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

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## LABOR LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS\*

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## I. ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT

### A. *Jurisdiction*

In a speech given in the fall of 1978 at the Twenty-Fifth Annual Institute on Labor Law, John Fanning, Chairman of the National Labor Relations Board (the Board or NLRB), stated that the most significant development in his twenty years on the Board had been the expansion of the Board's jurisdiction.<sup>1</sup> It was Mr. Fanning's belief that this trend would continue as existing jurisdictional limitations contin-

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1. Fanning, *Jurisdiction in the 1970s: The Impact of Cornell*, in THE SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 1979, 169, 171 (1979).

ued to meet with growing disfavor.<sup>2</sup> The manner in which the Ninth Circuit has dealt with jurisdictional questions arising under the National Labor Relations Act (Act or NLRA)<sup>3</sup> reflects a tacit approval of Mr. Fanning's comments.

### 1. Statutory jurisdiction and definitions

The general jurisdiction of the Board encompasses "labor disputes,"<sup>4</sup> a term which includes employee representation and unfair labor practices that affect interstate commerce.<sup>5</sup> Despite this wide-ranging authority, the Board on occasion will decline to hear certain cases whenever "the policies of the Act would not be effectuated by its assertion of jurisdiction."<sup>6</sup>

Section 2 of the Act defines the term "employee" to include "any employee" while specifically exempting "any individual employed as an agricultural laborer, . . . or any individual having the status of an independent contractor, or any individual employed as a supervisor."<sup>7</sup> In *NLRB v. Hearst Publications, Inc.*,<sup>8</sup> the Supreme Court recognized the broad statutory language in the Act's definition of "employee" and determined that, in doubtful situations, underlying economic facts must be examined when the term is interpreted and applied.<sup>9</sup> The Court also noted that "the Board's determination that specified employees are 'employees' . . . is to be accepted if it has 'warrant in the record' and a

#### 2. *Id.*

3. The NLRA is codified at 29 U.S.C. §§ 151-169 (1976) as subchapter II of the Labor Management Relations Act.

4. A "labor dispute" is defined by the Act to include "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." *Id.* § 152(9).

The Ninth Circuit recently noted that courts rarely find "concerted union activity to fall outside this broad definition." *Hasbrouck v. Sheet Metal Workers, Local 232*, 586 F.2d 691, 694 n.3 (9th Cir. 1978). *Cf.* *NLRB v. International Longshoreman's Ass'n*, 332 F.2d 992, 995 (4th Cir. 1964) (refusal by ILA to service ships trading with Cuba held a political activity not intended to affect the terms or conditions of employment and thus not a labor dispute). *But see* *NLRB v. Twin City Carpenters Dist. Council*, 422 F.2d 309, 312-13 (8th Cir. 1970); *National Maritime Union v. NLRB*, 346 F.2d 411, 415 (D.C. Cir. 1965); *National Maritime Union v. NLRB*, 342 F.2d 538, 542-43 (2d Cir. 1965).

5. *See, e.g.*, *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 8-9 (1937).

6. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951).

7. 29 U.S.C. § 152(3) (1976).

8. 322 U.S. 111 (1944).

9. *Id.* at 129.

reasonable basis in law.”<sup>10</sup>

In *NLRB v. Design Sciences*,<sup>11</sup> the Ninth Circuit addressed the question of whether workers, who did approximately eighty percent of their work on farms, were “employees,” and thus subject to the protections of the Act, or agricultural laborers and therefore exempt from the Board’s jurisdiction. The employer designed grading and drainage systems on a contract basis for agricultural irrigation operations. Recognizing that this was a close question and that the Board might have reached a different conclusion, the court upheld the Board’s finding that the workers were “employees” within the definition of the Act.<sup>12</sup>

Independent contractors are also specifically excluded from the Act’s definition of “employees”. In *NLRB v. United Insurance Co. of America*,<sup>13</sup> the Supreme Court upheld the Board’s determination that debit agents who collected premiums from policy holders, prevented lapsing of policies, and occasionally sold new insurance were employees and not independent contractors. The Court noted that the Act was amended in 1947 to add the independent contractor exclusion and stated that the amendment’s obvious purpose was to “apply general agency principles in distinguishing between employees and independent contractors.”<sup>14</sup> Because the debit agents did not have decision-making authority and initiative, characteristics commonly attributable to independent contractors, they were found to be employees under the Act.<sup>15</sup>

The Ninth Circuit also applied general agency principles in *Associated General Contractors v. NLRB*<sup>16</sup> in reversing the Board’s determination that owner-operators of dump trucks were employees. The court emphasized the importance of the right-to-control test under general agency law. Acknowledging that the determination of who has the right to control and direct is the foremost factor, the court also noted that this determination must be made by examining the relationship in its entirety.<sup>17</sup> The court recognized the distinctions drawn by the Board between the right to control the manner and means of doing the work

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10. *Id.* at 131.

11. 573 F.2d 1103 (9th Cir. 1978) (per curiam).

12. *Id.* at 1105.

13. 390 U.S. 254 (1968).

14. *Id.* at 256.

15. *Id.* at 258.

16. 564 F.2d 271 (9th Cir. 1977).

17. *Id.* at 279.

and the right to control only the result of the work<sup>18</sup> but reversed the Board because its finding was not based on an examination of the "total factual context."<sup>19</sup>

This question arose again in *Merchant's Home Delivery Service, Inc. v. NLRB*<sup>20</sup> in which the court found delivery drivers to be independent contractors under the Act. The court recognized that the Truckman's Agreement signed by each owner-operator was a guarantee of their right to control the "method, means, and manner of performance,"<sup>21</sup> and therefore held that this agreement, coupled with the flexible hours the drivers worked, the entrepreneurial characteristics of the job, and the fact that most of the owner-operators were established corporations or partnerships supported the determination that the workers were independent contractors. The court stated that the administrative law judge (ALJ)<sup>22</sup> and the Board had erred by giving too much weight to the employer's right to exercise "an ex post facto right to reprimand when the end result is unsatisfactory."<sup>23</sup>

The Act also specifically excludes supervisors from its definition of employee; unlike agricultural laborers and independent contractors, however, "supervisor" is expressly defined.<sup>24</sup> The determination of

18. While both the Board and the court recognized the distinction, the court thought that the Board had improperly applied it to the facts. *Id.* at 280-81.

19. *Id.* at 282 (quoting *NLRB v. United Ins. Co.*, 390 U.S. 254, 258 (1968)). The Board "gave inordinate weight to isolated examples of contractor control at the jobsite, control which in the main involved only the result sought to be accomplished." 564 F.2d at 282. In its decision the court expressly disagreed with the District of Columbia Circuit which had found owner-operators of dump trucks to be employees. *See* *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971) (per curiam). According to the Ninth Circuit the *Joint Council* court had made two errors: "it failed to consider the relationship as a whole, and . . . it was blinded by the presence of the contractors' right to control details of the work." 564 F.2d at 282 n.11.

20. 580 F.2d 966 (9th Cir. 1978).

21. *Id.* at 974.

22. Use of an ALJ is the initial step in the processing of unfair labor practices. A person who wishes to file such charges must set them forth, in writing and under oath, and file them with the Regional Director for the Board. This office investigates the charges; if they are found to have some validity and if the charges are not dismissed or withdrawn, the Regional Director files a complaint on the charges, serving it, along with a notice of hearing on the alleged offending party. The ALJ holds a full evidentiary hearing on these charges and, if they are found to be true, orders appropriate remedies to correct the problem. This order along with all findings of the ALJ are filed with the Board, which reviews all of these items on record if a party files exceptions to the decision of the ALJ. Judicial review of the Board's actions is also available in the circuit court of appeals for the region wherein the charges were filed. *See* 29 C.F.R. § 101.2-.15 (1979).

23. 580 F.2d at 974.

24. 29 U.S.C. § 152(11) (1976) provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, re-

whether an employee is a supervisor within the Act's definition hinges on the concept of responsibility.<sup>25</sup> The primary consideration for the NLRB is the employee's authority to hire and fire other employees or effectively to recommend such action.<sup>26</sup> Often there is a fine line to be drawn between supervisors and employees. For example, in *NLRB v. Doctor's Hospital*,<sup>27</sup> the Ninth Circuit held that registered nurses who assign and direct other hospital workers such as licensed vocational nurses and nurses' aides were not supervisors: "The leadman or straw boss may give minor orders or directives or supervise the work of others, but he is *not necessarily* a part of management and a 'supervisor' within the Act."<sup>28</sup> As a result of this narrow distinction between supervisors and employees, the courts have determined that this is an appropriate area to defer to the Board's industrial relations expertise.<sup>29</sup>

The Act defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>30</sup> The Supreme Court has held that any employee committee which discusses subjects relating to working conditions, wages, or grievances with management is a "labor organization" within the meaning of the Act.<sup>31</sup> In addition, the Board has held that "loosely

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ward, 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.

25. "To be responsible is to be answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity, and integrity, and is implied by power." *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545, 549 (9th Cir. 1960) (quoting *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949)).

26. *W. Horace Williams Co.*, 130 N.L.R.B. 223, 225 n.8 (1961).

27. 489 F.2d 772 (9th Cir. 1973).

28. *Id.* at 776 (emphasis in original).

29. *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961), *quoted in* *Marine Eng'rs Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, 176 n.6 (1962). This deference to Board expertise was evident in *NLRB v. Prineville Stud Co.*, 578 F.2d 1292 (9th Cir. 1978) (over employer's contrary assertions, employees who committed unfair labor practices held to be supervisors); *NLRB v. Adrian Belt Co.*, 578 F.2d 1304 (9th Cir. 1978) (*per curiam*) (after detailed examination of functions and responsibilities, employees held to be supervisors). *See also* *Kaiser Eng'rs v. NLRB*, 538 F.2d 1379, 1383-84 (9th Cir. 1976) (although evidence subject to different inferences, Board finding that employee who directed seven employees was not a supervisor upheld); *NLRB v. Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1172-73 (2d Cir. 1968) (question of supervisory status is one of fact; Board's finding must be given "great weight").

30. 29 U.S.C. § 152(5) (1976).

31. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210 n.3, 213 (1959).

formed committees are 'labor organizations' when their purpose is to represent employees' interests in dealing with employers."<sup>32</sup>

A 1974 amendment to the NLRA brought employees of non-profit health care institutions within the protections of the Act.<sup>33</sup> As a compromise to this extension, Congress amended section 8(g) to require that "[a] labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing . . . of that intention."<sup>34</sup> The rationale behind the ten-day notice period was to allow the institution to take steps to insure the continuity of health care to the community and the well-being of the patients before any job action occurred.<sup>35</sup>

The Ninth Circuit, in *Kapiolani Hospital v. NLRB*,<sup>36</sup> refused to extend the notice requirement of section 8(g) to individual employees, holding that a hospital had committed an unfair labor practice by firing an unrepresented clerk for her refusal to cross a picket line without giving the ten-day notice.<sup>37</sup> The court noted that the congressional purpose for inserting the notice period was to protect the health of the patients in the hospitals: "'A brief work stoppage by a few unorganized employees simply was not the type of disruption with which Congress was concerned.'"<sup>38</sup>

The question of what constitutes a section 8(g) labor organization arose in *NLRB v. Long Beach Youth Center, Inc.*<sup>39</sup> The employer contended that seventeen non-union employees formed a de facto labor

32. *In re Perry Norvell Co.*, 80 N.L.R.B. 225 (1948). See also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15-16 (1962) (walkout by seven employees of a machine shop after individual complaints about the coldness of the shop were registered held to be a concerted action growing out of a labor dispute); *NLRB v. Robertson Indus.*, 560 F.2d 396, 399 (9th Cir. 1976) (refusal of several employees to report to work in order to attend union meeting held a protected activity).

33. S. REP. NO. 766, 93d Cong., 2d Sess. 3 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946. The Senate Committee on Labor and Public Welfare recognized that approximately 56% of all hospital employees were excluded from NLRA protections by the then-existing non-profit hospital exemption. While it could find no acceptable reason for this exclusion, the Committee noted that if non-profit hospital employees were to be given the right to strike, corresponding provisions to assure continued patient care in the event of a work stoppage must also be included in the amendment. *Id.* at 3948.

34. 29 U.S.C. § 158(g) (1976) (emphasis added).

35. S. REP. NO. 766, 93d Cong., 2d Sess. 4 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3949.

36. 581 F.2d 230 (9th Cir. 1978).

37. *Id.* at 234.

38. *Id.* (quoting *Walker Methodist Residence & Health Care Center, Inc.*, 227 N.L.R.B. 1630, 1631 (1977)) (emphasis deleted).

39. 591 F.2d 1276 (9th Cir. 1979).

organization and thus violated the Act by failing to give notice prior to a work stoppage. The Ninth Circuit disagreed, reasoning that since the employees signed union authorization cards at their first organizational meeting, which occurred *after* the work stoppage had begun, at the time of the commencement of the work stoppage the employees were not a labor organization.<sup>40</sup>

## 2. Administrative jurisdiction

While the Board may have jurisdiction to involve itself in a particular situation under the statutory test of "affecting interstate commerce," it may refuse to act because of a failure to meet the administrative standards which it has promulgated.<sup>41</sup> In order to limit the volume of cases that come before it each year, the Board has issued a number of jurisdictional standards. It will assert its jurisdiction over certain categories of enterprises but only if the enterprise in question does a certain annual dollar volume of business.<sup>42</sup> In addition to these standards, the Board historically has refrained from asserting its jurisdiction over certain industries and is hesitant to involve itself in intra-union disputes.<sup>43</sup> Finally, the courts will carefully examine the Board's involvement in what are arguably state questions.<sup>44</sup>

Section 8(b)(1) of the Act provides that a labor organization shall

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40. *Id.* at 1279. It should be noted that the court chose to ignore the April 30th meeting of three of the employees at which the work stoppage was initially proposed, and instead based its decision on the May 1st "organizational meeting" during which the authorization cards were signed. *Id.* at 1277-78.

41. *See* NLRB v. Pease Oil Co., 279 F.2d 135, 137 (2d Cir. 1960).

42. The first of such jurisdictional standards, adopted in 1950, are contained in 15 NLRB ANN. REP. 5-6 (1950) and 16 NLRB ANN. REP. 15-39 (1951). These standards were modified somewhat in 1958, and these modifications, contained in 23 NLRB ANN. REP. 8-9 (1958), remain substantially in effect today.

43. *Stelling v. International Bhd. of Elec. Workers*, 587 F.2d 1379 (9th Cir. 1978) (claim brought by local union members against the international and local unions); *Smith v. UMW*, 493 F.2d 1241 (10th Cir. 1974) (action to enjoin a merger of four districts comprised of local unions); *Hotel & Restaurant Employees Local 400 v. Svacek*, 431 F.2d 705 (9th Cir. 1970) (claim alleging violation of union constitution and bylaw in action by local union against one of its members).

44. *San Diego Bldg. Trades Council v. Gamon*, 359 U.S. 236, 244 (1959). *Compare* *Malone v. White Motor Corp.*, 435 U.S. 497 (1978) (the Act does not foreclose state regulatory power over pension plans that may be the object of collective bargaining) *and* *Farmer v. Carpenters Local 25*, 430 U.S. 290 (1977) (the Act held not to preempt a tort action for damages suffered by a local member allegedly caused by union officials) *with* *Amalgamated Ass'n of Street Elec. Ry. Employees v. Lockridge*, 403 U.S. 274 (1971) (action by member against his union for wrongful interference with his employment relation held to be within exclusive jurisdiction of Board; not to be considered by state court as breach of contract action).

be free to set its own rules for joining or continuing as a member,<sup>45</sup> thereby implicitly foreclosing Board jurisdiction over intra-union disputes. In the 1967 case of *NLRB v. Allis Chalmers Manufacturing Co.*,<sup>46</sup> the Supreme Court upheld a union rule forbidding the crossing of a picket line during a strike: "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status."<sup>47</sup> Implicit in the Court's decision was the fact that, if union membership were a requirement for an individual's employment, a different result would have been reached.<sup>48</sup> This construction of 8(b)(1) was reaffirmed two years later in *Scofield v. NLRB*,<sup>49</sup> in which the Supreme Court upheld a union-imposed fine and suspension of members who had violated the union's rule relating to production ceilings.<sup>50</sup>

In extending the *Allis Chalmers-Scofield* rule, the Court in *NLRB v. Boeing Co.*<sup>51</sup> recognized the distinction between internal and external enforcement of union rules and noted that the Board has authority to rule on union regulations which affect an individual's employment status but not on those regulations which deal solely with his status as a union member.<sup>52</sup> The Court stated that it would not even consider the reasonableness of a fine imposed by the Board that did not affect either the employer-employee relationship or other policies of the Act.<sup>53</sup>

In *NLRB v. Retail Clerks Local 1179*,<sup>54</sup> the Ninth Circuit expressed an unwillingness to allow unions such latitude in enforcing internal rules. After several union members had violated union regulations by crossing a picket line, the union levied fines and other penalties on the violating employees. The Board subsequently determined the picket line to be illegal, and the Ninth Circuit held that penalties imposed by the union constituted an unfair coercive labor

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45. 29 U.S.C. § 158(b)(2)(A) (1976).

46. 388 U.S. 175 (1967).

47. *Id.* at 195.

48. *Id.* at 196-97. The Court examined the question of intra-union discipline only as it related to "full membership" members and expressly reserved the question of the application of the rule to those members whose membership is limited to mere payment of dues pursuant to a § 8(a)(3) union security agreement.

49. 394 U.S. 423 (1969).

50. *Id.* at 430-32.

51. 412 U.S. 67 (1973).

52. *Id.* at 74.

53. *Id.* at 73.

54. 526 F.2d 142 (9th Cir. 1975).



practice.<sup>55</sup>

This strict examination of internal regulation enforcement was also evident in the 1978 case of *NLRB v. ILWU Local 13*.<sup>56</sup> The question before the court was whether the Board had jurisdiction to involve itself in a dispute involving the enforcement of internal regulations. The effect of the regulations was to bar an employee from using the dispatch hall for ten days, thereby preventing his employment during that period or forcing him to drop his union membership. The court held that jurisdiction was proper because of the effect of the regulation on the worker's employment status, the power to hear such controversies being within the Board's discretionary authority.<sup>57</sup>

Under the Act, the Board is free to assert or decline its jurisdictional discretion by either promulgating rules in its administrative capacity or resolving a controversy in its adjudicatory capacity.<sup>58</sup> Challenges to the Board's exercise of this jurisdictional discretion generally have been unsuccessful.<sup>59</sup> For example, in *NLRB v. Bell Aerospace Co.*,<sup>60</sup> the Supreme Court took issue with a Second Circuit decision that the Board could only determine that buyers were "managerial employees" by invoking its rulemaking powers under section 6 of the Act.<sup>61</sup> The Court recognized the broad discretionary language of section 6 and held that the question at bar was particularly appropriate for resolution by adjudication.<sup>62</sup> Addressing the issue of the prejudicial effect of promulgating new regulations by means of adjudication, the Court stated that the Board was not precluded from reconsidering its regulations in an adversarial setting because the parties had not been adversely affected by their reliance on the pronouncements.<sup>63</sup>

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55. "The internal affairs exemption from § 8(b)(1)(A) does not apply when a union's application of its rules is contrary to national labor policy." *Id.* at 145.

56. 581 F.2d 1321 (9th Cir. 1978).

57. *Id.* at 1322.

58. 29 U.S.C. § 164(c)(1) (1976) provides in pertinent part that "the Board, in its discretion, may by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute . . . where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." *See also id.* § 156, which provides in relevant part that "[t]he Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter." The Supreme Court noted in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) that "[t]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion."

59. *See, e.g.*, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975).

60. 416 U.S. 267 (1974).

61. 29 U.S.C. § 156 (1976).

62. 416 U.S. at 294.

63. *Id.* at 295. The Court also noted that "this is not a case in which some new liability

The same issue was addressed by the Ninth Circuit in *NLRB v. Children's Baptist Home*,<sup>64</sup> in which the employer argued that the Board had abused its discretion by reversing its jurisdictional policy regarding non-profit children's homes twice within the prior three years.<sup>65</sup> The unfair labor practice charges asserted, however, were based on actions that had occurred in 1974, before the jurisdictional policy had been reversed the first time. Therefore, there was no substance to the claim of prejudice because the Board had asserted jurisdiction over the home according to its original policy and did not change this position during the pendency of the action.<sup>66</sup>

Historically, the Board has refused to exercise jurisdiction over private, non-profit educational institutions,<sup>67</sup> because the Act only deals with industries that affect interstate commerce.<sup>68</sup> Due to the increasing number of these institutions and the potential for disruption of the public's welfare resulting from labor disputes involving these institutions, the Board will now assert jurisdiction over those institutions<sup>69</sup> that meet certain Board regulatory standards.<sup>70</sup> Initial decisions in this

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is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements." *Id.*

64. 576 F.2d 256 (9th Cir. 1978).

65. In *Children's Village, Inc.*, 186 N.L.R.B. 953 (1970), and *Jewish Orphan's Home*, 191 N.L.R.B. 32 (1971), the Board had asserted its jurisdiction over similar institutions. In May 1974, the Board announced a policy of declining jurisdiction over such non-profit childcare centers. *Ming Quong Children's Center*, 210 N.L.R.B. 899 (1974). Finally, in 1976, *Ming Quong* was overruled by *Rhode Island Catholic Orphan Asylum (St. Aloysius Home)*, 224 N.L.R.B. 1344 (1976), and the Board returned to its original policy of exercising jurisdiction over these institutions.

66. 576 F.2d at 261.

67. *See, e.g.*, *The Trustees of Columbia University*, 97 N.L.R.B. 424 (1951). The Board noted that Columbia University was a non-profit educational corporation whose sole purpose was to promote education.

Although the activities of Columbia University affect commerce sufficiently to satisfy the requirements of the statute and the standards established by the board for the normal exercise of its jurisdiction, we do not believe that it would effectuate the policies of the Act for the Board to assert its jurisdiction here.

*Id.* at 425. While the University's activities did affect commerce, the Board determined that their purpose was "non-commercial in nature and intimately connected" with charity and education. *Id.* at 427.

68. 29 U.S.C. § 141(b) (1976).

69. *Cornell University*, 183 N.L.R.B. 329, 329 (1970) (while education remains the primary goal of such institutions, universities have become involved in a number of interstate commercial activities). *See Maryland v. Wirtz*, 392 U.S. 183, 194-95 (1968) (upholding the constitutionality of amendments to the Fair Labor Standards Act extending coverage to non-profit private universities and hospitals) ("It is clear that labor conditions in schools and hospitals can affect commerce . . . . Strikes and work stoppages involving employees of schools and hospitals . . . obviously interrupt and burden this flow of goods across state lines.").

70. The regulatory standards that have been developed are two: first, the annual gross

area involved secular institutions;<sup>71</sup> in later decisions, the Board extended its jurisdiction to include religious institutions.<sup>72</sup>

In *NLRB v. Catholic Bishop*,<sup>73</sup> however, the Supreme Court upheld a reversal of the Board's exercise of jurisdiction over a religious, educational institution. Construing the Act narrowly, the Court held that the Board's assertion of jurisdiction was improper for there was no sign of a clear congressional intent to include such institutions within the Board's purview.<sup>74</sup>

While the Board has no jurisdiction in some areas, it has exclusive jurisdiction in others. In *San Diego Building Trades Council v. Garmon*,<sup>75</sup> the Court announced a doctrine of preemption: if an activity is even arguably subject to section 7 or section 8 of the Act, state and federal courts must refuse jurisdiction and defer to the Board and its expertise in the field of labor relations.<sup>76</sup> An exception to the *Garmon* rule has been provided recently by the Supreme Court. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,<sup>77</sup> Sears

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revenues of the institution must be over one million dollars and second, the institution must have a substantial impact on interstate commerce. See Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976). See also 29 C.F.R. § 103.1 (annual revenue requirement of one million dollars for Board to have jurisdiction over private non-profit universities and colleges).

71. See, e.g., *The Judson School*, 209 N.L.R.B. 677 (1974); *The Shattuck School*, 189 N.L.R.B. 886 (1971).

72. Compare Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976) (annual income over one million dollars; substantial interstate purchases) with *Academia San Jorge*, 234 N.L.R.B. 1181 (1978) (advisory opinion) (annual income of \$486,000 below the Board's regulatory minimum).

The Board has stepped around the first amendment issue by finding its exercise of jurisdiction to be "a minimal intrusion on religious conduct and . . . necessary to obtain the Act's objective." Cardinal Timothy Manning, 223 N.L.R.B. 1218, 1218 (1976) (emphasis in original). The Board has also drawn a distinction between schools that are "completely religious" and those that are "religiously associated" and has refused to exercise jurisdiction over institutions in the former category. E.g., *Hebrew Teachers*, 210 N.L.R.B. 1053 (1974) (no jurisdiction over an institution concerned primarily with religious activities and teachings that minimally impact interstate commerce).

73. 440 U.S. 490 (1979), *aff'd* 559 F.2d 1112 (1977).

74. *Id.* at 504-06. The Court resolved the case in this manner to avoid first amendment questions that would have been raised had the Board had jurisdiction over these institutions. *Id.* at 504.

The *Catholic Bishop* decision also casts doubts on the validity of *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d 467 (9th Cir. 1978), announced prior to *Catholic Bishop*. The cultural center operated as a non-profit corporation, wholly owned by the Church of Jesus Christ of Latter Day Saints; it based its challenge to the Board's jurisdiction on the Seventh Circuit's holding in *Catholic Bishop*. *Id.* at 472 (citing *Catholic Bishop v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979)).

75. 359 U.S. 236 (1959).

76. *Id.* at 245.

77. 436 U.S. 180 (1978).

filed an action for trespass against the carpenters in a California state court. Two union representatives had visited a Sears store and found certain carpentry work was not being done by men dispatched from the hiring hall. They requested that Sears arrange to have the work performed by union members, and when no action was taken, the union set up picket lines on Sears' property. The California Supreme Court dismissed the case on the authority of *Garmon*.<sup>78</sup> The United States Supreme Court reversed, recognizing that "the Court has upheld state-court jurisdiction over conduct that touches 'interests so deeply rooted in local feeling that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act.'"<sup>79</sup> The trespass action clearly fell within this exception.

The Ninth Circuit recently considered this preemption doctrine in two cases brought under the trusteeship provisions of the Labor Management Relations Act and the Labor Management Reporting and Disclosure Act of 1959 (LMRDA).<sup>80</sup> In *Brenda v. Grand Lodge of the International Association of Machinists*,<sup>81</sup> the local union had brought an action in district court challenging a trusteeship imposed by the international on the district lodge. The international challenged the court's jurisdiction on the ground that the NLRB had exclusive jurisdiction over unfair labor practice disputes. The court, however, upheld federal court jurisdiction, basing its decision on congressional intent. The LMRDA was passed "to regulate internal union practices so as to protect the rights of individual union members." In order to "prevent frustration of Congressional purposes" the Ninth Circuit determined that the doctrines of preemption and primary jurisdiction must yield.<sup>82</sup> In *Burke v. Ernest W. Hahn, Inc.*,<sup>83</sup> union trustees brought an action in district court to recover money allegedly owed to union trusts by an employer. The Ninth Circuit reversed the district court's determination that it lacked jurisdiction, reasoning that "remedies for 'jurisdictional' controversies . . . come into play only by a strike or threat of a strike."<sup>84</sup> Without a labor dispute or unfair labor practice, the Board could not exercise jurisdiction in the case, and the district court should have assumed jurisdiction.

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78. 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 143 (1976), *rev'd*, 436 U.S. 180 (1978).

79. 436 U.S. at 195 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

80. This act is codified in 29 U.S.C. §§ 401-531 (1976).

81. 584 F.2d 308 (9th Cir. 1978).

82. *Id.* at 314 n.2.

83. 592 F.2d 542 (9th Cir. 1979).

84. *Id.* at 545 (quoting *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 263-64 (1964)).

### B. Procedure

Board operating procedures have not changed significantly during the survey period. Although the Board and the Ninth Circuit continue to adhere to the general procedures catalogued in sections 9 and 10 of the Act,<sup>85</sup> the Ninth Circuit has clarified certain statutory requirements for bringing unfair labor practice claims under the Act.

#### 1. Six-month limitation period on evidence

Section 10(b) of the Act authorizes the Board to issue a complaint when it determines that a person or company should be charged with an unfair labor practice, provided that the alleged practice occurs within the six months prior to the filing of charges with the Board.<sup>86</sup> In *Local Lodge 1424, International Association of Machinists v. NLRB*,<sup>87</sup> the Supreme Court noted that section 10(b) does not preclude the use of all evidence pertaining to events occurring more than six months before the filing and service of an unfair labor practice charge. In applying the limitation period the Court distinguished two situations. If acts occurring within the six-month period constitute an unfair labor practice, events occurring before may be examined and used for evidentiary purposes to establish facts to prove these charges. If the conduct within the preceding six months "can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice," then this evidence "cloak[s] with illegality that which was otherwise lawful" and may not be introduced.<sup>88</sup>

In *NLRB v. Local 30 ILWU*,<sup>89</sup> the Ninth Circuit addressed the issue of when this six-month period begins to run. A union member had crossed his union's picket line and was fined \$3,150 on September 17, 1974. Official notice of this action was not received by the member, however, until March 6, 1975, and his unfair labor practice charges against the union were filed on March 18, 1975, six months and one day

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85. 29 U.S.C. §§ 159-160 (1976).

86. *Id.* § 160(b).

87. 362 U.S. 411 (1960).

88. *Id.* at 416-17. The union and the employer had entered into a bargaining agreement before the union had obtained the consent of a majority of the employees. The agreement contained a union security clause that required all employees to become union members within forty-five days. More than six months after the agreement had been executed, unfair labor practice charges were filed, alleging that the union lacked majority status at the time the agreement was entered into and that continued enforcement of the agreement was illegal. The Court held that the action was barred by the six-month limitation period and that it fell into the second category.

89. 549 F.2d 698 (9th Cir. 1977).

after the union had acted. The court held that the action was not barred because the "six-month time period does not begin to run until the laborer [is] in a position to file the unfair labor practice charge, i.e., upon receipt of the notice of the penalty."<sup>90</sup>

Similarly, in *NLRB v. California School of Professional Psychology*,<sup>91</sup> a teacher employed by the school attempted to organize the faculty, and on July 23, the school notified him in writing that his contract would be allowed to expire on August 31. On the following February 12, the terminated employee filed an unfair labor practice charge with the Board. The court dismissed the action because the time limit began running as soon as the employee was able to file an unfair labor practice charge.<sup>92</sup> The court held that the July 23 termination letter constituted a final decision not to rehire the employee, and became a potential unfair labor practice.

Fraudulent concealment of facts constituting an unfair labor practice tolls this six-month limitation period. As long as the victimized party remains ignorant of these facts, through no fault of his own, the limitation period will not begin to run until the fraud is either discovered or with reasonable diligence should have been discovered.<sup>93</sup> This issue was considered in *NLRB v. Don Burgess Construction Corp.*<sup>94</sup> In June 1974, Burgess Corporation formally recognized a union as the bargaining representative for the carpenters it employed. In August 1974, the president of Burgess and the foreman of the carpenters formed a partnership. All of the carpenters were transferred from the corporation to the partnership. The partnership entered into a new agreement with the union and the corporation notified the union that it no longer employed any carpenters, would not employ any carpenters in the future, and considered itself no longer bound to the agreement.

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90. *Id.* at 701. The union argued that the rule of *Lodge 1424* required a different result. Recognizing that a literal application of *Lodge 1424* compelled a decision favoring the union, the court distinguished *Lodge 1424* as a situation in which the activity complained of was the continued enforcement of an agreement invalid from its inception. *Id.* at 700-01.

The Second Circuit reached a similar conclusion in *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 883 (2d Cir. 1977). The district had notified an employee on June 13 that he would not be rehired for the next school year. The union filed an unfair labor practice charge on December 24, alleging that the six-month period did not start to run until September 1, the start of the new school year. The court disagreed for the June 13 action was not tentative but was final and conclusive. *Id.* at 882. See also *NLRB v. Plumbers & Pipe Fitters, Local 214*, 298 F.2d 427 (7th Cir. 1962).

91. 583 F.2d 1099 (9th Cir. 1978).

92. *Id.* at 1101.

93. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (citing *Bailey v. Glover*, 88 U.S. 342, 348 (1874)) ("This equitable doctrine is read into every federal statute of limitation.")

94. 596 F.2d 378 (9th Cir.), cert. denied, 100 S. Ct. 293 (1979).

The union did not object. In January 1975, the corporation employed non-union carpenters. The union discovered this in May 1975 and filed unfair labor practice charges in October 1975. The corporation contended that the six-month limitation had started in January and was a bar to the union's charge.<sup>95</sup> The Ninth Circuit rejected the corporation's contention, noting that the corporation had fraudulently concealed its employment of the non-union carpenters and the union neither knew nor should have known of this hiring prior to May.<sup>96</sup> The court found that the corporation's actions tolled the six-month limitation period and agreed to hear the charges.

While section 10(b) of the Act expressly applies the six-month period to the filing of charges, it has been extended to bar evidence of unfair labor practices raised as a defense to refusal-to-bargain charges.<sup>97</sup> In *NLRB v. Tahoe Nugget, Inc.*,<sup>98</sup> the Ninth Circuit refused to allow an employer to justify its refusal to bargain with evidence that the union lacked majority status when first recognized as the bargaining agent five years before.<sup>99</sup> In applying the *Lodge 1424* distinctions regarding the six-month limitation period, the court determined that the employer was essentially attempting to revive a defunct unfair labor practice claim to defend a subsequent charge, and evidence of this prior event was therefore inadmissible.<sup>100</sup>

## 2. Hearings

Section 9(c) of the Act provides that the Board shall investigate

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95. *Id.* at 382.

