514, 112 L.R.R.M. at 1192 (Van de Water, Chairman, dissenting in part).

[59] 192 N.L.R.B. at 388, 77 L.R.R.M. at 1793.

[60] 29 U.S.C. § 151 (1982). The relevant text provides: "It is hereby declared to be the policy of the United States to eliminate . . . obstructions to . . . commerce . . . by encouraging . . . collective bargaining . . . for the purpose of negotiating the terms and conditions of . . . employment or other mutual aid or protection." *Id. See, e.g.*, Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 452-54, 40 L.R.R.M. 2113, 2114-15 (1957). The Court recognized that Congress, through the Labor Act, intended to promote industrial peace by encouraging collective bargaining. *Id.* The Court also noted that Congress meant for the labor-management agreements to be valid and binding to encourage a high degree of responsibility by the parties. *Id. See also* NLRB v. Lundy Manufacturing Corp., 316 F.2d 921, 925, 53 L.R.R.M. 2106, 2109 (2d Cir. 1963), where the court stated, "the rights recognized in § 7 may be affected by a valid collective bargaining agreement; to deny this would be to ignore . . . the whole policy of Congress, set forth in § 1 of 'encouraging . . . collective bargaining' and relying on such agreements for the maintenance of industrial peace." *Accord, United Aircraft Corp.*, 192 N.L.R.B. at 387, 77 L.R.R.M. at 1791.

[61] *See, e.g., United Aircraft Corp.*, 192 N.L.R.B. at 387, 77 L.R.R.M. at 1792. The Board in *United Aircraft Corp.* noted that the officials of the union were "experienced, competent, and knowledgeable," and that the union had accepted the benefits of the agreement. *See also* Collyer Insulated Wire, 192 N.L.R.B. 837, 843, 77 L.R.R.M. 1931, 1937-38 (1971).

agreements which might limit the reinstatement rights of strikers, employers would have no incentive to bargain on other reinstatement matters.[62] Such a result would conflict with the public policy favoring private, voluntary resolution of conflicts.[63] Consequently, the court's decision directing the Board to reassess the validity of the settlement agreement should promote responsible bargaining and a stable acceptance of the agreements reached.

Accordingly, although the court in *Hotel Holiday Inn* did not pass on the merits of the strike settlement agreement, but merely remanded the case to the Board for reconsideration, the language and tenor of the court's opinion evidences a strong presumption in favor of voluntary resolution of reinstatement disputes.[64] Because the court's position is supported by prior Board decisions,[65] the policy of the Act,[66] and public policy,[67] future strike settlement agreements affecting the reinstatement rights of strikers should find judicial acceptance.

In addition, the Board is not likely to reject on remand the presumptive validity attributed to strike settlement agreements by *United Aircraft Corp.*, for two reasons. First, as Judge Breyer noted in dissent, the Board's lack of consideration of the agreement may have been due to the poorly focused arguments of the parties before the Board.[68] Second, it is doubtful the Board will establish a broad policy rule on remand since the agreement can be invalidated on much narrower grounds.[69] The agreement, in fact, did not provide for the posting of notice of unfair labor practices, or for backpay, nor were the employees involved in the negotiations.[70] All of these reasons have in the past proven important factors in setting aside settlement agreements.[71]

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[62] 723 F.2d at 173, 115 L.R.R.M. at 2190.

[63] *See, e.g.*, Insurance Concepts, Inc. v. Western Life Insurance Co., 639 F.2d 1108, 1111-12 (5th Cir. 1981)(public policy favors voluntary settlement of disputed insurance claims); Pearson v. Ecological Science Corp., 522 F.2d 171, 176 (5th Cir. 1975)(private settlement of securities fraud claim is to be strongly encouraged); Howard v. Commissioner, 447 F.2d 152, 158 (5th Cir. 1971)(out of court settlement of tax liability contested in good faith is favored).

[64] *See* 723 F.2d at 172-73, 115 L.R.R.M. at 2190-91; *see also supra* notes 39-63 and accompanying text.

[65] *United Aircraft Corp.*, 192 N.L.R.B. at 388, 77 L.R.R.M. at 1790-93.

[66] *See supra* note 60.

[67] *See supra* note 63.

[68] 723 F.2d at 174, 115 L.R.R.M. at 2192 (Breyer, J., dissenting). Judge Breyer noted that the hotel's brief apparently conceded that if the employees were found to have been illegally discharged, the settlement agreement would not alter the situation. *Id.* (Breyer, J., dissenting). Such a position, of course, completely negated the bargained for terms, but it may explain why the Board did not give due consideration to the agreement after finding that the two workers had been illegally discharged.

[69] *See infra* notes 70-71 and accompanying text.

[70] 723 F.2d at 175, 115 L.R.R.M. at 2192 (Breyer, J., dissenting).

[71] *APD Transport Corp.*, 253 N.L.R.B. 468, 469, 105 L.R.R.M. 1675, 1676 (1980) *enforcement denied on other grounds, sub nom*, National Book Consolidators v. NLRB, 672 F.2d 323, 109 L.R.R.M. 3035 (3d Cir. 1982)(settlement agreement rejected partly because it did not provide for posting of notice of employer's unfair labor practices); Finnishline Industries, Inc., 181 N.L.R.B. 756, 758-59, 74 L.R.R.M. 1654, 1655 (1970), *modified in other respects*, 451 F.2d 1280, 79 L.R.R.M. 2007, (9th Cir. 1971)(union-employer agreement which did not provide for employee back pay set aside); *APD Transport Corp.*, 253 N.L.R.B. at 470, 105 L.R.R.M. at 1676-77 (settlement agreement which employees had no hand in negotiating set aside).

In addition, Judge Breyer suggested that the settlement agreement in the present case was explicitly non-binding. 723 F.2d at 174, 115 L.R.R.M. at 2192 (Breyer, J., dissenting). If that was the case, then, of course, the employees could not be held accountable for their non-compliance with the agreement.

In sum, the court's opinion in *Hotel Holiday Inn* indicates, without directly holding, that strike settlement agreements should still be considered acceptable mediums for bargaining regarding strikers' reinstatement rights.[72] The practitioner should look to the Board's thorough discussion of settlement agreements in *United Aircraft Corp.* for guidance with respect to the appropriate Board standards.[73] Attention should also be paid to the *United Aircraft Corp.* Board's caution that settlement agreements which operate to restrict reinstatement rights will be closely examined.[74] The Board is not bound by any private adjustment or allocation of rights in preventing unfair labor practices.[75] Nonetheless, if a strike settlement agreement contains terms which may prove to limit the reinstatement rights of allegedly illegally discharged economic strikers, the agreement should be upheld provided it meets Board standards and does not offend the policies of the Act.[76]

### 3. **Allocation of Burden of Proof in Dual Motive Discharge Cases*: NLRB v. Transportation Management Corp.[1]

Section 8(a)(3) of the National Labor Relations Act (the Act)[2] makes it unlawful for an employer to discharge an employee because of that employee's union activity.[3] An employer, however, retains the right to discharge employees for any legitimate business reason so long as the discharge was not motivated by a desire to discourage union activity.[4] When charges are filed against an employer for a discharge that allegedly violates section 8(a)(3) of the Act, the determinative question is the motivation of the employer.[5] In such cases, the burden of showing an unlawful motive falls on the General Counsel.[6] Difficulty in these cases arises when there is a dual motive for the discharge.[7] In dual motive cases, the General Counsel is able to meet the burden of proving that antiunion animus, a desire to discourage union activity, was one of the motivating factors for the discharge. In rebuttal, however, the employer asserts an additional motive that is a legitimate business reason for discharging the employee.[8] Prior to 1980, uncertainty existed among the

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[72] *See* 723 F.2d at 172-73, 115 L.R.R.M. at 2190-91.

[73] *See supra* note 55.

[74] *See supra* note 55.

[75] 29 U.S.C. § 160(a) (1982). In Laher Spring & Electric Car Corp., 192 N.L.R.B. 464, 77 L.R.R.M. 1800 (1971), decided the same day as *United Aircraft Corp.*, the Board rejected the reinstatement provisions of a strike settlement agreement where it found the employer had used the agreement in a discriminatory fashion. *Id.* at 466, 77 L.R.R.M. at 1802. *See also supra* note 71.

[76] 723 F.2d at 172-73, 115 L.R.R.M. at 2190-91. *See also supra* note 55.

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* By Ronald T. Gerwatowski, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 103 S. Ct. 2469, 113 L.R.R.M. 2857 (1983).

[2] 29 U.S.C. § 158(a)(3) (1982), which states in pertinent part: "(a) It shall be an unfair labor practice for an employer — . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

[3] *See* C. MORRIS, THE DEVELOPING LABOR LAW, 208 (1983) [hereinafter cited as C. MORRIS].

[4] *See id.* at 209.

[5] *See id.* at 208.

[6] *See id.* at 208-09.

[7] *Id.* at 209.

[8] *Id.*

circuit courts as to the amount of antiunion animus that was necessary to establish a section 8(a)(3) violation in dual motive cases.[9] Several circuit courts found a violation of section 8(a)(3) only where the dominant motive for the discharge was antiunion animus,[10] while other circuit courts held that the General Counsel had only to show that the employer was motivated in part by antiunion animus to establish a violation of the Act.[11]

In 1980, the National Labor Relations Board (Board) attempted to resolve the conflict in the circuit courts in *Wright Line, Inc.*[12] In *Wright Line*, the Board adopted a new two-part test.[13] Under this test, the General Counsel was first required to make a prima facie showing that antiunion animus was a motivating factor in the employer's decision to discharge the employee.[14] Once the General Counsel had made such a showing, the burden then shifted to the employer to show that the employee would have been discharged even in the absence of protected union activity.[15] The new *Wright Line* standard was adopted by many circuit courts.[16] Other circuit courts rejected the standard, however,[17] reasoning that it misallocated the burden of persuasion that section 10(c) of the Act had expressly placed on the General Counsel.[18] As a result, these latter courts not only required the General Counsel to prove antiunion animus, but also required the General Counsel to show by a preponderance of the evidence that the employee would not have been fired had it not been for the union activity.[19] Consequently, uncertainty remained in section 8(a)(3) dual motive cases, despite the Board's attempt in *Wright Line* to establish a uniform standard.[20]

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[9] *See id.* at 189-90.

[10] *See, e.g.*, Stephenson v. NLRB, 614 F.2d 1210, 1213, 103 L.R.R.M. 2238, 2239 (9th Cir. 1980); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293, 94 L.R.R.M. 3071, 3071 (1st Cir. 1977).

[11] *See, e.g.*, Edgwood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368, 99 L.R.R.M. 2036, 2040 (3d Cir. 1978); NLRB v. Gogin, 575 F.2d 596, 601, 98 L.R.R.M. 2250, 2253 (7th Cir. 1978).

[12] 251 N.L.R.B. 1083, 105 L.R.R.M. 1169 (1980), *enforced*, 662 F.2d 899, 108 L.R.R.M. 2513 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 109 L.R.R.M. 2779 (1982).

[13] 251 N.L.R.B. at 1089, 105 L.R.R.M. at 1174-75.

[14] *Id.* at 1089, 105 L.R.R.M. at 1175.

[15] *Id.*

[16] *See, e.g.*, NLRB v. Senftner Volkswagon Corp., 681 F.2d 557, 560, 110 L.R.R.M. 3190, 3191 (8th Cir. 1982); Peavey Co. v. NLRB, 648 F.2d 460, 461, 107 L.R.R.M. 2359, 2360 (7th Cir. 1981); NLRB v. Nevis Industries, 647 F.2d 905, 909, 107 L.R.R.M. 2890, 2893 (9th Cir. 1981).

[17] *See, e.g.*, NLRB v. New York University Medical Center, 702 F.2d 284, 294, 112 L.R.R.M. 2633, 2640 (2d Cir. 1983); Behring International, Inc. v. NLRB, 675 F.2d 83, 88, 109 L.R.R.M. 3265, 3268 (3d Cir. 1982).

[18] 29 U.S.C. § 160 (1982). *See* Behring International, Inc. v. NLRB, 675 F.2d 83, 88, 109 L.R.R.M. 3265, 3268 (3d Cir. 1982).

Section 10(c) provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . . If upon a preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint . . . .

29 U.S.C. § 160 (1982).

[19] *See Behring International*, 675 F.2d at 89, 109 L.R.R.M. at 3269.

[20] For commentaries on the circuit court responses to the *Wright Line* standard, *see, e.g.*, Jackson & Heller, *The Irrelevance of the* Wright Line *Debate: Returning to the Realism of* Erie Resistor *in Unfair*

During the *Survey* year, the Supreme Court of the United States resolved the conflict regarding the *Wright Line* standard in *NLRB v. Transportation Management Corp.*[21] In *Transportation Management*, the Court held that the Board's *Wright Line* standard was a reasonable allocation of the burden of proof.[22] According to the Court, the Board's standard extended an affirmative defense to the employer without changing the elements of the unfair labor practice that the General Counsel must show in meeting the burden of proof under section 10(c) of the Act.[23] The Supreme Court in *Transportation Management* thus settled a long-running conflict in the circuit courts over the proper allocation of the burden of proof in section 8(a)(3) discharge cases, and established the *Wright Line* rule as the proper allocation of the burden of proof to be uniformly applied throughout the circuits.[24]

*Transportation Management* involved an employee of a bus company, Sam Santillo, who met with officials of the Teamsters Union on March 19, 1979 to discuss the possibility of organizing the bus drivers of the company.[25] Over the next four days, Santillo spoke with many of his fellow employees about joining the union and began distributing union authorization cards.[26] Santillo's supervisor, Patterson, heard about Santillo's union activities,[27] and on March 23, 1979, Patterson made some comments to other employees about Santillo, promising to get even with Santillo for his union activities.[28] Later that day, Patterson inquired about Santillo's activities and told one employee that he took Santillo's activities personally.[29] Patterson also told the employee that he would remember Santillo's union activities the next time Santillo asked for a favor.[30] On March 26, Santillo was discharged.[31] According to Patterson, Santillo was being discharged for taking unauthorized breaks and leaving his keys in the bus.[32] Subsequently, Santillo filed a complaint with the Board, alleging violations of sections 8(a)(1) and 8(a)(3) of the Act.[33]

In response to Santillo's charges, the General Counsel issued a complaint with the National Labor Relations Board that was heard by an administrative law judge (ALJ).[34] The ALJ found that the employer was clearly motivated by antiunion animus in discharging Santillo, and rejected the asserted business reasons offered by the employer.[35] According to the ALJ, the supervisor had not learned about Santillo's practice of leaving keys in the bus until after the supervisor had decided to fire Santillo.[36] In addition, the practice of

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*Labor Practice Cases*, 77 Nw. U. L. Rev. 737, 746 (1983) [hereinafter cited as Jackson & Heller]; Kelly, Wright Line, A Division of Wright Line, Inc., *The Right Answer to the Wrong Question: A Review of Its Impact to Date*, 14 Pac. L. Rev. 869, 903 (1983) [hereinafter cited as Kelly]; Lewis & Fisher, Wright Line — *An End to the Kaleidoscope in Dual Motive Cases?*, 48 Tenn. L. Rev. 879, 897 (1981)[hereinafter cited as Lewis & Fisher].

[21] 103 S. Ct. 2469, 113 L.R.R.M. 2857 (1983).

[22] *Id.* at 2475, 113 L.R.R.M. at 2861.

[23] *Id.* at 2474-75, 113 L.R.R.M. at 2861.

[24] *See id.* at 2475, 113 L.R.R.M. at 2862.

[25] *Id.* at 2471, 113 L.R.R.M. at 2858.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See id.*

[35] *Id.*

[36] *Id.*, 113 L.R.R.M. at 2858-59.

leaving keys in the vehicles was common among many of the bus drivers.[37] Regarding the unauthorized breaks, the ALJ found that Santillo had never been warned about the activity, and the employer had tolerated the breaks among its other employees unless such practices interfered with the bus drivers' duties.[38] The ALJ found no indication that Santillo would have been discharged had he not engaged in union activities.[39]

The Board affirmed the ALJ's decision, but clarified the conclusions of law by expressly applying the *Wright Line* analysis.[40] According to the Board, the employer had failed to meet its burden of showing that the employee would have been discharged regardless of the employee's union activities.[41] The Board subsequently sought enforcement of its decision in the Court of Appeals for the First Circuit.[42] The court of appeals, however, refused to enforce the Board's decision,[43] and remanded the case for consideration of whether the General Counsel had met its burden of showing by a preponderance of the evidence that Santillo would not have been discharged if he had not engaged in protected activities.[44] In reaching its decision, the court of appeals rejected the Board's *Wright Line* standard, stating that the Board had improperly placed a higher burden of proof on the employer than was permissible under the Act.[45] Section 10(c) of the Act, the court stated, expressly places the burden on the General Counsel to show an unfair labor practice by a preponderance of the evidence.[46] The court reasoned that the Board went beyond its statutory authority by requiring the employer to meet the burden of overcoming the General Counsel's prima facie case.[47] On appeal, the Supreme Court reversed the court of appeals, holding that the *Wright Line* standard was a permissible allocation of the burden of proof.[48]

In its opinion, the Supreme Court reviewed the previous Board decisions establishing the elements of a section 8(a)(3) violation where it was alleged that an employer has discharged an employee because of that employee's union activities.[49] According to the Court, the Board in these cases construed the Act fairly in requiring the General Counsel to show that the discharge was motivated in some way by a desire to discourage union activity.[50] At the same time, the Court acknowledged other decisions which held that an employer could avoid the consequences of a violation by asserting legitimate reasons for the discharge.[51] Referring to the conflict that had developed in the circuit courts over the proper approach to be applied in dual motive cases, the Court discussed the Board's attempt in *Wright Line* to establish a standard that would be acceptable to the circuit courts.[52] The Court concluded that the second half of the *Wright Line* analysis, which had

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[37] *Id.*, 113 L.R.R.M. at 2859.

[38] *Id.* at 2471-72, 113 L.R.R.M. at 2859.

[39] *See id.* at 2472, 113 L.R.R.M. at 2859.

[40] *Id.*

[41] *Id.*

[42] *See id.*

[43] *Id.*

[44] *Id.*

[45] NLRB v. Transportation Management Corp., 674 F.2d 130, 131, 109 L.R.R.M. 3291, 3292 (1st Cir. 1982).

[46] *See id.*, 109 L.R.R.M. at 3292.

[47] *See id.*

[48] *See Transportation Management*, 103 S. Ct. at 2475, 113 L.R.R.M. at 2861.

[49] *Id.* at 2472, 113 L.R.R.M. at 2859.

[50] *See id.* at 2473, 113 L.R.R.M. at 2859-60.

[51] *Id.*, 113 L.R.R.M. at 2860.

[52] *Id.*

the effect of shifting the burden to the employer, was merely a requirement for the employer to make out an affirmative defense to the General Counsel's showing of antiunion animus.[53]

In its review of the First Circuit's decision, the Supreme Court analyzed the court's conclusion that the Board had erred when it shifted the burden of proof to the employer.[54] The Supreme Court agreed with the court of appeals' assertion that section 10(c) of the Act requires the General Counsel to carry the burden of proving an unfair labor practice.[55] The Court disagreed, however, with the circuit court's conclusion that section 10(c) forbids the Board from requiring that the employer prove that the discharge would have occurred even in the absence of union activity.[56] According to the Court, the Board's decision to recognize an affirmative defense, although not necessarily required by the Act, was a permissible construction and "entitled to deference."[57] The Court further reasoned that the Board's *Wright Line* standard is "clearly reasonable" in making the wrongdoer bear the risk that the legal and illegal motives cannot be separated.[58] Reasoning that it is fair to shift the burden of persuasion to the employer where the employer created the risk through his own wrongdoing,[59] the Court concluded that the court of appeals had erred when it refused to enforce the Board's decision.[60]

Finding that the Board's *Wright Line* standard was a permissible allocation of the burden of proof, the Supreme Court then considered whether the Board's finding on the facts of the case before it was supported by the record.[61] According to the Court, the Board was justified in its conclusion that the employee would not have been fired had it not been for his union activities.[62] The Court noted that the record revealed that the two transgressions cited by the employer were in fact commonplace among the employees, and that no other employee had ever been disciplined for such activities.[63] In addition, the Court found that the employer had departed from its usual procedures of employee discipline and had failed to warn the employee that he would be fired for the actions in question.[64] Finally, the Court agreed that the employer "was obviously upset with" the employee for his union activity.[65] Accordingly, the Court concluded that there was substantial evidence to support the Board's finding, and reversed the court of appeals decision.[66]

The Supreme Court's decision in *Transportation Management* is a much needed clarification of the proper standard to be applied in dual motive discharge cases. As a result, the debate over the allocation of the burden of proof in such section 8(a)(3) cases should subside and the *Wright Line* standard should finally be applied uniformly throughout the

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[53] *See id.*
[54] *Id.* at 2474, 113 L.R.R.M. at 2860.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 2475, 113 L.R.R.M. at 2861.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 2476, 113 L.R.R.M. at 2862.
[61] *Id.* at 2475-76, 113 L.R.R.M. at 2862.
[62] *Id.*
[63] *Id.* at 2476, 113 L.R.R.M. at 2862.
[64] *Id.*
[65] *Id.*
[66] *Id.*

circuits. By deferring to the Board's construction of the Act, the Court affirmed a workable standard that strikes a balance between the employees' right to engage in concerted activity and the employer's right to discharge employees for legitimate business reasons.[67] As one circuit court that has approved the *Wright Line* standard has stated, the rule is consistent with the legislative history of the Act, which suggests that an employer show cause for the discharge of any employee,[68] and which recognizes that the employer has better access to the evidence required to prove motivation.[69]

Despite general approval of the *Wright Line* standard,[70] some commentators still perceive underlying problems with the Board's approach.[71] At least three commentators have suggested that the Board's *Wright Line* approach contains a more fundamental problem than the debate over allocation of burdens of proof has revealed.[72] According to this view, the Board should have been more concerned with the fundamental policy of the Act, which requires a balancing of interests of employees in their right to engage in concerted activity against the interests of the employer in operating its business.[73] At least two of the commentators have suggested that the Board would better serve the policy objectives of the Act by focusing first on the injury to the rights of the employees caused by the employer's conduct.[74] These commentators suggest that if the conduct of the employer is "inherently destructive" of union activity, then a violation should be found without further inquiry.[75] If, however, the impact on the employees' union activity is "comparatively slight," then, according to these commentators, the Board should balance the asserted business interest against the specific interest of the employees.[76] It is fair to assume that the Board will not alter its standard in the near future, but the general criticisms of the policy implications of the *Wright Line* standard may indicate that the debate over the effectiveness of the rule has not been entirely settled by the Supreme Court's decision in *Transportation Management*.

Notwithstanding the policy questions surrounding the Board's *Wright Line* standard, the Supreme Court has at least resolved the issue of proper allocation of the burdens of proof in dual motive cases. In cases where an employer has both unlawful and legitimate motives for discharging an employee, the level of proof required to establish a violation of section 8(a)(3) is clear. *Transportation Management* establishes that General Counsel in such cases bears the initial burden of proving that an employer was motivated in some way by antiunion animus. The burden then shifts to the employer to assert an affirmative defense.[77] That affirmative defense allows an employer to avoid a violation by proving by a preponderance of the evidence that the employee would have been discharged even if that employee had not engaged in union activity.[78] This standard, affirmed by the Supreme Court, finally brings needed clarification and uniformity to an area of labor law that has been uncertain for too long.

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[67] *Id.*

[68] NLRB v. Nevis Industries, 647 F.2d 905, 909, 107 L.R.R.M. 2890, 2893 (9th Cir. 1981).

[69] *Id.*

[70] *See, e.g., supra* note 16 and cases cited therein. *See also* Lewis & Fisher, *supra* note 20, at 902 (viewing the *Wright Line* standard as "a step forward").

[71] *See, e.g.*, Jackson & Heller, *supra* note 20, at 740; Kelly, *supra* note 20, at 870.

[72] *See* Jackson & Heller, *supra* note 20, at 740; Kelly, *supra* note 20, at 870.

[73] *See* Jackson & Heller, *supra* note 20, at 740.

[74] *See id.* at 773.

[75] *Id.* at 774.

[76] *Id.*

[77] *See* 103 S. Ct. at 2473, 113 L.R.R.M. at 2860.

[78] *Id.*

4. **Dual Motive Discharge Cases in the Fourth Circuit*: McLean Trucking Co. v. NLRB[1]

Under section 8(a)(3) of the National Labor Relations Act[2] (the Act) it is an unfair labor practice for an employer to discriminate in hiring or employment practices because of a person's union activities.[3] An employer's discharge of an employee violates this section if it is precipitated by an anti-union discriminatory purpose.[4] Nevertheless, an employer is free to discharge an employee for a non-discriminatory reason, such as incompetence, even when that employee is engaged in union activities.[5] Thus, it is the employer's motive that determines whether the discharge is an unfair labor practice.[6]

Where evidence exists of both proper and improper motivation for the firing, a difficult question of causality arises. Such situations — the "dual motive" cases[7] — occur when the discharging employer exhibits an anti-union bias but also has a good cause for the dismissal. A court, hearing an unfair labor practice claim based on a "dual motive" dismissal, must judge whether the dismissal was caused by the proper or improper motive and, consequently, whether it was fair or unfair. In June, 1983, the United States Supreme Court resolved a conflict in the circuit courts over the proper allocation of the burden of proof in such dual motive cases.[8] In *NLRB v. Transportation Management Corp.*,[9] the Supreme Court held that in determining whether an employer has violated the Act in dual motive cases, the circuit courts must defer to the National Labor Relations Board's (Board) *Wright Line* standard.[10] As reiterated by the Supreme Court, the *Wright Line* standard provides that the General Counsel has the initial burden of showing "by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity."[11] Once this burden is met, the burden shifts to the employer to show that "without regard to the impermissible motivation, the employer would have taken the same action for wholly permissible reasons."[12] As the Supreme Court has

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* By David P. Curtin, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 719 F.2d 1226, 114 L.R.R.M. 2649 (4th Cir. 1983).

[2] 29 U.S.C. § 158(a)(3) (1982).

[3] Section 8(a)(3) provides, in pertinent part: "(a) It shall be an unfair labor practice for an employer —

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

[4] Radio Officers' Union v. NLRB, 347 U.S. 17, 42-43, 33 L.R.R.M. 2417, 2427 (1954); NLRB v. Consolidated Diesal Electric Co., 469 F.2d 1016, 1024, 81 L.R.R.M. 2709, 2715 (4th Cir. 1972).

[5] C. MORRIS, THE DEVELOPING LABOR LAW, 115 (1971).

[6] Associated Press v. NLRB, 301 U.S. 103, 132, 1 L.R.R.M. 732, 737 (1937).

[7] NLRB v. Kiawah Island Co., 650 F.2d 485, 490, 107 L.R.R.M. 2599, 2602 (4th Cir. 1981); Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337, 93 L.R.R.M. 2625, 2627 (4th Cir. 1976); *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1084, 105 L.R.R.M. 1169, 1170 (1980).

[8] NLRB v. Transportation Management Corp., 103 S. Ct. 2469, 2475, 113 L.R.R.M. 2857, 2861 (1983). For a discussion and analysis of the Supreme Court's *Transportation Management* decision, see *supra* (this *Survey*) p. 191, 1983-84 *Annual Survey of Labor Relations and Employment Discrimination Law — Allocation of Burden of Proof in Dual Motive Discharge Cases*: NLRB v. Transportation Management Corp., 26 B.C. L. REV. 191 (1984) [hereinafter cited as *Allocation of Burden of Proof:* Transportation Management].

[9] 103 S. Ct. 2469, 113 L.R.R.M. 2857 (1983) (*see supra* p. 191).

[10] 103 S. Ct. at 2475, 113 L.R.R.M. at 2861. *See* Wright Line, Inc., 251 N.L.R.B. 1083, 1089, 105 L.R.R.M. 1169, 1174-75 (1980), *enforced*, 662 F.2d 899, 108 L.R.R.M. 2513 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 109 L.R.R.M. 2779 (1982).

[11] 103 S. Ct. at 2473, 113 L.R.R.M. at 2859.

[12] *Id.* at 2473, 113 L.R.R.M. at 2860.

indicated, this shifting of the burden amounts to an "affirmative defense" upon which the employer may "escape the consequences of a violation" of the Act.[13]

Prior to the Supreme Court's *Transportaion Management* decision, however, the *Wright Line* standard was not accepted by all of the circuit courts.[14] The Fourth Circuit, although never expressly rejecting the *Wright Line* analysis, had adopted a standard different from *Wright Line* for the dual motive cases.[15] The Fourth Circuit's mode of analysis was established prior to *Wright Line* in its 1976 decision in *Firestone Tire & Rubber Co. v. NLRB*.[16] In that case, the court held that the General Counsel has the burden of showing not only that the employer was motivated in part by anti-union animus, but also that the employer had rejected proper motivation and chosen an impermissible one.[17]

During the *Survey* year, the Fourth Circuit Court of Appeals again addressed the problem of dual motive in *McLean Trucking Co. v. NLRB*,[18] a case argued five months prior to the Supreme Court's *Transportation Management* decision, but decided shortly thereafter.[19] In *McLean*, ample evidence existed of both the employer's anti-union animus[20] and the employee's abysmal work record.[21] The court, however, although purporting in a footnote to accept the Supreme Court's standard,[22] held that the General Counsel of the Board did not sustain his burden of proof by merely establishing the employer's anti-union animus.[23] Following the reasoning it had previously articulated in *Firestone Tire & Rubber Co.*,[24] the court ruled that the General Counsel had failed to carry the burden of proof,[25] which, in the Fourth Circuit, requires the General Counsel to "articulate, with support in the record, 'an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one.'"[26] Consequently, after *McLean*, uncertainty still exists in the Fourth Circuit regarding the proper standard of proof in dual motive cases, despite the Supreme Court's expressed attempt in *Transportation Management* to resolve the issue.

In *McLean*, both the Board and the circuit court found ample evidence of the employer's anti-union animus.[27] Daniels, the employee who had been dismissed by the McLean Trucking Company, had been very active in union affairs.[28] In addition to organizational activity, Daniels assisted his fellow employees in filing numerous grievances against the company.[29] Daniels's persistent activities annoyed company officials and

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[13] *Id.*

[14] *Id.* at 2472 n.3, 113 L.R.R.M. at 2859 n.3. *See Allocation of Burden of Proof*: Transportation Management, *supra* pp. 191-92.

[15] *See* Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337, 93 L.R.R.M. 2625, 2627 (4th Cir. 1976).

[16] 539 F.2d 1335, 93 L.R.R.M. 2625 (4th Cir. 1976).

[17] *Id.* at 1337, 93 L.R.R.M. at 2627.

[18] 719 F.2d 1226, 114 L.R.R.M. 2649 (4th Cir. 1983).

[19] *McLean* was argued January 10, 1983 and decided October 6, 1983.

[20] 719 F.2d at 1228, 114 L.R.R.M. at 2650.

[21] *Id.* at 1229, 114 L.R.R.M. at 2651.

[22] *Id.* at 1228 n.1, 114 L.R.R.M. at 2650 n.1.

[23] *Id.* at 1232, 114 L.R.R.M. at 2653-54.

[24] 539 F.2d 1335, 93 L.R.R.M. 2525 (4th Cir. 1976).

[25] 719 F.2d at 1227, 114 L.R.R.M. at 2650.

[26] *Id.* at 1232, 114 L.R.R.M. at 2653.

[27] *Id.* at 1228, 114 L.R.R.M. at 2650.

[28] *Id.*

[29] *Id.*

caused several of those officials to express a desire to "get rid" of Daniels.[30] Moreover, there were several other incidents in which company officials displayed hostility to Daniels's union activities.[31]

At the same time, however, Daniels had an extremely poor work record.[32] He was late or absent without an excuse 31 percent of the time over the 36 month period that he worked for McLean.[33] During that time Daniels had also accumulated a large number of warnings and reprimands.[34] Ultimately, Daniels was fired by McLean — allegedly for his poor work performance.[35]

Daniels protested his dismissal. Initially, Daniels submitted his case to an arbitration board which found that the discharge was merited by poor performance.[36] Following this adverse decision, Daniels filed an unfair labor practice charge with the Board.[37] The Administrative Law Judge (ALJ) found that Daniels's dismissal violated section 8(a)(3) even though other evidence indicated that Daniels was fired because he was a "horrendous" employee.[38] This finding was grounded on the collective bargaining agreement between McLean and its union that provided that a warning notice would not remain in effect against an employee for more than nine months.[39] The ALJ construed this to mean that his investigation into McLean's motive for dismissing Daniels was limited to Daniels's misconduct in the nine months preceding his dismissal.[40] In spite of Daniels's deplorable past record, his misconduct in the nine months prior to his dismissal was relatively minor[41] and the ALJ concluded that it was insufficient grounds for discharge.[42] Accordingly, the ALJ held that he could find no good cause for Daniels's discharge and the real reason must have been McLean's anti-union animus.[43]

Although the Board upheld the ALJ's ruling,[44] the Board's affirmation rested on a different rationale.[45] Unlike the ALJ the Board reviewed Daniels's entire work record.[46]

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[30] *Id.* Daniels had become something of an expert on the workers' contract with McLean, *id.* at 1228 n.2, 114 L.R.R.M. at 2650 n.2, and had himself filed at least 64 grievances with the company in a five year period. *Id.* at 1228 n.3, 114 L.R.R.M. at 2650 n.3.

[31] *Id.* The court reported that a terminal manager had told Daniels that "McLean was a big company and they had ways of getting rid of people like [Daniels] who thought they were lawyers." *Id.* at 1228 n.5, 114 L.R.R.M. at 2650 n.5.

[32] *Id.* at 1228 n.5, 114 L.R.R.M. at 2650 n.5. Among other things, McLean managers threatened to deny Daniel's promotion, refused to accept his grievances, and threatened to issue retaliatory disciplinary citations. *Id.*

[33] *Id.* at 1229, 114 L.R.R.M at 2651.

[34] *Id.*

[35] *Id.* These warnings included unauthorized absences, unacceptable work habits, failure to follow instructions, and failure to make a timely report of an injury. *Id.* at 1229 n.7, 114 L.R.R.M. at 2651 n.7.

[36] *Id.* at 1231, 114 L.R.R.M. at 2653.

[37] *See id.* at 1230 n.9, 114 L.R.R.M. at 2652 n.9.

[38] *Id.* at 1229-30, 114 L.R.R.M. at 2651-52.

[39] *Id.* at 1230, 114 L.R.R.M. at 2652.

[40] *Id.* at 1230, 114 L.R.R.M. at 2651.

[41] *Id.* The company was contractually prohibited from dismissing an employee for a "stale" wrongdoing (over 9 months old). *Id.*

[42] *Id.* Daniels had received four warnings during that time: two were trivial productivity complaints, one was essentially a parking ticket, and the other involved driving his car in an unauthorized area to avoid walking in the rain. *Id.*

[43] *Id.* at 1230, 114 L.R.R.M. at 2651-52.

[44] *Id.*, 114 L.R.R.M. at 2652.

[45] McLean Trucking Co., 261 N.L.R.B. 793, 110 L.R.R.M. 1146 (1982).

[46] 719 F.2d at 1231, 114 L.R.R.M. at 2652.

Nevertheless, the Board emphasized that during the original discharge hearings McLean had justified the dismissal solely on the grounds of Daniels's misconduct in the last nine months of his employment.[47] Only when the matter came before the Board did McLean take the position that the dismissal was motivated by all of Daniels's misconduct.[48] The Board concluded that this "shifting of defenses" indicated that McLean's justifications were "clearly afterthoughts" and that Daniels had been unlawfully discharged.[49] Consequently, the Board issued a cease and desist order.[50]

On appeal the Fourth Circuit Court of Appeals subsequently denied enforcement of the Board's order.[51] The appeals court held that, although the Board's General Counsel had established McLean's anti-union animus, he had failed to make out a prima facie case of discriminatory discharge, as set out in *Firestone Tire & Rubber Co. v. NLRB*,[52] because he had not produced evidence sufficient to support a finding that Daniels's poor work record was not the cause of the dismissal.[53] In so holding, the court rejected the analysis of both the ALJ[54] and the Board.[55] The appeals court stated that the ALJ had erred in considering Daniels's work performance for only the nine months prior to his discharge[56] and found that Daniels's prior deficiencies could have contributed to McLean's decision to fire him.[57] Although such a motivation would have been contractually improper, it would nevertheless not violate the Act because it would not constitute discriminatory intent.[58] Accordingly, the court reasoned that the ALJ should have given weight to Daniels's entire work history at McLean.[59]

The court also concluded that the Board should have given greater consideration to Daniels's work record.[60] The majority asserted that the Board, by concentrating on the "shifting defense" proposition, had failed to address the evidence that Daniels's dismissal was caused by his poor work performance rather than by McLean's discriminatory motive.[61] Consequently, the court concluded that the Board had wrongly held that a prima facie case had been made for a section 8(a)(3) violation. The court rejected the "shifting defense" rationale, noting that there was no inconsistency in McLean's position that would make it suspect.[62] Although the court conceded that McLean had stressed Daniels's more recent misbehavior at the discharge hearing, where contractual considerations were preeminent, and had pleaded Daniels's entire record before the Board,[63]

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[47] *Id.*

[48] *Id.*, 114 L.R.R.M. at 2653.

[49] *Id.*

[50] *Id.*, 114 L.R.R.M. 2652. *See McLean*, 261 N.L.R.B. 783 n.3, 110 L.R.R.M. 1146 n.3.

[51] 261 N.L.R.B. 783, 110 L.R.R.M. 1146.

[52] 719 F.2d at 1232, 114 L.R.R.M. at 2654.

[53] 539 F.2d 1335, 93 L.R.R.M. 2525 (4th Cir. 1976).

[54] *McLean*, 719 F.2d at 1232, 114 L.R.R.M. at 2653-54. "Lacking is a supportable reason for the Board's conclusion that anti-union animus, rather than McLean's utter disenchantment with Daniels as a worker, prompted the discharge." *Id.*

[55] *Id.* at 1230, 114 L.R.R.M. at 2652.

[56] *Id.* at 1231, 114 L.R.R.M. at 2652-53.

[57] *Id.* at 1230, 114 L.R.R.M. at 2652.

[58] *Id.*

[59] *Id.* "In that case anti-union animus did not motivate McLean. Its sole motive would be to rid itself of a demonstrably poor worker." *Id.*

[60] *Id.*

[61] *Id.* at 1231, 114 L.R.R.M. at 2652.

[62] *Id.*

[63] *Id.*, 114 L.R.R.M. at 2653.

the court interpreted this change as a case of "coming clean" before the Board.[64] In addition, the circuit court found that McLean had maintained throughout the proceedings that Daniels's prior work performance was the reason for his dismissal.[65] The court concluded that the Board had failed to demonstrate that McLean's decision to dismiss Daniels was motivated by anti-union animus rather than "utter disenchantment with Daniels as a worker . . . ."[66] Accordingly, the court denied enforcement and remanded the case to the Board.[67]

In dissent, Judge Sprouse asserted that the majority had "misse[d] the impact of *NLRB v. Transportation Management Corp.*"[68] According to the dissent, once the majority conceded that the General Counsel had made a prima facie showing that the employee's protected union activity was a "motivating factor" in the employer's decision to discharge the employee, the sole issue was whether the employer had proved that the discharge would have occurred "even in the absence of the protected conduct."[69]

Applying this standard, Judge Sprouse concluded that the Board was correct in finding that the employer had violated the Act.[70] According to Judge Sprouse, the majority, in addition to using the wrong standard to decide the dual motive issue, had understated the evidence of McLean's anti-union animus.[71] First, Judge Sprouse noted that one of McLean's managers had threatened to issue warning letters in retaliation for Daniels's grievance activities.[72] Furthermore, Daniels was discharged on the day following his election as union steward.[73] Second, Judge Sprouse disagreed with the majority's opinion that the Board had concentrated too much on McLean's "shifting defense."[74] Remarking on the Board's detailed findings of fact, Judge Sprouse indicated that the majority was wrong to rule that the Board had given insufficient weight to Daniels's work record.[75] Judge Sprouse also argued that the Board had correctly determined that it had to consider McLean's motivation for dismissing Daniels based on the company's justification at the time of the dismissal.[76] At that time, and until the time of the unfair labor practice hearing, McLean's sole justification had consisted of Daniels's most recent, "trivial" work rule violations.[77] Judge Sprouse further contended that the Board had correctly weighed the trivial misconduct against the large accumulation of evidence of anti-union animus when it ruled that the General Counsel had made a prima facie showing that the discriminatory motive contributed to McLean's decision to discharge Daniels.[78] Accordingly, Judge Sprouse concluded that the Board's order should have been enforced by the court.[79]

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[64] *Id.*
[65] *Id.* at 1231-32, 114 L.R.R.M. at 2653.
[66] *Id.* at 1232, 114 L.R.R.M. at 2653-54.
[67] *Id.* at 1233, 114 L.R.R.M. at 2654.
[68] *Id.* at 1236, 114 L.R.R.M. at 2656 (Sprouse, J., dissenting).
[69] *Id.* at 1233, 114 L.R.R.M. at 2654-55 (Sprouse, J., dissenting).
[70] *Id.* at 1236, 114 L.R.R.M. at 2657 (Sprouse, J., dissenting).
[71] *Id.*
[72] *Id.* at 1233, 114 L.R.R.M. at 2654 (Sprouse, J., dissenting).
[73] *Id.* at 1234, 114 L.R.R.M. at 2655.
[74] *Id.*
[75] *Id.* at 1235, 114 L.R.R.M. at 2656.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 1236, 114 L.R.R.M. at 2657 (Sprouse, J., dissenting).

The *McLean* dissent was correct in asserting that the majority failed to apply the *Wright Line* standard adopted by the Supreme Court in *Transportation Management*.[80] Notwithstanding the majority's cursory acknowledgment of the *Transportation Management* decision, it applied a standard significantly different than the *Wright Line* standard. The *Wright Line* standard consists of a two-part "causation test" for dual motive cases:[81] (1) the General Counsel must make a prima facie showing that the employee's union activities were a "motivating factor" in the employer's dismissal decision; and, (2) once this motivation is established, the burden shifts to the employer to show that the employee would have been fired even if he had not engaged in union activities. The Supreme Court upheld this allocation of the burden of proof,[82] reasoning that the employer, because of his wrongdoing, should bear the risk that the proper and improper motives could not be separated for the purpose of showing causation.[83] Under the *McLean* analysis, however, the burden never shifts to the employer. On the contrary, the General Counsel must not only show that union activity was one of the motivating factors, but also show that the employer rejected any proper motives and based his decision solely on the improper one.[84]

Although the Supreme Court has apparently resolved the conflict among the circuits regarding the proper mode of analysis to be applied in dual motive cases, the *McLean* decision appears to have perpetuated the confusion in the area, at least in the Fourth Circuit. The dissent was correct in asserting that the *McLean* majority missed the impact of that Supreme Court decision. Perhaps the only explanation for the majority's decision is that the case was decided before the impact of the *Transportation Management* decision could be fully understood, notwithstanding the dissent's criticism.[85] Whatever the reason for the Fourth Circuit's failure to apply the *Wright Line* standard, the *McLean* case should not be viewed as persuasive precedent in the other circuits. The Supreme Court has deferred to the Board's adoption of the *Wright Line* standard in an expressed attempt to resolve the prior conflict in the circuits.[86] Given the dates upon which the *McLean* decision was argued and decided, that decision should be viewed, at best, as an aberration.

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[80] *Id.*

[81] *See Wright Line*, 251 N.L.R.B. at 1089, 105 L.R.R.M. at 1174-75.

[82] *Transportation Management*, 103 S. Ct. at 2475, 113 L.R.R.M. at 2861.

[83] *Id.*

[84] *See* 719 F.2d at 1227, 114 L.R.R.M. at 2650.

[85] Because the *McLean* case was argued in January, 1983, 5 months before the Supreme Court's *Transportation Management* decision, it is conceivable that the Fourth Circuit had determined the outcome of the case before the Supreme Court decided *Transportation Management*. Perhaps the majority of the court believed that the outcome of *McLean* would have been no different, even if the court had expressly applied the *Wright Line* standard. *See* 719 F.2d at 1228 n.1, 114 L.R.R.M. at 2650 n.1.

[86] *See Allocation of Burden of Proof:* Transportation Management, *supra* p. 193.

It is well-settled that a court must defer to the Board's application and construction of the general provisions of the Act where the Board's interpretation is "reasonably defensible," even if the court might prefer a different view. Ford Motor Co. v. NLRB, 441 U.S. 488, 497, 101 L.R.R.M. 2222, 2225 (1979). Because the Supreme Court held in *Transportation Management* that the Board's *Wright Line* standard was reasonable and deserved deference, 103 S.Ct at 2475, 113 L.R.R.M. at 2861, the Fourth Circuit should have applied the *Wright Line* standard. *See also* Automobile Salesman's Union Local 1095 v. NLRB, 711 F.2d 383, 385-86, 113 L.R.R.M. 3175, 3176-77 (D.C. Cir. 1983), discussed *infra* (this Survey) p. 243, 1983-84 *Annual Survey of Labor Relations and Employment Discrimination Laws — Discharge of Supervisor for Union Activity:* Automobile Salesman's Union Local 1095 v. NLRB, 26 B.C. L. REV. 243 (1984).

### 5. **The Fourth Circuit's New Alter Ego Standard*: Alkire v. NLRB[1]

In general, a change in business ownership terminates any labor agreements and obligations that existed between a union and the predecessor owner.[2] Under the doctrine of "alter ego,"[3] however, a predecessor's labor contract or duties are not eliminated by a transfer of business ownership if the transfer is not an "arms length" transaction,[4] but is "merely a disguised continuance of the old employer."[5] The alter ego doctrine is designed to eliminate changes in corporate ownership that are essentially technical,[6] and the doctrine has been widely applied against employers attempting to avoid a National Labor Relations Board (Board) order,[7] or escape from their collective bargaining agreements.[8] Where alter ego status is found the predecessor and successor companies are treated as the same employer,[9] and the Board's remedial powers over the two entities are coextensive.[10]

The determination of whether an existing corporation is the alter ego of its predecessor involves the consideration of numerous factors, rather than the application of a particular rule.[11] Among the factors that the Board considers in determining whether two entities are alter egos are substantial identity of management, business purpose, operation, equipment, customers, supervision, and ownership.[12] Alter ego status is essentially a

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* By Robert J. Gilson, Staff Member, BOSTON COLLEGE LAW REVIEW

[1] 716 F.2d 1014, 114 L.R.R.M. 2180 (4th Cir. 1983).

[2] *See* NLRB v. Burns International Detective Agency, Inc., 406 U.S. 272, 291, 80 L.R.R.M. 2225, 2232 (1972). *See also* 1 THE DEVELOPING LABOR LAW 694-97 (C. Morris 2d ed. 1983) [hereinafter cited as THE DEVELOPING LABOR LAW]. Under certain circumstances, however, a successor corporation may be required to bargain with the union. NLRB v. Burns International Detective Agency, Inc., 406 U.S. 272, 281, 80 L.R.R.M. 2225, 2228, or remedy an unfair labor practice committed by its predecessor. *See* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 185, 84 L.R.R.M. 2839, 2845 (1973).

[3] This doctrine should be distinguished from the alter ego doctrine used in the corporate context. *See* Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U.L. REV. 624, 638 n.101 (1979).

[4] *See* Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984).

[5] Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942).

[6] *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 259 n.5, 86 L.R.R.M. 2449, 2453 n.5 (1974). Technical changes are superficial changes in a business structure that really do not affect ownership or control.

[7] *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942); NLRB v. Ozark Hardwood Co., 282 F.2d 1, 4, 46 L.R.R.M. 2823, 2825 (8th Cir. 1960); Associated Transport Co., 194 N.L.R.B. 62, 71-72, 78 L.R.R.M. 1678, 1679 (1971).

[8] *See* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489, 508, 111 L.R.R.M. 2787, 2798-99 (5th Cir. 1982), *cert. denied*, 104 S.Ct. 335, 114 L.R.R.M. 2976 (1983); NLRB v. Scott Printing Corp., 612 F.2d 783, 785, 103 L.R.R.M. 2153, 2155 (3d Cir. 1979).

[9] *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942); NLRB v. Al Bryant, Inc., 711 F.2d 543, 553, 113 L.R.R.M. 3690, 3699 (3d Cir. 1983).

[10] *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942); Crawford Door Sales Co., 226 N.L.R.B. 1144, 1144, 94 L.R.R.M. 1393, 1394 (1976).

[11] NLRB v. Tricor Products, Inc., 636 F.2d 266, 270, 105 L.R.R.M. 3271, 3273 (10th Cir. 1980); *see also* Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984); Crawford Door Sales Co., 266 N.L.R.B. 1144, 1144, 94 L.R.R.M. 1393, 1394 (1976).

[12] The Board first cited these factors in Crawford Door Sales Co., 266 N.L.R.B. 1144, 1144, 94 L.R.R.M. 1393, 1394 (1976), and this has become the Board's general standard. *See* THE DEVELOPING LABOR LAW, *supra* note 2, at 735. For circuit courts that have cited these factors, see, *e.g.*, Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984); NLRB

factual question,[13] and the common element among the cases is the continued ownership or control of the new entity by the owner of the old entity.[14] In making its factual determination, the Board will consider whether the motive for the transaction was designed to avoid contractual obligations or to escape the reach of Board remedies.[15] Motive, however, is not always controlling.[16] Aside from the element of continued control, neither the Board nor courts have established specific factors as necessary criteria for applying the alter ego doctrine.[17]

During the *Survey* year, the United States Court of Appeals for the Fourth Circuit rejected the Board's existing alter ego multi-factored standard[18] and established a two part test.[19] In *Alkire v. NLRB*,[20] the Board found that a sole proprietorship and its wholly owned corporation were both alter egos of a new corporation that had purchased the assets of the wholly owned corporation.[21] Accordingly, the Board concluded that the existing corporation was under a legal obligation to rehire striking employees laid off by the sole proprietorship, and, because the new corporation had failed to do so, it ordered back wages to be paid to the employees who were not rehired.[22] On appeal the Fourth

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v. Al Bryant, Inc., 711 F.2d 543, 553-54, 113 L.R.R.M. 3690, 3699 (3d Cir. 1983); Carpenters Local Union No. 1848 v. Pratt-Farnsworth, 690 F.2d 489, 507, 111 L.R.R.M. 2787, 2798 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 335, 114 L.R.R.M. 2976 (1983); Nelson Electric v. NLRB, 638 F.2d 965, 968, 106 L.R.R.M. 2393, 2394-95 (6th Cir. 1981).

[13] *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942); NLRB v. Al Bryant, Inc., 711 F.2d 543, 553, 113 L.R.R.M. 3690, 3699 (3d Cir. 1983); Crawford Door Sales Co., 266 N.L.R.B. 1144, 94 L.R.R.M. 1393 (1976).

[14] *See* NLRB v. Bell Company, Inc., 561 F.2d 1264, 1267, 96 L.R.R.M. 2437, 2440 (7th Cir. 1977); NLRB v. Scott Printing Corp., 612 F.2d 783, 786, 103 L.R.R.M. 2153, 2155 (3d Cir. 1979); THE DEVELOPING LABOR LAW, *supra* note 2, at 735.

[15] Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14, 15 L.R.R.M. 882, 883 (1945); Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942); Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984); NLRB v. Al Bryant, Inc., 711 F.2d 543, 553, 113 L.R.R.M. 3690, 3699 (3d Cir. 1983); Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 24, 113 L.R.R.M. 2219, 2223 (1st Cir. 1983), *cert. denied*, 104 S. Ct. 237, 114 L.R.R.M. 2648 (1983); NLRB v. Tricor Products, Inc., 636 F.2d 266, 270, 105 L.R.R.M. 3271, 3273 (10th Cir. 1980).

[16] *See* Nelson Electric v. NLRB, 638 F.2d 965, 968, 106 L.R.R.M. 2393, 2394-95 (6th Cir. 1981); NLRB v. Tricor Products, Inc., 636 F.2d 266, 269-70, 105 L.R.R.M. 3271, 3273 (10th Cir. 1980); Crawford Door Sales Co., 266 N.L.R.B. 1144, 94 L.R.R.M. 1393 (1976); *see also* Note, *The Successorship Doctrine: In Search of a New Focus*, 17 WILLAMETTE L.J. 405, 419 (1981). The lack of motive, however, can be a justification for not finding alter ego status. *See* Blazer Industries, Inc., 236 N.L.R.B. 103, 110 app. (1978) (Corbley, A.L.J.); Cagle's, Inc., 218 N.L.R.B. 603, 605, 89 L.R.R.M. 1337, 1340 (1975).

[17] The factors most often cited are the ones set out in *Crawford Door*, *see supra* note 12 and accompanying text. A case need not involve all these factors, however, for the doctrine to apply. *See* NLRB v. Scott Printing Corp., 612 F.2d 783, 786, 103 L.R.R.M. 2153, 2155 (3d Cir. 1979)(a nominal change in ownership is not dispositive). Thus, the Board and courts review cases in light of their relevant facts, and different cases will highlight different factors. *See, e.g.*, Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984); Nelson Electric v. NLRB, 638 F.2d 965, 968, 106 L.R.R.M. 2393, 2394-95 (9th Cir. 1981); NLRB v. Tricor Products, Inc., 636 F.2d 266, 270, 105 L.R.R.M. 3271, 3273 (10th Cir. 1980).

[18] *See* Alkire v. NLRB, 716 F.2d 1014, 1018 n.4, 114 L.R.R.M. 2180, 2183 n.4 (4th Cir. 1983).

[19] *Id.* at 1020, 114 L.R.R.M. at 2184. *See infra* notes 65-66 and accompanying text.

[20] 716 F.2d 1014, 114 L.R.R.M. 2180 (4th Cir. 1983).

[21] *Alkire*, 259 N.L.R.B. 1323, 1325, 109 L.R.R.M. 1107, 1110 (1982).

[22] *Id.* at 1325-26, 109 L.R.R.M. at 1110-11.

Circuit refused to enforce the Board's order.[23] The Fourth Circuit held that when a change in business ownership occurs, alter ego status can only be imposed on the new business if (1) the same entity controls both the old and new business, and (2) the transfer of business ownership resulted in a foreseeable economic benefit to the predecessor employer by the elimination of its labor obligations.[24] In establishing this new standard, the Fourth Circuit departed from the "well-established" alter ego standard,[25] and created a standard unique to the Fourth Circuit.[26]

In *Alkire*, the respondent operated, as an individual proprietorship, a trucking business hauling coal, rock, and other materials in the Backhannon area of West Virginia.[27] Prior to 1975, the bulk of Alkire's business was hauling for nonunion companies.[28] After 1975, however, Alkire began hauling coal for the Badger Coal Corporation, a union company. As a result, Alkire's drivers became union members covered by the terms of Badger's contract with the United Mine Workers (UMW).[29]

In December of 1977, the UMW engaged in an industry wide strike that lasted until late March of 1978.[30] During this strike Alkire dissolved his proprietorship and fired all his employees.[31] Approximately two weeks after the dissolution of the proprietorship, Upshur Enterprises, Inc. (Upshur), a corporation formed and wholly owned by Alkire,[32] began operating the same hauling business.[33]

While the UMW strike was still in effect, Alkire negotiated a sale of Upshur's assets to a former employee, Dennett Houdyeshell.[34] Houdyeshell formed Mountaineer Corporation for the purpose of taking over the hauling business, and in March 1978 Alkire and Houdyeshell executed a contract of sale.[35] The purchase price was to be paid with the proceeds of a Small Business Administration loan, which was approved in January 1978, to be effective in July 1978.[36] In the interim, Mountaineer leased the business from

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[23] Alkire v. NLRB, 716 F.2d 1014, 1022, 114 L.R.R.M. 2180, 2186 (4th Cir. 1983).

[24] *Id.* at 1020, 114 L.R.R.M. at 2184.

[25] *See* Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984); THE DEVELOPING LABOR LAW, *supra* note 2, at 735; *see also supra* note 12 and accompanying text.

[26] *See supra* notes 11-17 and accompanying text.

[27] Alkire v. NLRB, 716 F.2d 1014, 1016, 114 L.R.R.M. 2180, 2181 (4th Cir. 1983).

[28] *Alkire*, 259 N.L.R.B. at 1323, 109 L.R.R.M. at 1108 (1982).

[29] *Id.*

[30] *Id.*

[31] *Id.* The Board subsequently found that this dissolution was lawful. *Id. See infra* note 47.

[32] In the fall of 1977, Alkire's employees filed a grievance that they were not receiving union scale wages. *Alkire*, 259 N.L.R.B. at 1323, 109 L.R.R.M. at 1108. On September 15, 1977 the grievance was adjusted in favor of the employees. *Id.* On the same day, Alkire formed Upshur. *Id.*

[33] *Id.* Because of the UMW strike, Upshur's operation consisted of caretaking and record keeping functions. Alkire v. NLRB, 716 F.2d 1014, 1016, 114 L.R.R.M. 2180, 2181 (4th Cir. 1983).

[34] *Alkire*, 259 N.L.R.B. at 1323, 109 L.R.R.M. at 1108.

[35] Alkire v. NLRB, 716 F.2d at 1016, 114 L.R.R.M. at 2181. The Administrative Law Judge's findings, adopted by the Board, state that the parties entered the agreement on March 27, 1978. *Alkire*, 259 N.L.R.B. at 1323, 109 L.R.R.M. at 1108. The Fourth Circuit found that the agreement was dated March 6, 1978 and concluded that "there is no support in the record that the agreement was signed on a date other than that which appears on its face." Alkire v. NLRB, 716 F.2d at 1016 n.1, 114 L.R.R.M. at 2181 n.1.

[36] Because of the unfair labor practice charges filed against Mountaineer, the Small Business Administration cancelled its loan. *Id.* at 1017, 114 L.R.R.M. at 2182. This resulted in the termination of the sale agreement between Alkire and Houdyeshell, and in July, 1978 Alkire sold his trucking business assets to another party. *Id.*

Alkire.[37] Under the terms of the lease Mountaineer paid all net profits from the hauling business as rent on the trucking equipment.[38] In return, Alkire remained responsible for taxes, licenses, and loan payments on the equipment.[39] In addition, Alkire received four hundred dollars per week for services as a consultant to Mountaineer.[40]

At the end of the UMW strike, Mountaineer began hauling union coal, principally for the same customers for whom Alkire had hauled.[41] As business picked up, Mountaineer notified prospective employees, including former Alkire employees, that the company was taking job applications.[42] Subsequently, Mountaineer rehired some of Alkire's former employees but refused to hire others.[43] Based on these circumstances, the former employees of Alkire who were not rehired filed unfair labor practice charges alleging that Alkire, Upshur, and Mountaineer were alter egos, and that they had violated section 8(a)(1) and (3) of the Act[44] by requiring striking employees to file new employment applications and by failing to rehire certain employees.[45]

The Board applied its "well settled" alter ego standard[46] and concluded that, although Alkire had lawfully terminated his proprietorship,[47] he continued to control both Upshur and Mountaineer and the three entities were really one integrated business so that Upshur and Mountaineer were alter egos of Alkire.[48] Mountaineer, therefore, was under a duty to reinstate Alkire's employees and its failure to do so constituted unfair labor practices in violation of section 8(a)(1) and (3) of the Act.[49] Consequently, the Board ordered back wages to be paid to the former Alkire employees who were not rehired, and held Alkire, Upshur, and Mountaineer jointly liable.[50]

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[37] *Id.* at 1017, 114 L.R.R.M. at 2181.

[38] *Id.* Included in the operating expenses of Mountaineer was a $400 per week salary to Houdyeshell. *See Alkire*, 259 N.L.R.B. at 1324, 109 L.R.R.M. at 1109.

[39] Alkire v. NLRB, 716 F.2d at 1017, 114 L.R.R.M. at 2181.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] 29 U.S.C. § 158(a)(1) and (3) (1982).

[45] *Alkire*, 259 N.L.R.B. at 1323, 109 L.R.R.M. at 1108. Under Section 8(a)(1) and (3) of the Act it is an unfair labor practice to interfere with the exercise of employees rights to organize and to strike. 29 U.S.C. § 158(a)(1) and (3). In NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 66 L.R.R.M. 2737 (1967), the Supreme Court held that if, after conclusion of a strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their statutory rights under the Act. *Id.* at 378, 66 L.R.R.M. at 738. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to a "legitimate and substantial business justification," he is guilty of an unfair labor practice. NLRB v. Great Dan Trailers, 388 U.S. 26, 34, 65 L.R.R.M. 2465, 2469 (1967). *See Alkire*, 259 N.L.R.B. at 1326 n.15, 109 L.R.R.M. at 1110 n.15. If, however, Mountaineer was not the alter ego of Alkire, then Mountaineer had no duty to recall or reinstate Alkire's former employees. *See Alkire*, 716 F.2d at 1017 n.3, 114 L.R.R.M. at 2182 n.3.

[46] *Alkire*, 259 N.L.R.B. at 1324, 109 L.R.R.M. at 1109. This is the Board's *Crawford Door* standard, *see supra* note 12 and accompanying text.

[47] *Alkire*, 259 N.L.R.B. at 1323, 109 L.R.R.M. at 1109. An employer has a right to go out of business, even if the liquidation is motivated by vindictiveness toward a union. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 268, 58 L.R.R.M. 2657, 2660 (1965).

[48] *Alkire*, 259 N.L.R.B. at 1325, 109 L.R.R.M. at 1110.

[49] *Id.* at 1325-26, 109 L.R.R.M. at 1110-11. For an explanation of a section 8(a)(1) and (3) violation in this context see *supra* note 45. The Board found that the burden had shifted to Mountaineer to prove that it had legitimate business justification for failing to reinstate the former employees; Mountaineer failed to meet this burden. *Id.* at 1326, 109 L.R.R.M. at 1111.

[50] *Id.* at 1327, 109 L.R.R.M. at 1111.

Alkire and Upshur appealed the Board's finding that they were alter egos of Mountaineer to the Fourth Circuit Court of Appeals.[51] The Fourth Circuit found that the Board had "misapplied the standard for imposing alter ego status."[52] The appeals court, therefore, denied enforcement of the Board's order and established a new standard for imposing alter ego status.[53]

The Fourth Circuit began its review by discussing the balance that must be struck in weighing an employer's right to terminate and sell a business and an employee's right to be protected from a sudden change in the employment relationship.[54] Although the court recognized that the existence of an alter ego relationship between two companies is essentially a factual question,[55] it concluded that most other courts of appeals failed to set out minimum criteria for applying the doctrine.[56] The court, therefore, focused on what it considered to be the unsettled question of whether the element of motive or intent should be a prerequisite for finding alter ego status.[57] In considering this issue, the court reviewed prior appeals court decisions and found that, although intent or motive was not always expressly held to be a criterion of alter ego status, the element of intentional evasiveness was generally present.[58] The court reasoned that this element of intent usually manifested itself in the question of whether the predecessor owner obtained a benefit from transferring the business.[59] The court, therefore, held that motive should be a necessary factor in determining whether an alter ego relationship exists.

In support of this conclusion the court drew an analogy between the alter ego doctrine and the partial closing situation.[60] Citing the Supreme Court's leading case in the area of partial closing, *Textile Workers v. Darlington Manufacturing Co.*,[61] the appeals court stated that a "similar analysis is appropriate in determining whether alter ego status should be imposed."[62] In *Darlington Manufacturing* the Supreme Court had held that in determining whether a partial closing was an unfair labor practice the purpose and effect of the closing relative to the labor situation of the remaining business must be considered.[63] The Fourth Circuit concluded that this criterion objectified the element of motive and it incorporated the *Darlington Manufacturing* criterion into a new two part test.[64]

Under the Fourth Circuit's test, the initial question is whether the predecessor retains substantial control over the new entity.[65] If the element of control is established, the

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[51] *Alkire*, 716 F.2d at 1016, 114 L.R.R.M. at 2181.

[52] *Id.*

[53] *Id.* at 1020, 114 L.R.R.M. at 2184.

[54] *Id.* at 1017-18, 114 L.R.R.M. at 2182-83. *See also* John Wiley & Sons v. Livingston, 376 U.S. 543, 549, 55 L.R.R.M. 2769, 2772 (1964).

[55] *Alkire*, 716 F.2d at 1018, 114 L.R.R.M. at 2183.

[56] *Id.* at 1019, 114 L.R.R.M. at 2183.

[57] *Id.* at 1018, 114 L.R.R.M. at 2183.

[58] *Id.* at 1019, 114 L.R.RM. at 2183-84.

[59] *Id.*

[60] *Id.* at 1019-20, 114 L.R.R.M. at 2184. A partial closing involves a situation where a large enterprise controlling various divisions or plants closes down a part of its operations for the purpose of chilling unionism at its remaining operations. *See* Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 275, 58 L.R.R.M. 2657, 2662 (1965). The Supreme Court has held that it is an unfair labor practice for an employer to effect such a partial closing where the employer may reasonably have foreseen that the partial closing would have such a chilling effect. *Id.*

[61] 380 U.S. 263, 58 L.R.R.M. 2657 (1965).

[62] *Alkire*, 716 F.2d at 1020, 114 L.R.R.M. at 2184.

[63] *Darlington Mfg.*, 380 U.S. at 275, 58 L.R.R.M. at 2662.

[64] *See Alkire*, 716 F.2d at 1020, 114 L.R.R.M. at 2184.

[65] *Id.*

second inquiry considers whether the change in ownership "resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations."[66] Applying this test to the facts of *Alkire* the court held that the Board had made no findings concerning Alkire's benefit with respect to his labor obligations in transferring the hauling operations.[67] Noting that the normal procedure would be to remand the case, the court concluded that the complete lack of evidence in the record upon which such a finding could be based rendered remand for a factual finding unnecessary.[68] The court, therefore, remanded with instructions to dismiss any charges of unfair labor practices against Alkire or Upshur based on actions occurring after the sale of Upshur's assets to Mountaineer.[69]

Judge Sprouse filed a dissenting opinion in which he argued that intent had not been a requirement for imposing alter ego status in previous cases and consequently should not be a requirement in the instant case.[70] According to the dissent, although the predecessor employer's motive should be a relevant factor, it should not be determinative of alter ego status.[71] Instead, Judge Sprouse opined that the "guiding rationale" in alter ego cases should be whether the successor employer is "merely a disguised continuance of the old employer."[72] Applying this analysis, Judge Sprouse concluded that the Board's finding of alter ego status was supported by substantial evidence, and therefore the Board's order should have been enforced.[73]

The Fourth Circuit's opinion in *Alkire v. NLRB* represents a substantial departure from the opinions of prior courts of appeals that have reviewed the alter ego doctrine.[74] In place of a flexible, multi-factor standard,[75] the Fourth Circuit has established a rigid two part test.[76] The first part of the Fourth Circuit's test — the element of control by the predecessor employer — has generally been recognized as a necessary prerequisite for finding alter ego status.[77] The second part of the test — the element of intent to evade labor obligations — however, is unique to the Fourth Circuit in that it makes intent a required criterion.[78] While conceding that the question of intent is unsettled in other circuits,[79] the majority opinion in *Alkire* held that intent should be a prerequisite for imposing alter ego status. The court, however, failed to adequately analyze the need for such a requirement.[80] Instead, the court merely argued that intent, or at least the element of economic benefit to the predecessor employer, had been present in most alter ego cases.[81] From this limited discussion the court concluded that intent should be a control-

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[66] *Id.*

[67] *Id.* at 1021, 114 L.R.R.M. at 2185.