96. *Id.* at 384. The court held that the corporation and the partnership were one employer and that the carpenters, whether employed by the partnership or the corporation, constituted a single bargaining unit. *Id.*

97. See *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 673 (9th Cir. 1972) (§ 10(b) barred evidence of a union's loss of a certification election); *NLRB v. District 30, UMW*, 422 F.2d 115, 122 (6th Cir. 1969), *cert. denied*, 398 U.S. 959 (1970) (union's assertion of refusal to bargain barred as a defense to later charge of illegal picketing); *Lane-Coos-Curry-Douglas Bldg. & Constr. Trades Council v. NLRB*, 415 F.2d 656, 659 n.7 (9th Cir. 1969) (trades council barred from defending illegal picketing charge with assertion that local unions not lawfully recognized because union contracts executed more than a year before).

98. 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2847 (1979).

99. 584 F.2d at 302.

100. *Id.* See also *NLRB v. B.C. Hawk Chevrolet, Inc.*, 582 F.2d 491 (9th Cir. 1978). In *B.C. Hawk*, the employer attempted to defend his refusal to bargain on the basis that the signing of the bargaining agreement ten months earlier was itself an unfair labor practice. The court rejected this contention because nothing in the record indicated that the employer could not have brought these charges within the six months following the execution of the agreement. *Id.* at 494. See generally *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2837 (1979) (following *NLRB v. Tragniew, Inc.*, 470 F.2d 669 (9th Cir. 1972)).

representation petitions after they are filed and shall order a hearing on the petition if it raises questions of representation affecting interstate commerce. If the hearing reveals such questions, an election to determine the bargaining representative shall be ordered and, in the ordinary course of proceedings, certified by the Board.<sup>101</sup>

In *Alson Manufacturing Aerospace Division of Alson Industries, Inc. v. NLRB*,<sup>102</sup> the employer's exceptions to the results of the representation election were summarily rejected by the Board. The employer refused to bargain, and the union filed unfair labor practice charges. The court explained that the employer must present substantial and material factual issues warranting decertification of the election before a hearing will be granted.<sup>103</sup> The court found that the employer's exceptions could justify decertification, and the employer was reasonably entitled to a hearing. A hearing was ordered on the exceptions notwithstanding the Board's policy of expeditiously processing election objections so as to facilitate collective bargaining.<sup>104</sup>

In *Oshman's Sporting Goods, Inc. v. NLRB*,<sup>105</sup> the Ninth Circuit refused to reverse the Board's decision not to grant a hearing. New evidence was offered more than eight months after the hearing request had been denied and more than five months after the Board had denied a request to review.<sup>106</sup> While the evidence may have presented a material issue sufficient to justify a hearing, the court stressed the importance of the timeliness of the request for a hearing.<sup>107</sup>

### 3. Twelve-month presumption of validity for elections

Section 9(c)(3) of the Act prohibits the Board from directing an election in a bargaining unit which has held a valid election during the preceding twelve months.<sup>108</sup> This section has been construed to give an almost conclusive presumption of majority support for the union dur-

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101. 29 U.S.C. § 159(c)(1) (1976).

102. 523 F.2d 470 (9th Cir. 1975) (per curiam).

103. *Id.* at 472. See 29 C.F.R. § 102.69(c) (1979).

104. The court stated that a party, to request a hearing, must "make a prima facie showing as to the alleged facts which, if true, would require a new election." 523 F.2d at 472. The showing required to obtain this hearing was further defined in *NLRB v. L.D. McFarland Co.*, 572 F.2d 256 (9th Cir.), cert. denied, 99 S. Ct. 280 (1978) (hearing on representation election denied; mere disagreement with findings of fact without offer of proof held insufficient basis for hearing; no substantial issues raised).

105. 586 F.2d 699 (9th Cir. 1978).

106. *Id.* at 703.

107. *Id.*

108. 29 U.S.C. § 159(c)(3) (1976).



ing the year following certification.<sup>109</sup> While this section is strictly construed,<sup>110</sup> problems arise from its rather uneven application. In *NLRB v. Tri-Ex Tower Corp.*,<sup>111</sup> the Board waited ten months to certify an election which the union had lost. Two months after certification, and twelve months after the prior election, another election was held and won by the union. Recognizing that the employer was placed in an unfair position because any new economic benefits conveyed upon the employees prior to an upcoming representation election might result in an unfair labor practice charge, the court nevertheless found the employer guilty of an unfair labor practice by refusing to bargain. The employer based its refusal to bargain on section 9(c)(3), contending that the twelve-month period ran from the date of certification, not from the date of the election.<sup>112</sup> The court upheld the Board's approval of the second election as within the Board's wide discretion "to effectuate the policy of the Act that employees be represented by their chosen bargaining representative."<sup>113</sup>

A different rule applies when the union wins the election. In *Brooks v. NLRB*,<sup>114</sup> the Supreme Court held that when an election results in the union's certification, the twelve-month period runs from the certification date.<sup>115</sup> The *Brooks* Court adopted the certification bar with the proviso that certain "unusual circumstances" may justify an employer's refusal to bargain during the one-year period.<sup>116</sup> For example, an unusual circumstance may arise after a significant change in the bargaining unit's size,<sup>117</sup> after the certified union is dissolved,<sup>118</sup> or after the union disclaims interest in representing the employees.<sup>119</sup> The Ninth Circuit seldom finds such an "unusual circumstance." In *NLRB*

109. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954). The Court considered this presumption conclusive in the absence of unusual circumstances and defined three such circumstances: "(1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time." *Id.* at 98-99 (footnotes deleted).

110. *See, e.g., NLRB v. Burns Int'l Security Sys.*, 406 U.S. 272, 279 (1972); *Inter-Polymer Indus., Inc. v. NLRB*, 480 F.2d 631, 633 (9th Cir. 1973).

111. 595 F.2d 1 (9th Cir. 1979).

112. *Id.* at 1. *See Mallenckrodt Chemical Works*, 84 N.L.R.B. 291 (1949) (12-month period runs from date of election, not certification).

113. 595 F.2d at 2.

114. 348 U.S. 96 (1954).

115. *Id.* at 104. *See NLRB v. Lee Office Equip.*, 572 F.2d 704, 706 n.1 (9th Cir. 1978).

116. 348 U.S. at 98-99.

117. *Id.*

118. *Id.* at 98 (citing *Public Serv. Elec. & Gas Co.*, 59 N.L.R.B. 325 (1944)).

119. 348 U.S. at 98. *See WTOP, Inc.*, 114 N.L.R.B. 1236, 1237 (1955).

*v. Lee Office Equipment*,<sup>120</sup> the Ninth Circuit determined that evidence that employees had "abandoned their certified union, without more"<sup>121</sup> was not an "unusual circumstance" sufficient to rebut the presumption of majority support. The harshness of this holding was lessened somewhat in *NLRB v. Tahoe Nugget, Inc.*,<sup>122</sup> in which the Ninth Circuit held that the presumption could be rebutted by "clear, cogent, and convincing evidence, that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of refusal."<sup>123</sup> Clearly, the presumption of majority support is rooted in the court's considerations of employee free choice and stability in bargaining.<sup>124</sup>

An employer is faced with a difficult problem when he wishes to contest the union majority during this certification period. Refusal to bargain is clearly not the answer.<sup>125</sup> The Supreme Court held in *Brooks* that even if the employer has solid evidence that his employees have deserted the certified union he must continue to bargain in good faith, while petitioning the Board for relief, that is, the self-help remedy of refusing to bargain with the union is not an available alternative. This is in keeping with one of the overall policies of the Act of promoting industrial peace.<sup>126</sup>

The Ninth Circuit in *Tahoe Nugget* specified the suggested procedure for contesting the union majority: employees are free to petition for decertification and employers may petition for an election, "the preferred method for resolving disputes."<sup>127</sup> Unfortunately there remains a significant burden on the employer who contests such an election, and it should be noted that the Board's decisions regarding representation elections are not subject to direct appeal.<sup>128</sup>

### C. NLRB Orders and Remedies

Sections 7 and 9 of the Act set out the general grant of Board authority for representation election procedures and for proscribing un-

120. 572 F.2d 704 (9th Cir. 1978).

121. *Id.* at 706. "It appears that the union had in fact lost virtually all employee support at the time of the refusals to bargain." *Id.*

122. 584 F.2d 293 (9th Cir. 1978).

123. *Id.* at 297 (citations omitted).

124. *Id.* at 300-01, 303.

125. This is indigenious to the certification period, because refusal to bargain is recognized as a method for seeking judicial review. *See Valley Rock Products, Inc. v. NLRB*, 590 F.2d 300 (9th Cir. 1979).

126. 348 U.S. at 103.

127. 584 F.2d at 301.

128. *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1308 n.3 (9th Cir. 1978).

fair labor practices.<sup>129</sup> Section 10 of the Act authorizes the Board to take certain steps to prevent any person from engaging in an unfair labor practice that affects interstate commerce.<sup>130</sup> It remains the primary responsibility of the Board to reconcile "the inherent conflict between employee rights and bargaining stability."<sup>131</sup> To this end, the courts have granted the Board a significant degree of authority in framing remedies.<sup>132</sup> The traditional remedies utilized by the Board to rectify violations of the Act by employers are bargaining orders, reinstatement with back pay, and cease and desist orders.<sup>133</sup>

### 1. Bargaining orders

In *NLRB v. Gissel Packing Co.*,<sup>134</sup> the union had obtained authorization cards from a majority of the employees; thereafter the employer committed an unfair labor practice. The Supreme Court held that an order to the employer to bargain with the union was an appropriate remedy as the unfair labor practice had tainted the resulting election. Noting that secret elections are the preferred manner of determining union support, the Court recognized that "the cards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded."<sup>135</sup> Since "employee sentiment" was clearly indicated by the card majority, the Court concluded that the Board's decision to issue a bargaining order was appropriate. The Court rejected the employer's contention that a bargaining order acted as a punishment and a restraint on the employer because "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct."<sup>136</sup>

The Court in *Gissel* identified three categories of unfair labor practices: (1) outrageous and pervasive practices, which *might* warrant a bargaining order even though the union never attained majority status,

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129. 29 U.S.C. § 158 (1976) (unfair labor practices by employers and labor organizations); *id.* § 159 (representative elections).

130. *Id.* § 160(a); *id.* § 160(e) (judicial review of Board rulings).

131. *NLRB v. Tahoe Nugget*, 584 F.2d 293, 304 (9th Cir. 1978).

132. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Marriot Corp. v. NLRB*, 491 F.2d 367, 371 (9th Cir. 1974).

133. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (bargaining order); *Fibreboard Paper Prods. Co. v. NLRB*, 379 U.S. 203 (1964) (reinstatement of discharged employee); *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941) (cease-and-desist order issued and employer required to post notice).

134. 395 U.S. 575 (1969).

135. *Id.* at 603.

136. *Id.* at 612.

(2) less pervasive practices, which nonetheless still have the tendency to undermine majority strength and impede the election process if the union has at some point secured authorization cards signed by a majority of the employees, and (3) less extensive unfair labor practices, which, because of their minimal impact on the election machinery, could not sustain a bargaining order.<sup>137</sup> These categories have served as the standard for several circuit courts in examining the propriety of Board bargaining orders.<sup>138</sup>

*Gissel* was liberally construed by the Ninth Circuit during the survey period. In *NLRB v. Ultra-Sonic De-Burring, Inc.*,<sup>139</sup> the court considered a situation in which the employer had committed significant unfair labor practices prior to the union's obtaining a card majority.<sup>140</sup> Recognizing that similar acts followed by a union card majority had been deemed insufficient by the Eighth Circuit to justify a bargaining order,<sup>141</sup> the court held that the subsequent discharge of a union organizer and the illegal interrogation of employees were sufficiently pervasive to uphold the bargaining order, for this conduct had a "tendency to undermine the majority's strength and impede the election."<sup>142</sup>

The Ninth Circuit also upheld a bargaining order issued by the Board on behalf of a union defeated in a representation election. In *Hambre Hombre Enterprises, Inc. v. NLRB*,<sup>143</sup> twenty-seven of forty-four employees had signed union authorization cards, but the union

137. *Id.* at 613-15.

138. *See, e.g.*, *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 242 (9th Cir. 1978) (bargaining order justified because employer's threats to employees about their union activity, its granting of wage and benefit increases to discourage union organization, and the enticement of employees to terminate their strike by offering settlement of various matters were "so pervasive as to make resolution of employer-employee problems through normal channels impossible"); *Automated Business Sys. v. NLRB*, 497 F.2d 262, 266-67 (6th Cir. 1974) (threatened closure of plant and employer's promises of benefits not so pervasive as to weaken the employees' adherence to their union; bargaining order should be reexamined upon evaluation of additional evidence); *NLRB v. Henry Colder Co.*, 447 F.2d 629, 631 (7th Cir. 1971) (unlawful interrogation of employees during union organizational drive, promise of substantial benefits if union ignored, and termination of an employee for union activity deemed sufficient to have "polluted the 'electoral atmosphere'"; within *Gissel's* second category).

139. 593 F.2d 123 (9th Cir. 1979).

140. *Id.* at 124-25. The employer had discharged two employees for union activities, threatened to close the business if the union won the representation election, and created an impression that the employees involved in union activities were under surveillance.

141. *Arbie Mineral Feed Co. v. NLRB*, 438 F.2d 940 (8th Cir. 1971) (union obtained authorization card majority after employer interrogated employees about their union activities and after an employee discharged for his union activities).

142. 593 F.2d at 124.

143. 581 F.2d 204 (9th Cir. 1978).

had subsequently been defeated in the representation election. Between the signing of the cards and the election, an employee, who had been active in union discussion, was fired. The Board, in reversing the ALJ's finding that the firing did not constitute an unfair labor practice, issued a bargaining order. The Ninth Circuit agreed with the Board and enforced the order.<sup>144</sup>

Although the Ninth Circuit generally upholds Board bargaining orders, it has declined to do so when a union questionably or fraudulently obtains a card majority. In *NLRB v. Randall P. Kane, Inc.*,<sup>145</sup> a majority of the company's employees had signed union authorization cards, but the company refused to bargain. The company contended that prospective signers had been informed that the signed cards would merely prompt a representation election, even though they had been used to demand recognition. The court held that the Board must consider the degree to which these signers had been influenced by the election argument before respondent could be compelled to bargain.<sup>146</sup>

## 2. Reinstatement with back pay

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."<sup>147</sup> Section 8(a)(4) prohibits an employer from discharging or otherwise discriminating "against an employee because he has filed charges or given testimony under this subchapter."<sup>148</sup> The authority to impose the usual remedies of back pay and reinstatement is provided by section 10(c) of the Act, which requires the Board to take "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."<sup>149</sup>

An employer who has discharged employees for union activities can be compelled to reinstate the employee. In *Fibreboard Paper Products Corp. v. NLRB*,<sup>150</sup> the union contract expired and the employer terminated all employees represented by the union. The Court ordered the employer to reinstate the dismissed employees. Its determination was based on the broad remedial authority of the Board and the ab-

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144. *Id.* at 207.

145. 581 F.2d 215 (9th Cir. 1978).

146. *Id.* at 218.

147. 29 U.S.C. § 158(a)(3) (1976).

148. *Id.* § 158(a)(4).

149. *Id.* § 160(c).

150. 379 U.S. 203 (1964).

sence of evidence "showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining was not well-designed to promote the policies of the Act."<sup>151</sup>

In the seminal case of *F. W. Woolworth Company*,<sup>152</sup> the Board ordered the employer, who had wrongfully discharged an employee for union activities and affiliation, to make the employee whole for any loss of pay suffered as a result of its unfair labor practice. The back-pay remedy was to be calculated on a quarterly basis of the employee's normal net earnings from termination until a "proper offer of reinstatement" was made.<sup>153</sup> The Ninth Circuit has continued to apply the *Woolworth* rule in its back-pay awards.<sup>154</sup> For example, in *Polynesian Cultural Center, Inc. v. NLRB*,<sup>155</sup> the court considered a situation in which six employees had allegedly been terminated for union involvement and upheld the Board's finding that liability for back pay runs until the employer makes the employee "an unconditional offer of reinstatement."<sup>156</sup> The court emphasized that the employees are not required to make an attempt to return to work and ruled that the employer was required to make the first move towards "reestablishment of the employment relationship."<sup>157</sup>

In *NLRB v. Mercy Peninsula Ambulance Service, Inc.*,<sup>158</sup> however, the court made a different determination. An employee was discharged for union activity, and the Board held that he was entitled to back pay for a nine-month period following his discharge. The court denied enforcement of the Board order. While the employer has the duty to produce evidence that mitigates its back-pay liability, "[a] worker who has been the victim of an unfair labor practice is not entitled to simply await reimbursement from his or her employer for wages lost, for 'the statute was not intended to encourage idleness.'"<sup>159</sup> In tempering this seemingly harsh result, the court stated that "reasonable" attempts to

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151. *Id.* at 216.

152. 90 N.L.R.B. 289 (1950).

153. *Id.* at 293.

154. *See, e.g.*, *NLRB v. International Ass'n of Bridge Iron Workers Local 378*, 532 F.2d 1241 (9th Cir. 1976); *NLRB v. Local 776, IATSE (Film Editors)*, 303 F.2d 513, 520 (9th Cir. 1962); *NLRB v. International Ass'n of Machinists Aeronautical Indus. Dist. Lodge 727*, 279 F.2d 761, 764 (9th Cir.), *cert. denied*, 364 U.S. 890 (1960).

155. 582 F.2d 467 (9th Cir. 1978).

156. *Id.* at 475.

157. *Id.*

158. 589 F.2d 1014 (9th Cir. 1979).

159. *Id.* at 1017 (quoting Daylin, *Back Pay Under the National Labor Relations Act*, 39 IOWA L. REV. 104, 117 (1958)).

secure comparable employment are sufficient.<sup>160</sup> No mention of the *Polynesian Cultural Center* decision, which placed the entire burden of reinstatement upon the employer, was made in *Mercy Peninsula Ambulance*. It appears, however, that the position of the Ninth Circuit is that the employer is liable to the employee for back pay which accrues from the time of termination until either an unconditional offer of reinstatement is made or the end of such period during which the employee should have reasonably sought other employment to mitigate his damages.

### 3. Union violations of the Act

As in the case of employer unfair labor practices, the Board's traditional remedies against union violations of the Act are cease-and-desist orders, reinstatement and back pay, and bargaining orders.<sup>161</sup> Section 10(c) provides that reinstatement and back-pay remedies may be "required of the . . . labor organization" if it is responsible for the discrimination suffered by the employee.<sup>162</sup> In *NLRB v. Warehousemen's Local 17*,<sup>163</sup> the union rejected a contract that contained an agreement previously worked out by the parties, seeking instead to have the employer sign another contract. The court enforced the Board's order requiring the union to compensate the employer for any out-of-pocket expenses incurred as a result of executing both contracts, reasoning that the award of compensatory damages "was a reasonable exercise of the Board's section 10(c) power to make whole the victim of an unfair labor practice."<sup>164</sup>

In *Graphic Arts International, Local 280 v. NLRB*,<sup>165</sup> the union, until 1975, had negotiated an employment contract with an employer

160. 589 F.2d at 1017. The court determined that the employee made approximately three inquiries a month for the nine-month period. "[G]iven the quantity and quality of his efforts . . . we believe that . . . the Board [in]correctly applied the standard of 'reasonableness' to which a discriminatee must be held with respect to his or her mitigation duty." *Id.* at 1018 n.6.

161. *See, e.g.*, *Teamsters Local 886*, 119 N.L.R.B. 222 (1957), *enforced*, 264 F.2d 21 (10th Cir. 1959) (cease-and-desist order and refund of dues ordered after union failed to sign collective bargaining agreement and withheld negotiated benefits from employees until they had signed membership applications and dues check-off authorizations); *Acme Mattress Co.*, 91 N.L.R.B. 1010 (1950), *enforced*, 192 F.2d 524 (7th Cir. 1951) (union and employer jointly and severally liable for discrimination; employees reinstated with back pay).

162. 29 U.S.C. § 160(c) (1976). *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 52-55 (1954) (because union and employer both responsible for the discrimination but employer was not a necessary party to the complaint, back-pay order issued against the union alone).

163. 451 F.2d 1240 (9th Cir. 1971).

164. *Id.* at 1243.

165. 596 F.2d 904 (9th Cir. 1979).

bargaining association, of which Color-Tech was a member. During 1975 the union discontinued that practice and negotiated separate contracts with the individual employers and induced Color-Tech to leave the association and sign an independent contract. During this time the association members engaged in a lockout of union members, and eventually a new contract was signed. The Board found the union guilty of unfair labor practices in inducing Color-Tech to sign the independent contract and ordered the union to compensate Color-Tech for those expenditures incurred pursuant to the independent contract, which it would not have been obligated to make under the later association contract. The union argued that receiving the benefits of the second contract without having incurred the economic costs of a lockout constituted a windfall to Color-Tech. The court held that this argument was without merit: "To reject a make-whole remedy because of this possible windfall would mean allowing the union to benefit from its unlawful conduct by escaping an appropriate remedy."<sup>166</sup>

#### D. Judicial Review and Enforcement

Sections 10(e) and 10(f) of the Act specify that federal appellate courts have jurisdiction to review only "final orders" of the Board.<sup>167</sup> In its rules and regulations, the Board has provided that final orders will be entered in unfair labor practice cases only after the issuance of a complaint, a hearing before a trial examiner, and a decision by the Board.<sup>168</sup>

##### 1. Final order requirement

The Ninth Circuit does not take a restrictive view of what constitutes a final order. In the 1972 case of *Waterway Terminals Co. v. NLRB*,<sup>169</sup> the court held that an order quashing or denying a notice of hearing was a final order despite the fact that no complaint had been issued by the Board. This position was reaffirmed in *Stromberg-Carlson Communications, Inc. v. NLRB*,<sup>170</sup> in which the employer filed an unfair labor practice charge against a union that resulted in the Board's issuance of a notice of hearing. Upon motion of the union, the Board entered an order to quash the notice and denied the employer's petition

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166. *Id.* at 910.

167. 29 U.S.C. § 160(e) (1976) (Board may petition federal appellate courts for enforcement of its orders); *id.* § 160(f) (any person aggrieved by a final order of the Board may petition a federal appellate court for review); *AFL v. NLRB*, 308 U.S. 401 (1940).

168. 29 C.F.R. § 101-34 (1979).

169. 467 F.2d 1011 (9th Cir. 1972).

170. 580 F.2d 939 (9th Cir. 1978).



for review, contending that its order was not subject to review as a final order because no complaint had been issued, no adjudication had occurred, and therefore no final issue of adjudication had been entered.<sup>171</sup> Citing *Waterway Terminals* without comment, the court found that the order to quash did constitute a final order and the petition for review should have been granted.<sup>172</sup>

## 2. Scope of review

Section 10(e) of the Act further provides that findings of fact by the Board shall be conclusive "if supported by substantial evidence on the record considered as a whole."<sup>173</sup> In *Universal Camera Corp. v. NLRB*,<sup>174</sup> the Supreme Court set out guidelines for courts to consider when determining whether the Board's findings are supported by substantial evidence. The courts must examine matters in the record that detract from the Board's finding,<sup>175</sup> but, if the Board has made a choice between two conflicting outcomes, the court must abide by that decision even though a different result would obtain were the court to hear the matter de novo.<sup>176</sup> The court must recognize and give requisite weight to Board findings which are based upon the Board's special expertise in the area of industrial relations.<sup>177</sup> Furthermore, the courts may reverse a decision of an ALJ only when it conflicts with the clear preponderance of the evidence, particularly regarding questions concerning the credibility of witnesses.<sup>178</sup>

Although the courts are bound by Board findings supported by substantial evidence, they are free to overturn the decisions of the Board when it has misapplied the law.<sup>179</sup> It should be noted, however, that an error of law on the part of an ALJ or the Board is itself not necessarily sufficient to warrant remand of a decision. The error must be prejudicial to support a reversal of the administrative determination.<sup>180</sup> The party claiming injury from the alleged error must show this prejudice and raise this question during the course of the Board

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171. *Id.* at 941.

172. *Id.*

173. 29 U.S.C. § 160(e) (1976).

174. 340 U.S. 474 (1951).

175. *Id.* at 488. *Accord*, *NLRB v. Tomco Communications Inc.*, 567 F.2d 871, 877 (9th Cir. 1979).

176. 340 U.S. at 488. *Accord*, *NLRB v. Hospital & Inst. Workers Local 350*, 577 F.2d 649 (9th Cir. 1978).

177. 340 U.S. at 488.

178. *Id.* at 496.

179. *See* *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 691-92 (1951).

180. *NLRB v. Lee Office Equip.*, 572 F.2d 704, 708 (9th Cir. 1978).

proceedings.<sup>181</sup>

### 3. Representation elections

Acquiescence to Board findings is particularly evident in certain controversies. The Ninth Circuit generally defers to the Board's expertise in labor relations in questions dealing with representation elections.<sup>182</sup> In *Beck Corp. v. NLRB*,<sup>183</sup> the employer asserted that, by setting the date for a representation election on a date other than a pay day, the Board disenfranchised twenty-six employees among a total work force of 168. The court recognized that the question centered on whether the Board had abused its discretion and held that "[s]uch discretion includes the determination of whether or not the opportunity afforded all eligible voters to exercise their rights was sufficiently 'adequate' or 'equal' as to reflect accurately the 'majority' required by the labor Act."<sup>184</sup> The court upheld the Board's action interpreting the Act merely to require that a *majority* of the employees have an *opportunity to exercise* their voting rights.<sup>185</sup> The Act provides that representatives be "designated or selected . . . *by* the majority of the employees."<sup>186</sup> It is not sufficient that a majority have an opportunity to exercise their voting rights; rather a majority must *select* representation. The Ninth Circuit is apparently willing to overlook the clear language of the Act to accommodate the Board's wide discretionary authority in instances of representation election controversies.<sup>187</sup>

### 4. Unfair labor practices

In unfair labor practice cases, application of the "substantial evidence" rule is complicated by the need to examine the findings of the ALJ as well as those of the Board. The Ninth Circuit will not overturn an ALJ's findings on the credibility of witnesses unless they are found

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181. *Vari-Tonics Co. v. NLRB*, 589 F.2d 991, 993 (9th Cir. 1979).

182. *See* *NLRB v. Tri-Ex Tower Corp.*, 595 F.2d 1, 2 (9th Cir. 1979); *NLRB v. Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1130 (9th Cir. 1973); *International Tel. & Tel. Corp. v. NLRB*, 294 F.2d 393, 395 (9th Cir. 1961).

183. 590 F.2d 290 (9th Cir. 1978) (per curiam).

184. *Id.* at 293 (citing *International Tel. & Tel. Corp. v. NLRB*, 294 F.2d 393, 395 (9th Cir. 1961)).

185. 590 F.2d at 293.

186. 29 U.S.C. § 159(a) (1976) (emphasis added).

187. *See, e.g.*, *NLRB v. Cadillac Steel Prod. Corp.*, 355 F.2d 191 (9th Cir. 1966); *International Tel. & Tel. Corp. v. NLRB*, 294 F.2d 393 (9th Cir. 1961); *Foreman & Clark, Inc. v. NLRB*, 215 F.2d 396, 409 (9th Cir.), *cert. denied*, 348 U.S. 887 (1954).

to be "inherently incredible or patently unreasonable."<sup>188</sup> When the Board's decision reverses or modifies an ALJ's findings, the appellate court will uphold the Board's findings if they are supported by substantial evidence,<sup>189</sup> and the Board shall be free to draw its own inferences from the testimony.<sup>190</sup> The ALJ's findings regarding credibility, however, must be given added weight because he "has the responsibility of evaluating the credibility of witnesses and the weight to be given their testimony."<sup>191</sup>

In *Loomis Courier Service, Inc. v. NLRB*,<sup>192</sup> the court considered the petition for review of a Board order which had found an employer in violation of unfair labor practice provisions of the Act. The ALJ had found that the shutdown of one of the employer's branches was effected solely for economic reasons, not because of discriminatory anti-union motivation. The Board reversed the finding, contending that the permanent shutdown and discharge of the work force was a per se violation of the Act because it was "inherently destructive of employee rights."<sup>193</sup> In its examination of the controversy, the court restated the principles relating to the relative deference to be given the Board's and the ALJ's positions when they differ:

1) [A] reviewing court will not sustain a factual finding which rests solely on discredited evidence; and 2) even when there is independent, credited evidence of the Board's decision, a reviewing court will scrutinize the Board's findings of fact more critically if they contradict the ALJ's factual conclusions than if they accord with the ALJ's findings.<sup>194</sup>

Applying these principles to the facts before it, the court declined to enforce the order, noting that the ALJ had expressly credited the testimony of the employer's general manager contradicting the union's tes-

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188. *NLRB v. Don Burgess Const. Corp.*, 596 F.2d 378, 383 (9th Cir. 1979); *NLRB v. Anthony Co.*, 557 F.2d 692, 695 (9th Cir. 1977).

189. *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1347 (9th Cir. 1978). See *NLRB v. Yama Woodcraft, Inc.*, 580 F.2d 942 (9th Cir. 1978) (Board adopted ALJ's decision in its order but court denied petition to enforce the decision holding the finding unsupported by substantial evidence); *Boeing Co. v. NLRB*, 581 F.2d 793 (9th Cir. 1978) (Board's interpretation concerning "recognition clause" had effect of extending a standard recognition clause into an unbargained for implied jurisdictional clause).

190. See *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1974).

191. *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 560 F.2d 77, 80 n.3 (9th Cir. 1977) (quoting *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), cert. denied, 434 U.S. 818 (1977)). See *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972) (quoting *Russell-Newman Mfg. Co. v. NLRB*, 407 F.2d 247, 249 (5th Cir. 1969)).

192. 595 F.2d 491 (9th Cir. 1979).

193. *Id.* at 494.

194. *Id.* at 496.

timony upon which the Board's decision had been based. Therefore, because the Board's finding was based on discredited testimony, invalid assumptions, and inferences, the court concluded that it did not meet the substantial evidence rule.<sup>195</sup>

During the survey period in cases that reversed an ALJ's decision, *Loomis* was the only case in which the Ninth Circuit applied the principles of relative deference to each of the tribunal's findings. In the two other cases,<sup>196</sup> the court justified its increased scrutiny on the ground that the questions before it were mixtures of fact and law. Accordingly, the court's scrutiny is strongest when the Board's determination is purely legal. The level of scrutiny for mixed questions of law and fact will depend upon the distribution of legal and factual issues therein.<sup>197</sup> A strict application of these standards will not always be sufficient, as consideration must be given to the inferences drawn by the ALJ. For example, in *NLRB v. Warren L. Rose Castings, Inc.*,<sup>198</sup> the court recognized that it was the Board's findings, not those of the ALJ, that were before the court for review. Since the ALJ's findings are only a part of the record, if the findings of the ALJ are contrary to the Board's, then the support underlying the Board's findings is lessened somewhat, but the basic standard of review remains the same.<sup>199</sup>

## II. UNFAIR LABOR PRACTICES

The declared policy of the National Labor Relations Act is to promote the free flow of commerce by protecting employees' rights to engage in concerted activity for their "mutual aid" and "protection."<sup>200</sup> This policy is implemented in section 7 of the NLRA, which gives employees the right to self-organize, to bargain collectively, to engage in other concerted activities, and to refrain from engaging in such activities.<sup>201</sup> These rights are specifically protected by section 8 of the NLRA.<sup>202</sup>

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195. *Id.* at 500.

196. *NLRB v. Mercy Peninsula Ambulance Serv., Inc.*, 589 F.2d 1014 (9th Cir. 1979); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978).

197. 589 F.2d at 1019 n.8 (quoting *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 876 n.2 (9th Cir. 1978)).

198. 587 F.2d 1005 (9th Cir. 1978).

199. *Id.* at 1008. If the fact-finder must rely on circumstantial evidence and inferences, the Board is free to draw its own inferences from the evidence presented. *See NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343 (9th Cir. 1978); *Shattuck-Penn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

200. 29 U.S.C. § 151 (1976).

201. *Id.* § 157.

202. *Id.* § 158.

*A. Interference with Employees' Section 7 Rights*

Under section 8(a)(1) of the NLRA, employers may not "interfere with, restrain, or coerce employees" in the exercise of their section 7 rights.<sup>203</sup> Section 8(a)(1)'s reach is broad,<sup>204</sup> tempered only by a finding that the employer's actions were justified by substantial, legitimate, business reasons.<sup>205</sup> A violation of section 8(a)(1) requires no discriminatory motive or anti-union animus.<sup>206</sup> Rather, the test is whether, under the circumstances, the employer's conduct reasonably tends to interfere with the employees' free exercise of their rights.<sup>207</sup>

Violations of section 8(a)(1) may be dependent or independent.<sup>208</sup> Dependent 8(a)(1) violations may occur whenever another specific 8(a) subsection has been violated, *e.g.*, when an employer unlawfully supports a labor organization,<sup>209</sup> discharges employees to discourage membership in a union,<sup>210</sup> or discriminates against an employee for giving testimony before the NLRB.<sup>211</sup> Independent 8(a)(1) violations do not require a finding of an 8(a) subsection violation, *e.g.*, employer transgression of distribution and solicitation rules,<sup>212</sup> threats,<sup>213</sup> promises<sup>214</sup>

203. *Id.* § 158(a)(1).

204. *See, e.g.*, NLRB v. Bausch & Lomb, Inc., 526 F.2d 817, 823 (2d Cir. 1975):

[Section] 8(a)(1), like § 8(a)(3), protects an employee's right to belong to a union without interference from an employer . . . . Section 8(a)(1) . . . is broader in scope and covers anti-union interference in any form.