[68] *Id.* at 1021-22, 114 L.R.R.M. at 2185-86.

[69] *Id.* at 1022, 114 L.R.R.M. at 2186.

[70] *Id.* (Sprouse, J., dissenting).

[71] *Id.* (Sprouse, J., dissenting).

[72] *Id.* (Sprouse, J., dissenting).

[73] *Id.* at 1023, 114 L.R.R.M. at 2186 (Sprouse, J., dissenting).

[74] *See supra* notes 11-17 and accompanying text.

[75] *See supra* note 12 and accompanying text.

[76] *Alkire*, 716 F.2d at 1022, 114 L.R.R.M. at 2184. *See also supra* notes 65-66 and accompanying text.

[77] *See supra* note 14 and accompanying text.

[78] *See infra* notes 83-88 and accompanying text.

[79] *Alkire*, 716 F.2d at 1018, 114 L.R.R.M. at 2183.

[80] Although the court drew an analogy to the partial closing situation as support for its holding that intent is a necessary element, it failed to examine the benefits and/or disadvantages of its decision. *See id.* at 1018-22, 114 L.R.R.M. at 2183-85.

[81] *Id.* at 1019, 114 L.R.R.M. at 2183-84.

ling factor.[82] Although motive or intent has often been a relevant inquiry in applying the alter ego doctrine,[83] because alter ego is primarily a factual question,[84] the relevance of intent or motive depends upon the specific circumstances of a case.[85] Thus, although some courts have focused on the factor of intent, they have not established intent as a necessary requirement for finding alter ego status.[86] Indeed, as Judge Sprouse's dissent points out, the Supreme Court has indicated that alter ego status is not limited to employers who purposefully attempt to evade the effects of labor laws.[87] The Fourth Circuit's decision in *Alkire v. NLRB*, therefore, represents a unique departure from the "well-established" doctrine of alter ego.[88]

The principal issue in imposing alter ego status had been whether the new employer was "merely a disguised continuance of the old employer."[89] Such an inquiry requires the consideration of numerous factors.[90] Establishing a rigid test fails to deal with the myriad of potential situations within which transfers of business ownership can occur. Moreover, as one of the ultimate goals of labor law is to provide an equitable balance between the property rights of employers and the legitimate expectations of employees,[91] a rigid two part test unnecessarily restricts the Board's scope of inquiry. Although the Fourth Circuit's attempt to objectify the element of intent, by looking at the benefit flowing from the change in business ownership, is a useful consideration,[92] other courts should not adopt it as a necessary factor for finding alter ego status. Instead, the element of intent, like a number of other factors, should be weighed in light of the particular circumstances of each case.

### 6. **Mid-Contract Work Transfers Without Union Approval:* Milwaukee Spring Division of Illinois Coil Spring Co.[1]

Section 8(a)(5) of the National Labor Relations Act (the Act) requires employers to bargain in good faith with employee representatives.[2] Section 8(d) of the Act limits the

[82] *Id.*

[83] *See supra* note 15 and accompanying text.

[84] *See supra* note 13 and accompanying text.

[85] *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942); NLRB v. Al Bryant, Inc., 711 F.2d 543, 553, 113 L.R.R.M. 3690, 3699 (3d Cir. 1983); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 486, 508, 111 L.R.R.M. 2787, 2798-99 (5th Cir. 1982); NLRB v. Tricor Products, Inc., 636 F.2d 266, 270, 105 L.R.R.M. 3271, 3273 (10th Cir. 1980).

[86] *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942); Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984); NLRB v. Scott Printing Corp., 612 F.2d 783, 787, 103 L.R.R.M. 2153, 2156 (3d Cir. 1979); NLRB v. Bell Company, Inc., 561 F.2d 1264, 1267, 96 L.R.R.M. 2437, 2440 (7th Cir. 1977).

[87] *Alkire*, 716 F.2d at 1022, 114 L.R.R.M. at 2186 (Sprouse, J., dissenting), (quoting Howard Johnson Co. v. Detroit Joint Exec. Bd., 417 U.S. 249, 259 n.5, 86 L.R.R.M. 2449, 2453 n.5 (1974)).

[88] *See* Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984). *See also supra* notes 11-17 and accompanying text.

[89] *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 413-14 (1942); Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419, 115 L.R.R.M. 2571, 2573 (D.C. Cir. 1984); Alkire v. NLRB, 716 F.2d at 1022, 114 L.R.R.M. at 2186 (Sprouse, J., dissenting).

[90] *See supra* notes 11-13 and accompanying text.

[91] *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 549, 55 L.R.R.M. 2769, 2772 (1964).

[92] *See Alkire*, 716 F.2d at 1022, 114 L.R.R.M. at 2186 (Sprouse, J., dissenting).

* By Lloyd E. Selbst, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 268 N.L.R.B. 601, 115 L.R.R.M. 1065 (1984), *rev'g* Milwaukee Spring Div. of Illinios Coil, 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*).

[2] 29 U.S.C. § 158(a)(5) (1982). The same duty to bargain in good faith is imposed on labor unions by section 8(b)(3) of the Act. 29 U.S.C. § 158(b)(3) (1982).

mandatory subjects of bargaining to "wages, hours, and other terms and conditions of employment."[3] The parties are not required, however, to reach agreement on these subjects.[4] If the parties reach an impasse, the employer may unilaterally implement his decision.[5] Once an employer and the union have agreed to a collective bargaining agreement, however, section 8(d) provides that the union need not discuss nor agree to midterm modifications of terms in the collective bargaining agreement.[6] Furthermore, section 8(d) makes it an unfair labor practice for an employer unilaterally to modify a mandatory term of a collective bargaining agreement while the agreement remains in effect.[7]

Several times in recent years, the National Labor Relations Board (the Board) has considered whether an employer's decision to relocate work out of a bargaining unit without the union's consent while the collective bargaining agreement is in effect violates sections 8(a)(5) and 8(d) of the Act in the absence of a work-preservation clause in the agreement.[8] Until recently, the Board had consistently ruled that such transfers of work — and subsequent lay-offs of workers at the original facility — were violations of section 8(a)(5) and 8(d) although the circuit courts have generally refused to enforce the Board orders.[9] The Seventh Circuit rejected the Board's holding in *University of Chicago v.*

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[3] 29 U.S.C. § 158(d) (1982). This subsection provides, in pertinent part: "For the purposes of this section, to 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 . . . ."

[4] Section 8(d) provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1982).

[5] American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965).

[6] Section 8(d) provides that the duties imposed by that section "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. § 158(d) (1982).

[7] Section 8(d)(4) requires that the parties maintain "all the terms and conditions of the existing contract." 29 U.S.C. § 158(d)(4) (1982). The Supreme Court, however, has held that "a 'modification' is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining." Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 185, 78 L.R.R.M. 2974, 2984 (1971). If an employer unilaterally changes a term which is a permissive subject of bargaining, employees may bring a breach of contract action under section 301 of the Act, 29 U.S.C. § 185 (1982). *Id.* at 181 n.20, 188, 78 L.R.R.M. at 2983 n.20, 2986.

[8] *See* cases cited *infra* notes 9-10. The Board has also considered whether such action constitutes a violation of section 8(a)(3). *See, e.g., Milwaukee Spring I*, 265 N.L.R.B. at 208-09, *rev'd upon reconsideration*, Milwaukee Spring Div. of Illinois Coil Co., 268 N.L.R.B. 601, 604, 115 L.R.R.M. 1065, 1069 (1984) (*Milwaukee Spring II*). Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1982). Although generally, anti-union animus must be shown to establish a violation of section 8(a)(3), American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311, 58 L.R.R.M. 2672, 2676 (1965), anti-union animus is not required to establish a violation when the employer's conduct is shown to be "inherently destructive" of employee rights, NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34, 65 L.R.R.M. 2465, 2469 (1967). This comment will focus primarily on the Board's section 8(a)(5) and 8(d) analysis, however, since the Board's findings of violations of section 8(a)(3) in the area of mid-term work relocation appear to derive from the finding of section 8(a)(5) and 8(d) violations. *See Milwaukee Spring II*, 268 N.L.R.B. at 604, 115 L.R.R.M. at 1069.

[9] *See, e.g., Milwaukee Spring I*, 265 N.L.R.B. at 206 (1982); Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, 98 L.R.R.M. 1571 (1978), *enforced*, 602 F.2d 1302, 102 L.R.R.M. 2498 (9th Cir. 1979); Boeing Co., 230 N.L.R.B. 696, 96 L.R.R.M. 1355 (1977), *enforcement denied*, 581 F.2d 793, 99

*NLRB*,[10] ruling that unless a term in the collective bargaining agreement specifically states that the employer cannot transfer work to a different facility during the life of the agreement, a mid-contract transfer does modify the agreement and therefore does not require union approval.[11] The court did, however, condition an employer's ability to transfer work in two respects.[12] First, the court held that, as with other changes in work conditions not specifically addressed in the collective bargaining agreement, the employer must bargain in good faith to impasse before instituting the change under the rule announced by the Supreme Court in *Fibreboard Paper Products v. NLRB*.[13] Second, the court ruled that, as with other employer decisions, the decision to transfer work could not be motivated by anti-union animus under the Supreme Court decision in *Textile Workers Union of America v. Darlington Manufacturing Co.*[14]

The only other circuit to consider the issue, the Ninth Circuit, has reached inconsistent results.[15] When the Board turned a deaf ear to the Seventh Circuit's *University of Chicago* holding in deciding *Boeing Co.*[16] two years later, the Ninth Circuit denied enforcement of the order relying on *University of Chicago*.[17] In *Los Angeles Marine Hardware Co. v. NLRB*,[18] however, the Ninth Circuit enforced a Board order finding a violation of section 8(a)(5) and 8(d) when an employer laid off several employees and relocated bargaining unit work during the term of the collective bargaining agreement.[19] Significantly, the court found an unfair labor practice even though the employer had bargained in good faith over the decision to remove work and was motivated solely by economic considerations.[20] Thus, the Ninth Circuit's decision was directly in conflict with the Seventh Circuit's decision in *University of Chicago*[21] and with its own earlier decision in *Boeing Co.*[22]

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L.R.R.M. 2847 (9th Cir. 1978); University of Chicago, 210 N.L.R.B. 190, 86 L.R.R.M. 1073 (1974), *enforcement denied*, 514 F.2d 942, 89 L.R.R.M. 2113 (7th Cir. 1975).

[10] 514 F.2d 942, 89 L.R.R.M. 2113 (7th Cir. 1975).

[11] *Id.* at 9948-49, 89 L.R.R.M. at 2116-18.

[12] *Id.* at 949, 89 L.R.R.M. at 2117.

[13] *Id.* (citing Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 L.R.R.M. 2609 (1964)).

[14] *Id.* (citing Textile Workers of Am. v. Darlington Mfg. Co., 380 U.S. 263, 58 L.R.R.M. 2657 (1965)).

[15] *See supra* notes 17-23 and accompanying text.

[16] 230 N.L.R.B. 696, 96 L.R.R.M. 1355 (1977).

[17] 581 F.2d 793, 796-97, 99 L.R.R.M. 2847, 2850-51 (9th Cir. 1978).

[18] 602 F.2d 1302, 102 L.R.R.M. 2498 (9th Cir. 1979).

[19] *Id.* at 1306-07, 102 L.R.R.M. at 2500-01. The court also upheld the Board's finding that the lay-off of 23 employees due to the transfer of work constituted a violation of section 8(a)(3), reasoning that the lay-off was "inherently destructive" of employee rights. *Id.* at 1307, 102 L.R.R.M. at 2501. *See supra* note 8.

[20] *Id.* at 1306, 102 L.R.R.M. at 2500. *See also* the extensive findings of the Administrative Law Judge on these issues, adopted by the Board, 235 N.L.R.B. at 732-33.

[21] *See supra* text accompanying notes 11-15. Curiously, the court did not even mention *University of Chicago*, 210 N.L.R.B. 190, 86 L.R.R.M. 1073 (1974).

[22] *See supra* text accompanying notes 17-18. The Ninth Circuit's position on this issue is further complicated by its subsequent decision in Brown Co. v. NLRB, 663 F.2d 1078, 109 L.R.R.M. 2663 (9th Cir. 1981), *rev'g and remanding without opinion* 243 N.L.R.B. 769, 101 L.R.R.M. 1608 (1979). In *Brown*, the Board found that the employer transferred work and laid off employees during the term of the collective bargaining agreement to avoid paying union wages in violation of section 8(a)(3). *Id.* at 772, 101 L.R.R.M. at 1611. The Board did not reach the section 8(a)(5) issue. *Id.* The Board based

During the *Survey* year, in *Milwaukee Spring Division of Illinois Coil Spring Co. (Milwaukee Spring II)*,[23] the Board adopted the Seventh Circuit's reading of section 8(d) and abandoned its former position by holding that a mid-contract transfer of work out of a bargaining unit does not violate section 8(d) unless a collective bargaining agreement specifically forbids an employer from transferring work to a different facility.[24] In reversing its position, the Board also adopted the Seventh Circuit's two limitations on the employer's freedom to transfer work to another facility during the term of a contract.[25] The Board's change of position may have the long-term effect of weakening the bargaining power of many unions and consequently, of undermining the purpose of section 8(d).

In *Milwaukee Spring II*, the employer, Illinios Coil Spring Company, decided without the union's consent, to transfer its assembly operation from its unionized Milwaukee, Wisconsin facility to its nonunionized McHenry, Illinois facility during the term of a collective bargaining agreement.[26] As a result of that decision, a number of workers at the Milwaukee site were laid off.[27] The union brought an action before the Board charging that the Illinois Coil Spring Company had engaged in an unfair labor practice by transferring work without union approval.[28] Applying its traditional analysis to a mid-contract transfer, the Board originally held that the transfer and lay-off violated sections 8(a)(5) and 8(d) of the Act.[29] Illinois Coil petitioned the Court of Appeals for the Seventh Circuit to set aside the Board's decision.[30] Before the court acted, however, the Board requested the court to remand the case to it for additional consideration.[31] After a rehearing, the Board reversed its previous ruling and found that the employer had not violated sections 8(a)(5) and 8(d) of the Act.[32]

In its new decision, the Board noted that only modifications by an employer of "terms and conditions contained in" a collective bargaining agreement are subject to union consent under section 8(d) of the Act.[33] The Board held, therefore, that if the condition of employment which the employer wished to change was not an express term in the contract, the employer was subject only to the general obligation under the Act of bargaining in good faith to impasse before instituting the proposed change.[34] The employer need not secure the union's consent.[35]

In the Board's view, the sole issue in the instant case was whether an agreement by Illinois Coil Spring not to move its assembly operations elsewhere during the life of the

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its finding of the section 8(a)(3) violation on the *Los Angeles Marine* theory that the employer's actions were inherently destructive of employee rights. *Id.*, *see supra* note 20. The court denied enforcement of the Board order and remanded the case to the Board for a determination of whether the employer's actions were permitted under the terms of the collective bargaining agreement. 109 L.R.R.M. at 2663 (brief unofficial opinion).

[23] 268 N.L.R.B. 601, 115 L.R.R.M. 1065 (1984).

[24] *Id.* at 602, 115 L.R.R.M. at 1068.

[25] *Id.* at 604, 115 L.R.R.M. at 1068. *See also supra* notes 11-15 and accompanying text.

[26] *Milwaukee Spring II*, 268 N.L.R.B. at 601, 115 L.R.R.M. at 1065.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 601, 115 L.R.R.M. at 1066.

[32] *Id.*

[33] *Id.* at 602, 115 L.R.R.M. at 1066.

[34] *Id.*

[35] *Id.*

agreement was "contained in" a clause of the company's contract with the union.[36] The Board ruled that it was not.[37] Upon examination of the collective bargaining agreement, the Board found no term expressly forbidding relocation of work during the contract period without the union's approval.[38] Further, the Board rejected the reasoning of the Ninth Circuit in *Los Angeles Marine*[39] by ruling that no clause in the contract implied such an agreement by the employer.[40] Specifically, the Board stated that the transfer did not violate the contract's wages and benefits clauses since the transfer did not disturb the salary rates and fringe benefits offered at the Milwaukee site.[41] Similarly, in the Board view, the transfer could not be said to violate the recognition clause.[42] In a recognition clause, the Board asserted, the employer merely agrees to bargain with the union chosen by the employees.[43] The employer does not agree that only members of that union will do the work covered by the contract.[44] In reaching this conclusion, the Board expressly adopted the reasoning of the Seventh Circuit in *University of Chicago* and the Ninth Circuit in *Boeing Co.*[45] Like the Seventh Circuit, the Board noted that employers and unions were free to write clauses into their agreements requiring that certain tasks be performed only by members of the bargaining unit.[46] Indeed, the Board pointed out that many contracts have such clauses.[47] The Board held, therefore, that if an employer and a union chose not to forbid the relocation of work to another facility for the life of the contract expressly, no such ban should be read into the existing clauses of the contract.[48]

The Board acknowledged that its decision, like that of the Seventh Circuit in *University of Chicago*, was irreconcilable with the Ninth Circuit's ruling in *Los Angeles Marine*.[49] The Board asserted, however, that the Ninth Circuit's opinion was a misinterpretation of the law.[50] Moreover, the Board adopted as consistent with the Act the limitations on an employer's freedom to transfer work imposed by *University of Chicago*.[51] That is, the Board ruled that an employer who wished to effect a transfer not specifically barred by the contract must first bargain in good faith with the union to impasse before effecting the transfer,[52] and second, refrain from making transfers motivated solely by anti-union animus.[53]

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[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] 602 F.2d 1302, 102 L.R.R.M. 2498 (9th Cir. 1979).
[40] *Milwaukee Spring II*, 268 N.L.R.B. at 602, 115 L.R.R.M. at 1066-67.
[41] *Id.*
[42] *Id.* at 602, 115 L.R.R.M at 1067.
[43] *Id.*
[44] *Id.*
[45] *See supra* notes 11-18 and accompanying text.
[46] *Milwaukee Spring II*, 268 N.L.R.B. at 602, 115 L.R.R.M. at 1068.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 604, 115 L.R.R.M. at 1068.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* The Board also overruled its earlier decision that the employer's actions violated section 8(a)(3) of the Act. *Id.* The Board reasoned that its earlier finding of the section 8(a)(3) violation "flowed from" the finding of the section 8(a)(5) violation, and that since it now ruled that no section 8(a)(5) violation had occurred, therefore no violation of section 8(a)(3) had occurred either. *Id. See supra* notes 8, 20 and 23 regarding the section 8(a)(3) theory.

The dissenting opinion in *Milwaukee Spring II* found the majority's reasoning to be flawed.[54] According to the dissent, in the absence of an explicit relocation ban in the contract, the employer should be able to transfer work after bargaining to impasse, provided not only that the employer was not motivated by anti-union animus but also that the employer's motive was not to save on labor costs by avoiding paying the wages and benefits that he agreed to pay in the contract.[55] If the employer's motive arises from any other considerations, the dissent asserted, then the employer is free to transfer after bargaining to impasse.[56]

In addition, the dissent argued that an employer should not be allowed to do indirectly what he could not do directly under a collective bargaining agreement.[57] According to the dissent, an employer should not, therefore, be permitted under section 8(d) to avoid meeting crucial pay and benefit terms of a collective bargaining contract simply by shifting work from the unit covered by the contract to a different unit.[58] The dissent maintained that the decisions of both the Seventh and Ninth Circuits on mid-term relocations were reconcilable and supported this view.[59] In addition, the dissent asserted that although the Seventh Circuit in *University of Chicago* had permitted the reassignment of work, the court did so because the employer's sole motive in making the transfer was to increase the quality of performance, not to reduce the wage rate to employees performing the work.[60] Similarly, in the dissent's view, the Ninth Circuit had permitted the transfer of work without union consent in *Boeing Co. v. NLRB* because the employer's motive was to increase efficiency in production and not to reduce labor costs.[61] In *Los Angeles Marine*, the dissent argued, the Ninth Circuit had affirmed *Boeing* by finding that the transfer of work violated section 8(d) because the employer made the transfer solely to avoid paying the high labor costs specified in his contract with the union.[62]

The sole issue in the instant case, according to the dissent, was the employer's motive in relocating.[63] The dissent found that the employer's motive was to reduce labor costs by moving to a nonunionized facility.[64] Since, in the dissent's view, reducing labor costs was a motive that the circuit courts had found impermissible under section 8(d), the Board should have ruled that the transfer was improper without union consent.[65]

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[54] *Id.* at 605, 115 L.R.R.M. at 1069 (Zimmerman, Member, dissenting). The dissent began by considering the "threshold issue" of whether the employer's relocation decision was a mandatory subject of bargaining, noting that section 8(d) prohibits midterm unilateral modifications only with regard to mandatory subjects of bargaining. *Id. See supra* note 7. The dissent found that the relocation decision was a mandatory subject. *Id.* at 609, 115 L.R.R.M. at 1069. The majority did not address the preliminary issue, apparently because the parties agreed to consider the relocation decision a mandatory subject of bargaining. *Id.* at 601 n.5, 115 L.R.R.M. at 1066 n.5. For a detailed discussion of when an employer's decision to relocate is a mandatory subject of bargaining, *see* O'Keefe & Tuohey, *Economically Motivated Relocations of Work and an Employer's Duties under Section 8(d) of the National Labor Relations Act: a Three-Step Analysis*, 11 FORDHAM URB. L. J. 795, 815-25, 839-42 (1983).

[55] *Id.* at 605, 610-11, 115 L.R.R.M. at 1069, 1074-75 (Zimmerman, Member, dissenting).

[56] *Id.* at 611-12, 115 L.R.R.M. at 1075 (Zimmerman, Member, dissenting).

[57] *Id.* at 611, 115 L.R.R.M. at 1074 (Zimmerman, Member, dissenting).

[58] *Id.*

[59] *Id.* at 610, 115 L.R.R.M. at 1073-74 (Zimmerman, Member, dissenting).

[60] *Id.* at 610, 115 L.R.R.M. at 1074 (Zimmerman, Member, dissenting).

[61] *Id.* (discussing Boeing Co. v. NLRB, 581 F.2d 793, 99 L.R.R.M. 2847 (9th Cir. 1978)).

[62] *Id.*

[63] *Id.* at 611, 115 L.R.R.M. at 1075 (Zimmerman, Member, dissenting).

[64] *Id.* at 611, 115 L.R.R.M. at 1074 (Zimmerman, Member, dissenting).

[65] *Id.*

As the dissent correctly pointed out, the majority opinion in *Milwaukee Spring II* was a departure from the Board's previous position.[66] Nevertheless, the dissent's attempt to synthesize the rulings of the Seventh and Ninth Circuits into a consistent series of decisions is not convincing.[67] The Seventh Circuit in *University of Chicago* did not approve the transfer merely, as the *Milwaukee Spring II* dissent asserted, because the employer's motive in deciding to transfer work was to improve efficiency rather than to reduce wages.[68] The court inquired into the employer's motive only to establish whether the reason for the relocation was anti-union animus.[69] The Seventh Circuit's view in *University of Chicago*, adopted by the Board in *Milwaukee Spring II*, was that a mid-contract relocation was permissible provided the employer had not acted out of anti-union animus and had bargained in good faith with the union before relocating.[70] In contrast, the Ninth Circuit's ruling in *Los Angeles Marine* held mid-term transfers for any reason invalid in the absence of union approval.[71] The decisions of the two circuits cannot be harmonized in any way.

The *Los Angeles Marine* rule, however, seems to be more in line with the statutory goal of protecting the rights of employees. Relocation amounts to wholesale repudiation of a collective bargaining agreement. To hold, as the Board did in *Milwaukee Spring II*, that the employer cannot unilaterally make changes regarding matters covered specifically in the contract, but can unilaterally scrap the entire contract at will and move elsewhere, seems to be an unnecessarily narrow and formalistic reading of section 8(d). Further, this decision, if upheld by the circuit courts, encourages employers who do not have nontransfer clauses in their contracts to shift work to wherever they can pay lower wages, since the decision would eliminate the union's ability to prevent such action. Thus, the decision would seem to jeopardize the continued existence of many unionized facilities. Finally, the Board's decision in *Milwaukee Spring II* will have the effect of making nontransferability of work a separate subject of negotiation between unions and employers. Accordingly, unions may in the future have to grant significant concessions to secure nontransferability. The *Milwaukee Spring II* decision, rather than aiding unionized workers, appears merely to provide employers with a new weapon for compelling "give backs" by unions.

### 7. **Accord and Satisfaction as Defense to Breach of Contract Suit by Union Against Employer Over Modification of Benefits to Retired Workers*: UAW v. Yard-Man, Inc.[1]

Neither unions nor management are obligated under federal labor law to bargain over permissive contractual provisions.[2] In the 1971 case of *Allied Chemical and Alkali*

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[66] *Id.* at 610, 115 L.R.R.M. at 1073-74 (Zimmerman, Member, dissenting).

[67] *See supra* notes 48-59 and accompanying text.

[68] *See supra* note 54 and accompanying text.

[69] University of Chicago v. NLRB, 514 F.2d 942, 949, 89 L.R.R.M. 2113, 2117 (7th Cir. 1975).

[70] *Id.*; *see also Milwaukee Spring II*, 268 N.L.R.B. 601, 604, 115 L.R.R.M. 1065, 1068 (1984).

[71] Los Angeles Marine Hardware Co. v. NLRB, 602 F.2d 1302, 1307, 102 L.R.R.M. 2498, 2501 (9th Cir. 1979).

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* By Walter L. Maroney, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Local 134 UAW v. Yard-Man, Inc., 716 F.2d 1476, 114 L.R.R.M. 2489 (6th Cir. 1983) [hereinafter cited as *UAW v. Yard-Man, Inc.* or *Yard-Man*].

[2] Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Company, Inc., 404 U.S. 157, 182, 183 n.20, 78 L.R.R.M. 2974, 2983, 2983 n.20 (1971) (employers and union under no obligation). *See also* Titmus Optical Co., Inc. v. United Steelworkers of America, 205 N.L.R.B. 159, 84 L.R.R.M. 1559 (1973) (union not obligated to bargain for benefits to retired workers).

*Workers v. Pittsburgh Plate Glass Company, Inc.*,[3] the United States Supreme Court declared that benefits for already retired workers are permissive rather than mandatory subjects for collective bargaining.[4] Accordingly, the Court held, unilateral modification by an employer of the terms of retirement provisions relating to already retired workers is not an unfair labor practice within the meaning of section 8(d) of the National Labor Relations Act (the Act).[5] Employers who agree to retirement benefit provisions as part of a collective bargaining agreement, however, are bound by the terms of that agreement.[6]

During the *Survey* year, the Sixth Circuit Court of Appeals in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and Local 134, UAW v. Yard-Man, Inc.*[7] considered two questions arising from the *Pittsburgh Plate Glass* doctrine that retirement benefit provisions are permissive elements of collective bargaining agreements. The court first held that an employer is under no duty to notify the union of a proposed modification of benefits to retired employees, even when the union had undertaken to represent the retirees in a breach of contract suit over the employer's failure to provide such benefits as required under a collective bargaining agreement.[8] Second, the court held that acceptance by individual retirees of an employer's modification of benefits, which had originally been provided for in a collective bargaining agreement, could constitute grounds for the affirmative defenses of estoppel and accord and satisfaction to a union's suit for specific performance under the contract.[9]

*UAW v. Yard-Man, Inc.* was based upon a collective bargaining agreement entered into in August 1974, which bore a stated expiration date of June 1, 1977 and covered employees at Yard-Man's Jackson, Michigan plant.[10] Less than a year after the signing of the contract, the plant closed.[11] In April, 1977, Yard-Man notified its Jackson retirees that existing health and life insurance benefits would terminate upon expiration of the collective bargaining agreement.[12] The UAW promptly filed grievances and responded to Yard-Man's refusal to arbitrate with a breach of contract suit filed in federal district court[13] pursuant to section 301 of the Act.[14] In its first count, the UAW sought to compel arbitration over the disputed benefits.[15] Alternatively, the union asked for specific performance of Yard-Man's alleged obligation to provide health and life insurance benefits

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[3] 404 U.S. 157, 78 L.R.R.M. 2974 (1971).

[4] *Id.* at 180-82, 78 L.R.R.M. at 2982. The Court reasoned that retirees are not "employees" within the meaning of 29 U.S.C. § 152(3). *Pittsburgh Plate Glass*, 404 U.S. at 172, 78 L.R.R.M. at 2979. Nor does modification of retirement benefits vitally affect the "terms and conditions of employment" of active workers. *Id.* at 182, 78 L.R.R.M. at 2983. Accordingly, neither unions nor management have a statutory obligation to bargain over benefits for retired workers. *Id.* at 182, 183 n.20, 78 L.R.R.M. at 2983, 2983 n.20.

[5] *Pittsburgh Plate Glass*, 404 U.S. at 183 n.20, 78 L.R.R.M. at 2983 n.20. *See generally* Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 916-20 (1971) (retiree pension rights protected under common law of contract).

[6] Nedd v. United Mine Workers of America, 556 F.2d 190, 95 L.R.R.M. 2392 (3d Cir. 1977); Toensing v. Brown, 528 F.2d 69 (9th Cir. 1975).

[7] 716 F.2d 1476, 114 L.R.R.M. 2489 (6th Cir. 1983).

[8] *Id.* at 1486, 114 L.R.R.M. at 2496.

[9] *Id.* at 1485, 114 L.R.R.M. at 2495.

[10] *Id.* at 1478, 114 L.R.R.M. at 2489.

[11] *Id.*

[12] *Id.*

[13] 716 F.2d at 1478, 114 L.R.R.M. at 2489.

[14] 61 Stat. 136, ch. 120, title III § 301 (1947) (codified at 29 U.S.C. §§ 185-187 (1982)).

[15] *Yard-Man*, 716 F.2d at 1478, 114 L.R.R.M. at 2489.

beyond the term of the collective bargaining agreement.[16] In its second count, the UAW sought specific performance of Yard-Man's acknowledged obligation, in the event of business failure, to purchase annuities to fund a supplemental pension plan.[17] After the suit had been filed, but without notice to the UAW, Yard-Man distributed lump sum payments purportedly equal to the present value of the supplemental pension rights directly to each retiree.[18]

In the district court, the UAW waived its demand for arbitration and the parties filed cross motions for summary judgment.[19] Relying solely on the language of the collective bargaining agreement, the district court found for the UAW on both counts.[20] As to the first count, the district court held that Yard-Man had breached a contractual obligation through its unilateral cancellation of the retirees' insurance policies.[21] As to the second count, the court held that, as a matter of law, Yard-Man could not provide a substituted performance in accord and satisfaction of its contractual obligation to the retirees to purchase annuities on their behalf.[22] Accordingly, the court ordered specific performance of Yard-Man's obligations under each count.[23] The United States Court of Appeals for the Sixth Circuit allowed certified appeal by Yard-Man of the district court's specific performance orders.[24]

The Circuit Court first examined the UAW's contention that the life and health insurance provisions were intended by the parties to the Yard-Man agreement to create vested rights in retirees extending beyond the term of the contract.[25] Relying on a body of "federal common law" precedent established under the aegis of *Textile Workers Union v. Lincoln Mills*,[26] the court treated as established doctrine that parties to a collective bargaining agreement may provide for rights surviving the termination of their contractual relationship.[27] Regarding the duration of the benefit provisions at issue in the Yard-Man

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[16] *Id.*

[17] *Id.* at 1478, 114 L.R.R.M. at 2490.

[18] *Id.* Prior to closing, Yard-Man offered two pension plans to its employees. The "Yard-Man Basic Plan," a qualified ERISA plan, was not involved in the litigation. *Id.* at 1488, 114 L.R.R.M. at 2498 (Holschuh, J., concurring in part and dissenting in part). The "Improved Yard-Man Pension Plan — Jackson" offered optional benefits beyond the scope of the ERISA-qualified Basic Plan. *Id.* (Holschuh, J., concurring in part and dissenting in part). Article XVIII of the collective bargaining agreement between Yard-Man and UAW obligated Yard-Man, in the event of business failure, "to fund the balance of the pension benefits payable to employees then in retirement through purchase of an annuity from a life insurance company." *Id.* (Holschuh, J., concurring in part and dissenting in part). The company did not dispute this obligation. *Id.* (Holschuh, J., concurring in part and dissenting in part).

[19] 716 F.2d at 1478, 114 L.R.R.M. at 2490.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 1487, 114 L.R.R.M. at 2496-97.

[23] *Id.* at 1478, 114 L.R.R.M. at 2490. The district court, however, required the affected retirees to repay the lump-sum distribution as a precondition to receiving their bargained-for annuities. *Id.*

[24] *Id.* The district court certified its judgment under 28 U.S.C. § 1292(b) as a summary judgment controlled by a question of law over which substantial difference of opinion existed. *Id.*

[25] *Id.* at 1479-83, 114 L.R.R.M. at 2490-93.

[26] 353 U.S. 448, 40 L.R.R.M. 2113 (1957).

[27] 716 F.2d at 1479, 114 L.R.R.M. at 2490. Relying on the holding of *Lincoln Mills*, 353 U.S. 448, 40 L.R.R.M. 2113 (1957), that federal courts may adopt common law doctrines to construe collective bargaining agreements, the court expounded five rules for the divination of the existence of vested rights in collective bargaining agreements. The court suggested that it should first look to the precise

contract, however, the court found the language of the agreement to be facially ambiguous.[28] The court, therefore, looked to other provisions of the agreement for evidence indicative of the parties' intent.[29]

First, the court noted that specific durational limits on insurance benefits to active employees were set out in the agreement.[30] The court further noted that retiree savings and basic pension plans, as well as coverage of spouses and children of deceased employees, were similarly made explicitly coextensive with the life of the collective bargaining agreement.[31] In the absence of equivalent limiting language, the court found it "reasonable to infer" that the parties to the agreement intended to vest lifetime health and insurance benefits in retired workers.[32]

Turning to the annuities purchase and lump-sum distribution question, the court

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language of the agreement for clear manifestations of the parties' intent. 716 F.2d at 1479, 114 L.R.R.M. at 2490-91. Second, any intent so discernible should be interpreted as consistently as possible with the overall agreement. *Id.* at 1479-80, 114 L.R.R.M. at 2491. Third, the disputed provision should not be construed so as to render it "nugatory" or "illusory." *Id.* at 1480, 114 L.R.R.M. at 2491. Fourth, where the language of the agreement is ambiguous, the court may look to other language in the agreement for guidance. *Id.* Finally, any interpretation of a disputed provision must be consistent with basic principles of federal labor law. *Id. See generally* Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., Inc., 404 U.S. 157, 183 n.20, 78 L.R.R.M. 2974, 2983 n.20 (1971), *supra* note 4; John Wiley & Sons v. Livingston, 376 U.S. 543, 545, 55 L.R.R.M. 2769 (1964). *See also* Upholsterers International Union v. American Pad and Textile Co., 372 F.2d 427, 64 L.R.R.M. 2200 (6th Cir. 1969); International Union, UAW, v. Robertshow Controls Co., 405 F.2d 29, 68 L.R.R.M. 2571 (2d Cir. 1968); International Union, UAW, Local 784 v. Cadillac Malleable Iron Co., Inc., 113 L.R.R.M. 2525 (W.D. Mich. 1982); Roxbury Carpet Co. and Textile Workers of America 73-2 Lab. Arb. Awards (CCH) ¶ 8521 (1973) (Summers, Arb.); American Standard, Inc., 57 Lab. Arb. (BNA) 698 (1971) (Warns, Arb.).

[28] 716 F.2d at 1481, 114 L.R.R.M. at 2491.

[29] *Id.* at 1480-81, 114 L.R.R.M. at 2491. The court determined that the relevant contractual language was limited to Article XVII, Section 4 of the collective bargaining agreement which read in relevant part: "When the former employee has attained the age of 65 years then: (1) the Company will provide insurance benefits equal to the active group's benefits . . . for the former employee and his spouse." *Id.* at 1480, 114 L.R.R.M. at 2491. The court explicitly rejected Yard-Man's claim that a general durational clause terminating the collective bargaining agreement on June 1, 1977 demonstrated the parties' intent that all benefits conferred by the agreement should terminate on that date. *Id.* at 1482-83, 114 L.R.R.M. at 2493. *See supra* note 10 and accompanying text.

[30] *Id.* at 1481, 1481 n.3, 1481 n.4, 114 L.R.R.M. at 2492, 2492 n.3, 2492 n.4 (company contribution to active employee benefit plans terminable after layoff on a seniority based schedule).

[31] *Id.* at 1482, 114 L.R.R.M. at 2493.

[32] *Id.* at 1481, 114 L.R.R.M. at 2492. The court noted that the collective bargaining agreement permitted early retirement at age 55. Article XVII, Section 4 of the agreement committed Yard-Man to assume insurance costs of the early retiree when the retiree reached sixty-five. *Id.* Such a promise, the court observed, bound the company for up to ten years, while the collective bargaining agreement itself was to be in force for only three. *Id.* According to the court, to hold the duration of the agreement as controlling all promises therein would render the company's obligation under Section 4 "illusory." *Id.*

The court also suggested that the permissive nature of retirement benefit provisions in the collective bargaining process argued for their interpretation as creating vested rights beyond the term of any given contract. *Id.* at 1482, 114 L.R.R.M. at 2492-93. The court reasoned that retirement benefits are typically understood as delayed compensation. *Id.* at 1482, 114 L.R.R.M. at 2493. Neither the union nor the employer, however, is under a statutory duty to include such provisions in subsequent contracts. *Id.* Therefore, the decision by union members to forgo current wages in return for future benefits implies an expectation that such benefits will be assured beyond the term of the authorizing contract. *Id. See also Pittsburgh Plate Glass*, 404 U.S. 157, 78 L.R.R.M. 2974 (1971), *see supra* text accompanying notes 2-4.

identified two issues. First, the court examined the question of whether retirees may, consistently with federal labor law and principles, settle disputes over benefits directly with their former employer by means of accord and satisfaction without notice to, or consent of, the union.[33] Second, the court considered whether such settlements should be precluded once the union undertakes legal representation of the retirees in litigation pursuant to section 301 of the Act.[34]

Regarding the issue of notice of settlement to the union, the court began by observing that section 159(a) of the Act requires such notice in the case of settlements between the employer and active employees.[35] The court held, however, that section 159(a) did not control the instant situation because, under the *Pittsburgh Plate Glass* doctrine, retirees are not "employees" within the purview of federal labor law.[36] Moreover, according to the court, as permissive contractual elements, retirement benefits are not "terms and conditions of employment" specifically covered by the Act.[37]

The court then examined the union's argument that general principles of federal labor policy mandated judicial imposition of a union notice requirement as a prerequisite to settlement of disputes between retirees and a former employer.[38] The section 159(a) notice requirement, the court observed, protects only the union's interest in preserving the integrity of "*terms and conditions of employment . . . of active employees.*"[39] Individual settlement of retiree benefit disputes would not modify or compromise any mandatory provision of a collective bargaining agreement and so posed no threat to the union interest recognized by section 159(a).[40] Furthermore, the court reasoned, the retiree has an individual remedy at law under section 301 of the Act against a former employer who breaches a contractual obligation.[41] This remedy, the court stressed, does not require recourse to the union for effectuation.[42] Logically, therefore, the settlement of a section 301 suit between a retiree and former employer is a matter for the individual discretion of the retiree and is beyond the scope of federal labor law.[43] Accordingly, the court refused

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[33] *Id.* at 1484, 114 L.R.R.M. at 2494.

[34] *Id.*

[35] *Id.* The court observed that 29 U.S.C. § 159(a) "permits 'adjustments' between employer and employee without intervention of the union so long as the agreement is not inconsistent with the terms of the bargaining agreement and the union has been given the opportunity to be present." *Id.*

[36] *Id. See Pittsburgh Plate Glass*, 404 U.S. 157, 172, 78 L.R.R.M. 2974, 2979 (1971). *See also supra* text accompanying notes 2-4.

[37] 716 F.2d at 1485, 114 L.R.R.M. at 2495.

[38] *Id.* at 1484-85, 114 L.R.R.M. at 2494-95.

[39] *Id.* at 1484, 114 L.R.R.M. at 2494 (emphasis in original).

[40] *Id.* The court reasoned:

> [Section 159(a)] requires notification to the union prior to employer settlements with active employees out of recognition of the union's status as the active employees' sole bargaining representative. In the case of retirees who are not employees or members of the bargaining unit and whose relationship to the employer and union is not directly controlled by the labor statutes, this primary rationale for notification no longer exists.

*Id.*

[41] *Id.* at 1485, 114 L.R.R.M. at 2495. *See also Pittsburgh Plate Glass*, 404 U.S. at 181 n.20, 78 L.R.R.M. at 2983 n.20 (1971), *see supra* notes 2-4 and accompanying text.

[42] 716 F.2d at 1485, 114 L.R.R.M. at 2495 ("[F]ormer employees do not need . . . joint common strength to enforce their vested contractual rights against their former employer.").

[43] *Id.* at 1486, 114 L.R.R.M. at 2496. Indeed, the court went so far as to argue that a retiree's discretion concerning settlement of a section 301 suit against an employer is a "right" which should not be compromised absent a showing of compelling federal policy interest. *Id.*

to establish a notice requirement as a matter of substantive federal law for settlement of benefit disputes between retirees and a former employer.[44]

The court then turned to Yard-Man's assertion that such a settlement could serve as a basis for the affirmative defenses of accord and satisfaction to a section 301 suit by the union on behalf of retirees.[45] The court stated that it found the argument for a union notice requirement as a prerequisite to individual settlements "more compelling" where, as in the Yard-Man litigation, the union had actually undertaken to represent retirees in a section 301 suit.[46] Since the union was a signatory to the contract in its own right, the court noted, it had a consequent interest in ensuring employer compliance with all terms of the collective bargaining contract.[47] Characterizing this interest as "residual," however, the court deemed it of insufficient weight to counterbalance the interest of retired workers in direct settlement of disputes with a former employer.[48] Therefore, the court held, the district court's decision that Yard-Man was precluded by law from asserting common law defenses based on individual settlement to the union's suit over the annuity dispute was in error.[49] Summary judgment against Yard-Man on this issue was therefore held inappropriate,[50] and the court remanded the question of Yard-Man's annuity purchase obligation for consideration of the factual viability of the asserted defenses.[51]

The dissenting opinion took issue with the court's refusal to establish a union notice requirement for individual settlement of retirement benefit disputes.[52] Disputing the court's characterization of Yard-Man's lump sum distribution of present value of the

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[44] *Id.*

[45] *Id.* at 1485, 114 L.R.R.M. at 2495.

[46] *Id.* at 1486, 114 L.R.R.M. at 2496.

[47] *Id.* The court argued: "Clearly the union's efforts in ensuring compliance with all terms of a collective bargaining contract are a significant consideration for the active employees when choosing to retain the union as their exclusive bargaining representative." *Id. See also Pittsburgh Plate Glass*, 404 U.S. at 176 n.17, 78 L.R.R.M. at 2981 n.17 (1971), *supra* note 3. The union's status as a contract signatory, of course, assures its standing to sue the company on its own behalf for breach of contract arising out of a retirement benefits dispute. *Yard-Man*, 716 F.2d at 1486, 114 L.R.R.M. at 2496.

[48] *Yard-Man*, 716 F.2d at 1486, 114 L.R.R.M. at 2496.

[49] *Id.* at 1487, 114 L.R.R.M. at 2497.

[50] *Id.*

[51] *Id.* Consistent with its reading of *Lincoln Mills*, 353 U.S. 448, 40 L.R.R.M. 2113 (1957), *supra* notes 26-27, the court adopted as consonant with federal law the principles of Michigan common law concerning the three necessary elements of the defense of accord and satisfaction: "[T]here must be a disputed claim, a substituted performance agreed upon and accomplished, and valuable consideration." 716 F.2d at 1487, 114 L.R.R.M. at 2497. The court also instructed the lower court to examine the conduct of the Yard-Man lump-sum distribution offer for evidence of contractual overreaching by the employer. *Id.* at 1488, 114 L.R.R.M. at 2497. A finding of overreaching by the company would, of course, constitute grounds for overturning the putative settlements. *Id.* at 1488, 114 L.R.R.M. at 2496.

[52] *Yard-Man*, 716 F.2d at 1488, 114 L.R.R.M. at 2497 (Holschuh, J., concurring in part and dissenting in part). The dissent was written by District Court Judge John D. Holschuh, sitting on the circuit court panel by designation. Judge Holschuh concurred with the court's finding that the parties to the contract had intended to vest lifelong rights to health and life insurance benefits in employees. He dissented from the court's decision to remand the issue of annuity payments for fact-finding related to Yard-Man's affirmative defenses. *Id.* (Holschuh, J. concurring in part and dissenting in part). The dissent also argued that the affirmative defenses of estoppel and accord and satisfaction offered by Yard-Man before the circuit court had been insufficiently articulated at trial, and so should be precluded on appeal. *Id.* at 1490, 114 L.R.R.M. at 2499-2500 (Holschuh, J., concurring in part and dissenting in part).

contractual annuities as a "settlement,"[53] the dissent argued instead that Yard-Man's conduct and the language of the proposal sent by Yard-Man to the retirees constituted a unilateral modification of a contract to which principles of accord and satisfaction would be inapplicable as a matter of common law.[54]

Alternatively, the dissent argued that the court's decision to allow employers to raise defenses based on individual settlements in a section 301 suit by a union contravened three significant labor policies.[55] First, federal labor law rests on a policy of equalizing bargaining strength between employers and employees.[56] To permit an employer to completely bypass the union in its dealings with retirees would be contrary to the assumption that the individual worker (or former worker) is overmatched in direct negotiation with the employer.[57] Second, the dissent identified a federal policy that favored honoring collective bargaining agreements.[58] The dissent characterized the union's interest in enforcement of retirement provisions as central to the vitality of this policy.[59] Finally, the dissent argued by extrapolation that the federal government has,

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[53] *Id.* at 1492, 114 L.R.R.M. at 2500 (Holschuh, J., concurring in part and dissenting in part).

[54] *Id.* at 1493, 114 L.R.R.M. at 2501 (Holschuh, J., concurring in part and dissenting in part). The notice to participating employees, sent *after* the union had filed its section 301 suit, read in relevant part: "Effective November 1, 1978, each participant in the Improved Yard-Man Pension Plan — Jackson will receive a lump-sum payment equal to the present value of all his or her expected future payments. . . . There will be no further payments made after the lump-sum distribution." *Id.* at 1489, 114 L.R.R.M. at 2498 (Holschuh, J., concurring in part and dissenting in part). The dissent emphasized the "unilateral" character of this offer:

> Yard-Man unilaterally, without any prior notice to the union or retirees, or agreement of the union or retirees, decided it would not fulfill [its annuity purchase obligation] because of the cost to Yard-Man but, instead, would terminate the Improved Plan, and send lump-sum cash payments, in amounts determined solely by Yard-Man.

*Id.* (Holschuh, J., concurring in part and dissenting in part).

The dissent argued that the unilateral character of this transaction failed to satisfy the basic criterion of the defense of accord and satisfaction that any substituted performance must be "agreed upon and accomplished." *Id.* at 1492, 114 L.R.R.M. at 2501 (Holschuh, J., concurring in part and dissenting in part). *See supra* note 51. Likewise, the dissent argued that the retirees' seemingly coerced acceptance of Yard-Man's modification offer ought not establish a defense of estoppel against either the retirees or the union. *Yard-Man*, 716 F.2d at 1493, 114 L.R.R.M. at 2501-02 (Holschuh, J., concurring in part and dissenting in part). These are entirely meritorious arguments concerning the applicability of the defenses of accord and satisfaction to the facts of the case. *But see infra* note 67 and accompanying text for discussion of the inappropriateness of such analysis to an appeal of summary judgment.

[55] *Id.* at 1495-97, 114 L.R.R.M. at 2503-05 (Holschuh, J., concurring in part and dissenting in part).

[56] *Id.* at 1495, 114 L.R.R.M. at 2503 (Holschuh, J., concurring in part and dissenting in part) (quoting NLRB v. Allis-Chalmers, Mfg. Co., 388 U.S. 175, 180, 65 L.R.R.M. 2449, 2450-51 (1967) ("National labor policy has been built on the premise that by pooling their economic strength and acting through a labor union freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.")).

[57] *Yard-Man*, 716 F.2d at 1496, 114 L.R.R.M. at 2504 (Holschuh, J., concurring in part and dissenting in part). The dissent reasoned: "[Such a policy] would pit the sophistication and power of an employer against the unorganized and less sophisticated individual retirees." *Id.* (Holschuh, J., concurring in part and dissenting in part).

[58] *Id.* at 1495, 114 L.R.R.M. at 2503.

[59] *Id.* at 1497, 114 L.R.R.M. at 2505 (Holschuh, J., concurring in part and dissenting in part). The dissent relied for this principle on *Pittsburgh Plate Glass*, 404 U.S. at 176 n.17, 114 L.R.R.M. at

through ERISA[60] provisions, demonstrated an interest in the provision of retirement benefits to former workers by employers.[61] This interest would be controverted, according to the dissent, by the availability of affirmative defenses to charges by the union of breach of contract arising from modification by an employer of retirement benefits.[62] The dissent, therefore, would have held that an employer who initiates a modification of retirees' vested benefits without notice to the union or express approval of the retirees should be precluded as a matter of federal law from raising affirmative defenses to a section 301 suit by the signatory union based on individual settlements.[63]

The dissent, however, misconstrued the breadth of the court's holding. As to the annuity dispute, the court held only that actions to enforce permissive provisions of a collective bargaining agreement do not preclude affirmative defenses based on the common law of contract.[64] No cognizable federal policy, in the court's view, demands union notification of individual settlement of disputes between retirees and an employer concerning vested rights to retirement benefits.[65] Moreover, the court confined its holding to general questions of law appropriate to an appeal from summary judgment and reserved to the trial court examination of the factual applicability of the asserted defenses to the employer's conduct.[66]

The dissent, on the other hand, examined the factual predicates of Yard-Man's conduct at length to determine that Yard-Man's conduct constituted a unilateral modification as opposed to a settlement.[67] Such a precise factual determination, however, is the province of the trial court. By engaging in so comprehensive an analysis of the Yard-Man dispute, the dissent would impose a general procedural requirement on disputes between employers and retirees predicated largely on a unique fact situation.[68] The dissent

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2881 n.17 (1971) (union interest in retirement benefits "undeniable") and Cehaich v. International Union, United Automobile, Aerospace and Agricultural Workers of America, 710 F.2d 234, 173 L.R.R.M. 3220 (6th Cir. 1983) (procurement of retirement benefit compliance "one of the most visible means for the union to show that it is meeting the needs of its members"). *Yard-Man*, 716 F.2d at 1497, 114 L.R.R.M. at 2503 (Holschuh, J., concurring in part and dissenting in part).

[60] The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1982).

[61] *Yard-Man*, 716 F.2d at 1497-98, 114 L.R.R.M. at 2505 (Holschuh J., concurring in part and dissenting in part).

[62] *Id.* at 1498, 114 L.R.R.M. at 2505 (Holschuh, J., concurring in part and dissenting in part).

[63] *Id.* (Holschuh, J., concurring in part and dissenting in part).

[64] *Id.* at 1487-88, 114 L.R.R.M. at 2496-97.

[65] *Id.* at 1487, 114 L.R.R.M. at 2496.

[66] *Id.* at 1488, 114 L.R.R.M. at 2497.

[67] *Id.* at 1498, 114 L.R.R.M. at 2505 (Holschuh, J., concurring in part and dissenting in part).

[68] *Id.* (Holschuh, J., concurring in part and dissenting in part). The dissent would hold that defenses based on individual settlements should be unavailable to employers "as a matter of federal substantive law" when the employer initiates a contractual modification of permissive benefits without notice to the union or approval of either the retirees or the union. *Id.* (Holschuh, J., concurring in part and dissenting in part). Arguably, by expressly laying out the elements for evaluation by the district court of Yard-Man's accord and satisfaction defense, the majority may be signalling the appropriateness of an ultimate finding by the trial court similar to that of the dissent. *See id.* at 1487-88, 114 L.R.R.M. at 2497, *supra* note 51. Nevertheless, the court observed that "[the lack of] clear justification beyond the case at bar . . . strongly cautions against judicial adoption of any rule." *Id.* at 1487, 114 L.R.R.M. at 2496. The court's reasoning is particularly persuasive in the context of an appeal from summary judgment.

At a more basic level, the majority and dissenting in part opinions in *Yard-Man* are predicated on differing readings of the *Lincoln Mills* doctrine that collective bargaining agreements are subject to

attempts to justify the generality of its proposed holding by reference to general policies underlying federal labor law.[69] The propositions relied on by the dissent, however, are too vague and, in the case of the dissent's ERISA analogy, too tenuously related to federal labor law to support adoption of a blanket disallowance of common law defenses in a section 301 suit.[70] Nor does the dissent adequately address the status of retirement benefit provisions as permissive elements of collective bargaining agreements, on which status the court had based its refusal to recognize a compelling federal or union interest in modification.[71]

The decision of the Sixth Circuit in *UAW v. Yard-Man* elucidates the current status of retirement benefit provisions in collective bargaining agreements under federal law. According to the court, retirement benefit provisions are permissive elements of a collective bargaining contract.[72] The parties to a negotiation are free, however, to agree to vest benefits in active or retired workers beyond the durational terms of a given contract.[73] In case of a dispute, such a provision is to be construed, consistently with established federal practice under the aegis of *Lincoln Mills*,[74] in accordance with traditional canons of common law contract interpretation, and in a manner consistent with federal labor policy.[75] No federal policy, however, requires notice to, or consent of, a union concerning agreements between employers and retirees modifying vested retirement benefits.[76] Accordingly, in the wake of *Yard-Man*, an employer may raise defenses based on individual settlements with retirees in a section 301 suit by a union to compel specific performance of contractual obligations to retirees.[77] The substantive merits of such defenses are to be determined in each case by the trier of fact.[78]

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federal common law. *See* Textile Workers of America v. Lincoln Mills, 353 U.S. 448, 40 L.R.R.M. 2113 (1957); *see also supra* notes 26-27. The court appears to read *Lincoln Mills* as empowering the federal courts to adopt principles of common law not inconsistent with federal labor policy. *See Yard-Man*, 716 F.2d at 1487, 114 L.R.R.M. at 2497. The dissent, on the other hand, appears to envision *Lincoln Mills* more broadly: as licensing the federal courts to fashion common law principles which best effectuate federal labor policy. *Id.* at 1498, 114 L.R.R.M. at 2502 (Holschuh, J., concurring in part and dissenting in part). This assumption permits the dissent to advocate adoption of substantive rules of federal common law, preclusive of traditional common law defenses, as a matter of federal policy.

[69] *See supra* text accompanying notes 55-63.

[70] *Id.*

[71] *See supra* text accompanying notes 38-43. *See also Pittsburgh Plate Glass*, 404 U.S. 157, 78 L.R.R.M. 2974 (1971), *supra* text accompanying notes 3-4.

[72] *See supra* text accompanying notes 4 & 37.

[73] *See supra* text accompanying note 32.

[74] *See supra* note 27.

[75] *See supra* text accompanying notes 27 and 44.

[76] *See supra* text accompanying notes 44-48.

[77] *See supra* text accompanying note 49.

[78] *See supra* text accompanying note 51

### B. *Union Unfair Labor Practices*

#### 1. **A New Board Standard for Superseniority Clauses in Collective Bargaining Agreements*: Local 900, International Union of Electrical, Radio and Machine Workers v. NLRB[1]

Section 7 of the National Labor Relations Act[2] (the Act) protects the rights of employees to refrain from engaging in union activity. Under sections 8(a)(1) and (3) of the Act,[3] it is an unfair labor practice for an employer to interfere with those rights or to encourage or discourage union membership. Similarly, under section 8(b)(1)(A) and (2) of the Act,[4] unions may not coerce employees in the exercise of their section 7 rights or cause an employee to encourage or discourage union membership.

In recent years, the National Labor Relations Board (Board) and the courts have considered whether clauses in collective bargaining agreements granting union officers superseniority[5] for layoff, recall, and other contractual benefits violate employees' rights to refrain from union activity. Neither the Board nor the courts established a per se rule regarding superseniority clauses. Accordingly, the Board has developed a balancing test under which it weighs the tendency of superseniority clauses to encourage employees to become active union members to obtain the corresponding benefits against the union's legitimate interests in assuring the continued on-the-job presence of union officers.[6]

During the *Survey* year, the United States Court of Appeals for the District of Columbia Circuit enforced a Board decision announcing a new rule regarding superseniority clauses.[7] In *Gulton Electro-Voice, Inc.*,[8] the Board had held that superseniority accorded to officers who do not perform grievance processing or other on-the-job contract administrative functions is not permissible because it unjustifiably discriminates in favor of certain employees based on union involvement.[9] The Board also ruled, however, that superseniority provisions for stewards or other union officers who perform such functions would be permissible because the continued presence of such officers on the job is necessary to carry out their union duties.[10] In *Local 900, International Union of Electrical Radio and Machine Workers v. NLRB* (*Electrical Workers*), the appeals court affirmed the

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* By Michael Roy, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 727 F.2d 1184, 115 L.R.R.M. 2760 (D.C. Cir. 1984).

[2] 29 U.S.C. § 157 (1982).

[3] 29 U.S.C. § 158(a)(1), 158(a)(3) (1982).

[4] 29 U.S.C. § 158(b)(1)(A), 158(b)(2) (1982).

[5] "Superseniority" refers to provisions in collective bargaining agreements granting some employees seniority over other employees with longer service. *See, e.g.*, Dairylea Cooperative, Inc., 219 N.L.R.B. 656, 657, 89 L.R.R.M. 1737, 1737 (1975), *enforced sub nom.* Milk Drivers and Dairy Employees, Local 338, International Brotherhood of Teamsters v. NLRB, 531 F.2d 1162, 91 L.R.R.M. 2929 (2d Cir. 1976).

[6] *See infra* notes 26-42 and accompanying text; *see generally* C. MORRIS, THE DEVELOPING LABOR LAW, 234-35, 245 (2d ed. 1983).

[7] Local 900, International Union of Electrical, Radio and Machine Workers v. NLRB, 727 F.2d 1184, 115 L.R.R.M. 2760 (D.C. Cir. 1984), *enforcing* Gulton Electro-Voice, Inc., 266 N.L.R.B. 406, 112 L.R.R.M. 1361 (1983).

[8] 266 N.L.R.B. 406, 112 L.R.R.M. 1361 (1983), *enforced sub nom.* Local 900, International Union of Electrical, Radio and Machine Workers v. NLRB, 727 F.2d 1184, 115 L.R.R.M. 2760 (D.C. Cir. 1984).

[9] *Id.* at 406, 112 L.R.R.M. at 1361.

[10] *Id.* at 408, 112 L.R.R.M. at 1364.

Board's new rule and rejected the union's argument that employees had waived their section 7 rights by ratifying the contract that included the clause.[11] *Gulton*, and its affirmation in *Electric Workers*, established the rule that only those superseniority clauses that provide layoff and recall protection for stewards or other union officials who process grievances or perform on-the-job contract administration will be enforceable.[12]

In *Gulton/Electrical Workers*, the collective bargaining agreement contained a clause granting superseniority as to layoff and recall to a number of union officers, including the Recording Secretary and the Financial Secretary.[13] The duties of the Recording Secretary included keeping minutes of union meetings, preparing correspondence, and maintaining records.[14] The duties of the Financial Secretary involved receiving and accounting for union funds, paying bills, furnishing supplies, and transmitting dues to the parent international union.[15] On various occasions, the grant of superseniority to the Recording Secretary caused certain other employees to be laid off when they otherwise would not have been.[16]

The General Counsel to the Board filed unfair labor practice charges against the union and the employer, claiming that the grant of superseniority to the two officers unjustifiably discriminated against other employees' exercise of their section 7 rights under the Act.[17] The Administrative Law Judge (ALJ) dismissed the complaint, concluding that superseniority for these officers served the lawful purpose of promoting both effective representation and the collective bargaining relationship.[18] The Board unanimously reversed the ALJ's decision, concluding that according superseniority to officers who do not perform grievance processing or other on-the-job contract administration functions is not permissible because it unjustifiably discriminates against employees who choose not to become involved with the union.[19] The union sought reversal of the Board's order in the Court of Appeals for the District of Columbia Circuit, and the Board cross-petitioned for enforcement of the order.[20]

The appeals court began its review by making some general observations concerning employees' section 7 rights.[21] Section 7, the court noted, protects employees' rights to engage in or refrain from engaging in concerted activity, preserving an employee's right to be a " 'good, bad, or indifferent' " union member.[22] Coercion or discriminatory action by employers or unions based on the exercise of section 7 rights may be an unfair labor practice under sections 8(a)(3) and 8(b)(2) of the Act.[23] The court acknowledged, however, that discriminatory treatment may be permitted in situations in which it furthers other substantial statutory or business purposes.[24]

The court then traced the development of the Board's decisions regarding superse-

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[11] *Electrical Workers*, 727 F.2d at 1190, 115 L.R.R.M. at 2765-66.
[12] *Id.* at 1190-95, 115 L.R.R.M. at 2766-70.
[13] *Id.* at 1186, 115 L.R.R.M. at 2762.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Gulton*, 266 N.L.R.B. at 406, 112 L.R.R.M. at 1361.
[20] *Electrical Workers*, 727 F.2d 1185, 115 L.R.R.M. at 2761.
[21] *Id.* at 1186, 115 L.R.R.M. at 2762.
[22] *Id.* (quoting Radio Officers' Union v. NLRB, 347 U.S. 17, 40, 33 L.R.R.M. 2417, 2426 (1954)).
[23] *Id.*
[24] *Id.*

niority.[25] In *Dairylea Cooperative, Inc.*,[26] the court stated, the Board had considered the lawfulness of a clause in a collective bargaining agreement that accorded stewards top seniority with respect to all contractual benefits, such as layoffs, recalls, overtime assignments, vacations, driver routes, shifts, and days off.[27] In that case, the court observed, the Board had noted that superseniority clauses could have a discriminatory effect against employees for union related reasons.[28] According to the court, the Board had recognized, however, that steward superseniority for layoff and recall furthers the effective administration of collective bargaining agreements, thereby serving a legitimate statutory purpose and benefiting all unit employees.[29] Consequently, the court noted, the Board had concluded in *Dairylea* that steward superseniority provisions limited to layoff and recall were presumptively valid but that superseniority provisions as to other job benefits were presumptively invalid.[30]

Subsequently, the court went on to state, the Board had addressed the broader issue of superseniority for "functioning union officers."[31] In *United Electrical, Radio & Machine Workers of America, Local 623 (Limpco)*,[32] the union officer had been the Recording Secretary, who had had no official duties regarding the processing of grievances, although she had participated informally in such activities.[33] Although the Board had upheld the clause in *Limpco*, the court noted that the Board had been sharply divided on the issue.[34] According to the court, two members had concluded that superseniority regarding layoff and recall for functional union officers was presumptively lawful.[35] Member Murphy, in casting the deciding vote, the court noted, had limited the presumption of legality to superseniority for " 'stewards and officers whose functions relate in general to furthering the bargaining relationship.' "[36] The court stated that the two dissenting Board members would have limited valid superseniority clauses to clauses that served to keep union officials who process grievances on the job.[37]

The court noted that the Third Circuit, in enforcing the Board's *Limpco* order, had considered the Board to have required that the union prove that the official involved " 'was *officially assigned* duties which helped to implement the collective bargaining agreement in a meaningful way.' "[38] The Third Circuit's limited language in *Limpco*, the court found, was one reason for the Board's subsequent decision in *American Can Co.*[39] In

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[25] *Id.* at 1186-88, 115 L.R.R.M. at 2762-64.

[26] 219 N.L.R.B. 656, 89 L.R.R.M. 1737 (1975), *enforced sub nom.* NLRB v. Milk Drivers & Dairy Employees, Local 338, 531 F.2d 1162, 91 L.R.R.M. 2929 (2d Cir. 1976).

[27] 727 F.2d at 1187, 115 L.R.R.M. at 2762-63.

[28] *Id.* at 1187, 115 L.R.R.M. at 2763.

[29] *Id.*

[30] *Id.* The court noted that the Second Circuit enforced the Board's order for reasons largely in accord with those of the Board. *Id.* at 1187 n.1, 115 L.R.R.M. at 2763 n.1.

[31] *Id.* at 1187, 115 L.R.R.M. at 2763.

[32] 230 N.L.R.B. 406, 95 L.R.R.M. 1343 (1977), *enforced sub nom.* D'Amico v. NLRB, 582 F.2d 820, 99 L.R.R.M. 2350 (3d Cir. 1978).

[33] 727 F.2d at 1187, 115 L.R.R.M. at 2763.

[34] *Id.*

[35] *Id.*

[36] *Id.* (quoting *Limpco*, 230 N.L.R.B. at 408, 95 L.R.R.M. at 13 (Murphy, Member, dissenting)).

[37] *Id.* at 1187-88, 115 L.R.R.M. at 2763.

[38] *Id.* at 1188, 115 L.R.R.M. at 2763 (quoting D'Amico v. NLRB, 582 F.2d 820, 825, 99 L.R.R.M. 2350, 2353 (3d Cir. 1978) (emphasis supplied by the *Electrical Workers* court)).

[39] 244 N.L.R.B. 736, 102 L.R.R.M. 1071 (1979), *enforced*, 658 F.2d 746, 108 L.R.R.M. 192 (10th Cir. 1981).

*American Can*, according to the court, the Board once again had been sharply divided on the issue of superseniority, with two members finding the clause invalid on its face because it applied to union officials other than stewards, and two members finding the clause valid because, in their view, superseniority clauses have only an insignificant impact on employees' section 7 rights.[40] The court noted that Member Murphy, who again cast the deciding vote, had found the clause valid on its face, but had nevertheless concluded that the General Counsel had met his burden of proving that the application of the clause to the officers involved was not justified because their activities did not further the bargaining relationship.[41]

The court then concluded its discussion of prior Board decisions concerning superseniority by summarizing its view of the Board's general approach to the problem. According to the court, superseniority clauses limited to layoff and recall of functional union officers were presumed lawful by the Board, and the General Counsel had the burden of proving that the clause was unfairly discriminatory. If the General Counsel met this burden, the union and employer could avoid liability only by demonstrating that the clause served a legitimate purpose.[42]

The court then turned its attention to the *Gulton* order.[43] The court reasoned that the Board had recognized in *Gulton* that any form of superseniority is inherently at odds with an employee's section 7 rights.[44] According to the court, the Board had concluded, however, that superseniority for stewards, if limited to layoff and recall, was nonetheless presumptively lawful for three reasons: (1) the immediacy of attention that stewards can offer; (2) the steward's function helps all employees; and (3) the steward's need to maintain an on-the-job presence.[45] From this rationale, the court stated, the Board's conclusion followed that it would uphold " 'only those superseniority provisions limited to employees, who, as agents of the union, must be on the job to accomplish their duties directly relating to administering the collective bargaining agreement.' "[46]

The court found that the Board had explicitly rejected the argument previously accepted by the *Limpco* Board, that superseniority was justified for other officers because it helped to maintain an effective and efficient bargaining relationship.[47] According to the court, the Board had concluded that the Act precludes tying job rights to union activity to achieve this legitimate goal.[48] The court noted that the Board had also rejected the argument that job retention was necessary for officers without on-the-job union duties for three reasons: (1) a laid-off officer can continue to serve in office; (2) the laying-off of officers is not overly disruptive; and (3) the replacement of officers due to lay-offs cannot be inherently disruptive of adequate union representation, since unions often change officers anyway.[49]

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[40] 727 F.2d at 1188, 115 L.R.R.M. at 2764.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 1189, 115 L.R.R.M. at 2764. Moreover, the court and Board stated that such superseniority for stewards furthers one purpose of the Labor Management Relations Act, namely, " 'to provide additional facilities for the mediation of labor disputes.' " *Id.* (quoting a portion of the title of the Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136, 136 (1947)).

[46] *Id.* (quoting *Gulton*, 266 N.L.R.B. at 409, 112 L.R.R.M. at 1365).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 1189, 115 L.R.R.M. at 2765.

Finding that the new standard announced by the Board in *Gulton* was a reasonable one, the court affirmed that portion of the Board's order without deciding whether it would have adopted the same standard.[50] The Board, the court stated, has expert knowledge in labor relations, had thoroughly addressed the issue, and had reached a unanimous decision on the issue for the first time since *Dairylea*.[51] Noting that the Board's action must be upheld if it is reasonable and supported by the record,[52] the court concluded: "We therefore affirm the Board's new presumption of legality restricted to layoff-and-recall superseniority for union officials who must be on the job to administer the collective bargaining agreement."[53]

The court then addressed the union's argument that even if the superseniority clause discriminates against the exercise of an employee's section 7 rights, the employees had waived their section 7 rights by ratifying the contract that included the superseniority clause.[54] According to the court, the cases cited in support of the union's argument stand only for the proposition that union members can waive their economic right to strike.[55] The court therefore distinguished those cases, finding that the right at stake in *Gulton/ Electrical Workers* was the right of the employees' to choose their level of involvement in union affairs.[56] Reasoning that superseniority encourages employees to support the union actively, and that, under the decision of the Supreme Court in *NLRB v. Magnavox Co.*,[57] the employees' right to be free of coercion in deciding whether or not to support the union could not be waived, the court rejected the union's waiver defense.[58]

Finally, the court addressed the union's argument that it was unfair for the Board to enforce its new rule in the case in which it was first announced.[59] The court listed five factors to consider in deciding this issue:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[60]

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[50] *Id.*

[51] *Id.*

[52] *Id.* at 1186, 1189, 115 L.R.R.M. at 2762, 2765.

[53] *Id.* The court noted that although superseniority for stewards would most clearly be presumptively legal, the Board had expressed its rule in terms of union officers who " 'perform steward or steward-like functions; i.e., grievance processing or other on-the-job contract administration responsibilities.' " *Id.* at 1189 n.4, 115 L.R.R.M. at 2765 n.4 (quoting *Gulton*, 266 N.L.R.B. at 406, 112 L.R.R.M. at 1361). Although the Board opinion suggested that tasks other than grievance processing may justify superseniority, neither it nor the court gave any examples of what these tasks might be.

[54] *Id.* at 1190, 115 L.R.R.M. at 2765.

[55] *Id.*

[56] *Id.*

[57] 415 U.S. 322, 325-26, 85 L.R.R.M. 2475 (1974).

[58] *Electrical Workers*, 727 F.2d at 1190, 115 L.R.R.M. at 2765-66.

[59] *Id.* at 1190, 115 L.R.R.M. at 2766. The court reached the merits of this argument only after rejecting the Board's contention that the court had no jurisdiction to decide the issue since, the Board argued, the union had not raised the argument before the Board. *Id.* at 1190-91, 115 L.R.R.M. at 2766. The court, however, concluded that the union's cross-exceptions to the ALJ's decision, its opposition to the proposed remedy, and the Board's familiarity with the issue of retroactivity were sufficient to preserve the issue for appeal. *Id.* at 1194, 115 L.R.R.M. at 2769.

[60] *Id.* at 1194, 115 L.R.R.M. at 2769 (quoting Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390, 80 L.R.R.M. 3244, 3251 (D.C. Cir. 1972)).

The court concluded that none of these factors weighed in the union's favor.[61] The case was not one of first impression, the court stated, since superseniority cases had been litigated for years.[62] Moreover, according to the court, since Board members had differed widely on how to treat such cases, the Board's *Gulton* rule could not be considered an abrupt departure from well-established practice.[63]

The court also found no evidence that the union had relied on *Dairylea*, the only superseniority case decided before the collective bargaining agreement at issue was entered into in 1975.[64] The court further rejected as unreasonable any reliance which the union may have placed on the *Limpco* decision, in which the Board had upheld superseniority for recording secretaries.[65] In enforcing the Board's order in *Limpco*, the court stated, the Third Circuit had found it "crucial" that the officer participated in grievance processing, a fact not present in *Gulton/Electrical Workers*.[66] Finally, the court did not perceive a great hardship in enforcing the Board's order, since the court estimated that the amount of money involved was minimal.[67] Having approved the Board's new superseniority rule and having rejected the waiver and retroactivity defenses, the court enforced the Board's order in its entirety.[68]

The Board's *Gulton/Electrical Workers* rule presents a sensible standard for distinguishing between superseniority clauses which unfairly discriminate against those employees who do not choose to be union officers and superseniority clauses which are justifiable to carry out union business. Stewards or other officers who perform grievance processing and on-the-job contract administration must remain on the job to carry out their duties.[69] Officers, such as those in *Gulton/Electrical Workers* whose duties do not include grievance processing or on-the-job contract administration may continue to carry out their duties despite being laid off.[70] Regarding this latter group of officers, superseniority provisions had a discriminatory effect on other employees who did not actively participate in the union.[71] The court and the Board were therefore correct in stating that this amounted to coercion in violation of section 8(b) and (c).[72] The result in *Gulton/Electrical Workers* is fair to employees who are not union officers, and it should not impede the union's search for good union officials.

Relying on the Supreme Court's decision in *NLRB v. Magnavox Co.*[73] that employees' section 7 rights to choose a bargaining representative can not be waived, the court correctly rejected the waiver defense.[74] In *Magnavox*, the Supreme Court distinguished

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[61] *Id.* at 1195, 115 L.R.R.M. at 2769-70.

[62] *Id.* at 1195, 115 L.R.R.M. at 2769.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 1195, 115 L.R.R.M. at 2769-70.

[66] *Id.* The court also rejected as unreasonable any reliance on Otis Elevator Co., 231 N.L.R.B. 1128, 96 L.R.R.M. 1108 (1977)(approving superseniority for Recording Secretary because that case had not been reviewed by a court). Moreover, the court found that the union had not demonstrated reliance on either *Limpco* or *Otis*. 727 F.2d at 1195, 115 L.R.R.M. at 2769-70.

[67] *Id.* at 1195, 115 L.R.R.M. at 2770.

[68] *Id.*

[69] *Electrical Workers*, 727 F.2d at 1189, 115 L.R.R.M. at 2764.

[70] *Id.* at 1189, 115 L.R.R.M. at 2765.

[71] *Id.* at 1189, 115 L.R.R.M. at 2764.

[72] *Id.*

[73] 415 U.S. 322, 85 L.R.R.M. 2475 (1974).

[74] *Id.* at 325-26, 85 L.R.R.M. at 2475.

earlier cases holding that employees could waive their economic right to strike.[75] Under *Magnavox*, therefore, employees may waive their economic right to strike but not their other, noneconomic section 7 rights. The right at stake in *Gulton/Electrical Workers* — the right to choose one's level of involvement in union affairs — was of the nonwaivable variety.

The court was also correct in enforcing the Board's ruling retroactively. In past superseniority cases the Board had been sharply divided. For example, the *Limpco* rule, decided by an aggregate majority, was hardly a settled principle.[76] The *Gulton/Electrical Workers* rule, therefore, is not an abrupt departure from existing law since unions and employers could not have reasonably relied on the *Limpco* decision as being the final word on the issue.[77]

The rule announced in *Gulton* and enforced in *Electrical Workers* is important for two reasons. First, it narrows the scope of allowable superseniority clauses allowed by prior Board decisions, principally *Limpco*. After *Gulton/Electrical Workers*, only those superseniority clauses restricted to layoff and recall of union officials who must be on the job to administer the collective bargaining agreement will be presumed lawful.[78] Superseniority would most clearly be allowed for stewards, who must be on the job to process grievances; superseniority for other officials who are involved in on-the-job contract administration would be allowable as well.[79] Second, the *Gulton* decision was unanimous. This unanimity is preferable to the sharp division which characterized the Board's earlier decisions in this area and which lead to uncertainty and inconsistency.[80] The *Gulton/Electrical Workers* decision should therefore lead to less litigation and more certainty in the area of superseniority clauses.

### 2. **The Limits of an Expansive Reading of the Section 8(b)(4) Publicity Proviso*: Edward J. DeBartolo Corp. v. NLRB[1]

Section 8(b)(4)(B) of the National Labor Relations Act[2] (the Act) makes it an unfair labor practice for a union to use certain "coercive" secondary boycott activities to apply

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[75] *Id.*

[76] *See supra* notes 26-42 and accompanying text.

[77] *Electrical Workers*, 727 F.2d at 1195, 115 L.R.R.M. at 2769.

[78] *Id.* at 1189, 115 L.R.R.M. at 2765.

[79] *See supra* note 53.

[80] *Compare Limpco*, 230 N.L.R.B. at 406, 95 L.R.R.M. at 1343, *with American Can*, 244 N.L.R.B. 736, 102 L.R.R.M. 1071; *see supra* notes 26-42 and accompanying text.

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* By Robert J. Gilson, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 103 S. Ct. 2926, 113 L.R.R.M. 2953 (1983).

[2] 29 U.S.C. § 158(b)(4)(B) (1982). This section provides:

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents — . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other

economic pressure on an employer.[3] Secondary boycotts involve the exertion of economic pressure upon a person with whom a union has no dispute in an attempt to persuade that person — usually another business referred to as a secondary employer — to cease doing business with a primary employer whose employees are engaged in a labor dispute.[4] While Congress attempted to insulate "neutral" employers from secondary boycotts, it also recognized the necessity of preserving unions' first amendment rights.[5] Consequently, Congress added a proviso to section 8(b)(4).[6] Under the language of the proviso[7] communications "other than picketing" that are "truthful" and that do not induce either an interference with deliveries or a work stoppage at a secondary employer's facility are exempt from the general prohibition.[8] The proviso, known as the publicity proviso, also contains limiting language that requires that in order for its exemption to apply, the "products produced" by the primary employer must be "distributed" by the secondary employer.[9] In other words, the publicity proviso allows unions to notify the general public that the products produced by a primary employer, with whom the union has a labor

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> producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

*Id.*

[3] Although Section 8(b)(4)(A), amended to 8(b)(4)(B) has been labeled the "secondary boycott provision" the term does not appear in the statutory language. Indeed, the provision does not outlaw all types of secondary boycotts, and some forms of secondary activity remain lawful. *See* 2 C. MORRIS, THE DEVELOPING LABOR LAW 1133 (2d ed. 1983) [hereinafter cited as THE DEVELOPING LABOR LAW].

[4] 105 CONG. REC. 17,674 (1959) (glossary of terms to be used in debate over labor legislation), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1386 (1959) [hereinafter cited as 2 LEG. HIST.]. *See also* 2 THE DEVELOPING LABOR LAW, *supra*, note 3, at 1129; Kamer, *The 8(b)(4) Publicity Proviso and* NLRB v. Servette: *A Supreme Court Mandate Ignored*, 16 GA. L. REV. 575 (1982) [hereinafter cited as Kamer]; R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 240 (1976).

[5] *See* 105 CONG. REC. at 17, 898-99 (1959), *reprinted in* 2 LEG. HIST., *supra* note 4, at 1432; (statements of Sen. Kennedy); 105 CONG. REC. at 18,133-34 (1959), *reprinted in* 2 LEG. HIST., *supra* note 4, at 1720-21 (statements of Rep. Thompson); 105 CONG. REC. at 6233 (1959), *reprinted in* 2 LEG. HIST., *supra* note 4, at 1038 (statements of Sen. Humphrey); *see also* NLRB v. Servette, Inc., 377 U.S. 46, 55, 55 L.R.R.M. 2957, 2960 (1964).

[6] 29 U.S.C. § 158(b)(4) (1982).

[7] The full text of the proviso provides:

> Provided , . . . nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution . . . .

29 U.S.C. § 158(b)(4) (1982).

[8] *See* Edward J. DeBartolo Corp. v. NLRB, 103 S. Ct. 2926, 2931, 113 L.R.R.M. 2953, 2955 (1983); 2 THE DEVELOPING LABOR LAW, *supra* note 3, at 1111.

[9] 29 U.S.C. § 158(b)(4) (1982). *See supra* note 7.

dispute, are being distributed by a secondary employer.[10] A continuing problem in interpreting the publicity proviso, however, has been the scope of this producer-distributor relationship.[11] Neither the National Labor Relations Board (Board) nor the courts have yet to define adequately the parameters of this language.[12]

The Board has given a broad construction to the "producer" language of the publicity proviso, and has interpreted the proviso to cover nonpicketing secondary boycotts even where the primary employer is not strictly a manufacturer.[13] Accordingly, in the Board's leading case in this area, *Lohman Sales Co.*,[14] a wholesale distributor was held to be a producer within the meaning of the proviso.[15] The Board reasoned that "*labor* is the prime requisite of one who produces," and that an employer need not manufacture or physically add to an article so long as labor in the form of capital, enterprise, or service was provided.[16] In *NLRB v. Servette, Inc.*,[17] the United States Supreme Court endorsed the Board's construction of the proviso's "producer" requirement. In so doing, the Court overruled a decision by the United States Court of Appeals for the Ninth Circuit that would have limited the proviso's exemption to secondary boycotts involving disputes with primary employers who physically created goods, that is, traditional manufacturers.[18] Rejecting the Ninth Circuit's strict construction of the term producer, the Supreme Court held that " 'producer' must be given a broader reach,"[19] and that the legislative history of the proviso suggested that it was intended to be as broad in its coverage as the section 8(b)(4) prohibition to which it is an exemption.[20] In decisions following *Servette*, the Board has given the "producer" language of the publicity proviso an expansive scope. The Board has determined that radio[21] and television stations,[22] construction companies,[23] service companies[24] and wholly owned subsidiaries that do not sell to any arm of the

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[10] 29 U.S.C. § 158(b)(4)(B).

[11] *See* Kamer, *supra* note 4, at 578; *see also* cases cited *infra* notes 14, 21-25.

[12] This failure is evident from the Supreme Court's remand of *Edward J. DeBartolo Corp. v. NLRB*. The Court has not established any firm principles. Rather, it has simply set limits on the expansive interpretation that the Board has given the proviso. *See infra* notes 64-73 and accompanying text.

[13] *See* Kamer, *supra* note 4, at 577; 2 THE DEVELOPING LABOR LAW, *supra* note 3, at 1111-13.

[14] International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.), 132 N.L.R.B. 901, 48 L.R.R.M. 1429 (1961).

[15] *Id.* at 907, 48 L.R.R.M. at 1432.

[16] *Id.*

[17] 377 U.S. 46, 55 L.R.R.M. 2957 (1964).

[18] *Id.* at 55, 55 L.R.R.M. at 2960.

[19] *Id.* at 56, 55 L.R.R.M. at 2961.

[20] *Id.* at 55, 55 L.R.R.M. at 2960.

[21] Local 662, Radio and Television Engineers (Middle South Broadcasting Co.), 133 N.L.R.B. 1698, 1705, 49 L.R.R.M. 1042, 1046 (1961).

[22] American Federation of Television and Radio Artists, Local 55 (Great Western Broadcasting Corp.), 134 N.L.R.B. 1617, 1621, 49 L.R.R.M. 1391, 1393, *rev'd and remanded sub nom.* Great Western Broadcasting Corp. v. NLRB, 310 F.2d 591, 51 L.R.R.M. 2480 (9th Cir. 1962). The Ninth Circuit's decision was criticized by the Supreme Court in NLRB v. Servette, Inc., 377 U.S. 46, 55, 55 L.R.R.M. 2957, 2960 (1964). On remand the Board affirmed its original holding that the proviso applied. American Federation of Television and Radio Artists, Local 55, 150 N.L.R.B. 467, 473, 58 L.R.R.M. 1019, 1022, *enforced sub nom.* Great Western Broadcasting Corp. v. NLRB, 356 F.2d 434, 61 L.R.R.M. 2364 (9th Cir. 1966), *cert. denied*, 384 U.S. 1002, 62 L.R.R.M. 2392 (1966).

[23] Int'l Brotherhood Electrical Workers, Local 712 (Golden Dawn Foods), 134 N.L.R.B. 812, 816, 49 L.R.R.M. 1220, 1221 (1961); Electrical Workers Local Union No. 73, 134 N.L.R.B. 498, 500, 49 L.R.R.M. 1181, 1182 (1961).

[24] United Plant Guard Workers of America (Houston Armored Car Co.), 136 N.L.R.B. 110,

parent enterprise[25] all qualify as "producers" under the proviso. Under this analysis, retail stores advertising products on a radio or televison station, or the company hiring a construction company to build its facilities, or the company receiving services, or the diversified corporate enterprise are all "distributors" of the producers' products and, therefore, they are subject to peaceful, nonpicketing secondary boycotts.[26] Carried to its extreme, this expansive interpretation ignored the producer-distributor language contained within the publicity proviso, and broadly construed the proviso's coverage.[27]

During the *Survey* year, however, the United States Supreme Court indicated that there is a limit to the expansive interpretation of the publicity proviso.[28] In *Edward J. DeBartolo Corp. v. NLRB*,[29] a unanimous Court held that the publicity proviso's exemption did not encompass peaceful handbilling of an entire shopping mall where the union's dispute was with a construction company who was building a store for a single tenant of the mall, and the tenant had no business relationship with the mall's owner other than as a lessee.[30] In concluding that there is a limit to the expansive interpretation of the publicity proviso, the Court held that the express producer-distributor language of the proviso cannot be ignored.[31]

In *Edward J. DeBartolo Corp. v. NLRB*,[32] DeBartolo Corporation, the owner and operator of a shopping mall in Tampa, Florida, entered into a lease with H.W. Wilson Company (Wilson), a retail department store operator.[33] Under the terms of the agreement, DeBartolo leased land upon which Wilson agreed to build and operate a department store.[34] The lease between DeBartolo and Wilson, however, differed from the leases previously used by DeBartolo in that it did not require Wilson to request its construction

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111, 49 L.R.R.M. 1713, 1714 (1962)(handbilling customers of business whose money was transported by an armored car service company with whom a union had a labor dispute).

[25] United Steelworkers of America (Pet, Inc.), 244 N.L.R.B. 94, 101, 102 L.R.R.M. 1046, 1050 (1979)(a union's total consumer boycott of a diversified holding company and its other subsidiaries was within the proviso's exemption even where the union's dispute was with one subsidiary who did not sell any of its products to any other arm or the corporate enterprise), *rev'd and remanded sub nom.* Pet, Inc. v. NLRB, 641 F.2d 545, 106 L.R.R.M. 2477 (8th Cir. 1981).

[26] United Steelworkers of America, 144 N.L.R.B. 94, 101, 102 L.R.R.M. 1046, 1050 (1979), *rev'd and remanded sub nom.* Pet, Inc. v. NLRB, 641 F.2d 545, 106 L.R.R.M. 2477 (8th Cir. 1981); United Plant Guard Workers of America, 136 N.L.R.B. 110, 111, 49 L.R.R.M. 1713, 1714 (1962); International Brotherhood of Electrical Workers, Local 712, 134 N.L.R.B. 812, 816, 49 L.R.R.M. 1220, 1221 (1961); America Federation of Television and Radio Artists, Local 55, 150 N.L.R.B. 467, 473, 58 L.R.R.M. 1019, 1022, *enforced sub nom.* 356 F.2d 434, 61 L.R.R.M. 2364 (9th Cir. 1961), *cert. denied*, 384 U.S. 1002, 62 L.R.R.M. 2392 (1961); Local 662, Radio and Television Engineers, 133 N.L.R.B. 1698, 1706, 49 L.R.R.M. 1042, 1047 (1961)..

[27] *See* Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264, 269, 108 L.R.R.M. 2729, 2732 (4th Cir. 1981). In affirming a Board dismissal of a complaint the United States Court of Appeals for the Fourth Circuit stated: "Board and judicial interpretation of the producer-distributor language, based in large part upon the legislative history of the proviso, clearly indicates that the language is not to be read literally but instead is to be broadly construed." *Id.*

[28] Edward J. DeBartolo Corp. v. NLRB, 103 S. Ct. 2926, 2932, 113 L.R.R.M. 2953, 2956 (1983).

[29] 103 S. Ct. 2926, 113 L.R.R.M. 2953 (1983).

[30] *Id.* at 2933, 113 L.R.R.M. at 2957.

[31] *Id.* at 2932, 113 L.R.R.M. at 2956-57.

[32] Florida Gulf Coast Building Trade Council, 252 N.L.R.B. 702, 105 L.R.R.M. 1273 (1980), *petition denied*, 662 F.2d 264, 108 L.R.R.M. 2729 (1981), *vacated and remanded*, 103 S. Ct. 2926, 113 L.R.R.M. 2953 (1983).

[33] Florida Gulf Coast Building Trade Council, 252 N.L.R.B. 702, 703, 105 L.R.R.M. 1273, 1273 (1980).

[34] *Id.*

contractors to use union labor or otherwise assure that the employees who constructed the store were compensated at a level at least equal to established area standards.[35]

Wilson contracted with H.J. High Construction Company (High) to build its store at the mall.[36] Subsequently, Florida Gulf Coast Building Trades Council (the Union) became involved in a primary labor dispute with High over the payment of alleged substandard wages and fringe benefits.[37] As part of its dispute with High, the Union distributed handbills at all the entrances to the mall.[38] The handbills appealed to the public not to shop at the mall until the mall's owner (DeBartolo) agreed to require that all construction at the mall be performed by contractors who paid their employees fair wages.[39] The handbilling was conducted in a peaceful manner and was not accompanied by any patrolling or picketing.[40]

DeBartolo filed an unfair labor practice charge against the Union, alleging that the Union had violated Section 8(b)(4)(ii)(B) of the Act by conducting an illegal secondary boycott.[41] The case came before the Board on stipulated facts, and without deciding whether the handbilling constituted a form of "coercion" or "restraint" proscribed by section 8(b)(4), the Board dismissed the complaint on the grounds that the handbilling came within the publicity proviso exemption.[42] The Board focused on the question of whether High was a "producer," and concluded that there was a "symbiotic" relationship among Wilson, DeBartolo, and the other mall tenants, such that they would all derive benefit from the product High was producing — the new store.[43]

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Board's dismissal of DeBartolo's charge.[44] The Fourth Circuit held that the Board's interpretation was consistent with both the proviso's legislative history and the Supreme Court's decision in *NLRB v. Servette, Inc.*[45] The appeals court also reasoned that because DeBartolo and its other tenants shared the mall with Wilson they could apply pressure on Wilson and Wilson in turn could apply pressure on High so that the proviso's exemption should control this dispute.[46] The Supreme Court granted certiorari to resolve a conflict among the circuits.[47] The Court vacated and remanded.[48]

The Supreme Court began its analysis by reviewing *NLRB v. Servette, Inc.*, its only

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[35] Brief for the NLRB at 3-4, Edward J. DeBartolo Corp. v. NLRB.

[36] Florida Gulf Coast Building Trade Council, 252 N.L.R.B. 702, 703, 105 L.R.R.M. 1273, 1274 (1980).

[37] *Id.*

[38] *Id.* The handbilling took place for a three week period, until the Union was enjoined by a state court order issued pursuant to a trespass suit brought by DeBartolo. *DeBartolo*, 103 S. Ct. at 2931 n.5, 113 L.R.R.M. at 2955 n.5.

[39] *Id.* at 2929, 113 L.R.R.M. at 2954.

[40] *Id.* at 2929-30, 113 L.R.R.M. at 2954.

[41] Florida Gulf Coast Building Trades Council, 252 N.L.R.B. 702, 704, 105 L.R.R.M. 1273, 1274 (1980).

[42] *DeBartolo*, 103 S. Ct. at 2930, 113 L.R.R.M. at 2955.

[43] Florida Gulf Coast Building Trades Council, 252 N.L.R.B. 702, 705, 105 L.R.R.M. 1273, 1275 (1980).

[44] *See* Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264, 273, 108 L.R.R.M. 2729, 2735 (1981).

[45] *Id.* at 269-72, 108 L.R.R.M. at 2732-34.

[46] *Id.* at 271, 108 L.R.R.M. at 2734.

[47] Edward J. DeBartolo Corp. v. NLRB, 103 S. Ct. 205 (1982). The conflict involved the Fourth Circuit's decision in *DeBartolo* and the Eighth Circuit's decision in Pet, Inc. v. NLRB, 641 F.2d 545,. 106 L.R.R.M. 2477 (8th Cir. 1981); *see also supra* note 25 and accompanying text.

[48] *DeBartolo*, 103 S. Ct. at 2933, 113 L.R.R.M. at 2957.

previous decision interpreting the publicity proviso.[49] The Court stated that its focus in *Servette* had been on the proviso's term "producer."[50] In *DeBartolo*, however, the Court shifted its focus to the language in the proviso that required the primary employer's products to be "distributed by" the secondary employer.[51] Conceding that High, the primary employer, was a producer for the purposes of the proviso,[52] the Court refused to adopt the Board's symbiotic relationship test in order to hold that the distribution requirement had been met.[53] Reasoning that the Board's test shifted the inquiry away from the relationship between the primary employer and the secondary employer to the relationship among the secondary employers, the Court rejected this test as completely ignoring the proviso's explicit distribution language.[54] Because Wilson received services from High in the form of a building, the cost of which would affect the cost of Wilson's retail products, the Court assumed that Wilson distributed products produced by High.[55] The Court, however, found "no justification for treating the products that the cotenants distributed to the public as products produced by High."[56] The Court, therefore, concluded that because there was no producer-distributor relationship the Union's secondary boycott against the entire mall did not fall within the publicity proviso exemption.[57] Although the Court recognized that its holding may give rise to a first amendment question,[58] because of the Union's right to distribute handbills to the public, the Court refused to reach this issue until the Board determined whether the handbilling in this case was a form of "coercion" or "restraint" prohibited by section 8(b)(4) of the Act.[59] The Court, therefore, vacated and remanded for a determination of the coercion or restraint issue.[60]

The requirement that products produced by the primary employer must be distributed by the secondary employer is expressly set out in the publicity proviso and cannot be ignored.[61] Although the term "producer" has been interpreted broadly,[62] the Board's interpretation of the proviso focused almost exclusively on the issue of whether the primary employer was a producer, and ignored the requirement that the secondary

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[49] *Id.* at 2931, 113 L.R.R.M. at 2956; *see also Servette*, 377 U.S. 46, 55 L.R.R.M. at 2957 (1964); *see supra* notes 17-20 and accompanying text.

[50] *Id.* at 2932, 113 L.R.R.M. at 2956.

[51] *See id.*

[52] Petitioner, DeBartolo, conceded that High was a producer within the meaning of the Act, and the Court accepted this assumption. *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 2032-33, 113 L.R.R.M. at 2957. The Petitioner, DeBartolo, conceded that Wilson distributed products produced by High, and the Court accepted this assumption. *Id.* at 2932, 113 L.R.R.M. at 2957.

[56] *Id.* at 2933, 113 L.R.R.M. at 2957.

[57] *Id.*

[58] *Id.* This Constitutional question arises because this case involves the peaceful distribution of a written message — arguably a form of pure speech. *Id.* The Board had argued that the Court should invoke its prudential policy of construing acts of Congress so as to avoid unnecessary constitutional questions. *Id.* The Court rejected this argument, however, reasoning that the policy the Board sought to invoke only comes into play if the statute can be construed in a manner that is " 'fairly possible' ". *Id.* In *DeBartolo*, the court reasoned that the express language of the publicity proviso cannot be "fairly" construed so as to ignore its distribution requirement. *See id.*

[59] *Id. See also supra* note 40 and accompanying text.

[60] *DeBartolo*, 103 S. Ct. at 2933, 113 L.R.R.M. at 2957.

[61] 29 U.S.C. § 158(b)(4), *see also DeBartolo*, 103 S. Ct. at 2932, 113 L.R.R.M. at 2956-57.

[62] *See* NLRB v. Servette, Inc., 377 U.S. 46, 55, 55 L.R.R.M. 2957, 2960-61 (1964).

employer must distribute the primary employer's products.[63] The Supreme Court's decision in *DeBartolo* does not directly affect the Board's construction of the term "producer."[64] Instead, the decision holds that a finding that an employer is a producer is only one component of the proviso's test.[65] According to the Court, in order for the proviso's exemption to apply, the distribution requirement must also be satisfied.[66] The *DeBartolo* decision, therefore, rejected the Board's one step test where a finding that an employer was a producer was the basis upon which the distribution requirement was satisfied, and adopted a two part test requiring a separate analysis of the producer and distributor requirements.[67] Consequently, the Supreme Court's decision in *DeBartolo* limits the expansive interpretation of the publicity proviso by refocusing the analysis of the proviso to treat the distribution requirement as an independent element.

Although the publicity proviso clearly contains a distribution requirement, a test that treats this requirement as a separate element may cause uncertainty in future interpretations of section 8(b)(4) of the Act. Prior to *DeBartolo*, the publicity proviso had been interpreted to be as broad in its coverage as section 8(b)(4)'s ban of secondary boycotts.[68] Thus, any nonpicketing publicity that would have been prohibited as a secondary boycott was exempt under the publicity proviso.[69] After *DeBartolo*, the new two part test for applying the publicity proviso's exemption could result in decisions construing the proviso more narrowly than the proscription of secondary boycotts. Consequently, peaceful, nonpicketing secondary boycotts that do not satisfy the distribution requirement of the proviso could be found to be unfair labor practices under section 8(b)(4) of the Act.[70] Such a construction, however, would conflict with the Supreme Court's earlier decision in *Servette*, where the Court held that the scope of section 8(b)(4) is no broader than the publicity proviso.[71] In addition, a finding that peaceful, nonpicketing publicity violated section 8(b)(4) would raise a first amendment issue concerning the free expression rights of unions.[72]

A section 8(b)(4) violation requires a finding that the union has coerced or restrained persons from doing business with the secondary employer.[73] Because of the uncertainty surrounding the scope of the publicity proviso, future Board decisions may shift their focus away from the proviso and concentrate on the "coerce" and "restrain" requirements of the section 8(b)(4) prohibition itself. Under this new perspective, two possible results are foreseeable. First, in future cases where the producer-distributor requirement cannot be satisfied and, consequently, a union's peaceful, nonpicketing secondary boycott does

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[63] *See DeBartolo*, 103 S. Ct. at 2932, 113 L.R.R.M. at 2956.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See supra* notes 19-20 and accompanying text. The Court quoted the *Servette* language as to the scope of the proviso with seeming approval in *DeBartolo*. *See DeBartolo*, 103 S. Ct. at 2932, 113 L.R.R.M. at 2956.

[69] *See supra* notes 19-25.

[70] This would be the result, if on remand the Board finds that the Union's activity in *DeBartolo* was coercive or a restraint within the meaning of section 8(b)(4)(ii)(B) of the Act. Section 8(b)(4)(ii)(B), which prohibits secondary boycotts, contains no analogous producer-distributor requirement that could arguably restrict its scope. *See* 29 U.S.C. § 158(b)(4)(ii)(B) (1982). This section is quoted *supra* note 2.

[71] *See supra* note 20.

[72] *See DeBartolo*, 103 S. Ct. at 2031, 113 L.R.R.M. at 2955.

[73] 29 U.S.C. § 158(b)(4)(ii)(B) (1982). For the full text of the provision *see supra* note 2.

not fall within the proviso's exemption, the union's activity may be found to be coercive or a restraint and thus a violation of section 8(b)(4) of the Act. Because the effect of a section 8(b)(4) violation would be a ban on the union's publicity, such a finding would also require a conclusion that the union's activity was outside the ambit of first amendment protection. Second, in future cases where the producer-distributor requirement cannot be met and a union's peaceful, nonpicketing secondary boycott does not fall within the publicity proviso, the union's activity may not violate section 8(b)(4) of the Act if no coercion or restraint is found. This second interpretation is more probable, because it avoids construing the proviso more narrowly than the ban on secondary boycotts, and it also avoids a difficult constitutional question.

After twenty years of expansive interpretations, the Supreme Court has finally indicated that there is a limit to the breadth of the publicity proviso. The Court's decision in *Edward J. DeBartolo v. NLRB* requires the Board to refocus its analysis of the proviso so that both the producer and distributor requirements are separately tested and met. Although future interpretations of the proviso's scope are clouded, the Supreme Court has denoted that the express language of the proviso will not be "unfairly" construed.

## III. Concerted Activity

### A. **Individual Employees and Concerted Activity Under Collective Bargaining Agreements:* NLRB v. City Disposal Systems, Inc.[1]

Section 7 of the National Labor Relations Act[2] (the Act) provides that employees shall have the right to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[3] Although the Act does not define the term "concerted activities,"[4] the concept clearly embraces the activities of employees who have joined together to achieve common goals.[5] Whether the actions of an individual employee may be protected as concerted activity, however, is not self-evident from the language of the Act.[6] According to the National Labor Relations Board's (Board) "*Interboro* doctrine," an individual's assertion of a right grounded in a collective bargaining agreement is "concerted activit[y]" and therefore accorded the protection of section 7 of the Act.[7]

The circuits had been split over whether to apply *Interboro* as the test for concerted activity under section 7 of the Act. At least three circuit courts of appeals accepted the Board's interpretation of "concerted activities" as including an individual's assertion of a right grounded in a collective bargaining agreement.[8] Five others, however, expressly

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* By Scott A. Faust, Staff Member, Boston College Law Review.

[1] 104 S. Ct. 1505, 115 L.R.R.M. 3193 (1984).

[2] 29 U.S.C. §§ 151-69 (1982).

[3] 29 U.S.C. § 157. Section 7 provides that: "Employees shall have the right to . . . form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.*

[4] NLRB v. City Disposal Systems, Inc., 104 S. Ct. 1505, 1511, 115 L.R.R.M. 3193, 3197 (1984).

[5] *Id.*

[6] *Id.*

[7] Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298, 61 L.R.R.M. 1537, 1539 (1966), *enforced* 388 F.2d 495, 67 L.R.R.M. 2083 (2d Cir. 1967).

[8] *See, e.g.*, NLRB v. Ben Pekin Corp., 452 F.2d 205, 206, 78 L.R.R.M. 2429, 2430 (7th Cir. 1971); NLRB v. Selwyn Shoe Manufacturing Corp., 428 F.2d 217, 221, 74 L.R.R.M. 2474, 2477 (8th Cir. 1970); NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 500, 67 L.R.R.M. 2083, 2086 (2d Cir. 1967).

declined to follow the *Interboro* doctrine.[9] The District of Columbia Circuit had expressed doubt about the validity of the *Interboro* doctrine,[10] and the Fourth Circuit had left the issue open.[11]

During the *Survey* year, the United States Supreme Court resolved this conflict by holding in *NLRB v. City Disposal Systems, Inc.*[12] that the Board's *Interboro* doctrine is a reasonable interpretation of the Act.[13] The Court ruled that the language of section 7 did not confine itself to situations where two or more employees acted together, or to situations where a lone employee intended to induce group activity or acted as a representative of at least one other employee.[14] The Court concluded that as long as the employee based his action on a reasonable and honest belief and reasonably directed it towards the enforcement of a collectively bargained right, no justification existed for overturning the Board's judgment that the employee was engaged in concerted activity.[15] Consequently, after *City Disposal Systems*, courts will apply the *Interboro* doctrine as the test for concerted activity by an individual employee.

In *City Disposal Systems*, the collective bargaining agreement between the employer, City Disposal Systems, Inc., and the union representing City Disposal's truckdrivers provided that the company would not require employees to operate any vehicle that was not in safe operating condition.[16] It also provided that the agreement would not be violated where employees refused to operate such equipment unless such refusal was unjustified.[17] The underlying action in *City Disposal Systems* arose from the company's discharge of one of its employees when he refused to drive a truck that he honestly and reasonably believed to be unsafe because of faulty brakes.[18] After the union declined to process the employee's grievance under the bargaining agreement,[19] he filed an unfair labor practice charge with the Board, challenging his discharge.[20]

The Administrative Law Judge (ALJ) found that, even though the employee acted alone in asserting a contractual right, his refusal to operate the truck constituted concerted activity protected under section 7.[21] The ALJ concluded that the company had

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[9] *See, e.g.*, Royal Development Co., Ltd. v. NLRB, 703 F.2d 363, 374, 112 L.R.R.M. 2932, 2940 (9th Cir. 1983); Roadway Express, Inc. v. NLRB, 700 F.2d 687, 693-94, 112 L.R.R.M. 3152, 3157 (11th Cir. 1983); Aro, Inc. v. NLRB, 596 F.2d 713, 717, 101 L.R.R.M. 2153, 2155 (6th Cir. 1979); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719, 83 L.R.R.M. 2625, 2628 (5th Cir. 1973)(dictum); NLRB v. Northern Metal Co., 440 F.2d 881, 884-85, 76 L.R.R.M. 2958, 2961 (3d Cir. 1971).

[10] *See* Kohls v. NLRB, 629 F.2d 173, 176-77, 104 L.R.R.M. 3049, 3051 (D.C. Cir. 1980).

[11] In Roadway Express, Inc. v. NLRB, 532 F.2d 751, 91 L.R.R.M. 2239 (4th Cir. 1976), the Fourth Circuit enforced, without opinion, a decision of the Board applying the *Interboro* doctrine, Roadway Express, Inc., 217 N.L.R.B. 278, 88 L.R.R.M. 1503 (1975), but in Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 308-09, 105 L.R.R.M. 3407, 3410 (4th Cir. 1980), the court indicated that whether that circuit would follow *Interboro* remained an open question.

[12] 104 S. Ct. 1505, 115 L.R.R.M. 3193 (1984).

[13] *Id.* at 1510, 115 L.R.R.M. at 3197.

[14] *Id.* Courts that have rejected the *Interboro* doctrine have found the actions of a lone employee in these two limited situations to be concerted activity. *See infra* note 32.

[15] *Id.* at 1516, 115 L.R.R.M. at 3200.

[16] *Id.* at 1508, 115 L.R.R.M. at 3195.

[17] *Id.*

[18] *Id.* The issue of whether the employee was motivated by an honest belief was not before the Court. *Id.* at 1508 n.5, 115 L.R.R.M. at 3195 n.5.

[19] *Id.* at 1509, 115 L.R.R.M. at 3195. The union found no objective merit in the grievance and declined to process it. *Id.*

[20] *Id.*

[21] City Disposal Systems, Inc., 256 N.L.R.B. 451, 454, 107 L.R.R.M. 1267, 1267 (1981).

therefore committed an unfair labor practice under section 8(a)(1) by discharging the employee.[22] The Board adopted the ALJ's findings and conclusions and ordered the company to reinstate the employee with back pay.[23] On appeal by the employer, however, the Sixth Circuit Court of Appeals denied enforcement of the Board's order.[24] Finding that the employee's refusal to drive the truck was an action taken solely on his own behalf,[25] the appeals court concluded that the refusal was not a concerted activity within the meaning of section 7.[26] The Supreme Court granted certiorari to resolve the conflict among the circuits and, in a five to four decision, reversed.[27]

The issue before the Court in *City Disposal Systems* was whether an individual's assertion of a right grounded in a collective bargaining agreement constituted concerted activity within the meaning of section 7.[28] Because this issue implicated the Board's expertise in labor relations,[29] the Court narrowed the issue to whether the Board's application of section 7 to the employee's assertion of a right grounded in the collective bargaining agreement was reasonable.[30]

Justice Brennan, writing for the majority,[31] approached this question by first noting that even the courts of appeals that had rejected the *Interboro* doctrine recognized the possibility that an individual employee may be engaged in concerted activity when he acts alone.[32] The disagreement over the *Interboro* doctrine, the Court reasoned, merely reflected differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group for section 7 to apply.[33] On the basis of this reasoning, the Court said that the resolution of the issue in this case required a determination of the exact manner in which particular actions of an individual employee are related to the actions of fellow employees to find that the individual was engaged in concerted activity.[34]

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[22] *Id.* Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a).

[23] *City Disposal Systems*, 256 N.L.R.B. at 451, 107 L.R.R.M. at 1267.

[24] NLRB v. City Disposal Systems, Inc., 683 F.2d 1005, 1006, 110 L.R.R.M. 3225, 3226 (6th Cir. 1982).

[25] *Id.* at 1007, 110 L.R.R.M. at 3226.

[26] *Id.* at 1008, 110 L.R.R.M. at 3226. The court's rejection of *Interboro* followed its prior decision in Aro, Inc. v. NLRB, 596 F.2d 713, 101 L.R.R.M. 2153 (6th Cir. 1979), in which the court held that for an individual complaint to amount to concerted action, it must not have been made solely on behalf of an individual employee; it must be made on behalf of other employees or at least be made with the object of inducing group action and have some arguable basis in the collective bargaining agreement. *Id.* at 718, 101 L.R.R.M. at 2156.

[27] 104 S. Ct. at 1508, 115 L.R.R.M. at 3195.

[28] *Id.*

[29] *See id.* at 1510, 115 L.R.R.M. at 3197; Eastex, Inc. v. NLRB, 437 U.S. 556, 558, 98 L.R.R.M. 2717, 2721 (1978).

[30] 104 S. Ct. at 1510, 115 L.R.R.M. at 3197.

[31] Justices White, Marshall, Blackmun, and Stevens joined in the majority opinion. *Id.* at 1507, 115 L.R.R.M. at 3194.

[32] 104 S. Ct. at 1511, 115 L.R.R.M. at 3197. These courts have limited their recognition of this type of concerted activity to two situations: 1) that in which the lone employee intends to induce group activity, and 2) that in which the employee acts as a representative of at least one other employee. *See, e.g.*, Aro, Inc. v. NLRB, 596 F.2d 713, 717, 101 L.R.R.M. 2153, 2155 (6th Cir. 1979); NLRB v. Northern Metal Co., 440 F.2d 881, 76 L.R.R.M. 2958, 2961 (3d Cir. 1971).

[33] 104 S. Ct. at 1511, 115 L.R.R.M. at 3197.

[34] *Id.*

The Court found that the employee's invocation of a right based upon a collective bargaining agreement was an integral part of the process that gave rise to the agreement.[35] According to the Court, this process — beginning with the organization of a union, continuing into the negotiation of a collective bargaining agreement, and extending through the enforcement of the agreement — is a single collective activity.[36] As a result, the Court found that a lone employee's invocation of a right grounded in the collective bargaining agreement was sufficiently related to the collective activity of his fellow employees, and was therefore a concerted activity.[37]

The Court also reviewed the general history of section 7[38] and found that the *Interboro* doctrine was entirely consistent with the purposes of the Act.[39] According to the Court, this history revealed no indication that Congress intended to limit the protection of section 7 to situations in which an employee's activity combined in any particular way with that of his fellow employees.[40] More specifically, the Court found no congressional intention to have the protection of section 7 withdrawn in situations in which a single employee, acting alone, participated in an integral aspect of a collective process.[41]

Finally, the Court pointed out the limits of the *Interboro* doctrine by stating that even though activity by an individual employee may be concerted, an employee may not engage in that activity with impunity.[42] An employee may engage in concerted activity in such a manner that he loses the protection of section 7.[43] Furthermore, the Court noted, if an employer did not wish to tolerate certain methods by which employees invoked their collectively bargained rights, he would be free to negotiate a provision in the agreement that would limit the availability of such methods.[44]

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[35] *Id.*

[36] *Id.* As the Supreme Court noted in Conley v. Gibson, 355 U.S. 41, 46, 41 L.R.R.M. 2089, 2091 (1957), "[c]ollective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract."

[37] 104 S. Ct. at 1513, 115 L.R.R.M. at 3199.

[38] *Id.*; R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 299 (1976). According to Professor Gorman, the "concerted activities" language was carried over from the purpose clause of the Norris-LaGuardia Act, the primary aim of which was to overturn common law concepts of tortious and criminal conspiracy. He contends that no clear evidence exists that Congress intended to exclude from protection employees who act alone in lodging complaints. *Id.*

[39] 104 S. Ct. at 1513, 115 L.R.R.M. at 3199. The Court stated that by applying section 7 to the actions of individual employees invoking their rights under a collective bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective bargaining process. *Id.* "[B]y invoking a right grounded in a collective bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective bargaining agreement, but also into the entire process envisioned by Congress as the means by which to achieve industrial peace." *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1514, 115 L.R.R.M. at 3200.

[43] *Id. See, e.g.*, Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729, 74 L.R.R.M. 2855, 2859 (5th Cir. 1970) (abusive and insubordinate conduct at grievance meeting); Yellow Freight System, Inc., 247 N.L.R.B. 177, 181, 103 L.R.R.M. 1154, 1154 (1980) (manner of assertion of contract right constituted insubordination).

[44] 104 S. Ct. at 1514, 115 L.R.R.M. at 3200. No-strike provisions, for example, are a common means by which employers and employees agree that the latter will not assert their rights by refusing to work. *Id.* In general, if an employee violates such a provision, his activity is unprotected even though it may be concerted. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 271, 284, 37 L.R.R.M. 2587, 2588, 2594 (1956).

The Court based its acceptance of the *Interboro* doctrine upon its recognition that a lone employee's invocation of a collectively bargained right was an integral part of the collective bargaining process. It also found that the *Interboro* doctrine was entirely consistent with section 7 and the policies of the Act. The Court, thus, accepted the doctrine as a reasonable interpretation of the Act. Having found that the employee's action was concerted activity, the Court remanded the case for a determination of whether the employee's action was protected activity.[45]

Justice O'Connor, writing for the four dissenting Justices,[46] rejected the *Interboro* doctrine because she considered it to be "an exercise in undelegated legislative power by the Board."[47] In the dissent's view, the ability to ground the right the employee asserts in the collective bargaining agreement was not sufficient to transform the individual's self-interested action into concerted activity.[48] If concerted activity is read this broadly, the dissenting opinion reasoned, every contract claim could be the basis for an unfair labor practice complaint.[49] According to the dissent, such an interpretation would be contrary to established law that unequivocally states that an employer's alleged violation of a collective agreement cannot, by itself, provide the basis for an unfair labor practice complaint.[50] The dissent said that by basing the determination of whether an employee's assertion of a right is concerted activity on the assertion's ultimate grounding in the collective bargaining agreement,[51] the *Interboro* doctrine's extension of section 7's concerted activity proviso transfers the final authority for resolving all contract disputes to the Board.[52] The dissenting Justices concluded that "[t]his arrogation of power violates Congress' decision to the contrary."[53] The dissent therefore would have affirmed the Court of Appeals decision to reject the *Interboro* doctrine as an unreasonable interpretation of the Act.[54]

The Supreme Court's decision in *City Disposal Systems* resolved the conflict between the circuits over the applicability of the *Interboro* doctrine. The law is now settled that an individual employee's assertion of a right grounded in a collective bargaining agreement

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[45] 104 S. Ct. at 1517, 115 L.R.R.M. at 3202. *See infra* notes 62-65 and accompanying text.

[46] Chief Justice Burger and Justices Powell and Rehnquist joined in the dissent.

[47] 104 S. Ct. at 1516, 115 L.R.R.M. at 3202 (O'Connor, J., dissenting).

[48] *Id.*

[49] *Id.*

[50] *Id. See* NLRB v. C & C Plywood, 385 U.S. 421, 427-28, 64 L.R.R.M. 2065, 2068 (1967) (Board not empowered to resolve contract disputes); Dowd Box Co. v. Courtney, 368 U.S. 502, 509-13, 49 L.R.R.M. 2619, 2621-23 (1962) (Congress did not intend that NLRB would resolve contract disputes). Congress once considered a proposal that would have given the Board "general jurisdiction over all alleged violations of collective bargaining agreements." NLRB v. C & C Plywood, 385 U.S. 421, 427, 64 L.R.R.M. 2065, 2068 (1967). It realized, however, that "[t]o have conferred upon the [Board] generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements." *Id.* Congress expressly decided that, "[o]nce [the] parties have made a collective bargaining contract[,] the enforcement of that contract should be left to the usual processes of the law and not to the . . . Board." H.R. REP. No. 510, 80th Cong., 1st Sess. 42 (1946).

[51] Justice O'Connor was particularly disturbed by the *Interboro* doctrine because it did not require the individual expressly to refer to the contract provision supporting the claim or even to be aware of the existence of the agreement. 104 S. Ct. at 1517 n.3, 115 L.R.R.M. at 3203 n.3 (O'Connor, J., dissenting).

[52] *Id.* at 1517, 115 L.R.R.M. at 3203.

[53] *Id. See supra* note 50.

[54] 104 S. Ct. at 1517, 115 L.R.R.M. at 3202 (O'Connor, J., dissenting).

is recognized as concerted activity and is, therefore, eligible for protection under section 7. Analysis of the Court's opinion, however, reveals the limits of the decision.

First, the Court's decision limited itself to the situation where the collective bargaining agreement contained a provision granting employees the right to take individual action in response to certain conduct of their employer which was violative of the agreement.[55] In this case, employees had an express right to refuse to operate unsafe vehicles.[56] *City Disposal Systems* held that, given the existence of such a provision in the collective bargaining agreement, an employee's assertion of his rights under that provision was an integral part of the collective process which produced the provision in the first place.[57] Because it was part of the collective process, the employee's action was concerted activity.

This limitation responds to Justice O'Connor's concern about the Board assuming an improper adjudicative role in contractual disputes.[58] In *City Disposal Systems*, the Board's task was not to define the employee's rights under the agreement, but to determine whether the employer interfered with the employee's right to engage in concerted activity in violation of the Act.[59] To make this determination, the Board had to ascertain whether the employee's refusal to drive an unsafe truck, a collectively bargained right, was concerted activity. If, as was found, the employee's refusal to drive an unsafe truck, a collectively bargained right, was concerted activity and was protected under section 7, the employer's action was not only a violation of the collective bargaining agreement but also a violation of the Act.[60] The employee enforced the agreement by exercising his right to refuse to drive the truck; the Board merely enforced the Act. The Board therefore acted within its statutory power to adjudicate complaints of unfair labor practices.[61]

A second limitation of the Court's decision arises because all concerted activity is not necessarily protected under section 7.[62] The Court specifically stated that the only issue it was deciding was whether the employee's action was concerted, not whether it was protected.[63] The Court discussed this limitation briefly in its decision.[64] It indicated that if the agreement in *City Disposal Systems* had somehow limited the means by which an individual employee could exercise his right to refuse to drive unsafe vehicles, then a refusal which exceeded the limitation would not be protected even though it might be concerted activity.[65]

These two limitations in the Court's opinion reveal that the availability of the type of concerted activity at issue in *City Disposal Systems* is totally controlled by the collective

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[55] *Id.* Article XXI of the collective bargaining agreement between City Disposal and the Teamsters Union provided: "[t]he Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified." *Id.* at 1508, 115 L.R.R.M. at 3195.

[56] *Id.*

[57] *Id.* at 1511, 115 L.R.R.M. at 3199.

[58] *See supra* notes 50-53 and accompanying text.

[59] *See supra* note 22.

[60] *See supra* notes 55 and 59.

[61] Section 10(c) of the Act empowers the Board to adjudicate and remedy unfair labor practices. 29 U.S.C. § 160(c).

[62] *See supra* note 43 and accompanying text.

[63] 104 S. Ct. at 1514, 115 L.R.R.M. at 3200.

[64] *Id.*

[65] *Id.*

bargaining agreement. The Court has not undermined the collective process, as the dissent argues.[66] Rather, it has given the parties the power to negotiate the terms of the agreement and the means of enforcing those terms. If an employer does not wish to tolerate certain methods by which employees invoke their rights, the employer is free to negotiate a provision that limits the availability of such methods.[67]

The existence of a collective bargaining agreement was thus the essential element of the Court's decision in *City Disposal Systems*. The Court's decision, however, neither addressed nor answered the question of whether an individual may be said to engage in concerted activity where no collective bargaining agreement is in force.[68]

The Supreme Court's decision in *City Disposal Systems* establishes the *Interboro* doctrine as the test for determining whether an individual's action constitutes concerted activity within the meaning of section 7 of the Act. According to the *Interboro* doctrine, an individual's assertion of a right grounded in a collective bargaining agreement is concerted activity. All concerted activity, however, may not necessarily be protected activity under section 7. Whether an individual employee's action is protected concerted activity is controlled by the terms of the collective bargaining agreement. The parties have the power to negotiate their rights under the agreement and the means of enforcing these rights. Once the collective bargaining process establishes rights and enforcement procedures, however, violations of these rights are subject to remedial action by the Board under the Act.

## B. **Discharge of Supervisor for Union Activity*: Automobile Salesmen's Union Local 1095 v. NLRB[1]

Section 8(a)(1) of the National Labor Relations Act (the Act) makes it an unfair labor practice for an employer to interfere with the exercise of an employee's union rights.[2] Section 7 of the Act gives employees the rights, among others, to organize and engage in collective bargaining and other concerted activities.[3] Until 1947, the National Labor Relations Board (the Board) interpreted the term "employee" to include supervisors, thus

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[66] *See id.* at 1517, 115 L.R.R.M. at 3203 (O'Connor, J., dissenting).

[67] *Id.* at 1516, 115 L.R.R.M. at 3200.

[68] In the absence of such an agreement, an employee's assertion of rights would not be part of a continuing collective process and, according to the rationale adopted by the Court in *City Disposal Systems*, would not be concerted activity. The Board has recently held that, where a group of employees are not unionized and no collective bargaining agreement exists, an employee's assertion of a right that can only be presumed to be of interest to other employees is not concerted activity. Meyers Industries, 268 N.L.R.B. No.73, 115 L.R.R.M. 1025 (1984). For a complete treatment of the Board's decision in *Meyers Industries*, see *infra* (this *Survey*), p. 247, 1983-84 *Annual Survey of Labor and Employment Discrimination Law — Return to an Objective Standard of Concerted Activity:* Meyers Industries, 26 B.C. L. REV. 247 (1985).

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* By Marianne T. McCabe, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] Automobile Salesmen's Union Local 1095, United Food and Commercial Workers Union, AFL-CIO v. NLRB, 711 F.2d 383, 113 L.R.R.M. 3175 (D.C. Cir. 1983) [hereinafter cited as Automobile Salesmen's Union Local 1095 v. NLRB].

[2] 29 U.S.C. § 158(a)(1) (1982).

[3] 29 U.S.C. § 157 (1982).

bringing supervisors within the protective scope of section 8(a)(1).[4] The Taft-Hartley Amendments to the Act, however, narrowed the definition of the term "employee" by specifically excluding "any individual employed as a supervisor."[5] The purpose behind this exclusion was to enable employers to insist on the loyalty of their supervisors.[6] The effect of the Taft-Hartley Amendments was to allow employers to discharge supervisors for participation in union activities, without violating section 8(a)(1).[7]

The Board has developed certain exceptions to the general exclusion of supervisors from coverage under the Act. Accordingly, the Board has found violations of section 8(a)(1) of the Act when a supervisor is discharged for testifying against an employer at an NLRB proceeding,[8] refusing to commit unfair labor practices,[9] and failing to prevent unionization.[10] The Board has stated that the protection afforded to supervisors in these situations stems not from any statutory protection inuring to supervisors, but rather from the need to protect employees in the exercise of their section 7 rights.[11]

The Board has also recognized that the discharge of a supervisor for participation in union activities violates section 8(a)(1) if the discharge was an "integral part" of a plan or part of a "pattern of conduct" designed to interfere with an employee's section 7 rights.[12] This line of decisions began with *Pioneer Drilling Co., Inc.*,[13] where the employer fired two supervisors as a pretext for terminating the supervisor's pro-union crew. In *Pioneer Drilling*, the Board found that the practice in the drilling industry was for the employment of rank-and-file employees to depend on the continued employment of the supervisor who had hired them. Reasoning that the supervisor's discharge was a mechanism to unlawfully discharge the pro-union crew, the Board concluded that the supervisor's discharge was an unfair labor practice.[14] In decisions subsequent to *Pioneer Drilling*, the Board extended that decision's rationale to supervisors who joined in union activity and who are then discharged along with the rank-and-file employees.[15] In these decisions, the

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[4] NLRB v. North Arkansas Electric Co-op Inc., 446 F.2d 602, 605, 77 L.R.R.M. 3114, 3116 (8th Cir. 1971). *See* Brod, *The NLRB in Search of a Standard: Is the Discharge of a Supervisor in Connection with Employees' Union or Other Protected Activities an Unfair Labor Practice?*, 14 IND. L. REV. 727, 727 n.3 (1981).

[5] Labor Management Relations Act § 2(3) (Taft-Hartley Act), 29 U.S.C. § 152(3) (1982).

[6] Florida Power and Light v. Electrical Workers, 417 U.S. 790, 806-09, 86 L.R.R.M. 2689, 2695 (1974).

[7] *See* Beasley v. Food Fair, Inc., 416 U.S. 653, 654-55, 86 L.R.R.M. 2196, 2197 (1974).

[8] *See, e.g.*, Oil City Brass Works, 147 N.L.R.B. 627, 56 L.R.R.M. 1262 (1964), *enforced*, 357 F.2d 466, 61 L.R.R.M. 2318 (5th Cir. 1966); Better Monkey Grip Company, 115 N.L.R.B. 1170, 38 L.R.R.M. 1025 (1956), *enforced*, 243 F.2d 836, 40 L.R.R.M. 2027 (5th Cir. 1957).

[9] *See, e.g.*, Belcher Towing Company, 238 N.L.R.B. 446, 99 L.R.R.M. 1556 (1978), *enforced*, 614 F.2d 88, 103 L.R.R.M. 2939 (5th Cir. 1980); Vail Manufacturing Company, 61 N.L.R.B. 181, 16 L.R.R.M. 85 (1945), *enforced*, 158 F.2d 664, 19 L.R.R.M. 2177 (7th Cir. 1947).

[10] *See, e.g.*, Talledega Cotton Factory, Inc., 106 N.L.R.B. 295, 32 L.R.R.M. 1479 (1953), *enforced*, 213 F.2d 209, 34 L.R.R.M. 2196 (5th Cir. 1954).

[11] Parker-Robb Chevrolet, Inc., 262 N.L.R.B. 402, 403, 110 L.R.R.M. 1289, 1290 (1982), *petition for review den. sub nom.* Automobile Salesmen's Union Local 1095 v. NLRB, 711 F.2d 383, 386, 113 L.R.R.M. 3175, 3177 (1983).

[12] An analysis of these decisions appears in DRW Corporation, Brothers Three Cabinets, 248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980)(Truesdale, Member, concurring in part and dissenting in part).

[13] 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in pertinent part*, 391 F.2d 961, 67 L.R.R.M. 2956 (10th Cir. 1968).

[14] *Pioneer Drilling*, 162 N.L.R.B. at 923, 64 L.R.R.M. at 1131.

[15] *See, e.g.*, Fairview Nursing Home, 202 N.L.R.B. 318, 82 L.R.R.M. 1566 (1973); Krebs and King Toyota, Inc., 197 N.L.R.B. 462, 80 L.R.R.M. 1570 (1972).

Board ruled that the firing of a supervisor was an unfair labor practice if the motivation behind the employer's conduct was to coerce rank-and-file employees into curtailing union activities.[16]

During the *Survey* year, in *Automobile Salesmen's Union Local 1095 v. NLRB*, the United States Court of Appeals for the District of Columbia Circuit denied a petition for review of a Board decision overruling the "pattern of conduct" line of cases.[17] In doing so, the court let stand the Board's ruling in *Parker-Robb Chevrolet, Inc.*[18] that the discharge of a supervisor is unlawful only if it directly interferes with the statutory rights of protected employees.[19] Consequently, the discharge of a supervisor as part of a "pattern of conduct" designed to curtail protected union activities will no longer constitute a section 8(a)(1) violation unless the employer directly interferes with the exercise of employees' section 7 rights.[20]

In *Automobile Salesmen's Union*, several employees of Parker-Robb Chevrolet (Parker-Robb) were fired after attending an organizational meeting conducted by the Automobile Salesmen's Union (the Union).[21] Subsequently, Terry Doss, a supervisor at Parker-Robb and crew chief for some of the discharged workers who had also attended the meeting, repeatedly demanded an explanation from Parker-Robb's managers for the discharges.[22] Doss was then told by a management official that he, too, was being discharged.[23] Relying upon the "pattern of conduct" line of cases, the Administrative Law Judge (ALJ) determined that Doss's discharge violated section 8(a)(1) of the Act because it was part of an overall plan to discourage employees from exercising their statutory right to unionize.[24] Upon review, the Board reversed the ALJ's decision, overruling the "pattern of conduct" line of cases and limiting *Pioneer Drilling* to its facts.[25]

The Union petitioned the District of Columbia Circuit Court for review of the Board's decision.[26] The court began its analysis of whether to grant the Union's petition by noting that its review of the Board's construction of the Act is limited. According to the court, the Board's interpretation must be enforced unless it has no reasonable basis in law or is fundamentally inconsistent with the Act's purposes.[27] The court found that the Board's construction of the Act was not vulnerable to either of these grounds of attack.[28] The court noted that the Board had found that the "pattern of conduct" line of cases had produced inconsistent decisions and had effectively brought supervisors under the protection of the Act.[29] Furthermore, the court observed, the Board had determined that previous cases holding that the existence of a section 8(a)(1) violation turns on the

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[16] *See* Donelson Packing Co., Inc., 220 N.L.R.B. 1043, 90 L.R.R.M. 1549 (1975); VADA of Oklahoma, Inc., 216 N.L.R.B. 750, 88 L.R.R.M. 1631 (1975).

[17] Automobile Salesmen's Union Local 1095 v. NLRB, 711 F.2d 383, 113 L.R.R.M. 3175 (1983).

[18] 262 N.L.R.B. 402, 110 L.R.R.M. 1289 (1982), *petition for review den. sub nom.* Automobile Salesmen's Union Local 1095 v. NLRB, 711 F.2d 383, 113 L.R.R.M. 3175 (1983).

[19] *Automobile Salesmen's Union*, 711 F.2d at 388, 113 L.R.R.M. at 3178.

[20] *Parker-Robb*, 262 N.L.R.B. at 404, 110 L.R.R.M. at 1291.

[21] *Automobile Salesmen's Union*, 711 F.2d at 385, 113 L.R.R.M. at 3176.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Parker-Robb*, 262 N.L.R.B. at 402-03, 110 L.R.R.M. at 1290-91.

[26] *Automobile Salesmen's Union*, 711 F.2d at 388, 113 L.R.R.M. at 3178.

[27] *Id.* at 385-86, 113 L.R.R.M at 3176-77.

[28] *Id.* at 386, 113 L.R.R.M. at 3177.

[29] *Id.* at 387, 113 L.R.R.M. at 3178.

employer's motivation were incorrect.[30] According to the court, the Board properly acknowledged that the discharge of a supervisor for union activity would always have an incidental effect on rank-and-file employees, and that such secondary affects on employee unionization formed an insufficient basis upon which to warrant an exception to the general provision excluding supervisors from coverage under the Act.[31] Consequently, the court denied the Union's petition for review, stating that the Board's new approach to supervisor discharge cases constituted a reasonable exercise of the Board's discretion.[32]

The refusal of the Court of Appeals to disturb the Board's decision in *Automobile Salesmen's Union* was proper because the Act expressly excludes supervisors from its protection.[33] The Board's reasoning that supervisors are not covered under the Act except in those rare circumstances where the discharge of a supervisor also directly interferes with the statutorily protected rights of employees flows logically from the Act.[34] As the court noted, its standard of review in cases involving the Board's construction of the Act is a narrow one.[35] Accordingly, because the Board's decision in *Automobile Salesmen's Union* had an arguably reasonable basis in law and was consistent with the Act's structure and purposes, the court was correct to deny the union's petition for review.

The Board's decision to overrule the "pattern of conduct" line of cases is equally sound. In *Pioneer Drilling*,[36] the discharge of supervisors was in reality a means to fire the pro-union crew. Because the firing of the supervisors directly operated to deny employees their section 7 rights, the supervisors' discharge was unlawful. In *Automobile Salesmen's Union*, however, the firing of a supervisor for his pro-union conduct did not directly interfere with the employees' rights but had merely an incidental effect on those rights.[37] Given such a tenuous connection between the supervisor's discharge and the employees' exercise of their rights, little basis exists upon which to find that the supervisor is protected under the Act when the congressional directive is expressly to the contrary.