. . . [T]he coverage of § 8(a)(3) overlaps with that of § 8(a)(1). An employer with discriminatory hiring policies violates not only the specific § 8(a)(3) mandate against anti-union employment practices, but also the broader § 8(a)(1) prohibition against anti-union actions of any form.

205. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268-69 (1965) ("Naturally, certain business reasons will, to some degree, interfere with concerted activities by employees. But it is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated.").

206. *Id.* at 269.

207. *See, e.g.*, *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977) (conversations between employees and supervisor about union did not tend to restrain or interfere with employees' exercise of § 7 rights).

208. *See, e.g.*, *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 296-97 (9th Cir. 1978).

209. *E.g.*, *ILGWU v. NLRB*, 366 U.S. 731 (1961) (dependent 8(a)(1) violations in conjunction with an 8(a)(2)).

210. *E.g.*, *Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251 (9th Cir. 1978) (dependent 8(a)(1) violation in conjunction with an 8(a)(3)).

211. *E.g.*, *NLRB v. Western Clinical Lab., Inc.*, 571 F.2d 457 (9th Cir. 1978) (dependent 8(a)(1) violation in conjunction with an 8(a)(4)).

212. *E.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (independent 8(a)(1) violation when employer would not allow employees to distribute union sponsored newsletter containing articles not immediately pertaining to work); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) (independent 8(a)(1) violation when employer forbade employees from soliciting and distributing union literature in hospital cafeteria during nonworking hours).

or grants of benefits,<sup>215</sup> surveillance,<sup>216</sup> and the promotion of decertification petitions.<sup>217</sup>

### 1. Distribution and solicitation rules

Employers' rules that prohibit organizational solicitation and distribution are not per se violations of section 8(a)(1), for they often serve an employer's need to maintain production and discipline.<sup>218</sup> Thus, an employer may enforce no-solicitation/no-distribution rules during working hours.<sup>219</sup> Rules prohibiting solicitation or distribution in working areas during non-working time, however, absent special business reasons, are presumed unlawful.<sup>220</sup>

In determining whether special business reasons exist, an employer's property and managerial rights, such as the right to conduct its business efficiently, are balanced against the employees' right to organ-

213. *E.g.*, NLRB v. Broadmoor Lumber Co., 578 F.2d 238 (9th Cir. 1978) (independent 8(a)(1) violation when employer warned of job loss if employees associated with union).

214. *E.g.*, *id.* (independent 8(a)(1) violation when employer promised to meet any demand for benefits in order to get rid of union).

215. *E.g.*, NLRB v. B.C. Hawk Chevrolet, 582 F.2d 491 (9th Cir. 1978) (independent 8(a)(1) violation when employer instituted benefit programs which it claimed to be as good as or better than union's).

216. *E.g.*, Hambre Hombre Enterprises, Inc. v. NLRB, 581 F.2d 204 (9th Cir. 1978) (independent 8(a)(1) violation when company officers watched union meeting from car parked across the street).

217. *E.g.*, NLRB v. Triumph Curing Center, 571 F.2d 462 (9th Cir. 1978) (independent 8(a)(1) violation when supervisor circulated decertification petition in an effort to erode employees' union support).

218. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1944). *Republic Aviation* dealt only with rules affecting *employees* who solicited support or distributed information for unions. Non-employee union organizers, however, may not violate a non-discriminatory no-trespass rule unless other reasonable means of communication with the employees are unavailable. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113-14 (1956). *E.g.*, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205 n.41 (1978) (absent "unique obstacles," access to non-employees generally has been denied); Marshall v. Barlow's, Inc., 436 U.S. 307, 314 (1978) ("By opening up his property to employees, the employer had yielded so much of his private property rights as to allow those employees to exercise § 7 rights . . . . [But his private property rights] prevailed over the intrusion of nonemployee organizers."); NLRB v. S&H Grossinger's, Inc., 372 F.2d 26, 30 (2d Cir. 1967) (union was permitted to enter the employer's premises when a majority of employees lived on the job site and no effective alternative methods of communicating with them existed); NLRB v. Monsanto Chem. Co., 225 F.2d 16, 18-19 (9th Cir. 1955) (employer's no-distribution rule did not violate the NLRA when employees could be contacted by mail or were easily accessible to non-employee union organizers because they lived in a nearby small town).

219. Such rules carry a presumption of validity unless evidence proves they were adopted for a discriminatory purpose. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1944).

220. *Id.*

ize and bargain collectively. Special business reasons are usually found when the primary purpose of an employer's operation is to serve others, *e.g.*, in the restaurant<sup>221</sup> and retail marketing<sup>222</sup> industries. Union solicitation that is carried on when customers are present, even if conducted during an employee's lunch hour or after working hours, could disrupt the employer's business by driving customers away.<sup>223</sup>

Although no Ninth Circuit cases dealt with solicitation and distribution restrictions during the survey period, two recent Supreme Court cases have discussed the limits of permitted solicitation and distribution with respect to location and subject matter. In *NLRB v. Baptist Hospital, Inc.*,<sup>224</sup> the Court noted a recent NLRB decision, *St. John's Hospital & School of Nursing, Inc.*,<sup>225</sup> which had held that an employer's ban on employee solicitation and distribution is presumed invalid except in "strictly patient care areas,"<sup>226</sup> absent justification that the ban is necessary to avoid disruption of patient care.<sup>227</sup> The Court in *Baptist Hospital* held that the employer-hospital had justified its no-solicitation rule in corridors and waiting rooms accessible to patients as well as in "immediate patient care" areas but had not supported its ban on solicitation in the cafeteria, gift shops, and lobby.<sup>228</sup> In *Baptist Hospital*, the hospital-employer had instituted a ban on all solicitation by employees in any area accessible to the public. The NLRB had held that the rule was too broad, restricting its enforcement to areas of im-

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221. *Marriott Corp. (Children's Inn)*, 223 N.L.R.B. 978 (1976) (ban not limited to customer or sales areas of restaurant held overly broad); *Banker's Club, Inc.*, 218 N.L.R.B. 22 (1975) (rule prohibiting solicitation in banquet room of private club held overly broad when room was used exclusively by employees one-half hour each day).

222. *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952) (no-solicitation rule invalid in non-selling areas of department store); *In re Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262 (1948) (no-solicitation rule on selling floors could be extended to public restaurants of department stores).

223. *In re May Dep't Stores Co.*, 59 N.L.R.B. 976, 981 (1944), *enforced as modified*, 154 F.2d 533 (8th Cir. 1946).

224. 99 S. Ct. 2598 (1979).

225. 222 N.L.R.B. 1150 (1976), *enforced as modified*, 557 F.2d 1368 (10th Cir. 1977) (denying enforcement of Board's order allowing employee solicitation and distribution in hospital's hallways, elevators, stairways, and waiting rooms that were accessible to patients when numerous other employee-only areas existed).

226. "Strictly patient care areas" were defined as patients' rooms, operating rooms, and treatment areas, including therapy and x-ray areas. 222 N.L.R.B. at 1150.

227. *Id.* The Court in *Baptist Hospital* agreed with the NLRB that substantial weight must be given to the need to avoid disruption of patient care when balancing employers' and employees' interests. 99 S. Ct. at 2605 (citing *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978)).

228. *Id.* at 2605. *Cf.* *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) (employer could not justify no-solicitation/no-distribution ban in cafeteria as being detrimental to patient care since only 1.56% of cafeteria patrons were patients, while 77% were employees).

mediate patient care as defined in *St. John's Hospital*. The Court, however, found that the ban on solicitation was necessary in the hallways and sitting rooms of patients' floors in order for the hospital to maintain the tranquil atmosphere needed for the patients' recuperation.<sup>229</sup> Yet, the ban's applicability to the gift and coffee shops and first floor lobby was struck down because only patients considered healthy enough to withstand the activities in those areas were allowed to visit them.<sup>230</sup>

Distribution of union sponsored non-organizational material was discussed by the Supreme Court in *Eastex, Inc. v. NLRB*.<sup>231</sup> The Court expressly confined its ruling to the facts of the case<sup>232</sup> when it upheld the distribution of a union sponsored newsletter that protested a presidential veto of an increase in the federal minimum wage and urged employee action regarding a state right-to-work statute.<sup>233</sup> The Court held that handing out the newsletter in nonworking areas of the employer's premises during nonworking time was protected under section 7's "mutual aid and protection" clause because the veto of a federal minimum wage increase was found to be of immediate concern to employees.<sup>234</sup> In addition, the Court determined that incorporating a state right-to-work statute into a revised state constitution could elevate a scheme inimical to union security into a constitutional mandate.<sup>235</sup>

The *Eastex* Court further held that the rule announced in *Republic*

229. 99 S. Ct. at 2604-05. The Court noted the tremendous part that patients' psychological attitudes play in their recovery, the increased importance of patient mobility during recuperation, the use of corridors on patients' floors to move the more critically ill, and the use of the corridors and waiting rooms for conferences during times of crises. *Id.*

230. *Id.* at 2606.

231. 437 U.S. 556 (1978).

232. *Id.* at 575.

233. *Id.* at 569-70. The union newsletter consisted of four sections. The first and fourth urged participation in and extolled the virtues of the union. The second section urged employees to ask their legislators to oppose incorporation of the state's right-to-work statute into the state constitution. The third section noted that the President had just vetoed an increase in the federal minimum wage and then urged employees to register to vote so that those more sympathetic to labor could be elected. *See also* *Kaiser Eng'rs v. NLRB*, 538 F.2d 1379, 1384-85 (9th Cir. 1976) (lobbying legislators for changes in national policies which affect job security is protected by the "mutual aid and protection" clause); *NLRB v. Tanner Motor Livery Ltd.*, 349 F.2d 1, 3-4 (9th Cir. 1965) (employees' efforts to promote racially non-discriminatory hiring practices are protected under "collective bargaining" and "mutual aid and protection" clauses).

234. 437 U.S. at 575.

235. *Id.* at 569 ("union security is 'central to the union concept of strength through solidarity'" and is a mandatory subject of bargaining in states without right-to-work statutes) (quoting *Eastex, Inc.*, 215 N.L.R.B. 271, 274 (1974), *enforced*, 550 F.2d 198 (1977), *aff'd*, 438 U.S. 556 (1978)).



*Aviation Corp. v. NLRB*,<sup>236</sup> which allowed employees to distribute literature in nonworking areas on nonworking time, should not be limited by distinctions between types of literature.<sup>237</sup> After balancing the employees' and employer's interests, the Court found that the employer's only property right was the right to prevent the distribution of literature on its property—employers cannot choose, on the basis of content, which distributions to suppress.<sup>238</sup>

## 2. Interrogation and polling

Interrogation of employees by an employer does not constitute a per se violation of the NLRA;<sup>239</sup> rather, violations depend upon the facts of a given case.<sup>240</sup> If questioning occurs in an atmosphere which

236. 324 U.S. 793, 803 (1945).

237. 437 U.S. at 572-74 (purely organizational literature versus literature covering all other activity protected by § 7).

238. *Id.* at 573.

239. The Supreme Court has stated that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union" or the NLRB. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). This right is implemented by § 8(c), which permits employers and unions to express any views, whether written or oral, as long as the expressions contain no threats of reprisal, force or promises of benefits in violation of § 8(a)(1). 29 U.S.C. § 158(c) (1976). An employer may state his legal rights, make objective predictions about the probable effects of unionization on his company, and give any opinions or advice as long as the statements are neither coercive nor made under coercive conditions. *Hecla Mining Co. v. NLRB*, 564 F.2d 309, 314 (9th Cir. 1977) (isolated, non-threatening statements by company officials reflected their personal opinions, not company policy, and therefore were protected by § 8(c)). *Cf. NLRB v. Four Winds Indus.*, 530 F.2d 75, 78 (9th Cir. 1976) (employer literature contained veiled threat of job loss, rather than mere prediction of election outcome).

While the Ninth Circuit did not consider employer conduct under § 8(c) during the survey period, other circuits found certain actions by employers protected by this section. *E.g.*, *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979) (letter to employees advising them of right to talk to attorney before talking to NLRB representative was not attempt to frustrate NLRB investigations but was expression of opinion regarding employees' right); *NLRB v. South Shore Hosp.*, 571 F.2d 677 (1st Cir. 1978) ("what the union got the employees, the hospital employees would also get" was honest answer regarding company policy); *NLRB v. Douglas Div., Scott & Fitzer Co.*, 570 F.2d 742 (8th Cir. 1978) (isolated and joking conversations, non-committal answers, and lack of anti-union animus indicated that employer's questions were non-coercive; rather, were simply employer's views forthrightly communicated to employees).

240. *See, e.g.*, *NLRB v. Armstrong Circuit, Inc.*, 462 F.2d 355, 357 (6th Cir. 1972) (per curiam) (finding of coercion in employer questioning of employees' union sentiment was supported by subsequent unlawful discharge); *Daniel Constr. Co. v. NLRB*, 341 F.2d 805, 812-13 (4th Cir. 1964), *cert. denied*, 382 U.S. 831 (1965) (conversations between supervisor and employees who were all close friends, which would support finding of no coercion, were nevertheless coercive when considered with all other facts of the case). *See also Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964) (per curiam) (factors to consider are prior employer hostility, nature of information sought, identity of questioner, place and method of interrogation, and truthfulness of reply).

tends to coerce or restrain the exercise of employees' section 7 rights, then it is prohibited.<sup>241</sup> Thus, unless certain safeguards are followed, an employer violates section 8(a)(1) when he polls his employees about their union sympathies.<sup>242</sup> The court in *Struksnes Construction Co.*<sup>243</sup> set forth several safeguards: (1) the poll's purpose must be to determine the truth of a union's majority claim; (2) this purpose must be communicated to the employees; (3) the employees must be given assurances against reprisal; (4) polling should be conducted by secret ballot; and (5) the employer cannot have committed other unfair labor practices or have otherwise created a coercive atmosphere.

In several cases during the survey period, the Ninth Circuit found that employers had violated section 8(a)(1) by coercively interrogating or polling their employees. For example, in *Free-Flow Packaging Corp. v. NLRB*,<sup>244</sup> the employer questioned his employees about their union sympathies, threatened job loss if the union won, and promised employment benefits if the union lost.<sup>245</sup> The court found ample testimony to support the NLRB's determination that a violation of section 8(a)(1) had occurred.<sup>246</sup> In *NLRB v. Broadmoor Lumber Co.*,<sup>247</sup> the

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241. *NLRB v. Deutsch Co.*, 445 F.2d 902, 904 (9th Cir. 1971), *cert. denied*, 405 U.S. 988 (1972) (interrogation is an unfair labor practice when it contains threats or promises or is part of an overall coercive atmosphere); *Conolon Corp. v. NLRB*, 431 F.2d 324, 330 (9th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971) (interrogation must be accompanied by coercion to constitute a violation of § 8(a)(1)); *NLRB v. McCatron*, 216 F.2d 212, 216 (9th Cir. 1954) (violation occurs when questioning involves threats or promises or is part of a pattern that tends to restrain or coerce employees).

242. *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967) (supplemental decision and order). It is the NLRB's view that "any attempt by an employer to ascertain" employees' union sympathies tends to cause a fear of reprisal and thus impinges on the exercise of § 7 rights. Therefore, polling employees while a petition for an NLRB election is pending is an unnecessary intrusion on those rights and violates the NLRA. *Id.* at 1063. Polling employees to determine a union's claim for recognition, however, serves a legitimate interest of the employer and is lawful as long as appropriate safeguards are followed. *Id.*

243. 165 N.L.R.B. 1062, 1063 (1967). *See NLRB v. Gissell Packing Co.*, 395 U.S. 575, 609 (1969) ("reasonable polling [to verify majority status] will not always be termed violative of § 8(a)(1) if conducted in accordance with the requirements set out in *Struksnes*"). *Accord*, *NLRB v. B.C. Hawk Chevrolet, Inc.*, 582 F.2d 491, 495 (9th Cir. 1978); *NLRB v. Super Toys, Inc.*, 458 F.2d 180, 182-83 (9th Cir. 1972).

244. 566 F.2d 1124 (9th Cir. 1978).

245. *Id.* at 1131. The plant manager was instructed by the vice-president to determine which employees had started the union organization efforts and which supported the union. *Free-Flow Packaging Corp.*, 219 N.L.R.B. 925, 938 (1975). During the next week, the plant manager talked with several employees at the plant trying to ascertain the employees' attitude toward the union. Similar conversations were held in subsequent weeks, but the employee-witnesses were generally unable to recall specific dates or places. *Id.*

246. 566 F.2d at 1131. The employer's principal contention on appeal was that the NLRB had denied the employer due process by amending the complaint to include the allegation of coercive interrogation. The court held that the NLRB could amend the com-

court cited *Free-Flow Packaging* for the proposition that interrogation of employees about their union activity violates section 8(a)(1). Following a union demand for recognition, the sales clerks had been questioned about their union activities and were threatened with job loss if union affiliation continued.<sup>248</sup> As in *Free-Flow Packaging*, the court in *Broadmoor Lumber* found that the record clearly supported the NLRB's decision.<sup>249</sup>

Polling of employees in violation of section 8(a)(1) was found in *NLRB v. B.C. Hawk Chevrolet, Inc.*<sup>250</sup> Noting the Ninth Circuit's prior approval of the polling safeguards set forth in *Struksnes Construction*, the court found that those safeguards were violated because the employer had not given the employees any assurances against reprisal; furthermore, a public vote, rather than a secret ballot, had been taken.<sup>251</sup> In addition, the polling had been conducted in a coercive atmosphere—the employer's service manager was present and a secretary took notes of the meeting at which the vote was taken.<sup>252</sup>

### 3. Surveillance

Another independent violation of section 8(a)(1) occurs when surveillance by an employer interferes with, restrains, or coerces an employee in the exercise of his section 7 rights.<sup>253</sup> The employee reasonably may assume that reprisals for his pro-union activity will result from the employer's actual or implied surveillance.<sup>254</sup> Creating the

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plaint because the coercive interrogation issue was fully litigated during the original examination of the union's charges. *Id.*

247. 578 F.2d 238 (9th Cir. 1978).

248. *Id.* at 241. During the month after the union's demand for recognition, the owner/president separately questioned three salesmen about their union sympathies. The salesmen testified that the questioning involved threats to fire employees who joined the union and a warning to stay away from the union representative. *Broadmoor Lumber Co.*, 227 N.L.R.B. 1123, 1125-26, 1129-30 (1977). The opinion did not mention where the questioning took place.

249. 578 F.2d at 241. The court noted that several clerks testified regarding the coercive questioning, and that the ALJ, who had observed their demeanor, chose to believe their testimony rather than that of the owner/president. *Id.* See also *NLRB v. Prineville Stud Co.*, 578 F.2d 1292, 1294 (9th Cir. 1978) (as amended on denial of rehearing) (Interrogation about union activity accompanied by threats of plant shutdown); *NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978) (interrogation conducted in an atmosphere of threats, intimidation, and surveillance).

250. 582 F.2d 491, 495 (9th Cir. 1978).

251. *Id.* (noting prior approval in *NLRB v. Super Toys, Inc.*, 458 F.2d 180 (9th Cir. 1972)).

252. *Id.*

253. *E.g.*, *Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300 (9th Cir. 1978).

254. *Oil Workers Int'l Union v. NLRB*, 547 F.2d 575, 586 (D.C. Cir. 1977) (quoting Hen-

impression that the employees' union activities are under surveillance is unlawful because it may create a fear of reprisal, thus adversely affecting an employee's decision to exercise his section 7 rights.<sup>255</sup>

Surveillance may also invalidate an election. In the 1978 case of *Hambre Hombre Enterprises v. NLRB*,<sup>256</sup> the employers, five weeks before an election, sat in a car parked across from the site of a union meeting.<sup>257</sup> The NLRB found that this surveillance was an unfair labor practice and that the activity invalidated the election.<sup>258</sup>

#### 4. Threats and withholding of benefits

Employer statements that threaten reprisal against union supporters are prohibited by section 8(c).<sup>259</sup> During the survey period, the Ninth Circuit found that substantial evidence supported section 8(c) violations involving threats of job loss,<sup>260</sup> plant closure,<sup>261</sup> stricter

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drix Mfg. Co. v. NLRB, 321 F.2d 100, 104-05 n.7 (5th Cir. 1963)) (supervisor's attendance at union meeting and subsequent report to employer constituted unlawful surveillance). *But see* NLRB v. Computed Time Corp., 587 F.2d 790, 794 (5th Cir. 1979) (mere presence of supervisor at organizational meeting not unlawful surveillance when there is no evidence of interference, coercion, or restraint).

255. *E.g.*, NLRB v. Ultra-Sonic De-Burring, Inc., 593 F.2d 123, 124 (9th Cir. 1979) (per curiam) (employer conceded it had created the unlawful impression that it was surveilling its employees); NLRB v. Tamper, Inc., 522 F.2d 781, 785 (4th Cir. 1975) (supervisor's statement that he knew what was going on created an unlawful impression of surveillance); NLRB v. Hotel Conquistador, Inc., 398 F.2d 430, 434 (9th Cir. 1968) (comments concerning a list of union workers created the impression of unlawful surveillance).

256. 581 F.2d 204 (9th Cir. 1978).

257. *Hambre Hombre Enterprises, Inc.*, 228 N.L.R.B. 136, 143-44 (1977). The employer did not contest the NLRB finding that the surveillance invalidated the election. 581 F.2d at 206 n.2.

258. 228 N.L.R.B. at 136-37. The NLRB had found that the unlawful surveillance and illegal discharge were such serious and substantial invasions of the employees' § 7 rights that the only effective remedy was a bargaining order. *Id.*

259. 29 U.S.C. § 158(c) (1976).

260. NLRB v. Randall P. Kane, Inc., 581 F.2d 215, 217-18 (9th Cir. 1978) (employer threatened to replace all busboys with less expensive alien labor); Great Chinese Am. Sewing Co. v. NLRB, 578 F.2d 251, 253, 254 (9th Cir. 1978) (per curiam) (supervisor told union card signers they need not return to work); NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 240, 241 (9th Cir. 1978) (three employees warned of job loss if they associated with the union); Free-Flow Packaging Corp. v. NLRB, 566 F.2d 1124, 1131 (9th Cir. 1978) (employer promised benefits or threatened job loss, depending on outcome of union election).

261. NLRB v. Tri-City Linen Supply, 579 F.2d 51, 54 n.4 (9th Cir. 1978) (employer threatened that business would be sold in 30 days if union won); NLRB v. Prineville Stud Co., 578 F.2d 1292, 1295 (9th Cir. 1978) (threat to close down made one day after union meeting); Great Chinese Am. Sewing Co. v. NLRB, 578 F.2d 251, 255 (9th Cir. 1978) (president threatened to close shop if union won). *See* NLRB v. Triumph Curing Center, 571 F.2d 462, 469 (9th Cir. 1978) (supervisor/union shop steward dissatisfied with union stated plant would be closed if employees did not withdraw from union).

working conditions, fewer benefits, and cuts in pay.<sup>262</sup>

Withholding "well-established or previously promised benefits because of a union organizing campaign"<sup>263</sup> or an anticipated representation election also violates section 8(a)(1). In *Free-Flow Packaging Corp. v. NLRB*,<sup>264</sup> the employer had refused to grant a wage increase prior to a representation election. The court stated that to find a violation in this instance, the withholding would have to constitute a change in a previous pattern of existing employment conditions.<sup>265</sup> The court held that no such clear pattern existed because during the three years prior to the alleged violation there had been only irregular wage increases.<sup>266</sup> Examining the employer's motive in denying the increase, the court found no anti-union animus; the employer had followed legal advice that the granting of a wage increase just before the union election could constitute an unfair labor practice absent a more clearly established prior commitment to a raise.<sup>267</sup>

### 5. Promises or grants of benefits

Promises of benefits are also explicitly forbidden by section 8(c).<sup>268</sup> Thus, an employer's promise to meet any union demand for benefits if his striking employees will return to work has been found to be coercive.<sup>269</sup> Similarly, an employer's promise to increase wages if the union loses a representation election has been held to be a section 8(c) violation.<sup>270</sup>

Grants of benefits have been compared to "a fist inside the velvet glove"<sup>271</sup> because the employee can infer that the employer's economic power will be used to harm as well as benefit him. In 1978, the Ninth Circuit found an unlawful grant of benefits when an employer instituted additional benefit programs after a collective bargaining agree-

262. *NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978) (employer threatened that tough new rules, lower wages, and lost benefits would result from unionization).

263. *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1129 (9th Cir. 1978).

264. *Id.*

265. *Id.* at 1129. "The cases make it crystal clear that the vice involved in . . . the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *Id.* (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970)).

266. *Id.*

267. *Id.* at 1128-29, 1130.

268. 29 U.S.C. § 158(c) (1976).

269. *See NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

270. *See Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251, 253-54 (9th Cir. 1978).

271. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1963).

ment had been signed, thereby showing "that the [c]ompany could do as well as or better than the [u]nion."<sup>272</sup>

#### 6. Employer assistance to secure union repudiation

Within the Ninth Circuit, an employer violates section 8(a)(1) when he instigates or promotes a union repudiating document, such as a decertification petition, particularly when accompanied by promises or threats.<sup>273</sup> The court reasons that such employer activities are calculated to erode union support.<sup>274</sup> Whether an employer unlawfully assisted its employees to repudiate their union was examined in *NLRB v. Triumph Curing Center*.<sup>275</sup> A supervisor had circulated a decertification petition without the knowledge of her employer. Nevertheless, the Ninth Circuit found the employer to be in violation of section 8(a)(1) because of the supervisor's position of authority, which could cause other employees to believe that the supervisor spoke for her employer.<sup>276</sup> Moreover, even without the petition, the court found substantial evidence to justify the NLRB's finding of a section 8(a)(1) violation; various company officials had advised and aided striking employees in sending withdrawal telegrams to their union so that they could return to work.<sup>277</sup>

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272. *NLRB v. B.C. Hawk Chevrolet, Inc.*, 582 F.2d 491, 493, 495 (9th Cir. 1978). Medical, dental, pension, and bonus plans were enacted two to three months prior to the effective date of the collective bargaining contract. The company service manager had stated that the company's benefit programs would counteract the union's programs. *Id.* at 493. *Cf.* *NLRB v. South Shore Hosp.*, 571 F.2d 677, 681-82 (1st Cir. 1978) (remark that "what the union got the union employees, the hospital employees would also get" was an honest answer about company policy to question posed at employee meeting during organizational campaign).

273. *NLRB v. Sky Wolf Sales*, 470 F.2d 827, 829-30 (9th Cir. 1972) (employer assisted the circulation of decertification petitions).

274. *NLRB v. Triumph Curing Center*, 571 F.2d 462, 470 (9th Cir. 1978).

275. *Id.*

276. *Id.* at 471. The supervisor was also a union shop steward. Upset with her vacation pay, she became dissatisfied with the union, ascertained how to withdraw, and circulated a decertification petition. Testimony was received indicating she also said that benefits would be better without the union and that the plant would close if the union was not repudiated. *Id.* at 469.

277. *Id.* at 470. After the union went on strike to protest the employer's bargaining conduct, the supervisor, as well as the employer's labor negotiator and plant manager called or sent letters to the striking employees offering them jobs if they withdrew from the union. They assisted those employees wishing to return to work by telling them how to withdraw and lending them use of the company telephone to facilitate their withdrawal. *Id.* at 469-70. The court stated: "These incidents represent the type of promises of economic benefit and employer assistance to secure union repudiation which are prohibited by the Act." *Id.* at 471.

## 7. Right to representation in investigatory interviews

In *NLRB v. J. Weingarten, Inc.*,<sup>278</sup> the Supreme Court held that employees have a right to representation in an investigatory interview when the employee requesting representation reasonably believes the investigation will result in disciplinary action.<sup>279</sup> Justice Brennan, writing for a 6-3 majority, viewed the employee's request for representation not only as the protected activity of an individual under section 7 but also as a safeguard of "the interests of the entire bargaining unit."<sup>280</sup> Thus, the Court found that an employer's denial of an employee's request for union representation during an interview investigating a food theft and unauthorized free lunches violated the right to representation.<sup>281</sup>

In 1978, the Ninth Circuit discussed the *Weingarten* rule in *Alfred M. Lewis, Inc. v. NLRB*.<sup>282</sup> To obtain the right to representation, the court stated that (1) the interview must give rise to the reasonable belief that disciplinary action is probable or is being seriously considered, (2) the employee's participation must be compelled, and (3) a factual investigation remains a significant part of the interview.<sup>283</sup> The court found that the right accrued at counselling sessions, which were the first step in the disciplinary system, especially since a policy allowing union representatives at such meetings recently had been improperly termi-

278. 420 U.S. 251 (1975).

279. *Id.* at 257. *Accord*, *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975) (companion case to *Weingarten*) (discharged employee was denied union representative at investigatory interview; she and shop chairlady who persisted in seeking to represent her were ordered reinstated under § 8(a)(1)). *See generally* *Lewis v. Greyhound Lines-East*, 555 F.2d 1053 (D.C. Cir.), *cert. denied*, 434 U.S. 997 (1977) (union president's statement that employee was not entitled to representation at disciplinary meeting did not breach union's duty of fair representation since it was made prior to *Weingarten*); *Glomac Plastics, Inc.*, 234 N.L.R.B. 1309 (1978), *enforced*, 600 F.2d 3 (2d Cir. 1979) (the right accrues to employees denied union representation because of their employer's refusal to bargain in good faith).

280. 420 U.S. at 260-61 (1975).

281. *Id.* at 252-56.

282. 587 F.2d 403 (9th Cir. 1978). The employer suspended or discharged several employees after unilaterally terminating its policy of permitting union representation at counselling and disciplinary procedures. *Id.* at 406.

283. *Id.* at 410-11. The court examines an investigatory interview objectively to determine whether it may lead to disciplinary action. *Id.* at 410. The court, in explaining *Weingarten*, distinguished four types of interviews: counselling or training conversations which carry no reasonable expectation of disciplinary action; investigatory interviews which may lead to disciplinary action; disciplinary interviews which involve some investigation; and disciplinary interviews in which the action to be taken is merely explained to the employee and no investigation takes place. The right accrues only in the second and third types of interviews.

nated.<sup>284</sup> There was no violation, however, with respect to those employees who were merely informed of predetermined disciplinary action.<sup>285</sup>

*B. Employer Domination of, Interference with, and Assistance to a Union*

The purpose of section 8(a)(2)<sup>286</sup> is to ensure that the employees' collective bargaining representative will be able to represent fairly its employees without fear of employer interference, domination, or support.<sup>287</sup> While section 8(a)(2) was involved in much litigation in the late 1930's and 1940's, actions under this section have decreased considerably.<sup>288</sup> The principal issue litigated when this section was first enacted was employer domination of a union.<sup>289</sup> Currently courts are grappling with the fine line between beneficial "cooperation" with unions and unlawful "support," and the propriety of employer support of one union when a second union is engaged in organizing or has majority support.<sup>290</sup> When dealing with the distinction between support and cooperation, a line is drawn between an employer's actions which indi-

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284. *Id.* at 410. *Cf.* *Spartan Stores, Inc.*, 235 N.L.R.B. 522 (1978) (employee was unlawfully discharged for refusing to participate in an investigatory interview without a union representative present); *South-Western Bell Tel. Co.*, 227 N.L.R.B. 1223 (1977) (foreman unlawfully threatened to take matter to higher management if employees insisted upon union representation during individual disciplinary interviews involving investigation of alleged misconduct).

285. 587 F.2d at 411. *Accord*, *NLRB v. Certified Grocers, Ltd.*, 587 F.2d 449 (9th Cir. 1978) (no violation when purpose of meeting, at which representation was denied, was simply to issue a warning and give a disciplinary layoff notice; plant manager refused to discuss the notice with employee); *NLRB v. Columbia Univ.*, 541 F.2d 922 (2d Cir. 1976) (no violation when sole purpose of meeting was to notify employee of discharge). *Cf.* *Climax Molybdenum Co. v. NLRB*, 584 F.2d 360 (10th Cir. 1978) (no violation to deny union representative's request to meet with employees on company time prior to investigatory interview which employees believed would lead to disciplinary action); *Mt. Vernon Tanker Co. v. NLRB*, 549 F.2d 571 (9th Cir. 1977) (no violation for ship captain to require seaman's unrepresented attendance at explanatory "logging"); *Coca-Cola Bottling Co.*, 227 N.L.R.B. 1276 (1977) (employer has no obligation to postpone interview when requested union representative unavailable but another representative whose presence could have been requested is available; employer has prerogative to avoid delay).

286. 29 U.S.C. § 158(a)(2) (1976).

287. *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975).

288. R. GORMAN, *BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 196 (1976) [hereinafter cited as GORMAN].

289. Domination was found when the employer actually controlled the union and the employees' participation was induced largely by fear of the consequences if they did not support the union. *NLRB v. Wemyss*, 212 F.2d 465, 471-72 (9th Cir. 1954) (dictum) (employer interfered with the union by giving it preferential use of the employer's premises).

290. GORMAN, *supra* note 288, at 196.



cate control over the union (support) and those actions which merely assist employees in carrying out their freedom to choose the type of organization they wish or which aid in complying with union requests (cooperation).<sup>291</sup>

When two or more unions are vying for representational status, the NLRB has declared,<sup>292</sup> and the Ninth Circuit has enforced,<sup>293</sup> the rule that an employer may not recognize any union when conflicting claims of multiple unions "give rise to a real question concerning representation [until a union's] right to be recognized has finally been determined under the special procedures provided by the Act."<sup>294</sup> The Ninth Circuit has delineated two types of situations that raise the employer's duty of neutrality.<sup>295</sup> The first involves multiple unions competing for exclusive representation, "none of which have had prior collective bargaining agreements with the employer."<sup>296</sup> In such cases, the employer may not rely on a card check to verify a majority claim unless the competing unions are allowed either to submit proof of their own majority support or to discredit the first union's support.<sup>297</sup> The

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291. See, e.g., *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975) (no unlawful employer support when employer participated in approval and operation of in-house committee system which was employee-initiated and approved). See also *ILGWU v. NLRB*, 366 U.S. 731 (1961) (unlawful support found when employer had bona fide but mistaken belief that union achieved majority status; employer violated § 8(a)(2) by recognizing minority union); *NLRB v. Mercy Peninsula Ambulance Serv., Inc.*, 589 F.2d 1014, 1016 n.3 (9th Cir. 1979) (employer admitted violating § 8(a)(2) by requiring employees to declare their allegiance to the union as soon as they accepted employment); *NLRB v. Wemyss*, 212 F.2d 465, 471 (9th Cir. 1954) (*dicta*) (courts must examine whether employees' union support exists through their own free choice or through fear of reprisal); *Interstate Eng'r, Inc.*, 230 N.L.R.B. 1, 4 (1977), *enforced*, 583 F.2d 1087 (9th Cir. 1978) (§ 8(a)(2) violation found when employer supplanted employee-elected grievance committee with one chaired by company president, scheduled the meetings, paid the members for attending, and controlled the topics to be discussed and written meeting summaries given to the other employees).

292. See, e.g., *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1070 (1945) (presented with conflicting claims by rival unions, employer unlawfully disregarded duty of neutrality by negotiating with one of the unions).

293. See, e.g., *Retail Clerks, Local 770 v. NLRB*, 370 F.2d 205, 207 (9th Cir. 1966) (union's bare assertion of representation plus employer's apparent willingness to bargain did not give rise to real question of representation; thus, recognition of second union after receipt of evidence of representation was valid).

294. *Id.*

295. *Buck Knives, Inc. v. NLRB*, 549 F.2d 1319, 1319-20 (9th Cir. 1977) (applying *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1070 (1945)).

296. *Id.* at 1320. E.g., *Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36 (9th Cir. 1969) (employer's recognition of minority union unlawful because competing unions were not given a chance to submit evidence contradicting that union's majority claim).

297. *Buck Knives, Inc. v. NLRB*, 549 F.2d 1319, 1320 (9th Cir. 1977); *Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36, 39 (9th Cir. 1969).

second situation involves multiple unions competing for exclusive representation when one of them has a current collective bargaining agreement that does not cover the sought after employees.<sup>298</sup> Absent coercion or deception, in this second situation, an employer does not violate section 8(a)(2) when exclusive recognition is based upon a "clear demonstration of majority support."<sup>299</sup>

### C. Discrimination by Employers

The purpose of section 8(a)(3) is to prevent an employer from encouraging or discouraging union membership through discriminatory terms and conditions of employment.<sup>300</sup> Since not all discouragement or encouragement is a violation of this subsection,<sup>301</sup> the employer's anti-union animus must be shown in order to establish an unlawful discrimination.<sup>302</sup>

The quantum of anti-union animus required to establish an 8(a)(3) violation has not been conclusively determined.<sup>303</sup> The Ninth and First Circuits generally require that the anti-union animus be the *dominant* motive for the discharge, while the NLRB and the other circuits generally require that it merely be *a part* of the motive.<sup>304</sup> The Ninth Circuit

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298. *Buck Knives, Inc. v. NLRB*, 549 F.2d 1319, 1320 (9th Cir. 1977). *E.g.*, *NLRB v. Inter-Island Resorts, Ltd.*, 507 F.2d 411 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (recognition lawful when recognized union had present contract with employer covering other employees and clearly demonstrated majority support of the sought-after employees in 62-28 election); *Fraser & Johnston Co. v. NLRB*, 469 F.2d 1259 (9th Cir. 1972) (employer unlawfully recognized rival union at new plant when old employees transferring to new plant were already represented by another union); *NLRB v. Peter Paul, Inc.*, 467 F.2d 700 (9th Cir. 1972) (no violation for employer to continue bargaining with union which had represented employees for twenty years and which demonstrated majority support after rival union filed petition for election).

299. *NLRB v. Inter-Island Resorts, Ltd.*, 507 F.2d 411, 412 (9th Cir. 1974). *But cf.* *Playskool, Inc.*, 195 N.L.R.B. 560 (1972), *rev'd*, 477 F.2d 66, 69-71 (7th Cir. 1973) (Seventh Circuit disagreed with Board's position that the *only* requirement necessary to establish real question of representation is that rival union's claim "not be clearly unsupported or lacking in substance"; that court holds that there is no question concerning representation if incumbent union demonstrates clear majority support).

300. 29 U.S.C. § 158(a)(3) (1976).

301. *See Radio Officers v. NLRB*, 347 U.S. 17, 42-43 (1954) (§ 8(a)(3) outlaws "only such discrimination as encourages or discourages membership in a labor organization").

302. *Compare NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1966) (employer discriminatorily refused to give vacation payments to striking employees while granting them to non-striking employees) with *Loomis Courier Serv. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1979) (plant closure supported by valid economic reasons).

303. *Hambre Hombre Enterprises v. NLRB*, 581 F.2d 204, 207 n.4 (9th Cir. 1978); *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 n.3 (9th Cir. 1977).

304. *Compare NLRB v. South Shore Hosp.*, 571 F.2d 677, 684 (1st Cir. 1978) (NLRB has burden of showing "the employer's *dominant* motive was . . . [anti-union animus]") (em-

was asked to reconsider its standard in *Polynesian Cultural Center, Inc. v. NLRB*<sup>305</sup> but declined to take a position since the decision would have been the same under either standard.<sup>306</sup>

A presumption of anti-union animus arises when an employer's actions are "inherently destructive of employee rights."<sup>307</sup> The Ninth Circuit has stated that this phrase is hard to define<sup>308</sup> and that violations under this standard are rare.<sup>309</sup> In *Loomis Courier Service v.*

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phasis added) and *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 n.3 (9th Cir. 1977) (protected union activity must be the "moving cause" or "dominant motive" behind discharge) with *Waterbury Community Antenna, Inc. v. NLRB*, 587 F.2d 90, 98 (2d Cir. 1978) (discharge motivated by anti-union animus); *M.S.P. Indus., Inc. v. NLRB*, 568 F.2d 166, 173-74 (10th Cir. 1977) (anti-union animus must be "whole or material part" of motive); *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 569 (4th Cir. 1977) ("It is settled in this circuit, and most of the others, that 'it is enough that a discriminatory motive was a factor in the employer's decision.'") (quoting *Winchester Spinning Corp. v. NLRB*, 402 F.2d 299, 304 (4th Cir. 1968)) (emphasis added). But see *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 50 (9th Cir. 1970) ("The test is whether the business reason or the protected union activity is the moving cause behind the discharge. . . . In other words, would this employee have been discharged but for his union activity?") (emphasis in original) (citations omitted).

305. 582 F.2d 467 (9th Cir. 1978).

306. *Id.* at 473. Six employees were discharged after they refused to attend a meeting with management to discuss their discontent. The court found that the close timing of the employees' organizational activities to the subsequent discharges, together with management's hostility to the employees' representative, clearly established the company's anti-organizational bias. In addition, the court found insufficient evidence to support a valid business reason for the discharges. *Id.* at 473-74. The court stated that it required that the discriminatory motive be the moving cause of the discharge, while the NLRB usually required a finding that, but for their union activity, the employees would not have been fired. *Id.*

307. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-31 (1963) (grant of super-seniority to non-strikers was inherently destructive). See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) (dictum) (no proof of anti-union motive necessary when employer's discriminatory conduct was "inherently destructive" of important employee rights").

308. *Loomis Courier Serv. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1978). In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967), the Supreme Court described the standard of proof necessary to find conduct "inherently destructive" as one that requires the employer to both foresee and intend the consequences of his actions. The Ninth Circuit has stated further that cases finding conduct to be "inherently destructive" usually involve far-reaching negative effects on employees' section 7 rights or involve conduct based solely on participation in union activity. *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976).

309. *Loomis Courier Serv. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1978). Few cases in the Ninth Circuit have relied on the holding of *Erie Resistor* or on the dicta of *Great Dane Trailers*, note 308 *supra*, to support a finding of "inherently destructive" behavior. See, e.g., *Kaiser Eng'rs v. NLRB*, 538 F.2d 1379, 1386 (9th Cir. 1976) (employee unlawfully discharged for drafting letter sent to legislators in effort to protect jobs); *Signal Oil & Gas Co. v. NLRB*, 390 F.2d 338, 343 (9th Cir. 1968) (employee discharged for making pro-strike comment; this was directly related to protected activity and thus "inherently destructive"). But cf. *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1117 n.2, 1118 n.3 (9th Cir. 1977) (isolated discharge is not "inherently destructive;" NLRB must balance employer's and em-

*NLRB*,<sup>310</sup> the court rejected the NLRB's finding of inherently destructive conduct and agreed with the factual findings of the ALJ when he held that the employer did not violate sections 8(a)(1) and 8(a)(3). The employer stopped delivery operations at one of its branches due to high operating costs and terminated all the persons employed there. Picketing began at other branch sites, and in order to avoid a much larger financial loss, the employer reopened the branch. The NLRB determined that the employer intended a temporary closure to discourage union activities. In re-examining the evidence, however, the Ninth Circuit found substantial business reasons for the closure and reversed the Board's finding.<sup>311</sup>

### 1. Discrimination in hiring and rehiring

Persons protected by section 8(a)(3) include applicants for employment, as well as persons already employed.<sup>312</sup> The Ninth Circuit found that employment was unlawfully denied in *Alexander Dawson, Inc. v. NLRB*<sup>313</sup> as a result of the applicants' prior union affiliation or activities.<sup>314</sup> The court enforced the NLRB order requiring the employer to offer those applicants employment in the positions they would have had absent discrimination and to make those applicants whole through back pay.<sup>315</sup>

Reemployment was discriminatorily denied in *Polynesian Cultural Center, Inc. v. NLRB*<sup>316</sup> because the job applicant was denied reemployment due to her support of six discharged employees. As in *Alexander Dawson*, the court in *Polynesian Cultural Center* enforced the

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employees' interests; thus courts may uphold employer's conduct despite "inherently destructive" characterization); *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976) (distinguishing *Erie Resistor*) (granting retroactive pay increases to non-strikers had no continuing consequences, thus not "inherently destructive").

310. 595 F.2d 491 (9th Cir. 1979).

311. *Id.* at 499-500.

312. 29 U.S.C. § 152(3) (1976). See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183-85 (1941) (employer unlawfully refused to hire applicants because of their union activities); *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d 467, 474 n.3 (9th Cir. 1978) (discriminatory refusal to hire and discriminatory termination are both violations of § 8(a)(3)); *K.B.&J. Young's Super Markets, Inc. v. NLRB*, 377 F.2d 463, 466 n.4 (9th Cir. 1967) (well established that § 8(a)(3) discrimination refers to applicants as well as existing employees).

313. 568 F.2d 1300 (9th Cir. 1978) (per curiam).

314. *Id.* at 1304. The employer had an active policy to remain non-union. Toward that end, it interrogated applicants regarding their present union status and sympathies and informed them of its non-union policy when interviewing them for jobs. *Alexander Dawson, Inc.*, 228 N.L.R.B. 165, 172-73 (1977).

315. 568 F.2d at 1302, 1304.

316. 582 F.2d 467 (9th Cir. 1978).

NLRB order requiring the employer to offer the applicant a job substantially equivalent to the one she would have had if hired earlier and to make her whole through back pay.<sup>317</sup>

## 2. Discharge

Terminating an employee to discourage or encourage union involvement is strictly forbidden by section 8(a)(3).<sup>318</sup> During the survey period, the Ninth Circuit held that several specific acts constituted discriminatory discharges. An employee was discharged just hours after being seen distributing union cards and literature and discussing union proposals in *NLRB v. Warren L. Rose Castings, Inc.*<sup>319</sup> Conflicting testimony regarding a reprimand for tardiness and absences was the only business justification presented.<sup>320</sup>

Prominent union supporters were terminated in *NLRB v. Randall P. Kane, Inc.*<sup>321</sup> and *Great Chinese American Sewing Co. v. NLRB.*<sup>322</sup> In the former case, the employee was discharged after a year of union promotion because the owner was "tired of . . . [the employee's] interfering with the day-to-day operation of the place."<sup>323</sup> In the latter case, the employer stated that it discharged the most prominent union supporter for lack of work.<sup>324</sup> After admitting that the reason was false, the employer's second justification, unsatisfactory performance, was disproved when it was shown that the employee was employed over two years, received two or three wage increases, and had a good performance record.<sup>325</sup>

Asserting his right to discuss a union meeting with another employee on company time, an employee was fired several hours later by the co-owner of the business in *Hambre Hombre Enterprises, Inc. v. NLRB.*<sup>326</sup> Although the co-owner may not have had any knowledge of the employee's union activity, "the supervisor's knowledge of that ac-

317. *Id.* at 476.

318. *See* *NLRB v. California School of Profess. Psych.*, 583 F.2d 1099, 1102 (9th Cir. 1978) (complaint barred by six-month statute of limitations; employer's alleged discrimination began with notice of nonrenewal of teacher's contract) (clearly stated hiring and firing decisions per se violate §§ 8(a)(1) and 8(a)(3) when used to discourage assertion of § 7 rights).

319. 587 F.2d 1005 (9th Cir. 1978).

320. *Id.* at 1007.

321. 581 F.2d 215 (9th Cir. 1978).

322. 578 F.2d 251 (9th Cir. 1978) (per curiam).

323. 581 F.2d at 218.

324. 578 F.2d at 255.

325. *Id.*

326. 581 F.2d 204, 206 (9th Cir. 1978).

tivity, her hostility to the union, and her role in the discharge" sustained a finding of discriminatory motive attributable to the company.<sup>327</sup>

Discharging non-union employees for engaging in various concerted activities also constitutes a violation of section 8(a)(3).<sup>328</sup> In *Kapiolani Hospital v. NLRB*,<sup>329</sup> a non-union employee was discriminatorily discharged for refusing to cross a picket line set up by other union-represented employees.<sup>330</sup> The employee was not required to give a ten-day notice of her work stoppage required by section 8(g) because unrepresented employees do not fall under the term "labor organizations" as referred to in that section.<sup>331</sup> The employer also argued that the discharge was justified because the employee had failed to give two hours notice of her absence as required by hospital policy. This argument was rejected by the court when it noted that two prior violations had been excused and the current one also would have been excused had the employee reported for work.<sup>332</sup>

### 3. Replacement and reinstatement of strikers

Striking employees are explicitly protected from discrimination under the NLRA.<sup>333</sup> Economic strikers<sup>334</sup> have a right to reinstatement upon their unconditional request to return to work unless their jobs have been filled by permanent replacements<sup>335</sup> or the employer has jus-

327. *Id.* at 207.

328. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963).

329. 581 F.2d 230 (9th Cir. 1978).

330. *Id.* at 234. *See also* *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d 467, 473 (9th Cir. 1978) (court upheld NLRB determination that § 8(a)(3) violation occurred when six employees were terminated for engaging in protected activities). *But cf.* *NLRB v. Long Beach Youth Center, Inc.*, 591 F.2d 1276, 1278 (9th Cir. 1979) (§ 8(a)(3) violation not discussed when 17 non-union employees were terminated for engaging in protected work stoppages).

331. 581 F.2d at 233-34. The court reviewed the Board's discussion of the legislative history of § 8(g), 29 U.S.C. § 158(g) (1976), enacted as a compromise for bringing certain health care employees within the coverage of the NLRA. *Accord*, *NLRB v. Long Beach Youth Center, Inc.*, 591 F.2d 1276, 1278 (9th Cir. 1979) (unorganized employees at residential facility for the emotionally disturbed were not required to give 10-days notice of work stoppage per § 8(g)).

332. 581 F.2d at 234.

333. 29 U.S.C. § 152(3) (1976) ("employee" defined); *id.* § 158(a)(3) (prohibiting employer discrimination). *See* *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345, 347 (1938) (striking employees remain employees for remedial purposes of NLRA).

334. Striking employees engaged in a lawful strike are called economic strikers unless they are protesting the employer's unfair labor practices. *See* notes 815-1030 *infra*.

335. *E.g.*, *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 242 (9th Cir. 1978); *General Teamsters Local 162 v. NLRB*, 568 F.2d 665, 667-69 (9th Cir. 1978).

tifiable business reasons for his refusal.<sup>336</sup> Unfair labor practice strikers,<sup>337</sup> however, are entitled to reinstatement whether or not they have been permanently replaced.<sup>338</sup>

Economic strikers were discriminatorily refused reinstatement in *NLRB v. Murray Products, Inc.*<sup>339</sup> The employees elected a new union, and, in bargaining for an initial contract, the negotiations reached an impasse. The employees then went on strike. Replacements were hired on the condition that their jobs would be temporary. When the strikers later requested their jobs back, the employer told them their positions were filled. The company argued that while the replacements were initially temporary, once the employer decided that a settlement was impossible, it decided to treat the replacements as permanent employees. The court stated that such a unilateral, undisclosed company decision could not change the new employees' original temporary status. Thus, the employer's refusal to reinstate the strikers was discriminatory.<sup>340</sup>

Distinguishing between economic and unfair labor practice strikers, the Ninth Circuit, in *NLRB v. Top Manufacturing Co.*,<sup>341</sup> declared that economic strikers become unfair labor strikers on the day the strike is expanded to include unfair labor practice protests.<sup>342</sup> In *Top Manufacturing*, the employees began an economic strike after unsuccessful negotiations for a new collective bargaining contract. Less than a month later, the employer unlawfully refused to bargain with the union. The court found that the striking employees had not been permanently replaced at that time and thus were entitled to immediate reinstatement upon their unconditional request to return to work.<sup>343</sup>

When a discriminatory refusal to reinstate a striker is found, the Ninth Circuit has said that an employer has a backpay obligation to that employee covering the period from the unlawful refusal to the reinstatement or a valid offer of reinstatement.<sup>344</sup> When reviewing the validity of a reinstatement offer, one element to examine is whether the

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336. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-79 (1969).

337. Unfair labor practice strikers are called such when they protest an employer's unfair labor practices. See notes 815-1030 *infra*.

338. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956) (absent contractual or statutory provision to contrary, unfair labor practice strikers are entitled to reinstatement with backpay regardless of replacements) (unfair labor practice strikers unlawfully refused reinstatement after making unconditional request to return to work).

339. 584 F.2d 934 (9th Cir. 1978).

340. *Id.* at 939.

341. 594 F.2d 223 (9th Cir. 1979) (*per curiam*).

342. *Id.* at 225.

343. *Id.* at 224-25.

344. *NLRB v. Murray Prods., Inc.*, 584 F.2d 934, 940 (9th Cir. 1978).

offer gives the employee a reasonable time to respond.<sup>345</sup> In *Murray Products*, the employer had lied about the lack of openings available for the returning strikers, and subsequently made offers to the strikers while they were on the picket line, requiring an immediate response. The strikers were threatened that their names would be crossed off a seniority list if they refused. The court held that the immediate response requirement was not reasonable.<sup>346</sup> The employees could have interpreted the employer's actions as an indication that, if they did not immediately accept the offer, they could lose their jobs permanently or their reinstatement or seniority rights.<sup>347</sup> In addition to reasonable response time, the terms of the offer must also be examined. In *Top Manufacturing*, letters offering reinstatement had been sent to unfair labor practice strikers, but the court found them insufficient because the offers were conditioned upon future job vacancies.<sup>348</sup>

#### 4. Discrimination based on NLRB testimony

Section 8(a)(4) makes it an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under" provisions of the NLRA.<sup>349</sup> This section is interpreted broadly to uphold the congressional purpose of allowing all persons with information about unfair labor practices to be able to report them without fear of reprisal.<sup>350</sup> Thus, an employee who testifies before the NLRB is protected whether his testimony is voluntary or given under subpoena.<sup>351</sup>

#### D. Restraint and Coercion by Unions

Section 8(b)(1) prohibits two types of union activity. Subsection 8(b)(1)(A) prohibits unions from restraining or coercing employees in the exercise of their rights guaranteed by section 7.<sup>352</sup> Subsection

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345. *Id.*

346. *Id.* at 941. The court indicated that an exception to their finding could occur in the presence of "unusual circumstances."

347. *Id.* at 942.

348. 594 F.2d at 225. The court noted the offers would have been valid if directed to economic strikers.

349. 29 U.S.C. § 158(a)(4) (1976).

350. *E.g.*, NLRB v. Scrivener, 405 U.S. 117, 122 (1972) (employee's voluntary statement to NLRB field examiner protected).

351. *Id.* at 124. *Accord*, NLRB v. Western Clinical Lab., Inc., 571 F.2d 457, 460 (9th Cir. 1978) (requiring employee to use accrued vacation benefits while testifying constitutes unfair labor practice).

352. 29 U.S.C. § 158(b)(1)(A) (1976). Although designed to parallel section 8(a)(1), subsection 8(b)(1)(A) has been construed more narrowly, so that only union activity involving



8(b)(1)(B) prohibits a union from restricting an employer's free choice of representation "for the purposes of collective bargaining or the adjustment of grievances."<sup>353</sup> When conduct is being examined for possible violations of 8(b)(1)(A) or (B), the *effect* of the alleged coercive actions is examined rather than the intent with which the acts are done.<sup>354</sup> Furthermore, the coercion need not be effective to sustain a violation.<sup>355</sup>

### 1. Initiation fee waivers during election campaigns

In *NLRB v. Savair Manufacturing Co.*,<sup>356</sup> the Supreme Court held that a union's offer to waive initiation fees for all employees who signed union authorization cards prior to an election violated the employees' section 7 rights because it bribed employees into making a false showing of union support during an election campaign.<sup>357</sup> Interpreting *Savair*, the Ninth Circuit has stated that a "temporary waiver of dues for *all employees* does not" result in such unlawful coercion.<sup>358</sup> Such a waiver is coercive only when it is offered as an inducement for pre-election support.<sup>359</sup>

No violation of the *Savair* rule was found in the majority of Ninth Circuit cases during the survey period which dealt with initiation fee campaign statements.<sup>360</sup> In *NLRB v. Aladdin Hotel Corp.*,<sup>361</sup> however,

violence, intimidation, and threatened or actual reprisal are prohibited. *E.g.*, *NLRB v. Drivers Local Union 639*, 362 U.S. 274, 290 (1960). And unlike section 8(a)(1), violations of other 8(b) subsections do not create dependent violations of subsection 8(b)(1)(A). *Id.*

353. 29 U.S.C. § 158(b)(1)(B) (1976). The purpose of subsection 8(b)(1)(B) is to prevent a union from exerting pressure on an employer's collective bargaining and grievance adjustment representatives, thus jeopardizing those interests. *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 429 (1978).

354. *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 429-30 (1978) ("carry-over" effect violates § 8(b)(1)(B)); *ILGWU v. NLRB*, 366 U.S. 731, 738-39 (1961) (good faith belief no defense and scienter not required for § 8(b)(1)(A) violation).

355. *National Cash Register Co. v. NLRB*, 466 F.2d 945, 961 (6th Cir. 1972).

356. 414 U.S. 270 (1973).

357. *Id.* at 277.

358. *NLRB v. Wabash Transformer Corp.*, 509 F.2d 647, 649 (9th Cir. 1975) (emphasis in original).

359. *Id.* See also *NLRB v. Aaron Bros. Corp.*, 563 F.2d 409, 412-13 (9th Cir. 1977) (no proof offered that union waiver of fees was conditioned upon pre-election support).

During the survey period, the Ninth Circuit twice was presented with the issue of whether a union violated section 8(b)(1)(A) merely by declaring that any pre-election fees paid by the employees were non-refundable if the union lost the election. *Vari-Tronics Co. v. NLRB*, 589 F.2d 991 (9th Cir. 1979) (per curiam); *NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891 (9th Cir. 1978). The court refused to discuss the issue because the employer had failed to raise it in a timely manner, 589 F.2d at 993, and because the NLRB order was not enforced on other grounds, 584 F.2d at 893.

360. See, e.g., *NLRB v. Mike Yurosek & Sons, Inc.*, 597 F.2d 661, 663 (9th Cir. 1979)

the court found that the manner in which the fee waiver was issued was so confusing that it fell under the *Savair* prohibition.<sup>362</sup> A letter sent to Aladdin employees before the election promising a fee reduction "for this organizing campaign" was interpreted by the NLRB to include periods both before and after the election. The court disagreed, however, stating that a reasonable interpretation of the offending phrase was that it referred only to that period prior to the election, thus violating the *Savair* rule.<sup>363</sup>

## 2. Union-sponsored threats and violence

As with employers, union-sponsored threats of reprisal or violence are forbidden by section 8(c).<sup>364</sup> Furthermore, threats and acts of violence designed to intimidate the exercise of employees' section 7 rights violate section 8(b)(1)(A).<sup>365</sup> For example, the Ninth Circuit found that the union was guilty of threats and violent acts, including personal injury, in *NLRB v. International Association of Bridge Workers Local 433*.<sup>366</sup> One union official was physically beaten for dispatching men in another official's territory and union members were threatened or physically assaulted when they complained of discriminatory hiring hall practices. In addition, the court found that the union official in charge of the hiring hall acquiesced to the threatened elimination of NLRB witnesses by remaining silent and smiling.

Representation elections will be set aside when the court finds that threatening rumors or acts of violence significantly impair the employees' exercise of their section 7 rights.<sup>367</sup> The employer's standard of

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(employees specifically advised that waiver was available to all signees before collective bargaining agreement would be signed); *Levitz Furniture Co. v. NLRB*, 587 F.2d 983, 983 (9th Cir. 1978) (waiver sent to all employees was good for 30 days after contract was signed); *NLRB v. Spring Road Corp.*, 577 F.2d 586, 589 (9th Cir. 1978) (no nexus found between pre-election support and waiver of initiation fees); *NLRB v. L.D. McFarland Co.*, 572 F.2d 256, 259 (9th Cir. 1978), *cert. denied*, 439 U.S. 911 (1978) (the phrase "any member" interpreted by NLRB to mean "any incoming member").

361. 584 F.2d 891 (9th Cir. 1978).

362. *Id.* at 893.

363. *Id.* The court stated that employees would "almost certainly" interpret the letter as applying only to the period before the election, noting that an "organizing campaign is generally thought of as being over once the election is held." *Id.* at 892.

364. 29 U.S.C. § 158(c) (1976).

365. *See, e.g., Union de Operadores y Canteros de la Industria del Cemento de Ponce*, 231 N.L.R.B. 171 (1977).

366. 600 F.2d 770, 775-76 (9th Cir. 1979). Though the acts were not specifically alleged in the original complaint, the court upheld the NLRB's right to find an unfair labor practice when the issue had been fully litigated. *See* note 246 *supra*.

367. *See Heavenly Valley Ski Area v. NLRB*, 552 F.2d 269, 272-73 (9th Cir. 1977) (evi-

proof is high and the Ninth Circuit is reluctant to set aside elections when the questionable conduct cannot be directly attributed to the union.<sup>368</sup>

When examining union election conduct, the Ninth Circuit examines whether the conduct is coercive and so related to the election that it has a "probable effect" on employees' voting decisions.<sup>369</sup> When no such evidence is presented, the court will order an evidentiary hearing, as it did in *Valley Rock Products, Inc. v. NLRB*.<sup>370</sup> In that case, the hearing was deemed necessary to determine whether a recent election had been affected by a union official's assault on two company men in a bar frequented by employees shortly before the election.<sup>371</sup> Even though several employees may have been aware of the assault prior to the election, the court stated that it could not rule on the issue without an evidentiary hearing and testimony indicating the probability of a "coercive effect" on the employees.<sup>372</sup>

### 3. Breaching the duty of fair representation

A union breaches its duty of fair representation only when its conduct toward members of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.<sup>373</sup> Section 7 gives employees the right to be free from such union actions, and a violation of that right is prohibited under section 8(b)(1)(A).<sup>374</sup>

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dentiary hearing denied on alleged union campaign misrepresentations because election process was not "significantly impaired").

368. *NLRB v. Mike Yurosek & Sons, Inc.*, 597 F.2d 661, 663 (9th Cir. 1979) (insufficient evidence to prove union started rumor of immigration inspection); *NLRB v. Spring Road Corp.*, 577 F.2d 586, 588 (9th Cir. 1978) (evidentiary hearing denied when employer failed to sustain burden of showing union interference with employees' choice of representative); *NLRB v. Heath Tec Div.*, 566 F.2d 1367, 1372 (9th Cir.), *cert. denied*, 439 U.S. 832 (1978) (employer unable to prove union responsibility for deportation rumors when it relied on unsuccessful attempt to subpoena NLRB records and agents).

369. *Valley Rock Prods., Inc. v. NLRB*, 590 F.2d 300, 302 (9th Cir. 1979) (citing *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969)).

370. *Id.* at 304.

371. *Id.* at 301-02. The union's business agent and chief organizer accosted the company vice president six days before the election, and accosted the company president in the same bar the night before the election. He later pled guilty to two charges of disturbing the peace.

372. *Id.* at 303. *Cf.* *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 10 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (violent attack on supervisor in front of employee notified employee of what could befall him if he did not support union); *NLRB v. Local 140, United Furniture Workers*, 233 F.2d 539, 541 (2nd Cir. 1956) (employees, hearing of violent assault by union organizers on company president and son, would reasonably regard it as warning of what would happen to them if they did not support union).

373. *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (union did not breach duty by denying employee the right to arbitration in absence of proof of employer's bad faith conduct).

374. *Construction Drivers Local 83 v. NLRB*, 590 F.2d 316, 317 (9th Cir. 1979) (per

A systematic and continuous pattern of section 8(b)(1)(A) violations was found in *NLRB v. International Association of Bridge Workers Local 433*.<sup>375</sup> The court found that by openly making multiple "backdoor" referrals,<sup>376</sup> the union was wielding "its power arbitrarily, [giving] notice that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies."<sup>377</sup> The Ninth Circuit disapproved of the standard of proof used by the NLRB. A "specific intent to discriminate on the basis of union membership need not be shown," since the NLRA is violated whenever the union acts unreasonably, arbitrarily, or invidiously with regard to a member's employment.<sup>378</sup>

A similar disagreement regarding the standard of proof occurred in *NLRB v. International Association of Bridge Workers Local 75*.<sup>379</sup> In *Bridge Workers Local 75*, an employee was denied a job referral to an employer specifically requesting him because, according to the collective bargaining agreement, he lacked the tenure for such a referral. The employee blamed the refusal on union animosity from an earlier quarrel. He also felt that, since the union had already made an exception to the agreement by allowing him to work at the jobsite without going through the normal referral process, it should do so again. The court summarized the NLRB's position: the refusal was merely a pretext, based in fact on arbitrary and irrelevant grounds. As a result, it was a violation of sections 8(b)(1)(A) and 8(b)(2).<sup>380</sup> The Ninth Circuit

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curiam), enforcing 233 N.L.R.B. 509, 511 (1977) (duty breached after union member complained and union retaliated by refusing to give member job referrals); *Kling v. NLRB*, 503 F.2d 1044, 1046 (9th Cir. 1975) (union breached duty when it arbitrarily sought seniority reduction and constructive discharge of employee); *Local Union 12, United Rubber Workers v. NLRB*, 368 F.2d 12, 17 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967), rehearing denied, 389 U.S. 1060 (1968) (union breached duty when it refused to process grievances of black members).

375. 600 F.2d 770 (9th Cir. 1979).

376. A union "backdoors" job referrals when it gives jobs to favored members and thus bypasses the prescribed referral procedures in the collective bargaining agreement. *Id.* at 774.

377. *Id.* at 777 (citing *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d 834, 839-40 (9th Cir. 1977)).

378. *Id.* at 776-77. This conflicts with the NLRB's position that a discriminatory motive is presumed whenever a union, which is operating under an exclusive hiring hall agreement, refuses to give referrals to a qualified employee. *Id.* at 777 n.5.

379. 583 F.2d 1094 (9th Cir. 1978).

380. *Id.* at 1096-97. The NLRB noted several instances illustrative of the union officials' negative attitude toward the employee, as well as the union's own prior waiver of the contract provisions for the employee. Relying on these incidents, the NLRB found that the refusal was based on personal dislike while the union hid its animus behind the terms of the contract.

held, however, that because the employer enforced the terms of its collective bargaining agreement without discretion, the court could not examine the union's motive. As to the union's prior waiver of the contract provisions, the court noted that it was an "extraordinary" incident and could not justify a second waiver simply because one had already occurred.<sup>381</sup>

#### 4. Union dues and fines

Section 8(b)(1)(A) imposes no controls on a union's internal affairs, except as they affect a member's employment status.<sup>382</sup> The purpose of this provision is to "insulate employees' jobs from their organizational rights."<sup>383</sup> Thus, the NLRB has authority to oversee only the enforcement of external union rules.<sup>384</sup> The propriety of taking internal disciplinary action against a union member that affects his employment status was discussed in *NLRB v. International Longshoremen's Union Local 13*.<sup>385</sup> After the employee neglected to pay union-leveled fines, the union refused to accept his tender of dues, dismissed him from the jobsite, and then prevented his use of the dispatch hall. The court held that this effectively deprived the employee of work, which directly affected his employee status rather than his status as a union member, and thus constituted a violation of section 8(b)(1)(A).<sup>386</sup>

#### 5. Unlawful bargaining by minority unions

Accepting exclusive bargaining authority for a unit of employees at a time when the union lacks majority status or when there is a competing union<sup>387</sup> is a violation of section 8(b)(1)(A) because such recog-

381. *Id.* at 1097.

382. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967) (no violation for union to impose fines on union members who are doing regular work during strike).

383. *Radio Officer's Union v. NLRB*, 347 U.S. 17, 40 (1954).