Following *Automobile Salesmen's Union*, an employer may discharge a supervisor without violating the Act if the supervisor participates in union activity, unless such discharge would directly harm an employee's section 7 rights.[38] By abandoning its inquiry into the employer's motivation in determining the lawfulness of a discharge of a supervisor, the Board has shifted its focus from what the employer intended his conduct to achieve to what the actual effect of his conduct was on the employees.[39] This shift in focus should produce better-reasoned and more consistent decisions because, as several commentators have noted, assessing the dominant motivation behind an employer's conduct toward his employees is often difficult, if not impossible.[40] Although the decision decreases the protections formerly afforded supervisors in labor-management relations, it keeps intact the principle that an employer may not commit unfair labor practices simply by channelling them through the supervisor.[41]

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[30] *Id.*

[31] *Id.*

[32] *Id.* at 388, 113 L.R.R.M. at 3178.

[33] 29 U.S.C. § 152(3) (1982).

[34] *Parker-Robb*, 262 N.L.R.B. at 404, 110 L.R.R.M. at 1289.

[35] *Automobile Salesmen's Union*, 711 F.2d at 385, 113 L.R.R.M. at 3177.

[36] 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967).

[37] *Automobile Salesmen's Union*, 711 F.2d at 387, 113 L.R.R.M. at 3178.

[38] *Id.*

[39] *Parker-Robb*, 262 N.L.R.B. at 404, 110 L.R.R.M. at 1291.

[40] *See, e.g.*, Brod, *The NLRB Changes Its Policy On the Legality of an Employer's Discharge of a Disloyal Supervisor*, 1983 LAB. L. J. 13, 16 (1983).

[41] *Automobile Salesmen's Union*, 711 F.2d at 387, 113 L.R.R.M. at 3178.

The Board has left open the question of when a supervisor's discharge will be held to have a direct affect on employees' section 7 rights. The firing of a supervisor for testifying before a Board hearing or a contractual grievance proceeding,[42] however, should continue to be an unlawful practice under the Act because the discharge of a supervisor in these situations would disrupt procedures designed to protect employee rights.[43] Moreover, the firing of a supervisor for refusing to commit an unfair labor practice or for failing to prevent unionization should also continue to be illegal because of the need to ensure that even statutorily excluded individuals, such as supervisors, will not be coerced into violating laws designed to protect employees.[44]

Although the discharge of a supervisory employee for participating in union activities could have a substantial "chilling" effect on employee union rights, this situation will no longer be within the scope of section 8(a) protection.[45] Such a chilling effect could result if employees mistakenly assume that a supervisor is afforded equal protection under the Act.[46] This chilling effect can be eliminated if employees are educated about their section 7 rights.[47] Then, even if a supervisor is fired for union activities, the employees will recognize that they, unlike the supervisor, are shielded from such reprisals. Armed with such information, the employees will not be discouraged from exercising their rights.[48] By providing such information, union leaders will be able to minimize the potential impact of *Automobile Salesmen's Union* on rights of self organization.

### C. **Return to an Objective Standard of Concerted Activity*: Meyers Industries, Inc.[1]

Section 7[2] of the National Labor Relations Act[3] (the Act) gives employees the right to self-organization for the purpose of mutual protection.[4] This right has been traditionally referred to as "concerted action."[5] Although the legislative history of section 7 does not contain any definition of "concerted activity," it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal.[6] An employer violates section 8(a)(1) of the Act[7] when it discharges without further cause an employee who has

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[42] *See, e.g.*, Dal-Tex Optical Company, Inc., 131 N.L.R.B. 715, 48 L.R.R.M. 1143 (1961), *enforced*, 310 F.2d 58, 51 L.R.R.M. 2608 (5th Cir. 1962).

[43] Parker-Robb Chevrolet, Inc., 262 N.L.R.B. at 404, 110 L.R.R.M. at 1291.

[44] *Id.*

[45] *Automobile Salemen's Union*, 711 F. 2d at 387, 113 L.R.R.M. at 3178.

[46] *See* Note, *Limiting An Employee's Liability for Firing Supervisor for Union Activity*, 59 NOTRE DAME LAW. 270, 279 (1983).

[47] *Id.*

[48] *See id.*

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* By Jennifer L. Jorgensen, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 268 N.L.R.B. 493, 115 L.R.R.M. 1025 (1984).

[2] 29 U.S.C. § 157 (1982) states in pertinent part: "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.*

[3] 29 U.S.C. §§ 151-69 (1982).

[4] *See supra* note 2.

[5] *See* Meyers Industries, Inc., 268 N.L.R.B. 493, 115 L.R.R.M. 1025 (1984).

[6] *Id.*

[7] Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ." 29 U.S.C. § 158(a)(1) (1982).

engaged in a protected concerted activity.[8]

The National Labor Relations Board (Board) and those courts which have attempted to interpret "concerted activity" have defined it in different ways over the years. Until 1975, the Board and courts generally analyzed the concept of concerted activity by first considering whether some kind of group action occurred and then by examining whether that action was for the purpose of mutual aid or protection of employees.[9] Concerted activity was described as "employee interaction in support of a common goal,"[10] and a clear showing of employees' group effort was required for an activity to be deemed "concerted."[11] In the 1975 case of *Alleluia Cushion Co.*,[12] however, the Board developed the theory of "implied concerted activity" to replace the two-tiered approach to the concept.[13] In that decision, the Board held that an employee who complained on his own to a state agency about safety conditions had engaged in concerted action within the meaning of section 7.[14] The *Alleluia* Board based its decision on two premises. First, the Board reasoned that safe working conditions concerned the entire work force.[15] Second, the Board asserted that public policy enunciated in state and federal legislation provided industrial employees with a right to safe employment conditions.[16] The Board, therefore, held that where an employee seeks to enforce statutory provisions designed for the benefit of all employees, consent of all employees to those actions may be implied and such activity may be deemed concerted.[17] Thus, after *Alleluia* an employee needed only to assert his statutory right to a healthy work environment for his claim of "concerted

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[8] Protection of concerted activities arises exclusively out of section 7. All concerted activity, however, is not protected by the Act. For example, if such activity is not engaged in "for the purpose of collective bargaining or other mutual aid or protection," or is unlawful or insubordinate, it is not a violation of the Act to restrain an employee from engaging in such concerted activity. *See* Eastex Inc. v. NLRB, 437 U.S. 556, 568 n.18, 98 L.R.R.M. 2717 (1978). *See generally* Gregory, *Unprotected Activity and the NLRA*, 39 VA. L. REV. 421 (1953).

[9] *See Meyers*, 268 N.L.R.B. at 494, 115 L.R.R.M. at 1026 (citing Texas Textile Mills, 58 N.L.R.B. 352, 15 L.R.R.M. 14 (1944); Globe Co., 54 N.L.R.B. 1, 13 L.R.R.M. 107 (1943)).

[10] *Meyers*, 268 N.L.R.B. at 494, 115 L.R.R.M. at 1026 (citing Traylor-Pamco, 154 N.L.R.B. 380, 59 L.R.R.M. 1756 (1965) (two workers who refused to eat their lunch with other employees were acting individually and were not engaging in concerted actions); Root-Carlin, 92 N.L.R.B. 1313, 27 L.R.R.M. 1235 (1951) (conversation among employees about the need for a union was concerted activity because section 7 protects activity which "in its inception, involves only a speaker and listener, [because] such activity is an indispensable preliminary step to employee self-organization.")).

[11] *See, e.g.*, Continental Mfg., 155 N.L.R.B. 255, 257, 60 L.R.R.M. 1290, 1291 (1965) (one employee's letter to company owner complaining of workplace conditions that bothered all employees but which was signed and prepared by only that one employee was not concerted activity since there was no evidence that the criticisms and suggestions for improvement in the letter reflected the views or enlisted the support of other employees).

[12] 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975).

[13] *Id.* at 1000, 91 L.R.R.M. at 1133 ("Where an employee . . . seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees . . . we will find an implied consent [of other employees] and deem such activity to be concerted.").

[14] *Id.* at 1001, 91 L.R.R.M. at 1133. In *Alleluia*, an employee was fired after he wrote a letter complaining about safety conditions in his workplace to the Occupational Safety and Health Administration (OSHA). Even though there was no evidence that the employee had discussed the safety problems with other employees or had sought their support in remedying the problems, the Board found his actions to be concerted and protected by section 7. *Id.*

[15] *Id.* at 1000, 91 L.R.R.M. at 1133.

[16] *Id.* ("Recent years have witnessed the recognition of [the] vital interest [of occupational safety] by Congress through enactment of the Occupational Safety and Health Act [29 U.S.C. §§ 651-678] and by state and local governments through the passage of similar legislation.").

[17] *Alleluia* at 1000, 91 L.R.R.M. at 1133.

activity" to be valid and within the protective ambit of section 7 of the Act.[18] The Board would presume that his fellow employees had consented to occupational safety.

During the *Survey* year, the Board overruled *Alleluia*, rejected the "implied concerted action" standard, and returned to the pre-*Alleluia* "objective" standard of section 7 concerted activity.[19] In *Meyers Industries, Inc.*,[20] the Board held that an employee's action is "concerted" only if the activity is employed with or on the authority of the other workers and is not done solely by and on behalf of the employee himself.[21] Consequently, after *Meyers Industries*, individual employees who complain about working conditions alone and on their own behalf, without the formal consent of fellow employees, lose the protection of section 7 of the Act and may be legally discharged by their employers.

The dispute in *Meyers* involved the discharge of an employee for refusing to drive a truck and trailer and for contacting state authorities on his own to arrange for an inspection of the unsafe vehicle. Employee Kenneth Prill, who had been in the trucking business for a number of years,[22] was a driver for Meyers Industries, Inc. (Meyers), a Michigan-based trucking company.[23] Prill had been assigned a particular truck and trailer on a semi-permanent basis.[24] He lodged several complaints with his employer concerning malfunctions in the truck's brakes and steering, but Meyers did not respond to the complaints.[25] A second employee, Ben Gove, who had driven the truck for a temporary period and had also experienced difficulties with it, reported the problems to his supervisor and refused to drive the truck again until it was repaired.[26] Following Gove's complaint, the employer's mechanic made an unsuccessful attempt to correct the problems.[27] Soon thereafter, Prill voluntarily stopped at an Ohio roadside inspection station where the truck and trailer unit was given a citation for several defects.[28] Prill forwarded this citation to company officials.[29] Following this incident, Prill was involved in an accident in Tennessee caused by a malfunction in the truck's brakes.[30] After receiving telephone instructions from Meyers' president to return home "as best he could" with the truck,[31] Prill remained in Tennessee until the company finally agreed to send its mechanic to Tennessee to examine the equipment.[32] Prill then contacted the Tennessee Public

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[18] *Id.* The Board reasoned that because Congress and the states made manifest the national will in the area of industrial safety, "the consent and concert of action emanates from the mere assertion of such statutory rights." *Id.*

[19] *Meyers*, 268 N.L.R.B. at 498, 115 L.R.R.M. at 1029.

[20] 268 N.L.R.B. 493, 115 L.R.R.M. 1025 (1984).

[21] *Id.* at 498, 115 L.R.R.M. at 1029. The Board also held that once an activity is deemed concerted, an employer violates section 8(a)(1) only if the concerted activity is protected under the Act, the employer knew of the concerted nature of the employee's actions, and the employer's adverse response was motivated by the activity. *Id. See infra* note 72.

[22] *Id.* at 497, 115 L.R.R.M. at 1029 ("Charging party . . . Prill drove trucks for a number of years and was an owner-operator for the four years before his employment by the Respondent.").

[23] *Id.* Respondent's facility was located in Tecumseh, Michigan but its trucks traveled throughout the country. *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* Gove drove the truck during the first two weeks of June, 1979. *Id.*

[27] *Id.*

[28] *Id.* The citation included defects relating to the truck's brakes. *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* The company president also instructed Prill to have a mechanic look at the truck before he returned to Michigan. *Id.*

[32] *Id.*

Service Commission to arrange for an official inspection of the vehicle.[33] Upon examination, the unit was cited for several Department of Transportation safety violations.[34] When Prill reported to work in Michigan, company officials asked him why he had not driven the truck back immediately as instructed. Prill answered that he had believed that it was unsafe to drive the vehicle.[35] The vice-president of Meyers fired Prill, stating "we can't have you calling the cops like this all the time."[36]

Prill filed charges of an unfair labor practice with the National Labor Relations Board.[37] At the administrative hearing, the General Counsel contended that employer Meyers had violated section 8(a)(1) by discharging employee Prill because of his safety complaints and his refusal to drive an unsafe vehicle.[38] The Administrative Law Judge (ALJ)[39] agreed with Prill's allegations,[40] and held that this discharge was unlawful because his actions were concerted and therefore protected under section 7.[41] The ALJ relied on the *Alleluia* case, reasoning that Prill's activity established a presumption of concertedness, since his complaints were a matter of concern for all employees.[42] Further, the ALJ noted that by refusing to drive and by contacting state authorities, Prill's actions were the equivalent of one employee's safety complaint to the Occupational Safety and Health Administration (OSHA),[43] which had been found to be a concerted action in *Alleluia*.[44] The ALJ also maintained that employee Gove's similar complaints about the safety of the truck, in Prill's presence, "clearly" showed that Prill's complaints were concerted.[45] The ALJ concluded that Respondent Meyers was free, under *Alleluia*, "to rebut the inference that Prill's activity inured to the benefit of all employees,"[46] but that Meyers had failed to do so.[47]

Reviewing the ALJ's decision, the Board accepted the findings of fact but rejected the ALJ's reliance on *Alleluia*. Instead, the Board overruled *Alleluia* and held that Meyers had not violated section 8(a)(1) when it discharged Prill because, according to the Board, Prill

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[33] *Id.*

[34] *Id.* The citation specifically noted that the unit's brakes and hitch were unsafe. A commission representative instructed Prill that certain repairs would have to be made before the vehicle could be moved. Upon arrival in Tennessee, the mechanic phoned the president and it was decided to sell the trailer for scrap, while Prill was ordered to drive the truck back to Michigan. *Id.*

[35] *Id.* at 498, 115 L.R.R.M. at 1030.

[36] *Id.*

[37] *Id.* at 493 n.1, 115 L.R.R.M. at 1025 n.1.

[38] *Id.* A motion to amend the complaint to include an additional allegation that Prill's discharge was unlawful as supported by section 502 of the National Labor Relations Act was denied and the Board affirmed the ALJ's ruling. *Id.*

[39] The Administrative Law Judge was Robert A. Giannosi. *Id.* at 493, 115 L.R.R.M. at 1025.

[40] The ALJ concluded that Prill was fired because of his refusal to drive an unsafe truck after filing a report with the Tennessee Public Service Commission and his earlier safety complaints to Ohio authorities. *Id.* at 498, 115 L.R.R.M. at 1030.

[41] *Id.*

[42] *Id.* (citing decision of ALJ, sec. II, B, par. 2). The judge found that Prill's refusal to drive was mandated by Department of Transportation regulations which require the inspection of a vehicle involved in an accident. *Id.* The judge also stated that Prill's actions "enforced . . . national transportation policy." *Id.*

[43] *See* 29 U.S.C. §§ 651-678 (1982).

[44] *See* 268 N.L.R.B. at 498, 115 L.R.R.M. at 1030 (citing *Alleluia*, 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975)).

[45] *Meyers*, 268 N.L.R.B. at 498, 115 L.R.R.M. at 1030.

[46] *Id.*

[47] *Id.*

had acted solely on his own behalf.[48] In Part I of the Board's decision, it examined the concept of protected concerted activity under section 7 of the Act.[49] First, the Board looked to legislative history behind the phrase "concerted activity"[50] and to the specific language of section 7[51] in determining that the concept is limited to self-organization and collective action which represents an employee group.[52] Next, the Board noted that Board and court decisions prior to *Alleluia* were consistent with this interpretation,[53] because those decisions analyzed the concerted activity concept by looking for some kind of group action before considering whether that interaction was for the purpose of mutual protection.[54] The *Meyers* Board pointed out that in *G.V.R., Inc.*,[55] it had specifically disavowed any public policy considerations for extending concerted activity to one employee's complaints to public agencies.[56]

In the second part of the *Meyers* analysis, the Board discussed the *Alleluia* decision[57] and criticized that Board for creating a "per se" standard of concerted activity.[58] The *Meyers* Board rejected the *Alleluia* rationale, theorizing that the practical effect of allowing solitary employees to invoke "concerted action" protection would be "to transform concerted activity into a mirror image of itself."[59] According to the Board, this mirror image reflected two problems inherent in the *Alleluia* analysis. First, the *Meyers* Board asserted that the *Alleluia* Board was wrong to determine whether an issue ought to concern employees as a group.[60] The *Meyers* Board reasoned that the Board's proper function is to look at the observable evidence to see whether employees had taken group action.[61]

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[48] *Id.*

[49] *Id.* at 493-95, 115 L.R.R.M. at 1025-27.

[50] *Id.* at 493, 115 L.R.R.M. at 1026. The Board noted that the legislative history of section 7 did not specifically define "concerted activity," but the Board stated that Congress considered the concept "in terms of individuals united in pursuit of a common goal." *Id.* at 493, 115 L.R.R.M. at 1025. The Board also pointed to section 7(a) of the National Industrial Recovery Act and section 2 of the Norris-LaGuardia Act to show that there was a common purpose of creating rights in workers to organize for the betterment of working conditions. *See id.* at 493 n.4, 115 L.R.R.M. at 1025-26 n.4.

[51] *See supra* note 2 for text of the relevant provisions of section 7.

[52] *Meyers*, 268 N.L.R.B. at 494, 115 L.R.R.M. at 1026. The Board also emphasized that "the statute requires that the activities in question be 'concerted' before they can be 'protected.'" *Id.*

[53] *See supra* notes 9-11 and accompanying text.

[54] *Meyers*, 268 N.L.R.B. at 494, 115 L.R.R.M. at 1026. The Board spent a significant portion of Part I setting forth the facts and analyses of pre-*Alleluia* decisions which described concerted activity in terms of employee interaction in support of a common goal. *Id.* at 493-95, 115 L.R.R.M. at 1025-27.

[55] 201 N.L.R.B. 147, 82 L.R.R.M. 1139 (1973).

[56] 268 N.L.R.B. at 495, 115 L.R.R.M. at 1027. The Board pointed out, however, that even though it had rejected the judge's finding in *G.V.R.* that public policy would be frustrated if employees could not complain to public agencies with the Act's protection, it had held in that case that where an employee complaining about employment conditions was covered by a federal statute governing wages, hours, and conditions of employment, the employee would be engaging in concerted activity. *Id.* (citing G.V.R., Inc., 201 N.L.R.B. at 147, 82 L.R.R.M. 1139). The *Meyers* Board interpreted *G.V.R.* as declining to extend the concerted activity concept as a matter of law. *Meyers*, 268 N.L.R.B. at 495, 115 L.R.R.M. at 1027. The Board admitted that "[t]he distinction is a difficult one to discern." *Id.*

[57] *See supra* notes 12-18 and accompanying text.

[58] *Meyers*, 268 N.L.R.B. at 496, 115 L.R.R.M. at 1028.

[59] *Id.* at 495, 115 L.R.R.M. at 1028.

[60] *Id.*

[61] *Id.* at 496, 115 L.R.R.M. at 1028.

Second, the Board suggested that it was incongruent with section 7 to require an employer to prove that activity was not concerted.[62] Under *Alleluia*, an employer was required to submit evidence that other employees disavowed the lone employee's actions.[63] This "clear shift in the burden of proof," said the Board, is not countenanced by legislative history or by judicial interpretation of section 7.[64] The *Meyers* Board concluded Part II of its analysis by referring to the refusal of numerous appeals courts to accept the per se standard of concerted activity.[65]

In Part III of the *Meyers* decision, the Board distinguished its decision in *Interboro Contractors*[66] from the *Alleluia* and *Meyers* cases. In *Interboro*, the Board held that actions an individual takes to enforce a provision of a collective bargaining agreement are grievances within the framework of that agreement and should be considered as implied concerted activity.[67] The *Meyers* Board stated that the focal point in *Interboro* was the collective bargaining agreement, which is always presumed to be consented to by all employees and therefore implies concerted action.[68] The Board found no such agreement at issue in *Alleluia* and so held that the analysis in *Interboro* was distinct from that in *Alleluia*.[69]

In Part IV of the *Meyers* decision, the Board explicitly overruled *Alleluia*, declaring that the concept of concerted activity enunciated in that decision "does not comport with the principles inherent in Section 7 of the Act."[70] Instead, the Board returned to an objective standard, holding that in order for an employee's activity to be "concerted," it is necessary that the activity is performed "with or on the authority of other employees, and not solely by and on behalf of the employee himself."[71] The Board also reaffirmed pre-*Alleluia* holdings which placed a burden on the General Counsel to show that the elements of a section 8(a)(1) violation existed.[72]

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[62] *Id.*

[63] *Id.* (citing *Alleluia*, 221 N.L.R.B. at 1000, 91 L.R.R.M. at 1131).

[64] *Meyers*, 268 N.L.R.B. at 496, 115 L.R.R.M. at 1028 (citing the Fourth Circuit in Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 310, 105 L.R.R.M. 3407 (4th Cir. 1980)).

[65] *Meyers*, 268 N.L.R.B. at 496 n.18, 115 L.R.R.M. at 1028, 1028 n.18 (citing *Krispy Kreme*, 635 F.2d at 309, 105 L.R.R.M. 3407; *see, e.g.*, Ontario Knife Co. v. NLRB, 637 F.2d 840, 106 L.R.R.M. 2053 (2d Cir. 1980); Dawson Cabinet Co., 566 F.2d 1079, 97 L.R.R.M. 2075 (8th Cir. 1977)).

[66] 157 N.L.R.B. 1295, 61 L.R.R.M. 1537 (1966), *enf'd.*, 388 F.2d 495, 67 L.R.R.M. 2083 (2d Cir. 1967).

[67] *Id.* at 1298, 61 L.R.R.M. at 1540.

[68] *See Meyers*, 268 N.L.R.B. at 496, 115 L.R.R.M. at 1028; City Disposal Systems, 256 N.L.R.B. 451, 107 L.R.R.M. 1267 (1981), *enf. denied*, 683 F.2d 1005, 110 L.R.R.M. 3225 (6th Cir. 1982), *rev'd and remanded*, 104 S. Ct. 1505 (1983). In *City Disposal*, a trucker who complained on his own about a truck's safety, like Meyers' employee Prill, was found to be engaging in concerted activity. The Supreme Court held specifically, however, that the decision should be read narrowly because a collective bargaining agreement was being enforced by the employee. The existence of the agreement was what made his activity concerted. *City Disposal*, 104 S. Ct. at 1505. For a full discussion of the Supreme Court's decision in *City Disposal*, see *supra* p. 237, 1983-84 *Annual Survey of Labor and Employment Discrimination Law — Concerted Activity — Individual Employees and Concerted Activity Under Collective Bargaining Agreements:* N.L.R.B. v. City Disposal Systems, Inc., 26 B.C. L. Rev. 237 (1985).

[69] *Meyers*, 268 N.L.R.B. at 496, 115 L.R.R.M. at 1028.

[70] *Id.*

[71] *Id.* at 496-97, 115 L.R.R.M. at 1028-29.

[72] Once an activity is deemed "concerted," said the *Meyers* Board, a section 8(a)(1) violation occurs if, in addition, "the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue [for example, discharge] was motivated by the employee's protected concerted activity." *Id.* at 497, 115 L.R.R.M. at 1029. In a footnote, the Board cited several recent cases which set forth this standard. *Id.* at 497 n.23,

The Board was careful to limit its holding, however, by recognizing that its definition of concerted activity was "by no means exhaustive."[73] The Board emphasized that a "myriad of factual situations" could arise in this area of the law,[74] and that under its standard the question of whether an employee engaged in a "concerted activity" was a factual one.[75]

In the final part of its analysis, the *Meyers* Board applied the objective standard of concerted activity that it had adopted to the facts of the *Meyers* case and found that Prill had acted solely on his own behalf when he refused to drive the truck, contacted a public service commission, and contacted Ohio authorities.[76] Without the "artificial presumption *Alleluia* created,"[77] said the Board, these actions could not support a finding that Prill had engaged in concerted activity.[78] The Board also rejected the ALJ's determination that Prill's presence in the office when a second employee complained about the truck amounted to concerted action.[79] Absent evidence that the two employees had joined forces to protest the truck's condition, said the Board, individual employee concerns manifested on an individual basis did not show "concert of action."[80] The Board concluded that although Prill's situation "is a sympathetic one . . . we are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws."[81]

Member Zimmerman dissented from the Board's decision to permit employer Meyers to lawfully discharge employee Prill for his filing of a safety complaint.[82] The dissent first argued that in overruling *Alleluia* the *Meyers* Board had overlooked the two rationales on which that case had been based.[83] According to the dissent, *Alleluia* stood first for the proposition that concert of action is presumed from a matter of "great and continuing concern" to the workforce and requires an analysis of the specific complaint to determine whether it goes beyond individual concerns.[84] Under the second *Alleluia* rationale, according to the dissent, the Board is permitted to presume concert of action from an assertion of a statutory right based on legislative declaration of public interest in a workplace matter.[85] The dissent asserted that the *Meyers* situation directly involved the

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115 L.R.R.M. at 1029 n.23. Among them, the Board cited NLRB v. Condenser Corp. of America, 128 F.2d 67, 75, 10 L.R.R.M. 483 (3d Cir. 1942), for the proposition that "under this standard, an employee may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." *Meyers*, 268 N.L.R.B. at 497 n.23, 115 L.R.R.M. at 1029 n.23. This procedural holding by the *Meyers* Board constitutes a further restriction on section 8(a) protection.

[73] *Meyers*, 268 N.L.R.B. at 497, 115 L.R.R.M. at 1029.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 497-98, 115 L.R.R.M. at 1029-30. *See supra* notes 28-35 and accompanying text.

[77] *Id.* at 498, 115 L.R.R.M. at 1030.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 498-99, 115 L.R.R.M. at 1030.

[81] *Id.* at 499, 115 L.R.R.M. at 1031. The Board stated that it did "not believe . . . that Section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid or protection, was intended to encompass the case of individual activity presented here." *Id.*

[82] *Id.* at 499-503, 115 L.R.R.M. at 1031-35 (Zimmerman, Member, dissenting).

[83] *Id.* at 500, 115 L.R.R.M. at 1032 (Zimmerman, Member, dissenting).

[84] *Id.* at 499, 115 L.R.R.M. at 1031-32 (Zimmerman, Member, dissenting). *See supra* notes 12-18 and accompanying text.

[85] *Id.* at 500, 115 L.R.R.M. at 1032 (Zimmerman, Member, dissenting). *See supra* notes 12-18 and accompanying text.

second principle of *Alleluia* and that it would, therefore, be proper and valid to presume concert of action from the assertion of an employment-related statutory right.[86]

The history and spirit of federal labor laws, as well as the policies behind the Act, the dissent argued, indicate that section 7's "concerted activity" language protects an individual employee's assertion of a collective right in the workplace.[87] After discussing the history of the term "concert"[88] and the subsequent federal legislation which incorporated that term,[89] the dissent asserted that it is reasonable to construe "concerted activity" as supplementing an individual employee's rights as well as the rights of employees who engaged in actual collective activity.[90] This interpretation of congressional intent is supported, stated the dissent, by the fact that a work-related statutory right is not an individual right, but is one shared by and created for employees as a group through legislation.[91] Thus, the dissent concluded that presuming concert in the individual assertion of an employment-related statutory right running to all employees accommodates the Act's overall policies regarding workplace conditions.[92] Further, the dissent argued, the shifting of the burden of proving the lack of concerted activity to the employer in these instances does not make the presumption any less valid.[93] The dissenter, therefore, maintained that in the *Meyers* situation it should have been presumed that other drivers supported Prill's assertion of Department of Transportation safety regulations.[94] Thus, Member Zimmerman would have held that employer Meyers had violated section 8(a)(1) of the Act by discharging an employee who was protected by section 7's concerted activity concept.[95]

Following the Board's decision in *Meyers*, an individual employee who complains alone and on his own behalf about safety conditions in his workplace may lose his section 7

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[86] *Id.* at 500, 115 L.R.R.M. at 1032 (Zimmerman, Member, dissenting). *See infra* notes 99-100 and accompanying text.

[87] *Id.* at 500, 115 L.R.R.M. at 1032 (Zimmerman, Member, dissenting). The dissenter stated that the "central purpose of the Act is to avoid or minimize industrial strife which interferes with the normal flow of commerce." *Id.* Other sections of the Act, the dissenter asserted, provide for the full freedom of association by employees as one way of accomplishing the desired harmony between employers and employees. *See id.* (Zimmerman, Member, dissenting).

[88] The *Meyers* dissent noted that the earliest use of the term "concert" was in opposition to the application of the doctrine of criminal conspiracy to employees' organizing efforts. *Id.* at 501, 115 L.R.R.M. at 1032-33 (Zimmerman, Member, dissenting). That doctrine made it a crime for two or more employees to conspire to raise their wages or improve their working conditions. *Id.* at 501, 115 L.R.R.M. at 1033 (Zimmerman, Member, dissenting). Early legislation, stated the dissent, was directed toward insulating organized labor from the doctrine, and it was in this context that the term "concert" first appeared. *Id.* (Zimmerman, Member, dissenting).

[89] *Id.* (Zimmerman, Member, dissenting). The dissent pointed to the use of "concert" in the Clayton Act of 1914, the Norris-LaGuardia Act of 1932, section 7(a) of the National Industrial Recovery Act of 1938, and finally, section 7 of the Act. *Id.* (Zimmerman, Member, dissenting).

[90] *Id.*

[91] *Id.* The dissent also noted that the Supreme Court "has long acknowledged the Board's authority to use presumptions in administering the Act." *Id.* at 502, 115 L.R.R.M. at 1033 (Zimmerman, Member, dissenting) (citing Republican Aviation Corp. v. NLRB, 324 U.S. 793, 16 L.R.R.M. 620 (1945) (where the presumption that a rule prohibiting union solicitation by employees outside of working hours is an unreasonable impediment to self-organization and hence was held to be invalid)).

[92] *Meyers*, 268 N.L.R.B. at 502, 115 L.R.R.M. at 1034 (Zimmerman, Member, dissenting).

[93] *Id.* at 503, 115 L.R.R.M. at 1034 (Zimmerman, Member, dissenting).

[94] *Id.* at 503, 115 L.R.R.M. at 1035 (Zimmerman, Member, dissenting).

[95] *Id.* (Zimmerman, Member, dissenting).

protection and, therefore, could be legally discharged. To show concerted activity and, thus, gain section 7 protection, the General Counsel must either submit evidence that the employee engaged in actual physical group organization before a complaint was filed or show that the individual employee asserted a federal statutory right which governs employment conditions rather than simply a regulatory right.[96] It is submitted that, as the dissent suggested, this strict, objective standard of concerted activity is inconsistent with the policies of labor legislation. As the dissenting member noted, federal labor acts support the premise that employers must recognize that neither party has a right to engage in practices which jeopardize public health, safety or interest.[97] Further, the dissent recognized that Congress' policy of eliminating occupational safety problems is complemented by extending the concept of concerted action to employees' attempts to ensure enforcement of that policy.[98] As the dissent in *Meyers* suggested, the assertion of a work-related statutory right by an individual employee is at the core of the public policy underlying federal labor legislation. The *Meyers* Board, however, cited *G.V.R., Inc.* to dismiss the value of public policy concerns when evaluating concerted activity.[99] At the same time, however, the Board agreed with the *G.V.R., Inc.* Board's holding that an employee who protests an employer's noncompliance with a statute which governs employment conditions has engaged in concerted activity for the protection of all employees similarly situated.[100] Nevertheless, the Board refused to extend this rationale to the *Meyers* case because it did not view Department of Transportation regulations as federal legislation under which Prill's safety complaints were protected.

Although the Board in *Meyers* asserted that its definition of concerted activity is "by no means exhaustive," the practical results of its decision may contradict that statement. The Board's holding is rigid in that it leaves open only two protected avenues for an individual employee who detects safety violations. In the wake of the *Meyers* decision, an employee, unless he wishes to risk losing his job, must actually promote group meetings and collective activity before he lodges a complaint. Alternatively, an employee may acquire the protection of section 7 if he individually asserts rights derived directly from a federal statute.[101] Furthermore, the *Meyers* Board never explicitly states how *many* employees it takes to make activity concerted. Instead, the Board merely warned that the employees need to "join forces." If Prill had spoken up when the second employee complained about the truck, would this have been enough to show "group action" under the objective standard?[102] The Board avoids this issue by directing future ALJ's consider-

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[96] *See G.V.R., supra* notes 55-56 and accompanying text and *infra* notes 99-100 and accompanying text. An example of a federal statute which governs conditions of employment is the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982).

[97] *Meyers*, 268 N.L.R.B. at 500, 115 L.R.R.M. at 1032 (Zimmerman, Member, dissenting). The dissent pointed to section 1(b) of the Labor Management Relations Act, 29 U.S.C. § 141(b) to support this premise.

[98] *Meyers*, 268 N.L.R.B. at 500, 115 L.R.R.M. at 1032 (Zimmerman, Member, dissenting).

[99] *Id.* at 495, 115 L.R.R.M. at 1027. *See supra* note 56 and accompanying text.

[100] *Meyers*, 268 N.L.R.B. at 495, 115 L.R.R.M. at 1027.

[101] *See supra* notes 55-56 and 99-100 and accompanying text. The *Meyers* Board also makes it harder still for an employee to assert a section 8(a)(1) violation of illegal discharge against an employer since it must be shown that the employer's action was "motivated" by concerted activity. *See supra* notes 21 and 72.

[102] The *Meyers* Board's discussion of the concurrent complaints by Prill and Gove does suggest, however, that two employees are enough to make an action concerted. *See supra* note 80 and accompanying text. *See also Root Carlin*, 92 N.L.R.B. 1313, 27 L.R.R.M. 1235 (1951), where the Board stated that section 7 protects activity which "in its inception, involves only a speaker and listener . . . ."

ing the concerted activity issue to look at the entire "factual situation" of each case.

Examination of the facts of the *Meyers* case, however, does not lead to conclusions favorable to the Board's position. As the dissent observed, the Board itself admitted that there is something "outrageous" about an employer who is willing to endanger its employees by attempting to force the use of a trailer which had "clearly given up its ghost."[103] Also, the Board conceded that a solitary over-the-road trucker would be hardpressed to enlist the support of co-workers while away from the home terminal.[104] Nevertheless, the *Meyers* Board relieved the employer of section 8(a)(1) liability because Prill's activities were not literally concerted. Employee Prill, and those in his position, can only be protected by actual concerted activity or assertion of statutory rather than regulatory requirements. Public policy demands for occupational safety which are not statutorily defined do not by themselves shelter employees like Prill.

After *Meyers*, an employer may escape liability under the Act for discharging an employee who complains solely on his own behalf about safety conditions and thus loses section 7 protection under the concerted activity concept. The objective standard for concerted activity which was reinstated by the Board, however, is inconsistent with policy considerations underlying federal and state labor legislation concerning occupational safety. It is to be hoped that the absence of defined limitations on the standard will open the door for a more lenient review of the collective group activity necessary for a showing of concerted action.

## IV. PROCEDURAL DEVELOPMENTS

### A. **Statute of Limitations Applicable to Labor Relations Actions*: DelCostello v. International Brotherhood of Teamsters[1]

It is a well-settled principle of law that when no federal statute of limitations expressly applicable to a federal cause of action exists, congressional intent requires the court to apply the closest analogous statute of limitations under state law.[2] When adoption of a state statute of limitations would be at odds with the purposes or operation of the federal substantive law, however, rules of limitation must be drawn from federal substantive law.[3] Rules of limitation borrowed from federal law may be based either on express limitation periods drawn from a related federal statute,[4] or on an alternative basis, such as laches.[5]

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*See supra* note 10, *Meyers*, 268 N.L.R.B. at 494, 115 L.R.R.M. at 1026 (citing *Root Carlin*, 92 N.L.R.B. 1313, 27 L.R.R.M. 1235 (1951)).

[103] *Meyers*, 268 N.L.R.B. at 499, 115 L.R.R.M. at 1031 (Zimmerman, Member, dissenting).

[104] *Id.*

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* By Marguerite M. Dorn, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 103 S. Ct. 2281, 113 L.R.R.M. 2737 (1983).

[2] *See* Runyon v. McCrary, 427 U.S. 160, 180-82 (1976); Chevron Oil Co. v. Huson, 404 U.S. 97, 100-01 (1971); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946).

[3] *See* Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977); Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975).

[4] *Johnson*, 421 U.S. at 462.

[5] *Id.* at 466. Laches is an equitable doctrine which bars a party from enforcing long neglected rights. The term signifies an undue lapse of time in enforcing a cause of action and negligence in failing to act more promptly. *See* BLACK'S LAW DICTIONARY 787 (5th ed. 1979).

In 1981, the United States Supreme Court, in *United Parcel Service, Inc. v. Mitchell*,[6] had considered what statute of limitations would apply in suits brought by an employee against an employer.[7] Specifically, the Court in *Mitchell* considered which statute of limitations would apply to an employee's action against an employer, alleging that the employer had discharged him for invalid reasons and in violation of its collective bargaining agreement.[8] The *Mitchell* Court held that a 90-day state statute of limitations for vacation of an arbitration award applied to the employee's action.[9] The *Mitchell* Court based its holding on the conclusion that the state statute was most closely analogous to the underlying federal claim.[10]

The *Mitchell* Court left unanswered, however, two important questions concerning the applicable statute of limitations in cases similar to *Mitchell*. First, the Court's holding applied only to the employee's claim against the employer.[11] Thus, the Court did not address the issue of which statute of limitations should govern employee claims against a union.[12] Second, the *Mitchell* Court expressly limited its consideration to a choice between two state statutes of limitations, and did not consider the alternative of applying a federal limitation period.[13]

During the *Survey* year, the Supreme Court, in *DelCostello v. International Brotherhood of Teamsters*,[14] addressed the two questions left unanswered by *Mitchell*.[15] Specifically, the Court in *DelCostello* considered which statute of limitations should apply in an employee's suit against an employer and a union, where the employee alleged that the employer breached its collective bargaining agreement by firing the employee and that the union breached its duty of fair representation by mishandling the employee's grievance proceeding.[16] In answer to this question, the Court held that the six-month limitation period

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[6] 451 U.S. 56, 107 L.R.R.M. 2001 (1981).

[7] *Id.* at 64, 107 L.R.R.M. at 2001.

[8] *Id.* at 58, 107 L.R.R.M. at 2003. Although the employee in *Mitchell* had also brought an action for breach of the union's duty of fair representation, the Court did not decide which statute of limitations should apply to this claim. *Id.*

[9] *Id.* at 64, 107 L.R.R.M. at 2004.

[10] *Id.*

[11] *Id.* at 58, 107 L.R.R.M. at 2002. Only the employer in *Mitchell* sought certiorari from the Court. *Id.* at 60, 107 L.R.R.M. at 2002.

[12] *Id.*

[13] *Id.* at 64, 107 L.R.R.M. at 2002. The petition for certiorari presented only the question of which *state* statute of limitations should apply to the facts of *Mitchell*. Further, the parties did not contend that a federal limitation period should be applied. An amicus brief did suggest that section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), was the most appropriate limitation period. The Court, however, did not address that question. *Id.* at 60 n.2, 107 L.R.R.M. at 2002 n.2. Section 10(b) of the Act reads in relevant part:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .

29 U.S.C. § 160(b).

[14] 103 S. Ct. 2281, 113 L.R.R.M. 2737 (1983).

[15] *Id.* at 2285, 113 L.R.R.M. at 2738.

[16] *DelCostello*, 103 S. Ct. at 2285, 113 L.R.R.M. at 2737.

under section 10(b) of the National Labor Relations Act (the Act), which governs the filing of unfair labor practices charges, was the most appropriate statute of limitations.[17]

The petitioner, Philip DelCostello, was employed by Anchor Motor Freight, Inc., and was represented by the Teamsters Local 557.[18] DelCostello was discharged from his duties and filed a complaint with the union.[19] The union brought a formal grievance proceeding under the company's collective bargaining agreement and a hearing was held before a joint union-management committee.[20] The committee concluded that DelCostello's grievance was without merit.[21]

DelCostello then filed suit in the United States District Court for the District of Maryland against the employer and the union.[22] DelCostello alleged that the employer had discharged him in violation of the company's collective bargaining agreement and that the union had represented him in the grievance procedure in a "discriminatory, arbitrary and perfunctory manner."[23] The district court held in favor of DelCostello.[24] Thereafter, however, the district court, on its own motion, reconsidered its decision in light of the Supreme Court's intervening decision in *Mitchell* and granted summary judgment for the employer and the union.[25] The district court reasoned that the Supreme Court's decision in *Mitchell* compelled application of a state statute of limitations which governed actions to vacate arbitration awards.[26] On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision.[27] DelCostello then applied for a writ of certiorari to the United States Supreme Court and the petition was granted.[28]

The Court consolidated the *DelCostello* case with a pending unrelated case, *Flowers v. Local 2602 of United Steel Workers of America*.[29] In *Flowers*, petitioners Donald Flowers and King Jones were employed by the Bethlehem Steel Corporation and were represented by the Steelworkers Local 2602.[30] Flowers and Jones filed several grievance complaints with

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[17] *Id.* at 2285, 113 L.R.R.M. at 2738.

[18] DelCostello v. International Brotherhood of Teamsters, 510 F. Supp. 716, 717 (D.C. Md. 1981).

[19] *Id.* at 718. The employer contended that DelCostello's refusal to perform an assignment was a "voluntary quit." DelCostello contended, however, that he was wrongfully discharged. *Id.* at 2285 n.3, 113 L.R.R.M. at 2738 n.3.

[20] *DelCostello*, 103 S. Ct. at 2285, 113 L.R.R.M. at 2738.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 2286, 113 L.R.R.M. at 2738.

[24] *DelCostello*, 510 F. Supp. at 720. The union and the employer asserted that the action was governed by a 30-day state statute of limitations. The district court disagreed, however, holding that the applicable limitation period was set forth in the three-year state statute governing actions on contracts. *Id.*

[25] DelCostello v. International Brotherhood of Teamsters, 524 F. Supp. 721, 726, 111 L.R.R.M. 2761, 2762 (D.C. Md. 1981), *aff'd*, 679 F.2d 879, 111 L.R.R.M. 3062 (4th Cir. 1982), *rev'd*, 103 S. Ct. 2281, 113 L.R.R.M. 2737 (1983).

[26] *Id.* at 726, 111 L.R.R.M. at 2764. DelCostello had contended that the applicable limitation period was the six-month period set forth in section 10(b) of the Act. *Id.* at 726, 111 L.R.R.M. at 2763.

[27] DelCostello v. International Brotherhood of Teamsters, 679 F.2d 879, 111 L.R.R.M. 3062 (4th Cir. 1982), *rev'd*, 103 S. Ct. 2281, 113 L.R.R.M. 2737 (1983). The appeals court decision was rendered without a published opinion.

[28] DelCostello v. International Brotherhood of Teamsters, 459 U.S. 1034 (1982).

[29] 671 F.2d 87, 109 L.R.R.M. 2805 (2d Cir. 1982), *rev'd*, 103 S. Ct. 2281, 113 L.R.R.M. 2737 (1983).

[30] *Id.* at 88, 109 L.R.R.M. at 2806.

the union asserting that the company had violated its collective bargaining agreement.[31] The union subsequently invoked arbitration proceedings, and the arbitrator issued an award in favor of the employer.[32]

Flowers and Jones filed an action in the United States District Court for the Western District of New York, naming both the employer and the union as defendants.[33] The complainants alleged that the employer had violated the collective bargaining agreement and that the union had ineptly and carelessly handled the arbitration proceeding on their behalf.[34] The district court dismissed the complaint against both defendants,[35] but on appeal the United States Court of Appeals for the Second Circuit reversed the lower court decision.[36] The United States Supreme Court subsequently granted certiorari and remanded the case for further consideration in light of its decision in *Mitchell*.[37] On remand, the court of appeals, following *Mitchell*, held that the suit was governed by a state statute of limitations governing actions to vacate arbitration awards.[38] The United States Supreme Court then granted a writ of certiorari in the *Flowers* case, and consolidated the case with *DelCostello*.[39]

The Court in *DelCostello* considered the employees' contentions that the actions were governed by the six-month limitation period set forth in section 10(b) of the Act, rather than by a state statute of limitations governing arbitration awards.[40] Concluding that section 10(b) was the limitation period most closely analogous to the underlying federal claim, and that it applied to the charges against both the employers and the unions,[41] the Court reversed the appeals courts' decisions and remanded the case for determination of whether the six-month limitation period under section 10(b) had expired.[42]

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[31] *Id.*

[32] *Id.*

[33] *DelCostello*, 103 S. Ct. at 2286, 113 L.R.R.M. at 2739.

[34] *Id.*

[35] *Id.*

[36] Flowers v. Local 2602 of United Steel Workers of America, 622 F.2d 573, 105 L.R.R.M. 2304 (2d Cir. 1980) (unpublished decision).

[37] United Steelworkers of America, AFL-CIO v. Flowers, 451 U.S. 965, 107 L.R.R.M. 2144 (1981).

[38] *Flowers*, 671 F.2d at 91, 109 L.R.R.M. at 2806. The employees contended, however, that section 10(b) was the applicable limitation period. *Id.*, 109 L.R.R.M. at 2807.

[39] United Steelworkers of America, AFL-CIO v. Flowers, 103 S. Ct. 442 (1982).

[40] *DelCostello*, 103 S. Ct. at 2285, 113 L.R.R.M. at 2739. The Court also considered whether the petitioning employees maintained the right to sue their employers in court. *Id.* at 2290, 113 L.R.R.M. at 2741. The Court stated that an employee normally is required to exhaust any grievance against an employer under the collective bargaining agreement and that, subject to very limited judicial review, the employee will be bound by the result according to the provisions of the agreement. The Court asserted that under Vaca v. Sipes, 386 U.S. 171, 64 L.R.R.M. 2369 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 91 L.R.R.M. 2481 (1976), however, an employee who was represented at the grievance proceeding by the union in a discriminatory, dishonest or arbitrary fashion may bring an action in court against both the employer and the union, notwithstanding the outcome or finality of the grievance proceeding. *DelCostello*, 103 S. Ct. at 2290, 113 L.R.R.M. at 2741. *See Vaca*, 386 U.S. at 183, 64 L.R.R.M. at 2377; *Hines*, 424 U.S. at 567, 91 L.R.R.M. at 2488. Such a suit, the Court noted, comprises two causes of action. The suit against the employer for breach of the collective bargaining agreement rests on section 301 of the Act. The suit against the union is based on a claim of unfair representation which is implied under the scheme of the Act. The employee will prevail only if he or she can prove both claims; that is, the employee bears the burden of demonstrating that he or she was discharged in violation of the contract and that the union breached its duty of representation. 103 S. Ct. at 2290, 113 L.R.R.M. at 2742.

[41] *Id.* at 2285, 113 L.R.R.M. at 2738.

[42] *Id.* at 2294-95, 113 L.R.R.M. at 2745. The Court reversed the judgment in the *Flowers* case

In support of its holding, the *DelCostello* Court first found that no federal statute of limitations expressly applied to the facts of *DelCostello*.[43] The Court acknowledged that, generally, in such circumstances congressional intent requires that courts adopt a suitable rule of timeliness from the most analogous state law.[44] Nevertheless, the Court asserted that in some circumstances state statutes of limitations can be inappropriate vehicles for the enforcement of federal law and that Congress did not intend for courts to apply mechanically a state rule which is at variance with the purpose of federal substantive law.[45] The *DelCostello* Court maintained that, in such circumstances, courts must use appropriate limitation periods set forth in related federal statutes or established under alternative theories such as laches.[46]

Applying these principles, the Court considered which state statute of limitations would be most closely related to the action in the present case.[47] After determining that the limitation period for vacating arbitration awards would be the closest analogous state statute, the Court asserted that application of that limitation period to the present case would be at variance with the underlying federal claim, because such limitation period failed to provide an employee with a reasonable opportunity to vindicate his or her rights.[48] The Court stated that, while the parties in an action to vacate an arbitration award are normally represented by counsel, employees involved in disputes connected with collective bargaining agreements will rarely be represented by counsel independent of the union.[49] Thus, the Court concluded that the employee in a labor dispute has a strong need for a longer period than in an arbitration dispute in which to evaluate the merits of his or her case and institute a suit against an employer and a union.[50]

The *DelCostello* Court then considered as a possible alternative resorting to the state statute of limitations applicable to legal malpractice actions.[51] The Court pointed out that,

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because the parties conceded that the suit was filed eleven months after the cause of action accrued. *Id.* The Court was unsure whether the limitation period had expired with respect to DelCostello's cause of action. Consequently, the Court remanded the *DelCostello* case for determination of that question. *Id.*

[43] *Id.* at 2287, 113 L.R.R.M. at 2739.

[44] *Id.*

[45] *Id.* at 2289, 113 L.R.R.M. at 2740.

[46] *Id.* The Court cited several cases in which it had declined to apply the state statutes of limitations to federal actions. The Court cited Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977), as an example. In *Occidental*, the Court held that application of state limitation periods to suits brought by the Equal Employment Opportunity Commission under Title VII of the 1964 Civil Rights Act would unduly hinder the policy of the Act. *Id.* at 372. Similarly, in McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), the Court applied the federal limitation period set forth in the Jones Act to a seaworthiness action under general admiralty law because the two forms of claim were found to be closely related. *Id.* at 225.

[47] *DelCostello*, 103 S. Ct. at 2291, 113 L.R.R.M. at 2742.

[48] *Id.* In concluding that the most closely analogous state statute of limitations would not be applicable in the present case, the Court also addressed the respondents' contention that the Rules of Decision Act, 28 U.S.C. § 1652 (RDA), mandated application of state statutes of limitations whenever a federal law does not contain a limitation period. The Court asserted that the RDA does not establish a mandatory rule that state law be applied in federal interstices, and maintained that the numerous cases in which the Court has declined to borrow state law demonstrated the validity of that position. *Id.* at 2287 n.13, 113 L.R.R.M. at 2740 n.13.

[49] *DelCostello*, 103 S. Ct. at 2291, 113 L.R.R.M. at 2742-43.

[50] *Id.*

[51] *Id.* at 2292, 113 L.R.R.M. at 2743. In his dissenting opinion in *Mitchell*, Justice Stevens had contended that the limitations period for legal malpractice was most appropriate to an action

in a commercial setting, a party who sued his or her lawyer for mishandling an arbitration could recover his or her entire damages, even if the statute of limitations foreclosed any recovery against the opposing party to the arbitration.[52] Accordingly, the *DelCostello* Court stated, a legal malpractice action protects the interests in finality of the party opposing the litigation, while permitting the misrepresented party to retain the right to sue his or her lawyer for malpractice under the longer limitation period and to recover his or her entire damages.[53] The Court asserted, however, that application of the legal malpractice limitation period in the present case would not result in the employee's recovery of his or her total damages.[54] A union may be held liable, the Court maintained, only for any increase in the employer's damages directly caused by the union's misrepresentation of the employee.[55] Consequently, once the legal malpractice statute of limitations foreclosed the possibility of recovery against the employer, the employee would be unable to collect the bulk of the damages, even though an action against the union was not barred.[56]

Having determined that all arguably applicable state statutes of limitations were inappropriate in the present case, the *DelCostello* Court considered whether federal law provided a more appropriate alternative limitation period.[57] The Court concluded that section 10(b) of the Act was the federal statute of limitations most closely analogous to the present case.[58] The Court reasoned that the section 10(b) six-month period for filing unfair labor practices charges was designed to accommodate interests similar to those involved in unfair representation claims.[59] Observing that the National Labor Relations Board has consistently held that all breaches of a union's duty of fair representation are unfair labor practices,[60] the Court stated that claims of both unfair representation and unfair labor practices are based on similar allegations.[61] Consequently, identical evidence would support both causes of action.[62]

In addition, the Court noted the similarity in the considerations appropriate to a choice of limitation period under both unfair representation and unfair labor practices actions.[63] Under both claims, the appropriate statute of limitations is determined by weighing the general interest in viable bargaining relationships and in the finality of private settlements against an individual employee's interest in setting aside an unfair settlement under a collective bargaining agreement.[64] Thus, the Court concluded that the

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brought by an employee against a union. *Mitchell*, 451 U.S. at 72-75, 107 L.R.R.M. at 2008 (Stevens, J., dissenting). Consequently, the Court in *DelCostello* addressed the applicability of that limitation period to the present case, noting that the analogy was to a lawyer who mishandled a commercial arbitration. *DelCostello*, 103 S. Ct. at 2292, 113 L.R.R.M. at 2743.

[52] *DelCostello*, 103 S. Ct. at 2292, 113 L.R.R.M. at 2743.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 2293, 113 L.R.R.M. at 2743-44.

[59] *Id.* at 2293, 113 L.R.R.M. at 2744.

[60] *Id.* The Court declined to decide the correctness of the Board's position, asserting that "even if not all breaches of the duty are unfair labor practices, . . . the family resemblance is undeniable." *Id.*

[61] *Id.* at 2293-94, 113 L.R.R.M. at 2744.

[62] *Id.* Specifically, the Court asserted that both claims rest on allegations of unfair, arbitrary, or discriminatory treatment of workers by a union. *Id.*

[63] *Id.* at 2294, 113 L.R.R.M. at 2744.

[64] *Id.* (citing United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 70-71, 107 L.R.R.M. 2001, 2006 (1981) (Stewart, J., concurring in the judgment)).

close congruence in policy considerations underlying the choice of limitation periods in both causes of action provided another reason for applying section 10(b) to the present situation.[65]

Accordingly, the Court held that the need for uniformity among procedures governing the similar claims of unfair labor practices and unfair representation, coupled with the need to balance the competing interests at stake in claims against an employer and a union, required the adoption of section 10(b) as the appropriate limitation period.[66] The Court stressed, however, that its holding should not be construed as a departure from the prior practice of borrowing state limitation periods for federal causes of action. Asserting that resort to state law remains the norm, the Court stated that the norm should be ignored only when a rule from a federal law provides a closer analogy than available state statutes and the policies at stake make the federal rule a significantly more appropriate vehicle for interstitial lawmaking.[67]

In two separate dissenting opinions, Justices Stevens and O'Connor asserted that congressional intent mandated application of a state statute of limitations to the facts of the present case, rather than the limitations period under section 10(b).[68] In his dissenting opinion,[69] Justice Stevens stated that the policy of using state statutes of limitations in actions where the federal law is silent on the question of timeliness is a settled practice well-grounded in the Rules of Decision Act.[70] Justice Stevens suggested that a cause of action for legal malpractice was most closely analogous to the present action[71] and, therefore, he maintained that worker-union disputes should be governed by such a limitation period.[72]

Justice O'Connor's dissenting opinion[73] stated that Congress intended the use of a state limitation period where no applicable federal statute of limitations exists.[74] Relying on Justice Stevens' argument in his dissenting opinion, Justice O'Connor stated that a malpractice action against an attorney provides the closest analogy to an employee's suit against a union,[75] and that the statute of limitations applicable to legal malpractice actions should have been applied in the present case to the claim against the union.[76] Furthermore, Justice O'Connor maintained that the Court should have followed its decision in *Mitchell* and applied the state statute of limitations governing vacation of arbitration awards to the present claim against the employer.[77]

With the *DelCostello* decision, the United States Supreme Court finally resolved the question of timeliness in the context of an employee's action against a union for breach of its duty of fair representation and against an employer for breach of its collective bargaining agreement.[78] By adopting the six-month limitation period of section 10(b) of

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 2294, 113 L.R.R.M. at 2745-46.

[69] *Id.* at 2295, 113 L.R.R.M. at 2745 (Stevens, J., dissenting).

[70] *Id. See supra* note 48.

[71] 103 S. Ct. at 2295, 113 L.R.R.M. at 2745 (Stevens, J., dissenting).

[72] *Id.*

[73] *Id.* at 2295-96, 113 L.R.R.M. at 2745-46 (O'Connor, J., dissenting).

[74] *Id.* at 2296, 113 L.R.R.M. at 2746 (O'Connor, J., dissenting).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Prior to the *DelCostello* decision, the issue of timeliness was governed by the Court's decision in *Mitchell*. Because *Mitchell* addressed only the claim against the employer, the federal courts were

the Act as the governing statute of limitations, the Court dispelled confusion among the federal courts and substantially expanded the rights of an individual union member covered by a collective bargaining agreement. Rather than the 90-day limitation period set forth in *Mitchell*, an employee now has six months to file an action against an employer or a union.[79]

The *DelCostello* decision is in complete harmony with Supreme Court precedent. The adoption of section 10(b) as the governing statute of limitations ensures employees a reasonable opportunity to enforce their rights to fair representation.[80] At the same time, application of the section 10(b) limitation period upholds basic labor law policies by restricting the time in which employees may challenge their employers' actions.[81]

Although all statutes of limitations are necessarily arbitrary, the length of the period permitted for institution of a suit inevitably reflects the legislature's value judgment as to the point when the interests favoring protecting valid claims are outweighed by the interests favoring prohibiting the institution of stale claims.[82] In borrowing a state period of limitation for application to a federal cause of action, a federal court relies on that state's wisdom in setting a limit on the prosecution of a closely analogous claim.[83] State legislatures, however, do not devise limitation periods with national interests in mind, and the federal courts must insure that the acceptance of state law will not interfere with the implementation of national policy.[84] The *DelCostello* Court, therefore, properly refused to mechanically apply a state statute of limitations which was at variance with the policies of the federal substantive law supporting an employee's right to pursue claims against a union and an employer.[85] Congress established in section 10(b) of the Act a limitation period in accordance with its view of the proper balance between an employee's interest in setting aside a final determination against him and the continued protection of the collective bargaining system.[86] Consequently, by adopting section 10(b) as the governing statute of limitations in this case, the *DelCostello* Court established a uniform rule for all federal courts consonant with the national interests of federal labor law.[87]

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unsure whether to apply the *Mitchell* holding to claims against a union. Furthermore, prior to *DelCostello*, some circuit courts adopted the majority opinion in *Mitchell* as controlling, while other courts applied the statute of limitations governing legal malpractice, adopting the views of Justices Stewart and Stevens. *See generally* Note, *Union Duty of Fair Representation: The Timeliness Issue in Light of* United Parcel Service, Inc. v. Mitchell, 58 NOTRE DAME LAW. 816 (1983).

[79] *See* section 10(b) of the Act, 29 U.S.C. § 160(b). *See also supra* note 13.

[80] *See supra* text accompanying notes 48-50.

[81] *Id.*

[82] Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975).

[83] *Id.*

[84] Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977).

[85] *Id.*

[86] United Parcel Service v. Mitchell, 451 U.S. 56, 68, 107 L.R.R.M. 2001, 2006 (1981) (Stewart, J., concurring in the judgment). In his concurring opinion, Justice Stewart maintained that section 10(b) was designed to strengthen and defend the stability of bargaining relationships, and that the time limitation under section 10(b) reflected the balance drawn by Congress between the competing interests at stake. *Id.* at 68-69, 107 L.R.R.M. at 2006.

[87] In *Mitchell*, Justice Stewart also recognized the need for uniformity among procedures followed for similar claims. *Id.* at 70, 107 L.R.R.M. at 2006.

## V. PREEMPTION

### A. *Preemption of State Regulation*: Massachusetts Nurses Association v. Dukakis[1]

The preemption doctrine provides that, in accordance with the Supremacy Clause of the United States Constitution,[2] the Constitution, laws and treaties of the United States supersede contrary state enactments or adjudications. In determining whether state regulation has been preempted by congressional action, the focal inquiry for a court is the intent of Congress.[3] When Congress has clearly manifested its intent to preempt an area of law, state regulation is displaced accordingly.[4] If, however, congressional purpose is unclear, the courts must delimit the appropriate scope of preemption.[5]

In enacting the National Labor Relations Act (the Act),[6] Congress did not intend to preempt the entire labor relations field.[7] Congress did not clearly specify, however, which aspects of labor law were still open to state regulation.[8] The task has thus fallen to the courts to determine, in accordance with the policies expressed in the Act, those labor situations which Congress intended to be controlled exclusively by federal law.[9]

The Supreme Court has developed two lines of analysis for determining whether the Act preempts state law. The principal line of decisions holds that states may not regulate conduct which is either "arguably protected" or "arguably prohibited" by the Act.[10] Accordingly, state

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* By Richard K. Stavinski, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 726 F.2d 41, 115 L.R.R.M. 2713 (1st Cir. 1984).

[2] The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

[3] New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 540, 100 L.R.R.M. 2876, 2903 (1979) (plurality opinion); Garner v. Teamsters Union, 346 U.S. 485, 488, 33 L.R.R.M. 2218, 2219-20 (1953).

[4] Hines v. Davidowitz, 312 U.S. 52, 74 (1941).

[5] Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81, 35 L.R.R.M. 2637, 2642 (1955). Speaking of the Labor Management Relations Act, the Court stated that the Act " 'leaves much to the states, though Congress has refrained from telling us how much.' " *Id.* (citing Garner v. Teamsters Union, 346 U.S. 485, 488, 33 L.R.R.M. 2218, 2219-20 (1953)). "This penumbral area can be rendered progressively clear only by the course of litigation." *Weber*, 348 U.S. at 480-81, 35 L.R.R.M. at 2642.

[6] 29 U.S.C. §§ 151-169 (1982). The National Labor Relations Act, enacted in 1935, was substantially amended in 1947 by the Labor Management Relations Act. *Id.* §§ 141-144, 151-167. Reference herein to the Act refers to the National Labor Relations Act as amended.

[7] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959); International Association of Machinists v. Gonzales, 356 U.S. 617, 619, 42 L.R.R.M. 2135, 2136 (1958).

[8] "The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." International Association of Machinists v. Gonzales, 356 U.S. 617, 619, 42 L.R.R.M. 2135, 2136 (1958). "The National Labor Relations Act . . . leaves much to the states, though Congress has refrained from telling us how much." Garner v. Teamsters Union, 346 U.S. 485, 488, 33 L.R.R.M. 2218, 2219-20 (1953).

[9] *See supra* note 8.

[10] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959). The "*Garmon* rule" refers to conduct protected under section 7 of the Act, 29 U.S.C. § 157

courts may not hear cases involving such conduct, but must defer to the exclusive jurisdiction of the National Labor Relations Board (Board).[11] There are two specific exceptions to this rule. First, states may regulate conduct which is of only peripheral concern to the Act.[12] Second, the arguably protected or arguably prohibited rule does not prevent state regulation of conduct involving interests "deeply rooted in local feeling and responsibility."[13]

A complementary line of preemption analysis was articulated by the Supreme Court in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*.[14] The *Machinists* approach indicates that certain kinds of state regulation, although concerning conduct which is clearly neither protected nor prohibited by the Act, may nonetheless be preempted by the Act.[15] This view recognizes that Congress, in enacting the Act, implicitly intended for some conduct to be free from *any* governmental regulation, whether federal or state.[16] States may not upset the "balance of power" between labor and management resulting from the congressional choice to leave a labor area unregulated.[17] Instead, states must leave some economic tactics of the parties to the "free play of economic forces."[18] Under *Machinists*, state regulation which shifts the economic balance of power and frustrates effective implementation of the policies of the Act is invalid unless other evidence of congressional intent to allow the state regulation exists.[19]

In *New York Telephone Co. v. New York State Department of Labor*,[20] however, a plurality of the Supreme Court found that the *Machinists* analysis did not apply to state laws of general applicability — laws implementing broad state policies for the benefit of all citizens and not directed specifically at labor-management relations.[21] The plurality stated

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(1982), or prohibited by section 8 of the Act, 29 U.S.C. § 158 (1976). *See also* Local 107, Bridge Workers v. Perke, 373 U.S. 701, 53 L.R.R.M. 2327 (1963); Marine Engineers Beneficial Assn. v. Interlake Steamship, 370 U.S. 173, 50 L.R.R.M. 2347 (1962).

[11] *Garmon*, 359 U.S. at 244-45, 43 L.R.R.M. at 2841. The *Garmon* court determined that the possibility of conflict between the dictates of the Act and the requirements imposed by state law was too great to allow state courts to entertain jurisdiction of claims involving conduct arguably protected or prohibited by the Act. *Id.* at 244-45, 43 L.R.R.M. at 2842. Federal, as well as state courts must yield jurisdiction to the Board. *Id.*

The Court has held that the proper inquiry in determining whether a state court must relinquish jurisdiction to the Board is whether the controversy presented to the state court is identical to the controversy which would be presented to the Board. Belknap v. Hale, 103 S. Ct. 3172, 3183, 113 L.R.R.M. 3057, 3064-65 (1983).

[12] *Garmon*, 359 U.S. at 243, 43 L.R.R.M. at 2841.

[13] *Id.* at 244, 43 L.R.R.M. at 2841.

This exception has been construed to apply only to a limited number of situations. *See, e.g.*, Farmer v. Carpenters, 430 U.S. 290, 96 L.R.R.M. 3314 (1977)(damages for intentional infliction of emotional distress); Linn v. Plant Guard Workers, 383 U.S. 53, 61 L.R.R.M. 2345 (1966)(action for libel); International Union, UAW v. Wisconsin Employment Relations Board, 351 U.S. 266, 38 L.R.R.M. 2165 (1956)(injunction against violence).

[14] 427 U.S. 132, 92 L.R.R.M. 2881 (1976). For a discussion of the *Machinists* line of labor law preemption, *see* Note, *Labor Law Preemption*, 18 B.C. L. REV. 494 (1977).

[15] *Machinists*, 427 U.S. at 141, 92 L.R.R.M. at 2887-88. *See also* Teamsters Union v. Morton, 377 U.S. 252, 56 L.R.R.M. 2225 (1964).

[16] *Machinists*, 427 U.S. at 148, 92 L.R.R.M. at 2886.

[17] *Id.* at 148-49, 92 L.R.R.M. at 2886 (citing Teamsters Union v. Morton, 377 U.S. 252, 56 L.R.R.M. 2225, 2228 (1964)).

[18] New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 526, 100 L.R.R.M. 2896, 2898 (1979) (plurality opinion).

[19] *Machinists*, 427 U.S. at 147-48, 92 L.R.R.M. at 2886-87.

[20] 440 U.S. 519, 100 L.R.R.M. 2896 (1979) (plurality opinion).

[21] 440 U.S. at 532-33, 100 L.R.R.M. at 2900-01 (plurality opinion). *New York Telephone* involved a

that it would be more difficult to infer congressional intent to preempt general state laws than to infer intent to preempt state laws directly regulating labor conduct.[22] In addition, the *New York Telephone* plurality concluded that the New York unemployment compensation statute at issue involved "interests 'deeply rooted in local feeling and responsibility' " and should not be preempted in the absence of "compelling congressional direction."[23] These two views, however, were rejected by a majority of the Justices,[24] and the case was decided on other grounds.[25]

During the *Survey* year, the United States Court of Appeals for the First Circuit, in *Massachusetts Nurses Association v. Dukakis*,[26] considered the issue of whether a Massachusetts hospital cost containment statute[27] was preempted by the National Labor Relations Act. The court held that the statute, which limited the overall amount that hospitals could receive annually in payment for their services, did not impermissibly alter the balance of bargaining power between the hospital and its employees and therefore was not preempted by the Act under *Machinists*.[28] The court reasoned that the statute only affected the bargaining relationship indirectly, and was not an attempt to influence the substantive

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New York statute which provided unemployment compensation for strikers. *Id.* The plurality found that the unemployment statute was not designed to regulate the bargaining relationship but to promote the public purpose of providing for employment security. *Id.* For further discussion of *New York Telephone* see Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 227 (1980); Note *Labor Law Preemption of State Unemployment Compensation Law Paying Benefits to Strikers Not Mandated by Federal Labor Law*, 55 TUL. L. REV. 268 (1980); 1978-79 *Annual Survey of Labor Law* — Unemployment Benefits to Strikers: New York Telephone Co. v. New York State Department of Labor, 21 B.C. L. REV. 94 (1979).

[22] *New York Telephone*, 440 U.S. at 533, 100 L.R.R.M. at 2901 (plurality opinion).

[23] *Id.* at 539-40, 100 L.R.R.M. at 2903 (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959)).

[24] Three Justices joined in the Court's plurality opinion. *Id.* at 522, 100 L.R.R.M. at 2846 (plurality opinion). Justice Brennan, concurring separately, did not believe that the New York statute was a law of general applicability, and was equivocal on the question of whether laws of general applicability should be accorded greater deference. *Id.* at 546 & n.*, 100 L.R.R.M. at 2905 & n.* (Brennan, J., concurring in the judgment). Justice Blackmun, joined by Justice Marshall, concluded that it was not relevant that the New York law was one of general applicability. *Id.* at 550, 100 L.R.R.M. at 2907 (Blackmun, J., concurring in the judgment). The three dissenters also found it immaterial whether the statute was a law of general applicability. *Id.* at 557-58, 100 L.R.R.M. at 2909-10 (Powell, J., dissenting).

Justice Brennan stated that he found "more substance" in the plurality's claim that the New York unemployment statute regulated "interests deeply rooted in local feeling and responsibility." *Id.* at 546 n.*, 100 L.R.R.M. at 2905 n.* (Brennan, J., concurring in the judgment). Justice Blackmun, concurring with Justice Marshall, and the three dissenting Justices stated that they would keep the "deeply rooted in local feeling and responsibility" exception to state law preemption limited to a narrow range of state tort laws involving violence, libel, or intentional infliction of emotional distress. *Id.* at 550-51, 100 L.R.R.M. at 2907 (Blackmun, J., concurring in the judgment); *id.* at 559-60, 100 L.R.R.M. at 2910 (Powell, J., dissenting).

[25] Six Justices agreed that the New York statute should be upheld on the grounds that Congress, in enacting the National Labor Relations Act and the Social Security Act, had intended to allow state unemployment statutes such as New York's. *Id.* at 544, 100 L.R.R.M. at 2903 (plurality opinion); *id.* at 546-47, 100 L.R.R.M. at 2905 (Brennan, J., concurring in the judgment); *id.* at 549, 100 L.R.R.M. at 2907 (Blackmun, J., concurring in the judgment).

[26] 726 F.2d 41, 115 L.R.R.M. 2713 (1st Cir. 1984).

[27] MASS. ANN. LAWS ch. 6A, §§ 31-73 (Michie/Law. Co-op. 1980 & Supp. 1984). *See infra* notes 32-35 and accompanying text.

[28] 726 F.2d at 42-43, 115 L.R.R.M. 2713-14. MASS. ANN. LAWS ch. 6A, §§ 31-73 (Michie/Law. Co-op. 1980 & Supp. 1984). *See infra* notes 32-35 and accompanying text.

aspects of the bargaining process.[29] In addition, the court indicated that the Massachusetts statute was a law of general applicability not directed at labor-management issues but concerned with hospital costs — "an 'interest . . . deeply rooted in local feeling and responsibility.' "[30] Consequently, the court stated that the statute was valid because there was no evidence of " 'compelling congressional direction' " to preclude the hospital cost regulation at issue.[31] The court, therefore, found the statute valid under both *Machinists* and the plurality decision of *New York Telephone*.

The result in *Dukakis* is in accord with the preemption analysis articulated by the Supreme Court in *Machinists*. Since the Massachusetts statute does not significantly affect the balance of bargaining power between labor and management, it follows under *Machinists* that the statute should not be preempted. To the extent that the First Circuit adopts the rationale of the *New York Telephone* plurality, however, the *Dukakis* decision evidences a narrow view of the scope of the Act's preemption. By extending the "deeply rooted in local feeling and responsibility" exception to include hospital cost regulation, the court significantly expands the category of general state laws which may be deemed presumptively valid and preempted only upon a showing of "compelling congressional direction." Because a majority of the Justices in *New York Telephone* rejected the analysis of that Court's plurality opinion, however, the state of the Act's preemption law regarding state laws of general applicability and the "deeply rooted in local feeling and responsibility" exception should still be considered unsettled.

The controversy in *Dukakis* arose from the passage by the Massachusetts Legislature of a statute aimed at curtailing rising hospital costs by establishing a prospective hospital cost reimbursement system.[32] Under the statute, a hospital's total yearly reasonable costs are projected in advance using a formula approved by the Massachusetts Rate Setting Commission.[33] The resulting figure represents the maximum amount the hospital is allowed to collect for its services for the entire year.[34] The statute contained no provision allowing employee wage increases to be "passed through" and charged to patients.[35]

The Massachusetts Nurses Association (MNA or the Association) brought suit in the United States District Court for the District of Massachusetts, contending that the Massachusetts statute was preempted by the Act.[36] Specifically, the MNA alleged that by

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[29] 726 F.2d at 43-44, 115 L.R.R.M. at 2714-15.

[30] *Id.* at 44, 115 L.R.R.M. at 2715 (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959)). The court does not specifically use the phrase "law of general applicability" but the label is applicable to the court's description of the Massachusetts statute. The court's description of the Massachusetts statute directly parallels the characterization of a law of general applicability used by Justice Stevens in *New York Telephone*. *See supra* note 21 and accompanying text. The First Circuit says of the Massachusetts statute: "[it] is oriented toward neither labor-management issues in general nor wages in particular. The subject of hospital cost containment, for the benefit of all citizens, lies within 'the historic police powers of the States . . . it is an 'interest . . . deeply rooted in local feeling and responsibility.' " *Dukakis*, 726 F.2d at 44, 115 L.R.R.M. at 2715 (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959)).

[31] *Dukakis*, 726 F.2d at 44, 115 L.R.R.M. at 2715 (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959)).

[32] MASS. ANN. LAWS ch. 6A §§ 31-73 (Michie/Law. Co-op. 1980 & Supp. 1984).

[33] MASS. ANN. LAWS ch. 6A §§ 32, 34A (Michie/Law. Co-op. 1980 & Supp. 1984).

[34] *Id.*

[35] *See* MASS. ANN. LAWS ch. 6A §§ 31-73 (Michie/Law. Co-op. 1980 & Supp. 1984). Massachusetts Nurses Association v. Dukakis, 570 F. Supp. 628, 635, 114 L.R.R.M. 2456, 2461 (D. Mass. 1983), *aff'd*, 726 F.2d 41, 115 L.R.R.M. 2713 (1st Cir. 1984).

[36] *Dukakis*, 570 F. Supp. at 635, 114 L.R.R.M. at 2461.

restricting the amount that hospitals could receive for their services, the statute impermissibly interfered with the Association's collective bargaining efforts and, therefore, should be preempted by federal labor law.[37] The MNA argued that the statute placed the Association at a disadvantage in attempting to negotiate wage increases from the hospitals.[38] The hospitals, the MNA charged, could contend that they were unable to pay wage increases due to the cost restrictions in the statute and the failure of the statute to allow for wage increases to be passed on to the patients.[39] In addition, the MNA noted, hospitals were reducing their nursing staffs because of the economic effects of the statute.[40]

The district court judge found no intent of Congress to preclude the Massachusetts statute.[41] The statute, the judge held, did not affect the relative bargaining power of labor and management in a way that interfered with the purposes of the Act.[42] Rather, the judge concluded, the statute was "neutral and permit[ted] the 'free play of economic forces in the collective bargaining process.' "[43] Accordingly, the district court found the Massachusetts statute to be a permissible expression of state policy and not preempted by federal labor law.[44]

The First Circuit affirmed, holding that the Massachusetts statute was not an obstacle to accomplishing the purposes of Congress in enacting the Act.[45] The court reasoned that previous Supreme Court cases in which preemption had been found involved state statutes which reached directly into the labor-management relationship.[46] In the *Dukakis* case, however, the state statute only affected the bargaining process indirectly and was not an attempt by the state to influence or dictate specific terms of the collective bargaining agreement.[47] The court acknowledged that by restricting the hospital's annual gross income, the Massachusetts statute limited the money available for collective bargaining.[48] Nevertheless, the court pointed out that a myriad of state regulatory provisions, such as price controls or health and safety requirements, have similar effects of abating the overall income of a business.[49] Although such regulations may decrease the funds available to a business, they do not, the court determined, interfere with the rights of labor or management under the Act or detract from the practices and procedures of collective

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[37] *Id.* at 638, 114 L.R.R.M. at 2464.

[38] *Id.*

[39] *Id.* at 635, 114 L.R.R.M. at 2461.

[40] *Id.*

[41] *Id.* at 639-40, 114 L.R.R.M. at 2465.

[42] *Id.*

[43] *Id.* at 640, 114 L.R.R.M. at 2465 (quoting New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 526, 100 L.R.R.M. 2896, 2898 (1979)).

[44] *Dukakis*, 570 F. Supp. at 640, 114 L.R.R.M. at 2465.

[45] Massachusetts Nurses Association v. Dukakis, 726 F.2d 41, 42, 115 L.R.R.M. 2713, 2713-14 (1st Cir. 1984).

[46] *Id.* at 43, 115 L.R.R.M. at 2714 (citing Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 92 L.R.R.M. 2881 (1976); Teamsters Union v. Morton, 377 U.S. 252, 56 L.R.R.M. 2225 (1964); International Brotherhood of Teamsters v. Oliver, 358 U.S. 283, 43 L.R.R.M. 2374 (1959)).

[47] *Dukakis*, 726 F.2d at 43-44, 115 L.R.R.M. at 2714-15 (citing Amalgamated Transit Union, Division 819 v. Byrne, 568 F.2d 1025, 96 L.R.R.M. 2440 (3d Cir. 1977)(en banc); *id.* at 1035, 96 L.R.R.M. at 2449 (Aldisert, J., dissenting); *id.* at 1042, 96 L.R.R.M. at 2454 (Adams, J., dissenting)).

[48] *Dukakis*, 726 F.2d at 45, 115 L.R.R.M. at 2715.

[49] *Id.*

bargaining.[50] Thus, the court concluded, the Massachusetts hospital cost containment statute was a valid state regulation and was not preempted by the Act.[51]

The First Circuit also indicated that the Massachusetts statute was one of general applicability, passed pursuant to the state's police powers, and directed at health care and not labor relations.[52] Hospital cost containment, the court stated, was an " 'interest . . . deeply rooted in local feeling and responsibility,' " and, therefore, the state's action should only be preempted upon a showing of " 'compelling congressional direction' " to preclude the state regulation.[53] The court reviewed congressional hospital cost legislation similar to the legislation enacted by Massachusetts which, the court determined, contemplated state passage of legislation containing hospital cost provisions such as the provisions contained in the Massachusetts statute.[54] Consequently, the court concluded that Congress meant to encourage, and not to preempt, legislation such as the Massachusetts statute.[55]

Although the result in *Dukakis* is well in accord with established law, the *Dukakis* court's opinion suggests a narrowing of the scope of the Act's preemption of state law. The plaintiff in *Dukakis* could not contend that the arguably protected or arguably prohibited line of the Act's preemption cases required preemption of the Massachusetts statute because the Act clearly does not protect or prohibit state health cost regulation. Therefore, the only available argument for preemption of the Massachusetts statute was that, contrary to the principles of *Machinists*, the statute intruded upon an area of labor relations which Congress intended to be unregulated. Under *Machinists*, the inquiry is whether the state regulation at issue alters the balance of bargaining power between labor and management in a way that obstructs the processes of the Act.[56] State laws violating this standard are preempted by the Act, unless Congress has otherwise evidenced an intent to allow the state regulation.[57]

As the First Circuit correctly held, the Massachusetts statute is valid under the *Machinists* standard. The Massachusetts statute does not impose a direct or significant shift in the balance of collective bargaining power between the parties, and is not concerned with the substantive aspects of the bargaining process.[58] The statute does not intrude into the labor-management relationship but merely limits "the universe in which [the] collective bargaining takes place."[59] Furthermore, the court's ruling is supported by other court decisions which have upheld state action far more intrusive of the bargaining processes than is the Massachusetts statute.[60]

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[50] *Id.*

[51] *Id.*

[52] *Id.* at 44, 115 L.R.R.M. at 2715. *See also supra* note 30.

[53] *Id.* (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959)).

[54] *Dukakis*, 726 F.2d at 44-45, 115 L.R.R.M. at 2715.

[55] *Id.*

[56] Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 146-48, 92 L.R.R.M. 2881, 2886-87 (1976).

[57] *See* New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 100 L.R.R.M. 2896 (1979) (plurality opinion); *id.* at 549, 100 L.R.R.M. at 2906 (Blackmun, J., concurring).

[58] *Dukakis*, 726 F.2d at 43-44, 115 L.R.R.M. at 2714-15.

[59] *Id.* at 45, 115 L.R.R.M. at 2715.

[60] *See* New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 100 L.R.R.M. 2896 (1979). The state statute in *New York Telephone* directly affected the labor-management relationship by providing unemployment benefits to strikers. *Id.* at 523-24, 100

Because the Massachusetts statute appears to be valid under *Machinists*, there seems to be no reason in *Dukakis* for adopting a more restrictive view of the scope of the Act's preemption than the facts of the case necessitate. The court, however, in determining that the Massachusetts statute was not susceptible to preemption, indicated that it viewed the statute as a law of general applicability, and stated that the statute's objective of hospital cost containment was an " 'interest . . . deeply rooted in local feeling and responsibility.' "[61] The court concluded, therefore, that the statute should not be preempted without evidence of " 'compelling congressional direction' " to proscribe the state action.[62] This portion of the First Circuit's opinion thus suggests an approach to labor law preemption analysis similar to that used in the Supreme Court's *New York Telephone* plurality opinion.[63]

The First Circuit's reliance on the generality of the Massachusetts statute is, however, misplaced. State laws which intrude upon the scope of the Act's regulation may be laws which are directed specifically at labor-management affairs or laws which carry a general public purpose beyond the area of labor relations.[64] Consequently, there is no compelling reason to distinguish laws of general applicability from other laws for purposes of labor law preemption. The issue of the generality of a law misses the point. As one commentator has pointed out, although a general law may be less likely to interfere with the policies of the Act, whether a law is general or specific the pertinent inquiry for purposes of labor law preemption is the same.[65] In every case, courts should look to the impact which the state law has on the collective bargaining relationship, and ascertain whether the state is attempting to reconcile or influence labor-management relationships in a way which would upset the balance struck by Congress.[66] Accordingly, the particular aspect of a state law which affects the labor area should be the focal point of analysis and the broader general purpose of the law should not provide increased protection from preemption.

Similarly, the First Circuit's extension of the "deeply rooted in local feeling and responsibility" exception to include hospital cost legislation accords undue deference to state regulation which may affect labor relations. Requiring "compelling congressional direction" for preemption is a substantial deviation from the general standard for

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L.R.R.M. at 2897. Moreover, employers were required to finance the unemployment compensation system, and hence, the strike against them. *Id.*

In Amalgamated Transit Union, Division 819 v. Byrne, 568 F.2d 1025, 1029, 96 L.R.R.M. 2440, 2443 (3d Cir. 1977)(en banc), the Third Circuit held that federal labor law policy did not operate to preempt action by New Jersey's Governor threatening to withdraw state subsidies from any private transportation companies which agreed to include unlimited cost of living increases in their collective bargaining agreements with their union. The First Circuit, in *Dukakis*, stated that it considered *Byrne* authority for its holding. *Dukakis*, 726 F.2d at 44, 115 L.R.R.M. at 2715.

[61] *Dukakis*, 726 F.2d at 44, 115 L.R.R.M. at 2715 (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959)).

[62] *Dukakis*, 726 F.2d at 44, 115 L.R.R.M. at 2715 (quoting San Diego Trades Council v. Garmon, 359 U.S. 236, 244, 43 L.R.R.M. 2838, 2841 (1959)).

[63] *See supra* notes 20-25 and accompanying text.

[64] " '[I]t is well settled that the general applicability of a state cause of action is not sufficient to exempt it from pre-emption. [I]t [has not] mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.' " New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 558, 100 L.R.R.M. 2896, 2910 (1979) (Powell, J., dissenting) (quoting Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 300, 94 L.R.R.M. 2759, 2763 (1977)).

[65] *See* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1356 (1972).

[66] *Id. Accord*, New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 558, 100 L.R.R.M. 2896, 2910 (1979) (Powell, J., dissenting).

preemption established in *Machinists*, and the exception should be sparingly extended. The *Machinists* rationale presumes that some areas of labor relations are to be free from any governmental regulation and that state laws will be invalid if they alter the economic balance of power between labor and management.[67] A requirement of "compelling congressional direction" makes a finding of preemption significantly more difficult, and would protect some state laws which would otherwise be preempted under *Machinists*.[68] For these reasons, a majority of the Justices of the Supreme Court have been unwilling to extend the "deeply rooted in local feeling and responsibility" exception on the grounds that to do so would be inconsistent with the principles of *Machinists* and other precedents delimiting the scope of the exception.[69] These Justices would keep the "deeply rooted in local feeling and responsibility" exception limited to a narrow range of state laws regulating tortious conduct involving violence, libel, or intentional infliction of emotional distress.[70] The reasoning of these Justices should be followed. If the exception were extended to include health care cost regulation, it is likely that most other exercises of a state's police power also would fall within the exception. Such an extension of the "deeply rooted in local feeling and responsibility" exception would, therefore, significantly narrow the boundaries of federal labor law preemption. The extension could allow some state regulation which substantially intrudes upon labor relations to escape federal preemption because a "compelling congressional direction" to preempt cannot be shown.

In sum, the result reached by the First Circuit in *Dukakis* is in accordance with the principles of labor law preemption set forth by the Supreme Court in *Machinists*. Inasmuch as the Massachusetts statute at issue did not significantly alter the balance of bargaining power between the hospital and its employees or intrude into the labor-management relationship, the statute was not subject to preemption under *Machinists*. The First Circuit's analysis of labor preemption law, however, was more restrictive than was necessary to decide the case. The court's treatment of the Massachusetts statute as a general state law and its extension of the "deeply rooted in local feeling and responsibility" exception to include hospital cost legislation indicates a more deferential regard for general state regulations and a more limited view of the reach of federal labor law preemption.

### B. **State Action Under Section 8(a)(3) of the National Labor Relations Act*: Kolinske v. Lubbers[1]

Labor organizations have the right to determine their own rules regarding membership.[2] Title 29, section 158 of the United States Code expressly grants labor organizations the right to make agreements requiring, as a condition of employment, that all employees

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[67] Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 145-48, 92 L.R.R.M. 2881, 2886-87 (1976).

[68] New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 549, 100 L.R.R.M. 2896, 2906 (1979) (Blackmun, J., concurring in the judgment).

[69] *See supra* notes 23-25 and accompanying text.

[70] *See supra* notes 23-25 and accompanying text.

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* By Terry Barchenko, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 712 F.2d 471, 113 L.R.R.M. 2957 (D.C. Cir. 1983).

[2] 29 U.S.C. § 158(b)(1)(A) (1982) in relevant part provides that this paragraph "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of its membership therein; . . . ." *Id.*

become members of the organization.[3] Consequently, labor organizations may in practice control access to employment through their membership restrictions. Because the union's power to control membership is authorized by statute, the question arises whether eligibility requirements imposed by a labor organization constitute state action and are potentially violative of the first amendment.[4] If no state action is involved, eligibility requirements imposed by a labor organization are only private conduct that is not subject to constitutional scrutiny.[5] Conversely, if eligibility requirements bear the imprimatur of the state, the union must establish a compelling reason for imposing requirements which indirectly restrict the right of freedom of association.[6]

Several cases have addressed the question of whether a union shop clause negotiated pursuant to the Railway Labor Act (RLA) constituted state action. In *Railway Employes' Department v. Hanson*,[7] the Supreme Court held that a union shop clause constituted state action. In *Hanson*, the Supreme Court considered a provision in a labor contract requiring all employees, as a condition of their continued employment, to become union members and to maintain that membership.[8] The Court upheld the constitutionality of such a provision on the basis of federal preemption, reasoning that section 2(11) of the RLA expressly superseded state laws prohibiting the union shop. Accordingly, although the Court upheld the union shop provision, it reached the constitutional claims presented because the private agreement was made pursuant to federal law thereby providing the required governmental action.[9] The Court's finding of state action in *Hanson*, therefore, rested upon federal preemption of a contrary state law.

In two later cases,[10] the Court was confronted with challenges by union members to the use of union dues for political purposes which some of the dissenting union members opposed. Both cases arose under the RLA, making the *Hanson* analysis controlling in disposing of the constitutional claims presented. The Court in these cases focused on the

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[3] 29 U.S.C. § 157 declares in relevant part that: "employees . . . shall have the right to refrain from any or all activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." *Id.*

29 U.S.C. § 158(a)(3) provides: ". . . [T]hat nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . ." *Id.*

[4] *Kolinske*, 712 F.2d at 471, 113 L.R.R.M. at 2957.

[5] *Id.* at 474, 113 L.R.R.M. at 2960.

[6] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 25 (1976) (where the Court stated that governmental action which may affect the first amendment's protection of the freedom to associate is subject to close scrutiny).

In *Buckley v. Valeo*, the Court further stated that interference with the right of political association "may be sustained if the state demonstrates a sufficiently important interest and employs narrowly tailored means to avoid unnecessary abridgment of First Amendment freedoms." *Id.* at 25. *See also* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) ("[A] sufficiently important government interest . . . can justify incidental limitation on First Amendment freedoms. . . .").

[7] 351 U.S. 225, 38 L.R.R.M. 2099 (1956).

[8] *Id.* at 227, 38 L.R.R.M. at 2100.

[9] *Id.* at 232, 38 L.R.R.M. at 2101. Although the Supreme Court noted that the right to work is frequently considered within the concept of liberty within the meaning of the due process clauses, the Court focused on the power of Congress under the commerce clause to decide whether the interests of workers are better served by one type of union agreement or another. *Id.* at 234-35, 38 L.R.R.M. at 2102.

[10] Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113, 53 L.R.R.M. 2128 (1963); International Association of Machinists v. Street, 367 U.S. 740, 48 L.R.R.M. 2345 (1961).

language of section 2(11) of the RLA and interpreted the provision to deny unions the statutory power to use funds collected from union members to support ideological or political activities that the members oppose.[11]

During the *Survey* year the District of Columbia Circuit Court of Appeals, in *Kolinske v. Lubbers*,[12] addressed the issue of whether an agency shop clause[13] provision negotiated by a labor organization with an employer constituted state action. Because a union is a private organization, the threshold question was whether the alleged infringement of a union member's first amendment right to freedom of association was "fairly attributable to the state."[14] The *Kolinske* court held, in a unanimous decision, that the agency shop clause, and attendant restrictions attached to strike benefits funded in part by those agency fees, did not constitute state action.[15]

The decision in *Kolinske* is of particular interest because there is currently a split among the circuits that have been confronted with the question of state action under a union shop clause. It seems likely, however, that such a provision will not be deemed to constitute state action because a union shop clause is neither compelled by federal law nor exercised as a state created right or privilege.

The Regional Director of the National Labor Relations Board (Board) investigated the charges brought by Kolinske, the dissenting union member, and found that the union's eligibility requirements[16] for strike benefits were lawful and nondiscriminatory.[17] The General Counsel of the Board affirmed the findings of the Regional Director and the charges were dismissed.[18] Kolinske then initiated suit in federal district court against the UAW and the General Counsel of the Board[19] alleging that both parties had violated his

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[11] *Allen*, 373 U.S. at 118, 53 L.R.R.M. at 2131-32; *Street*, 367 U.S. at 768-69, 48 L.R.R.M. at 2372-73. The Court's decisions in *Hanson* and *Street* controlled the decision of that reached by the Court in the next case to come before it. In Abrood v. Detroit Board of Education, 431 U.S. 209, 224-26, 95 L.R.R.M. 2411, 2416-17 (1977), the Court upheld the right of the union to assess nonmember fees for the purpose of collective bargaining, but held that the union could not constitutionally use agency fees for political purposes unrelated to its duties as collective bargaining representative. *Id.* at 235-36, 95 L.R.R.M. at 2421.

[12] 712 F.2d 471, 113 L.R.R.M. 2959 (D.C. Cir. 1983).

[13] Under an agency shop clause union membership is optional, but nonunion employees, as a condition of employment, must pay to the union each month an agency fee equal to the monthly membership dues established by the union for its members. *Id.* at 472, 113 L.R.R.M. at 2958.

[14] 712 F.2d at 474, 113 L.R.R.M. at 2960 (citing Rendall-Baker v. Kohn, 457 U.S. 830 (1982), quoting Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)). The Court stated:

> the ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the state' . . . .If the action of the [private entity] is not state action, our inquiry ends.

712 F.2d at 474, 113 L.R.R.M. at 2960.

[15] 712 F.2d at 480, 113 L.R.R.M. at 2965.

[16] Eligibility for strike benefits was determined by guidelines established by the union. *Id.* at 473, 113 L.R.R.M. at 2959. Conditions of eligibility included registration, nondelinquency in dues or agency fees, active employment prior to the strike, and participation in strike activity. *Id.* Nonmember agency fee payers like Kolinske were eligible to receive strike benefits provided the conditions for receiving such payments were satisfied. *Id.*

[17] 712 F.2d at 474, 113 L.R.R.M. at 2960.

[18] *Id.*

[19] *Id.* The district court determined that it was without jurisdiction to review the Director's decision not to issue a complaint. Kolinske v. Lubbers, 516 F. Supp. 1171, 1180-81, 107 L.R.R.M. 2977, 2984-85 (D.D.C. 1981). The court, however, denied the union's motion to dismiss the allegations against it. 516 F. Supp. at 1181, 107 L.R.R.M. at 2985.

rights under section 7 of the National Labor Relations Act (the Act)[20] as well as under the first and fifth amendments to the Constitution.[21] In addition, Kolinske alleged that the union had also breached the duty of fair representation it owed him by forcing nonmembers to participate in strike activities in order to receive strike benefits.[22] The district court held that the UAW's use of agency fees constituted state action and that the union's denial of strike benefits constituted a breach of its duty of fair representation.[23] On cross-motions for summary judgment the district court determined that the union's refusal to pay strike benefits not only constituted a breach of its duty of fair representation, but in addition violated Kolinske's first amendment rights.[24] The union appealed to the United States Court of Appeals for the District of Columbia.[25]

In reversing the district court's finding of state action, the circuit court rejected the lower court's determination that the state action question was controlled by the Supreme Court's holdings in *Railway Employes' Department v. Hanson* and its progeny.[26] The court in *Kolinske* distinguished prior cases under the RLA from the present case, which arose under the National Labor Relations Act.[27] The *Kolinske* court considered the federal preemption of a contrary state law to be the critical factor in the finding of state action in *Hanson*.[28] In the court's view, section 8(a)(3) of the Act, on the other hand, merely authorized the use of agency shop fees and did not expressly preempt state law to create direct involvement of the federal government in the enforcement of the agency shop clause as was the case with the union shop clause in *Hanson*.[29] The court, therefore, concluded that prior Supreme Court decisions regarding the question of state action under the RLA were not applicable to the issue in *Kolinske*.[30] Accordingly, the court proceeded to analyze the question of whether the UAW's eligibility rules constituted state action.[31]

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[20] 29 U.S.C. § 157 (1982); Kolinske v. Lubbers, 712 F.2d at 474, 113 L.R.R.M. at 2960 (D.D.C. 1981).

[21] 712 F.2d at 474, 113 L.R.R.M. at 2960.

[22] *Id.* The duty of fair representation arises out of the exclusive representational status of a union. The exclusive representation status is granted a union by section 9(a) of the Act, 29 U.S.C. § 159(1) (1982).

[23] *Kolinske*, 516 F. Supp. at 1080-81, 107 L.R.R.M. at 2484-85.

[24] Kolinske v. UAW, 530 F. Supp. 728, 733-35, 109 L.R.R.M. 2464, 2467-69 (D.D.C. 1982). The district court awarded Kolinske damages of $130.00 equaling the amount of strike benefits which he would have received had he participated in strike activities originally. *Id.* at 735, 109 L.R.R.M. at 2469.

[25] The UAW appealed this award pursuant to 28 U.S.C. § 1291 (1982).

[26] *See* Railway Employes' Department v. Hanson, 351 U.S. 225, 38 L.R.R.M. 2099 (1956). *See supra* notes 7-11 and accompanying text.

[27] *Kolinske*, 712 F.2d at 475, 113 L.R.R.M. at 2961. *Accord*, Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410, 77 L.R.R.M. 2609, 2611 (10th Cir. 1971).

[28] *Kolinske*, 712 F.2d at 475-76, 113 L.R.R.M. at 2961 ("Because the federal statute [in *Hanson*] did more than merely authorize the use of a union shop clause and allowed a private agreement to override contrary state law, the Constitutional deprivation alleged by the plaintiff in *Hanson* was caused by the exercise of some *right or privilege* created by the government.").

[29] *Id.* at 476, 113 L.R.R.M. at 2962.

[30] The court noted that although the Supreme Court has not decided the issue of state action under section 8(a)(3) of the Act, the Court has stated on other occasions that union rules governed by the Act do not involve state action. *Id.* (citing United Steelworkers v. Sadlowski, 457 U.S. 102, 112 n.16, 110 L.R.R.M. 2609, 2617 n.16 (1982); United Steelworkers v. Weber, 443 U.S. 193, 200, 20 FEP Cases 1, 4 (1979); American Communications Association v. Douds, 339 U.S. 382, 402, 26 L.R.R.M. 2084, 2092 (1950)). *See also Kolinske*, 712 F.2d at 477 n.7, 113 L.R.R.M. at 2962 n.7.

[31] *Kolinske*, 712 F.2d at 477, 113 L.R.R.M. at 2962.

The court noted that in addressing the question of state action previous cases decided by the Supreme Court relied on a two tier analysis to determine whether private conduct should be attributed to the state.[32] According to the court, the first part of the analysis requires an examination of whether the alleged constitutional infringement was caused by the exercise of some right or privilege created by the state or by a person for whom the state is responsible.[33] The second part of the test, the court stated, requires a determination of whether the person responsible for the deprivation may be held to be a state actor.[34] This two part test was employed by the *Kolinske* court to determine whether the agency shop clause at issue compelled a finding of state action.[35] The court summarily concluded that the first part of the state action test was not satisfied because the agency shop clause was neither compelled by federal law nor exercised as a state created right or privilege.[36] In so doing, the court rejected the district court's finding that congressional authorization of the agency shop clause constituted state action. The circuit court noted that it is well settled that a state's mere authorization of private conduct does not warrant a finding of state action.[37] The court therefore held that, although the Act provides a framework for collective bargaining, the Act is neutral regarding the content of particular agreements. According to the court, the parties in this case, as parties to a private contract, were free to accept or reject an agency shop clause without government interference.[38]

After concluding that adoption of the agency shop clause was a decision by two private parties lacking direct government influence, the court turned to a discussion of the second part of the analysis to determine whether the alleged constitutional deprivation was caused by a state actor. The court concluded that none of the traditional indicia for attributing private conduct to the state were present in *Kolinske*.[39] For example, the court pointed out that collective bargaining has never been the exclusive province of the state. Consequently, the UAW and McLaughlin Company could not be held to be performing exclusive public functions.[40] Similarly, the court noted that the agency shop clause would not pass the so-called state compulsion test[41] since neither state nor federal law compelled adoption of the agency shop clause at issue in *Kolinske*.[42] Third, the court

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[32] *Id.* (citing Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)).

[33] *Id.* (citing *e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 602-03 (1975) (pre-judgment garnishment); Fuentes v. Shevin, 407 U.S. 67, 73-74 (1972) (pre-judgment attachment)).

[34] *Id.* (citing *Lugar*, 457 U.S. at 937). The court noted, for example, situations which have given rise to a finding of state action: where the private party performed what was traditionally an exclusively public function, Terry v. Adams, 345 U.S. 461, 469-70 (1953); where the private party acted in concert with the state, *Lugar*, 457 U.S. at 941; the private conduct was compelled by state law, Adickes v. S.H. Kress Co., 398 U.S. 144, 170-71 (1970); or where a nexus exists between the private party and the state such that conduct should be attributed to the state, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

[35] *Kolinske*, 712 F.2d at 477, 113 L.R.R.M. at 2962-63.

[36] *Id.* at 477-78, 113 L.R.R.M. at 2963.

[37] *Id.* at 478 (citing Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 354 (1974)).

[38] *Id.* at 477, 113 L.R.R.M. at 2963.

[39] *Id.*

[40] For a discussion of the "public function" doctrine, *see*, *e.g.*, Terry v. Adams, 345 U.S. 461, 468-70 (1953); Marsh v. Alabama, 326 U.S. 501, 505-10 (1946).

[41] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 170-71 (1970) (the state compulsion test examines private conduct compelled by express legal sanctions or by state enforced custom).

[42] *Kolinske*, 712 F.2d at 478, 113 L.R.R.M. at 2963.

rejected any finding of state action based upon joint conduct between the private party and the state.[43] The court, therefore, concluded that *Kolinske* demonstrated no direct governmental involvement in either the parties' adoption or adherence to the agency shop clause.[44]

In addition, the court rejected any notion that extensive federal regulation of unions establishes the requisite nexus between the UAW and the government.[45] The court reasoned that determining whether the requisite nexus is present requires an examination of whether the action of a private party allegedly resulting in a constitutional deprivation was based upon the independent judgment of that party.[46] In *Kolinske* the court found that the decision of the UAW and McLaughlin Company to adopt the agency shop clause was based upon the judgment of the parties to the contract and could not be attributed to the state.[47] Relying on the forgoing reasoning, the court opined that the collective bargaining agreement in *Kolinske* was privately negotiated and privately enforced. Consequently, the court dismissed Kolinske's first amendment claim since the decision to adopt the agency shop clause and attendant strike benefits lacked the requisite state action.[48]

Having concluded that the requisite state action was not present, the court turned to Kolinske's second allegation that the union had breached its duty of fair representation.[49] A union's duty of fair representation has been described as requiring the union to "serve the interests of all [employees] without hospitality or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."[50] The *Kolinske* court reversed the district court's holding regarding this issue[51]

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[43] *Id.* at 479, 113 L.R.R.M. at 2963. The court noted that state action was found to exist in *Lugar* because the state was directly involved in the procedure by which a private creditor protected its interest in a debtor's property because a court clerk assisted in the pre-judgment attachment of the debtor's property. *Cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155-57 (1978) (no state action held to exist through self-help because no state officials were directly involved).

[44] *Kolinske*, 712 F.2d at 478, 113 L.R.R.M. at 2964.

[45] For example, the court noted that in a pair of cases involving extensive state regulation of the affairs of two private entities, a nursing home and a private school, the Supreme Court determined that state action was not present. *See* Blum v. Yaretsky, 457 U.S. 991, 1003-12 (1982) (nursing home's decision regarding a Medicaid patient did not constitute state action even though the nursing home was extensively regulated and required the physician's certification regarding the necessity of certain medical treatment before the state would pay for the services); Rendell-Baker v. Kohn, 457 U.S. 832, 841-43 (1982) (extensive regulation of private school offering alternative program for problem students which received 90 percent of school funds — decision to discharge the employees was held to be the act of a private party and therefore beyond constitutional protection).

[46] *Kolinske*, 712 F.2d at 480, 113 L.R.R.M. at 2964-65.

[47] *Id.* The court similarly dismissed a further argument advanced by Kolinske that the agency shop clause is attributable to the state because of the power of the federal government to enforce the agreement. *Cf.* Shelley v. Kraemer, 334 U.S. 1, 18-23 (1948) (state action present where state court acts to enforce a racially restrictive covenant to prevent a sale between a willing seller and buyer). The issue in *Kolinske*, the court reasoned, was not controlled by *Shelley*. Rather, *Kolinske* concerned a private agreement which was neither mandated nor enforced by the government. *Kolinske*, 712 F.2d at 480, 113 L.R.R.M. at 2965.

[48] *Kolinske*, 712 F.2d at 480, 113 L.R.R.M. at 2965.

[49] *Id.* at 481, 113 L.R.R.M. at 2965. A union's duty of fair representation arises out of the exclusive representational status granted a union by section 9(a) of the Act, 29 U.S.C. § 159(a) (1982).

[50] *Kolinske*, 712 F.2d at 481, 113 L.R.R.M. at 2965 (quoting Vaca v. Sipes, 386 U.S. 171, 177, 64 L.R.R.M. 2369, 2371 (1967)).

[51] Kolinske v. UAW, 530 F. Supp. at 735, 109 L.R.R.M. at 2468. The district court reasoned that the union breached its duty of fair representation because it was inherently discriminatory to force

and found that the union's duty of fair representation arising out of the union's exclusive representational status does not extend to its eligibility rules for strike benefits. Instead, the court stated that the duty of fair representation extends only to matters in which the union represents employees at *all* — matters relating to rates of pay, wages, hours or other conditions of employment[52] — and does not affect an employee's relationship with the union structure.[53] The court therefore concluded that since the eligibility rules are solely an internal union matter without substantial impact on a participant's relations with his employer, the union cannot be held to have breached its duty of fair representation.[54]

A conflict currently exists among the circuit courts concerning the question of state action under section 8(a)(3) of the Act.[55] The Tenth Circuit's decision in *Reid v. McDonnell Douglas*[56] is in accord with the analysis in *Kolinske*. The *Reid* case involved an action brought by nonunion members alleging that the union violated its duty of fair representation by spending a portion of the dues collected under an agency shop clause for political candidates and causes opposed by the plaintiff-employee.[57] In *Reid*, the Tenth Circuit held that the finding of state action regarding the application of the RLA in *Hanson* had no applicability to the Act.[58] The Tenth Circuit noted that under the Act, in contrast with the RLA, the federal government is not directly involved in the decision of a union and employer to agree to a union security clause so as to make that choice state action.[59]

Two other circuits have reached an opposite conclusion regarding the issue of state action. In *Seay v. McDonnell Douglas Corp.*[60] the Ninth Circuit, relying on *Hanson*, held agency fees collected by a union to be subject to constitutional scrutiny.[61] The Ninth Circuit offered no analysis of the state action question, however, apparently assuming that the issue was controlled by *Hanson*. In *Seay*, the court failed to distinguish between those statutory provisions which create a right or privilege under federal law and those that merely authorize private conduct. The court's analysis leads to the conclusion that the Ninth Circuit would find state action inherent in any action brought under the Act because the Act is based upon the power of Congress to regulate interstate commerce.

Similarly, the First Circuit in *Linscott v. Miller Falls Co.*[62] found a union shop clause requiring union membership as a condition of employment to constitute state action.[63] The provision at issue in *Linscott*, section 14(b) of the Act,[64] empowered the state to outlaw

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nonmembers to participate in strike activities to obtain strike benefits since strike benefits served to compensate Kolinske for events beyond his control. *Id.*

[52] *Kolinske*, 712 F.2d at 481, 113 L.R.R.M. at 2966 (citing Bass v. International Brotherhood of Boilermakers, 630 F.2d 1058, 1062-63, 105 L.R.R.M. 3258, 3261-62 (5th Cir. 1980)). The *Kolinske* court notes that the strike benefits served as a tool for collective bargaining and had no direct or substantial relationship to Kolinske's dealings with the company. *Id.*

[53] 712 F.2d at 481, 113 L.R.R.M. at 2966.

[54] *Id.* at 482, 113 L.R.R.M. at 2966. The court concluded its discussion by warning against creating constitutional significance for all union activities because of the unique role that unions play in our economic structure. *Id.*

[55] *Id.* at 480-82 n.9, 113 L.R.R.M. at 2965 n.9.

[56] *See* Reid v. McDonnell Douglas Corp., 443 F.2d 408, 77 L.R.R.M. 2609 (10th Cir. 1971).

[57] *Id.* at 409, 77 L.R.R.M. at 2610-11.

[58] *Id.* at 410, 77 L.R.R.M. at 2611.

[59] *Id.* at 410, 77 L.R.R.M. at 2611-12.

[60] 427 F.2d 996, 74 L.R.R.M. 2600 (9th Cir. 1970).

[61] *Id.* at 1003-04, 74 L.R.R.M. at 2605-07.

[62] 440 F.2d 14, 76 L.R.R.M. 2994 (1st Cir. 1971).

[63] *Id.* at 16-17, 76 L.R.R.M. at 2995-96.

[64] 29 U.S.C. § 164(b) (1982).

union shop agreements. While the court acknowledged that *Linscott* went further than *Hanson*, which involved an affirmative preemption of a contrary state law, the *Linscott* court did not believe that a sufficient basis existed for distinguishing *Hanson*. In reaching this conclusion, the court reasoned that if federal support attaches to the union shop when two parties agree to it, it is the same support where the state must consent as a precondition to attachment.[65] On the merits, the *Linscott* court upheld the union shop clause, holding that governmental interest in peaceful labor relations outweighed an employee's religious objection to forced union membership.[66]

Judge Coffin noted in his concurrence that the plaintiff's complaint failed to establish a violation of her constitutional rights because of the absence of state action.[67] Judge Coffin noted that unlike the union shop provision in *Hanson*, the provision at issue in *Linscott* was incapable of overriding any inconsistent state legislation and merely represented a term in a privately negotiated collective bargaining agreement.[68] As Judge Coffin noted, every term in a bargaining agreement does not bear the imprimatur of the state merely because a federal agency is empowered to supervise the formation of the agreement.[69]

Because of the conflict among the circuit courts, it is unclear, at present, to what extent *Hanson* will be invoked to support a finding of state action in an action involving a union shop clause. Although the Ninth Circuit in *Seay* reached the opposite conclusion from the District of Columbia Court of Appeals in *Kolinske*, the *Seay* court failed to analyze the question, apparently assuming that it was controlled by *Hanson*. It seems likely, however, that *Hanson* will in the future be confined to its facts. That is, the analysis in *Hanson* will only be invoked where an express preemption of a contrary state law exists. Absent a finding of preemption, when confronted with this issue, the Supreme Court is likely to employ the two tier test enunciated in *Lugar v. Edmondson Oil Co.*[70] in determining the question of state action. If the court continues to apply the *Lugar* test, union shop provisions similar to the agency shop clause at issue in *Kolinske* must necessarily fail the first part of the state action test because such provisions are neither compelled by federal law nor exercised as a state created right or privilege. Further, as the *Kolinske* court noted, it would be unwise to support a finding of governmental action in these circumstances because such a conclusion would lead to the treatment of unions as local governmental units in nearly all of their activities.

## VI. BANKRUPTCY

### A. **Rejection of Collective Bargaining Agreements Under Chapter 11 Bankruptcy Proceedings*: NLRB v. Bildisco and Bildisco[1]

Courts considering whether a business attempting reorganization under the bankruptcy law may reject a collective bargaining agreement are confronted with the seem-

[65] *Linscott*, 440 F.2d at 16, 76 L.R.R.M. at 2995.
[66] *Id.* at 17-18, 76 L.R.R.M. at 2996-97.
[67] *Id.* at 19, 76 L.R.R.M. at 2997 (Coffin, J., concurring).
[68] *Id.* at 19-20, 76 L.R.R.M. at 2997-98 (Coffin, J., concurring).
[69] *Id.* at 20, 76 L.R.R.M. at 2998 (Coffin, J., concurring).
[70] 457 U.S. at 936-40; *see supra* notes 32-38 and accompanying text.

* By Ann P. Michalik, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 104 S. Ct. 1188, 115 L.R.R.M. 2805 (1984). For a more comprehensive discussion of the *Bildisco* decision and an intensive analysis of the bankruptcy and labor statutes, see Gregory, *Labor*

ingly incompatible congressional policies expressed in the National Labor Relations Act (the Act)[2] and the Bankruptcy Reform Act of 1978 (the Code).[3] The purpose of the Act is to eliminate the strife between labor and management, that can obstruct the free flow of commerce, by encouraging collective bargaining and reducing disparity in bargaining power.[4] Under section 8(d) of the Act,[5] neither party to a collective bargaining agreement may modify or terminate an agreement in effect unless that party follows a delineated set of procedures.[6] When an employer alters a collective bargaining agreement without adhering to the provisions of section 8(d), a union may file a charge with the National Labor Relations Board (Board) claiming an "unfair labor practice" pursuant to section 8(a)(5) of the Act.[7]

The prohibition in the Act against unilateral alteration of a collective bargaining agreement may, however, conflict with provisions of the Bankruptcy Code that permit a debtor to reject an executory contract as part of a reorganization effort.[8] Under chapter 11 of the Code,[9] a commercial business may file a petition for reorganization in bankruptcy court.[10] The filing of a petition under chapter 11 allows a debtor, who then becomes a "debtor-in-possession,"[11] time to develop a plan to repay its creditors and reduce or extend its debts so that the business may once again become financially viable.[12]

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*Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in* NLRB v. Bildisco, 25 B.C. L. REV. 539 (1984).

[2] 29 U.S.C. §§ 151-169 (1982).

[3] 11 U.S.C. §§ 1-330 (1982).

[4] *See* 29 U.S.C. § 151 (1982).

[5] 29 U.S.C. § 158(d), commonly known as section 8(d), provides in pertinent part:

> That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

*Id.*

[6] *See id.*

[7] 29 U.S.C. § 158(a)(5) (1982), also known as section 8(a)(5), provides in part: "It shall be an unfair labor practice for an employer — . . . to refuse to bargain collectively with the representatives of his employees. . . ." *Id. See* NLRB v. Bildisco and Bildisco, 104 S. Ct. 1188, 1202, 115 L.R.R.M. 2805, 2817 (1984) (Brennan, J., dissenting).

[8] Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391, 391 (1981) [hereinafter cited as Note, *The Bankruptcy Law's Effect*].

[9] 11 U.S.C. §§ 1101-1174 (1982).

[10] 11 U.S.C. §§ 301, 303 (1982).

[11] 11 U.S.C. § 1101 (1982).

[12] Note, *The Bankruptcy Law's Effect*, *supra* note 8, at 392.

To facilitate a workable reorganization, section 365(a) of the Code[13] permits the debtor-in-possession to petition the bankruptcy court for the rejection of disadvantageous executory contracts.[14] Although the Code does not define the term "executory contract," it is generally understood to include contracts under which performance remains due on both sides,[15] including collective bargaining agreements.[16] Rejection of an agreement constitutes a breach of contract relating back to the date immediately prior to the filing of the bankruptcy petition.[17] The breach releases the debtor from future obligations under the contract and allows the other party to claim damages.[18] Consequently, claims for lost future earnings resulting from rejection of an employment contract are nonpriority claims that are assessed at the fair market value, rather than at the bargained contract rate, for services rendered during the reorganization period.[19]

The Code does not provide the courts with a standard for determining the propriety of rejecting an executory contract.[20] When dealing with executory contracts of a commercial nature, courts often have employed the "business judgment test."[21] When faced with the question of the applicable standard for the rejection of collective bargaining agreements, however, courts have attempted, with some difficulty, to reconcile the conflict between the Act and the Code by applying more exacting standards for review of the decision to reject.[22] For example, in *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*,[23] the Court of Appeals for the Second Circuit ruled that the bankruptcy court, when deciding whether to allow rejection of a collective bargaining agreement, must balance the equities on both sides.[24] The court stated that it is not sufficient simply to find that

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[13] 11 U.S.C. § 365(a) (1982) provides: "(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *Id.* From the concept that a trustee in bankruptcy could reject a burdensome executory contract, there evolved the view that the contract may be rejected simply because a more beneficial arrangement was available. 2 COLLIER ON BANKRUPTCY, § 365.03 (15th ed. 1980) [hereinafter cited as COLLIER].

[14] 11 U.S.C. § 365(a). *See also*, COLLIER, *supra* note 13, § 365.03.

[15] COLLIER, *supra* note 13, § 365.03 at 365-12.

[16] Bordewieck and Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J., 293, 294 (1983) [hereinafter cited as Bordewieck and Countryman].

[17] 11 U.S.C. § 365(g)(1) (1982) provides:

> (g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease —
>
> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition.

*Id.*

[18] Note, *The Bankruptcy Law's Effect*, *supra* note 8, at 393 n.18.

[19] *Id.* at 393-94. On the other hand, if a debtor assumes the contract, a subsequent rejection would give rise to a claim for damages that could be entitled to first priority as an administrative cost. *Id.* at 394.

[20] *See* COLLIER, *supra* note 13, § 365.03 at 365-14. *See also* 11 U.S.C. § 365(a) (1982).

[21] *See, e.g.*, Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U.S. 523, 550 (1943). Under the business judgment test, a contract may be rejected, even though it is beneficial and not burdensome, if it can be replaced by a more profitable agreement. *See* COLLIER, *supra* note 13, § 365.03 at 365-14.

[22] COLLIER, *supra* note 13, § 365.03 at 365-16.

[23] 519 F.2d 698, 89 L.R.R.M. 3133 (2d Cir. 1975).

[24] *Id.* at 707, 89 L.R.R.M. at 3139 (citing *In re* Overseas National Airways, 238 F. Supp. 359, 361-62 (E.D.N.Y. 1965)).

rejection improves the financial condition of the debtor.[25] A short time later, however, in *Brotherhood of Railway, Airline, and Steamship Clerks v. REA Express, Inc.*,[26] the same court, enunciating a stricter standard, found that the bankruptcy court should authorize rejection only if the collective bargaining agreement is so onerous and burdensome that, absent rejection, reorganization will fail.[27] The difficulty the Second Circuit experienced in establishing a standard attests to the problem courts faced in reconciling the provisions of the Act and the Code.

During the *Survey* year, the Supreme Court in *NLRB v. Bildisco and Bildisco*,[28] established a standard for review of petitions to reject collective bargaining agreements in chapter 11 bankruptcy proceedings.[29] The Court held that the bankruptcy court should approve the rejection of a collective bargaining agreement, which is subject to the Act, if the debtor demonstrates that the agreement burdens the debtor's financial condition and that a balancing of the equities favors rejection of the labor agreement.[30] The Court also stated that prior to approval of a petition to modify or reject a collective bargaining agreement, the bankruptcy court must find that reasonable efforts at negotiating a voluntary settlement have been unsuccessfully made and are not likely to be fruitful in the near future.[31] In addition, the Court held that the Board may not find a debtor-in-possession guilty of an unfair labor practice for unilaterally modifying or terminating all or part of a collective bargaining agreement prior to formal approval of rejection by the court.[32] As a result of the *Bildisco* decision, bankruptcy courts will evaluate petitions to reject collective bargaining agreements using a standard that, while higher than the business judgment rule, is less exacting than the test established by the Second Circuit in *REA Express*.[33]

In *Bildisco*, a general partnership, Bildisco and Bildisco, filed a voluntary petition in bankruptcy under chapter 11.[34] The bankruptcy court authorized Bildisco to operate the business as a debtor-in-possession.[35] At the time the bankruptcy petition was filed, a collective bargaining agreement existed between the business and a union that represented 40 to 45 percent of the employees.[36] The agreement stipulated that it was binding on the parties and their successors even if bankruptcy should occur.[37] Shortly after filing for bankruptcy, however, Bildisco, which had already failed to meet other

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[25] *Kevin Steel*, 519 F.2d at 707, 89 L.R.R.M. at 3139.

[26] 523 F.2d 164, 90 L.R.R.M. 2579 (2d Cir.), *cert. denied*, 423 U.S. 1017, 90 L.R.R.M. 3176 (1975).

[27] *Id.* at 169, 90 L.R.R.M. at 2582. In *REA Express*, the court, addressing a rejection of a collective bargaining agreement under the Railway Labor Act, implied it was adopting the standard set forth in *Kevin Steel*. *Id.* Courts have subsequently distinguished the two standards, however. *See, e.g.*, NLRB v. Bildisco and Bildisco, 104 S. Ct. 1188, 1196, 115 L.R.R.M. 2805, 2812 (1984).

[28] 104 S. Ct. 1188, 115 L.R.R.M. 2805 (1984). Rehnquist, J. delivered the opinion of the Court, joined by all members in Parts I and II, and by Burger, C.J., and Powell, Stevens, and O'Connor, J.J., in Part III.

[29] *Id.* at 1196, 115 L.R.R.M. at 2812.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1191-92, 115 L.R.R.M. at 2808.

[33] *Id.* at 1196, 115 L.R.R.M. at 2812.

[34] *Id.* at 1192, 115 L.R.R.M. at 2809.

[35] *Id.*

[36] *Id.* The agreement was negotiated by Local 408 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Id.*

[37] *Id.*

obligations under the labor agreement, refused to pay wage increases provided for in the contract.[38] In response, the union filed an unfair labor practice charge with the Board.[39] The Board found that Bildisco had violated the Act by unilaterally altering the terms of the collective bargaining agreement and by refusing to negotiate with the union.[40] Subsequently, the Board petitioned the Court of Appeals for the Third Circuit to enforce its order requiring Bildisco to fulfill the employer's obligations under the labor contract.[41]

Several months after the union filed the charge with the Board, Bildisco petitioned the bankruptcy court for permission to reject its collective bargaining agreement.[42] After a hearing on the petition, the bankruptcy court granted the rejection.[43] The district court upheld the decision and the union appealed.[44]

The Court of Appeals for the Third Circuit consolidated the union's appeal with the Board's petition for an enforcement order.[45] The appeals court first determined that a collective bargaining agreement is an executory contract subject to rejection in a bankruptcy proceeding.[46] Next, the court stated that section 8(d) of the Act did not conflict with the authority under the Bankruptcy Code to seek rejection because the debtor-in-possession was a "new entity" not bound by the prior agreement.[47] Adopting the more lenient standard set forth by the Second Circuit in *Kevin Steel*, however, the court held that in order to obtain a rejection the debtor-in-possession must show that the collective bargaining agreement was burdensome and that equity favored rejection of the agreement.[48] Addressing the Board's argument that unilateral rejection of a collective bargaining agreement prior to approval by the bankruptcy court constituted an unfair labor practice, the court rejected the Board's reasoning that the debtor-in-possession was the

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[38] *Id.*

[39] *Id.*

[40] *Id.* at 1192-93, 115 L.R.R.M. at 2809. The Board found Bildisco in violation of section 8(a)(5) and section 8(a)(1) of the Act. *Id. See supra* note 7 for pertinent part of section 8(a)(5). Section 8(a)(1) provides in part: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157. . . ." 29 U.S.C. § 158(a)(1) (1982).

[41] *Bildisco*, 104 S. Ct. at 1193, 115 L.R.R.M. at 2809-10.

[42] *Id.* at 1192, 115 L.R.R.M. at 2809.

[43] *Id.* At the hearing, held at Bildisco's request, the only witness was a partner with Bildisco. *Id.* The testimony indicated that rejection would save the ailing business $100,000 in the following year. *Id.*

[44] *Id.*

[45] *In re* Bildisco, 682 F.2d 72, 74, 110 L.R.R.M. 2954, 2955 (3d Cir. 1982), *aff'd sub nom.* NLRB v. Bildisco and Bildisco, 104 S. Ct. 1188, 115 L.R.R.M. 2805 (1984).

[46] *Id.* at 78-79, 110 L.R.R.M. at 2858-59.

[47] *Id.* at 78, 110 L.R.R.M. at 2959. Courts have also disagreed in their characterization of a debtor-in-possession vis-à-vis the pre-petition debtor. In reaching their various decisions, courts have analogized the debtor-in-possession to a "new entity," a "successor employer," or an "alter ego" of the debtor. *See* Bordewieck and Countryman, *supra* note 16, at 300-10. Under the new entity theory, the debtor-in-possession in a chapter 11 bankruptcy proceeding represents an entirely new business with its own rights and duties, and consequently, is not a party to or bound by the contracts of its predecessor, the pre-petition debtor. *Id.* at 300-01. Similarly, in the successor employer analogy, the debtor-in-possession constitutes a completely new employer who does not automatically assume the obligations of a collective bargaining agreement, made by the debtor, to which it was not a party. *Id.* at 304-07. In contrast, courts sometimes viewed the debtor-in-possession as the same employer as the pre-petition debtor, as its alter ego, and thus subject to all the contractual obligations of the predecessor. *Id.* at 309.

[48] 682 F.2d at 79-80, 110 L.R.R.M. at 2959-60.

alter-ego of the pre-petition employer.[49] Instead the appeals court found that the debtor-in-possession was a new entity and, unless it assumed the contract, it was not a party to its predecessor's collective bargaining agreement.[50] Consequently, the court reasoned, the debtor-in-possession may reject the agreement without following the steps prescribed in section 8(d) of the Act.[51] The Supreme Court granted certiorari to resolve the conflict between the decision of the Second Circuit in *REA Express* and the Third Circuit's holding in *In re Bildisco* on the proper standard for approval of a debtor-in-possession's rejection of a collective bargaining agreement.[52]

The Supreme Court addressed two issues in *NLRB v. Bildisco and Bildisco*.[53] First, the Court determined the conditions under which a bankruptcy court may allow a debtor-in-possession to reject a collective bargaining contract.[54] Second, the Court considered whether the Board may find a debtor-in-possession guilty of an unfair labor practice for unilaterally modifying or terminating a collective bargaining agreement prior to court approval of a petition to reject.[55]

Addressing the first issue, the Court agreed with the holding of the Third Circuit that unexpired collective bargaining agreements are executory contracts subject to rejection under section 365(a) of the Code.[56] Reviewing the statutory language of the Code, the Court reasoned that Congress' failure to exclude agreements subject to the Act from section 365(a) showed congressional intent that the section apply to labor contracts.[57] According to the Court, however, the special nature of the collective bargaining agreement warranted the use of a stricter standard than the one applied to other executory contracts when deciding whether to allow a rejection.[58] Nevertheless, the Court refused to adopt the stringent standard enunciated by the Second Circuit in *REA Express*.[59] The Court opined that the *REA Express* standard focused simply on whether rejection was necessary to avoid liquidation of the business, and disregarded the equitable and flexible nature of chapter 11 reorganization.[60] Instead, the Supreme Court held that the bankruptcy court may approve rejection of collective bargaining contracts if the debtor-in-possession can establish that the agreement burdens the debtor's financial condition and that equity favors rejection.[61] In deference to the duty to bargain embodied in the Act, however, the Court found that before acting on the petition for rejection, the bankruptcy court must determine that reasonable efforts to negotiate have been made and that the parties' inability to reach a solution may hinder the success of the reorganization process.[62] Moreover, the Court stated that the bankruptcy judge should grant the petition

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[49] *Id.* at 82, 110 L.R.R.M. at 2962.

[50] *Id.* at 82-83, 110 L.R.R.M. at 2962.

[51] *Id.* at 83, 110 L.R.R.M. at 2962.

[52] *Bildisco*, 104 S. Ct. at 1194, 115 L.R.R.M. at 2810.

[53] *Id.* at 1191, 115 L.R.R.M. at 2808.

[54] *Id.* at 1194-97, 115 L.R.R.M. at 2810-13.

[55] *Id.* at 1197-1201, 115 L.R.R.M. at 2813-16.

[56] *Id.* at 1194-95, 115 L.R.R.M. at 2810-11.

[57] *Id.* The Court supported this argument by noting that in section 1167, Congress had expressly limited rejection of collective bargaining agreements under the Railway Labor Act. *Id.*

[58] *Id.* at 1195, 115 L.R.R.M. at 2811.

[59] *Id.* at 1196, 115 L.R.R.M. at 2812.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1196-97, 115 L.R.R.M. at 2812-13. The Court noted that both the underlying policy of the Act and section 8(a)(5) generally require employers and unions to reach agreement on the terms of employment without government interference. *Id.* at 1196, 115 L.R.R.M. at 2812. According to

only after finding that rejection would aid in the successful rehabilitation of the debtor.[63] According to the Court, the relevant considerations include not only the effect of affirmation of the labor agreement on the value of creditors' claims, and on the likelihood and consequences of liquidation for the debtor, but also the effect of rejection on employees.[64] In weighing these factors, the Court noted, the degree and qualitative difference in the hardship each party would face must be addressed.[65] The Court emphasized, however, that the bankruptcy court's primary focus in considering the interests involved must be on how the equities relate to a successful reorganization under chapter 11.[66]

Having thus established the standard for review of a petition to reject a collective bargaining agreement in a chapter 11 bankruptcy proceeding, the Court, addressing the second issue, held that the Board cannot find a debtor-in-possession guilty of an unfair labor practice for unilaterally rejecting or modifying a labor contract before court approval of the rejection.[67] In its discussion, the Court first decided not to view the debtor-in-possession as an "alter ego," "new entity," or "successor employer," but rather to view the debtor-in-possession as the same entity that existed pre-petition, empowered by the Bankruptcy Code to seek rejection of disadvantageous contracts.[68] After noting that the main goal of reorganization is to avoid liquidation of the business, the Court found that the debtor-in-possession's authority to reject burdensome executory contracts is vital to prevent the business undergoing reorganization from going into liquidation.[69] In support of its position, the Court found that Congress intended that debtors-in-possession in reorganization proceedings should have greater leeway in deciding whether to reject a contract than debtors in the process of liquidation. The Court noted that the debtor-in-possession in a chapter 11 reorganization has until confirmation of the reorganization plan to decide whether to reject an executory contract, in contrast to the sixty day limit in a chapter 7 liquidation proceeding.[70] The Court reasoned that this difference reflected Congress' judgment that a debtor-in-possession attempting to reorganize should be granted more flexibility in deciding whether to reject a contract than should a trustee in liquidation.[71]

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the Court, the bankruptcy court should step in only if the parties' lack of progress at reaching an agreement threatens the reorganization process. *Id.* at 1196-97, 115 L.R.R.M. at 2812. The Court noted that the parties need not be deemed to have bargained to impasse for the bankruptcy court to act. *Id.* at 1197, 115 L.R.R.M. at 2813.

[63] *Id.* at 1197, 115 L.R.R.M. at 2813.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1191-92, 115 L.R.R.M. at 2808.

[68] *Id.* at 1197, 115 L.R.R.M. at 2813. *See supra* note 47 for explanation of these theories.

[69] *Id.*

[70] *Id.* at 1198, 115 L.R.R.M. at 2814. 11 U.S.C. §§ 365(d)(1) and (2) provide:

> (1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected. (2) In a case under chapter 9, 11, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of the debtor at any time before the confirmation of a plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

*Id.*

[71] *Bildisco*, 104 S. Ct. at 1198, 115 L.R.R.M. at 2814.

After recognizing the importance of the ability of a debtor-in-possession to reject a contract, the Court examined the effect of a reorganization proceeding on the status of executory contracts and on claims arising under such contracts in order to determine whether rejection of a collective bargaining agreement constituted an unfair labor practice within the meaning of section 8(d) of the Act.[72] The Court noted that under section 365(g)(1) of the Code, which provides that rejection of an executory contract relates back to the date immediately prior to filing a petition in bankruptcy, claims arising from the rejection must be presented to the bankruptcy court for administration.[73] As a result, the Court pointed out, a suit against the debtor-in-possession may be brought only through administration of the claim in bankruptcy, and not under the collective bargaining agreement.[74] In addition, the Court noted that if the debtor-in-possession chooses to affirm the contract, the liabilities incurred under it are treated as administrative expenses and receive high priority.[75] On the other hand, the Court observed, if the contract is rejected, damages resulting from the breach receive the low priority given to general unsecured creditors.[76] In the interim, the debtor-in-possession must pay an employee a reasonable amount for his services which may or may not be the sum specified in the labor contract.[77]

Based on the foregoing consideration, the Supreme Court concluded that the Board may not enforce a collective bargaining agreement by filing an unfair labor practice charge against a debtor-in-possession.[78] The Court reasoned that once a bankruptcy petition is filed, and until reorganization is confirmed, the labor agreement is no longer immediately enforceable and may never again be an enforceable contract within the meaning of section 8(d) of the Act.[79] A contrary decision, according to the Court, would be inconsistent with the Code's efforts to provide the debtor-in-possession with "flexibility and breathing space."[80] Consequently, the Court stated, the debtor-in-possession need not comply with the procedures required by section 8(d) after filing and prior to seeking permission to reject the agreement.[81] The Court noted that in a chapter 11 proceeding, the rejection results from the operation of law, not from an employer's unilateral action.[82] Moreover, the Court reasoned that the exigencies of the bankruptcy proceedings also require subordination of the duty to bargain to impasse found in sections 8(a)(5) and 8(d) of the Act prior to seeking rejection. The Court cautioned, though, that the Act does require the debtor-in-possession to bargain in good faith over terms of a new contract pending or following formal approval of rejection.[83]

Although all members of the Court concurred on the first part of the opinion, four justices dissented from the holding on the second issue.[84] The dissent argued that the

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[72] *Id.* at 1198-99, 115 L.R.R.M. at 2814.
[73] *Id.* at 1198, 115 L.R.R.M. at 2814.
[74] *Id.* at 1198-99, 115 L.R.R.M. at 2814.
[75] *Id.* at 1199, 115 L.R.R.M. at 2815.
[76] *Id.* at 1199, 115 L.R.R.M. at 2814.
[77] *Id.* at 1199, 115 L.R.R.M. at 2814-15.
[78] *Id.* at 1199, 115 L.R.R.M. at 2815.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 1200, 115 L.R.R.M. at 2816.
[82] *Id.* at 1200, 115 L.R.R.M. at 2815.
[83] *Id.*
[84] *Id.* at 1201, 115 L.R.R.M. at 2816 (Brennan, J., concurring in part and dissenting in part). Justice Brennan was joined by Justices White, Marshall, and Blackmun.

majority ignored important policies embodied in the Act when it held that a debtor-in-possession does not commit an unfair labor practice by unilaterally modifying or rejecting a collective bargaining agreement prior to formal authorization by a bankruptcy court.[85] According to the dissent, the majority's conclusion that Congress did not intend section 8(d) of the Act to apply after a bankruptcy petition is filed is erroneous in that it furthers the goals of the Code at the expense of the Act.[86] Rather than focusing solely on the Bankruptcy Code, the dissent maintained, the Court should have better accommodated the competing policies and provisions of the Code and the Act.[87]

Examining the language of the two statutes and the definitional sections of the Act, the dissent determined that although enforcement of a collective bargaining agreement is suspended after the filing of a bankruptcy petition, the contract retains sufficient vitality to be considered "in effect" under section 8(d) of the Act.[88] The dissent pointed out that collective bargaining plays a central role in achieving the goals of the Act, and argued that the need to prevent labor strife resulting from unilateral alteration of a collective bargaining agreement remains as great after the filing of a bankruptcy petition as it was before filing.[89] Moreover, the dissent stated, deference should be accorded by the Court to the Board's judgment that section 8(d) should remain applicable.[90]

Turning to the Bankruptcy Code, the dissent asserted that the Court had found no express provision in the Code rendering section 8(d) inapplicable.[91] The dissent contended that violation of a collective bargaining agreement is not necessary to assure a successful reorganization and in fact is more likely to lead to deleterious labor strife, which could in turn hinder a successful reorganization.[92] In addition, the dissent maintained that application of section 8(d) during the reorganization period would merely force the debtor-in-possession to seek early rejection of a collective bargaining agreement, which could not harm the reorganization process.[93] Noting that collective bargaining agreements are not like other contracts,[94] the dissent concluded that a debtor-in-possession commits an unfair labor practice by unilaterally altering the terms of a collective bargaining agreement because filing in bankruptcy does not render section 8(d) inapplicable.[95]

The Court in *Bildisco* decided several questions concerning the interaction of the Act

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[85] *Id.*

[86] *Id.* at 1203-04, 115 L.R.R.M. at 2818 (Brennan, J., concurring in part and dissenting in part).