384. *Scofield v. NLRB*, 394 U.S. 423, 428-30 (1968) (if a rule frustrates or invades overriding policy of NLRA, it violates § 8(b)(1) when enforced).

385. 581 F.2d 1321 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

386. *Id.* at 1323.

387. *ILGWU v. NLRB*, 366 U.S. 731, 738 (1960) (union unlawfully accepted exclusive bargaining authority when it enjoyed only minority support even though no other union was recognized or represented a majority). *See NLRB v. Inter-Island Resorts, Ltd.*, 507 F.2d 411, 412 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (competing union did not violate §§ 8(b)(1)(A) & 8(b)(2) when it clearly demonstrated numerical majority support without coercion or other unfair practice). *See also* 29 U.S.C. § 159(a) (1976) ("Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .").

dition hampers the employees' ability to choose their representative.<sup>388</sup> Furthermore, neither subsequent attainment of majority status nor a good faith belief in majority support will affect an 8(b)(1)(A) violation.<sup>389</sup>

Whether a union represented certain employees and was therefore able to impose an agency shop fee on them was discussed in *NLRB v. Hospital & Institutional Workers Local 250*.<sup>390</sup> For twenty years, agreements between the union and employer exempted physical, speech, and occupational therapists from mandatory union membership but provided that, if they chose to join, they were required to maintain their membership. In 1974, an agency shop provision was included in the new agreement that required therapists to become union members or pay a monthly fee as a means of ensuring their contribution to the cost of representation. The court found that the language of the pre-1974 union agreements, together with substantial testimony that the therapists did not want the union, supported the NLRB's determination that the union unlawfully tried to assume jurisdiction over employees it did not represent.<sup>391</sup>

#### 6. Interference with the employer's choice of representatives

Section 8(b)(1)(B) is narrowly focused to prohibit union restraint or coercion of an employer's right to select representatives freely for collective bargaining and grievance adjustment. Thus, in *Florida Power & Light v. Electrical Workers*,<sup>392</sup> the Supreme Court held that a union may discipline supervisor-members who cross a picket line during a strike and perform bargaining unit work.<sup>393</sup> In describing the limits of section 8(b)(1)(B), the Court stated that the section could only be violated when a supervisor's conduct as grievance adjuster or collective bargainer will be affected adversely by union discipline.<sup>394</sup>

A union's disciplinary powers over supervisor-members who elect to work during a strike was questioned in *American Broadcasting Companies v. Writers Guild*.<sup>395</sup> Producers, directors, and story editors were

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388. *ILGWU v. NLRB*, 366 U.S. 731, 738-39 (1960). *Accord*, *Komatz Constr., Inc. v. NLRB*, 458 F.2d 317, 322 (8th Cir. 1972) (recognition of union which does not represent majority impairs employees' "section 7 rights to choose their own representative").

389. *ILGWU v. NLRB*, 366 U.S. 731, 736, 739 (1960).

390. 577 F.2d 649 (9th Cir. 1978).

391. *Id.* at 652-53.

392. 417 U.S. 790, 803 (1973).

393. *Id.* at 813.

394. *Id.* at 804-05.

395. 437 U.S. 411 (1978).

notified by their employers that during an upcoming strike they would be required to perform their regular supervisory functions, including adjusting grievances, although they would not be asked to perform work covered in the union contract. Various penalties were subsequently imposed upon them by the union. The Court held that union discipline of those supervisor-members who crossed the picket line only to perform their supervisory work and adjust grievances deprived the employer of the opportunity to select effective representatives freely.<sup>396</sup> The Court reasoned that an employer's economic rights under section 8(b)(1)(B) override a union's right to resort to economic sanctions during a strike.<sup>397</sup>

### *E. Discrimination by Unions*

Unions are prohibited by section 8(b)(2) from causing or attempting to "cause an employer to discriminate against an employee in violation of section 8(a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure" to pay his union dues and initiation fees.<sup>398</sup> The term "employee" also includes job applicants who are discriminatorily denied employment in violation of section 8(a)(3).<sup>399</sup> The Ninth Circuit has stated that to support a violation, it must be shown that the union has attempted to cause or did cause an employer to discriminate and that the discrimination tended to encourage or discourage union membership.<sup>400</sup> It must also be shown that the employer has been approached directly or that some pattern of action has been aimed at him to cause him to discriminate.<sup>401</sup> As in section 8(a)(3), "discrimination" refers to any term or condition of employment, including tenure and hire.<sup>402</sup>

In two cases, the Ninth Circuit found that when the respective un-

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396. *Id.* at 429-31. *Accord*, *NLRB v. International Union of Operating Eng'rs Local 501*, 580 F.2d 359 (9th Cir. 1978) (per curiam) (union violated § 8(b)(1)(B) by fining employees who performed only supervisory work during strike). *See* *Graphic Arts Int'l Local 280 v. NLRB*, 596 F.2d 904, 909 (9th Cir. 1979) (union violated §§ 8(b)(1)(B) and 8(b)(3) when it banned overtime work until employer agreed to bargain with union individually and leave multi-employer bargaining association).

397. *Id.* at 430-31.

398. 29 U.S.C. § 158(b)(2) (1976).

399. *See* note 312 *supra* and accompanying text.

400. *NLRB v. International Bhd. of Elec. Workers Local 340*, 301 F.2d 824, 825 n.1 (9th Cir. 1962) (local union refused to refer member of another union to job, as required by contract, because of preference for own members).

401. *Glasser v. NLRB*, 395 F.2d 401, 406 (2d Cir. 1968).

402. 29 U.S.C. § 158(b)(2) (1976); *id.* § 158(a)(3).

ions violated section 8(b)(1)(A) by prohibiting employees from choosing their own representatives, they also violated section 8(b)(2). In *NLRB v. Hospital & Institutional Workers Local 250*, the violation occurred when the union agreed with the hospital to include all therapists, including those previously exempted, in a new agency-shop provision.<sup>403</sup> In *NLRB v. Retail Clerks Local 588*, the violation occurred when the union demanded representation and obtained a cross-check agreement that effectively eliminated the desires of a smaller unit represented by another union.<sup>404</sup>

Joint violations of section 8(b)(1)(A) and 8(b)(2) were also found in *NLRB v. International Longshoremen's Union Local 13* when a union which jointly administered a hiring hall with a multiple-employer representative threatened to and did prohibit an employee from working because he did not pay his union fines and assessments when due.<sup>405</sup> And, in *NLRB v. International Association of Bridge Workers Local 433*, the union violated both sections when it backdoored job referrals.<sup>406</sup> The Ninth Circuit found, however, that when a union refused to violate the terms of a collective bargaining agreement regarding its hiring hall referral practices, as in *International Association of Bridge Workers Union Local 75*, there was no violation of either section 8(b)(1)(A) or 8(b)(2), even though it had just violated those same terms for the same employee as an isolated, temporary, emergency measure.<sup>407</sup>

### III. THE REPRESENTATION PROCESS AND UNION RECOGNITION

#### A. *Appropriate Bargaining Units*

Congress has given the NLRB wide latitude to determine what constitutes an appropriate bargaining unit.<sup>408</sup> In making such determinations the Board applies the six factors listed by the Supreme Court in *Pittsburgh Plate Glass Co. v. NLRB*:<sup>409</sup> (1) similarity of employee skills, interests, duties, and working conditions within the prospective unit, (2) functional integration of the plant, including interchange and contact among prospective unit employees, (3) the employer's organizational and supervisory structure, (4) the employees' desires, (5) prior

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403. 577 F.2d 649, 650-51 (9th Cir. 1978).

404. 587 F.2d 984, 986 (9th Cir. 1978).

405. 581 F.2d 1321, 1321-22 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

406. 600 F.2d 770, 777 (9th Cir. 1979).

407. 583 F.2d 1094, 1097 (9th Cir. 1978).

408. 29 U.S.C. § 159(b) (1976).

409. 313 U.S. 146, 153 (1941).



bargaining history, and (6) the extent of union organization among the employees.

### 1. Departmental units

While some employee units are organized by craft,<sup>410</sup> others represent departments or divisions that have no craft identity.<sup>411</sup> In such industries, the Board tends to approve smaller bargaining units even though larger storewide units might also be appropriate<sup>412</sup>—unless the presumption of the appropriateness of the smaller departmental units is adequately rebutted.<sup>413</sup>

During the survey period, the Ninth Circuit determined that a departmental unit of drug store employees within a supermarket was appropriate. In *NLRB v. Retail Clerks Local 588*,<sup>414</sup> the challenging union argued that it was inappropriate to sever such a unit from the storewide unit. The court found the smaller unit to be appropriate based on bargaining history and the employer's organizational structure.<sup>415</sup> Thus, the court rejected the contention that storewide units are the *only* appropriate units for retail stores.<sup>416</sup>

In industrial settings, after bargaining units are established, the determination of whether additional employees belong in a unit with office employees or with production employees is based on the six factors in *Pittsburgh Glass*. The decision is a factual one and precedent can be found for inclusion in either unit.<sup>417</sup> Two cases which raised this issue

410. *See* Mallinckrodt Chem. Works, 162 N.L.R.B. 387 (1966).

411. *See* American Potash & Chem. Corp., 107 N.L.R.B. 1418 (1954) (employees of engineering department constituted an appropriate unit despite the fact that they were not craftsmen).

412. J.C. Penney Co., 196 N.L.R.B. 446 (1972); J.C. Penney Co., 196 N.L.R.B. 708 (1972) (separate unit approved for employees of auto center service department); Montgomery Ward & Co., 150 N.L.R.B. 598 (1964) (separate unit approved for automotive services personnel).

413. *John Wanamaker, Inc.*, 195 N.L.R.B. 452, 453 (1972).

414. 587 F.2d 984 (9th Cir. 1978).

415. *Id.* at 988.

416. *Id. Accord*, *NLRB v. Food Employers Council, Inc.*, 399 F.2d 501, 505 (9th Cir. 1968) (snack bar employees found to be an appropriate separate unit); *Retail, Wholesale, and Dep't Store Union v. NLRB*, 385 F.2d 301, 305 (D.C. Cir. 1967) (non-selling employees of a department store, except office clericals, formed an appropriate unit).

417. *Compare* *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (admission clerks who interview patients and record data excluded from production unit); *Jelco, Inc.*, 209 N.L.R.B. 827, 827-28 (1974) (material expediter and assistant materials purchaser excluded from production unit) *and* *Kroger Co.*, 204 N.L.R.B. 1055, 1055 (1973) (mail clerks excluded from production unit) *with* *NLRB v. Hoerner-Waldorf Corp.*, 525 F.2d 805, 807-08 (8th Cir. 1975) (sales office trainee excluded from office clerical unit because he did not share a "sufficient community of interest" with other unit members) *and* *Adams Corp.*, 172

in the Ninth Circuit reached opposite conclusions. The court in *NLRB v. Adrian Belt Co.*<sup>418</sup> relied primarily on similarity of skills to find that a clerical employee was appropriately placed in a production unit. She shared a community of interest with employees in the production unit because: (1) she was primarily involved with the preparation, transfer, and maintenance of inventory and production control records for the production employees, (2) like the production workers, she was paid an hourly rate, got time and a half for overtime, punched a time clock, and took her breaks in the factory area, and (3) when business was slow, she actually performed production work.<sup>419</sup>

The Ninth Circuit used all six *Pittsburgh Glass* factors to determine that fourteen previously unrepresented clerical employees belonged in a unit with office workers in *Pacific Southwest Airlines v. NLRB*.<sup>420</sup> The appellate court found as follows: (1) differences between the skills and duties of the production and clerical employees exceeded similarities, (2) there was only a slight interchange between the two groups, (3) the employer's organizational framework would have supported including these employees in the production unit but the court felt a separate unit would be most likely to further the employer's interest, (4) the employees had voted to be included in the production unit, (5) the bargaining history favored the formation of a new unit because the production unit's union had never sought to represent the clerical workers, and (6) the extent of union organization favored inclusion in the production unit.<sup>421</sup> The court in *Pacific Southwest Airlines* distinguished its holding from that in *Adrian*; in the latter there was more interchange between the clerical employee and production workers, and the clerical employee had the same hours and rest breaks as the production workers.<sup>422</sup> Furthermore, in *Pacific Southwest Airlines* the Ninth Circuit rejected a mechanical application of the long-standing NLRB rule that, when one of the unions seeking to represent plant clericals already represents the employer's production workers, the plant clericals are allowed an election and will be added to the ex-

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N.L.R.B. 552 (1968) (employee included in production unit because she (1) spent three hours a day performing work out of her office on the production floor, (2) the office where she worked overlooked the production floor, (3) she continued to punch a time clock, and (4) she worked in a white uniform like the production workers, not in street clothes like the clericals).

418. 578 F.2d 1304 (9th Cir. 1978) (per curiam).

419. *Id.* at 1312.

420. 587 F.2d 1032 (9th Cir. 1978).

421. *Id.* at 1042-45.

422. *Id.* at 1041.

isting unit if they so choose.<sup>423</sup> The court reasoned that the application of this rule to cases like the instant one would be inconsistent with the Act's intent to allow employees freedom to choose their bargaining representatives.<sup>424</sup>

## 2. Multi-location units

When an employer has more than one location or plant, unit determination is made on the basis of the *Pittsburgh Glass* factors<sup>425</sup>—although a single-facility unit is presumptively appropriate.<sup>426</sup> Single-location units were held appropriate for a restaurant with two locations in *Victoria Station, Inc. v. NLRB*.<sup>427</sup> Due to the employer's organization and supervisory structure, there was very little employee interchange between restaurants<sup>428</sup> and a wide geographic distance between restaurants.<sup>429</sup> The court also noted the presumption that "single units are appropriate for bargaining."<sup>430</sup> The court distinguished an earlier Board decision, which had held that single restaurant units were inappropriate for the same restaurant chain, by reasoning that the scope of managerial control at individual restaurants had been expanded considerably.<sup>431</sup> The local managers were given the power to retain control over day-to-day conditions of employment and screen applications, hire, fire, and discipline employees, grant merit salary increases, grant vacations, decide staffing schedules, and train and evaluate probationary employees.<sup>432</sup>

A broad unit which included both of the employer's construction corporations was held appropriate in *NLRB v. Don Burgess Construction Corp.*<sup>433</sup> based on community of interest between the employees:

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423. *Id.* at 1039 (citing *Fisher Controls Co.*, 192 N.L.R.B. 514 (1971); *In re Chrysler Corp.*, 76 N.L.R.B. 55 (1948)).

424. *Id.* at 1043-44.

425. *Columbia Univ.*, 222 N.L.R.B. 309, 309 (1976).

426. *Haag Drug Co.*, 169 N.L.R.B. 877, 877 (1968) (presumption could be overcome by showing that day-to-day interests of employees have merged with those of employees in other stores).

427. 586 F.2d 672 (9th Cir. 1978).

428. There was an eight percent annual transfer rate between restaurants. *Id.* at 675.

429. *Id.* See generally *NLRB v. Quaker City Life Ins. Co.*, 319 F.2d 690 (4th Cir. 1963) (single-office unit of debit insurance agents held appropriate because of common interests, common working conditions, common supervision and isolation from other branch offices).

430. 586 F.2d at 675; *NLRB v. Lerner Stores Corp.*, 506 F.2d 706, 707-08 (9th Cir. 1974) (presumption that a single store in a "chain" is an appropriate bargaining unit).

431. 586 F.2d at 674.

432. *Id.* at 674-75. See *NLRB v. Chicago Health & Tennis Clubs, Inc.*, 567 F.2d 331, 340 (7th Cir. 1977), cert. denied, 437 U.S. 904 (1978).

433. 596 F.2d 378 (9th Cir. 1979).

they possessed the same skills, performed the same functions, shared the same general working conditions, and usually worked at the same site.<sup>434</sup> The two separate corporations were held to be a single employer for purposes of the Act,<sup>435</sup> but the court would not impose the contract signed by one employer on the employees of the other unless the two together constituted an appropriate unit. After rejecting other arguments by the employer,<sup>436</sup> the court held the multi-location unit appropriate and enforced the contract.

## B. Representation Proceedings and Elections

### 1. Representation without consent

Non-union employees cannot be added to a pre-existing bargaining unit without their consent. In *NLRB v. Hospital Workers Local 259*,<sup>437</sup> non-member therapists were added to the bargaining unit by a contract between the union and the employer. The court held that these employees were entitled to an election to determine whether they should be included in the unit, basing its decision on the bargaining history between the parties and the clear language of previous agreements which recognized the union as the "exclusive bargaining agent only of those therapists who were union members."<sup>438</sup>

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434. *Id.* at 386.

435. Burgess Construction (BC) had signed a contract with the carpenter's union, but when its owner and his foreman formed V & B Builders (VB), a partnership, all the carpenters were transferred to the latter. VB signed a master agreement with the union during the next contract period but BC did not. The union accepted BC's refusal to sign an agreement based on BC's assurance that it would not hire carpenters. Later, however, BC did begin employing non-union carpenters.

The court held that BC and VB were a single employer based on the application of the following criteria: (1) there was a strong interrelation of operations; (2) both enterprises were managed separately at the worker level, but Burgess controlled both at the policy level, and both used his contractor's license; (3) there was centralized control of labor relations because Burgess made all policy decisions about labor relations and signed both agreements; and (4) Burgess owned 70% of BC and 50% of VB. *Id.* at 385.

436. The court pointed out that an "accretion" argument was not appropriate because the issue was not absorption into an existing unit but whether the two existing groups constituted a single appropriate unit. *Id.* at 386 n.5. The court also held that it was not required to find the *only* appropriate unit (citing *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 532 (9th Cir. 1968)) and that the parties did not intend to exclude BC employees from coverage. *Id.* at 387.

437. 577 F.2d 649 (9th Cir. 1978).

438. *Id.* at 651.

## 2. Conduct invalidating elections

### a. *waiver of initiation fees*

The Supreme Court in *NLRB v. Savair Manufacturing Co.*<sup>439</sup> held that an election will be set aside when, prior to the election, a union offers to waive initiation fees for all employees who sign union authorization cards, if this offer interferes with employees' free choice in the election.<sup>440</sup> During the survey period, the Ninth Circuit was presented with six cases in which it defined when such interference was sufficient to set aside an election. Four of the cases in which elections were upheld merely required application of the settled Ninth Circuit rule allowing initiation fee waivers if they are offered to all employees and are held open until a contract is signed.<sup>441</sup> This rule assumes that such offers are not conditioned on a showing of pre-election support for the union.<sup>442</sup>

For example, in *NLRB v. L.D. McFarland Co.*<sup>443</sup> an offer to waive initiation fees reasonably could have been interpreted as either a permissible across-the-board waiver or an impermissible waiver aimed only at employees who joined the union before the election. The offer stated: "THERE WILL BE NO INITIATION FEE FOR ANY MEM-

439. 414 U.S. 270 (1973).

440. *Id.* at 272 n.4. In support of its holding, the Court offered the following rationales: (1) by offering inducements that were operative only prior to the election, the union was in effect "buying the endorsements" of employees, thereby giving a false impression to other employees of union support; (2) employees might feel obligated to support the union as a result of having signed authorization cards; and (3) even though the waiver of fees was offered for the purpose of inducing employees to sign authorization cards, under the ruling in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), a union may gain certification through the mechanism of authorization cards in lieu of an election. This could allow a union to be certified on the basis of improperly induced signatures. 414 U.S. at 277-80.

441. The four cases were: *NLRB v. Mike Yurosek & Sons, Inc.*, 597 F.2d 661, 663 (9th Cir. 1979) (conflicting rumors did not invalidate election); *Levitz Furniture Co. v. NLRB*, 587 F.2d 983 (9th Cir. 1978) (per curiam) (initiation fee waiver was offered to all employees, good until 30 days after a contract was agreed to, and in no way conditional upon support of the union and could not be considered a vote for the union); *Vari-Tronics Co. v. NLRB*, 589 F.2d 991, 992 (9th Cir. 1979) (per curiam) (investigation disclosed that the offer was to remain open both before and after the election until a bargaining agreement was reached); *NLRB v. Spring Road Corp.*, 577 F.2d 586, 589 n.4 (9th Cir. 1978) (the evidence indicated that the union made an across-the-board waiver which would apply to all employees on the payroll when the contract was signed). *Accord*, *Warner Press, Inc. v. NLRB*, 525 F.2d 190, 196-97 (7th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *NLRB v. Dunkirk Motor Inn., Inc.*, 524 F.2d 663, 665 (2d Cir. 1975); *NLRB v. S. & S. Product Eng'r Serv., Inc.*, 513 F.2d 1311, 1312-13 (6th Cir. 1975); *NLRB v. Wabash Transformer Corp.*, 509 F.2d 647, 649-50 (8th Cir. 1975); *NLRB v. Con-Pac, Inc.*, 509 F.2d 270, 272-73 (5th Cir. 1975); *NLRB v. Stone & Thomas*, 502 F.2d 957, 958 (4th Cir. 1974).

442. *NLRB v. Aaron Bros. Corp.*, 563 F.2d 409, 412 (9th Cir. 1977) (per curiam).

443. 572 F.2d 256 (9th Cir.), *cert. denied*, 439 U.S. 911 (1978).

BER PRESENTLY WORKING IN THE PLANT. THERE WILL BE NO MONTHLY DUES UNTIL A CONTRACT IS NEGOTIATED.”<sup>444</sup> The court held that this offer was permissible because the term “member” was limited to incoming members. The court rejected the employer’s contentions that the phrase was impermissibly ambiguous and that it was intended to refer only to employees who became members prior to the election.<sup>445</sup>

The only case which did result in an election being set aside also involved the construction of an ambiguous phrase. In *NLRB v. Aladdin Hotel Corp.*<sup>446</sup> the ambiguity concerned how long the offer would remain open. Prior to the election, the union reduced its initiation fee from \$50 to \$25 as an inducement to obtain new members. The letter offering this reduction to employees stated that the reduction was authorized “for this organizing campaign,” dues would be held in escrow and applied to the first month after a labor agreement was reached, and if an election were held and the union defeated, all monies would be kept by the union.<sup>447</sup> The court struck down the dues reduction offer because a “responsible” interpretation of the phrase by employees would have led them to conclude that the fees would be reduced *only* if they joined the union prior to the election.<sup>448</sup> The offer was invalidated despite the union’s contention that it did not intend the phrase to have the meaning given to it by the court.<sup>449</sup>

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444. *Id.* at 258-59.

445. *Id.* at 259. The court attempted to distinguish *Inland Shoe Mfg. Co.*, 211 N.L.R.B. 724 (1974), finding that in *Inland* the word “charter” was put in front of “member.” 572 F.2d at 259. The NLRB in *Inland* had held that when a term is ambiguous, as “charter member” was found to be, the union has a duty to clarify it or suffer the consequences. 211 N.L.R.B. at 725.

446. 584 F.2d 891 (9th Cir. 1978) (per curiam).

447. *Id.* at 892.

448. Since an organizing campaign usually ends with an election, the court found that it was reasonable for the employees to so conclude. *Id.* *Western Refrigerator Co.*, 213 N.L.R.B. 227 (1974), held that “campaign” included both the pre- and post-election periods for purposes of waiver. *Western Refrigerator* is distinguishable from *Aladdin* on the ground that the latter referred to an “organizing campaign” while the former merely referred to a “campaign.”

449. At union meetings prior to the election, a union official stated that the waiver would apply after the election. These statements were not sufficient to overcome the union’s burden to clarify the ambiguity. 584 F.2d at 893. The Board’s contrary position on this issue is evident in *Smith Co.*, 215 N.L.R.B. 530, 530 (1974), in which an ambiguous phrase, “waived during a new organization,” was cured by a union representative’s statement that “*anyone who came in after the plant became union would have to pay.*” *Id.* at 533 (emphasis in original).

*b. misrepresentations*

The effect of misrepresentations on the validity of a representation election is an area of labor law currently undergoing much scrutiny and causing considerable uncertainty.<sup>450</sup> In *Hollywood Ceramics Co.*,<sup>451</sup> the NLRB held as follows:

[A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons.<sup>452</sup>

On April 8, 1977, the Board, after much criticism from commentators,<sup>453</sup> reversed itself in *Shopping Kart Food Market, Inc.*,<sup>454</sup> holding that it would "no longer set elections aside on the basis of misleading

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450. See note 453 *infra* and accompanying text. Section 8(c) of the Act provides that "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this subchapter, if such expression contains no threat of reprisal or force or promise to benefit." 29 U.S.C. § 158(c) (1976). This section does not apply to election cases. See Field, *Representation Elections, Films and Free Speech*, 25 LAB. L.J. 217, 220 (1974) [hereinafter cited as Field].

451. 140 N.L.R.B. 221 (1962).

452. *Id.* at 224 (footnotes omitted). It has been suggested that the application of these five tests—substantiality, materiality, timing, source and voter's independent knowledge—turns on a variety of subjective considerations which provide the Board with the flexibility to uphold elections that might have been invalidated under a "laboratory conditions" standard. The Board's application of the tests has necessarily been somewhat ambivalent. R. WILLIAMS, P. JANUS, & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT, 56-57 (Labor Relations and Public Policy Report No. 8, 1974) [hereinafter cited as NLRB REGULATION].

453. After examining a series of cases in which the Board found violations by employers who showed the film "And Woman Must Weep," Field, *supra* note 450, urged the Board to conduct empirical research to determine the validity of its conclusions about the deleterious effect of such propaganda on voters. The concern was whether the high cost in administrative time is justified by any real effect on the outcome of an election. *Id.* at 230.

In another criticism, the Board was urged even more vehemently to cease regulating election campaign practices because this holding was based on false assumptions regarding the influence of various campaign tactics upon voters. This study's conclusion was based on empirical data gathered during political elections and the authors' sample of 31 representa-

campaign statements."<sup>455</sup> One and one-half years later, in *General Knit of California*<sup>456</sup> the Board further complicated the law by reinstating the *Hollywood Ceramics* rule. The net result of the Board's flip-flop on this issue has been to place employers, unions, and courts in doubt as to which standard to apply in cases being litigated during the transition periods.

The only case decided by the Ninth Circuit since *General Knit, NLRB v. Hepa Corp.*,<sup>457</sup> held that the *Hollywood Ceramics* test was applicable because the Board's decision concerned a union certified before *Shopping Kart* had been decided.<sup>458</sup> In fact, *Shopping Kart* has not significantly influenced the outcome of any Ninth Circuit case during the period under review. In three cases the court found reasons why it should not be applied,<sup>459</sup> and in a fourth, in which it was applicable, the court invalidated the election on other grounds.<sup>460</sup>

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tion elections. J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS 146-47 (1976).

Furthermore, Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 92 (1964), suggested that the Board make revisions in its regulations so as to make the determination of prohibited misrepresentation simpler and more closely related to the goals which the prohibition is intended to serve.

454. 228 N.L.R.B. 1311 (1977).

455. *Id.* at 1313. The Board, however, retained its option to continue to intervene in instances "where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." *Id.*

456. 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec. 6, 1978).

457. 597 F.2d 166 (9th Cir. 1979) (per curiam).

458. *Id.* at 168. The Seventh Circuit in *NLRB v. Mosey Mfg. Co.*, 595 F.2d 375, 377-78 (7th Cir. 1979), was faced with an analogous problem which it remanded to the Board for reconsideration in light of *General Knit*.

459. *NLRB v. Spring Road Corp.*, 577 F.2d 586, 588 (9th Cir. 1978) (*Shopping Kart* not applicable because "[e]vidence that fails to meet the *Hollywood Ceramics* standard inevitably will not satisfy the narrower *Shopping Kart* test"); *NLRB v. Tri-City Linen Supply*, 579 F.2d 51, 57 n.13 (9th Cir. 1978) (*Shopping Kart* not applicable because there was held to be no misrepresentation); *Oshman's Sporting Goods, Inc. v. NLRB*, 586 F.2d 699 (9th Cir. 1978) (*Shopping Kart* need not be applied because the misrepresentations did not violate the stricter standards of *Hollywood Ceramics*). The *Oshman* court expressed its approbation of the *Shopping Kart* decision in dictum: "It is tempting to . . . go farther than the Board did in *Shopping Kart*, holding that we will no longer sustain orders setting aside elections, or set aside orders sustaining them, in cases of threats as well as in cases of claimed misrepresentation in election campaigns." 586 F.2d at 702. The court resisted the temptation because "it is the Board, not the courts, that is presumed to be expert in this field." *Id.*

460. In *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 950 (9th Cir. 1978), cert. denied, 439 U.S. 1128 (1979), the employer's misrepresentation was included in a flyer which falsely stated that the NLRB had found the union guilty of unfair labor practices. The court held that this misrepresentation did interfere with the election, setting aside the election because "in instances where a party has engaged in such deceptive campaign practices as improperly



Under *General Knit* and *Hollywood Ceramics*, misrepresentations will not invalidate an election if they are found to be mere "puffing"<sup>461</sup> or insubstantial departures from the truth.<sup>462</sup> The alleged misrepresentation in *NLRB v. Spring Road Corp.*<sup>463</sup> was a union campaign promise that if the union were selected, the employees would have better wages and benefits and more secure jobs. Applying the *Hollywood Ceramics* rule, the court found this to be mere "puffing" because its fulfillment was dependent on contingencies beyond the control of the union and therefore "less significant than if made by an employer."<sup>464</sup>

In two other cases, misrepresentation charges were dismissed due to the absence of evidence that a false statement had been made. The court in *NLRB v. Pacific International Rice Mills, Inc.*<sup>465</sup> held that employee testimony about union representatives' alleged misstatements was internally contradictory and inconsistent, and thus there was insufficient evidence to prove that any misstatements were communicated to employees.<sup>466</sup> In *NLRB v. Tri-City Linen Supply*,<sup>467</sup> the union represented that, if they won the election, the resulting contract would give the employees fifty dollars a week more than they would otherwise have expected to earn. The witnesses' testimony was unclear as to whether the union representative merely said that the union would *try* to get the higher paying contract or whether he *assured* the employees that the union would get it. The Ninth Circuit found that the union did not make a firm promise, and thus no misrepresentation had occurred.<sup>468</sup>

The Ninth Circuit will set aside an election only when the source of the misrepresentation is either the union or the employer, because only if the statements are attributable to one of these parties is it likely

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involving the Board and its processes . . .," misrepresentations will continue to be cause to set aside elections. *Id.* (quoting 228 N.L.R.B. at 1313). *See Formco, Inc.*, 233 N.L.R.B. 61, 62 (1977) (election set aside because of interference with Board processes).

461. *Southern Foods, Inc.*, 171 N.L.R.B. 999, 1000 (1968).

462. *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962).

463. 577 F.2d 586 (9th Cir. 1978).

464. *Id.* at 588. *See NLRB v. Hepa Corp.*, 597 F.2d 166, 168 (9th Cir. 1979) (union misstatements regarding the benefits which the union could provide members held not "material or substantial"); *Rex-Hide, Inc.*, 241 N.L.R.B. 168, 101 L.R.R.M. 1038, 1039 (April 27, 1979) (union misrepresentations about the employer's obligation not to give a raise during the campaign, and union distribution of false and misleading information concerning wages negotiated by the union at another company held to be "normal election propaganda" and "not substantially or materially misleading").

465. 594 F.2d 1323 (9th Cir. 1979).

466. *Id.* at 1326.

467. 579 F.2d 51 (9th Cir. 1978).

468. *Id.* at 57.

that an election outcome will be affected.<sup>469</sup> For example, in *NLRB v. Mike Yurosek & Sons, Inc.*<sup>470</sup> a rumor had circulated that, if employees did not vote in favor of the union, the union would give the Immigration and Naturalization Service (INS) the names of all illegal alien employees. The INS had been discussed during the campaign, but the exact content and source of these discussions were unclear. The court held that, since the rumors were not attributable to the union, there was no actionable misrepresentation and the election should be upheld.<sup>471</sup>

The *Hollywood Ceramics* standard provides that if the party allegedly injured by the misrepresentation has an adequate opportunity to make an effective reply, the incident will not be fatal to the election.<sup>472</sup> *Oshman's Sporting Goods, Inc. v. NLRB*<sup>473</sup> involved two separate misrepresentation charges. In the first charge, the Teamsters union wrote a letter to the employer (and distributed it to employees) citing "U.S. government" statistics on the prevailing area wage rates. Actually, the figures were not compiled by the federal government but were wages which other Teamsters were earning in that area for comparable labor. The court held that this misrepresentation was harmless because the employees were interested in what the Teamsters could get for them, and not in government statistics, and the employer had had an opportunity to respond to the misrepresentation.<sup>474</sup> The second misrepresentation charge posed a more serious problem, however, because it involved "the Board and its processes."<sup>475</sup> The union organizer sent a letter that falsely stated that a previous election had been set aside because of the employer's lies and false promises. The election actually had been set aside pursuant to an agreement between parties, and the Board had never ruled on the union's earlier charges. The court held this misrepresentation to be harmless because only one person received the letter containing the falsehood<sup>476</sup> and the employer had sufficient time to reply to the charge, even though it did not do so.<sup>477</sup>

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469. *NLRB v. Heath Tec Division*, 566 F.2d 1367, 1372 (9th Cir.), *cert. denied*, 439 U.S. 832 (1978); *NLRB v. Mike Yurosek & Sons, Inc.*, 597 F.2d 661, 663 (9th Cir. 1979) (citing *NLRB v. Aaron Bros. Corp.*, 563 F.2d 409, 412 (9th Cir. 1977)).

470. 597 F.2d 661 (9th Cir. 1979).

471. *Id.* at 663. *Accord*, *NLRB v. Heath Tec Division*, 566 F.2d 1367, 1372 (9th Cir.), *cert. denied*, 439 U.S. 832 (1978) (citing *Heavenly Valley Ski Area v. NLRB*, 552 F.2d 269 (9th Cir. 1977)).