[87] *Id.* at 1204, 115 L.R.R.M. at 2818 (Brennan, J., concurring in part and dissenting in part).

[88] *Id.* at 1206, 115 L.R.R.M. at 2820 (Brennan, J., concurring in part and dissenting in part).

[89] *Id.* at 1208, 115 L.R.R.M. at 2821 (Brennan, J., concurring in part and dissenting in part).

[90] *Id.* at 1208, 115 L.R.R.M. at 2822 (Brennan, J., concurring in part and dissenting in part).

[91] *Id.* at 1209, 115 L.R.R.M. at 2822 (Brennan, J., concurring in part and dissenting in part).

[92] *Id.*

[93] *Id.* at 1210, 115 L.R.R.M. at 2823 (Brennan, J., concurring in part and dissenting in part). According to the dissent, the debtor-in-possession will probably be able to negotiate a contract at least as favorable to it as the one rejected because union members will lose their jobs if reorganization fails. *Id.*

[94] *Id.* The dissent noted that the collective bargaining agreement is more than a contract: it represents an effort to establish a " 'system of industrial self-government' " to govern unanticipated disputes. *Id.* at 1210-11 115 L.R.R.M. at 2823 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-80 (1960)). Moreover, the dissent noted, the parties enter into a labor agreement to determine how to deal with each other, and not to establish a contractual relationship, which usually already exists between the labor and management. *Bildisco*, 104 S. Ct. at 1210-11, 115 L.R.R.M. at 2823 (Brennan, J., concurring in part and dissenting in part).

[95] *Id.* at 1211, 115 L.R.R.M. at 2824.

and the Bankruptcy Code. First, in accord with lower court decisions,[96] the Court established that a collective bargaining agreement is an executory contract subject to rejection under section 365(a) of the Bankruptcy Code.[97] Second, the Court made clear that a debtor-in-possession seeking rejection of an executory contract will henceforth be deemed the same entity that existed prior to filing in bankruptcy.[98] The decision, therefore, puts to rest prior status theories such as the alter ego, new entity, and successor employer theories which served only to trouble lower courts attempting to define the relationship between the parties to a rejected agreement. Third, the Court acknowledged that collective bargaining agreements differ from other types of executory contracts. Thus, the Court established that the standard for review of a petition to reject a labor contract is that the debtor-in-possession must show that the collective bargaining agreement burdens the debtor's financial condition and that a balance of the equities favors rejection.[99] Fourth, in deference to the national labor policy expressed in the Act, the Court ruled that the debtor-in-possession must attempt to negotiate a mutually agreeable modification with a union, but not bargain to an impasse, before a petition for rejection will be granted.[100] Finally, the Court determined that the Board cannot find a debtor-in-possession guilty of an unfair labor practice for breaching a collective bargaining agreement prior to formal action on the petition to reject.[101]

In *Bildisco*, the Court dealt with a conflict between federal labor and bankruptcy policies and found that a balance of the equities weighed against labor.[102] The standard adopted was considerably less stringent than the one adopted in *REA Express*, which the unions had supported.[103] As the dissent noted, the Court placed primary importance on the Bankruptcy Code and the need for flexibility in reorganization of a business under a chapter 11 bankruptcy proceeding.[104] In its decision, the Court put the interests of employees on an even par with those of the debtor and the creditors in terms of balancing the interests of affected parties.[105] As a result, the import of a valid collective bargaining agreement was diminished. Representatives of labor understandably found this decision a blow to the effectiveness and power of unions.[106]

In response to the *Bildisco* decision, Congress passed legislation on June 29, 1984, which overturned the Court's holding regarding unilateral rejections of collective bargaining agreements by debtors-in-possession, but which supported the Court's decision on the standard of review to be used by bankruptcy judges considering applications to

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[96] Bordewieck and Countryman, *supra* note 16, at 294.

[97] *Bildisco*, 104 S. Ct. at 1194-95, 115 L.R.R.M. 2810-11.

[98] *See id.* See Bordewieck and Countryman, *supra* note 16, at 300-11 for a discussion of the weaknesses inherent in the application of the "new entity" and "successor employer" theories which were used by courts to justify decisions that debtors-in-possession may reject collective bargaining agreements.

[99] *Bildisco*, 104 S. Ct. at 1196, 115 L.R.R.M. at 2812.

[100] *Id.* at 1196-97, 115 L.R.R.M. at 2812-13.

[101] *Id.* at 1201, 115 L.R.R.M. at 2816.

[102] *Id.* at 1197, 115 L.R.R.M. at 2813. The Court noted that the bankruptcy court must focus on the ultimate goal of chapter 11 when balancing the equities. *Id.* This holding is consistent with recent case law. *See* Bordewieck and Countryman, *supra* note 16, at 319-26 (discussing cases in support of thesis that courts considering rejection of collective bargaining agreements show a strong pro-debtor bias).

[103] *Bildisco*, 104 S. Ct. at 1196, 115 L.R.R.M. at 2812.

[104] *Id.* at 1204, 115 L.R.R.M. at 2818.

[105] *Id.* at 1197, 115 L.R.R.M. at 2813.

[106] *See* CONGRESSIONAL Q., 634 (March 17, 1984).

reject collective bargaining agreements.[107] Under the new law, a debtor-in-possession cannot "unilaterally terminate or alter any provisions of a collective bargaining agreement" without prior court approval.[108] Furthermore, before filing a petition to reject a collective bargaining contract, the debtor-in-possession must propose those modifications necessary to a successful reorganization to an authorized representative of the covered employees and meet with that representative in a good faith effort to reach a mutually acceptable change in the labor contract.[109] A court may approve an application to reject a collective bargaining agreement only if the required proposal was made to the union representative, the proposal was refused without cause, and the balance of the equities clearly favors rejection.[110]

In this latter provision, Congress essentially adopted the balancing of equities standard advanced by the Supreme Court in *Bildisco*.[111] Under this test, the interests of all parties affected by the bankruptcy proceeding — the debtor and creditors as well as the employees — are to be weighed "fairly and equitably."[112] The section also imposes time limits for the scheduling of hearings and provides for emergency court orders modifying contract terms which will be available to debtors-in-possession in need of more rapid relief.[113] The legislation thus represents a compromise between supporters of labor and business interests.[114]

The primary goal of both the Supreme Court's decision in *Bildisco* and the new legislation is to attain successful reorganization of an ailing business. Although the legislation gives greater emphasis to negotiation with unions prior to court involvement and prohibits the debtor-in-possession from modifying the terms of a collective bargaining agreement without court approval, the emphasis is nevertheless on assuring the continuation of the business. The legislation essentially supports the Court's view of equity by requiring the balancing of all interests equally. This approach recognizes that failure to successfully reorganize in bankruptcy means liquidation of the business and the loss of jobs, which does not benefit either business or labor.

As a result of the *Bildisco* decision and of the subsequent congressional modification of it, practitioners who represent unions in conflict with employers in bankruptcy will find it difficult to retain the benefits gained in previous bargaining agreements whenever the debtor-in-possession can show that the contract represents an impediment to successful reorganization. As the dissent in *Bildisco* noted, the debtor-in-possession will most likely be able to negotiate a more favorable contract than the one he seeks to reject. [115] Union members know they will lose their jobs if reorganization fails. Moreover, since employees probably will lose more benefits from outright rejection then from renegotiated contracts, they are likely to make concessions to forestall formal rejection. On the other hand, the debtor-in-possession now must negotiate in good faith with a union prior to seeking rejection and propose only those modifications financially necessary for a successful reorganization. A debtor-in-possession, therefore, cannot use bankruptcy under chapter 11 as an excuse to escape from a collective bargaining agreement he simply does not like.

[107] Bankruptcy Amendments and Federal Judgeship Act of 1984, Title III, Subtitle J, PUB. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS 390 (to be codified at 11 U.S.C. § 1113) ("Bankruptcy Amendments").

[108] *Id.* at 391.

[109] *Id.* at 390.

[110] *Id.*

[111] [Current Awareness Alert] BANKR. SERV. L. ED. 51, 52 (July, 1984).

[112] Bankruptcy Amendments, *supra* note 107, at 390.

[113] *Id.* at 391.

[114] *See* [Current Awareness Alert] BANKR. SERV. L. ED. 51, 52 (July, 1984).

[115] *Bildisco*, 104 S. Ct. at 1210, 115 L.R.R.M. at 2823.

# EMPLOYMENT DISCRIMINATION LAW

## I. PROCEDURAL DEVELOPMENTS

### A. *Counterdiscovery in an EEOC Enforcement Proceeding: In re* EEOC[1]

The Equal Employment Opportunity Commission (EEOC or Commission) is empowered under section 710 of Title VII of the United States Code[2] to conduct hearings and investigations for the purpose of combatting employment discrimination.[3] Section 710 provides that all hearings and investigations conducted by the Commission are governed by section 11 of the National Labor Relations Act (the Act).[4] The language of section 11 of the Act provides the agency with the subpoena powers ordinarily afforded similar administrative bodies.[5] The enforcement scheme of Title VII provides the Commission with investigative authority, often referred to as "demand power," to determine whether a company is engaging in a discriminatory employment practice.[6] This power is intended to simplify the procedures for subpoenaing witnesses or records thereby facilitating enforcement of Title VII.[7]

When a company under investigation refuses to comply with the EEOC's discovery requests, the Commission is empowered to bring a subpoena enforcement action.[8] If such a proceeding is instituted, the question often arises whether the defendant may engage in counterdiscovery to find grounds for resisting the subpoena. This question illustrates the inherent tension between the need for speedy and efficient administrative enforcement mechanisms and the due process rights of defendants in EEOC actions. The text of section 11 does not address this question and, until recently, the courts have not provided useful guidance in resolving the tension.

During the *Survey* year, the United States Court of Appeals for the Fifth Circuit considered the question of whether counterdiscovery should be permitted in an EEOC enforcement action.[9] In *In re EEOC*, a company, which was the subject of an EEOC investigation, sought counterdiscovery because it believed the Commission's discrimination proceedings had been wrongfully instituted.[10] In deciding that counterdiscovery was not warranted in that case, the Fifth Circuit held that, in light of the legislative history

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* By Terry Barchenko, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 709 F.2d 392, 32 FEP Cases 361 (5th Cir. 1983).

[2] 42 U.S.C. § 2000e-9 (1982). Section 710 of Title VII reads in its entirety: "For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies section [11 of the National Labor Relations Act, 29 U.S.C. § 161 (1982)] shall apply." *Id.*

[3] Title VII was originally enacted to eliminate, through the use of formal and informal remedial procedures, discrimination in employment based on race, color, religion, sex, or national origin. H.R. REP. No. 914, 88th Cong., 1st Sess. 26 (1963), *reprinted in*, 1964 U.S. CODE CONG. & AD. NEWS 2355, 2401.

[4] 42 U.S.C. § 2000e-9 (1982).

[5] *In re* EEOC, 709 F.2d at 396, 32 FEP Cases at 363 (citing H.R. REP. No. 1147, 74th Cong., 1st Sess. 25 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3076 (1949)).

[6] *In re* EEOC, 709 F.2d at 396, 32 FEP Cases at 363.

[7] *Id.*

[8] *Id.* at 399-400, 32 FEP Cases at 366-67.

[9] *Id.* at 393, 32 FEP Cases at 361.

[10] *Id.* at 392, 32 FEP Cases at 361. The facts of the case were recounted in the earlier opinion of EEOC v. Neches Butane Products Co., 704 F.2d 144, 31 FEP Cases 1099 (5th Cir. 1983).

relating to the enactment of Title VII, pre-enforcement discovery in a subpoena enforcement action was impermissible during the investigative stages of a discrimination suit absent a substantial demonstration by the employer that the Commission abused its investigative authority.[11] The decision in *In re EEOC* resolves the tension between efficiency and due process inherent in the enforcement powers granted to the EEOC in favor of efficiency, a result consistent with Title VII's goal of providing effective enforcement in employment discrimination actions.[12] The legislative due process interests of the subjects of EEOC investigations were not completely ignored by the new rule.[13] In situations where a target of an EEOC investigation can make a substantial showing that the EEOC abused its discretion, counterdiscovery will be permitted under the rule established in *In re EEOC*.[14]

*In re EEOC* concerned proceedings instituted after a finding by the EEOC that Neches Butane Products Company ranked low in the hiring of blacks, hispanics, and women.[15] The resulting investigation was impeded by the Company's refusal to comply with the Commission's request for documents.[16] The Commission therefore brought a subpoena enforcement action in the Eastern District of Texas pursuant to section 710 of Title VII.[17] To substantiate its claim of abuse by the Commission, the Company requested various documents concerning the Commission's decision to institute proceedings and sought to depose the EEOC Commissioner to whom the case had been assigned.[18] Reasoning that the Company had raised a "substantial question" concerning the Commission's good faith in bringing the charge, the district court ordered the EEOC to permit extensive discovery and ordered the Commissioner to submit to an oral deposition as a condition precedent to enforcement of the subpoena.[19] On appeal the EEOC sought a writ of mandamus[20] directing the district court to vacate its order compelling counterdiscovery, to vacate its stay order, and to proceed expeditiously to resolve the underlying subpoena enforcement action.[21]

The Fifth Circuit noted that because this case came before it on a petition for a writ of

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[11] 709 F.2d at 399-400, 32 FEP Cases at 367.

[12] *Id.* at 395-97, 32 FEP Cases at 363-64.

[13] *Id.* at 399-400, 32 FEP Cases at 366-67.

[14] *Id.* at 400, 32 FEP Cases at 367.

[15] *Neches Butane*, 704 F.2d at 145, 31 FEP Cases at 1099.

[16] *Id.* at 146, 31 FEP Cases at 1100.

[17] *Id.*

[18] *Id.*

[19] *Id.* The district court reasoned that the Commission should not be allowed to proceed with its subpoena enforcement action until the Company was able to take discovery. *Id.* at 144. The district court stated that the Company should have a chance to explore the Commission's motives in bringing the charge. *Id.*

[20] Mandamus is historically a drastic remedy reserved for "extraordinary" cases. *In re* EEOC, 709 F.2d at 394, 32 FEP Cases at 362 (citing Kerr v. United States District Court, 426 U.S. 394, 402 (1976)); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 385 (1953). Federal courts, however, have demonstrated an increasing willingness to use the writ as a one-time-only device to "settle new and important problems." Schlagenhauf v. Holder, 379 U.S. 104, 111 (1964). The District of Columbia Circuit Court of Appeals notes that "*Schlagenhauf* authorizes departure from the final judgment rule when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524 (D.C. Cir. 1975); *see generally* 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3934 (1977).

[21] *In re* EEOC, 709 F.2d at 394, 32 FEP Cases at 362.

mandamus, its review of the district court's order was limited.[22] Stating that the writ is issued only "when there is 'usurpation of judicial power' or a clear abuse of discretion,"[23] the court reasoned that the party seeking the writ has the burden of showing that it has an indisputable right to issuance of the writ.[24] The Fifth Circuit therefore concluded that the writ of mandamus should issue only if the district court's exercise of its discretion in issuing the discovery order was inconsistent with the design of section 710.[25]

After discussing the propriety of the court's review on a petition for mandamus the court turned to a discussion of the history and purpose of Title VII and section 11 of the Act to determine the standard that should govern the exercise of a district court's discretion when confronted with a counterdiscovery request in an EEOC subpoena enforcement action.[26] In examining the legislative history of Title VII, the Fifth Circuit concluded that section 710 was enacted so that the Commission would have the same investigative authority as that provided the National Labor Relations Board in section 11 of the Act.[27] The court noted that section 11 is very general and simply grants the agency the necessary subpoena power to compel the attendance of witnesses and the production of documents to effectuate the goals of the Act.[28] The court found, however, that the text of section 11 did not address the inherent tension between speed and administrative efficiency on the one hand, and due process concerns on the other.[29] According to the court, the tension between these competing goals was the central issue in the present

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[22] *Id.* at 395, 32 FEP Cases at 362.

[23] *Id.* (citing Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964)).

[24] *In re* EEOC, 709 F.2d at 395, 32 FEP Cases at 362 (citing Wills v. United States, 389 U.S. 90, 96 (1967)).

[25] *In re* EEOC, 709 F.2d at 395, 32 FEP Cases at 362-63. In stressing the limited opportunity for issuance of a writ of mandamus, the court adds one caveat by noting that the appropriateness for issuance of a writ in the instant case "is not to be construed as making mandamus appropriate in subsequent cases in which the principles . . . set forth in this opinion are applied." *Id.* at 395, 32 FEP Cases at 363 (citing United States v. Hughes, 413 F.2d 1244, 1249 (5th Cir. 1969)). The court reasoned that the purpose of exercising its supervisory and advisory functions through issuance of the writ is to meet "the compelling need to settle a new issue so that it can become only an ordinary issue." *In re* EEOC, 709 F.2d at 395, 32 FEP Cases at 363.

[26] *In re* EEOC, 709 F.2d at 395, 32 FEP Cases at 363.

[27] *In re* EEOC, 709 F.2d at 396, 32 FEP Cases at 363.

[28] *Id.*

[29] *Id.* at 396, 32 FEP Cases at 364. The defendant company argued that the liberal discovery standard in the tax summons cases should apply in the instant case. *Id.* at 397, 32 FEP Cases at 364. The Fifth Circuit rejected this suggestion for four reasons. *Id.* First, the court stated, the "discovery" in the tax cases is not actual discovery but rather an opportunity to question Internal Revenue Service (IRS) officials at a subpoena enforcement hearing. *Id.*, 32 FEP Cases at 364-65. Further, the court noted that tax investigations are initiated at the discretion of the IRS while an EEOC investigation may be started only upon a written charge under oath or affirmation thereby affording potential EEOC defendants some protection that potential IRS defendants may not always have. *Id.* at 397, 32 FEP Cases at 364. Second, according to the court, the majority of tax cases do not concern the propriety of deposing the Commissioner of Internal Revenue but rather the availability of lower-level local agents. *Id.* at 398, 32 FEP Cases at 365. The court noted that the efficiency of the EEOC would be severely reduced if its commissioners were subject to deposition in every routine subpoena enforcement proceeding. *Id.* Third, the court reasoned that delay is much more critical in an EEOC discrimination case than in the IRS cases because enforcement must be speedy. *Id.* The court, therefore, stated that delay should be tolerated in only the most unusual circumstances. *Id.* Finally, the court noted that tax summons enforcement actions were intended to be summary in nature and to provide for only limited discovery. *Id.* at 399, 32 FEP Cases at 365 (citing 1982 U.S. CODE CONG. & AD. NEWS 781, 1031).

action. Observing that the drafters of the Act were aware of the tension created by the subpoena enforcement power,[30] the court found that the legislative history of the Act seemed to have resolved the tension in favor of speed and efficiency because effective administrative action requires that enforcement proceedings be informal and fast.[31]

Nevertheless, the court was careful to point out that the choice of speed over due process is not absolute and that at some point a defendant's allegation of illegal purpose could warrant counterdiscovery prior to the enforcement of an EEOC subpoena.[32] Accordingly, the court of appeals adopted a two step procedure designed to maintain a satisfactory balance between these competing demands and stated that the two step procedure should be applied in all EEOC subpoena enforcement cases in the Fifth Circuit.[33] Under this two step procedure, the Commission is initially required to submit a petition for enforcement that meets the informal guidelines set forth by the Supreme Court in *United States v. Powell*.[34] These guidelines require that: (1) the petitioner show a legitimate purpose for the investigation; (2) the petition state that the inquiry may be relevant to the purpose; (3) the petition state that the agency does not already have the information sought; and (4) the petition provide evidence that the agency has complied with the required administrative steps.[35] After the Commission files a petition which satisfies the *Powell* criteria, the second procedural step requires the company under investigation to comply with the subpoena unless it can demonstrate that there is a significant chance that the EEOC abused its investigative authority and that counterdiscovery on that question is therefore warranted.[36]

In light of the history and purpose of section 710, the court concluded that counterdiscovery may be had only after a substantial demonstration of abuse based on meaningful evidence.[37] The Fifth Circuit had no difficulty in reaching this conclusion because the court noted that, in general, a defendant is not "entitled to engage in counterdiscovery to find grounds for resisting" a subpoena and that agency personnel should be deposed "[o]nly in the 'exceptional case.'"[38] According to the Court, the exceptional case is one where the defendant has presented "meaningful evidence" that the agency is attempting to abuse its investigative authority.[39] The court found that meaningful evidence does not require actual proof, but rather the possibility of some wrongful conduct by the Government.[40]

After discussing the two step procedure to be followed in EEOC subpoena enforcement cases in the Fifth Circuit, the court turned to the question of whether the Company in the case at issue had presented a substantial demonstration of abuse based on meaningful evidence entitling it to counterdiscovery. Upon reviewing the evidence presented,

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[30] *In re* EEOC, 709 F.2d at 396, 32 FEP Cases at 364 (citing *To Create A National Labor Board: Hearings before the* [Senate] Comm. on Education and Labor, 73d Cong., 2d Sess. 36 (1934)).

[31] *Id.*

[32] *In re* EEOC, 709 F.2d at 397, 32 FEP Cases at 364.

[33] *Id.* at 399, 32 FEP Cases at 366.

[34] 379 U.S. 48, 57-58 (1964).

[35] *In re* EEOC, 709 F.2d at 400, 32 FEP Cases at 366 (citing *Powell*, 397 U.S. at 57-58).

[36] *In re* EEOC, 709 F.2d at 400, 32 FEP Cases at 367.

[37] *Id.*

[38] *Id.* (quoting United States v. Litton Industries, Inc., 462 F.2d 14, 17 (9th Cir. 1972)).

[39] *In re* EEOC, 709 F.2d at 400, 32 FEP Cases at 367 (citing EEOC v. K-Mart Corp., 694 F.2d 1055, 1067, quoting United States v. Will, 671 F.2d 963, 968 (6th Cir. 1982)).

[40] *In re* EEOC, 709 F.2d at 400, 32 FEP Cases at 367 (citing United States v. Kis, 658 F.2d 526, 540 (7th Cir. 1981)).

the Fifth Circuit found that the district court surpassed the limits imposed upon its discretion in subpoena enforcement proceedings under Title VII and counterdiscovery should have been denied.[41] The court observed that the Company relied exclusively upon an affidavit by a person whose name remains under seal to urge that the Commissioner may have been improperly influenced by a possible vindictive or political motive.[42] This evidence, according to the court, was insufficient to discharge the Company's burden of demonstrating that the EEOC abused its authority, because evidence was not produced that implicated the Commissioner's own motive.[43] The affidavit that was submitted merely showed the motive of the informant, which is not determinative of the Commission's good faith in issuing a subpoena.[44] Since the central question was whether the Commission itself was proceeding in good faith, the court concluded that the Company failed to prove that the Commission abused its investigative authority.[45] The court stated that any "minor irregularit[y]"[46] which the affidavit raised in this case was not enough to trigger the Company's right to pre-enforcement discovery.[47] Granting pre-enforcement discovery in this case, the court reasoned, would contravene the purpose of section 710 of Title VII by transforming a summary proceeding into a lengthy discovery battle.[48] The court, therefore, concluded that absent a substantial demonstration by the Company that the Commission abused its investigative authority, pre-enforcement discovery in a subpoena enforcement action was impermissible during the investigative stages of a discrimination suit.[49]

Although *In re EEOC* represents a case of first impression in the Fifth Circuit, a

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[41] *In re* EEOC, 709 F.2d at 401, 32 FEP Cases at 368.

[42] *Id.* "The affiant states that he heard one Mrs. A. J. Albarado say that her husband did not need to proceed with his individual discrimination claim against the Company because he 'had friends in [the] League of United Latin American Citizens who could get a big-wig commissioner in Washington to make sure the company paid.'" *Id.*

[43] 709 F.2d at 401, 32 FEP Cases at 368.

[44] *Id.* (citing United States v. Cortese, 614 F.2d 914, 921 (3d Cir. 1980)).

[45] 709 F.2d at 401, 32 FEP Cases at 368. Further, the court noted that the remaining portions of the affidavit in which the affiant alleges to have received a telephone call from someone who identified himself as Commissioner Rodriguez and who asked about the instant case are similarly insufficient. *Id.* at 402, 32 FEP Cases at 368. The affiant stated that the call ended abruptly when the affiant remarked that one of the employees in question probably did not have a claim. *Id.* The court noted that "although this telephone call may have been unusual, it does not provide sufficient justification for ordering pre-subpoena enforcement discovery." *Id.* The court considered this call to constitute a "minor irregularity" which does not comport with the requisite "abuse of process" necessary to institute pre-subpoena enforcement discovery. *Id.*

[46] 709 F.2d at 402, 32 FEP Cases at 368.

[47] *Id.* The court was careful to note that it was not stating a general rule regarding when a minor irregularity becomes important enough to permit a defendant to engage in pre-enforcement discovery. *Id.*

[48] 709 F.2d at 402, 32 FEP Cases at 368.

[49] *Id.* at 402-03, 32 FEP Cases at 368-69. The dissent noted that this case did not merit the extreme remedy of mandamus because the facts of the case, according to Judge Jolly, comported with the two part *Powell* standard used by the majority. *Id.* at 403, 32 FEP Cases at 369 (Jolly, J., dissenting). Judge Jolly stated that there is sufficient evidence to support granting the Company counterdiscovery. The dissent based this conclusion on the submitted affidavit in which the charging party boasted that because of his Washington connections he could force the Company to pay on a charge for which the Company believed it had no liability and that following that boast, a Commissioner of the EEOC made a telephone call inquiring as to the merits of the charge. *Id.* The dissent found that these facts constituted "meaningful evidence" that the defendant Company became the target of an investigation because it would not settle a charge on which it did not think it was liable. *Id.*

recent Sixth Circuit decision has similarly held that a mandamus order may be appropriately issued to prevent a district court from requiring an EEOC Commissioner to submit to a deposition as a condition precedent to enforcement of an EEOC subpoena.[50] The fact that both circuits have reached the same conclusion is not surprising since neither the language of Title VII nor its legislative history requires a district court to allow discovery in a subpoena enforcement proceeding. The sole inquiry at this initial investigative stage is whether the information sought by the Commission is material and relevant. Once the Commission satisfies this initial burden, a company must comply with the subpoena unless it can demonstrate that the EEOC abused its investigative authority. This procedure makes it almost impossible for a defendant to engage in counterdiscovery. Although the burden theoretically shifts to the company to show that the investigation was conducted for an improper purpose, this procedural opportunity is likely to be ineffectual. In all likelihood, a defendant will only be able to meet this burden in the most egregious and apparent cases of abuse. This difficult procedural standard, however, is consistent with the underlying policy of Title VII. In light of the broad investigatory powers of the Commission and the purpose and history of section 710, it is reasonable to conclude that subpoena enforcement proceedings were intended to be expeditious to provide effective enforcement of Title VII actions. Allowing routine counterdiscovery at the early stages of the investigation would contravene this clear intention.

### B. **Defining Employer and Employee Under Title VII*: Armbruster v. Quinn[1]

An employee is protected by Title VII of the Civil Rights Act of 1964[2] (the Act) if his employer has at least fifteen employees.[3] Any individual seeking relief under Title VII must show that he meets this jurisdictional requirement.[4] The statute does little to define who is an employer or employee, however, and it does not provide the courts with guidelines for interpreting these terms.[5]

The legislative history of Title VII suggests that the Act should be interpreted broadly.[6] The Act has a broad remedial purpose, "to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities."[7]

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[50] EEOC v. K-Mart Corp., 694 F.2d 1055, 1060-61 (6th Cir. 1982).

* By Kimberly M. Collins, Staff Member, BOSTON COLLEGE LAW REVIEW

[1] 711 F.2d 1332, 32 FEP Cases 369 (6th Cir. 1983).

[2] 42 U.S.C. §§ 2000e to 2000e-17 (1982).

[3] 42 U.S.C. § 2000e(b) (1982). The statute provides in pertinent part: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ." *Id.*

[4] *See* Hassell v. Harmon Foods, Inc., 454 F.2d 199, 200, 4 FEP Cases 263, 264 (6th Cir. 1972) (defendant corporation did not have the then required minimum of twenty-five employees, therefore, motion to dismiss allowed); Fike v. Gold Kist, 514 F. Supp. 722, 725, 25 FEP Cases 1216, 1218 (N.D. Ala. 1981), *aff'd* 664 F.2d 295 (11th Cir. 1981).

[5] *See supra* note 3. The statute defined "employee" as "an individual employed by an employer . . . ." and excludes only those elected or appointed to public office. 42 U.S.C. § 2000e(f) (1982). *See also* Cobb v. Sun Papers, 673 F.2d 337, 28 FEP Cases 837, 839 (11th Cir. 1982).

[6] Armbruster v. Quinn, 711 F.2d 1332, 1336, 32 FEP Cases 369, 372 (6th Cir. 1983); Spirides v. Reinhardt, 613 F.2d 826, 831, 20 FEP Cases 241, 245 (D.C. Cir. 1979); Baker v. Stuart Broadcasting Co., 560 F.2d 389, 391, 15 FEP Cases 394, 395 (8th Cir. 1977).

[7] H.R. REP. No. 92-238, 92d Cong., 1st Sess. [hereinafter cited as H.R. REP. No. 92-238], *reprinted in* SENATE COMM. LABOR AND PUBLIC WELFARE 92D CONG., 2D SESS. LEGISLATIVE HISTORY OF

The limitation of statutory coverage to employees or prospective employees of companies with fifteen or more employees was included in the statute for the benefit of small, family-run businesses that were likely to hire relatives and friends.[8] Except for this sole exception, it is apparent that Congress intended broad coverage for the statute.[9]

A continuing problem in interpreting this jurisdictional limitation has been the small corporate subsidiary with fewer than fifteen employees. Potential plaintiffs attempting to satisfy this jurisdictional requirement have argued that the subsidiary and parent corporations should be treated as one employer.[10] These employees argue that the operations of the subsidiary and parent are so interrelated that the two corporations should be considered as a single employer under Title VII.[11] Many circuits have accepted this argument and have adopted the four-part test for interrelatedness formulated by the National Labor Relations Board (Board).[12] Historically, however, the Sixth Circuit has applied a stricter test. Under this test the plaintiff must demonstrate that the subsidiary was a "sham" corporation before the court would treat the parent and subsidiary as one employer.[13]

Plaintiffs have also attempted to circumvent the fifteen employee limitation in Title VII by arguing that persons who appear to be independent contractors should be treated as employees for jurisdictional purposes.[14] This approach was rejected by the Court of Appeals for the District of Columbia in a widely-followed opinion, *Spirides v. Reinhardt*.[15] The *Spirides* court and the courts that have followed it, have held that independent contractors are not employees under the Act.[16] Instead, these courts apply the common law "right to control" test to determine whether an independent contractor is an employee.[17]

During the *Survey* year, in *Armbruster v. Quinn*,[18] the Sixth Circuit again addressed the question of what should be the proper test to determine whether two corporations have such substantial identity that they should be deemed a single employer for Title VII jurisdictional purposes.[19] In its decision, the court adopted the four-part test formulated

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THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (Comm. Print 1972) [hereinafter cited as LEGISLATIVE HISTORY].

[8] 118 CONG. REC. 2409 (1972) (remarks of Sen. Fannin), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 1297. *See also* 118 CONG. REC. 2391 (1972) (remarks of Sen. Cotton), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 1283 ("In firms employing 25 persons . . . when they select an employee, it is very much like selecting a partner.").

[9] *See supra* notes 6-8 and accompanying text.

[10] *See, e.g., Hassell*, 454 F.2d 199, 199, 4 FEP Cases 263, 264 (6th Cir. 1972); Baker v. Stuart Broadcasting Co., 560 F.2d 389, 390, 15 FEP Cases 394, 395 (8th Cir. 1977).

[11] *Id.* at 390-91, 15 FEP Cases at 396.

[12] *Id. See infra* note 20 and accompanying text.

[13] Hassell v. Harmon Foods, Inc., 454 F.2d 199, 200, 4 FEP Cases 263, 264 (6th Cir. 1972). *See also Armbruster* 711 F.2d at 1335-36 & n.3, 32 FEP Cases at 372 & n.3.

[14] *See, e.g., Armbruster*, 711 F.2d at 1339, 32 FEP Cases at 375; Spirides v. Reinhardt, 613 F.2d 826, 20 FEP Cases 141 (D.C. Cir. 1979).

[15] Spirides v. Reinhardt, 613 F.2d 826, 20 FEP Cases 141 (D.C. Cir. 1979).

[16] *Armbruster*, 711 F.2d at 1341 n.7, 32 FEP Cases at 377 n.7.

[17] *Id.* The common law "right to control" test examines the extent to which an employer has the right to control the "means and manner" of the worker's performance. *Spirides*, 613 F.2d at 831 & n.26, 20 FEP Cases at 145 & n.26. An independent contractor is a person who contracts with another to do something for him but who is not subject to the right to control with respect to his physical conduct in the performance of the undertaking. *Id.*

[18] *Armbruster*, 711 F.2d 1332, 32 FEP Cases 369 (6th Cir. 1983).

[19] *Id.* at 1332-35, 32 FEP Cases at 372.

by the National Labor Relations Board to determine the interrelationship of corporations.[20] The Sixth Circuit also considered whether a manufacturer's representative may be an employee for jurisdictional purposes under Title VII.[21] The court determined that the "economic realities" of the relationship must be examined to determine whether the individual was susceptible to discriminatory practices by the principal or employer.[22] The Sixth Circuit, therefore, rejected the "right to control" test for Title VII purposes.[23] In reaching its conclusions in *Armbruster*, the Sixth Circuit joined the majority of other circuit courts in using the Board's four-part interrelation test to determine whether a subsidiary and its parent were one employer,[24] but split from the majority view of other circuits on the test to be used for determining who is an employee.[25]

The dispute in *Armbruster* arose when, in 1979 appellant Mayes and Armbruster each were hired and later fired from the position of secretary to T.J. Quinn (Quinn), then President of the now defunct Syntax Corporation (Syntax).[26] Mayes and Armbruster alleged that they were fired for their unwillingness to submit to or tolerate verbal and physical sexual harassment.[27] The former employees sued Quinn, Syntax, Pure Industries, Inc., and the Stackpole Corporation for sexual discrimination under Title VII of the 1964 Civil Rights Act.[28]

Syntax was a wholly owned subsidiary of Pure Industries, Inc.; Pure, in turn, is wholly owned by the Stackpole Corporation.[29] At all times during the twenty calendar weeks preceding the action, Syntax had less than fifteen employees, excluding manufacturer's representatives who were working for Syntax, and thus, failed to satisfy the jurisdictional requirements of Title VII.[30] If Pure was considered the employer of Mayes and Armbruster, however, then the jurisdictional requirement of fifteen employees would be satisfied.[31] Both plaintiffs and defendants presented the district court with affidavits on the issue of whether Syntax and Pure had sufficiently interrelated operations to be considered as one employer.[32]

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[20] *Id.* at 1337, 32 FEP Cases at 373-74. The four part test considers: (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Id.*

[21] *Id.* at 1335, 32 FEP Cases at 372.

[22] *Id.* at 1340, 32 FEP Cases at 376.

[23] *Id.* at 1341 n.7, 32 FEP Cases at 377 n.7. Under the traditional "right to control" test for distinguishing between employees and independent contractors an employee is an agent employed to perform services whose physical conduct in the performance of the service is subject to the right to control by the person who has hired the agent. RESTATEMENT (SECOND) OF AGENCY § 2(2) at 12 (1957).

[24] *Id.* at 1341 nn.7-8, 32 FEP Cases at 377 nn.7-8. In *Spirides v. Reinhardt*, the Court of Appeals for the District of Columbia applied the common law right to control test. 613 F.2d 826, 831, 20 FEP Cases 141, 145 (D.C. Cir. 1979). The Ninth Circuit adopted the *Spirides* test in Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 & n.5, 24 FEP Cases 859, 862 & n.5 (9th Cir. 1980). The economic realities test was rejected by the Eleventh Circuit in Cobb v. Sun Papers, Inc., 673 F.2d 337, 340-41, 28 FEP Cases 837, 840 (11th Cir. 1982).

[25] *Id.*

[26] *Armbruster*, 711 F.2d at 1334, 32 FEP Cases at 370-71.

[27] *Id.*

[28] *Id.* at 1333, 32 FEP Cases at 370. The plaintiffs also made a claim under the fourteenth amendment which was dismissed by the district court and not an issue in the appeals proceeding. *Id.* at 1334, 32 FEP Cases at 371.

[29] *Id.*

[30] *Id.* Employers with fifteen or more employees are subject to Title VII, 42 U.S.C. § 2000e(b) (1982). *See supra* note 3.

[31] *Armbruster*, 711 F.2d at 1334, 32 FEP Cases at 371.

[32] *Id.*

The district court held that Syntax and Pure were two separate corporations.[33] Applying the Sixth Circuit's standard as set forth in *Hassell v. Harmon Foods, Inc.*,[34] the district court found that Syntax was not a sham entity, and consequently refused to consolidate Syntax with Pure to satisfy the fifteen-employee requirement.[35] In addition, the district court found that the manufacturer's representatives were independent contractors, not employees, and thus not covered by the Act.[36] The lower court thus concluded that the minimal jurisdictional requirement of fifteen employees had not been met, and dismissed plaintiffs' claims for lack of subject matter jurisdiction.[37] The plaintiffs appealed the dismissal of this action to the Sixth Circuit.[38]

The Sixth Circuit began its analysis of the jurisdictional question with a commentary on the standard of review for jurisdiction issues.[39] The lower court's jurisdictional ruling was based, the court noted, on briefs supported by affidavits and other discovery materials.[40] Although a plaintiff in any action must ultimately prove jurisdiction by a preponderance of the evidence, the court stated that the plaintiff need only make a prima facie case of jurisdiction to avoid a motion to dismiss.[41] When confronted by a motion to dismiss, therefore, the court is required to review the record to ascertain whether the record raises genuine issues as to the existence of jurisdiction.[42]

Addressing the jurisdictional issues as they arose, the court found two issues were presented: first, whether Syntax and Pure had such "substantial identity" that they should be deemed a single employer for jurisdictional purposes; and second, whether Syntax's manufacturer's representatives fell within the meaning of the term "employee" for Title VII jurisdiction.[43] The court began its discussion of the single identity issue with a review and explanation of its prior decision in *Hassell v. Harmon Foods, Inc.*[44] In *Hassell*, the court observed that the parent was not liable for the subsidiary's debts and that the subsidiary was independent for tax purposes.[45] Based on these facts, the *Hassell* court concluded that the relationship between the parent and subsidiary in that case was a "normal" one, and that the subsidiary could not be considered a "sham."[46] Consequently in *Hassell* the parent and subsidiary were considered legally separate corporations for Title VII jurisdiction.[47] The *Armbruster* court stated that the *Hassell* test was not a rigid test, however, and that the instant, more complex, case provided an opportunity to refine the *Hassell* test.[48]

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[33] *Id.*

[34] 454 F.2d 199, 4 FEP Cases 263 (6th Cir. 1972).

[35] *Id.* The district court opinion is reported at 498 F. Supp. 858 (E.D. Mich. 1980).

[36] *Armbruster*, 711 F.2d at 1334, 32 FEP Cases at 371.

[37] *Id.* The district court also dismissed plaintiffs' fourteenth amendment claim since no state action was alleged. *Id.*

[38] *Id.* at 1333, 32 FEP Cases at 370. Because the plaintiffs did not appeal the dismissal of the fourteenth amendment claim this dismissal was affirmed by the Court of Appeals. *Id.* at 1334, 32 FEP Cases at 371.

[39] *Id.* at 1335, 32 FEP Cases at 371-72.

[40] *Id.*, 32 FEP Cases at 371.

[41] *Id.*

[42] *Id.*, 32 FEP Cases at 371-72.

[43] *Id.*

[44] 454 F.2d 199, 4 FEP Cases 263 (6th Cir. 1972).

[45] *Armbruster*, 711 F.2d at 1335-36, 32 FEP Cases at 372.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1336, 32 FEP Cases at 372.

Looking to the purpose and legislative history of Title VII for aid in assessing the propriety of treating parent and subsidiary corporations as a single employer under the Act,[49] the *Armbruster* court noted that Title VII is a remedial statute designed to eliminate employment discrimination.[50] To effectuate this purpose, according to the court, Title VII should be given a liberal construction.[51] Accordingly, the court determined that the employer and employee provisions of the Act should be interpreted broadly.[52] The court also noted that the framers of Title VII had used the National Labor Relations Act (NLRA) as a model.[53] According to the court, the similarity in language of the two Acts suggests that the broad construction of the NLRA should provide guidance in determining whether two companies should be deemed to have substantial identity and thus be treated as a single employer.[54] A second source favoring a broad interpretation, the court found, was the 1972 Amendment to Title VII.[55] The 1972 Amendment broadened the coverage of Title VII by reducing the statutory minimum of employees from twenty-five to fifteen.[56] This change, the court explained, indicates a congressional desire to have the entire Act construed broadly.[57]

The court continued with a discussion of the proper elements of a test for interrelatedness of corporations.[58] According to the court, the most important requirement is an indication of interrelationship between the two corporations which justifies the employee's belief that the affiliated corporation is jointly responsible for the acts of his or her immediate employer.[59] As an aid to testing the degree of interrelationship, the Sixth Circuit adopted the four-part test formulated by the Board.[60] That test assesses the following four areas: (1) interrelated operations, (2) management, (3) central control of labor relations, and (4) common ownership.[61] According to the court the presence or absence of any one factor is not conclusive; it is not necessary that all four factors be present before the Title VII single-employer doctrine is applicable.[62] Adopting a "facts and circumstances" approach that would consider the factors found relevant in the NLRA context, the court stated that the correct standard was whether the parent corporation exercises a degree of control which exceeds that normally exercised by a parent corporation that is distinct from a subsidiary corporation.[63]

Having described the degree of control necessary for single-employer status, the court analyzed the facts of the case in the light most favorable to the plaintiffs.[64] The court

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* The statutory definition of employer is broad and general. "An 'employer' is 'a *person* [or any agent of such person] engaged in any industry affecting commerce who has fifteen or more employees . . .' 42 U.S.C. § 2000e(b). A person 'includes one or more industries . . . [or] corporations.' 42 U.S.C. § 2000e(a)." *Id.* (emphasis and brackets in original).

[53] 711 F.2d at 1336, 32 FEP Cases at 373.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1336-37, 32 FEP Cases at 373.

[57] *Id.* at 1337, 32 FEP Cases at 373.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1337, 32 FEP Cases at 373-74.

[62] *Id.* at 1337-38, 32 FEP Cases at 374.

[63] *Id.* at 1338, 32 FEP Cases at 374.

[64] *Id.* Because this case was an appeal from a motion for dismissal, the plaintiffs only had to make a prima facie case for jurisdiction. *See supra* notes 21-22 and accompanying text.

found there was common ownership of the corporations in that Pure is the sole owner of its subsidiary, Syntax.[65] The court also found evidence of a close interrelation of operations between Pure and Syntax: the President of Pure was also a director and officer of Syntax, and authorized all purchases by Syntax that exceeded two hundred dollars.[66] In addition, Pure handled Syntax's accounts receivable and payroll, and assisted with sales shipments and other administrative matters.[67] Evidence of centralized control of labor also existed, the court stated.[68] Not only were several employees transferred from Pure to Syntax, but the court found that Pure's president had approved the hire of plaintiff Armbruster as a secretary.[69] Finally, the court found that while there was evidence of common management it was not as definitive as for the other factors. Nevertheless, the court determined that the plaintiffs had met their burden of establishing a prima facie case.[70] The court remanded this issue with instructions that the lower court analyze both the prima facie showing and whatever rebuttal evidence the defendants could advance and determine the merits of this claim.[71]

The court began its discussion of the second issue — whether a manufacturer's representative may be considered an employee — by noting that the determination of employee status under Title VII is a question of federal law.[72] The court found that Congress intended Title VII to cover the full range of workers who may be subject to the harms the Act was designed to eliminate.[73] Absent a provision specifically excluding manufacturer's representatives, the court was unwilling to find that such a label necessarily denied those individuals Title VII protection.[74] Instead, the court explained, the proper test is whether the economic realities underlying the relationship between the manufacturer's representative and principal were such that the individual would be susceptible to discriminatory practices forbidden under Title VII.[75] The court also analogized to the broad interpretation of "employee" under the Fair Labor Standards Act and the NLRA,[76] and adopted the method of interpretation employed by the United States Supreme Court in *NLRB v. Hearst Publications, Inc.*[77] In *Hearst Publications* the Court held that the term "employee" in a statute is not a word of art, but rather is to be interpreted by reference to the purpose of that statute.[78] Accordingly, the *Armbruster*

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[65] 711 F.2d at 1338, 32 FEP Cases at 374.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 1338-39, 32 FEP Cases at 374-75.

[70] *Id.* at 1339, 32 FEP Cases at 375. According to the court, the fact that Pure's president was also president of Syntax for the first seven years that Syntax was owned by Pure and that thereafter he remained as Syntax's chairman of the Board of Directors suggested common management. There was also testimony that Pure's president "professed the unity" between Pure and Syntax. *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1340, 32 FEP Cases at 376. The defendants-appellees alleged that the manufacturer's representatives were independent contractors, noting that the representatives did not work out of the corporate office, sold other product lines, and were paid only commissions. *Id.* at 1339, 32 FEP Cases at 375. Their work, Syntax alleged, was not under its control. *Id.*

[75] *Id.* at 1340, 32 FEP Cases at 376.

[76] *Id.* Under the Fair Labor Standards Act the term "employee" was construed to include former employees. *Id.* (discussing Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977)).

[77] *Armbruster*, 711 F.2d at 1340, 32 FEP Cases at 376.

[78] NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124, 14 L.R.R.M. 614, 619 (1944).

court determined that the end purpose of Title VII is to eliminate employment discrimination and therefore, "employee" is to be given a broad interpretation for Title VII purposes.[79]

The court recognized that some circuits had limited the term "employee" in Title VII by excluding independent contractors.[80] Those circuits based such a limitation on the amendments to the NLRA which exclude independent contractors from coverage under that Act.[81] The *Armbruster* court refused to accept this limitation.[82] Rather, the court explained that the NLRA had been amended to exclude independent contractors before the enactment of Title VII.[83] The court stated that although Congress used the NLRA as a model for Title VII, it did not incorporate the exclusionary provision of the NLRA into Title VII.[84] Therefore, the court stated, an ambiguity in this matter should be resolved in favor of broad coverage.[85] The court remanded the issue and instructed the lower court to determine whether the manufacturer's representatives were susceptible to the unlawful practices Title VII was designed to remedy.[86] If so, the court explained, they must be included as employees for the purposes of the jurisdiction requirement.[87]

In a concurring opinion, Judge Silver agreed with the majority's resolution of the single-employer issue, but dissented from the majority's discussion of the manufacturer's representatives.[88] Judge Silver stated that Congress had not defined employee in Title VII, nor did the legislative history of the Act specifically suggest a broad interpretation of that term.[89] Consequently, Judge Silver argued, when Congress is silent courts should fall back on the common law definition of "employee," and leave it up to Congress to correct the courts if necessary.[90] The common law definition of employee, Judge Silver commented, excludes independent contractors.[91] Because the district court found the manufacturer's representatives to be independent contractors, the district court's conclusion on this matter should not be disturbed.[92]

The decision of the Sixth Circuit in *Armbruster* brings that circuit's law into harmony with the decisions of several other circuits that have given a broad construction to the term "employer" for Title VII purposes.[93] The earlier decision of the Sixth Circuit, *Hassell v. Harmon Foods*,[94] had been construed by the lower courts as allowing two corporations to be considered as a single employer for Title VII jurisdictional purposes only upon a showing that the subsidiary relationship was a "sham," or that the parent corporation was

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[79] 711 F.2d at 1340, 32 FEP Cases at 376 (referring to 42 U.S.C. §§ 2000e-2 and 2000e-3 which outline unlawful employment practices).

[80] *Id.* at 1341 & nn.7-8, 32 FEP Cases at 376-7 & nn.7-8.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 1341, 32 FEP Cases at 376-77.

[85] *Id.* at 1341, 32 FEP Cases at 377.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1342-43, 32 FEP Cases at 377-78 (Silver, J., dissenting in part).

[89] *Id.* at 1343, 32 FEP Cases at 378 (Silver, J., dissenting in part).

[90] *Id.*

[91] *Id.* at 1342-43, 32 FEP Cases at 378 (Silver, J., dissenting in part).

[92] *Id.*

[93] *See Armbruster*, 711 F.2d at 1337, 32 FEP Cases at 373. *See, e.g.*, Quijano v. University Credit Union, 617 F.2d 129, 22 FEP Cases 1307 (5th Cir. 1980).

[94] 454 F.2d 199, 4 FEP Cases 263 (6th Cir. 1972).

liable for the debts of the subsidiary.[95] The *Armbruster* decision recognizes that a more liberal construction of the term "employer" is appropriate under Title VII.[96]

There is ample support for the position that Congress intended broad coverage under the Act.[97] A primary thrust of the 1972 Amendments was expansion of coverage by both decreasing the requisite number of employees from twenty-five to fifteen and by eliminating previous exemptions for certain classes of employees.[98] Fifteen was a compromise figure; the original proposal was for a minimum of eight employees, but fifteen was thought to protect the small businessman, particularly a family-owned business.[99] A company that becomes a subsidiary to a larger corporation which assumes some control over the subsidiary's business operations is thus no longer part of the group Congress sought to shield from Title VII liability.[100] The Sixth Circuit's decision on the single employer issue in *Armbruster*, then, is in accordance with Title VII policy and brings that circuit into harmony with those that already permitted this liberal construction of "employer."

In contrast, the decision of the *Armbruster* court on the issue of whether a manufacturer's representative constitutes an employee presents a conflict with other circuits.[101] Independent contractors, the *Armbruster* court found, may be covered employees under Title VII where the economic realities of the relationship between these individuals and the principal caused the individuals to be susceptible to employment discrimination.[102] This interpretation is in conflict with that of other circuits that have adopted the common law "right to control" test which would exclude independent contractors from coverage under Title VII.[103] The *Armbruster* court relied heavily on *NLRB v. Hearst Publications, Inc.*[104] in formulating its minority view of the term employee.[105] In *Hearst Publications*, the United States Supreme Court, construing the term "employee" under the NLRA found nothing in the statute or its history to indicate that Congress intended its scope to be limited by local or state concepts.[106] The term "employee," under the federal law of the NLRA, was held by the *Hearst* Court to include independent contractors, as this interpretation would promote the purpose of the statute.[107] Employing the same analysis, the

[95] *See, e.g.*, Watson v. Gulf and Western Indust., 650 F.2d 990, 993, 26 FEP Cases 1180, 1182 (9th Cir. 1981); Mas Marques v. Digital Equipment Corp., 637 F.2d 24, 27-28, 24 FEP Cases 1286, 1288 (1st Cir. 1980).

[96] *Armbruster*, 711 F.2d at 1336, 32 FEP Cases at 372-73.

[97] *See, e.g., supra* notes 7-9 and accompanying text.

[98] The original proposal was to reduce the employee requirement to eight. That proposal, it was estimated, would have added 6.5 million employees to the coverage of the Act. 118 CONG. REC. (1972) (remarks of Sen. Fannin), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 1297. The 1972 Amendments included state and local government and federal agencies as employers. 42 U.S.C. § 2000e(b) (1982). *See* H.R. REP. No. 92-238, *supra* note 7, at 61.

[99] *Armbruster*, 711 F.2d at 1337 n.4, 32 FEP Cases at 373 n.4.

[100] Senator Stennis voiced the concern that small businesses would not have the resources to meet the obligations of Title VII. 118 CONG. REC. (1972) (remarks of Sen. Stennis), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 1274.

[101] *See Armbruster*, 711 F.2d at 1337, 32 FEP Cases at 373.

[102] *See supra* note 75 and accompanying text.

[103] *See supra* note 17 and accompanying text.

[104] 332 U.S. 11 (1944).

[105] *Armbruster*, 711 F.2d at 1340-41, 32 FEP Cases at 376.

[106] *Hearst Publications, Inc.*, 332 U.S. 111, 123, 14 L.R.R.M. 614, 619 (1944). The court also noted that the imprecision of the common law "right to control" test could lead to an undesirable inconsistency of decisions. *Id.* at 121-23.

[107] *Id.* at 124-25. The NLRA has since been amended to exclude independent contractors from coverage. *See* Section 2(3) of the NLRA, 29 U.S.C. § 152 (1982).

*Armbruster* court found that the policy of Title VII, to eliminate employment discrimination on a national basis, required the term "employee" to be construed very broadly.[108]

Other circuits considering this issue have reached the opposite result.[109] The silence of Congress on the meaning of this term has encouraged courts to construe the term "employee" in accordance with common law, agency principles.[110] These courts have found that "employee" excludes independent contractors.[111] The narrow construction given this term contrasts with the liberal interpretation generally given Title VII. A possible explanation for this difference is that the courts have carried over the amendment to the NLRA excluding independent contractors from the definition of employee to Title VII.[112]

This prevailing, narrower interpretation of "employee" conflicts with the broad interpretation given the statute generally, and in particular with the broad interpretation given the term "employer."[113] By contrast, the Sixth Circuit's decision is in accord with the precedent in *Hearst Publications* for broadly interpreting the term "employee," and recognizes that Congress was or should have been aware of the broad construction "employee" would be given.[114] The *Armbruster* decision has expanded the jurisdictional coverage of Title VII. If this circuit's approach is followed employees and independent contractors previously excluded from Title VII protection will be included within its scope. This result is consistent with the Title VII purpose of eliminating employment discrimination in the United States.

### C. **Standard of Causation in Actions Brought Under Title VII*: Lewis v. University of Pittsburgh[1]

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of race, color, religion, national origin, or sex.[2] The United States Supreme Court has traditionally afforded Title VII a liberal interpretation.[3] In 1973, in *McDonnell Douglas*

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[108] *See supra* notes 80-83 and accompanying text.

[109] *See supra* notes 90-91 and accompanying text.

[110] *See, e.g.*, Cobb v. Sun Papers, Inc., 673 F.2d 337, 340-41, 28 FEP Cases 838, 839-41 (11th Cir. 1982); *see supra* note 23.

[111] *See supra* notes 14-17 and accompanying text.

[112] *Armbruster*, 711 F.2d at 1341, 32 FEP Cases at 376-77.

[113] *See supra* notes 6-8, 51-56 and accompanying text.

[114] 711 F.2d at 1340, 32 FEP Cases at 376-77.

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* By Teresita Rodriguez, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 725 F.2d 910, 33 FEP Cases 1091 (3d Cir. 1983).

[2] 42 U.S.C. § 2000e-2 (1982). The pertinent part of the Act reads as follows:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

*Id.*

[3] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). In this case the Court wrote:

> The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

*Corp. v. Green*,[4] the United States Supreme Court set forth the basic allocation of burden and order of proof required in a private, nonclass action complaint under Title VII charging employment discrimination.[5] In *McDonnell Douglas*, the Court stated that the Title VII plaintiff has the initial burden of making a prima facie case of employment discrimination.[6] A plaintiff establishes a prima facie case of discrimination under *McDonnell Douglas* by showing that he belongs to a minority group and that he applied and was qualified for a job the employer was trying to fill.[7] Further, the plaintiff must show that although qualified, he was rejected and that thereafter the employer continued to seek applicants with his qualifications.[8]

If the plaintiff succeeds in establishing a prima facie case, the burden of proof shifts to the defendant to articulate a legitimate nondiscriminatory reason for its actions.[9] If the employer articulates a legitimate, nondiscriminatory reason for the challenged decision, *McDonnell Douglas* provides that the burden of proof then returns to the plaintiff to demonstrate that the reason given by the employer for the challenged decision was not a true reason, but was a pretext for discrimination.[10]

The courts are not in agreement as to the appropriate standard of causation to be applied under the third tier of the *McDonnell Douglas* test to establish a violation of Title VII. For example, in *McDonald v. Santa Fe Trial Transportation Co.*,[11] the United States Supreme Court adopted a requirement of "but for" causation to establish a violation.[12] In that case, the Court stated in a footnote that to prove pretext under the third step of the *McDonnell Douglas* analysis, the Title VII plaintiff must show that the challenged decision would not have occurred "but for" the unlawful factor.[13] The Court did not explain why

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*Id.* at 801, 5 FEP Cases at 968. *See* County of Washington v. Gunther, 452 U.S. 161, 178, 25 FEP Cases 1521, 1527 (1981). "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. . . . We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *Id. See also* Griggs v. Duke Power Co., 401 U.S. 424, 431, 3 FEP Cases 175, 178 (1971) (holding that the Act proscribes not only intentional discrimination, but also facially neutral practices which have discriminatory effect).

[4] 411 U.S. 792, 5 FEP Cases 965 (1973). In that case, a black laid-off employee contended that he was denied re-employment because of his involvement in the civil rights movement and because of his race and brought suit under Title VII. *Id.* at 796, 5 FEP Cases at 966-67.

[5] *Id.* at 802-05, 5 FEP Cases at 969-70.

[6] *Id.* at 802, 5 FEP Cases at 969.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 804, 5 FEP Cases at 970. The Court formulated the pretext stage in an attempt to insure that plaintiffs have a "full and fair opportunity" to make the showing of causation necessary to establish liability. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255-56, 25 FEP Cases 113, 116 (1981). The Supreme Court has adopted a different approach to the burdens of proof allocation problems in constitutional discrimination cases. *See, e.g.*, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270 n.21 (1977); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[11] 427 U.S. 273, 12 FEP Cases 1577 (1976).

[12] *Id.* at 282 n.10, 12 FEP at 1580-81 n.10. In that case, two white employees, fired for stealing, alleged they were victims of invidious racial discrimination because a black employee who had been similarly charged with stealing was retained by the company. *Id.* at 276, 12 FEP Cases at 1578. The Supreme Court held that Title VII prohibits racial discrimination by employers and unions against white persons upon the same standards as it prohibits racial discrimination against nonwhites. *Id.* at 280, 12 FEP Cases at 1580.

[13] *Id.* at 282 n.10, 12 FEP Cases at 1580-81 n.10.

"but for" causation was the appropriate standard in a Title VII claim charging employment discrimination, nor did the Court explain how that standard should operate in practice.[14] The First Circuit Court of Appeals has adopted the Supreme Court's "but for" causation standard in determining Title VII liability.[15] At least two circuits, however, have construed *McDonald* as permitting adoption of a different standard for proof of pretext. For example, the Fifth Circuit has adopted a test that would invalidate personnel action based in "substantial part" on a discriminatory ground.[16] Under that standard, a Title VII plaintiff must prove that an unlawful criterion was a significant factor in the employer's decision.[17] In a similar vein, the Eighth Circuit has adopted a test that prohibits personnel action where an impermissible criterion was a "motivating factor" in that action.[18]

During the *Survey* year, the United States Court of Appeals for the Third Circuit, in *Lewis v. University of Pittsburgh*,[19] addressed the issue of the appropriate standard of causation to be used in a Title VII action. Concluding that *McDonald* controlled its adoption of a standard of causation,[20] the *Lewis* court held that Title VII requires a showing of "but for" causation in an employment discrimination suit.[21] Based on the "but for" standard, the court in *Lewis* affirmed the lower court's decision that racial discrimination claims were properly dismissed where a black candidate for promotion demonstrated that she was better qualified than the white employee chosen over her, but did not show that she would have been promoted but for unlawful discrimination.[22]

The plaintiff in *Lewis*, Ida Mary Lewis, had been an employee at the bookstore of the University of Pittsburgh (University) since 1965.[23] In 1976, an opening for the position of

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[14] *Id.*

[15] Fisher v. Flynn, 598 F.2d 663, 665, 19 FEP Cases 932, 933 (1st Cir. 1979) (plaintiff must satisfy but for causation in impermissibly motivated termination cases); Goldman v. Sears, Roebuck & Co., 607 F.2d 1014, 1019, 21 FEP Cases 96, 99 (1st Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (no indication that but for discriminatory action there would have been an opening); Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722, 20 FEP Cases 1679, 1680 (1st Cir. 1977) (Title VII plaintiff must show that but for impermissible factors she would have been re-employed).

[16] Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950, 956, 25 FEP Cases 947, 952 (5th Cir. 1981) (ultimate issue is whether racial considerations were significant factors in the challenged decision); Whiting v. Jackson State University, 616 F.2d 116, 121, 22 FEP Cases 1296, 1298 (5th Cir. 1980) (forbidden taint must be a significant factor in the challenged decision). Several district courts have applied a significant or substantial factor standard. *See* Williams v. Boorstin, 451 F. Supp.1117, 1123, 20 FEP Cases 1514, 1519 (D.D.C. 1978) (employer motivated in substantial part by hostile reaction to terminated employee's leadership abilities); Gerstle v. Continental Airlines, Inc., 358 F. Supp. 545, 553, 5 FEP Cases 976, 981 (D. Colo. 1973) (violating company rule not a substantial factor for challenged decision).

[17] *See* Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950, 956, 25 FEP Cases 947, 952 (5th Cir. 1981); Whiting v. Jackson State University, 616 F.2d 116, 121, 22 FEP Cases 1296, 1298 (5th Cir. 1980).

[18] Marshall v. Kirkland, 602 F.2d 1282, 1289, 20 FEP Cases 1437, 1442 (8th Cir. 1979) (invidious discriminatory purpose was motivating factor); Satz v. ITT Financial Corp., 619 F.2d 738, 746, 22 FEP Cases 929, 935 (8th Cir. 1980) (whether prohibited criterion was a factor in the challenged decision).

[19] 725 F.2d 910, 33 FEP Cases 1091 (3d Cir. 1983).

[20] *Id.* at 915, 33 FEP Cases at 1095.

[21] *Id.*

[22] *Id.* at 920, 33 FEP Cases at 1098.

[23] *Id.* at 912, 33 FEP Cases at 1092. In 1967, Lewis was promoted from clerk to the position of buyer in the trade book department. *Id.* In 1975, however, the University eliminated one of the buyer positions in the trade book department in a budgetary move, and as a result Lewis returned to her position as clerk. *Id.*

assistant buyer in the trade book department became available and Lewis applied for the position.[24] The position went to Jean Aiello, a white woman who had been employed with the University bookstore since 1972.[25] Lewis brought suit in United States District Court for the Western District of Pennsylvania against the University and its bookstore under section 706 of Title VII of the 1964 Civil Rights Act,[26] and under Title 42 of the United States Code, sections 1981[27] and 1983,[28] contending that she was denied a promotion on the basis of her race.[29] Lewis claimed that she was better qualified for the position of assistant buyer than Aiello.[30] The University contended that Lewis was not offered the position because of her poor employment record as a former assistant buyer in the trade book department.[31] A jury, which heard Lewis' claims under sections 1981 and 1983,[32] found that she had not been denied the promotion because of her race.[33] The Title VII claim was decided in a bench trial before the district court judge.[34] The judge found that

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[24] *Id.*

[25] *Id.*

[26] 42 U.S.C. § 2000e-5 (1982).

[27] 42 U.S.C. § 1981 (1982). That section provides in full:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind, and to no other.

*Id.*

[28] 42 U.S.C. § 1983 (1982). That section provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

*Id.*

[29] Lewis v. University of Pittsburgh, 725 F.2d 910, 912, 33 FEP Cases 1091, 1092 (3d Cir. 1983).

[30] *Id.* According to the district court findings, Lewis graduated from Carnegie Institute of Technology in 1947 with a bachelor's degree in history and english. *Id.* In 1950, she received a master's degree in history from the University of Pittsburgh. *Id.* Lewis received a master's degree in Library Science in 1961 from Carnegie. *Id.* Lewis had started working toward a Ph.D. degree in history in 1964, but had to abandon her studies because of financial and personal reasons. *Id.*, 33 FEP Cases at 1092-93. In contrast, Aiello obtained a high school degree in 1970. *Id.*, 33 FEP Cases at 1093. After graduating from high school, she attended the University of Pittsburgh for two years until she had to withdraw for financial reasons. *Id.* Lewis had previous experience as a buyer, while Aiello had only worked as a sales clerk in the bookstore. *Id.*

[31] *Id.*

[32] When Title VII employment discrimination and section 1981 civil rights claims are presented together, a jury trial is available on the legal claims stated under section 1981. Johnson v. Wolff's Clothiers, Inc., 663 F.2d 800, 804, 27 FEP Cases 493, 496 (8th Cir. 1981). *See also* Williams v. Owens-Illinois, Inc., 665 F.2d 918, 928, 27 FEP Cases 1273, 1280 (9th Cir. 1982); Bibbs v. Jim Lynch Cadillac, Inc., 653 F.2d 316, 319, 26 FEP Cases 1223, 1224 (8th Cir. 1981).

An individual bringing an action under section 1983 may also have a right to a jury trial. *See, e.g.*, Van Ermen v. Schmidt, 374 F. Supp. 1070, 1075 (W.D. Wis. 1974); Burt v. Board of Trustees, 521 F.2d 1201, 1206, 13 FEP Cases 1740, 1743 (4th Cir. 1975).

[33] Lewis v. University of Pittsburgh, 725 F.2d 910, 914, 33 FEP Cases 1091, 1094 (3d Cir. 1983).

[34] There is no right to a jury trial on a Title VII claim of race discrimination in employment. Daniels v. Lord & Taylor, 542 F. Supp. 68, 69, 31 FEP Cases 59, 59 (N.D. Ill. 1982), *See also* Ellis v.

Lewis' poor employment record, and not her race, was the reason she had not been offered the promotion.[35] On appeal, Lewis contended that the trial judge had erred in instructing the jury regarding the level of causation required for her to succeed on her claims under sections 1981 and 1983 and that the judge had decided the Title VII claim under the same erroneous standard.[36] The Third Circuit Court of Appeals ruled that Title VII and sections 1981 and 1983 all require a showing of "but for" causation in an employment discrimination suit.[37] The court affirmed both the jury and the district judge's findings according to this standard.[38]

In addressing the causation question, the court of appeals stated that in *McDonald* the Supreme Court had conclusively adopted a requirement of "but for" causation to establish a Title VII violation.[39] According to the court, no decision from either the Supreme Court or any other court suggested "any deviation from the use of the 'but for' test of causation."[40] Lewis, on the other hand, relied on the Supreme Court decision of *Mt. Healthy City Board of Education v. Doyle*[41] to assert that in establishing employment discrimination she only had to prove that race was a "substantial" or "motivating" factor in the University's decision not to offer her the promotion.[42] The court rejected the plaintiff's argument and found that *Mt. Healthy* "did not deviate from the requirement of 'but for' causation; rather, its only effect was to allocate and specify burdens of proof."[43]

In addition, the court dismissed Lewis' reliance on several circuit and district court decisions[44] as support for her position that she only had to prove that race was a

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Phillippine Airlines, 443 F. Supp. 251, 253, 17 FEP Cases 67, 68 (N.D. Cal. 1977); Schofield v. Stetson, 459 F. Supp. 998, 999, 19 FEP Cases 947, 948 (M.D. Ga. 1978).

[35] Lewis v. University of Pittsburgh, 725 F.2d 910, 914, 33 FEP Cases 1091, 1094 (3d Cir. 1983).

[36] *Id.*

[37] *Id.* The standards to be applied in evaluating a claim of racial employment discrimination brought under section 1981 are the same as those applied in actions brought pursuant to Title VII. *See, e.g.*, Wilson v. Legal Assistance of North Dakota, 669 F.2d 562, 563-64, 27 FEP Cases 1567, 1568 (8th Cir. 1982); Johnson v. Alexander, 572 F.2d 1219, 1223 n.3, 16 FEP Cases 894, 897 n.3 (8th Cir. 1978); Patterson v. American Tobacco Co., 535 F.2d 257, 270, 12 FEP Cases 314, 323 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976); Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 1316, 8 FEP Cases 577, 582 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). The same standards apply to claims brought under section 1983 when the 1983 action provides a parallel remedy for the transgression of rights conferred by Title VII. *See* Whiting v. Jackson State Univ., 535 F.2d 722, 729, 13 FEP Cases 1296, 1298 (5th Cir. 1980); Carrion v. Yeshiva Univ., 535 F.2d 722, 729, 13 FEP Cases 1521, 1527 (2d Cir. 1976).

[38] Lewis v. University of Pittsburgh, 725 F.2d 910, 912, 33 FEP Cases 1091, 1092 (3d Cir. 1983).

[39] *Id.* at 915, 33 FEP Cases at 1095.

[40] *Id.*

[41] 429 U.S. 274 (1977). In that case, an untenured teacher, who on a radio station show criticized a policy of his school, claimed that the school's failure to renew his contract was based on the radio station incident and thus was retaliation for conduct protected under the first and fourteenth amendments. *Id.* at 283.

[42] Lewis v. University of Pittsburgh, 725 F.2d 910, 915-16, 33 FEP Cases 1091, 1095 (3d Cir. 1983). In *Mt. Healthy*, the Supreme Court formulated a test of causation which placed the initial burden on the plaintiff in a constitutional discrimination case to show that his constitutionally protected conduct was a substantial or motivating factor in the challenged decision. 429 U.S. 274, 286 (1977). If the plaintiff met this burden, the burden would then shift to the employer who would have to prove that it would have reached the same decision even in the absence of the protected conduct. *Id.* at 287. *See also supra* note 10.

[43] *Lewis*, 725 F.2d at 916, 33 FEP Cases at 1095.

[44] Whiting v. Jackson State Univ., 616 F.2d 116, 22 FEP Cases 1296 (5th Cir. 1980); Niederhuber

"substantial" or "motivating" factor in the University's decision not to promote her.[45] The court in *Lewis* did not interpret these cases as departing from the "but for" causation standard. Rather, the court found that the effect of the "significant factor" standard was equivalent to the effect of the "but for" test adopted by the Supreme Court.[46] Stating that the "but for" standard was "more analytically measurable"[47] and that this standard would be easier for a jury to apply, the Third Circuit rejected the "significant factor" standard and adopted the "but for" standard.[48]

After deciding that the "but for" standard was the appropriate standard of causation in a Title VII claim, the court in *Lewis* turned its attention to the challenged jury instructions. The issue before the court was whether the district court judge had improperly instructed the jury regarding the level of causation required for Lewis to succeed on her claim of employment discrimination under sections 1981 and 1983.[49] Lewis claimed that by requiring race to be the "determinative factor" in its instructions to the jury, the district court had committed an error.[50] Instead, Lewis asserted that the district court judge should have instructed the jury that race needed to be only a "substantial" or "motivating" factor.[51] The court of appeals rejected this argument.[52] Although the district court judge did refer to race as a "determinative factor" in his charge to the jury, the Third Circuit stated that the judge had emphasized that the jury must decide whether the plaintiff would have been promoted "but for" her race.[53] The court of appeals noted that by framing the causation element in terms of "but for," the district court judge had been consistent with the Supreme Court requirement set forth in *McDonald*.[54] Further, the

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v. Camden County Vocational & Technical School Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980), *aff'd*, 671 F.2d 496 (3d Cir. 1980).

[45] *Lewis*, 725 F.2d at 916, 33 FEP Cases at 1096.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 916-17, 33 FEP Cases at 1096-97.

[50] *Id.* at 917, 33 FEP Cases at 1096. Part of the instruction to the jury was as follows:

> The defendants intended to or purposefully discriminated against plaintiff only if her race was the determinative factor in their failure to promote the plaintiff. *This means that the defendants refused to promote the plaintiff because she was black, and that but for the fact that she was black, the plaintiff would have been promoted.*
>
> If the defendants failed to promote the plaintiff for any other reason than her race, then you cannot find that the defendants intentionally and purposefully discriminated against the defendant [sic] because of her race.
>
> The consideration of race need not be the sole basis for the decision not to award the position to plaintiff, but it must be the determinative factor in the decision. If you find that Defendants did not intentionally and purposefully discriminate against the plaintiff because of her race, by failing to promote her, then you must find for the defendant.
>
> In summary, you must find for the plaintiff if you find that the plaintiff has proved by a preponderance of the evidence that, one, she was better qualified for the position of assistant buyer in the trade book department than Miss Aiello, and, two, that the determinative factor of the defendant's decision to deny Miss Lewis the promotion was her race. In other words, *but for the fact that Miss Lewis is black, she would have gotten the promotion*. . . .

*Id.*, 33 FEP Cases at 1096-97 (emphasis in original).

[51] *Id.* at 917, 33 FEP Cases at 1096.

[52] *Id.* at 920, 33 FEP Cases at 1098.

[53] *Id.* at 917, 33 FEP Cases at 1096.

[54] *Id.*

court found that in the jury instruction the term "determinative factor" was always combined with a description of the "but for" test.[55] Reasoning that the jury instructions were consistent with other cases approving the combined use of the "determinative factor" and the "but for" test in a jury instruction measuring the degree of causation,[56] the court concluded that the district court judge had properly instructed the jury on the correct test to be employed in determining employment discrimination under sections 1981 and 1983.[57]

The dissent in *Lewis* argued that the majority had erred in holding that the plaintiff had the burden of showing that "but for" her race the University would have promoted her.[58] According to the dissent, the Supreme Court has not yet addressed the degree of causation required in a Title VII claim.[59] Further, the dissent noted that despite the majority's assertion, the courts are not in agreement as to the standard of causation to be used in a Title VII employment discrimination claim.[60] The dissent also disapproved of the jury instruction referring to race as the "determining factor."[61] The dissent noted that a plaintiff would be at a disadvantage if she had to prove that race was a "determinative factor" in the challenged decision.[62] According to the dissent, Congress specifically rejected the use of such a restrictive test in determining whether race was a factor in the challenged decision.[63]

The *Lewis* decision accentuates the diversity of opinion among the courts concerning the appropriate standard of causation required in a private, nonclass Title VII complaint charging employment discrimination. Despite the majority's assertion that there is no indication of courts using a standard of causation other than the "but for" standard,[64] the federal courts are not in agreement regarding the appropriate standard of causation to be used in a Title VII employment discrimination case.[65] For example, some courts use a test that would invalidate a personnel decision where a discriminatory factor was a "significant or substantial factor" in the decision.[66] Other courts have adopted a test that would prohibit personnel action where an impermissible criterion was a "motivating factor" in that action.[67] The *Lewis* decision adds to the confusion by interpreting a "significant

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[55] *Id.* at 918, 33 FEP Cases at 1097.

[56] *Id.*, 33 FEP Cases at 1097-98. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1019, 20 FEP Cases 29, 41 (1st Cir. 1979); Bentley v. Stromberg-Carlson Corp., 638 F.2d 9,11-12, 24 FEP Cases 1255, 1257 (2d Cir. 1981).

[57] *Lewis*, 725 F.2d at 920, 33 FEP Cases at 1098.

[58] *Id.*, 33 FEP Cases at 1099 (Adams, J., dissenting).

[59] *Id.* at 921, 33 FEP Cases at 1099-1100 (Adams, J., dissenting). The dissent noted that the Supreme Court's reference to a "but for" standard in a footnote was "reflective of the fact that the Supreme Court has yet to address the degree of causation a plaintiff must establish to prevail on a Title VII disparate treatment claim." *Id.*

[60] *Id.* at 921-22, 33 FEP Cases at 1100 (Adams, J., dissenting); *see supra* notes 11-18 and accompanying text.

[61] *Id.* at 922, 33 FEP Cases at 1100 (Adams, J., dissenting).

[62] *Id.* (Adams, J., dissenting).

[63] *Id.*, 33 FEP Cases at 1100-01 (citing proposed McClellan Amendment, 110 CONG. REC. 13,837-38 (1964), which was defeated prior to ratification of the Civil Rights Act of 1964).

[64] *Lewis*, 725 F.2d at 915, 33 FEP Cases at 1095.

[65] *See* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 309 (1982) [hereinafter cited as Brodin]; *see also supra* notes 11-18 and accompanying text.

[66] *See supra* notes 16-17 and accompanying text.

[67] *See supra* note 18 and accompanying text.

factor" test as the equivalent of the "but for" standard of causation.[68] *Lewis*, therefore, suggests that the Supreme Court needs to provide further guidance on the issue of what standard of causation should be used in a Title VII employment discrimination action. Although in *McDonald* the Court required that race be a "but for" cause of the challenged decision, the Court did not explain why such a standard of causation was appropriate.[69] The Supreme Court, therefore, should clearly explain the justification for the "but for" standard in a Title VII claim charging employment discrimination. In addition, the Supreme Court should establish guidelines for the standard's operation.[70]

As it now operates, the "but for" standard is the functional equivalent of the "same decision" standard developed in *Mt. Healthy*.[71] Both standards operate to place the plaintiff in the same position he would have occupied had the impermissible factor not entered the picture.[72] If the fact finder determines that the defendant would have arrived at the same decision in the absence of the impermissible factor, the plaintiff is deemed not to have suffered any harm.[73] The only difference between the two standards is that under the *Mt. Healthy* standard the burden is on the defendant, rather than on the plaintiff, to show that the impermissible factor did not make a difference in the ultimate result.[74]

In *Lewis v. University of Pittsburgh*, the Third Circuit Court of Appeals stated that the Supreme Court had adopted a requirement of "but for" causation to establish a Title VII violation.[75] The Supreme Court, however, has not clearly defined the appropriate standard of causation and how that standard is to operate in a private, nonclass Title VII action charging employment discrimination. Until this issue is squarely addressed by the Supreme Court, lower federal courts will continue to use different standards of causation and similarly situated Title VII plaintiffs may be treated differently depending on where they file their case.

## II. EMPLOYMENT BENEFITS

### A. **Deduction of Unemployment Benefits from a Title VII Back Pay Award:* Craig v. Y & Y Snacks, Inc.[1]

Title VII of the Civil Rights Act of 1964[2] grants courts wide discretionary powers to frame remedies to redress wrongs caused by discrimination on the basis of national origin, race, religion, or sex.[3] Such discretionary power includes, but is not limited to,

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[68] *Lewis*, 725 F.2d at 916, 33 FEP Cases at 1095.

[69] *See* McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n.10, 12 FEP Cases 1577, 1580-81 n.10 (1976).

[70] Such guidelines would perhaps clear up the confusion created by the *Lewis* court interpreting the significant factor test as the functional equivalent of the "but for" standard. *Lewis*, 725 F.2d at 916, 33 FEP Cases at 1096.

[71] *See* Brodin, *supra* note 65, at 293 n.8.

[72] *Id.* at 316-17.

[73] *Id.* at 317.

[74] *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977).

[75] *Lewis*, 725 F.2d at 915, 33 FEP Cases at 1095.

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* By Tracy A. Miner, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 721 F.2d 77, 33 FEP Cases 187 (3d Cir. 1983).

[2] 42 U.S.C. §§ 2000e to 2000e-17 (1982).

[3] 42 U.S.C. § 2000e-5(g) (1982). The statutory text is as follows:

If the court finds that the respondent has intentionally engaged in or is intentionally

ordering reinstatement of a discharged employee with or without back pay.[4] If a court does award back pay, the statute provides that interim earnings or amounts that the employee could have earned with reasonable diligence be deducted from the award.[5] The statute is silent, however, on the issue of deducting unemployment compensation received by the employee from the back pay award.[6]

In the absence of a statutory mandate concerning the treatment of unemployment compensation in back pay awards under Title VII, courts have been left to frame their own rules regarding the deductibility of unemployment benefits. No consensus has been reached by the circuit courts of appeals that have addressed the issue. Four circuits have upheld the reduction of back pay awards by the amount of unemployment compensation received, considering it within the discretion of the district court to make such a reduction to avoid double recovery by the plaintiff.[7] Other circuits have adopted the rule that unemployment benefits should not be deducted from a Title VII back pay award because no reductions are made in awards under the National Labor Relations Act (NLRA),[8] which influenced Congress in its drafting of Title VII;[9] unemployment benefits should not be deducted from a Title VII back pay award.

During the *Survey* year, the United States Court of Appeals for the Third Circuit, in *Craig v. Y & Y Snacks, Inc.*,[10] adopted a rule prohibiting a deduction for unemployment compensation from a back pay award under Title VII. In so holding, the Third Circuit joined the Fourth, Ninth and Eleventh Circuits which have all reasoned that Title VII's policy of ending employment discrimination is best served by precluding the deduction of unemployment benefits.[11] These decisions represent a trend towards the adoption of a uniform rule which should eventually unite all circuit courts concerning the treatment of unemployment compensation in back pay awards under Title VII.

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> engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. . . .

*Id.*

[4] *Id.*

[5] *Id.*

[6] *See id.*

[7] Merriweather v. Hercules, Inc., 631 F.2d 1161, 1168, 26 FEP Cases 733, 737 (5th Cir. 1980); EEOC v. Enterprise Ass'n Steamfitters Local No. 638, 542 F.2d 579, 592, 13 FEP Cases 705, 715 (2d Cir. 1976), *cert. denied*, 430 U.S. 911, 14 FEP Cases 702 (1977); Satty v. Nashville Gas Co., 552 F.2d 850, 855, 11 FEP Cases 1, 4 (6th Cir. 1975), *aff'd in part, vacated in part on other grounds*, 434 U.S. 136, 16 FEP Cases 136 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721, 2 FEP Cases 121, 127 (7th Cir. 1969).

[8] 29 U.S.C. §§ 151-169 (1982).

[9] Brown v. A.J. Gerrard Manufacturing Co., 715 F.2d 1549, 1550, 32 FEP Cases 1701, 1702 (11th Cir. 1983) (en banc) (per curiam); Kauffman v. Sidereal Corp., 695 F.2d 343, 346-47, 32 FEP Cases 1710, 1713 (9th Cir. 1983) (per curiam); EEOC v. Ford Motor Co., 645 F.2d 183, 195-96, 25 FEP Cases 774, 783 (4th Cir. 1981).

[10] 721 F.2d 77, 33 FEP Cases 187 (3d Cir. 1983).

[11] *Id.* at 82, 33 FEP Cases at 191.

In *Craig*, the plaintiff, Valerie Craig, worked in the packaging department of the defendant corporation.[12] Craig's supervisor, Harris Hughes, had complete discretion over hiring and firing decisions in his department.[13] On July 15, 1978, Harris suggested to Craig that they have sexual relations.[14] Craig refused.[15] When Craig persisted in refusing, Harris indicated that he would get even.[16] Ten days after the incident involving Harris, Craig did not report to work because of an illness.[17] When she returned to work the next day with a doctor's note, she discovered that Harris had fired her.[18] When no action was taken by the employer after Craig protested her discharge, Craig filed a complaint with the Equal Employment Opportunity Commission (the Commission). Following an adverse ruling by the Commission, Craig brought suit in the federal district court for the Eastern District of Pennsylvania under Title VII for sexual harassment.[19]

The district court found that Craig had been dismissed in violation of Title VII and issued an order directing Craig's reinstatement, enjoining Y & Y from making future reprisals against Craig, and granting Craig back pay.[20] In awarding Craig back pay, however, the district court reduced the award by the amount of interim earnings and unemployment compensation that Craig had received after her dismissal.[21] The defendant appealed the finding of liability, maintaining that Craig had been discharged for independent, legitimate reasons, including excessive absenteeism.[22] Craig cross-appealed on the issue of damages, arguing that the district court erred by deducting the amount of unemployment compensation that she had received from the gross back pay award.[23]

On appeal, the Third Circuit affirmed the district court's determination of liability, finding that the district court did not err in concluding that the legitimate reason given for the dismissal was pretextual and that the corporation was on constructive notice of Harris' actions.[24] The Third Circuit, however, reversed the district court's damages award, holding that the district court erred in reducing plaintiff's back pay award by the amount of unemployment compensation she had received.[25]

Acknowledging that the back pay issue was a question over which reasonable persons could differ,[26] the court concluded that congressional intent, principles of tort law, and the policy underlying Title VII dictated that unemployment benefits not be deducted from Title VII back pay awards.[27] Looking first at congressional intent, the court reasoned that if Congress had intended unemployment benefits to be deducted from a back pay award it would have mandated the exclusion as it had done for interim earnings.[28]

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[12] *Id.* at 78, 33 FEP Cases at 187.
[13] *Id.* at 78, 33 FEP Cases at 188.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 78-79, 33 FEP Cases at 188.
[17] *Id.* at 79, 33 FEP Cases at 188.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 78, 33 FEP Cases at 187.
[23] *Id.* at 78, 33 FEP Cases at 187-88.
[24] *Id.* at 80-81, 33 FEP Cases at 189-90.
[25] *Id.* at 82, 33 FEP Cases at 191.
[26] *Id.*
[27] *Id.* at 82-84, 33 FEP Cases at 191-92.
[28] *Id.* at 82, 33 FEP Cases at 191.

Because Congress had not added such an exclusion, the court concluded that Congress did not intend for unemployment benefits to be deducted from Title VII awards.[29] The court also found evidence of congressional intent from the practice under the NLRA.[30] The National Labor Relations Board (the Board) has consistently refused to deduct unemployment benefits from back pay awards under the NLRA.[31] As Title VII was modeled on the NLRA,[32] the court reasoned that Congress intended that the practices under the statutes be analogous.[33] Presuming that Congress was aware of the practice of not deducting unemployment benefits from back pay awards under the NLRA, the court concluded that Congress must have intended the same practice to govern Title VII.[34]

The court also found support for its holding in principles of tort law, reasoning that unemployment compensation resembled a collateral benefit which is ordinarily not deducted from a plaintiff's recovery in a tort case.[35] According to the court, the rationale for the collateral source rule in torts[36] is that permitting a wrongdoer to benefit at the expense of the victim is inequitable.[37] This rationale, the court found, should also apply in Title VII cases.[38]

Finally, the court found that precluding the deduction of unemployment benefits from a Title VII back pay award would further Title VII's objective of ending employment discrimination by providing more of a deterrent to violations.[39] Pointing out that the prospect of back pay awards unreduced by unemployment compensation would add to the corrective force of Title VII by making its violation more costly,[40] the court rejected the approach of permitting the district court judge to determine, in his or her discretion, the issue of deduction of unemployment benefits.[41] The court reasoned that uniform rules were necessary to further the statutory objectives of Title VII and to avoid conflicting results.[42]

Chief Judge Seitz dissented from the part of the decision relating to the back pay award. The purpose of the damages provisions in Title VII, he argued, was to provide compensation for the tangible economic loss suffered by the victim of an unlawful employment practice.[43] This make-whole remedy was the deterrent provided by Congress in Title VII.[44] Thus, Judge Seitz reasoned, the employer could not be compelled to pay more damages than were necessary to make the plaintiff economically whole.[45] If the back

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[29] *Id.*

[30] *Id.* at 82-83, 33 FEP Cases at 191.

[31] *Id.* The Board's practice of refusing to deduct unemployment compensation from back pay awards under the NLRA was upheld by the Supreme Court in NLRB v. Gullett Gin Co., 340 U.S. 361, 364, 27 L.R.R.M. 2230, 2231 (1951).

[32] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 419, 10 FEP Cases 1181, 1188 (1975).

[33] *Craig*, 721 F.2d at 83, 33 FEP Cases at 191.

[34] *Id.*

[35] *Id.*

[36] Under the collateral source rule, payments that a plaintiff receives for his or her loss from another source are not credited against the defendant's liability for all damages resulting from its wrongful or negligent act. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).

[37] *See* Kassman v. American University, 546 F.2d 1029, 1034 (D.C. Cir. 1976) (per curiam).

[38] *Craig*, 721 F.2d at 83, 33 FEP Cases at 192.

[39] *Id.* at 84, 33 FEP Cases at 193.

[40] *Id.*

[41] *Id.* at 85, 33 FEP Cases at 193.

[42] *Id.*

[43] *Id.* at 85, 33 FEP Cases at 194 (Seitz, C.J., dissenting).

[44] *Id.* at 86, 33 FEP Cases at 194 (Seitz, C.J., dissenting).

[45] *Id.* (Seitz, C.J., dissenting).

pay award is not reduced by the unemployment benefits received, according to Chief Judge Seitz, the defendant would be required to pay more than was necessary to compensate the plaintiff.[46] This result, the dissent maintained, impermissibly goes beyond the provisions of Title VII and actively involves the courts in redistributing wealth.[47]

In *Craig*, the Third Circuit joined the Fourth, Ninth and Eleventh Circuits in adopting a rule that unemployment benefits should not be deducted from back pay awards.[48] Although an even split now exists among the circuits that have addressed the issue,[49] the *Craig* decision follows the trend of establishing a uniform practice denying a deduction for unemployment benefits received from a Title VII back pay award. District courts in the circuits that have not adopted a rule precluding deduction are given discretion to deny the deduction.[50] Plaintiffs in those jurisdictions, as well as in the jurisdictions which have not yet addressed the issue, therefore, should be guided by the reasoning of *Craig* in awarding damages under Title VII.

There is much to recommend widespread adoption of the rule in *Craig*. Adoption of a rule precluding deduction for unemployment benefits would provide greater deterrence against violations of Title VII than would otherwise exist if awards were routinely reduced by the unemployment benefits received.[51] Contrary to the argument of the *Craig* dissent, Congress did not mandate that victims of discrimination receive only compensation which would make them economically whole.[52] Rather, Congress provided only that interim earnings are to be deducted from back pay awards.[53] No mention was made of unemployment benefits,[54] although Congress was certainly aware of the widespread existence of such benefits. As no congressional mandate exists for either inclusion or exclusion of such benefits, courts should adopt a rule furthering the policy goals of Title VII. Denying deductions from back pay awards furthers Title VII's policy of ending employment discrimination by making violations of Title VII more costly and thereby providing greater deterrence to unlawful discrimination.[55]

In addition to its deterrent effect, a rule prohibiting deductions of unemployment benefits would avoid the inequity of permitting wrongdoers from profiting from a benefit funded by society. Payments of unemployment benefits are made by the state out of state funds derived from taxation.[56] Employment discrimination is a wrong not only to the individual victim but to society as a whole. Society's largesse in providing benefits to its unemployed should not, therefore, be used to subsidize those who have violated its employment discrimination laws.[57]

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[46] *Id.* (Seitz, C.J., dissenting).

[47] *Id.* (Seitz, C.J., dissenting).

[48] *See* cases cited *supra* note 9.

[49] *See* cases cited *supra* notes 7 and 9.

[50] *See* cases cited *supra* note 9 and accompanying text.

[51] *See Craig*, 721 F.2d at 84, 33 FEP Cases at 192.

[52] *See* 42 U.S.C. § 2000e-5(g) (1982). For the text of the statute see *supra* note 3.

[53] *Id.*

[54] *See id.*

[55] *Craig*, 721 F.2d at 84, 33 FEP Cases at 192.

[56] NLRB v. Gullett Gin Co., 340 U.S. 361, 364, 27 L.R.R.M. 2230, 2231 (1951). Although unemployment taxes are paid by employers and thus each employer has contributed to the fund, payments made to employees from this fund are not made to discharge any liability of the employer, but rather "to carry out a policy of social betterment for the benefit of the entire state." *Id.* Thus, although the employer had contributed to the fund, the moneys in the fund are state moneys to use for the achievement of state policies.

[57] As the Fourth Circuit reasoned, back pay awards under Title VII should not be affected by the unemployment compensation system because that system is designed to serve a wholly indepen-

No social policy is subverted, on the other hand, by precluding deduction of unemployment benefits from back pay awards. As the Ninth Circuit has recognized, because the statute imposes a duty on discharged employees to mitigate damages, denying an offset from back pay awards for unemployment benefits does not discourage discharged employees from seeking other employment.[58] Nor does it provide plaintiffs with a windfall that is abhorrent to society.[59] If society determines that a denial of the deduction does produce unwarranted benefits to the plaintiff, the states can provide for recoupment of the unemployment benefits.[60] Such a scheme would benefit all of society rather than a small segment. This result is preferable to granting the benefits, even indirectly, to those who have been found to have engaged in employment discrimination in violation of Title VII. Absent such a scheme, as between the violators of Title VII and their victims, it seems preferable that the victims receive the unemployment benefits.

With the *Craig* decision, the Third Circuit joined the Fourth, Ninth and Eleventh Circuits in adopting a rule precluding the reduction of back pay awards under Title VII by the unemployment benefits received by the plaintiff.[61] This holding is consistent with the practice under the National Labor Relations Act and furthers Title VII's policy of ending employment discrimination.[62] The sound reasoning of the Third Circuit in *Craig* should provide guidance for district courts in jurisdictions which have not yet adopted a rule against the deduction.

### B. **Exception Four to the Equal Pay Act*: Bence v. Detroit Health Corp.[1]

The Equal Pay Act of 1963[2] (the Act) requires that employers pay equal salaries to men and women employees for equal work.[3] While this legislation represents Congress'

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dent social policy. EEOC v. Ford Motor Co., 645 F.2d 183, 196, 25 FEP Cases 774, 784 (4th Cir. 1981).

[58] Kaufman v. Sidereal Corp., 695 F.2d 343, 347, 32 FEP Cases 1710, 1713 (9th Cir. 1983).

[59] *See* NLRB v. Gullett Gin Co., 340 U.S. 361, 364-65, 27 L.R.R.M. 2230, 2231 (1951).

[60] Kaufman v. Sidereal Corp., 695 F.2d 343, 347, 32 FEP Cases 1710, 1713 (9th Cir. 1983). Such a statute has been enacted in Pennsylvania. 43 PENN. STAT. (Purdon's) § 1874(b) (1983 Supp.) Under the Pennsylvania statute, the recipient of a back pay award from which unemployment benefits have not been deducted becomes liable to pay to the Unemployment Compensation Fund an amount equal to the amount of unemployment benefits he or she had received during the period covered by the back pay award. *Id.*

[61] *See supra* note 9 and accompanying text.

[62] *See supra* notes 30-40 and accompanying text.

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* By Jennifer L. Jorgensen, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 712 F.2d 1024, 32 FEP Cases 434 (6th Cir. 1983).

[2] The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), amended § 6 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (1982). The Equal Pay Act provides in pertinent part:

> No employer . . . shall discriminate, . . . between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based upon any other factor other than sex . . . .

29 U.S.C. § 206(d)(1) (1982).

[3] *See id.* Generally, courts have not interpreted the "equal work" language as necessarily requiring identical jobs. *See* 1979-1980 *Annual Survey of Labor Relations and Employment Discrimination*

attempt to eliminate wage differentials which discriminate against women,[4] the Act nevertheless permits differentials if they qualify under one of four statutory exceptions: a seniority system, a merit system, a system which measures earnings by quality or quantity of production, or a differential based upon any other factor other than sex.[5] The first three exceptions have faced relatively few legal challenges.[6] The fourth exception ("exception four"), however, which permits wage differentials if "based upon any other factor other than sex," has been the focus of extensive litigation.[7] The broad language of the fourth exception has been interpreted to permit wage differentials in a wide variety of circumstances.[8]

Generally, when an employer faced with charges of an Equal Pay Act violation asserts that its wage plan is legitimately based upon a "factor other than sex," courts will scrutinize the particular elements of the employer's wage system to determine whether

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*Law — Title VII and the Equal Pay Act*: Gunther v. County of Washington, 22 B.C. L. REV. 184, 185 n.3 (1980) (citing Usery v. Columbia Univ., 568 F.2d 953, 958, 15 FEP Cases 1333, 1336 (2d Cir. 1977); Schultz v. Wheaton Glass Co., 421 F.2d 259, 265, 9 FEP Cases 502, 506 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970))[hereinafter cited as 22 B.C. L. REV.]. Instead, jobs are "equal" for the purposes of the Equal Pay Act if "the actual work performed involves skill, effort, and responsibility of a substantially equal nature." 22 B.C. L. REV. at 185 n.3 (citing Ridgway v. United Hospital Miller Div., 503 F.2d 923, 926, 16 FEP Cases 345, 347 (8th Cir. 1977); Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 285, 9 FEP Cases 979, 980 (4th Cir. 1974)). *See also* Sullivan, *The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case*, 31 ARK. L. REV. 545, 559-83 [hereinafter cited as Sullivan].

[4] *See* Declaration of Purpose of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, *reprinted in* 1963 U.S. CODE CONG. & AD. NEWS 59-60. *See also* Sullivan, *supra* note 3, at 547. To make out a prima facie case of a violation of the Equal Pay Act, a plaintiff "must prove that two workers of the opposite sex in (1) the same 'establishment' are (2) receiving unequal pay (3) 'on the basis of sex' (4) for work which is 'equal.' " *Id.* For a good discussion of these four elements to plaintiff's prima facie case, see *id.* at 547.

[5] *See supra* note 2.

[6] Sullivan, *supra* note 3, at 587, Professor Sullivan contends that the statutory concept of "system" is the common denominator of the relatively few cases dealing with these issues. *Id.* He suggests that to qualify under any of these specific exceptions under 29 U.S.C. § 206(d), differentials in pay may not be "accidental or sporadic." *Id.* According to Sullivan, such a "broad interpretation of 'system' . . . makes more important the basic 'seniority,' 'merit,' and 'incentive' notions." *Id.* at 588.

[7] *Id. See also* 22 B.C. L. REV., *supra* note 3, at 185 n. 4 (citing 1 LARSON, EMPLOYMENT DISCRIMINATION, § 31.10 (1979)).

[8] *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188, 9 FEP Cases 919 (1974). *Corning Glass* established that if an employer pays different wages to those on different shifts, that practice is a factor other than sex for purposes of the Equal Pay Act and does not violate the Act as long as the shift differential was uniform and gender-neutral. *Id.* at 204, 9 FEP Cases at 922.

See also the administrative interpretation by the Wage and Hour Administration (the Administration) which recognizes the legitimacy of night shift differentials shown to be based on a factor other than sex. 29 C.F.R. § 800.145 (1983). The Administration stated: "Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to do various types of work in the establishment. At such times, the employee in training status may be performing equal work with nontrainees of the opposite sex whose wages or wage rates may be unequal to those of the trainee. Under these circumstances, the differential can be shown to be attributable to a factor other than sex and no violation of the equal pay standard will result." *Id. See* Sullivan, *supra* note 3, at 592-95 (a detailed discussion of the specific training program structure necessary to qualify for exception four).

"Red circle rates" is a term used to describe higher wage rates due to training programs, temporary reassignment and part-time employee situations. Johnson, *The Equal Pay Act of 1963: A Practical Analysis*, 24 DRAKE L. REV. 570, 594 [hereinafter cited as Johnson]. Red circle rates generally fall within the scope of exception four and relieve an employer of liability for paying unequal wages for equal work. *Id.* at 594.

exception four should relieve the employer of liability.[9] For instance, in *Hodgson v. Robert Hall Clothes, Inc.*,[10] where the Third Circuit held that an economic benefit to an employer may be a "factor other than sex" within the meaning of exception four,[11] the court afforded much weight to the employer's schedules of sales, earnings, and gross profits in comparing men's and women's clothing departments.[12] In *Robert Hall*, the court relied on the legislative history of the Act to hold that Congress did intend exception four to allow wage differentials based on "reasonable business judgments."[13] The Third Circuit found that the men's department, staffed only by males, produced more profit than the women's clothing department, staffed by women, because the men's clothing line stocked by the employer was more expensive and qualitatively better then the store's women's merchandise.[14] The court, therefore, held that the greater economic benefit received by the employer from the greater gross profits of the men's department justified its practice of paying higher incentive wages to salesmen than to saleswomen.[15] The Ninth Circuit has also scrutinized particular elements of an employer's wage plan under exception four of the Act in *Kouba v. Allstate Insurance*.[16] In that case, the court noted the importance of examining the "specific relevant considerations" of each employer's situation.[17] This case-by-case analysis for determining whether an employer's compensation plan demonstrates a business justification within the scope of exception four has been applied by most circuit courts which have confronted the issue.[18]

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[9] Sullivan, *supra* note 3, at 583. "[T]he Supreme Court's decision in *Corning Glass Works v. Brennan* makes clear that the defendant bears the burden of establishing an exception . . . [because] the facts necessary to establish the exceptions are 'peculiarly within the knowledge of the employer.'" *Id.* (citing 29 C.F.R. § 800.141(a) (1976)). *See* Corning Glass Works v. Brennan, 417 U.S. 188, 196-97, 9 FEP Cases 919, 226 (1974); Schulte v. Wilson Industries, Inc., 547 F. Supp. 324, 31 FEP Cases 1373 (1982). In *Schulte*, a district court reaffirmed that the employer must prove by a preponderance of the evidence that any differentials in pay to males and females doing equal work were due to factors other than sex. *Id.* at 338-39, 31 FEP Cases at 1380.

[10] 473 F.2d 589, 595, 11 FEP Cases 1271 (3d Cir. 1973), *cert. denied*, 414 U.S. 866, 11 FEP Cases 1310 (1973).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 590-91, 11 FEP Cases at 1272. The court accepted the employer's contention that the intimate contact between clerks and customers necessitated the segregated job placements. *Id.* at 595-97, 11 FEP Cases 1276.

[15] *Id.*

[16] 691 F.2d 873, 30 FEP Cases 57 (9th Cir. 1982). The Ninth Circuit, in *Kouba*, adopted the *Robert Hall* "legitimate business reason" test and asserted that the proper standard for implementing the Equal Pay Act is that "the employer must use the [business] factor reasonably in light of [its] stated purpose as well as its other practices. The specific relevant considerations will of course vary with the situation." 691 F.2d at 876-77, 30 FEP Cases at 60. This "pragmatic" standard, said the court, "protects against abuse yet accommodates employer discretion." *Id.* at 876, 30 FEP Cases at 60.

[17] In *Kouba*, a female insurance agent challenged Allstate's practice of computing the minimum salary of a new sales agent on the basis of ability, education, experience, and prior salary. During an 8-13 week training period, an Allstate agent received only the minimum. Afterwards, an agent received the greater of the minimum and the commissions earned from sales. As a result of this practice, female agents generally made less than their male counterparts. Plaintiff Kouba argued that the use of prior salary in computing present salary caused a wage differential which constituted unlawful sex discrimination. *Id.* at 874, 30 FEP Cases at 58.

[18] The Eighth Circuit rejected a defendant employer's alleged training program as justification for higher pay to males because there was no actual on-the-job training for the higher positions. Schultz v. American Can Company-Dixie Products, 424 F.2d 356, 9 FEP Cases 524 (8th Cir. 1970).

During the *Survey* year, the United States Court of Appeals for the Sixth Circuit addressed the issue of whether or not an employer is permitted under exception four to compensate male and female employees at different compensation rates for sales of identical products. In *Bence v. Detroit Health Corp.*,[19] the Sixth Circuit held that an employer's wage system, which compensated employees solely on a "per sale" basis and paid women employees at a lower commission rate than men, violated the Equal Pay Act even though the total remuneration provided to male and female employees was substantially equal.[20] The court held that the particular employer's compensation system at issue did not fall under the scope of exception four since the differential pay scale was not justified by any difference in economic benefit to the employer.[21] Although the Sixth Circuit in *Bence* neither expressly accepted nor rejected the "reasonable business justification" test for the exception four defense,[22] the court did adopt the approach of other courts which have ruled on the scope of that exception[23] by examining the unique elements of the employer's wage scheme in determining whether to impose liability on the employer.[24] Consequently, after *Bence*, an employer in the Sixth Circuit may not pay employees at different commission rates for the sale of identical products, even if the employees' total remuneration is equal, absent a showing that the employer's specific wage system is based on a "factor other than sex."

The plaintiff in *Bence* was an employee manager of Detroit Health Corporation (Detroit Health), which operated a chain of health spas.[25] Each spa was divided into a men's division, operated only by men, and a women's division, operated only by women. The spa was open to men and women on alternate days.[26] The job descriptions for male and female managers and assistant managers were identical,[27] and they performed their

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*See also* Schultz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969). The Fifth Circuit rejected the employer's contention that the alleged training programs came within exception four because they were "informal, unwritten, and, if not imaginary, consisted of little more than the recognition of the ability of employees to work their way up through the ranks." *Id.* at 654 (footnote omitted). Special problems arise in determining whether factors such as experience, hours of work, and physical exertion make the work performed unequal and thus not covered by the Equal Pay Act or whether these variants qualify under exception four. *See* 22 B.C. L. REV., *supra* note 3, at 185 n.4 (citing 1 LARSON, EMPLOYMENT DISCRIMINATION, §§ 31.10-.27 (1979)).

[19] 712 F.2d 1024, 32 FEP Cases 434 (6th Cir. 1983).

[20] *Id.* at 1027-28, 32 FEP Cases at 436-37.

[21] *Id.* at 1031, 32 FEP Cases at 439. The employer's wage system was not protected by exception three because the "quantity or quality test" was not met. *Id. See also infra* note 61.

[22] *Bence*, 712 F.2d at 1031, 32 FEP Cases at 439.

[23] *See supra* notes 10-18 and accompanying text.

[24] *See generally Bence*, 712 F.2d 1024, 32 FEP Cases 435 (1983) (The Sixth Circuit examined the facts of the case in detail before holding that the employer's wage system violated the Act).

[25] *Id.* at 1025, 32 FEP Cases at 435.

[26] *Id.* at 1025-26, 32 FEP Cases at 435.

[27] *Id.* at 1026, 32 FEP Cases at 435. The job descriptions stated that the managers were "completely responsible for the entire job operation." *Id.* at 1028, 32 FEP Cases at 437. This description included responsibility for personnel and bookkeeping functions as well as for the duties of Instructors and Assistant Manager Trainees, such as record-keeping, instruction of spa members, and supervision of cleaning personnel. *Id.* The job description also stated that the progress and compensation of all employees was "controlled by 'PRODUCTION,' which was defined as 'sales effectiveness.'" *Id.* The circuit court in *Bence* noted that "the specific job description for each grade of employee focused heavily on sales . . . [T]he record contains uncontradicted testimony that employer routinely fired managers who failed to meet its sales 'goals' . . . ." *Id.*

jobs under similar working conditions.[28] All managers and assistant managers were paid by commissions based on gross sales of memberships.[29] Male managers received 7.5% of the individual spa's gross sale of memberships to men.[30] Female managers, however, were paid only 5% of the gross membership sales to women.[31] The total remuneration received by male and female managers was substantially equal, however, because women tended to make more sales to their female customers than men made to male customers.[32] The female managers filed suit, asserting that the different commission rates violated the Act.[33] Detroit Health contended that its wage system did not violate the Act because it paid unequal commission rates to ensure that all employees received substantially equal remuneration for equal work performed.[34]

The United States District Court for the Eastern District of Michigan initially granted summary judgment for Detroit Health,[35] finding that it was "easier to sell memberships to women than to men."[36] The court held that this circumstance was "a factor other than sex" within the scope of exception four, which excused Detroit Health's ostensible violation of the Act.[37] On appeal, the Sixth Circuit remanded the case to the district court for further findings of fact and conclusions of law. The circuit court ruled that the district court had improperly granted summary judgment in favor of the employer without resolving the issue of how "easier sales to women" justified Detroit Health's pay differential.[38] On remand, the district court concluded that the employer's commission system was protected by both exceptions three and four of the Equal Pay Act.[39] The court noted that because the health spa business historically attracted more potential female members than male members,[40] male managers who exerted the same amount of effort under totally equal conditions as female managers would sell fewer memberships than women.[41] The

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[28] *Id.* at 1026, 32 FEP Cases at 435.

[29] *Id.*

[30] *Id.*

[31] *Id.* Similarly, male assistant managers received 4.5% of gross sales to men, and female assistant managers received 3% of the gross sales to women. *Id.*

[32] *Id.* "Over the course of employer's life, the gross volume of membership sales to women was 50% higher than the gross volume of membership sales to men." *Id.* (footnote omitted).

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1026, 32 FEP Cases at 436. The lower court decision is unreported.

[36] *Id.* at 1026, 32 FEP Cases at 435.

[37] *Id.* at 1026, 32 FEP Cases at 435-36. The district court also found that the commission differential established a prima facie case of wage discrimination and shifted the burden of justifying the differential to the employer. *Id.* At the same time, however, the district court rejected the employer's equal total remuneration argument, based on its finding that the Equal Pay Act focuses on equal wage *rates*, not simply equal *wages*. *Id.* at 1026, 32 FEP Cases at 435.

[38] *Id.*

[39] *Id.* at 1027, 32 FEP Cases at 436. The district court determined that the differential qualified under exception three because earnings were tied to membership sales or under exception four because the difference in the size of markets for male and female spa customers was "a factor other than sex" within the meaning of the Equal Pay Act. *Id.* at 1028, 32 FEP Cases at 437.

[40] *Id.* at 1026-27, 32 FEP Cases at 436. The district court accepted as conclusive the defendant's evidence that the membership composition would be sixty percent female and forty percent male. *Id.*

[41] The district court noted that the summary judgment motion referring to "easier sales to women" by women employees was not intended to be a "qualitative analysis but a quantitative one . . . [because] [t]here are simply more potential female customers in a consistent ratio of 60/40 and, with the same expenditure of effort, male and female managers will produce sales figures resulting in a 60/40 female/male membership. The net result of this is that . . . female and male managers at the same location will make . . . the same salary." *Id.* at 1027, 32 FEP Cases at 436.

court held that since the net result of the sales would be equal,[42] Detroit Health had conformed with the commands of the Equal Pay Act by equalizing pay for equal work.[43]

The Sixth Circuit Court of Appeals reversed the lower court's decision.[44] The appeals court initially identified two issues for review: (1) whether Detroit Health's commission differential amounted to a violation of the Equal Pay Act, even though the differential provided equal remuneration, and (2) whether Detroit Health's wage system was protected by one of the four exceptions to the Act.[45] In addressing these issues, the Sixth Circuit rejected Detroit Health's claim that its equal total remuneration was proper under the Act.[46] The court noted that since the Equal Pay Act commands an equal *rate* of pay for equal work,[47] inequality of rate of pay, as established in the plaintiff's prima facie case,[48] is necessarily inconsistent with the Act.[49] Equal remuneration, the court held, could never be a valid defense to an allegation of a violation of the Act.[50] Rather, according to the court, judicial inquiry into rate of pay differentials should be directed toward the nature of the services for which an employer compensates employees.[51]

In examining the job descriptions and the actual work performed by spa managers,[52] the court determined that the employees' primary function was to sell memberships.[53] According to the court, the evidence did not show that selling memberships was merely one element of the managers' total service to the employer's clientele.[54] If that had been the case, stated the court, the equal remuneration argument might have had some merit, because compensation would have been based on satisfactory performance of a host of specified duties.[55] Instead, the court determined that the commission differential was based exclusively on membership sales.[56] Thus, the court reasoned, the employees of Detroit Health were paid at unequal rates for performing identical functions — the precise result prohibited by the Equal Pay Act.[57]

The court of appeals next examined the district court's holding that Detroit Health qualified for either exception three or four of the Act.[58] After expressing the remedial purposes of the Equal Pay Act[59] and setting forth the burdens of proof delegated to each

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[42] *Id. See also supra* note 41.

[43] *Bence*, 712 F.2d at 1027, 32 FEP Cases at 435.

[44] *Id.* at 1031, 32 FEP Cases at 439. Both plaintiff and defendant advanced the same arguments they had presented to the district court. *Id. See also* text accompanying notes 33-34. The employer also admitted that there was no difference between the membership sold to either sex. *Bence*, 712 F.2d at 1031, 32 FEP Cases at 439.

[45] *Id.*

[46] *Id.* at 1027, 32 FEP Cases at 435.

[47] *Id.* (emphasis in original).

[48] *Id.* The court cited *Corning Glass Works*, 417 U.S. 188, 195, 9 FEP Cases 919 (1974) as evidence that inequality of pay was an element of plaintiff's prima facie case. *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *See supra* note 27.

[53] *Bence*, 712 F.2d at 1028, 32 FEP Cases at 437. *See supra* note 27.

[54] *Bence*, 712 F.2d at 1028, 32 FEP Cases at 437.

[55] *Id.* at 1028, 32 FEP Cases at 436-37.

[56] *Id.* at 1028, 32 FEP Cases at 437.

[57] *Id.*

[58] *See supra* note 39.

[59] *Bence*, 712 F.2d at 1029, 32 FEP Cases at 437. The court said, "The Equal Pay Act was intended as a broad charter of women's rights in the economic field. It sought to . . . eliminate the

party in an Equal Pay Act claim,[60] the court quickly dismissed the district court's contention that the employer's wage system was protected by exception three.[61] In a longer discussion, however, the court determined that the employer's commission differential also did not constitute a "factor other than sex" within the meaning of exception four.[62]

In examining the exception four question, the court initially examined the legislative history of the exception[63] and concluded that Congress had intended the broad wording of exception four to include factors other than traditional job evaluation criteria.[64] The court then discussed other decisions which had analyzed the exception, in light of the facts of *Bence*.[65] According to the Sixth Circuit, Detroit Health improperly relied on *Robert Hall* for the notion that an economic benefit to an employer may be a factor other than sex which justifies a pay differential.[66] The court rejected Detroit Health's argument that it was a legitimate business policy to provide male and female employees with equal total remuneration under an unequal commission system because the market for women's memberships was larger than the market for men's memberships.[67] Instead, the court held that the *Bence* employer could not avail itself of the *Robert Hall* economic benefit rule

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depressing effects on living standards of reduced wages for female workers . . . ." *Id.* (citing Schultz v. American Can Company-Dixie Products, 424 F.2d 356, 360, 9 FEP Cases 524 (8th Cir. 1970)).

[60] *Id. See supra* note 4 and accompanying text.

[61] *Bence*, 712 F.2d at 1029, 32 FEP Cases at 437. The court of appeals stated that exception three is applicable only when two employees are paid the same rate and one receives a higher salary either because he produces more or because the higher paid employee's work is harder to perform. According to the court, Detroit Health satisfied neither of these requirements. First, men employees were paid more and in fact produced less. Second, memberships were not "easier" to sell to women; sales to women merely happened with more frequency. *Id.*

[62] *Id.* at 1029-30, 32 FEP Cases at 438-39. The court of appeals phrased the issue as being "whether the phrase 'any other factor other than sex' means literally *any* other factor, a factor traditionally used in job evaluation systems, or something else." *Id.* at 1029, 32 FEP Cases at 438 (emphasis in original).

[63] *Id.* at 1029-30, 32 FEP Cases at 438 (quoting H.R. REP. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963, 88th Cong., 1st Sess. 44 (1963)).

[64] *Id.* at 1029, 32 FEP Cases at 438. The legislative comments discussed the broad, inclusive language of exception four. *Id.* at 1029-30, 32 FEP Cases at 438.

[65] *Id.* at 1030-31, 32 FEP Cases at 438-39. The court cited the Supreme Court's decision in County of Washington v. Gunther, 452 U.S. 161, 170-71 n.11 (1981), as suggesting that Congress added exception four "because of a concern that bona fide job evaluation systems used by American business would be otherwise disrupted." *Id.* at 1030, 32 FEP Cases at 439. The *Bence* court also briefly cited two lower courts which interpreted that decision as limiting exception four to factors traditionally included in job evaluation schemes. Schultz v. Wilson Industries, Inc., 547 F. Supp. 324, 339 n.16, 31 FEP Cases 373 (S.D. Tex. 1982); Kouba v. Allstate Insurance Co., 523 F. Supp. 148, 161, 27 FEP Cases 938 (E.D. Cal. 1981), *rev'd*, 691 F.2d 873, 30 FEP Cases 57 (9th Cir. 1982). According to the *Bence* court, the Ninth Circuit in *Kouba* "rejected this conclusion and adopted the *Robert Hall* 'legitimate business reason' test for the scope of exception (iv)." *Bence*, 712 F.2d at 1030, 32 FEP Cases at 439 (citing 691 F.2d at 867-77).

[66] 712 F.2d at 1031, 32 FEP Cases at 439. For a discussion of *Robert Hall*'s "economic benefit as a factor other than sex" theory see *supra* notes 15-18 and accompanying text. The court conceded that the Third Circuit in *Robert Hall* had based its decision on the relevant legislative history of exception four and also conceded that the *Robert Hall* decision could, if read broadly, "stand for the proposition that any nonsexual factor based on an employer's legitimate business judgment may be a factor other than sex within the meaning of exception four." *Bence*, 712 F.2d at 1031, 32 FEP Cases at 439. The court concluded that Detroit Health Corp. did not fall under the scope of the *Robert Hall* rule. *Id.* at 1031, 32 FEP Cases at 439.

[67] *Id.*

because the situations at issue in the two cases were distinguishable.[68] In *Bence*, female managers provided more profit than male managers, while in *Robert Hall*, the female employees provided less profit.[69] The court also noted that unlike the men's and women's clothing sold in *Robert Hall*, the memberships sold by male and female employees in *Bence* were identical as to price and quality.[70] The Sixth Circuit did not rule on whether the difference in market size for men's and women's memberships alone justified an employer's commission differential.[71] Instead, the court asserted that this segregation of the sales force by sex, combined with the lower wage rate, effectively locked female employees into an inferior position "regardless of their effort or productivity,"[72] in violation of the Act.[73] Concluding that the employer had not proven that sex provided no part of the basis for its wage differential,[74] the court held that exception four was inapplicable to the practices at issue in *Bence*.[75]

In reaching its decision, however, the court explicitly limited its holding to the unique facts before it.[76] By factually distinguishing *Bence* from *Robert Hall*, the court avoided the necessity of endorsing or rejecting the broad reading of exception four set forth in *Robert Hall*.[77] Rather, the court held that Detroit Health had not justified a sex-based wage differential under exception four, because it had not demonstrated that the wage differential reflected either a particular economic benefit to the employer or relative difficulty in individual sales.[78] Accordingly, the court observed, the narrowness and specificity of its ruling would not serve to prohibit segregation of male and female employees into separate departments subject to different wage rates, if such an exculpatory showing could be made by an employer.[79]

One Sixth Circuit judge, Judge Engel, concurred in part and dissented in part with the court's opinion in *Bence*.[80] Judge Engel agreed that the compensation at issue did not qualify for exception three[81] and that deliberate differentials in commission rates based on sex could not be justified by an employer's desire to equalize remuneration.[82] To the extent that the lower court's decision had been based on these factors, Judge Engel concurred in the reversal.[83] He did not, however, agree entirely with the majority's conclusion that the employer's wage system was not within the scope of exception four.[84] Arguing that if the different commission rates paid by Detroit Health were based upon the sex of the *club member* and not the sex of the employee, Judge Engel maintained that

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* The court also did not rule on the propriety of segregating male and female employees into men's and women's departments. *Id.* This treatment is similar to the Third Circuit's actions in *Robert Hall*. *See supra* text accompanying note 12.

[72] *Bence*, 712 F.2d at 1031, 32 FEP Cases at 439.

[73] *Id.* After *Bence*, the market-size question is still undetermined under exception four.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* (Engel, J., dissenting in part and concurring in part).

[81] *Id.*

[82] *Id.* at 1031, 32 FEP Cases at 440 (Engel, J., dissenting in part and concurring in part).

[83] *Id.*

[84] *Id.* at 1032, 32 FEP Cases at 440 (Engel, J., dissenting in part and concurring in part).

this could be a "factor other than sex" pursuant to exception four.[85] The Equal Pay Act, Judge Engel noted, concerns the *employee*'s sex, not the sex of the customer.[86] He suggested that the male-female membership ratio of 40-60 was "solid evidence" that the market for men's memberships was distinctly different from the market for women's memberships.[87] He noted that the large disparity in the female/male customer ratio in any health club business[88] was bound to evoke various economic responses from the clubs and affect their businesses in numerous ways.[89] According to Judge Engel, this difference in the markets for male and female memberships could be regarded as the requisite "factor other than sex," triggering exception four of the Equal Pay Act.[90]

Judge Engel cited the testimony of a witness at the trial level which, he asserted, could have supported a conclusion that the different commissions paid by the *Bence* employer violated the Act because they were based on the employee's sex and not the sex of the customer.[91] Because of this testimony and the other conflicting considerations, Judge Engel recommended remanding the case for reconsideration of this evidence by the trial judge.[92]

In *Bence v. Detroit Health Corp.*, the Sixth Circuit reaffirmed, and thereby strengthened, the case-by-case approach taken by courts in other jurisdictions in interpreting exception four of the Equal Pay Act.[93] The *Bence* court's holding was expressly limited to the facts of the case at issue, and the court noted that the decision would not necessarily control any other Equal Pay Act claim where employees were segregated into separate departments and paid at different wage rates.

Although the case-by-case analysis appears to be a fair way to judge an individual employer's wage schemes, analyses under that test are not uniform within the federal circuits. Accordingly, facts which one court accepts as a legitimate business justification for a sex-based wage differential will not, absent a clear rule, necessarily persuade other

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[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Judge Engel pointed out that, as stipulated by the majority opinion and the trial judge, health spas generally, and particularly those operated by defendant Detroit Health Corp., attract about 50% more female customers than male customers. *Id.*

[89] *Id.* Judge Engel offers no concrete example of the various responses and numerous effects of this market condition. The dissent found no merit in the majority's distinction between the *Robert Hall* and *Bence* facts and determined that paying a higher commission rate for sales to men could be "justified by the market generally and by other economic and business considerations." *Id.*

[90] *Id.* Judge Engel observed that, had pay rates to employees varied uniformly, the Act would pose no problem to differing rates for male, female, young, old, or handicapped customers. *Id.* He discussed the varying rates of commissions according to the type of market in which products were sold. *Id.* He asserted that the basis behind employer's paying commissions was an incentive to its sales staff. *Id.* According to Judge Engel, the most obvious discrimination in *Bence* was the exclusive use of females to attract only female customers and vice-versa for males. But, Judge Engel pointed out, this discrimination was not challenged in the case. *Id.*

[91] *Id.* at 1033, 32 FEP Cases at 441 (Engel, J., dissenting in part and concurring in part). The witness was James P. Hoppin, vice-president of Detroit Health Corp. since 1974. *Id.* His testimony related to walk-in customers, the managerial staff's duties, and the calculation of commission rates based on matching gross profits from sales to men or women, as opposed to individual sales *by* men or women. *Id.* According to his formula, a sale by a woman to a man on a "walk-in" basis would net the female manager $10, while a sale by a male employee to a female customer would net $15 to the male manager. *Id.*

[92] *Id.* at 1034, 32 FEP Cases at 441.

[93] *See supra* notes 9-24 and accompanying text.

courts. The case-by-case method presents a problem when a court reviews exception four as a matter of first impression. Reliance on court decisions in which differing results are based on slight variations in factual situations can lead to inconsistencies among circuits and does little to resolve the interpretational difficulties posed by the broad wording of exception four.

The *Bence* decision was an example of such unclear analysis under the case-by-case method. While the *Bence* court stated explicitly that it did not rule on whether *Robert Hall*'s economic benefit test[94] was appropriate for the scope of exception four, the court's long discussion and response to Detroit Health's "legitimate business reason" defense suggests an acceptance of the *Robert Hall* theory. In distinguishing *Bence* from *Robert Hall*, the court pointed to two factual differences which prohibited Detroit Health from using the economic benefit rule to come within exception four. The court's distinction implies that if the wage system in *Bence* was factually closer to the system in *Robert Hall*, the *Bence* employer would have fallen under the economic benefit rule. It follows that the Sixth Circuit agreed with the Third Circuit's opinion in *Robert Hall* and implicitly recognized that a legitimate business reason for a wage differential may provide an employer with exception four protection from an Equal Pay Act claim. Because of the Sixth Circuit's concern with maintaining a case-by-case approach, however, the court refused to expressly state its acceptance of that rule. Accordingly, *Bence*'s precedential value seems limited to a pallid declaration that facts identical to the facts at issue in *Robert Hall* fall within exception four, and that the precise situation in *Bence* could not be justified by the considerations advanced by the employer, Detroit Health.

Following *Bence v. Detroit Health Corp.*, courts which have not yet examined exception four may be persuaded to adopt the case-by-case analysis which examines the specific details of an employer's compensation system. This ad hoc method of decision gives little guidance to practitioners and is of relatively little precedential value. Future courts would do well to formulate a more general rule of analysis under exception four. Until a general rule is introduced, employers will be operating in a legal vacuum regarding what is or is not an acceptable wage differential practice.

### C. **Title VII and Pregnancy Discrimination Against Employees' Spouses*: Newport News Shipbuilding and Dry Dock Co. v. EEOC[1]

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex.[2] In *General Electric Co. v. Gilbert*,[3] the United States Supreme Court ruled that the exclusion of pregnancy-related disabilities from an employer's disability plan was not per se discrimination under Title VII.[4] The Court in *Gilbert* examined whether General Electric's (GE's) nonoccupational sickness and accident plan violated Title VII by excluding preg-

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[94] *Bence*, 712 F.2d at 1031, 32 FEP Cases at 439.

* By Susanna C. Burgett, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 103 S. Ct. 2622, 32 FEP Cases 1 (1983).

[2] Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 17 (1982), provides in pertinent part: "It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, or national origin; . . . . " 42 U.S.C. § 2000e-2(a).

[3] 429 U.S. 125, 13 FEP Cases 1657 (1976).

[4] *Id.* at 145-46, 13 FEP Cases at 1666.

nancy disabilities from its coverage.[5] The Court first concluded that the terms of the plan were not discriminatory, since the exclusion of pregnancy from an otherwise comprehensive disability plan was "not a gender-based discrimination at all."[6] Next, inquiring whether the effect of the plan was discriminatory, the Court determined that because the plan covered exactly the same catagories of risk for both men and women there was no discriminatory effect.[7] Because of this "facially evenhanded inclusion of risks,"[8] which, according to the Court, resulted in a parity of benefits for men and women alike, GE's plan was found to be nondiscriminatory and hence legal.[9]

Responding to *Gilbert*, Congress enacted the Pregnancy Discrimination Act (PDA) to clarify the meaning of Title VII sex discrimination.[10] The PDA redefined sex discrimination to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions."[11] By equating pregnancy discrimination with sex discrimination, the PDA prohibits an otherwise comprehensive disability plan, such as that examined in *Gilbert*, from excluding an employee's pregnancy-related conditions.[12]

During the *Survey* year, the Supreme Court, in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,[13] examined the scope of Title VII as amended by the PDA. Specifically, the Court inquired whether the amended statute prohibits an employer from providing fewer pregnancy benefits to spouses of male employees than it provides to female employees under an otherwise comprehensive insurance plan for employees and their dependents.[14] In a seven-to-two decision,[15] the *Newport News* Court answered that ques-

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[5] *Id.* at 127-28, 13 FEP Cases at 1658-59.

[6] *Id.* at 136, 13 FEP Cases at 1662. In reaching this conclusion, the *Gilbert* Court relied on the rationale of an earlier case, *Geduldig v. Aiello*, which held that a similar disability plan excluding pregnancy did not violate the equal protection clause of the fourteenth amemdment. 429 U.S. at 132-40, 13 FEP Cases at 1660-64 (citing Geduldig v. Aiello, 417 U.S. 484, 487, 8 FEP Cases 97, 102 (1974)). Both the *Gilbert* and the *Geduldig* opinions observed that pregnancy, like any physical condition, may or may not be covered in an insurance policy. *Gilbert*, 429 U.S. at 134, 13 FEP Cases at 1661; *Geduldig*, 417 U.S. at 496-97 n.20, 8 FEP Cases at 101-02 n.20. The two opinions viewed the classification created by the exclusion of pregnancy benefits as between "pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Gilbert*, 429 U.S. at 135, 13 FEP Cases at 1661; *Geduldig*, 417 U.S. at 496-97 n.20, 8 FEP Cases at 101-02 n.20. Because the classifications created in both disability plans were not strictly gender-based, both cases determined that the exclusion of pregnancy benefits was not gender-based discrimination. *Gilbert*, 429 U.S. at 134-35, 13 FEP Cases at 1661; *Geduldig*, 417 U.S. at 496-97 & n.20, 8 FEP Cases at 101-02 & n.20.

[7] *Gilbert*, 429 U.S. at 138, 13 FEP Cases at 1663.

[8] *Id.* at 139, 13 FEP Cases at 1663.

[9] *Id.* at 139-40, 13 FEP Cases at 1663-64.

[10] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[11] The PDA amended the "Definitions" section of Title VII, 42 U.S.C. § 2000e (1976), to add a subsection (k) which provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, . . . .

*Id.*

[12] *See* Note, *Pregnancy Discrimination, Equal Compensation and the Ghost of* Gilbert: *Medical Insurance Coverage for Spouses of Employees*, 51 FORDHAM L. REV. 696, 697 (1983).

[13] 103 S. Ct. 2622, 32 FEP Cases 1 (1983).

[14] *Id.* at 2624, 32 FEP Cases at 2.

[15] Justice Stevens wrote the majority opinion, joined by Chief Justice Burger and Justices

tion in the affirmative, holding that the limitation on pregnancy benefits for employees' spouses constituted sex discrimination against male employees in violation on Title VII.[16] The insurance plan unlawfully discriminated, according to the Court, by providing male employees with a less inclusive benefit package than the package provided to female employees.[17]

Following passage of the PDA in 1978, the Newport News Shipbuilding and Dry Dock Company (Company) amended its health insurance plan to provide its male and female employees with the same hospitalization coverage for all medical conditions.[18] The plan's coverage of eligible dependents was identical to its coverage of employees, except that spouses of male employees received less coverage for pregnancy-related hospital charges than did female employees.[19]

After the Company amended its insurance plan, a male employee filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that the Company's refusal to provide full insurance coverage for his wife's pregnancy-related hospitalization was unlawful sex discrimination.[20] This allegation found support in the EEOC's interpretive guidelines on the Pregnancy Discrimination Act, which were issued before the Company's amended plan became effective.[21] One such guideline states that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions."[22]

After the employee filed a charge with the EEOC, the Company brought an action in the United States District Court for the Eastern District of Virginia, challenging the EEOC's guidelines and requesting declaratory and injunctive relief.[23] After first determining that the provisions of the PDA extended only to female employees, and not to spouses of male employees,[24] the district court held that the Company's insurance plan did not constitute gender-based discrimination under the rationale of the Supreme Court in *Gilbert*.[25] The court, therefore, enjoined enforcement of the EEOC's guidelines on

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Brennan, White, Marshall, Blackmun, and O'Connor. Justice Rehnquist filed a dissenting opinion in which Justice Powell joined.

[16] *Newport News*, 103 S. Ct. at 2632, 32 FEP Cases at 8.

[17] *Id.* at 2631, 32 FEP Cases at 7.

[18] *Id.* at 2625, 32 FEP Cases at 3.

[19] *Id.* The Company's plan provided 100% coverage for reasonable and customary delivery and anesthesiologist's charges, and up to $500 of hospitalization charges to the spouses of male employees in connection with an uncomplicated delivery. *Id.* at 2625 & n.6, 32 FEP Cases at 2-3 & n.6. Female employees received the full cost of a semi-private room and the cost of other necessary medical and hospital charges while hospitalized up to 100% of the first $750 and 80% of the excess. *Id.* To the extent that hospital charges exceeded $500 for the spouse of a male employee, therefore, the male employee received less complete insurance coverage than did a female employee. *Id.* at 2625, 32 FEP Cases at 3.

[20] 103 S. Ct. at 2626, 32 FEP Cases at 3.

[21] *See* Guidelines on Discrimination Because of Sex & Appendix of Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 & app. question 21 (1983).