472. See note 452 *supra* and accompanying text.

473. 586 F.2d 699 (9th Cir. 1978).

474. *Id.* at 704.

475. *Id.* at 706.

476. It would have taken a change of three votes to upset the election. *Id.* at 701.

477. *Id.* at 706. *But see* *Fontaine Truck Equip. Co.*, 247 N.L.R.B. 164, 101 L.R.R.M.

*c. threats and violence*

In 1978-79, the Ninth Circuit decided four cases in which employers sought to have elections set aside due to alleged acts or threats of violence. In each of the four cases the court held that there was no unlawful interference with the elections. In *NLRB v. Spring Road Corp.*,<sup>478</sup> the court held that affidavits describing pre-election rumors of vandalism were insufficient to require a hearing because the union could not be connected with the alleged incidents.<sup>479</sup> Similarly, in *NLRB v. Hepa Corp.*,<sup>480</sup> the court upheld an election on the ground that the threats of violence were committed without union authorization.<sup>481</sup> In *Oshman's Sporting Goods, Inc. v. NLRB*,<sup>482</sup> one employee asked another what would happen if he crossed a picket line during a strike. The second employee answered that various violent acts might occur. The union won the election, which the Ninth Circuit subsequently refused to invalidate because the person making the threats was not a union agent and there was "no atmosphere of coercion and fear of reprisal."<sup>483</sup> In the fourth case, *Valley Rock Products, Inc. v. NLRB*,<sup>484</sup> the NLRB granted a union sponsored motion for summary judgment even though the employer claimed that the union used violence to win the election. The Ninth Circuit, however, reversed and remanded because violence had occurred and the perpetrator was a union official.<sup>485</sup>

*d. other violations*

Electioneering near a polling place traditionally has been forbidden by the NLRB,<sup>486</sup> but it has not been easy to determine the exact area within which this activity is prohibited.<sup>487</sup> The employer in *Rob-*

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1047 (April 23, 1979) (union held to have interfered with the election when it distributed a pamphlet, on the morning of the election, in which the employer's profits were misrepresented).

478. 577 F.2d 586 (9th Cir. 1978).

479. *Id.* at 588. The court found Ninth Circuit support for the proposition that the activities must be connected to the union or the employer in *NLRB v. Aaron Bros. Corp.*, 563 F.2d 409, 412 (9th Cir. 1977), and *NLRB v. Heath Tec Division*, 566 F.2d 1367, 1372 (9th Cir. 1978).

480. 597 F.2d 166 (9th Cir. 1979).

481. *Id.* at 167.

482. 586 F.2d 699 (9th Cir. 1978).

483. *Id.* at 703.

484. 590 F.2d 300 (9th Cir. 1979).

485. *Id.* at 303.

486. *Claussen Baking Co.*, 134 N.L.R.B. 111, 112 (1961); *Continental Can Co.*, 80 N.L.R.B. 785, 786 (1948).

487. NLRB REGULATION, *supra* note 452, at 258. *See NLRB v. Aaron Bros. Corp.*, 563

*erts Tours, Inc. v. NLRB*<sup>488</sup> argued that union supporters had campaigned within the restricted area by talking to employees in the "line of march to the polls."<sup>489</sup> Although the court was unable to dispose of the case because the Board record had not been sufficiently developed, the court did announce that polling place campaigning is lawful unless the acts interfere with voters' peaceful reflection at the polls.<sup>490</sup>

The issue of who may not be approached within the prohibited area was addressed in *NLRB v. L.D. McFarland Co.*<sup>491</sup> Although the court found the contention untimely, it indicated in dictum that conversations with non-voters are always permissible, even if they occur within the prohibited area.<sup>492</sup>

The Board has a policy against furthering or encouraging racial discrimination, and in *Natter Manufacturing Corp. v. NLRB*,<sup>493</sup> an employer sought to challenge a local union's certification on the ground that the international union and other affiliated locals engaged in discriminatory practices. The court held that the employer had not made out a prima facie case because the local in question was not "dominated by the International or a tainted local."<sup>494</sup> The Ninth Circuit did not decide if it would uphold the Board's new rule (granting certification to allegedly discriminatory unions and postponing the hearing of

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F.2d 409, 412 (9th Cir. 1977) (campaigning within 100 feet of the polls and shouting by employees in the vicinity of the polling area did not destroy laboratory conditions); *Locust Indus., Inc.*, 218 N.L.R.B. 717 (1975), *enforced sub nom. Owens v. NLRB*, 535 F.2d 1324 (D.C. Cir. 1976) (mem.) (union did not interfere with election when a union activist stood within 65 feet of the door to the polling area and conversed with prospective voters); *Marvil Int'l Security Serv., Inc.*, 173 N.L.R.B. 1260 (1968) (scope of non-electioneering area not a fixed distance; rather, it is within the discretion of the Regional Director).

488. 578 F.2d 242 (9th Cir. 1978).

489. *Id.* at 244.

490. *Id.* The court said that campaigning 150 feet from the polls might be within the prohibited area if the circumstances were such that the voters were disturbed.

491. 572 F.2d 256 (9th Cir.), *cert. denied*, 439 U.S. 911 (1978).

492. *Id.* at 260. The employer had relied on *Milchem, Inc.*, 170 N.L.R.B. 362 (1968), to support the proposition that conversation was objectionable within the non-electioneering perimeter regardless of its content or speakers. The court in *McFarland* distinguished that case on the ground that what was actually prohibited in *Milchem* was "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." *Id.* at 363 (emphasis added).

493. 580 F.2d 948 (9th Cir. 1978). When *Natter Mfg.* was at the administrative level, the Board was following a policy of denying certification to labor unions which engaged in racial discrimination. *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974). While the case was pending on appeal, the Board reversed itself and decided not to deny certification on this ground any longer. Henceforth allegations of union discrimination would be resolved during subsequent unfair labor practice proceedings. *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977).

494. *Id.* at 951-52.

the discrimination issue until a later unfair labor practice proceeding)<sup>495</sup> because in this case the discrimination issue had been raised at an unfair labor practice proceeding. The court, however, did allude to the possibility that it might not uphold the new Board rule.<sup>496</sup>

### 3. Bars to conducting elections

#### *a. statutory bar*

Section 9(c)(3) of the Act<sup>497</sup> states that "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." It is the clear policy of the Board that this statutory period begins to run on the day of balloting and not on the day certification is granted.<sup>498</sup> In *NLRB v. Tri-Ex Tower Corp.*,<sup>499</sup> for example, the employer was certified as the election winner ten months after the day of balloting.<sup>500</sup> Another election was held only two months after the certification but more than twelve months following the first ballot. The court reluctantly upheld the second election because it placed the employer in a "damned if you do, damned if you don't" position during the ten months the Board was deliberating.<sup>501</sup>

#### *b. pending unfair labor practice proceedings*

The Board has a general policy against proceeding in a representation case while an unfair labor practice charge is pending, unless the charging party files a request to proceed.<sup>502</sup> That rule was dispositive in *NLRB v. Tri-City Linen Supply*,<sup>503</sup> in which the employer challenged an election because it was scheduled during the pendency of an unfair

495. *Id.* at 951 n.2.

496. The court noted the Eighth Circuit's holding that the Constitution prohibits the Board from certifying a discriminatory union, *Mansion House Center Mgt. Corp.*, 473 F.2d 471 (8th Cir. 1973), and pointed out that the question was still open in the Ninth Circuit, 580 F.2d at 951 n.2.

497. 29 U.S.C. § 159(c)(3) (1976).

498. *E.g.*, *R.L. Polk & Co.*, 123 N.L.R.B. 1171, 1171 (1959); *Kolcast Indus., Inc.*, 117 N.L.R.B. 418, 419 (1957); *Mallinckrodt Chem. Works*, 84 N.L.R.B. 291, 292 (1949).

499. 595 F.2d 1 (9th Cir. 1979).

500. The reason for the Board's delay was unknown. *Id.* at 1.

501. *Id.* (citing *NLRB v. Dorn's Transp. Co.*, 405 F.2d 706, 715 (2d Cir. 1969)). The employer was faced with the insoluble dilemma that during the post-election, pre-certification period a wage increase might be considered an unfair labor practice while a failure to give such an increase could provide the union with invaluable propaganda.

502. *Louis-Allis Co. v. NLRB*, 463 F.2d 512, 516 (7th Cir. 1972); *Pullman Indus., Inc.*, 159 N.L.R.B. 580, 583-84 (1966); *Carlson Furniture Indus., Inc.*, 157 N.L.R.B. 851, 853 (1966).

503. 579 F.2d 51 (9th Cir. 1978).

labor practice charge. Since the union had filed a request to proceed with the representation proceedings at the time the unfair labor practice charge was filed, the election's validity was upheld.<sup>504</sup> The court rejected the argument that a Board decision to allow an election to be held during an unfair labor practice investigation is per se an abuse of its discretion.<sup>505</sup>

#### 4. Eligibility to vote in representation elections

Employees who are employed in a unit during the payroll period immediately preceding the date of the direction of an election are eligible to vote, as long as they are still employed when the election is held.<sup>506</sup> The determination of who is still employed varies from industry to industry, but generally those who have a substantial continuing interest in their employment are allowed to vote.<sup>507</sup>

##### *a. employees on layoff*

The NLRB has held that an employee on layoff has a substantial continuing interest in his employment if he has a reasonable expectation of recall and has not quit or been terminated.<sup>508</sup> The determination of whether an employee has a "reasonable expectation of recall" is a question of fact dependent on the peculiarities of each situation.<sup>509</sup> For example, in *NLRB v. L.D. McFarland Co.*,<sup>510</sup> the putative voter was ineligible to vote because he was a temporary employee who had been permanently laid off and was working elsewhere. In *NLRB v. Adrian Belt Co.*,<sup>511</sup> an employee was laid off because work was slow and subsequently was hospitalized for treatment of an illness. Her supervisor told her that it was a good time to be in the hospital since work was slow. The employee returned to work on election day and sought

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504. *Id.* at 57.

505. *Id.* n.14.

506. *Carl B. King Drilling Co.*, 146 N.L.R.B. 557 (1967); *Columbia Pictures Corp.*, 61 N.L.R.B. 1030 (1945); *Vultee Aircraft, Inc.*, 24 N.L.R.B. 1184 (1940).

507. *See* cases cited in note 506 *supra*.

508. *American Motors Corp.*, 206 N.L.R.B. 286, 291 (1973); *Miami Rivet Co.*, 147 N.L.R.B. 470, 483 (1964).

509. Laid off voters held eligible to vote: *Kustom Electronics, Inc. v. NLRB*, 590 F.2d 817 (10th Cir. 1978); *Allstate Mfg. Co.*, 236 N.L.R.B. 155, (1978) (only one employee had a reasonable expectancy of reemployment); *Acme Indus. Co.*, 227 N.L.R.B. 249 (1976) (employees told they could expect recall in 3 months). Laid off voters held ineligible to vote: *Resident Home*, 239 N.L.R.B. No. 2, 99 L.R.R.M. 1443 (Oct. 13, 1978) (positions had been eliminated for economic reasons); *Tomadur, Inc.*, 196 N.L.R.B. 706 (1972).

510. 572 F.2d 256, 260 (9th Cir. 1978).

511. 578 F.2d 1304 (9th Cir. 1978).

to vote. At that time her supervisor told her there was no work and suggested she continue on disability or unemployment. The court held that she was eligible to vote because it had not been established by overt action or clear communication from the employer that the employment relationship was terminated.<sup>512</sup> Even though the employee had violated the call-in rule,<sup>513</sup> she maintained a reasonable expectation of recall because usually employees who violated the call-in rule were not immediately terminated, and the supervisor's remarks to the employee indicated a leave of absence rather than a layoff.<sup>514</sup>

The Ninth Circuit overruled the Board by finding an employee on leave eligible to vote in *Valley Rock Products, Inc. v. NLRB*.<sup>515</sup> The employee had requested a leave of absence on February 6 for personal reasons. It was granted in writing a week later and covered a period not to exceed one year. He voted in the election which was held in July. Although during his leave he was self-employed hauling logs, he was allowed to vote in the July election. The court held that he was an employee at the time of the election because of the presumption that an employee on leave is still an employee<sup>516</sup> and because of the company's letter granting him the leave.<sup>517</sup>

#### *b. supervisors*

A supervisor<sup>518</sup> is not eligible to vote in representation elections because section 2(3) of the Act clearly excludes them from the defini-

512. *Id.* at 1308 (citing *Trailmobile Div., Pullman, Inc. v. NLRB*, 379 F.2d 419 (5th Cir. 1967)). *Cf.* *Bio-Science Labs. v. NLRB*, 542 F.2d 505 (9th Cir. 1976) (the rule was applied in the context of the 12-month right to vote when on an economic strike).

513. Employees were required to call in each day to see if work was available. 578 F.2d at 1309.

514. *Id.*

515. 590 F.2d 300 (9th Cir. 1979).

516. *Id.* at 303-04 (citing *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1308 (9th Cir. 1978)).

517. *Id.* at 304.

518. A supervisor is defined in the Act as follows:

[A]ny 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.

29 U.S.C. § 152(11) (1975). *See* *GAF Corp. v. NLRB*, 524 F.2d 492 (5th Cir. 1975) (employee not a supervisor even though he was promoted to acting foreman for an "indefinite period"); *Harold Jackson*, 239 N.L.R.B. No. 137, 100 L.R.R.M. 1094 (Dec. 21, 1978) (writing of service orders does not make a wreck driver/mechanic a supervisor); *Simley Corp.*, 233 N.L.R.B. 391, (1977) (employee held not a supervisor).

tion of an "employee"<sup>519</sup> and only "employees" are eligible to vote.<sup>520</sup> Two voters were challenged on the ground that they were supervisors in *NLRB v. Adrian Belt Co.*<sup>521</sup> One of them, Beltran, was found to be a supervisor on the basis of the following facts: (1) when the owners were away, he was left in complete charge of the work; (2) when the owners were present, he directed the work of other employees;<sup>522</sup> (3) his salary greatly exceeded the hourly wages paid to other employees; (4) he received a commission based on the total shop production;<sup>523</sup> and (5) he was not required to punch a time clock, worked longer hours than other employees, and was free to leave without permission.<sup>524</sup>

Similarly, a factual dispute over whether the second voter was introduced to other employees as a foreman was not sufficient to undermine his supervisory status, which was supported by the following factors: (1) despite the fact that he was paid hourly, he was responsible for the direction of most of the work at the plant during the absence of the owner; (2) he directed the work of three delivery employees;<sup>525</sup> (3) he opened the shop daily; (4) he was responsible for reassigning employees to complete rush orders; (5) he relayed the owner's instructions in Spanish to employees; and (6) he attempted to resolve grievances before referring them to the owner.<sup>526</sup>

### C. Representation Without an Election

In *NLRB v. Gissel Packing Co.*,<sup>527</sup> the Supreme Court considered the conditions which warrant the issuance of a bargaining order without an election. The Court focused its inquiry on the propriety of a

519. "The term 'employee' . . . shall not include . . . any individual employed as a supervisor." 29 U.S.C. § 152(3) (1976).

520. See note 506 *supra* and accompanying text.

521. 578 F.2d 1304 (9th Cir. 1978).

522. This was one of the factors found determinative by the Seventh Circuit in *NLRB v. Henry Colder Co.*, 416 F.2d 750 (7th Cir. 1969) and by the NLRB recently in *Liberty Mkts., Inc.*, 236 N.L.R.B. 1486 (1978).

523. A 1% override commission arrangement for the putative supervisor in *NLRB v. Henry Colder Co.*, 416 F.2d 750 (1960), also supported the Seventh Circuit's determination in that case.

524. 578 F.2d at 1311. The court found Ninth Circuit support for this position in *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960), where the county editor of a newspaper was held to be a supervisor because he had full authority over the assignments for his department's reporters, planned their work schedules, determined what news to use, and was held fully accountable for the product and performance of the reporters in his department. *Id.* at 550-51.

525. This factor was also supportive of similar findings in *Liberty Mkts., Inc.*, 236 N.L.R.B. 1486 (1978), and *NLRB v. Henry Colder Co.*, 416 F.2d 750 (7th Cir. 1969).

526. 578 F.2d at 1312.

527. 395 U.S. 575 (1968).



bargaining order when an employer engages in anti-union activities and the union asserts majority status on the basis of authorization cards.<sup>528</sup>

The Supreme Court delineated three categories of cases in which the Board might consider granting a bargaining order without an election. The Court distinguished between unfair labor practices that are outrageous and pervasive, those that are less extensive yet substantial, and those that are minor.<sup>529</sup> As to the activity characterized as "outrageous," "pervasive" or "exceptional," the Court sanctioned the use of the bargaining order.<sup>530</sup> The Court even intimated that in such circumstances there might be no need to inquire about union majority status.<sup>531</sup> Regarding "minor" employer misconduct, the Court noted that such conduct is always insufficient to justify a bargaining order.<sup>532</sup> The Court expressly approved of bargaining orders in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."<sup>533</sup> A bargaining order is an appropriate remedy when the holding of a fair election has been precluded by the improper acts of the employer.<sup>534</sup> Preliminarily, however, the Board is obligated to find that the union at one point enjoyed a majority status.<sup>535</sup>

### 1. Majority representation

The initial point of inquiry, therefore, is whether or not a majority of employees signed union authorization cards. The validity of such cards is to be measured by the standard adopted by the Court in *Gissel*. An authorization card is presumed valid unless the employee can "demonstrate that the solicitors told the employees that the *sole* purpose of the card was to obtain a union election."<sup>536</sup> Employees are bound "by the clear language of what they sign unless that language is

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528. Authorization cards are used as an indicator of union majority status. For example, they may be regular union membership cards, *NLRB v. Federbrush Co.*, 121 F.2d 954 (2d Cir. 1941), applications for membership, *NLRB v. Valley Broadcasting Co.*, 189 F.2d 582 (6th Cir. 1951), authorizations for check-off of union dues, *Lebanon Steel Foundry v. NLRB*, 130 F.2d 404 (D.C. Cir.), *cert. denied*, 317 U.S. 659 (1942), or cards that explicitly designate the union as the signer's bargaining representative, *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

529. 395 U.S. at 613-15.

530. *Id.* at 613-14.

531. *Id.* at 613.

532. *Id.* at 615.

533. *Id.* at 614.

534. *Id.* at 614-15.

535. *Id.* at 614.

536. *Id.* at 584.

deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature."<sup>537</sup>

In *NLRB v. Randall P. Kane, Inc.*,<sup>538</sup> the Ninth Circuit held that it is the "totality of the circumstances surrounding the card solicitation rather than the use of specific words that determines if a union agent effectively negated the card's language through his solicitation."<sup>539</sup> In adopting the totality of the circumstances test, the Ninth Circuit signaled that it was not willing to honor the authorization cards merely because an employee was not told that the "sole" function of the card was to enable a union election.<sup>540</sup> The *Kane* court determined that there was inadequate evidence on whether the union had a card majority and remanded the case to the Board to make this determination based upon the totality of the circumstances.<sup>541</sup>

## 2. Unfair labor practices

### a. with a card majority

In the three Ninth Circuit cases in which a card majority was demonstrated, the Board granted *Gissel* bargaining orders. In *NLRB v. Prineville Stud Co.*,<sup>542</sup> the court determined that the employer's unfair labor practices warranted the issuance of a bargaining order. The employer interrogated employees regarding their union activity, threatened to close the plant unless union activity ceased, and finally closed the plant. In *Great Chinese American Sewing Co. v. NLRB*,<sup>543</sup> the unfair labor practices were even more extensive than those committed in *Prineville*. In addition to interrogating employees and threatening closure, the employer promised a wage increase if the union was rejected, threatened to withhold paychecks until union cards were surrendered, and threatened to discharge union adherents. Because of

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537. *Id.* at 606.

538. 581 F.2d 215 (9th Cir. 1978).

539. *Id.* at 220.

540. The signer's subjective state of mind is not relevant to the determination of an authorization card's validity. *NLRB v. South Bay Daily Breeze*, 415 F.2d 360, 365-67 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970) (court refused to invalidate the card of a signer who thought its only purpose was to secure an election). The subjective belief of the signer had been determinative in at least one circuit prior to *Gissel*. *NLRB v. J.M. Machinery Corp.*, 410 F.2d 587, 591 (5th Cir. 1969); *NLRB v. Southland Paint Co.*, 394 F.2d 717, 730 (5th Cir. 1968).

541. 581 F.2d at 220.

542. 578 F.2d 1292 (9th Cir. 1978).

543. 578 F.2d 251 (9th Cir. 1978) (*per curiam*).

such practices, the employer negated the possibility of a fair election.<sup>544</sup> Therefore, a bargaining order was permissible under the circumstances. The Board's bargaining order was also enforced in *NLRB v. Ultra-Sonic De-Burring, Inc.*<sup>545</sup> The employer discharged two employees for union activity, threatened to cease business operations if the union won a majority, and created the impression that union activities were under surveillance. The court noted that the test to determine the propriety of a bargaining order is not whether the employer misconduct *actually* undermined the union majority, but rather whether it had a *tendency* to do so.<sup>546</sup>

*b. with no card majority*

In *NLRB v. Randall P. Kane, Inc.*, the court briefly addressed the question of whether a bargaining order may issue in the absence of a union majority. While recognizing the language in *Gissel* suggesting that, even without a union majority, bargaining orders might be proper if the employer's misconduct were exceptional, the court found that the employer's activities were not of the requisite magnitude.<sup>547</sup> Thus, for a bargaining order to issue, the court required the union to show a majority of authorization cards.<sup>548</sup> Neither the Board nor any court has issued a bargaining order on such grounds, although the Board has recently held that it has the authority to do so.<sup>549</sup> The Ninth Circuit joins the Board and the Fifth Circuit<sup>550</sup> in alluding to the permissibility

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544. *Id.* at 256.

545. 593 F.2d 123 (9th Cir. 1979) (per curiam).

546. *Id.* at 124.

547. 581 F.2d 215, 220 (9th Cir. 1978).

548. *Id.*

549. United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 179, 101 L.R.R.M. 1278, 1279-80 (June 12, 1979) (a majority of the Board held that its remedial authority may include the power to issue a bargaining order even in the absence of a prior showing of majority support for the union, but did not find such an order appropriate in the case). See Herbert Halperin Distrib., Corp., 228 N.L.R.B. 239, 239 n.3 (1977), *enforced*, 84 LC ¶ 10,645 (4th Cir. 1978) (mem.) (declined to decide that a bargaining order can never be imposed as a remedy, while holding that unfair practices involved were not outrageous or pervasive enough to justify one); Pinter Bros., Inc., 227 N.L.R.B. 921, 922 (1977), *enforced*, 84 LC ¶ 10,898 (2d Cir. 1978) (*Gissel* cited for the proposition that cards are not the only method for selecting a bargaining representative); Struthers-Dunn, Inc., 228 N.L.R.B. 49, 70 n.55 (1977), *enforcement denied*, 574 F.2d 796 (3d Cir. 1978) (Board has not yet seen fit to grant a bargaining order without a majority status); Richard L. Cannady (Bob White Target Co.), 189 N.L.R.B. 913, 926 (1971), *enforcement denied*, 466 F.2d 583 (10th Cir. 1972) (hearing examiner believed unfair practices were so "outrageous" and "pervasive" that a bargaining order would be appropriate without inquiry into majority status; however, the union had a majority).

550. *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971).

of such an order, while declining to grant one.<sup>551</sup>

*D. Withdrawal of Recognition*

1. During the certification year

For one year after the date of certification, a certified union enjoys an irrebuttable presumption of majority status, even if evidence of a union's loss of majority is brought forward.<sup>552</sup> An exception to this rule occurs when "unusual circumstances" are present.<sup>553</sup> For example, in *NLRB v. Lee Office Equipment*,<sup>554</sup> the employer sought to defend his refusal to bargain with the union on the grounds that the union's loss of all support and past misconduct constituted unusual circumstances. The court agreed that the union had lost all support because at least four of the ten unit employees wrote to the union indicating their desire to no longer be represented in bargaining. The court held, however, that neither the loss of all support<sup>555</sup> nor past misconduct, without more, constitutes unusual circumstances.<sup>556</sup> If an employer reasonably believes that it cannot continue bargaining with a union due to special circumstances, it can seek relief from the Board in the form of a petition for revocation of certification.<sup>557</sup>

Voluntary recognition, as opposed to Board certification, creates an irrebuttable presumption of majority status for a "reasonable period" from the date of recognition.<sup>558</sup> In *NLRB v. Broadmoor Lumber Co.*,<sup>559</sup> for example, the employer saw the appropriate authorization cards, the employer and union representative held a number of meetings, and the employer told the union representative to prepare a proposed contract. The court held that these facts were sufficient to support the Board's determination that the employer had voluntarily

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551. *NLRB v. Randall P. Kane, Inc.*, 581 F.2d at 220.

552. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

553. *Id.*

554. 572 F.2d 704 (9th Cir. 1978).

555. *Id.* at 706. See *Inter-Polymer Indus., Inc. v. NLRB*, 480 F.2d 631, 633 (9th Cir. 1973) (absent "unusual circumstances" an employer must bargain even if the union has lost its majority status); *NLRB v. Holly-Gen. Co.*, 305 F.2d 670, 675 (9th Cir. 1962) (company must bargain, absent "unusual circumstances," even though a majority of employees has repudiated the union); *Ajax Magnethermic Corp.*, 229 N.L.R.B. 317 (1977), *enforced*, 591 F.2d 1209 (6th Cir. 1979) (employee turnover and changes in "conditions" not "unusual circumstances"); *Tyler Pipe & Foundry Co.*, 161 N.L.R.B. 784 (1966) (fact that only 8% of the employees participated in a strike after an election did not overcome the presumption).

556. 572 F.2d at 706.

557. *Id.* at 707.

558. *Brooks v. NLRB*, 348 U.S. 96, 102 (1954).

559. 578 F.2d 238 (9th Cir. 1978).

recognized the union.<sup>560</sup>

## 2. After the certification year

The NLRB consistently has held that, after the certification year has elapsed, the presumption of majority status can be rebutted conclusively by an employer's reasonable good faith doubt as to the continuing majority status of the union.<sup>561</sup> The District of Columbia Circuit, however, holds that even a reasonable good faith doubt is not enough to rebut the presumption if the union has majority status at the time of the refusal to bargain.<sup>562</sup>

Several of the cases heard by the Ninth Circuit during the survey period dealt with the relevance of an employer's motivation in determining whether that employer had a reasonable good faith doubt. *NLRB v. Tahoe Nugget, Inc.*<sup>563</sup> held that the employer's subjective motivation for challenging the union's majority status is not the proper basis for a determination. The proper standard is whether *objectively* there is a good faith basis for the challenge.<sup>564</sup> An employer's motivation can be important as evidence, however, because as long as union support is lacking and the employer knows about it, he is justified in withdrawing recognition—even if his only motivation is to get rid of the union.<sup>565</sup> Thus, the court in *NLRB v. Cornell, Inc.*<sup>566</sup> used the employer's anti-union sentiment to support an otherwise established lack of good faith doubt.<sup>567</sup>

During the survey period, the Ninth Circuit upheld Board rulings that the employer bears the burden of proof on the reasonable doubt

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560. *Id.* at 241-42.

561. *Ingress-Plastene, Inc.*, 430 F.2d 542 (7th Cir. 1970); *Orion Corp.*, 210 N.L.R.B. 633 (1974), *enforced*, 515 F.2d 81 (7th Cir. 1975); *Automated Business Sys.*, 205 N.L.R.B. 532 (1973); *Bally Case & Cooler Inc.*, 172 N.L.R.B. 1127 (1968), *enforced*, 416 F.2d 902 (6th Cir. 1969), *cert. denied*, 399 U.S. 910 (1970); *Lloyd McKee Motors, Inc.*, 170 N.L.R.B. 1278 (1968).

562. *IAM Lodges 1746 & 743 v. NLRB*, 416 F.2d 809 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970).

563. 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2849 (1979).

564. *Id.* at 299 (citing *Automated Business Sys. v. NLRB*, 497 F.2d 262 (6th Cir. 1974)). See *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1978); *Segger, The Majority Status of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961, 984 (1973).

565. 584 F.2d at 300 n.24. The court explained that in situations in which the employer's actions are not inherently destructive of a union majority, evidence of the employer's anti-union motivation can be determinative.

566. 577 F.2d 513 (9th Cir. 1978).

567. The employer indicated a desire to use an attorney to break the contract and tried to delay the election. *Id.* at 518. See *NLRB v. Top Mfg. Co.*, 594 F.2d 223, 224 n.1 (9th Cir. 1979).

question,<sup>568</sup> that the evidence must be objective,<sup>569</sup> and that the various factors marshalled in support of the employer's argument will be treated cumulatively.<sup>570</sup> The court in *Tahoe Nugget*, however, pointed out that in most of the cases in which an employer has been found to have a reasonable doubt, there was one factor which unequivocally pointed to a decline in union support.<sup>571</sup> In every case on this issue during the survey period, the Ninth Circuit found that employers improperly withdrew recognition from their unions. Due to this unanimity, the following discussion is organized according to those factors which employers have offered to support their contention that they had a reasonable doubt.

*a. employee turnover*

Substantial employee turnover is a factor frequently mentioned by employers to support their position, but the NLRB consistently has maintained that this factor is not persuasive because there is a presumption that the new employees will support the union in the same ratio as the former employees did.<sup>572</sup> Other circuits<sup>573</sup> as well as the Ninth<sup>574</sup> agree with the Board.

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568. NLRB v. Top Mfg. Co., 594 F.2d 223, 224 (9th Cir. 1979); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 300 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2849 (1979).

569. NLRB v. Cornell, Inc., 577 F.2d 513, 516 (9th Cir. 1978) (citing *Terrell Mach. Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970)); NLRB v. Little Rock Downtowner, Inc., 414 F.2d 1084, 1091 (9th Cir. 1969).

570. *Pioneer Inn Assoc. v. NLRB*, 578 F.2d 835, 840 (9th Cir. 1978). *Accord*, *Star Mfg. Co.*, 220 N.L.R.B. 582 (1975), *enforced in part*, 536 F.2d 1192 (7th Cir. 1976).

571. 584 F.2d at 305. The cases on point were *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974) (decertification petition); *NLRB v. Gallaro*, 419 F.2d 97 (2d Cir. 1969) (7 of 10 employees petitioned for decertification); *IAM Lodges 1746 & 743 v. NLRB*, 416 F.2d 809 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970) (union admitted support was lacking).

572. *Windham Community Memo. Hosp.*, 230 N.L.R.B. 1070 (1977); *Surface Indus., Inc.*, 224 N.L.R.B. 155 (1976); *Cutten Supermarket*, 220 N.L.R.B. 507 (1975); *King Radio Corp.*, 208 N.L.R.B. 578 (1974), *enforced*, 510 F.2d 1154 (10th Cir. 1975); *Johns Swift Co.*, 133 N.L.R.B. 185 (1961), *enforced*, 302 F.2d 342 (7th Cir. 1962); *National Plastic Prods. Co.*, 78 N.L.R.B. 699, *enforced*, 175 F.2d 755 (4th Cir. 1949).

573. *Teamsters Local 769 v. NLRB*, 532 F.2d 1385 (D.C. Cir. 1976) (decline in checkoff authorization also present); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270 (5th Cir. 1975) (union silence for 5 to 10 months before withdrawal of recognition also present); *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542 (7th Cir. 1970); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084 (8th Cir. 1969).

574. *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 306 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2849 (1979); *Pioneer Inn Assoc. v. NLRB*, 578 F.2d 835 (9th Cir. 1978).

*b. lack of union membership*

Lack of union membership is insufficient by itself to establish the requisite doubt.<sup>575</sup> The Ninth Circuit's accord is evident in *Pioneer Inn Associates v. NLRB*<sup>576</sup> and in *Sahara-Tahoe Corp.*<sup>577</sup> in which the court stressed that union membership is not synonymous with union support.

*c. union inactivity*

Union inactivity is another oft-cited justification for an employer's refusal to bargain. According to the Board and other circuits,<sup>578</sup> it is no more persuasive than employee turnover or lack of union membership. The Ninth Circuit in *Pioneer Inn* agreed that it is a factor to be considered<sup>579</sup> but noted that in the instant case the union had resumed its activity prior to the withdrawal of recognition. In *Sahara-Tahoe*, after a period of inactivity, the union likewise began to show renewed interest in the employees.<sup>580</sup> In *Tahoe Nugget* the union had not processed any grievances in the years immediately preceding the employer's refusal to bargain, but there was no evidence that any grievance was warranted. Infrequent inspections of the premises by union agents and non-attendance by employees at a meeting held in the spring of 1974, although *de minimis*, could not support a contention that the union failed to meet its responsibilities under the contract.<sup>581</sup>

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575. *NLRB v. North Am. Mfg. Co.*, 563 F.2d 894 (8th Cir. 1977); *Teamsters Local 769 v. NLRB*, 532 F.2d 1385 (D.C. Cir. 1976); *NLRB v. Washington Manor, Inc.*, 519 F.2d 750 (6th Cir. 1975); *Sparks Nugget, Inc.*, 230 N.L.R.B. 275 (1977); *Strange & Lindsay Beverages, Inc.*, 219 N.L.R.B. 1200 (1975); *Orion Corp.*, 210 N.L.R.B. 633, *enforced*, 515 F.2d 81 (7th Cir. 1975); *Cantor Bros.*, 203 N.L.R.B. 774 (1973); *Massey Ferguson, Inc.*, 184 N.L.R.B. 640 (1970), *enforced*, 447 F.2d 1344 (7th Cir. 1971) (*per curiam*); *Terrell Mach. Co.*, 173 N.L.R.B. 1480 (1969), *enforced*, 427 F.2d 1088 (4th Cir. 1970).

576. 578 F.2d 835, 840 (9th Cir. 1978).

577. 581 F.2d 767, 772 (9th Cir. 1978) (citing *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1977)).

578. Held insufficient in *NLRB v. North Am. Mfg. Co.*, 563 F.2d 894 (8th Cir. 1977); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270 (5th Cir. 1975); *Grand Lodge*, 233 N.L.R.B. 143 (1977); *Nevada Club, Inc.*, 229 N.L.R.B. 1186 (1977); *Cut & Curl, Inc.*, 227 N.L.R.B. 1869 (1977).

579. The ALJ had incorrectly found this factor sufficient to displace the presumption of majority status. 578 F.2d at 838, 839 (citing *Star Mfg. Co. v. NLRB*, 536 F.2d 1192, 1194 (7th Cir. 1976); *Sierra Development Co.*, 231 N.L.R.B. 22 (1977), *enforced*, 604 F.2d 606 (9th Cir. 1979)).

580. 581 F.2d at 771.

581. 584 F.2d at 307.

*d. employee dissatisfaction*

One of the most widely mentioned of all factors is employee dissatisfaction with the representative union. The court, in *NLRB v. Cornell, Inc.*,<sup>582</sup> found that employee assertions of dissatisfaction are only one basis upon which reasonable doubt may rest and are insufficient by themselves. In most of the cases cited by the employer, employee dissatisfaction had been accompanied by evidence of some identifiable acts of the majority to support the assertion of dissatisfaction.<sup>583</sup> The court requires such identifiable acts for two reasons: to reduce the likelihood that the minority who complain are mistaken and to avoid allowing a minority to undermine a majority supported union.<sup>584</sup> No such identifiable act was found in *Cornell*.<sup>585</sup>

In three other cases, dissatisfaction was discounted because it came from management.<sup>586</sup> In *NLRB v. Top Manufacturing Co.*,<sup>587</sup> however, the court found that there was objective evidence of dissatisfaction: nine of the unit employees crossed picket lines during the strike and five expressed dissatisfaction with the union. The court held that these complaints were not necessarily a clear indication that the complainants no longer wanted union representation, especially since the complaints were by a relative few,<sup>588</sup> the return to work was a necessity for two individuals and there was no indication it was a rejection of the union on the part of the others.

*e. unwillingness to agree to an election*

The employer in *NLRB v. Cornell, Inc.*<sup>589</sup> asserted that the union's unwillingness to agree to an election supported the employer's reasonable doubt of majority status. Although this factor was determinative in a Seventh Circuit decision,<sup>590</sup> the Ninth Circuit distinguished that

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582. 577 F.2d 513 (9th Cir. 1978).

583. *Id.* at 516 nn.4-9.

584. *Id.* at 516.

585. The employees had communicated their dissatisfaction to the company's general manager (only 4 or 5 of them, according to the employer's testimony), but these employees were not called to testify and the court drew an inference from this against the employer because it bore the burden of proof. *Id.* at 517.

586. *NLRB v. Morse Shoe, Inc.*, 591 F.2d 542 (9th Cir. 1979); *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 305-06 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2849 (1979); *Pioneer Inn Assocs. v. NLRB*, 578 F.2d 835, 840 (9th Cir. 1978).

587. 594 F.2d 223 (9th Cir. 1979).

588. *Id.* at 224-25 (citing *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2849 (1979)); *Pioneer Inn Assocs. v. NLRB*, 578 F.2d 835 (9th Cir. 1978)).

589. 577 F.2d 513 (9th Cir. 1978).

590. *NLRB v. Laystrom Mfg. Co.*, 359 F.2d 799, 801 (7th Cir. 1966).



case from *Cornell* on the ground that two reasonable inferences could be drawn from a union's unwillingness to agree to an election: either the union doubts its own majority or the union doubts the employer's good faith in questioning the union's majority.<sup>591</sup> The Seventh Circuit had cited past union practices to support its inference that the union doubted its own majority. In *Cornell*, however, the Ninth Circuit inferred that the union doubted the good faith of the employer.<sup>592</sup>

*f. withdrawal from a multi-employer unit*<sup>593</sup>

There is a growing list of authority that the presumption of majority support survives the withdrawal of an employer from a multi-employer unit.<sup>594</sup> The employer in *NLRB v. Tahoe Nugget, Inc.*<sup>595</sup> argued that because recognition of the union was based on majority support within the larger multi-employer unit, an employer's withdrawal from that unit removed any presumption that might have attached in the larger unit.<sup>596</sup> The court rejected this reasoning and held that the presumption could be inferred from the employer's own conduct in voluntarily recognizing the union.<sup>597</sup> Furthermore, none of the other factors used by the employers to support their reasonable doubt were found to be sufficient, *e.g.*, filing an election petition by the employer,<sup>598</sup> financial difficulties of the union,<sup>599</sup> and bargaining history.<sup>600</sup>

591. 577 F.2d at 517-18.

592. *Id.*

593. A multi-employer unit consists of a group of employers joined together to help offset the bargaining strength of powerful unions. FRIEDEN, *THE TAFT-HARTLEY ACT AND MULTI-EMPLOYER BARGAINING* 4-5 (1949).

594. *NLRB v. Independent Ass'n of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB v. Acme Iron Works, Inc.*, 582 F.2d 153 (2d Cir. 1978); *Eugene's*, 232 N.L.R.B. 366 (1977); *Club Cal-Neva*, 231 N.L.R.B. 22 (1977), *enforced*, 604 F.2d 606 (9th Cir. 1979); *Barney's Club, Inc.*, 227 N.L.R.B. 414 (1976). *See cases cited in Morales, Presumption of Union's Majority Status in NLRB Cases*, 29 LAB. L.J. 309, 313 n.27 (1978).

595. 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2849 (1979).

596. *Id.* at 302.

597. *Id.* at 303. The court found support in the Act's policy of preserving industrial peace via maintenance of the status quo; if majority status did not survive withdrawal, unions would be encouraged to avoid multiple party bargaining, an "effective device for promoting industry-wide peace." *Id.* at 304. Voluntary recognition was also a determinative factor in *Sahara-Tahoe Corp.*, 581 F.2d 767 (9th Cir. 1978).

598. *NLRB v. Top Mfg. Co.*, 594 F.2d 223 (9th Cir. 1979) (citing *Brooks v. NLRB*, 348 U.S. 96, 103, 104 n.18 (1954)); *Bally Case & Cooler, Inc. v. NLRB*, 416 F.2d 902, 905 (6th Cir. 1969), *cert. denied*, 399 U.S. 910 (1970)).

599. *Sahara-Tahoe Corp.*, 581 F.2d 767, 771 (9th Cir. 1978); *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 307 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2849 (1979) (union being placed in trusteeship not probative of lack of support).

## IV. COLLECTIVE BARGAINING

A. *The Duty To Bargain in Good Faith*

Section 1 of the NLRA declares that the policy of the United States is to protect commerce "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."<sup>601</sup> To implement this policy, section 8(a)(5) of the NLRA<sup>602</sup> provides that an employer<sup>603</sup> commits an unfair labor practice if it refuses to bargain collectively with the representatives<sup>604</sup> of its employees.<sup>605</sup> Similarly, a labor organization commits an unfair labor practice in violation of section 8(b)(3) for refusal to bargain collectively with the employer.<sup>606</sup> Together, these statutory provisions<sup>607</sup> establish a continuing reciprocal duty between an employer and the representative of a majority of its employees to bargain collectively and in good faith.<sup>608</sup> This mutual bargaining obligation extends to the "wages,

600. *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 307-08 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2849 (1979).

601. 29 U.S.C. § 151 (1976).

602. *Id.* § 158(a). Employer conduct which violates § 8(a)(5) necessarily coerces and restrains employees in their § 7 rights and thus derivatively violates § 8(a)(1). *See* GORMAN, *supra* note 288, at 132.

603. Under 29 U.S.C. § 152(2) (1976), the term "employer" includes "any person acting as an agent of an employer, directly or indirectly," but expressly excludes "the United States or any wholly owned Government corporation, any Federal Reserve Bank, persons subject to the Railway Labor Act, labor organizations and their agents and officers, or any State or political subdivision thereof." (emphasis added). *See* Local 370, Int'l Union of Operating Eng'rs v. Detrick, 592 F.2d 1045, 1046 (9th Cir. 1979) (per curiam) (county government not an "employer" within meaning of NLRA). *See also* *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (church-affiliated schools not within jurisdiction of NLRB; Board therefore without authority to issue bargaining order).

604. The term "representative" includes any labor organization or individual. 29 U.S.C. § 152(4) (1976).

605. The term "employee" under § 152(3) includes "any employee" and is not limited to the employees of a particular employer; it includes those employees whose work has ceased due to a current labor dispute or unfair labor practice. The term "employee" specifically excludes agricultural laborers, domestic servants, individuals employed by their parents or spouse, independent contractors, and employees and supervisors subject to the Railway Labor Act. *Id.*

606. *Id.* § 158(b)(3).

607. *See also* 29 U.S.C. § 158(d) (1976) (collective bargaining defined); *id.* § 159(a) (employees' exclusive representative defined).

608. *See generally* SECTION OF LABOR RELATIONS LAW, ABA, THE DEVELOPING LABOR LAW 271-439 (1971) [hereinafter cited as ABA LABOR LAW]; COX & DUNLOP, *The Duty To Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1099-1101 (1950); DUVIN, *The Duty To Bargain: Law in Search of Policy*, 64 COLUM. L. REV.

hours and other terms and conditions of employment” of employees in the “unit appropriate for such purposes.”<sup>609</sup>

## 1. Indicia of good and bad faith

### *a. totality of conduct*

Neither party satisfies its bargaining obligation by engaging in a “mere superficial pretense at bargaining.”<sup>610</sup> The duty to bargain in good faith requires that both parties actively participate in the negotiations so as to manifest a present intent to reach the basis for an agreement.<sup>611</sup> In judging a party’s compliance with sections 8(a)(5) and 8(b)(3), the NLRB and the courts look to the entire course of the parties’ bargaining conduct, rather than any single element, to determine

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248, 266 (1964); Fleming, *The Obligation To Bargain in Good Faith*, 16 Sw. L.J. 43, 43-46 (1962).

Prior to the establishment of the National Labor Relations Board, the aim of early legislation and case law was to curtail open hostility as a result of unionization, rather than trying to prevent labor-management disputes by encouraging compromise and good faith negotiation. Enacted in 1935, the Wagner Act, ch. 372, 49 Stat. 449 (1935), was seen as a way to resolve the power imbalance between employer and employees by creating a statutorily enforceable right to organize. ABA LABOR LAW, *supra* note 608, at 272-74. Only two duties of collective bargaining were imposed by the original Act—a section 8(5) duty of the employer to “bargain collectively with the representatives of his employees” and a section 9(a) duty to bargain “in respect to rates of pay, wages, hours of employment, or other conditions of employment.” *Id.* at 273. Critics soon claimed that the one-sided nature of the Wagner Act failed to give employers and employees a corresponding protection against a union’s unjust actions. *Id.* at 27-29. Therefore, in 1947, the Taft-Hartley Amendments added a “good faith” requirement into § 8(d). *Id.* at 275. Section 8(d) was perceived as a means of creating an objective good faith standard by which the courts and the Board could analyze both parties’ bargaining posture. The addition of § 8(b)(3) also was seen as a means of creating a reciprocal duty upon the union to bargain in good faith with the employer. *See Cox, The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

609. *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971).

610. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 688 (9th Cir. 1943).

611. *Id.* at 686 (parties have an “obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground”); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941) (duty to bargain in good faith implies “an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation”). *See NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960) (quoting *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1959)) (“‘duty on both sides . . . to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement’”); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154 (1956) (the duty “obligate[s] the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith”) (Frankfurter, J., concurring); *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 637 (4th Cir. 1940) (Act requires negotiation “in good faith with the view of reaching an agreement if possible”).

whether a violation of the NLRA has taken place.<sup>612</sup> The question is one of "mixed fact and law" and the courts will not lightly disregard the Board's overall appraisal of the situation.<sup>613</sup>

During the survey period, the Ninth Circuit followed the "totality of conduct" doctrine in determining whether the employer and/or the union had bargained in bad faith.<sup>614</sup> In *NLRB v. Pacific Grinding Wheel Co.*,<sup>615</sup> the court applied the "totality of circumstances" ap-

612. In *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941), the Supreme Court adopted the "totality of conduct" standard to determine whether the employer or the union had bargained in good faith. The Court stated that:

conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways.

*Id.* at 477. Generally, the Board and the courts apply a case-by-case "totality of conduct" approach to evaluate the parties' bargaining conduct. *E.g.*, *Jasta Mfg. Co.*, 246 N.L.R.B. No. 16, at 34-36 (Oct. 12, 1979) (employer's conduct included coercive employee interrogation, threats of plant closure, layoffs, loss of business, and encouraging employees to persuade others to change opinions about the union; held to be "so pervasive and outrageous that a bargaining order should issue"); *NLRB v. Milgo Indus., Inc.*, 567 F.2d 540 (2d Cir. 1977) (employer's overall conduct included delayed bargaining, low wage offers, unilateral control of working hours, seniority restrictions, limited bulletin board use, and refusal to give five-minute, end-of-day, wash-up period, resulting in the issuance of a bargaining order); *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2d Cir. 1974) ("[T]he determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual pieces forming part of the mosaic."); *NLRB v. General Elec. Co.*, 418 F.2d 736, 756 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970) (employer "charged with an overall failure to bargain in good faith, compounded like a mosaic of many pieces, but depending not on any one alone. They are together to be understood to comprise the 'totality of circumstances.'"); *NLRB v. B.F. Diamond Constr. Co.*, 410 F.2d 463 (5th Cir. 1969) (*per curiam*) ("Whether or not an employer's bargaining conduct reveals such a strategy is a question to be determined from an assessment of the totality of his conduct.").

613. *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). *See also* *Kellwood Co. v. NLRB*, 427 F.2d 1170, 1171 (9th Cir. 1970) (court adopted Board's finding of employer unfair labor practice).

614. *Graphic Arts Int'l Union, Local 280 v. NLRB*, 596 F.2d 904, 909 (9th Cir. 1979); *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1348 (9th Cir. 1978). *See also* *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 883 (9th Cir. 1978) (Board and the courts must "look at the sum of the evidence, not merely pieces"); *NLRB v. Dent*, 534 F.2d 844, 846 (9th Cir. 1976) (good faith determined by examining circumstances of each case, including "previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations"); *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972) (good faith determined by drawing inferences from the conduct of the parties as a whole); *NLRB v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377, 381 (9th Cir. 1955) ("A state of mind such as good faith is not determined by a consideration of events viewed separately. The picture is created by a consideration of all the facts viewed as an integrated whole.").

615. 572 F.2d 1343 (9th Cir. 1978).

proach to the duty to bargain and found that an employer had been guilty of bad faith bargaining. Following six months of protracted negotiations, the union had gone out on strike. Before the strike, the company had violated a settlement agreement covering a prior unfair labor practice charge and had communicated directly with its employees in order to bypass the union. Immediately after the strike, the company unilaterally lowered its wage offers, proposed that the union security clause and other pro-union contractual terms be eliminated, and refused to provide the union with relevant data upon request. The court concluded that, "[v]iewed separately, each of the actions indicate[d] only hard bargaining by the company." Taken together, however, there was "substantial evidence to support the Board's conclusion that after the union went out on strike, the company's main goal was to punish, not to bargain with the union."<sup>616</sup>

In *Graphic Arts International Union, Local 280 v. NLRB*,<sup>617</sup> the Ninth Circuit held that the totality of the union's conduct indicated a failure to bargain in good faith with ten independent employers in violation of section 8(b)(3). The court found that the unilateral imposition of individualized contracts, the refusal to discuss bargaining proposals and modifications, and the unilateral imposition of an overtime ban, demonstrated the union's violation of the bargaining obligation.<sup>618</sup>

#### *b. surface bargaining*

In evaluating the parties' bargaining posture, the Board and the courts distinguish between "surface" and "hard" bargaining.<sup>619</sup> Sec-

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616. *Id.* at 1349.

617. 596 F.2d 904 (9th Cir. 1979).

618. *Id.* at 907-10.

619. *West Coast Casket Co.*, 192 N.L.R.B. 624 (1971), *enforced in part*, 469 F.2d 871 (9th Cir. 1972), provides a good example of surface bargaining. The Board found that the employer's bargaining was consistent in its attempt "to sabotage any effective bargaining." The company's "surface bargaining" strategy included: isolating union representatives from contact with the plant, refusing to meet at any place other than company "territory," insistence on the presence of a reporter to take a verbatim transcript, insistence on unreasonable delays in the scheduling of meetings, frivolous objections to certain union proposals, and rejection of substantially all of the union's proposals and "hard line" counterproposals. Viewed in its entirety, the company's conduct indicated a desire to "push the union to the wall and avoid an agreement." 192 N.L.R.B. at 637. *See also* *Greensboro News Co.*, 222 N.L.R.B. 893 (1976), *enforced*, 549 F.2d 308 (4th Cir. 1977) (per curiam) (union's adamant insistence on inclusion of arbitration clause and overall conduct, "which negated any intention of reaching an agreement," violated § 8(b)(3)); *West Coast Liquidators, Inc.*, 205 N.L.R.B. 512 (1973), *enforced sub nom. NLRB v. Selvin*, 527 F.2d 1273, 1277-78 (9th Cir. 1975) (employer who summarily rejected union proposals without offering counterproposals guilty of surface bargaining).

tion 8(d) of the NLRA states that the duty to bargain requires that an employer meet at reasonable times and confer in good faith with the union, but this obligation does not compel the parties to reach an agreement, agree to a proposal, or make a concession.<sup>620</sup> From the context of the employer's total conduct, it must be decided whether the employer who "meets" and "confers" with a labor organization is lawfully engaged in hard bargaining to achieve a desirable contract or in surface bargaining to frustrate the possibility of reaching an agreement.

In *NLRB v. Reed & Prince Manufacturing Co.*,<sup>621</sup> the First Circuit adopted the Board's test to distinguish between surface and hard bargaining. In *Reed*, the Board had found that an employer was guilty of surface bargaining because its final offer included "terms which no 'self-respecting union' could be expected to accept."<sup>622</sup> The Ninth Circuit, however, has declined to apply the Board's "self-respecting union" test. In *NLRB v. Tomco Communications, Inc.*,<sup>623</sup> the Ninth Circuit rejected the Board's finding that an employer had engaged in general bad faith bargaining. The Board had based its conclusion upon the combined effect of the company's economic and non-grievance proposals, overall bargaining tactics, and an illegal lockout that had penalized employees for their unionization and collective bargaining.<sup>624</sup> The court reasoned that the company's economic package represented

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620. 29 U.S.C. § 158(d) (1976). See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 104-09 (1970) (under § 8(d), NLRB does not have power to compel either party to agree to a contract checkoff clause or any other substantive provision of collective bargaining agreement); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) (§ 8(d) expressly provides that "the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession").

621. 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953).

622. *Id.* at 139. The Second Circuit also adopted the Board's test in *Vanderbilt Prods., Inc. v. NLRB*, 297 F.2d 833, 834 (2d Cir. 1961) (per curiam). The employer not only incorporated an extensive set of terms which no "self-respecting union could brook," into its substantive proposals, but also conditioned all negotiations upon the acceptance of its offer. *Id.* at 833.

623. 567 F.2d 871 (9th Cir. 1978). Following a Board certified election, the company and the union reached an impasse in negotiations. The employer threatened economic action if the union failed to accept its last offer, which included a minimal wage increase, a reduction in sick leave, and rejection of an existing grievance procedure concerning shop steward participation. *Id.* at 877-83.

624. The court noted that the surface bargaining cases, upon which the Board had relied, were distinguishable on their facts. These decisions included *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953) and *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717 (9th Cir. 1972). They were distinguished because they involved more "aggravated" behavior. The court characterized the instant case as one involving "hard bargaining between two parties who were possessed of disparate economic power: a relatively weak Union and a relatively strong Company." 567 F.2d at 883-84.

"some improvement in economic benefits."<sup>625</sup> Declining to apply the Board's "self-respecting union test" for good faith negotiations,<sup>626</sup> the court instead evaluated the "reasonableness" of the employer's total bargaining posture in light of its economic position and overall bargaining proposals.<sup>627</sup> The court concluded that the company's natural desire to use its economic power "to retain as many rights as possible" coupled with its proposed increases in the level of employee benefits, could not be characterized as surface bargaining.<sup>628</sup>

*c. proposals and demands*

In determining whether a party has violated its bargaining obligation, the NLRB considers the nature of a party's bargaining proposals and demands.<sup>629</sup> The proposal or demand must amount to a foreclosure of future negotiations before the courts will draw an inference of bad faith bargaining.<sup>630</sup> In *Graphic Arts International Union, Local 280 v. NLRB*,<sup>631</sup> the Ninth Circuit recently upheld the Board's determination that a union had failed to bargain in good faith with ten independent employers by taking "an intransigent, insincere and cavalier attitude toward the negotiations" and "improperly employ[ing] eco-

625. *Id.* at 877. Moreover, the company had the right to insist on mandatory subjects of collective bargaining, *viz.*, a management rights clause, a no-strike clause, a waiver of past practices clause, and an integration or zipper clause, even to the point of impasse. *Id.* at 878-80. Conceding that several of the offsetting provisions in the company's final offer were "harsh," such practices were merely "evidence of sharp draftsmanship." Furthermore, absent abuse, the company was allowed to retract previous concessions prior to the union's acceptance. *Id.* at 882-83.

626. *Id.* at 883-84. The court characterized the Board's test as "com[ing] perilously close to determining what the employer should give by looking at what the employees want." *Id.* at 883.

627. *Id.* at 884.

628. *Id.* at 883-84.

629. In *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972), the Ninth Circuit held that the Board may look to the content of the bargaining proposals as part of its review of the relevant circumstances. See *H.K. Porter Co.*, 153 N.L.R.B. 1370, 1372 (1965), *enforced sub nom. United Steelworkers v. NLRB*, 363 F.2d 272 (D.C. Cir.), *cert. denied*, 385 U.S. 851 (1966), 385 U.S. 1036 (1967) (employer's refusal to agree to a dues checkoff proposal was evidence of bad faith). On remand, the Board ordered the employer to grant the checkoff provision. 172 N.L.R.B. 966 (1968), *aff'd per curiam*, *H.K. Porter Co. v. NLRB*, 414 F.2d 1123 (1969), *rev'd as to remedy*, 397 U.S. 99 (1970) (Board is without authority to compel agreement on substantive contractual provisions).

630. See *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 409 (9th Cir. 1977) (quoting *Fraser & Johnston Co. v. NLRB*, 469 F.2d 1259, 1263 (9th Cir. 1972)) ("adhering to an untenable legal position during the course of negotiations is inconsistent with the obligation to bargain in good faith").

631. 596 F.2d 904 (9th Cir. 1979).

conomic power to thwart negotiations.”<sup>632</sup> The union’s unilateral imposition of bargaining proposals was tantamount to a foreclosure of negotiations in light of other evidence indicating its refusal to bargain in good faith.<sup>633</sup> Drawing the line between bad faith “obstructionist intransigence” and merely “hard bargaining,” the court rejected the union’s contention that it had “strenuously bargained for its proposals [in good faith] and had the economic clout to back up its demands [without violating the Act].”<sup>634</sup>

## 2. The duty to furnish information

The duty to bargain in good faith includes an employer’s obligation to provide requested information to the union so that the union can perform its function as a collective bargaining agent.<sup>635</sup> The union’s good faith request for information, however, is a prerequisite to the employer’s duty to bargain.<sup>636</sup> The union must demonstrate that the information requested is either relevant to bargaining issues or useful to the effective enforcement and administration of the existing collective bargaining agreement. The relevancy requirement is broadly interpreted by the courts.<sup>637</sup> Generally, an employer’s defense to this

632. *Id.* at 907.

633. *Id.* at 907-09, 908 n.5. The union had also committed an unfair labor practice by seeking to force one of the independent employers to leave a multi-employer bargaining association in violation of § 8(b)(1)(B) and § 8(b)(3) of the NLRA.

634. *Id.* at 907-08 (citing *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 407, 411 (9th Cir. 1977)) (employer refused to bargain in good faith by opposing security and hiring hall proposals “as a matter of moral principle”).

As a general rule, a party bargains in bad faith if it unilaterally imposes conditions that are patently unreasonable to the other party. Thus, the Ninth Circuit in *Graphic Arts* also found that the union had violated § 8(b)(1)(B) (unfair labor practice for union to restrain or coerce employer in selection of his collective bargaining representatives) and § 8(b)(3) of the NLRA because the purpose and effect of the union’s unilateral action was to induce the employer to “pull out of [the multi-employer association] and bargain individually with the Union.” *Id.* at 909.

635. *E.g.*, *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956); *NLRB v. Twin City Lines, Inc.*, 425 F.2d 164, 167 (8th Cir. 1970); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 450 (4th Cir.), *cert. denied*, 396 U.S. 903 (1969).

636. *E.g.*, *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969).

Although § 8(d) does not expressly provide for access to relevant information, case authority has characterized the union’s right to demand this information as a “statutory right.” *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963). *See also Kroger Co.*, 226 N.L.R.B. 512 (1976).

637. *E.g.*, *NLRB v. F.W. Woolworth Co.*, 352 U.S. 938 (1956) (*per curiam*) (failure to furnish wage information constitutes unfair labor practice); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965) (duty to provide wage information on employees outside collec-



duty will be rejected if it is based on claims of confidentiality<sup>638</sup> or privilege.<sup>639</sup>

While the NLRB requires an employer to disclose the methodology behind its employee promotion tests,<sup>640</sup> it was not until 1975 that the Board ordered an employer to disclose to a union preparing for arbitration the tests taken and scores achieved by particular employees.<sup>641</sup> In 1979, however, the Supreme Court reversed this Board order in *Detroit Edison Co. v. NLRB*.<sup>642</sup> The Supreme Court was confronted with two issues on appeal.<sup>643</sup> First, Detroit Edison questioned the propriety of the Board's order requiring that it disclose copies of the test battery and answer sheets directly to the union. Second, the company questioned the Board's determination that it had violated sections 8(a)(5) and 8(a)(1) by refusing to disclose, without individual employees' written consent, the test scores linked with the employees'

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tive bargaining unit); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963) (employer required to provide time-study material used in setting wage rates and incentives); *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 265 (2d Cir. 1963) (union has right to wage information when negotiating for higher wages); *International Woodworkers, Locals 6-7 v. NLRB*, 263 F.2d 483, 484 (D.C. Cir. 1959) (union entitled to wage information when negotiating new contract); *NLRB v. Oregon Coast Operators Ass'n*, 246 F.2d 280 (9th Cir. 1957) (per curiam) (employer required to provide information on equipment specifications); *Autoprod, Inc.*, 223 N.L.R.B. 773 (1976) (employer must provide employee addresses); *B.F. Goodrich Gen. Prods. Co.*, 221 N.L.R.B. 228 (1975) (duty to furnish information of employer's cafeteria operation); *Skyland Hosiery Mills, Inc.*, 108 N.L.R.B. 1600, 1601 (1954) (employer violated § 8(a)(5) by refusing to provide wage insurance information). *Cf.* *NLRB v. Western Elec., Inc.*, 559 F.2d 1131 (8th Cir. 1977) (employer can refuse to furnish data concerning employees not transferred into bargaining unit); *Nordstrom, Inc.*, 229 N.L.R.B. 601 (1977) (employer may refuse to supply union with list of employees who had worked during a strike).

638. *E.g.*, *General Elec. Co.*, 466 F.2d 1177, 1185 (6th Cir. 1972) (wage information); *NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 979 (8th Cir. 1967) (selling-price lists); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 68-69 (3d Cir. 1965) (job evaluation and wage data). *See* *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 n.9 (1979) (White, Brennan, & Marshall, J.J., dissenting).

639. *NLRB v. Item Co.*, 220 F.2d 956, 959 (5th Cir.), *cert. denied*, 350 U.S. 836 (1955), 352 U.S. 917 (1956) (no confidential privilege to refuse to disclose information on employee merit wage increases).

640. *Equitable Gas Co.*, 227 N.L.R.B. 300 (1977).

641. *Detroit Edison Co.*, 218 N.L.R.B. 1024 (1975), *enforced*, 560 F.2d 722 (6th Cir. 1977), *vacated and remanded*, 440 U.S. 301 (1979).

642. 440 U.S. 301 (1979). Justice Stewart delivered the majority opinion.

643. The Sixth Circuit Court of Appeals, in enforcing the Board's order without modification, found that all the requested items were relevant to the union's grievance and therefore ordered the company to turn over the material directly to the union. The court reasoned that the restrictions set by the administrative law judge on the union's use of the materials, including the requirement that the materials be used solely to process and arbitrate grievances and then be returned, guaranteed the tests security and validity. 560 F.2d at 726.

names.<sup>644</sup>

The Court held that the Board had abused its remedial discretion by ordering the company to turn this information over to the union.<sup>645</sup> The Court reasoned that the remedy selected by the Board failed to protect the security of the tests, for the union could not have been subject to a contempt citation if it disobeyed the restrictions placed on it, barring it from disclosing test information to employees who had taken or were likely to take the tests.<sup>646</sup>

The Court also held that the Board's order was erroneous.<sup>647</sup> The employer's willingness to disclose test scores only upon receipt of individual employees' written consent satisfied its statutory duty under section 8(a)(5). The Court reached its decision by balancing the sensitive nature of the testing information, the reasonableness of the company's offer, and the company's lack of intent to undermine the union.<sup>648</sup> The Court therefore rejected the Board's conclusion that the company had failed to bargain in good faith;<sup>649</sup> the interests served in conditioning disclosure on the consent of individual employees justified any impairment of the union's role in processing employee grievances.<sup>650</sup>

An employer who claims financial inability to meet a union wage demand has a duty to provide financial data to substantiate its claim.<sup>651</sup> During the survey period, the Ninth Circuit considered an employer's

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644. 440 U.S. at 312.

645. *Id.* at 316-17. The company's duty to supply information under § 8(a)(5) and the type of disclosure that satisfies the duty depends upon the "facts and circumstances of the particular case." *Id.* at 314 (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)).

646. *Id.* at 314-17. Another problem inherent in the Board's remedy was the danger of inadvertent leaks by the union, for the union was not a party to the enforcement proceedings in the court of appeals. The scope of the Board's enforcement order under § 10(e) of the NLRA is limited by FED. R. Civ. P. 65(d), which makes an injunction binding only "upon the parties to the action . . . and those in active concert or participation with them." Arguably, this would not have included the union. Moreover, NLRB regulations provide for contempt sanctions against a respondent only. 29 C.F.R. §§ 1019, 101.14-.15 (1976). Finally, the Board's General Counsel could refuse to issue a complaint by exercising its unreviewable discretion. *See* 29 U.S.C. § 153(d) (1976); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

647. 440 U.S. at 319-20.

648. *Id.*

649. *Id.* Justices White, Brennan and Marshall joined in a well-reasoned dissent. They expressed deference to the Board's "difficult and delicate" task of balancing competing claims "to effectuate national labor policy" and approved of the Board's remedial order. The Justices felt that the majority overrated the hazards of direct release to the union and underrated the interests that would have been vindicated by the release. *Id.* at 321-25.

650. *Id.* at 319.

651. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). *See NLRB v. Western Wirebound Box Co.*, 356 F.2d 88 (9th Cir. 1966) (employer failed to bargain in good faith by not providing cost figures to union).

financial-inability defense in *NLRB v. Pacific Grinding Wheel Co.*<sup>652</sup> In *Pacific*, the court stated that if a union requests information at a hearing, but fails to follow up on its request, the employer's mere failure to produce the data does not violate its duty to bargain in good faith.<sup>653</sup> The court noted, however, that the company's initial refusal to release existing data on local and industry wage scales would be considered in evaluating whether the company had breached its good faith obligation.<sup>654</sup>

### 3. Impasse

The duty to bargain in good faith is suspended when irreconcilable differences arise in the parties' bargaining positions after extensive negotiations.<sup>655</sup> The Board and the courts recognize that an impasse also permits an employer to make unilateral changes in working conditions that are consistent with its rejected offers to the union.<sup>656</sup> Generally, a deadlock on a single issue does not vitiate the employer's bargaining duty as to other issues.<sup>657</sup> An exception to this rule occurs when the parties deadlock over a "critical issue," thereby creating a situation "as impassable . . . as an inability to agree on several or all issues."<sup>658</sup>

In *NLRB v. Yama Woodcraft, Inc.*,<sup>659</sup> the parties had reached a bona fide impasse on economic issues during contract negotiations. Prior to impasse, the company had attended bargaining sessions, made contract proposals to the union, and reached agreement with the union on many noneconomic issues. When negotiations on critical economic issues reached a deadlock, however, and the union went out on strike, the employer no longer was obligated to bargain on noneconomic is-

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652. 572 F.2d 1343 (9th Cir. 1978).

653. *Id.* at 1348-49. The company justified its regressive wage proposals on the "recession" and on the claim that its wages were competitive in the local community and in the grinding wheel industry. *Id.* at 1346.

654. *Id.* at 1348-49.

655. Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470, 495-501 (1966).

656. See *NLRB v. Southern Coach & Body Co.*, 336 F.2d 214, 217 (5th Cir. 1964) (unilateral wage increases, without a bona fide bargaining impasse, constitutes refusal to bargain in good faith); *NLRB v. Intracoastal Terminal, Inc.*, 286 F.2d 954, 958 (5th Cir. 1961) (unilateral changes in policy, which were not within bargaining negotiations, not a permissible activity even after an impasse); *Falcon Tank Corp.*, 194 N.L.R.B. 333 (1971) (assuming an impasse, employer violates NLRA with wage increases that exceed those offered to union during bargaining).