[22] *Id.*

[23] *Newport News*, 103 S. Ct. at 2626, 32 FEP Cases at 3. A month later the United Steelworkers filed a similar suit on behalf of other individuals. *Id.*

[24] Newport News Shipbuilding and Dry Dock Co. v. EEOC, 510 F. Supp. 66, 70, 25 FEP Cases 5, 7-8 (E.D. Va. 1981), *rev'd*, 667 F.2d 448, 27 FEP Cases 1219 (4th Cir. 1982), *aff'd on rehearing*, 682 F.2d 113, 29 FEP Cases 200 (4th Cir.) (en banc), *aff'd*, 103 S. Ct. 2622, 32 FEP Cases 1 (1983).

[25] *Id.* at 71, 25 FEP Cases at 8. For a discussion of *Gilbert*, see *supra* notes 4-9 and accompanying text.

pregnancy benefits for employees' spouses.[26] Meanwhile, in a separate suit in the same court, the EEOC filed a complaint against the Company, alleging that the Company discriminated against its male employees on the basis of sex in the provision of health insurance benefits.[27] Following its decision in the Company's suit, however, the district court dismissed the EEOC's complaint.[28] The suits by the Company and the EEOC were consolidated on appeal.[29]

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed the district court.[30] Determining that the language and the legislative history of the PDA indicated that the statute applies to both employees and their spouses,[31] the Fourth Circuit rejected the Company's contention that the rationale of *Gilbert* was unaffected by the PDA.[32] The PDA, according to the Fourth Circuit, established that any distinction based on pregnancy is a distinction based on sex.[33] Consequently, the distinction in the Company's plan was unlawful under Title VII.[34] On rehearing en banc, the court reaffirmed the panel opinion.[35] Because the issue had been decided differently by the Ninth Circuit in *EEOC v. Lockheed Missiles and Space Co.*,[36] the Supreme Court granted certiorari.[37]

The Supreme Court affirmed the decision of the Fourth Circuit,[38] holding that the Company's plan discriminated against male employees in violation of Title VII by providing them with a health insurance package for dependents that was less comprehensive than the package provided female employees.[39] The Court first framed the question raised by *Newport News* as whether the Company's plan had discriminated against male employees within the meaning of section 703(a)(1) of Title VII.[40] Observing that neither the PDA nor Title VII defined the word "discriminate," the Court inquired whether Congress, by enacting the PDA, not only overturned the specific holding in *Gilbert*, but also rejected the Title VII discrimination test used by the Court in that case.[41] After

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[26] *Newport News*, 510 F. Supp. at 72, 25 FEP Cases at 9.

[27] *Newport News*, 103 S. Ct. at 2626, 32 FEP Cases at 3.

[28] *Newport News*, 510 F. Supp. at 72, 25 FEP Cases at 9.

[29] *Newport News*, 103 S. Ct. at 2626, 32 FEP Cases at 4.

[30] Newport News Shipbuilding and Dry Dock Co. v. EEOC, 667 F.2d 448, 451, 27 FEP Cases 1219, 1222 (4th Cir. 1982), *aff'd on rehearing*, 682 F.2d 113, 29 FEP Cases 200 (4th Cir.) (en banc), *aff'd*, 103 S. Ct. 2622, 32 FEP Cases 1 (1983).

[31] *Id.* at 450-51, 27 FEP Cases at 1220-22.

[32] *Id.* at 450-51, 27 FEP Cases at 1221-22.

[33] *Id.* at 451, 27 FEP Cases at 1222.

[34] *Id.*

[35] Newport News Shipbuilding and Dry Dock Co. v. EEOC, 682 F.2d 113, 114, 29 FEP Cases 200, 200 (4th Cir. 1982) (en banc), *aff'd*, 103 S. Ct. 2622, 32 FEP Cases 1 (1983).

[36] *Newport News*, 103 S. Ct. at 2626, 32 FEP Cases at 4. In *Lockheed Missiles*, the Ninth Circuit held that a company's medical benefit plan which covered the medical expenses of its employees' dependents except for pregnancy did not discriminate against male employees in violation of Title VII. 680 F.2d 1243, 1247, 29 FEP Cases 281, 283 (9th Cir. 1982).

[37] Newport News Shipbuilding and Dry Dock Co. v. EEOC, 459 U.S. 1069, 103 S. Ct. 487 (1982).

[38] *Newport News*, 103 S. Ct. at 2632, 32 FEP Cases at 8.

[39] *Id.* at 2631, 32 FEP Cases at 7.

[40] *Id.* at 2627, 32 FEP Cases at 4.

[41] *Id.* One confusing aspect of the *Newport News* opinion is that the Court does not state what the *Gilbert* "test of discrimination" is, although the Court refers to such a test. *See id.* Additionally, in *Gilbert*, the Supreme Court did not label any part of its analysis a "test of discrimination." Although the *Newport News* opinion is unclear on this point, it did state that the proper test of discrimination is the *comprehensiveness* of a disability plan. *Id.* The *Gilbert* opinion, by contrast, focused on the facial

describing the discrimination tests applied by the majority and dissents in *Gilbert*,[42] the Court examined whether the majority's test survived enactment of the PDA.[43] According to the Court, the PDA's legislative history indicated that Congress rejected the *Gilbert* majority's definition of discrimination, and with it both the majority's holding and reasoning.[44]

In considering the PDA's legislative history, the *Newport News* Court observed that congressional discussion of the PDA focused on the needs of female employees.[45] Nonetheless, the majority reasoned, "[t]his does not create a 'negative inference' limiting the scope of the act to the specific problem that motivated its enactment."[46] The Court noted that when the Senate Committee on Labor and Human Resources considered the specific issue of pregnancy-related coverage for dependents, the Committee stated that the question should be resolved "on the basis of existing Title VII principles."[47] According to the Court, "[t]he legislative context makes it clear that Congress was not thereby referring to the view of Title VII reflected in this Court's *Gilbert* opinion."[48] The Court concluded from the legislative history that proponents of the PDA intended to protect all individuals, not just pregnant employees, from sex discrimination in employment.[49]

After examining the PDA's effect on *Gilbert*, the Court applied Title VII principles to

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*inclusiveness* of risks in a plan. *See Gilbert*, 429 U.S. at 139, 13 FEP Cases at 1663 (to comply with Title VII, a plan must provide only a "facially evenhanded inclusion of risks"). Hence, the *Newport News* Court may be referring to this inclusiveness test as the test it is rejecting.

[42] *Newport News*, 103 S. Ct. at 2627-28, 32 FEP Cases at 4-5. For a discussion of the *Gilbert* majority's reasoning, see *supra* notes 4-9 and accompanying text. Briefly, the *Gilbert* dissenters disagreed with the majority's application of a fourteenth amendment standard of discrimination to a Title VII problem. 429 U.S. at 153-54 & n.6, 13 FEP Cases at 1669 & n.6 (Brennan, J., dissenting); *id.* at 160-61, 32 FEP Cases at 1672 (Stevens, J., dissenting). Justice Brennan concluded that General Electric's plan discriminated against women because men were covered for all risks including those unique to men, while women were not covered for all risks to which they were susceptible. *Id.* at 160, 13 FEP Cases at 1672 (Brennan, J., dissenting). Justice Stevens explained that "by definition, such a rule [excluding pregnancy benefits] discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 161-62, 13 FEP Cases at 1673 (Stevens, J., dissenting).

[43] *Newport News*, 103 S. Ct. at 2627-30, 32 FEP Cases at 4-6.

[44] *Id.* at 2628-29 & nn.15-17, 32 FEP Cases at 5-6 & nn.15-17. The Court cited numerous statements in the House and Senate Reports and statements made by proponents of the bill to support its conclusion. *Id.* A representative example of these statements is contained in the Senate Report, which explained that "the bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and the lower courts." S. REP. No. 331, 95th Cong., 1st Sess., 7-8 (1977), *reprinted in Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978*, at 45 (1980) [hereinafter cited as *Legis. Hist.*].

[45] *Newport News*, 103 S. Ct. at 2629, 32 FEP Cases at 6.

[46] *Id.* The Court cited McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976), as an example of a similar problem in interpreting the legislative history of a civil rights statute. In *McDonald*, the Court interpreted 42 U.S.C. § 1981 (1976), which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ," as protecting both black and white citizens against discrimination. 427 U.S. at 289-96. After examining the statute's legislative history, the *McDonald* Court determined that Congress intended to accomplish more than the alleviation of "the particular and immediate plight of the . . . Negro." 427 U.S. at 296.

[47] *Newport News*, 103 S. Ct. at 2629 & n. 20, 32 FEP Cases at 6 & n.20.

[48] *Id.* at 2629-30, 32 FEP Cases at 6.

[49] *Id.* at 2630, 32 FEP Cases at 6.

analyze the Company's insurance plan.[50] This plan, the Court observed, provided limited pregnancy-related hospitalization benefits for employees' wives while providing more complete coverage for employees' spouses for all other medical conditions.[51] Because Congress had rejected *Gilbert*'s reasoning, and because the PDA had established that treating pregnancy-related conditions less favorably than other medical conditions is discrimination, the Court concluded that the Company's plan violated Title VII by affording a less inclusive benefit package to male employees.[52]

The Court rejected the Company's argument that the PDA applies only to discrimination against female employees. According to the majority, the PDA equates discrimination based on a woman's pregnancy with discrimination based on her sex "for all Title VII purposes."[53] The Court reasoned that "since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees."[54]

Writing in a dissent joined by Justice Powell, Justice Rehnquist contended that *Gilbert* was binding precedent on *Newport News* and that the Company therefore did not violate Title VII.[55] The PDA, according to the dissent, applies only to female employees who are pregnant, not to pregnant spouses of male employees.[56] The dissent supported this argument by analyzing the language of Title VII as amended by the PDA,[57] and the legislative history of the PDA.[58]

The dissent observed that as amended by the definitional provision of the PDA,[59] section 703(a)(1) of Title VII proscribes discrimination "against any individual . . . because of such individual's . . . pregnancy, childbirth, or related medical conditions; . . . ."[60] According to the dissent, because the word "individual" refers to an employee or applicant for employment, Title VII proscribes only discrimination based on an employee's pregnancy.[61] The dissent buttressed this conclusion by noting that the second clause of the PDA states that "women affected by pregnancy . . . shall be treated the same . . . as

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[50] *Id.* at 2630-32, 32 FEP Cases at 6-8. The Court made three threshold observations concerning Title VII law. First, health insurance and other fringe benefits are "compensation, terms, conditions, or privileges of employment" for Title VII purposes. *Id.* at 2630, 32 FEP Cases at 6-7. Second, both male and female employees are protected against discrimination under this statute. *Id.* at 2630, 32 FEP Cases at 7. Finally, the *Newport News* Court reaffirmed the test of discrimination enunciated in Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 711, 17 FEP Cases 395, 400 (1978), where the Court stated that sex discrimination exists when a person is treated "in a manner which but for the person's sex would be different." 103 S. Ct. at 2631, 32 FEP Cases at 7.

[51] *Newport News*, 103 S. Ct. at 2631, 32 FEP Cases at 7.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 2632, 32 FEP Cases at 8 (Rehnquist, J., dissenting).

[56] *Id.*

[57] *Id.* at 2632-33, 32 FEP Cases at 8-9 (Rehnquist, J., dissenting).

[58] *Id.* at 2633-36, 32 FEP Cases at 9-11 (Rehnquist, J., dissenting).

[59] This provision of the PDA states that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; . . . ." 42 U.S.C. § 2000e(k) (1982).

[60] 42 U.S.C. § 2000e-2(a)(1) (1982). Although the statute does not read expressly as cited, such result is obtained by replacing the word "sex" in 42 U.S.C. § 2000e-2(a)(1) with the amended definition of the word "sex" as provided by 42 U.S.C. § 2000e(k).

[61] *Newport News*, 103 S. Ct. at 2633, 32 FEP Cases at 9 (Rehnquist, J., dissenting).

other persons not so affected but *similar in their ability or inability to work*."[62] This admonition, the dissent asserted, could only apply to female employees because the phrase "similar in their ability or inability to work" denotes employment.[63]

Examining the legislative history of the PDA, the dissent catalogued the instances where Congress referred to the PDA's protection of "working women" or "pregnant workers."[64] The dissent next quoted at length from the Senate Report, which raised the issue of pregnancy-related benefits for employees' dependents but declined to state a position on the matter.[65] The dissent concluded that this refusal to take a position demonstrated Congress's intent to restrict the PDA to the problem that motivated the PDA's enactment — discrimination against pregnant employees.[66] In support of this conclusion, the dissent recounted an exchange between Senator Williams, a sponsor of the bill, and Senator Hatch, during which the former stated: "I do not see how one can read into this any pregnancy other than the pregnancy of an employee."[67]

The dissent concluded with an attack on the majority's understanding of the relationship between the PDA and the *Gilbert* decision.[68] While conceding that some statements made by individual members of Congress indicated disapproval of the reasoning in *Gilbert*, the dissent maintained that, based on an examination of the legislative history of the PDA, Congress as a whole did not.[69] Therefore, the dissent concluded that *Gilbert* was still good law and that pursuant to *Gilbert* the Company's plan did not violate Title VII.[70]

The ultimate decision of the Court in *Newport News* that the Company's insurance plan discriminated on account of sex appears to be a fair one. Under the plan, male

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[62] *Id. See* 42 U.S.C. § 2000e(k).

[63] *Newport News*, 103 S. Ct. at 2633, 32 FEP Cases at 9 (Rehnquist, J., dissenting).

[64] *Id.* at 2633-35 & nn.4-6, 32 FEP Cases 9-10 & nn.4-6 (Rehnquist, J., dissenting). The dissent made reference to over twenty-five statements of members of Congress or congressional committees to the effect that the bill would provide true equality for women by ending a major form of discrimination. *See id.*

[65] *Id.* at 2635, 32 FEP Cases at 10 (Rehnquist, J., dissenting) (quoting S. REP. No. 331, 95th Cong., 1st Sess. 5-6, *reprinted in Legis. Hist.*, *supra* note 44, at 42-43). On the issue of the effect of the PDA on medical coverage for dependents of employees, the Senate Report stated that the question should "be determined on the basis of existing Title VII principles." S. REP. No. 331, 95th Cong., 1st Sess., at 6, *reprinted in Legis. Hist.*, *supra* note 44, at 42-43.

[66] *Newport News*, 103 S. Ct. at 2635, 32 FEP Cases at 10 (Rehnquist, J., dissenting).

[67] *Id.* The full exchange between Senators Hatch and Williams appears to clarify the intended scope of the PDA:

> Mr. Hatch: The phrase "women affected by pregnancy, childbirth, or related medical conditions," . . . appears to be overly broad, and is not limited in terms of employment. It does not even require that the person so affected be pregnant . . . . Could the sponsors clarify exactly whom that phrase intends to cover?
>
> Mr. Williams: I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity, let it be clear here now that this is very precise. It deals with a woman, a woman who is an employee, an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; . . . .
>
> Mr. Hatch: So the Senator is satisfied that, though "women affected by pregnancy" seems to be ambiguous, what it means is that this act only applies to the particular woman . . . who is an employee and has become pregnant after her employment?
>
> Mr. Williams: Exactly.

123 CONG. REC. 29, 643-44 (1977).

[68] *Newport News*, 103 S. Ct. at 2636-37, 32 FEP Cases at 11 (Rehnquist, J., dissenting).

[69] *Id.*

[70] *Id.* at 2637, 32 FEP Cases at 11 (Rehnquist, J., dissenting).

employees received less insurance coverage than did female employees.[71] Viewing an employee and his or her spouse as a unit, every couple should receive exactly the same coverage of risks, regardless of which spouse is the employee.[72] Accordingly, any difference in coverage based on the sex of the individual employed should be deemed discrimination.[73]

Likewise, the test of discrimination used by the Court in *Newport News* was appropriate. In *Newport News*, the Court examined the comprehensiveness of the plan's coverage of risks.[74] In *Gilbert*, the Court had focused on whether all risks common to both sexes were covered by the plan.[75] Because the sexes are biologically different and hence are not "similarly situated," a test such as *Gilbert*'s that examines only shared risks appears logical.[76] The *Newport News* test, however, is more appropriate as a Title VII test for discrimination precisely because it takes into account the biological differences between the sexes. Pregnancy presents women with risks and burdens not shared by men. Facially neutral employment policies, such as those analyzed in *Newport News* and *Gilbert*, perpetuate this disadvantage because they do not acknowledge and compensate women for this additional burden. Testing for discrimination in a facially neutral manner by examining only shared risks likewise fails to correct for this sex-related inequality.

The basic thrust of *Gilbert* was that inequalities resulting from inherent differences between the sexes should not give rise to findings of legal discrimination and should not require additional benefits for persons bearing additional burdens.[77] The problem with this approach is that it ignores a primary goal of Title VII: to remove the impediments hindering women from fully participating in the work force.[78] To assure men and women equal employment opportunities, "the legal system should recognize the particular difficulties that each sex faces in combining the dual roles of parent and worker."[79] By examining only the percentage level of coverage for all risks and ignoring whether risks are sex-shared, a comprehensiveness test acknowledges the unique role of women as childbearers. The *Newport News* Court, in adopting this test, recognized that because men and women are not necessarily identical, identical treatment is not always synonymous with legal equality.[80]

Although the above-noted policy considerations justify the result in *Newport News*, the Court's analysis raises questions concerning the appropriate use of the legislative history of a statutory amendment.[81] In *Newport News*, the Court concluded that, based on evi-

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[71] *Id.* at 2631, 32 FEP Cases at 7 (Rehnquist, J., dissenting).

[72] *See* Note, *Employment Discrimination — Pregnancy Discrimination Against Male Employees: Extending the Pregnancy Discrimination Act to Employees' Dependents*, 61 N.C.L. REV. 733, 743-44 (1983).

[73] *Id.*

[74] *Newport News*, 103 S. Ct. at 2627, 32 FEP Cases at 4.

[75] *Id. See Gilbert*, 429 U.S. at 139, 13 FEP Cases at 1663.

[76] *See* Comment, *Differential Treatment of Pregnancy in Employment: The Impact of* General Electric Co. v. Gilbert *and* Nashville Gas Co. v. Satty, 13 HARV. C.R.-C.L.L. REV. 717, 725 (1978).

[77] *See Gilbert*, 429 U.S. at 139 n.17, 13 FEP Cases at 166 n.17.

[78] Brown v. Porcher, 502 F. Supp. 946, 954 n.14 (D.S.C. 1980), *aff'd*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983); *See* H. REP. No. 948, 95th Cong., 2d Sess. 3 (1978) (in enacting Title VII, Congress mandated equal access to employment and its concomitant benefits for female and male workers).

[79] Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690, 715 (1983).

[80] *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 260-61 (1983).

[81] For a general discussion of the construction and effect of amendatory acts, see 1A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 22.01-22.39 (4th ed. 1972).

dence found in the PDA's legislative history, Congress had rejected the *Gilbert* rationale.[82] While the Court appears to have discerned congressional sentiment correctly, the Court did not adequately explain why Congress's disapproval and rejection gutted the vitality of *Gilbert*'s rationale. The terms of the PDA deal only with pregnancy discrimination against female employees, and hence the PDA overruled *Gilbert* only to that extent.[83] Nevertheless, the *Newport News* Court refused to accept any of *Gilbert*'s rationale as controlling, apparently a decision based solely on Congress's rejection of the premises of *Gilbert*.

The opinion in *Newport News* fails to provide any independent analysis of why *Gilbert*'s reasoning is wrong and why that reasoning should no longer be followed. While the PDA's legislative history provides persuasive support for the position that the entire *Gilbert* rationale was incorrect, the Court's analysis based solely on this legislative history suggests that legislative history alone requires disposing of the *Gilbert* rationale.[84] Although legislative history is a useful and flexible tool in statutory construction, whether it alone can mandate discarding the *Gilbert* rationale is questionable.

It is possible that the *Newport News* Court did not in fact rely exclusively on the PDA's legislative history, but had an independent basis for rejecting all of *Gilbert*. As discussed previously, the goals of Title VII can best be achieved by replacing *Gilbert*'s test of discrimination with the comprehensiveness test embraced in *Newport News*.[85] The *Newport News* opinion, as written, however, is troubling because it displays an unnecessary reliance on the PDA's legislative history and a judicial unwillingness to deal directly with an important legal and moral issue. By relying on the PDA's legislative history, the Court may have avoided the "political fallout" associated with requiring employers to provide spouses coverage for pregnancy-related conditions to the same extent as other medical conditions.[86] Although this observation may explain the Court's limited analysis, the political ramifications of the holding do not justify the opinion's analytical shortcomings. Lacking an independent analysis of the propriety of *Gilbert*'s reasoning, *Newport News* leaves lower courts with little guidance beyond the fact situation presented in *Newport News*. Since the Court did not expressly overrule *Gilbert*, even the simple question of whether any of *Gilbert* remains good law remains undecided.[87]

Because of the analytical gaps in *Newport News*, the likely impact of the decision is difficult to predict. Since *Gilbert* has not been overruled, the decision may be resurrected in the future, limiting the principles enunciated in *Newport News*. Additionally, *Newport News* acknowledges that general Title VII principles restrict the scope of the *Newport News*

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[82] *Newport News*, 103 S. Ct. at 2627, 32 FEP Cases at 4.

[83] *Id.* at 2633, 32 FEP Cases at 8 (Rehnquist, J., dissenting). The *Newport News* majority did not refute the dissent's argument that the PDA's protection extends only to female employees. Rather, the Court stated that it relied on the PDA "only to the extent that it unequivocally rejected the *Gilbert* decision" and that the *Newport News* decision rested primarily on general Title VII principles. *Id.* at 2630 n.21, 32 FEP Cases at 6 n.21.

[84] The Court did not state expressly that the PDA's legislative history mandated an abandonment of *Gilbert*'s rationale. The Court did assert, however, that "Congress' rejection of the premises of *General Electric Co. v. Gilbert* forecloses any claim that an insurance program excluding pregnancy coverage for female beneficiaries and providing complete coverage to similarly situated male beneficiaries does not discriminate on the basis of sex." 103 S. Ct. at 2632, 32 FEP Cases at 8.

[85] *See supra* notes 74-80 and accompanying text.

[86] *See* Mass, *The Pregnancy Discrimination Act: Protecting Men From Pregnancy-Based Discrimination*, 9 EMPL. REL. L.J. 240, 248 (1983) [hereinafter cited as Mass].

[87] The *Newport News* dissent, however, read the majority's opinion as overruling *Gilbert*. 103 S. Ct. at 2632, 32 FEP Cases at 8 (Rehnquist, J., dissenting). *See also* Mass, *supra* note 86, at 248.

decision. Although the Court asserted that "it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions,"[88] the Court will likely find unlawful sex discrimination only where the less favorable treatment of pregnancy results in a differing impact on female than on male employees. The Court observed, for example, that a plan limiting maternity benefits for employees' children would not be discriminatory since this limitation would affect male and female employees equally.[89]

In *Newport News*, the Supreme Court held that an employer's insurance plan that covered employees' spouses for all conditions, but limited hospitalization benefits only for pregnancy-related conditions of spouses, constituted sex discrimination under Title VII. The Court may be criticized for relying exclusively on the PDA's legislative history to support its decision to discard *Gilbert*'s rationale. Despite this shortcoming, however, the Court's abandonment of *Gilbert* must be welcomed as an important step toward eradicating sex discrimination in employment.

## III. Resolving Conflicts — Title VII Versus NLRA

### A. **Enforceability of Title VII Conciliation Agreements that Conflict with Collective Bargaining Contracts*: EEOC v. Safeway Stores, Inc.[1]

Title VII of the Civil Rights Act of 1964 (the Act)[2] requires the Equal Employment Opportunity Commission (the Commission) to attempt to eliminate discriminatory employment practices through informal methods of conference, conciliation, and persuasion.[3] Any agreement to remedy unlawful practices reached as a result of negotiations between the Commission and an employer or union charged with discrimination is usually reflected in a written conciliation agreement, which may include a detailed plan of affirmative action to provide remedial relief.[4] This conciliation process takes place after the Commission has investigated allegations of discriminatory employment practices and has determined that there is reasonable cause to believe that a charge is true.[5] A typical conciliation agreement provides relief for the charging party, an agreement to comply with the law by the respondent employer or labor union, and a waiver by the charging party of his or her right to sue the respondent, if the respondent performs its obligations pursuant to the conciliation agreement.[6]

Voluntary compliance and cooperation were selected by Congress as the preferred means for achieving the goal of the Act, which is to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of

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[88] *Newport News*, 103 S. Ct. at 2631, 32 FEP Cases at 7.

[89] *Id.* at 2631 n.25, 32 FEP Cases at 7-8 n.25.

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* By Renée M. Landers, Staff Member, Boston College Law Review.

[1] 714 F.2d 567, 32 FEP Cases 1465 (5th Cir. 1983).

[2] The Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1982).

[3] 42 U.S.C. § 2000e-5(b) (1982).

[4] 1 Empl. Prac. Guide (CCH) ¶ 1473.

[5] 42 U.S.C. § 2000e-5(g)(1982).

[6] 1 Empl. Prac. Guide (CCH) ¶ 1473. Relief for the charging party may include an award of back pay and a grant of retroactive or "constructive" seniority referring back to the date when the alleged discrimination occurred. *See* EEOC v. Safeway Stores, Inc., 714 F.2d 567, 569-70, 32 FEP Cases 1465, 1466-67 (5th Cir. 1983).

race, color, religion, sex, or national origin.[7] A complaining party must attempt to achieve voluntary compliance before seeking relief for alleged employment discrimination in the courts.[8] Conciliation offers several advantages over full-blown legal proceedings. If the party or parties accused of having discriminated do not acknowledge that any law has been violated, the agreements and any records of the investigations and negotiations are not made public.[9] Likewise, a conciliation agreement that solves the unlawful employment practice problem spares all parties the expense and delay of litigation.[10] Finally, the charged parties avoid having a judicial finding of violation of Title VII entered against them.[11]

Conciliation agreements entered into by employers and labor unions are specifically enforceable if regular contract rules are satisfied and if the agreement does not conflict with the parties' individual rights or the purposes of Title VII.[12] Agreements have been successfully challenged, however, when they have contained provisions that adversely affect the rights of individuals who were not parties to the agreements.[13] In *W.R. Grace and Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*,[14] for example, the Supreme Court held that, absent a judicial determination, the Commission and an employer cannot, without the union's consent, agree to alter a collective bargaining agreement in order to eliminate a discriminatory seniority system mandated by the agreement.[15]

During the *Survey* year, the Court of Appeals for the Fifth Circuit had occasion to apply the Supreme Court's ruling in *W.R. Grace* to a conciliation agreement which violated the terms of a collective bargaining contract by awarding retroactive seniority to the complaining parties. In *EEOC v. Safeway Stores, Inc.*,[16] the court held that retroactive seniority cannot properly be granted by a conciliation agreement absent either the union's consent or an adjudication on the merits of the discrimination claim in which the union has the opportunity to participate.[17] The decision in *Safeway* extends the prohibition in *W.R. Grace* to situations where the conciliation agreement does not alter the entire seniority system established by the collective bargaining contract, but merely affords the individual charging parties their rightful place within the seniority system.[18]

The action in *Safeway* was brought by the Commission seeking specific performance of three conciliation agreements entered into by defendant Safeway Stores, Inc. and the

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[7] Alexander v. Gardner-Denver Company, 415 U.S. 40, 44, 7 FEP Cases 81, 84 (1974).

[8] 42 U.S.C. § 2000e-5(b) (1982).

[9] *Id.*

[10] 1 EMPL. PRAC. GUIDE ¶ 1483.

[11] According to the statutory timetable, the conciliation procedure occurs prior to any judicial enforcement action. *See* 42 U.S.C. § 2000e-5(b) (1982).

[12] *Safeway*, 714 F.2d. at 574, 32 FEP Cases at 1470. *See* Fulgence v. J. Ray McDermott, 662 F.2d 1207, 27 FEP Cases 799 (5th Cir. 1981) (decision enforcing an oral conciliation agreement reached pursuant to Title VII).

[13] W.R. Grace and Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, 103 S. Ct. 2177, 2186, 31 FEP Cases 1409, 1414 (1983); *Safeway*, 714 F.2d at 577, 32 FEP Cases at 1472; United States v. City of Miami, 664 F.2d 435, 442, 27 FEP Cases 913, 919 (5th Cir. 1981); Southbridge Plastics Division, W.R. Grace and Co. v. Local 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America, 565 F.2d 913, 916, 16 FEP Cases 507, 509 (5th Cir. 1978).

[14] 103 S. Ct. 2177, 31 FEP Cases 1409 (1983).

[15] *Id.* at 2186, 31 FEP Cases at 1414.

[16] 714 F.2d 567, 32 FEP Cases 1465 (5th Cir. 1983).

[17] *Id.* at 580, 32 FEP Cases at 1475.

[18] *Id.* at 578, 32 FEP Cases at 1472.

Commission to resolve four charges of employment discrimination based on race and national origin.[19] After investigating all four charges, the Commission found reasonable cause to believe that the allegations were true.[20] As required by Title VII, the Commission then attempted conciliation with Safeway regarding the charges.[21] An agreement was reached in June and August of 1976, and was signed by Safeway, the Commission, and the charging parties.[22] Safeway promised to give each of the four individual complaining parties a seniority date retroactive either to the date he applied for employment or to the first date another person was hired by Safeway following his application.[23] In addition, Safeway agreed to pay each employee an amount which reflected what he would have earned had he been hired or promoted on the earlier date.[24] The Commission and the charging parties agreed not to sue Safeway on the underlying discrimination charges, subject to the performance by Safeway of the promises in the agreement.[25]

Several months after entering into the conciliation agreement, Safeway refused to revise the seniority status of the four charging parties.[26] Instead, Safeway gave the employees seniority dates corresponding to the date each was hired or promoted according to the seniority system established in the collective bargaining agreement.[27] After the charging parties complained to the Commission, Safeway and the Commission entered into a two-year addendum agreement whereby the charging parties would retain their pre-conciliation seniority dates and, in exchange, Safeway would protect them from economic loss in the event of layoffs due to the use of the less advantageous seniority dates.[28] Safeway performed the addendum agreement but failed to give the charging parties their retroactive seniority when the addendum expired.[29]

The Commission filed suit against Safeway in the district court for the Northern District of Texas in February, 1978, alleging that Safeway had breached the conciliation agreements by failing to assign retroactive seniority dates to the four charging parties.[30]

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[19] *Id.* at 569, 32 FEP Cases at 1466. Two of the complaining parties alleged that they were either not hired or not promoted to the position of truck driver by Safeway because of their race. *Id.* Willis Taylor filed a charge of discrimination on April 10, 1972, alleging that Safeway failed to transfer him to the position of truck driver because of his race. *Id.* In a charge filed on August 9, 1975, Billy Faison alleged that Safeway failed to hire him as a truck driver because of his race. *Id.* The other two complainants, Fernando Cantu and Concepcion Rodriguez, charged that they were not hired by Safeway for positions in its warehouse due to their national origin. *Id.*

[20] 714 F.2d at 569, 32 FEP Cases at 1466.

[21] *Id. See* 42 U.S.C. § 2000e-5(b) (1982). Teamsters Local 754 was the collective bargaining representative for Safeway employees in the truck driver and warehouseman job classifications related to the claims of the charging parties. 714 F.2d at 570, 32 FEP Cases at 1466. Although the Commission requested that the union take part in the conciliation process, the union did not do so and was not a party to the conciliation agreements. *Id.*

[22] 714 F.2d at 570, 32 FEP Cases at 1466. There were actually three agreements, one relating to the warehouse position claims and one each regarding the two individuals who sought to be hired or promoted to truck driver positions. *Id.* at 570 & n.2, 32 FEP Cases at 1466 & n.2.

[23] 714 F.2d at 569, 32 FEP Cases at 1466.

[24] *Id.* at 569-70, 32 FEP Cases at 1466.

[25] *Id.* at 570, 32 FEP Cases at 1466.

[26] *Id.* at 570, 32 FEP Cases at 1466-67.

[27] *Id.* at 570, 32 FEP Cases at 1467.

[28] *Id.*

[29] *Id.*

[30] *Id.* The Commission filed suit on February 1, 1978. Trial testimony indicated that Safeway did not perform the conciliation agreements because of threats received from employees and union members. *Id.*

Teamsters Local 745 was joined as a party under Rule 19 of the Federal Rules of Civil Procedure.[31] While Safeway and the union contended that Safeway's performance of the two-year addendum fulfilled its obligations to the employees, the Commission claimed that the purpose of the addendum had been to give Safeway additional time to resolve its problem with the union and employees while protecting the charging parties from economic harm.[32] In 1982, the district court ruled for the Commission, ordered specific enforcement of the conciliation agreement, and awarded back pay to the Commission on behalf of the charging parties.[33] No judgment was granted with respect to the union.[34] On appeal, the Fifth Circuit reversed.[35]

After dismissing all the objections Safeway raised against enforcement of the conciliation agreement,[36] the Fifth Circuit considered the union's claims that, because the provisions of the conciliation agreement violated the seniority provisions in the collective bargaining contract, the conciliation agreement could not be enforced in the absence of the union's consent or a judicial determination that the underlying charges of discrimination were true.[37] In opposition, the Commission contended that the lower court's order enforcing the agreement that provided that the charging parties receive retroactive seniority was proper because the agreement did not replace the collectively bargained seniority system, but merely afforded the charging parties their rightful place as specified in the conciliation agreement.[38]

The appeals court explained that the Commission relied on the proposition, established by the Supreme Court in *Franks v. Bowman Transportation Co.*[39] and reiterated in *International Brotherhood of Teamsters v. United States*,[40] that an employee who is the victim of unlawful employment discrimination may be made whole by an award of retroactive seniority, even though such relief may violate seniority provisions contained in the collective bargaining agreement between the employer and a union.[41] The court noted,

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[31] *Id.* at 570 n.5, 32 FEP Cases at 1467 n.5.

[32] *Id.* at 570, 32 FEP Cases at 1467.

[33] *Id.* at 570-71, 32 FEP Cases at 1467.

[34] *Id.* at 571, 32 FEP Cases at 1467.

[35] *Id.* at 577, 32 FEP Cases at 1472.

[36] *Id.* at 571-76, 32 FEP Cases at 1467-72. Before addressing the claims of the union with respect to the conflict between the terms of the conciliation agreement and the union contract, the court considered three defenses raised by Safeway against the Commission's action to enforce the terms of the conciliation agreement. *Id.* at 571-76, 32 FEP Cases at 1467-72. The court first rejected Safeway's contention that federal courts do not have jurisdiction over an action to enforce a Commission conciliation agreement, on the grounds of the primacy of conciliation in the Title VII statutory scheme. *Id.* at 571-73, 32 FEP Cases at 1467-69. The court also rejected Safeway's claims that conciliation agreements were unenforceable in federal court, reasoning that, so long as regular contract rules are satisfied and enforcement of the agreement does not conflict with the parties' individual rights or the purposes of Title VII, the agreement into which the parties entered voluntarily is specifically enforceable. *Id.* at 573-75, 32 FEP Cases at 1469-70. Lastly, the Court held that it was not clearly erroneous for the district court to have found that the addendum agreement between the Commission and Safeway was not intended to excuse Safeway from performing its promises in the original agreement but to give Safeway time to obtain the union's consent to a grant of retroactive seniority to the charging parties. *Id.* at 576, 32 FEP Cases at 1472. For a discussion of the addendum agreement, see *supra* notes 28-29 and accompanying text.

[37] 714 F.2d at 576-80, 32 FEP Cases at 1472-75.

[38] *Id.* at 577, 32 FEP Cases at 1472.

[39] 424 U.S. 747, 778, 779 n.41, 12 FEP Cases 549, 558, 561 n.41 (1976).

[40] 431 U.S. 324, 347, 14 FEP Cases 1514, 1524 (1977).

[41] 714 F.2d at 577, 32 FEP Cases at 1472 (citing Franks v. Bowman Transportation Co., 424 U.S.

however, that in the *Franks* and *Teamsters* cases on which the Commission relied, the issue of employment discrimination had been judicially resolved with the participation of the objecting union in the proceedings.[42] This judicial resolution of the discrimination issue was viewed by the *Safeway* court as a critical factor distinguishing the *Safeway* case from the prior *Franks* and *Teamsters* cases.[43] In a situation like the one presented in *Safeway*, involving enforcement of an agreement which would infringe on the rights of parties who did not participate in that agreement and without a finding that discriminatory practices had occurred, the "presumption" in favor of retroactive seniority could no longer take precedence, the court concluded, over the rights of the non-consenting parties.[44]

In support of its conclusion, the Fifth Circuit put forward two cases illustrating circumstances in which a court may enforce a settlement or conciliation agreement that alters the union's collectively bargained seniority system, without union consent.[45] In *Southbridge Plastics Division, W.R. Grace & Co. v. Local 759, International Union of United Rubber, Cork, and Linoleum and Plastics Workers of America*,[46] the Fifth Circuit refused to enforce a conciliation agreement between the employer and the Commission that replaced certain seniority provisions of the collective bargaining agreement with a quota system.[47] According to the *Safeway* court, the *Southbridge* decision held that, in the absence of a showing that the union's seniority system was negotiated and maintained with a discriminatory purpose, a conciliation agreement reached under Title VII that would result in the "wholesale destruction" of the seniority system would not be enforced.[48] The *Safeway* court emphasized the point made in *Southbridge*, that an award of retroactive seniority may be granted to charging parties so long as they have sought adjudication "through the traditional Title VII route."[49]

The other Fifth Circuit decision on which the court relied in upsetting the *Safeway* agreement was *United States v. City of Miami*.[50] In that case, the *Safeway* court noted, it approved only those provisions of a consent decree between the city and the United States that did not conflict with a union collective bargaining agreement.[51] The *Safeway* court adopted the reasoning of *City of Miami* that, where a party's contractual interests are potentially prejudiced by a decree, that party has a right to a judicial determination of the merits of its objection, notwithstanding the importance of voluntary settlement to Title VII's goal of eliminating employment discrimination.[52]

Finally, the *Safeway* court reasoned that the United States Supreme Court, in *W.R.*

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747, 778, 779 n.41, 12 FEP Cases 549, 558, 561 n.41 (1976); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 347, 14 FEP Cases 1514, 1524 (1977)).

[42] 714 F.2d at 577, 32 FEP Cases at 1472-73.

[43] *Id.* at 577, 32 FEP Cases at 1473.

[44] *Id.*

[45] *Id.* at 577-79, 32 FEP Cases at 1473-75.

[46] 565 F.2d 913, 16 FEP Cases 507 (5th Cir. 1978).

[47] *Id.* at 916, 16 FEP Cases at 509.

[48] 714 F.2d at 577-78, 32 FEP Cases at 1473 (citing *Southbridge Plastics*, 565 F.2d 913, 917, 16 FEP Cases 507, 509-10 (5th Cir. 1978)).

[49] 714 F.2d at 578, 32 FEP Cases at 1473 (citing *Southbridge Plastics*, 565 F.2d at 917, 16 FEP Cases at 509-10).

[50] United States v. City of Miami, 664 F.2d 435, 27 FEP Cases 913 (5th Cir. 1981) (en banc).

[51] 714 F.2d at 578, 32 FEP Cases at 1473 (citing United States v. City of Miami, 664 F.2d 435, 442, 27 FEP Cases 913, 919 (5th Cir. 1981)).

[52] 714 F.2d at 578, 32 FEP Cases at 1473 (citing United States v. City of Miami, 664 F.2d 435, 447, 27 FEP Cases 913, 924 (5th Cir. 1981)).

*Grace & Co. v. Local Union 759*,[53] had endorsed the conclusions the Fifth Circuit reached in its *Southbridge* and *City of Miami* decisions.[54] In *W.R. Grace*, the Supreme Court held that enforcement of the conciliation agreement at issue in *Southbridge*, which "nullified" collective bargaining agreement seniority provisions, would not be proper absent either a judicial determination that unfair employment practices had taken place, or union consent to the conciliation agreement.[55] The absence of a judicial determination, the Court reasoned, would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored.[56]

The Fifth Circuit rejected the Commission's attempts to distinguish *Southbridge*, *City of Miami*, and *W.R. Grace* on the basis that the conciliation agreements in *Safeway* did not involve a "wholesale destruction"of an existing collective bargaining agreement between an employer and its employees as did the agreements in the other cases.[57] The court agreed that the effect of the conciliation agreement on the collective bargaining system in *Safeway* may be less pronounced than in the three cited cases, but did not agree that conflict with the collective bargaining structure affected the result on the issue of the enforceability of the conciliation agreement.[58] Rights to due process of parties affected by conciliation agreements, the court concluded, should not depend on the degree of conflict with the collective bargaining agreement.[59] According to the court, awarding the charging parties a starting date other than the date on which they began work displaced others on the seniority roster, and thus constituted a violation of the collective bargaining contract.[60]

In its opinion, the court recognized that requiring union consent to conciliation agreements that alter the operation of a collective bargaining contract may interfere with the Commission's ability to use conciliation effectively to resolve employment discrimination claims.[61] This result was required by law, according to the court, because, while Title VII expresses an important national policy, it does not exist in a vacuum.[62] National labor policy, which protects agreements reached in the collective bargaining process, the court concluded, is a factor that constrains the remedial measures available to employers and the Commission through the Title VII conciliation process.[63] The court stated that the process of conciliation was a voluntary one and if parties chose not to agree, then conciliation could not alter the terms of a collective bargaining agreement.[64] Accordingly,

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[53] 103 S. Ct. 2177, 31 FEP Cases 1409 (1983).

[54] 714 F.2d at 578, 32 FEP Cases at 1473-74.

[55] 103 S. Ct. 2177, 2186, 31 FEP Cases 1409, 1414 (1983).

[56] *Id.*

[57] 714 F.2d at 578, 32 FEP Cases at 1474.

[58] *Id.* at 578-79, 32 FEP Cases at 1474.

[59] *Id.* at 578, 32 FEP Cases at 1474.

[60] *Id.* at 579 & n.22, 32 FEP Cases at 1474 & n.22. In the footnote, the court stated that, as a result of Safeway's assignment of retroactive seniority dates to Rodriguez and Cantu, those men advanced ahead of approximately 50 other men on the seniority roster. Taylor advanced ahead of 39 other truck drivers and Faison, ahead of 29 truck drivers. *Id.*

[61] *Id.* at 579, 32 FEP Cases at 1474.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 580, 32 FEP Cases at 1475. The final issue addressed by the court was the union's contention that it was entitled to attorneys' fees as the prevailing party in the action. *Id.* The court rejected this claim based on the rule that a prevailing defendant can recover fees only if the claim against it was without foundation, unreasonable, frivolous, meritless, or vexatious. *Id.* No such improper motivations led to the Commission's prosecution of this claim and the court, therefore, declined to award attorneys' fees to the union. *Id.*

the court struck down the award of retroactive seniority dates in the conciliation agreement between the Commission and the employer because that remedy violated the collective bargaining agreement.[65]

The Fifth Circuit holding in *Safeway*[66] is a logical extension of the *Southbridge*,[67] *City of Miami*,[68] and *W.R. Grace*[69] cases. Those cases established the rule that conciliation agreements are unenforceable where the agreements replace collectively bargained seniority systems with hiring and promotion structures designed to eliminate discrimination and to remedy past discrimination where the union had not agreed to the change.[70] *Safeway* extended this rule to a situation where the conciliation agreement was designed to remedy a few specific instances of alleged discrimination by granting retroactive seniority to four charging parties.[71]

*Safeway*, like its predecessors, *Southbridge*, *City of Miami*, and *W.R. Grace*, involves an area where employment discrimination law and labor law intersect, and where the mechanisms implementing the policies of each may interfere with the achievement of the goals of the other.[72] Under the National Labor Relations Act,[73] the terms and conditions of employment are to be shaped by the employer and employees through collective negotiation.[74] By contrast, Title VII requires the employer and the Commission to seek to resolve discrimination claims by conciliation.[75] As a consequence of *Safeway* and *W.R. Grace*, the Commission and employer cannot agree to a remedy that will violate the union contract when unions refuse to participate in such conciliation settlements.[76] Title VII claims where all three affected parties are unable to agree on a resolution of the discrimination claim will thus need to be resolved through litigation.[77] Employers and unions may find it wise, in future contract negotiations, to bargain for a contract provision that provides a mechanism for negotiating Title VII claims raised against the employer, the union, or both to avoid being placed in the position of having to choose between performing a Title VII conciliation agreement or following the terms of a union contract.[78]

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[65] *Id.* at 580, 32 FEP Cases at 1475-76.

[66] 714 F.2d 567, 32 FEP Cases 1465 (5th Cir. 1983).

[67] 565 F.2d 913, 16 FEP Cases 507 (5th Cir. 1978).

[68] 664 F.2d 435, 27 FEP Cases 913 (5th Cir. 1981).

[69] 103 S. Ct. 2177, 31 FEP Cases 1409 (1983).

[70] *See, e.g., id.* at 2186, 31 FEP Cases at 1414.

[71] 714 F.2d at 577, 32 FEP Cases at 1472.

[72] *Id.* at 579, 32 FEP Cases at 1474; W.R. Grace and Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, 103 S. Ct. 2177, 2186, 31 FEP Cases 1409, 1414-15 (1983). *See also* Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in* NLRB v. Bildisco, 25 B.C. L. REV. 539, 606-07 & n. 347 (1984) ("many aspects of labor and employment law jurisprudence are in conflict").

[73] 29 U.S.C. §§ 151-169 (1982).

[74] 714 F.2d at 579, 32 FEP Cases at 1476.

[75] 42 U.S.C. § 2000e-5(b) (1982).

[76] 714 F.2d at 578, 32 FEP Cases at 1473-74.

[77] *See, e.g.*, W.R. Grace and Co. v. Local Union of the United Rubber, Cork, Linoleum, and Plastics Workers of America, 103 S. Ct. 2177, 2186, 31 FEP Cases 1409, 1414 (1983). As a result of this decision, the Commission and parties claiming that they have suffered employment discrimination will need to rely less on conciliation and more heavily on other compliance processes to obtain relief. Charging parties may be forced to choose between accepting relief in the form of monetary damages and promotion and pursuing litigation with its inherent risks to obtain the benefits of seniority they could have earned but for the discriminatory acts of the employer.

[78] *Id.* at 2186, 31 FEP Cases at 1414-15. *See, e.g.*, United Steelworkers of America v. Weber, 443

In theory, the Title VII conciliation process and the collective bargaining process could complement one another rather than conflict.[79] Where only the employer is threatened with Title VII liability, as in the *Safeway* situation, the employer could persuade the union to enter the conciliation process to help the employer avoid a suit in exchange for other concessions.[80] In cases where the union and employer both are potentially liable, it would be in the joint interests of the union and the employer to work out a plan to share the burdens imposed by the Commission.[81] This scenario, however, will only be carried out in practice if employers and unions view the Title VII conciliation process seriously, and not as a means to delay and frustrate valid discrimination claims.

## IV. AGE DISCRIMINATION IN EMPLOYMENT ACT

### A. **Displacement of Incumbent Employees in ADEA Suits*: Spagnuolo v. Whirlpool Corp.[1]

The Age Discrimination in Employment Act (ADEA)[2] was passed by Congress in 1967[3] for the purposes of promoting employment of older persons based on their ability rather than their age, prohibiting arbitrary discrimination in employment on account of age, and assisting employers and employees in discovering ways of meeting problems arising from the impact of age on employment.[4] The ADEA protects individuals between the ages of 40 and 70.[5] To establish a prima facie case of employment discrimination under the ADEA, an employee must show that he: 1) was a member of the protected class; 2) was performing in a satisfactory manner; 3) was discharged; and 4) was replaced by a substantially younger employee with equal or inferior qualifications.[6]

The ADEA aims to make whole the victims of discrimination and to restore them to the positions they would have occupied absent the wrongful conduct of their employer.[7] To effectuate the purposes of the statute, the ADEA empowers courts to provide appropriate legal or equitable relief, such as judgments compelling employment, reinstatement, or promotion.[8] Although the district courts have broad discretion to award or deny such legal or equitable relief,[9] there is little authority on the question of whether the court's

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U.S. 193, 208-09, 20 FEP Cases 1, 7 (1979) (decision upholding an affirmative action plan collectively bargained by an employer and a union).

[79] *W.R. Grace and Co.*, 103 S. Ct. at 2186, 31 FEP Cases at 1414-15.

[80] *Id.*

[81] *Id.*

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* By Jennifer A. Parks, Staff Member, BOSTON COLLEGE LAW REVIEW.

[1] 717 F.2d 114, 32 FEP Cases 1382 (4th Cir. 1983).

[2] 29 U.S.C. § 621 (1982).

[3] *Id.*

[4] 29 U.S.C. § 621(b) (1982); *see also* Hodgson v. First Federal Sav. & Loan Ass'n, 455 F.2d 818, 820, 4 FEP Cases 269, 271 (5th Cir. 1972); Gill v. Union Carbide Corp., 368 F. Supp. 364, 367, 7 FEP Cases 571, 576 (E.D. Tenn. 1973).

[5] 29 U.S.C. § 631 (1982).

[6] Douglas v. Anderson, 656 F.2d 528, 533, 27 FEP Cases 47, 51 (9th Cir. 1981).

[7] Equal Employment Opportunity Commission v. Allegheny County, 519 F. Supp. 1328, 1336, 26 FEP Cases 1087, 1094 (W.D. Pa. 1981); Boddorff v. Publicker Indus., Inc., 488 F. Supp. 1107, 1112, 25 FEP Cases 1065, 1071 (E.D. Pa. 1980).

[8] 29 U.S.C. § 626(b) (1982).

[9] Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100, 30 FEP Cases 859, 865 (8th Cir. 1982); Cline v. Roadway Exp., 689 F.2d 481, 489, 29 FEP Cases 1365, 1372 (4th Cir. 1982); Hedrick v. Hercules, Inc., 658 F.2d 1088, 1095, 27 FEP Cases 279, 284 (5th Cir. 1981).

equitable powers under the ADEA extend to reinstatement orders which result in displacement of incumbent employees.

During the *Survey* year, the Fourth Circuit, in *Spagnuolo v. Whirlpool Corp.*,[10] examined the question of the scope of the court's remedial powers under the ADEA and held that relief in such cases does not generally extend to displacing incumbent employees.[11] Instead, the court held, the "rightful place" theory should be adopted. Under this theory the injured employee is given full seniority rights, may bid for the next equivalent vacancy on the basis of that seniority, and is awarded back pay in the interim to compensate for lost earnings.[12]

Plaintiff Spagnuolo had been Manager of the Builder Department of the Sales Division of defendant Whirlpool Corporation in Charlotte, North Carolina.[13] In November, 1977, Whirlpool combined Spagnuolo's position with one held by Daniel Brattain, and gave the new, combined position to Brattain, demoting Spagnuolo.[14] Spagnuolo brought suit against Whirlpool under the ADEA, and obtained a jury verdict in his favor.[15] The district court awarded him damages and entered a reinstatement order.[16] The order directed Whirlpool to reinstate Spagnuolo to either his old position, or to a position of equal stature, compensation, future prospects, and responsibility.[17] The rulings were affirmed by the court of appeals, and certiorari was denied by the Supreme Court.[18]

Whirlpool decided to wait for an equivalent position to become available for Spagnuolo, rather than to reinstate him either to his old position or the newly combined one.[19] By May, 1982, Whirlpool still had not offered Spagnuolo any position, and the district court ordered Whirlpool to continue to pay Spagnuolo lost wages.[20] In June, 1982, Whirlpool attempted to satisfy the reinstatement order by offering Spagnuolo a new position.[21] The district court did not find the proffered position equivalent to Spagnuolo's former position, and, reasoning that Whirlpool had been given sufficient time to find Spagnuolo a suitable position, amended its reinstatement order.[22] In its amended order, the court directed Whirlpool to either uncouple the newly combined position and give

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[10] 717 F.2d 114, 32 FEP Cases 1382 (4th Cir. 1983).

[11] *Id.* at 121, 32 FEP Cases at 1389.

[12] *Id. See* United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 594, 5 FEP Cases 308, 318 (4th Cir. 1972), *cert. denied sub nom.* Bro. of R.R. Trainmen v. United States, 411 U.S. 939, 5 FEP Cases 862 (1973); Local 189 v. United States, 416 F.2d 980, 988, 1 FEP Cases 875, 881 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 2 FEP Cases 426 (1970); Quarles v. Philip Morris, Inc. 279 F. Supp. 505, 520-21, 1 FEP Cases 260, 271-72 (E.D. Va. 1968).

[13] *Spagnuolo*, 717 F.2d 114, 116, 32 FEP Cases at 1383.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 25 FEP Cases 376 (4th Cir.), *cert. denied*, 454 U.S. 860, 26 FEP Cases 1688 (1981).

[19] *Spagnuolo*, 717 F.2d at 116, 32 FEP Cases at 1384. This option is routinely available to employers under the ADEA.

[20] *Id.*

[21] *Id.* at 117, 32 FEP Cases at 1384. The position was that of National Account Manager. It required Spagnuolo to travel 75% of the time, compared to 25% travel time in his old job. It also had no secretary or subordinates, while Spagnuolo's former position had a full-time secretary and 10-15 subordinates. *Id.*

[22] *Spagnuolo*, 548 F. Supp. 104, 109-10, 32 FEP Cases 1377, 1380-81 (W.D. N.C. 1982).

Spagnuolo his old job back, or replace Brattain with Spagnuolo in the combined position.[23]

Whirlpool moved to have its option to offer Spagnuolo a comparable position revived, and simultaneously offered Spagnuolo a position comparable to his old position in either its Dallas, Texas or Denver, Colorado markets.[24] The district court rejected this offer as insufficient compliance with its orders and reaffirmed its amended reinstatement order.[25]

Whirlpool appealed to the United States Court of Appeals for the Fourth Circuit.[26] The circuit court granted Whirlpool's motion for a stay pending appellate review of the modified reinstatement order, but denied the stay of the order continuing the lost wages award.[27] The court of appeals concluded that the positions offered to Spagnuolo were not equivalent to his former position and therefore failed to satisfy the reinstatement order.[28] Consequently, Spagnuolo did not have to accept either of the offered positions to comply with his statutory duty to mitigate damages.[29]

The circuit court then addressed the portion of the district court's order requiring Whirlpool to either uncouple the newly combined position and give Spagnuolo his prior job, or replace Brattain with Spagnuolo in the new position.[30] The court concluded that the district court had erred in ordering that the unknowing beneficiary of the original discrimination be displaced from either all or part of his job.[31] According to the court, although section 7 of the ADEA authorizes district courts to order employment, promotion, or reinstatement,[32] the legislative history of ADEA provided no guidance to the limits of district courts' remedial powers.[33] In the absence of specific legislative direction, the court drew guidance, by analogy, to cases applying the remedial provisions of Title VII of the Civil Rights Act of 1964.[34] The *Spagnuolo* appeals court reasoned that the analogy was appropriate because of the similarities between the language of the equitable relief provisions in the two statutes, and their similar purposes — to put the victim back into the position he would have occupied but for the discrimination.[35]

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[23] *Id.* at 108-10, 32 FEP Cases at 1380-81.

[24] *Spagnuolo*, 717 F.2d at 117, 32 FEP Cases at 1384.

[25] Spagnuolo v. Whirlpool Corp., 550 F. Supp. 432, 437, 32 FEP Cases at 1377 (W.D. N.C. 1982).

[26] *Spagnuolo*, 717 F.2d at 117, 32 FEP Cases at 1384.

[27] *Id.*

[28] *Id.* at 118, 32 FEP Cases at 1385. The court considered the factors of stature, future advancement, and amount of compensation in its evaluation of the new position offered to Spagnuolo. Regarding the Dallas and Denver offers, the court reasoned that, particularly for an older worker, the severance of business and personal ties would be quite burdensome and would put Spagnuolo in an objectively worse position than he was in prior to the discrimination. *Id.* at 117-18, 32 FEP Cases at 1384-85.

[29] *Spagnuolo*, 717 F.2d at 119, 32 FEP Cases at 1386.

[30] *Id.*

[31] *Id.* at 121, 32 FEP Cases at 1389.

[32] 29 U.S.C. § 626(b) (1982). The statute provides, in part: "In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion. . . ." *Id.*

[33] *Spagnuolo*, 717 F.2d at 119, 32 FEP Cases at 1386, (citing H.R. REP. No. 805, 90th Cong., 1st Sess. (1967), *reprinted at* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2218, 2222).

[34] *Spagnuolo*, 717 F.2d at 119, 32 FEP Cases at 1386-87 (citing 42 U.S.C. § 2000e-5(g)).

[35] *Spagnuolo*, 717 F.2d at 119-20, 32 FEP Cases at 1386, n.3. *See also* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756, 19 FEP Cases 1167, 1171 (1979).

The court began the review of Title VII cases by noting that the Supreme Court has directed the district courts to grant "the most complete relief possible,"[36] and that the district courts have, in the first instance, been given broad discretion to fashion equitable relief.[37] The court recognized, however, that the "rightful place" theory has been adopted as the appropriate mechanism for injunctive relief under Title VII.[38] In particular, the court noted that it had applied the rightful place theory in *Patterson v. American Tobacco Co.*[39] and *Sledge v. J.P. Stevens and Co.*,[40] two Title VII cases in which the court held that innocent white employees could not be "bumped" to provide immediate positions for individuals who had been subject to discrimination. In these cases the Fourth Circuit had reasoned that a necessary compromise for the enactment of Title VII was the assurance that the statute would not be used to displace innocent incumbent workers in favor of victims of discrimination.[41]

In *Spagnuolo* itself, the Fourth Circuit noted several policy reasons that justified its *Patterson* and *Sledge* holdings. First, the practice of "bumping" would result in resistance from white employees who had reasonable job expectations and who had not themselves engaged in discrimination.[42] Second, the court recognized that bumping might require the displacement of other black employees.[43] Third, wholesale bumping orders could improperly involve the district court in the operations of the business.[44] Fourth, back pay awards are available to compensate the aggrieved employees during the delays in reinstatement often inherent in the rightful place theory of filling vacancies.[45] Finally, while the court recognized that this method would result in injured employees temporarily performing less desirable jobs, albeit at high pay, it found that such was the inevitable result of the congressional process by which Title VII was enacted.[46] Finding that these policy reasons applied equally well to ADEA, the Fourth Circuit concluded that the district court's authority to fashion relief to the injured employee under the ADEA should not extend to ordering the displacement of an incumbent employee.[47] Rather, the court directed the district court to adopt the rightful place theory when applying ADEA.

The court went on to note, however, that the district court's original reinstatement order was in accordance with the rightful place theory, because it did not require the bumping of Brattain.[48] The district court had only amended its order because of

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[36] *Spagnuolo*, 717 F.2d at 120, 32 FEP Cases at 1386 (citing Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976)).

[37] *Spagnuolo*, 717 F.2d at 120, 32 FEP Cases at 1386.

[38] *Id.* Under the rightful place theory, a victim of discrimination can bid for jobs on the basis of seniority as those jobs become available. If he meets the existing ability requirements for the job, he is entitled to fill it, without regard to the seniority expectations of junior employees. He cannot, however, "bump" innocent employees out of their current positions, even though those employees may hold their positions as a result of the employer's discriminatory practices. *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268-69 (1967).

[39] 535 F.2d 257, 12 FEP Cases 314 (4th Cir.), *cert. denied*, 429 U.S. 920, 13 FEP Cases 1808 (1976).

[40] 585 F.2d 625, 18 FEP Cases 261 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

[41] *Patterson*, 535 F.2d at 268, 12 FEP Cases at 325.

[42] *Spagnuolo*, 717 F.2d at 120-21, 32 FEP Cases at 1387.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

Whirlpool's apparent noncompliance with the original order.[49] The appeals court inferred that Whirlpool was not making a reasonable effort to place Spagnuolo in an appropriate vacancy, basing its determination on the lower court finding concerning the size of the corporation and the substantial time that had elapsed before it made any offer to Spagnuolo.[50]

In light of this finding of unreasonable noncompliance with the district court's original order, the circuit court directed the district court to adopt an alternative procedure for enforcement of the ADEA. The court instructed the district court to issue such orders as "both afforded and required Whirlpool to demonstrate" its compliance with the reinstatement order.[51] The appeals court suggested that, in place of bumping Brattain from his position, the district court should require Whirlpool to disclose information regarding which positions it considered equivalent to that previously held by Spagnuolo, and whether anyone had been promoted to those positions since the reinstatement order took effect.[52] In addition, the appeals court stated, the district court could inquire as to what steps Whirlpool had taken to offer Brattain a comparable job in another location, in an attempt to accomodate both Brattain and Spagnuolo.[53]

The court then suggested a limited exception to the general rule against court-ordered bumping under the ADEA. Should the district court's inquiry disclose that Whirlpool had filled a vacancy in a job comparable to Spagnuolo's old position after the district court's reinstatement order, the circuit court stated that the district court would be authorized to bump the new incumbent and order that that position be given to Spagnuolo.[54] The court reasoned that this bumping was authorized because it displaces an employee whose promotion or hiring was in violation of the court's rightful place order, and who is not presumed to be an innocent beneficiary.[55] Should the information reveal that Whirlpool had attempted in good faith to comply with the reinstatement order, however, the appeals court held, the district court must simply continue its rightful place order, with back pay awards continuing to be paid to Spagnuolo.[56]

*Spagnuolo* is not the first case to analogize to Title VII to define the scope and operation of the ADEA. Analogies between the ADEA and Title VII have been drawn by various courts for other issues under the ADEA.[57] As the *Spagnuolo* court noted, the Supreme Court has recognized the validity in certain instances of analogies between the enforcement provisions of the ADEA and Title VII.[58] The Supreme Court has also noted, however, that there are significant differences in the remedial provisions of Title VII and the ADEA.[59] The ADEA was based on, and incorporates by reference, the Fair Labor Standards Act (FLSA),[60] while the model for Title VII was the National Labor Relations

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[49] *Id.* at 121, 32 FEP Cases at 1388.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 121-22, 32 FEP Cases at 1388.

[53] *Id.* at 122, 32 FEP Cases at 1388.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See* Massarsky v. Gen. Motors Corp., 706 F.2d 111, 117, 31 FEP Cases 832, 839 (3d Cir. 1983); Loeb v. Textron, 600 F.2d 1003, 1007, 20 FEP Cases 29, 34 (1st Cir. 1979).

[58] *Spagnuolo*, 717 F.2d at 119, 32 FEP Cases at 1386, n.3 (citing Oscar Mayer & Co. v. Evans, 441 U.S. 750, 768-69, 19 FEP Cases 1167, 1172 (1979)).

[59] Lorillard v. Pons, 434 U.S. 575, 584, 16 FEP Cases 885, 892 (1977).

[60] *Id.* at 582, 16 FEP Cases at 891; 29 U.S.C. § 201 (1982).

Act.[61] Indeed, in drafting the enforcement provisions of the ADEA, Congress rejected Title VII procedures in favor of incorporating the FLSA procedures.[62] Accordingly, Congress provided for "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII.[63] Therefore, the ADEA, like the FLSA, provides that employers "shall be liable" for amounts deemed unpaid minimum wages or overtime compensation. Under Title VII, conversely, back pay awards are a matter of equitable discretion.[64]

The differences between the remedial and procedural provisions of the two laws support the argument that courts need not rely on Title VII cases in deciding the issue of displacement of incumbent employees.[65] Instead, the question ought to be asked whether sufficient differences exist between the victims of age discrimination and those of racial or sex discrimination to require that older employees be allowed to bump incumbents while women and minorities are not. In *Spagnuolo*, the plaintiff was removed from his position in November 1977. The circuit court's decision now requires him to extend his six year wait for a position under the rightful place theory. A lengthy wait for a vacancy may well be more harmful to an older worker who is protected under the ADEA, yet approaching retirement age. While the victim of discrimination is receiving back pay during this period, he is not enjoying the intangible benefits of his former position, and upon reinstatement, will have less time to enjoy them than the younger incumbent. Examined in this light, displacement of an incumbent employee may well be a more appropriate remedy in the context of age discrimination than in cases of racial or sex discrimination. Further support for such bumping is found by considering that the *Spagnuolo* court would allow the plaintiff to bump an employee who was hired after the reinstatement order. Such a distinction, based on the assumption that the first incumbent is an innocent beneficiary while a later one is not, may not even be grounded in the actual knowledge of the incumbent, and may carry some of the disadvantages of bumping in the first instance, as outlined in *Patterson*.

In *Criswell v. Western Airlines, Inc.*,[66] the United States District Court for the Central District of California has adopted precisely this reasoning. The *Criswell* court recognized that displacement of less senior employees was unfortunate and perhaps inevitable in a shrinking economy.[67] Nonetheless, it noted that it must assume that such a possibility was within the contemplation of Congress in enacting ADEA.[68] Displacement, the *Criswell* court concluded, was not a sufficient reason to fail to effectuate ADEA.[69]

*Spagnuolo* extends the analogy between the ADEA and Title VII to the reinstatement of wronged employees, and does not require that the innocent incumbent be displaced by such reinstatement. Rather, *Spagnuolo* requires the use of the rightful place theory in such a situation. The question remains, however, whether the Fourth Circuit has reached a proper result given that several years can elapse between the issuance of a court order

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[61] 29 U.S.C. § 150 (1982)

[62] *Lorillard v. Pons*, 434 U.S. at 584, 16 FEP Cases at 892.

[63] *Compare* 29 U.S.C. § 626(b) (1982) *with* 42 U.S.C. § 2000e-5(g) (1982).

[64] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, 10 FEP Cases 1181, 1195 (1975).

[65] In the *Spagnuolo* opinion, the Fourth Circuit itself recognized that analogies between the ADEA and Title VII will not always be appropriate. 717 F.2d at 119 n.3, 32 FEP Cases at 1385 n.3. It concluded, however, that there were sufficient similarities between the language and the purposes of the two acts to apply Title VII principles to ADEA cases. *Id.*

[66] 514 F. Supp. 384, 29 FEP Cases 350 (C.D. Cal. 1981).

[67] *Id.* at 394, 29 FEP Cases at 358.

[68] *Id.*

[69] *Id.*

mandating reinstatement of an older worker and actual reinstatement under the rightful place theory.[70] This slow process may cause older victims of age discrimination to suffer harm not suffered by victims of racial and sex discrimination.[71] As the reasoning of the *Criswell* court demonstrates, that harm may be sufficient to justify displacing incumbent employees to reinstate wronged older workers.[72]

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[70] *See, e.g., Spagnuolo*, 717 F.2d at 116-17, 32 FEP Cases at 1384 (where the worker had been waiting six years to be reinstated at the time the Fourth Circuit's opinion was rendered).

[71] *See supra* text accompanying notes 65-66.

[72] *Criswell*, 514 F. Supp. at 384, 29 FEP Cases at 358.