657. *Pool Mfg. Co.*, 70 N.L.R.B. 540, 549 (1946), *aff'd*, 339 U.S. 577 (1949).

658. *American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 627 n.13 (D.C. Cir. 1968).

659. 580 F.2d 942 (9th Cir. 1978).

sues. The court held that the company did not violate sections 8(a)(5) and 8(a)(1) by "making its contract offer directly to its employees and in unilaterally effectuating that offer."<sup>660</sup>

#### 4. Defenses to the duty to bargain

##### *a. the construction industry proviso*

Section 8(f) was added to the NLRA by the Labor-Management Reporting and Disclosure Act of 1959.<sup>661</sup> Pursuant to that section, an employer engaged primarily in the building and construction industry may enter into a pre-hire agreement with a union that has not attained majority status prior to the execution of the agreement. This is an exception to the general rule that an employer commits an unfair labor practice by recognizing a minority union.<sup>662</sup> Moreover, the presumption of a union's majority status during the term of a collective bargaining contract does not apply to pre-hire agreements, and both parties may require a representation election at any time.<sup>663</sup>

The Supreme Court in *Local 103, International Association of Iron Workers v. NLRB*<sup>664</sup> resolved a disagreement between the NLRB and the District of Columbia Circuit Court of Appeals concerning the proper construction of section 8(f) in relation to sections 8(b)(7)(C)<sup>665</sup> and 8(a)(5).<sup>666</sup> The Court upheld the Board's determination that it was an unfair labor practice for an uncertified construction union lacking majority status to engage in extended picketing in an effort to enforce a pre-hire agreement with the employer.<sup>667</sup> Under section 8(b)(7)(C), a union which is not the certified representative of the employees in a bargaining unit commits an unfair labor practice if it pickets an employer with "an object" of "forming or requiring the employer to recognize or bargain with the union as the representative of his employees," and fails to file a petition for an election under section 9(c) within 30 days.<sup>668</sup> Adopting the Board's reasoning,<sup>669</sup> the Court concluded that

660. *Id.* at 944.

661. 29 U.S.C. § 158(f) (1976).

662. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-38 (1961).

663. *Bear Creek Constr. Co.*, 135 N.L.R.B. 1285, 1285-86 (1962).

664. 434 U.S. 335 (1978).

665. 29 U.S.C. § 158(b)(7)(C) (1976).

666. *Id.* § 158(a)(5).

667. 434 U.S. at 340-41.

668. 29 U.S.C. § 158(b)(7)(C) (1976).

669. 434 U.S. at 341. The Board relied on *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693 (1971), *enforcement denied sub nom.* *Local 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973). In *R.J. Smith*, the Board had held that an employer does

section 8(b)(7)(C) was violated since the purpose of the picketing was to force or require the employer to recognize or bargain with the minority union.<sup>670</sup>

*b. suspension during illegal or unprotected activity*

The employer's duty to bargain collectively with the representative of its employees has been characterized as a continuing one.<sup>671</sup> It has also been recognized, however, that an employer's duty to bargain in good faith may be suspended when a labor organization engages in illegal or unprotected activity.<sup>672</sup> Thus, the Board and the courts consistently hold that an employer may use union violence and illegal strikes and slowdowns as defenses to refusal-to-bargain charges.<sup>673</sup>

The employer's illegal and unprotected union activity defense was a highly litigated subject during the survey period. Two recent Ninth Circuit decisions demonstrate that third party misconduct, which is not linked directly to the union, does not suspend the employer's bargaining obligation. In *NLRB v. Hepa Corp.*,<sup>674</sup> the court refused to attribute to a newly certified union the misconduct of "in-plant organizing committee" members because those persons had acted without union authorization.<sup>675</sup> Enforcing the Board's bargaining order and summary judgment against the company, the court found that the employer had

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not commit an unfair labor practice under § 8(a)(5) by unilaterally terminating the bargaining relationship if the union fails to obtain majority status after the execution of a § 8(f) pre-hire agreement.

670. 434 U.S. at 352. The Court distinguished *Building & Constr. Trades Council*, 146 N.L.R.B. 1086, 1087 (1964) (§§ 8(b)-8(c) does not bar extended picketing by a majority union to enforce a contract). The dissenters, Justices Stewart, Blackmun, and Stevens, felt that the majority's construction of § 8(f) allowed the employer and the Board to dismiss a pre-hire agreement "as a nullity." 434 U.S. at 352-53.

671. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939).

672. *Arundel Corp.*, 210 N.L.R.B. 525, 527 (1974) (no duty to bargain during illegal strike that violated contractual no-strike provision).

673. *E.g. United Elec., Radio, & Mach. Workers, Local 1113 v. NLRB*, 223 F.2d 338, 341, 344 (D.C. Cir.), *cert. denied*, 350 U.S. 981 (1955) (no violation in employer's refusal to bargain after union called walkout despite no-strike clause); *Marathon Elec. Mfg. Corp.*, 106 N.L.R.B. 1171, 1180 (1953), *aff'd*, 223 F.2d 338 (D.C. Cir. 1955) (union called strike in breach of contract and forfeited its bargaining rights). *Cf. NLRB v. Insurance Agent's Int'l Union*, 361 U.S. 477, 495-96 (1960); *NLRB v. Katz*, 369 U.S. 736, 741 n.7 (1962) (union-instigated slowdown during contract negotiations will not justify employer's refusal to bargain); *NLRB v. Ramona's Mexican Food Prods., Inc.*, 531 F.2d 390, 394 (9th Cir. 1975) (*per curiam*) (even tortious union tactics do not relieve employer of duty to bargain in good faith).

674. 597 F.2d 166 (9th Cir. 1979) (*per curiam*).

675. *Id.* at 167. The employer failed to produce evidence that connected the union to the third party misconduct. The company had introduced "hearsay evidence" and speculative rumors that could not serve to invalidate the election. *Id.* at 167-68.

violated sections 8(a)(5) and 8(a)(1) and refused to suspend its duty to bargain.<sup>676</sup> Similarly, in *NLRB v. Miramar of California, Inc.*,<sup>677</sup> the court required the employer to bargain following an election. A union misconduct defense was rejected. The company failed to present prima facie evidence that "the alleged statements and conduct of the Union's adherents were instigated, authorized, solicited, ratified, condoned, or adopted by the Union."<sup>678</sup>

The Ninth Circuit reached a different result in *Valley Rock Products, Inc. v. NLRB*.<sup>679</sup> In *Valley Rock*, the court denied the union's motion for summary judgment because the employer had raised substantial and material issues of fact regarding a union official's pre-election conduct and the validity of one employee's election ballot. The company's duty to bargain was suspended pending an evidentiary hearing on the issues.<sup>680</sup>

In *General Teamster, Local 162 v. NLRB*,<sup>681</sup> the Ninth Circuit rejected an employer's "mistaken belief" defense to its duty to bargain. The employer was a party to the union's collective bargaining agreement with an employer association. He was not an association member, however, and a no-strike provision in the agreement did not apply to employers with non-member status. Following an economic strike against the employer's office, the employer withdrew recognition from and repudiated its contract with the union. The court held that the employer had violated sections 8(a)(5) and 8(a)(1) by repudiating the contract, reasoning that it was not excused by the "mistaken belief that it had the benefit of the [employer association] contract's no-strike provisions."<sup>682</sup>

In *NLRB v. Pacific International Rice Mills, Inc.*,<sup>683</sup> the employer's

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676. *Id.* at 167.

677. 601 F.2d 422 (9th Cir. 1979).

678. *Id.* at 424 nn. 4 & 5. The Court's review of three affidavits submitted by the company failed to show that union agents had sanctioned the alleged verbal threats, coercion, and knife exhibitions by company employees. *Id.* at 424-25.

679. 590 F.2d 300 (9th Cir. 1979) (per curiam).

680. *Id.* at 304 (company contended physical attack by union organizer on company officers had deleterious effect on voters' minds; ballot cast by bargaining unit employee). *Accord* *Robert's Tours, Inc. v. NLRB*, 578 F.2d 242, 242-43 (9th Cir. 1978) (unauthorized voter list and campaigning at polling area temporarily excuse employer's duty to bargain; evidentiary hearing necessary). See also *NLRB v. Tri-City Linen Supply*, 579 F.2d 51 (9th Cir. 1978) (employer's defense denied; no evidence in record of union misrepresentation or intimidation); *NLRB v. L.D. McFarland Co.*, 572 F.2d 256 (9th Cir. 1978) (employer's defense denied; no evidence of improper waiver of fees and dues in exchange for votes).

681. 568 F.2d 665 (9th Cir. 1978).

682. *Id.* at 668.

683. 594 F.2d 1323 (9th Cir. 1979).

defense to a refusal to bargain charge was based on an allegation that the hearing officer was biased against the employer because of the officer's membership in the National Labor Relation Board's Employees' Union. The court rejected that defense, reasoning that Executive Order 11491 gave each federal employee, including National Labor Relations Board employees, the right to participate in labor organizations.<sup>684</sup> Moreover, substantial evidence in the record clearly showed the hearing officer's impartiality.<sup>685</sup>

The Ninth Circuit recently rejected race and sex discrimination defenses to the duty to bargain that were raised by an employer and a union. In *Graphic Arts International Union, Local 280 v. NLRB*,<sup>686</sup> the court rejected the union's claim that it was justified in refusing to bargain with certain independent employers who were allegedly guilty of race and sex discrimination. Based upon the "peculiar facts" of the case, the court found that the union had been "perfectly willing to bargain with the independents—discrimination or not—as long as they accepted the terms 'proposed' by the Union."<sup>687</sup> The union had not asserted the defense of discrimination until it had been charged with an unfair labor practice for refusing to consider the employer's bargaining proposals. The court found that the union's protest was a subterfuge to mask its own bad faith bargaining.<sup>688</sup>

Similarly, in *Natter Manufacturing Co. v. NLRB*,<sup>689</sup> the Ninth Circuit rejected an employer's race and sex discrimination defenses and found that the employer had violated section 8(a)(5) by refusing to bargain with a union local. The employer had failed to establish a prima facie case that the union local seeking certification was dominated by a discriminatory international union or a "tainted" local.<sup>690</sup> The employer, therefore, was not entitled to a Board hearing on the discrimination charge.<sup>691</sup>

##### 5. Loss of union's majority status

Generally, the NLRA requires that an employer recognize and bargain with the representative chosen by a majority of his employees

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684. *Id.* at 1327 (citing 3 C.F.R. § 510 (1971)).

685. *Id.*

686. 596 F.2d 904 (9th Cir. 1979).

687. *Id.* at 911.

688. *Id.* at 913-14.

689. 580 F.2d 948 (9th Cir. 1978), *cert. denied*, 439 U.S. 1128 (1979).

690. *Id.* at 952.

691. *Id.* at 952 n.4.

in an appropriate bargaining unit, absent unusual circumstances.<sup>692</sup> The union enjoys an almost conclusive presumption of majority support during the certification year.<sup>693</sup> An employer may not refuse to bargain during this twelve month period even though it may be evident that the union has lost majority support.<sup>694</sup> Furthermore, the Board and the courts agree that a certified union, following the certification year, continues to enjoy a presumption of majority status.<sup>695</sup> Nonetheless, an employer may raise the incumbent union's loss of majority support as a defense to the duty to bargain. Such a defense, however, must be based upon either "clear, cogent, and convincing" evidence of an actual loss of majority support or sufficient "objective considerations" to support a reasonable good faith doubt of the union's majority status.<sup>696</sup>

In *NLRB v. Tahoe Nugget, Inc.*,<sup>697</sup> the Ninth Circuit reiterated the guidelines that govern the continuing presumption of union majority status.<sup>698</sup> In *Tahoe*, a multi-employer unit had voluntarily recognized a

692. *E.g.* *WTOP, Inc.*, 114 N.L.R.B. 1236, 1237 (1955) ("defunct" union is an "unusual circumstance"); *Public Serv. Elec. & Gas Co.*, 59 N.L.R.B. 325, 327 (1944) ("unusual circumstance" when certified union is dissolved).

693. *See* *Brooks v. NLRB*, 348 U.S. 96, 104 (1954). 29 U.S.C. § 159(c)(3) (1976) provides for the "certification bar" rule, which states that "no election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." The Board has acknowledged the existence of "unusual circumstances" as an exception to this rule. *See* cases cited at note 692 *supra*.

694. *NLRB v. Burns Int'l Security Serv.*, 406 U.S. 272, 279 n.3 (1972); *Brooks v. NLRB*, 348 U.S. 96 (1954); *Inter-Polymer Indus., Inc. v. NLRB*, 480 F.2d 631, 633 (9th Cir. 1973); *NLRB v. Holly-General Co.*, 305 F.2d 670, 674 (9th Cir. 1962).

695. *E.g.*, *NLRB v. Tesoro Petroleum Corp.*, 431 F.2d 95, 97 (9th Cir. 1970).

696. *See, e.g.*, *NLRB v. Cornell, Inc.*, 577 F.2d 513, 515-16 (9th Cir. 1978) ("good faith doubt of the union's continuing majority status . . . [must be] reasonable and supported by objective considerations"); *Star Mfg. Co. v. NLRB*, 536 F.2d 1192, 1195 (7th Cir. 1976); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1035-37 (8th Cir. 1976) (renewed employee support for union "evaporated" any "rational basis" for employer to doubt the majority status of the union); *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1978); *NLRB v. Tragniew Inc.*, 470 F.2d 669, 674-75 (9th Cir. 1972); *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 130 (5th Cir. 1969); *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951).

697. 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2847 (1979). In *Tahoe*, a voluntary association of restaurant and casino employers entered into a contract with a union. Two independent employers joined the association soon after it opened for business. Upon subsequently withdrawing, the same two independents refused to bargain with or recognize the union, based upon a reasonable doubt of the union's majority. *Id.* at 296.

698. *Id.* at 297-300. The *Tahoe* court stated that

[t]o sustain an 8(a)(5) charge, the General Counsel must show the union represented a majority of the unit employees when the employer refused to bargain. The Board employs two presumptions obviating an evidentiary showing of majority status. For a reasonable time, usually one year, after certification or voluntary recognition, majority support is irrebuttably presumed absent "unusual circum-



union as collective bargaining agent. The court held that the timely withdrawal of two single employers from that unit did not rebut the presumption of continuing union majority support within the single employer units.<sup>699</sup> The court noted that the employer had not established the seven "objective considerations" that would have demonstrated a decline in union support.<sup>700</sup> Absent such a showing, the single employers had unlawfully refused to bargain with the union.<sup>701</sup>

### B. *The Subjects of Bargaining*

The scope of bargaining includes "wages, hours and other terms and conditions of employment."<sup>702</sup> While the Wagner and Taft-Hart-

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stances." After one year, the presumption becomes rebuttable. Absent sufficient countervailing proof, the presumption establishes, without more, the employer's duty to bargain.

The presumption is rebutted if the employer shows by clear, cogent, and convincing evidence, that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal.

*Id.* at 297 (citation omitted).

699. *Id.* at 304.

700. *Id.* at 304-08. The single employers tried to establish the following: (1) employee discontent, (2) high employee turnover, (3) union inactivity, (4) low membership, (5) financial difficulties, (6) a bargaining history of employee-led challenges to union representation, and (7) admissions of lack of union support. The court characterized the employers, evidence as being "subjective," "ambiguous," and "unreliable." *Id.* at 308.

701. During the survey period, the Ninth Circuit rendered six other decisions involving the same presumption within different factual contexts; the court consistently applied the *Tahoe Nugget* guidelines. *NLRB v. Top Mfg. Co., Inc.*, 594 F.2d 223, 224-25 (9th Cir. 1979) (employee expressions of dissatisfaction with union not the type of "objective criteria" necessary to support reasonable doubt of majority status); *NLRB v. Morse Shoe, Inc.*, 591 F.2d 542, 546 (9th Cir. 1979) (company failed to establish either "actual loss of majority" or "objective criteria"; manager's affidavit of employee's desire to quit union insufficient); *NLRB v. B.C. Hawk Chevrolet*, 582 F.2d 491, 495 (9th Cir. 1978) (employer not allowed to rebut presumption after voluntary recognition nine months prior to refusal to bargain); *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767, 771-72 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979) (employer violated §§ 8(a)(5) & 8(a)(1) by withdrawing recognition from and refusing to bargain with uncertified, voluntarily recognized union; evidence of high turnover, union inactivity, low membership, financial difficulties, and membership drive did not support reasonable doubt defense); *Pioneer Inn Assocs. v. NLRB*, 578 F.2d 835, 839-40 (9th Cir. 1978) (employer's evidence of four "objective considerations" (inactivity, dissatisfaction, membership rate, turnover) rebutted by record or found to be "too vague"); *NLRB v. Lee Office Equip.*, 572 F.2d 704, 706-07 (9th Cir. 1978) (evidence of union's loss of support plus employer's reasonable belief of union misconduct not an "unusual circumstance" justifying employer's refusal to bargain during certification year).

702. When the National Labor Relations Act (the Wagner Act) was passed in 1935, § 8(5) established a duty to bargain for employers covered under the Act but did not enumerate the subjects of collective bargaining. Instead, § 8(5) referred to § 9(a), which in turn stated that the representatives designated or selected by employees in an appropriate unit shall be the exclusive representatives for the purpose of collective bargaining with respect to "rates to pay, wages, hours of employment, or other conditions of employment." This was the entire

ley Acts created no express division of subject matter into mandatory and nonmandatory bargaining subjects, in 1958 the Supreme Court clearly made this distinction in *NLRB v. Wooster Division of Borg-Warner Corporation*.<sup>703</sup>

In *Borg-Warner*, the Supreme Court affirmed and adopted the approach of the NLRB and the circuit courts of appeals in classifying bargaining issues as mandatory (those over which the parties must bargain), permissive (those over which the parties may bargain), and illegal or prohibited (those over which the parties cannot bargain).<sup>704</sup> The majority concluded that the mandatory duty to bargain under the NLRA was limited to those subjects falling within the statutory phrase "wages, hours and other terms and conditions of employment" set forth in section 8(d).<sup>705</sup> The Court therefore found that it was an unfair labor practice for an employer to insist upon the inclusion of a "ballot" clause and a "recognition" clause as a condition to its executing a collective bargaining agreement.<sup>706</sup> Neither clause dealt with "wages, hours and other terms and conditions of employment" and thus were not mandatory subjects of bargaining. Although the employer had a right to *propose* these two lawful clauses, *insistence* on their inclusion in the collective bargaining agreement was tantamount to a refusal to bargain in violation of section 8(a)(5).<sup>707</sup>

Although NLRB decisions following *Borg-Warner* continue to apply the mandatory-permissive distinction,<sup>708</sup> subsequent Supreme

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basis for determining the required scope of bargaining under federal law. NLRA, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-168 (1976)). In 1947, Congress added § 8(d), which briefly defined the procedural requirements of collective bargaining but made no serious attempt to describe specifically the subject matter of bargaining, except to incorporate the essential phrases of § 9(a), omitting only "rates of pay" and adding the words "terms" to conditions of employment. NLRA Amendments, ch. 120, § 8(d), 61 Stat. 136 (1947) (codified at 29 U.S.C. § 158(d) (1976)).

In 1947, a majority of both the House Committee on Labor and Education and the House of Representatives supported a bill listing the definitive subjects of bargaining. The bill, however, was defeated in the Senate. See Feinsinger, *The NLRA and Collective Bargaining*, 57 MICH. L. REV. 807 (1959).

See generally Oldham, *Organized Labor, the Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 936 (1973); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971); Comment, *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Re-evaluation*, 15 WM. & MARY L. REV. 918 (1974).

703. 356 U.S. 342 (1958).

704. *Id.* at 348-50, 351-62.

705. *Id.* at 348-49.

706. *Id.*

707. *Id.* at 349.

708. *E.g.*, National Football League Mgmt. Council, 203 N.L.R.B. 958 (1973) (safety con-

Court decisions have further qualified the scope of the duty to bargain under the NLRA.<sup>709</sup>

In *Ford Motor Company v. NLRB*,<sup>710</sup> the Supreme Court recently

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ditions & artificial turf are mandatory); Bralco Metals, Inc., 214 N.L.R.B. 143 (1974) (elimination of daily early morning catering trucks is mandatory); Missourian Pub. Co., Inc. 216 N.L.R.B. 175 (1975) (free coffee is mandatory); Columbia Printing Pressmen & Assts. Union 252, 219 N.L.R.B. 268 (1975) (interest arbitration is permissible); Gas Machinery Co., 221 N.L.R.B. 862 (1975) (Christmas bonuses are mandatory); Cheese Barn, Inc., 222 N.L.R.B. 418 (1976) (ratification procedures are mandatory); Wayne's Olive Knoll Farms, Inc., 223 N.L.R.B. 260 (1976) (health and welfare fund contributions and pensions are mandatory); Capital Times Co., 223 N.L.R.B. 651 (1976) (unilateral imposition of code of ethics not mandatory subject of bargaining); International Harvester Co., 227 N.L.R.B. 85 (1976) (unilateral decision by employer to remove job classification from bargaining unit held a mandatory subject because of impact on earnings of unit employees).

709. In *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), the Court held that work to be contracted out, previously performed by members of an existing bargaining unit, was a subject of mandatory bargaining. The Court based this holding upon three factors: (1) contracted-out work was within the "literal meaning" of the phrase "terms and conditions of employment" under § 8(d) of the NLRA; (2) the industrial practice of bargaining over contracted-out work brought the subject within the scope of mandatory bargaining; and (3) bargaining over such a subject would promote the reduction of industrial strife. *Id.* at 211-12 & n.7.

Justice Stewart's concurring opinion emphasized what he viewed as the "disturbing breadth" of the majority opinion. To Justice Stewart, § 8(d) defined "a limited category of issues subject to compulsory bargaining." *Id.* at 220. Mandatory collective bargaining should therefore include "the various physical dimensions of a person's working environment," *viz.*, hours, amount of work, periods of relief, safety practices, freedom from discriminatory discharge, seniority rights, retirement age determinations, and employment security. *Id.* at 223. Section 8(d), however, should be interpreted to exclude as mandatory those "managerial decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security." *Id.* at 225.

A managerial decision may be subjected to a bargaining requirement if it affects the terms and conditions of employment. The issue was raised in *Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The majority opinion held that retired workers are not "employees" within the meaning of the NLRA and their retirement benefits are not mandatory subjects of bargaining within the § 8(d) phrase "terms and conditions of employment." *Id.* at 178. "[T]he question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment." *Id.* at 179. The Court noted, however, that other considerations, such as the effect of bargaining on the employer's freedom to conduct his business, could be important. And, the Court slighted the Board's emphasis upon the industrial practice of bargaining over retiree benefits as a valid ground for including those benefits within the mandatory subjects of collective bargaining. *Id.* at 180 n.19, 182.

710. 441 U.S. 488 (1979). When the company refused to bargain with the union over proposed price increases, the union filed an unfair labor practice charge. Consistent with its earlier view that in-plant food prices and services are "other terms and conditions of employment," the Board upheld the charge and ordered the company to bargain. The Seventh Circuit enforced the order, based on the facts and circumstances of the case. *NLRB v. Ford Motor Co.*, 571 F.2d 993 (7th Cir. 1978) (enforcing 230 N.L.R.B. 716 (1977)). The previous stance by the First, Fourth, and Seventh Circuits, however, had been to reverse the NLRB when the Board found that in-plant cafeteria and vending machine prices were mandatory

held that in-plant cafeteria and vending machine prices are "terms and conditions of employment" subject to mandatory collective bargaining under sections 8(a)(5), 8(b)(3), and 8(d). The Court relied on Justice Stewart's concurring opinion in *Fibreboard Paper Products Corp. v. NLRB*<sup>711</sup> and found that the prices of in-plant food are "plainly germane to the 'working environment,' " they are "not among those 'managerial decisions which lie at the core of entrepreneurial control.'" <sup>712</sup> Furthermore, the record established a trend of negotiations over in-plant food prices.<sup>713</sup>

In *Alfred M. Lewis, Inc. v. NLRB*,<sup>714</sup> the Ninth Circuit applied the general principle that rules and standards of plant operation are mandatory subjects of collective bargaining.<sup>715</sup> The court found that the company had clearly violated sections 8(a)(5) and 8(a)(1) by failing to bargain with a union before it unilaterally instituted quota systems and terminated its policy of permitting employees to have union representation at counseling and disciplinary procedures.<sup>716</sup>

In *Maas v. Feduska, Inc. v. NLRB*,<sup>717</sup> the court held that an employer's contributions to a union's fringe benefit trust fund on behalf of two supervisors fell outside the statutory phrase "wages, hours, and other terms and conditions of employment."<sup>718</sup> Relying upon the mandatory-permissive distinction established in *Borg-Warner*, the

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bargaining subjects. *E.g.*, *Ladish Co.*, 219 N.L.R.B. 354 (1975), *rev'd*, 538 F.2d 1267 (7th Cir. 1976); *Package Mach. Co.*, 191 N.L.R.B. 268 (1971), *rev'd*, 457 F.2d 936 (1st Cir. 1972); *McCall Corp.*, 172 N.L.R.B. 540 (1968), *rev'd*, 432 F.2d 187 (4th Cir. 1970); *Westinghouse Elec. Corp.*, 156 N.L.R.B. 1080 (1966), *rev'd en banc*, 387 F.2d 542 (4th Cir. 1967).

711. 379 U.S. 203 (1964).

712. 441 U.S. at 498 (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222-23 (1964) (Stewart, J., concurring)). Moreover, in-plant food prices and services were "an aspect of the relationship" between the company and its employees. As a result, "[n]o third-party interest was directly implicated" and "the standard of [*Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*] had no application" here. *Id.* at 1851. See note 709 *supra* for discussion of *Allied Chemical*, 404 U.S. 157 (1971).

713. 441 U.S. at 499-500 n.11.

714. 587 F.2d 403 (9th Cir. 1978).

715. See *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 14 (9th Cir. 1969) (safety rules and regulations are mandatory); *Master Slack Corp.*, 230 N.L.R.B. 1054, 1055 (1977) (tardiness and absenteeism rules are mandatory); *Boland Marine & Mfg. Co.*, 225 N.L.R.B. 824 (1976) (safety, work, and disciplinary rules are mandatory); *San Isabel Elec. Serv.*, 225 N.L.R.B. 1073 (1976) (safety and work rules are mandatory); *Donna Lee Sportswear*, 174 N.L.R.B. 318 (1969) (warning and discharge policies are mandatory). *Cf.* *Hilton Mobil Homes*, 155 N.L.R.B. 873 (1965), *modified*, 387 F.2d 7 (8th Cir. 1967) (rule prohibiting employees from taking company tool boxes home not a mandatory subject; rule necessary for theft and fire protection of company property).

716. 587 F.2d at 407-11.

717. No. 78-1832 (9th Cir. Aug. 1, 1979).

718. *Id.*, slip op. at 2746, 2748.

court concluded that the union had violated section 8(b)(3) by threatening to strike over a permissive subject of collective bargaining.<sup>719</sup>

### C. Enforcement of Agreements under Section 301

#### 1. The power of the Board

Under section 10(a) of the NLRA, "[t]he Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce."<sup>720</sup> Except when it declines or cedes jurisdiction, the Board has exclusive and primary jurisdiction over the adjudication of unfair labor practices.<sup>721</sup> During the survey period, the Ninth Circuit addressed the Board's section 10(a) power in *Merchants Home Delivery Service, Inc. v. NLRB*.<sup>722</sup> The court found that the Board was without jurisdiction under section 10(a) to enforce a bargaining order against a contract carrier that had refused to bargain with truck drivers. The drivers, as independent contractors, were not "employees" within the meaning of section 2(3) and were therefore expressly excluded from NLRA coverage.<sup>723</sup>

#### 2. The scope of section 301

Section 301 of the Labor Management Relations Act regulates suits based on contract violations between an employer and a labor organization, or between labor organizations in any industry affecting commerce.<sup>724</sup> Suits may be brought "in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy, or without regard to the citizenship of the parties."<sup>725</sup>

In *Lerwill v. Inflight Motion Pictures, Inc.*,<sup>726</sup> motion picture projection technicians covered by a collective bargaining agreement brought a class action suit against their employer under section 301 of the Labor Management Relations Act seeking overtime pay allegedly due them under the express terms of the agreement. Upholding the propriety of the employees' suit, the court held that "uniquely personal rights" including "wages, hours, overtime pay, and wrongful discharge" may be directly enforced by individual employees under sec-

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719. *Id.*, slip op. at 2748.

720. 29 U.S.C. § 160(a) (1976).

721. A proviso to § 10(a) allows the Board to cede jurisdiction to a state or territorial agency. The Board may also decline to assert jurisdiction under § 14(c)(1). *Id.* § 164(c)(1).

722. 580 F.2d 966 (9th Cir. 1978).

723. *Id.* at 976. See note 605 *supra*.

724. 29 U.S.C. § 185(a) (1976).

725. *Id.*

726. 582 F.2d 507 (9th Cir. 1978).

tion 301.<sup>727</sup>

In *Bergman v. NLRB*,<sup>728</sup> the Ninth Circuit rejected an employer's complaint that a union had committed an unfair labor practice by filing a section 301 suit in federal district court for purposes of harrassment. The court held that the Board had correctly dismissed the employer's complaint.<sup>729</sup> The union had filed suit in order to establish the employer's breach of contract after its efforts to resolve contractual disputes had failed. There was no indication that the union had been guilty of malicious prosecution or abuse of process.<sup>730</sup> Based upon the particular facts of the case, the court concluded that the union had not committed an unfair labor practice by filing a civil suit in federal district court to enforce "a facially valid and binding labor agreement," regardless of its allegedly coercive effect upon the employees' statutory rights.<sup>731</sup>

In *Keppard v. International Harvester Co.*,<sup>732</sup> an employee who had failed to exhaust intra-union remedies was foreclosed from bringing a breach of fair representation claim against the union under section 301.<sup>733</sup> The court found that the aggrieved employee failed to show either that he had appealed the local union's unsatisfactory settlement of his medically-related grievance to higher tribunals within the international union or that such an appeal would have been futile.<sup>734</sup> The court concluded that there was no error in granting the union's motion for summary judgment under these facts.

In *Sheeran v. General Electric Co.*,<sup>735</sup> over 1,500 former employees of a company brought suit in state court seeking a declaratory judgment that they were entitled to the same pension plan increases that current employees were to receive under the existing agreement.<sup>736</sup> The company removed the case to federal court where the cause of action was barred by the statute of limitations.<sup>737</sup> On appeal, the Ninth

727. *Id.* at 511 (quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976)).

728. 577 F.2d 100 (9th Cir. 1978).

729. *Id.* at 103-04. The court noted that in *Clyde Taylor*, 127 N.L.R.B. 103, 108-09 (1960), the NLRB had held that "while the making of a threat . . . to resort to the civil courts as a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act was a violation of § 8(a)(1) of the Act, *an actual suit was not similarly unlawful.*" 577 F.2d at 103 (emphasis added).

730. *Id.* at 104.

731. *Id.*

732. 581 F.2d 764 (9th Cir. 1978).

733. *Id.* at 766-67.

734. *Id.* at 766.

735. 593 F.2d 93 (9th Cir. 1979).

736. *Id.* at 95.

737. *Id.* at 98-100.

Circuit rejected the employees' contention that the federal court lacked jurisdiction under section 301. The court reasoned that the individual union members had a right to sue the company under section 301(a) for enforcement of the labor contract, since the pension plan was incorporated by reference into the labor contract. The employees' suit for violation of the pension plan was therefore removable and federal law applicable.<sup>738</sup>

Finally, in *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*,<sup>739</sup> an employer brought a section 301 suit in district court alleging that the union had breached the no-strike provision of a written collective bargaining agreement by failing to give notice of the agreement's termination as provided for in a subsequent oral agreement.<sup>740</sup> The district court granted summary judgment for the union, finding the oral contract to be unenforceable.<sup>741</sup> Reversing and remanding, the Ninth Circuit applied principles of contract law and held that the written collective bargaining agreement could be modified orally as to duration.<sup>742</sup> Moreover, the oral collective bargaining agreement was enforceable under section 8(d) of the NLRA, which does not require that collective bargaining agreement be in writing.<sup>743</sup>

#### a. preemption

State courts have concurrent jurisdiction with federal courts over suits brought under section 301.<sup>744</sup> Federal labor law, however, prevails over inconsistent local rules in the substantive interpretation of the labor agreement.<sup>745</sup> During the survey period, the Ninth Circuit found that federal labor law preempted an employer's claims of defamation and business disparagement brought under Oregon state law against a local union and a labor council. In *Hasbrouck v. Sheet Metal Workers Local 232*,<sup>746</sup> the employer's claims were based upon a labor council's publication of its name in a "Do Not Patronize" list. The court found that the union's activity was protected from federal liabil-

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738. *Id.* at 95-97.

739. 597 F.2d 1269 (9th Cir. 1979).

740. *Id.* at 1270. The oral agreement with the union extended the written collective bargaining agreement on a day-to-day basis, subject to termination on 48 hours notice. *Id.*

741. *Id.* at 1272.

742. *Id.* at 1271. The court adopted the rule that a written agreement may be modified orally, even "in the face of a provision requiring that any modification must be in writing," because this rule furthers the federal policy of maintaining "industrial peace."

743. *Id.* at 1272.

744. *Charles Dowd Box v. Courtney*, 368 U.S. 502, 506 (1962).

745. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

746. 586 F.2d 691, 694 (9th Cir. 1978).

ity by the publicity proviso to section 8(b)(4) of the NLRA.<sup>747</sup> Federal preemption of state remedies also precluded the employer from asserting state claims of defamation and business disparagement as pendent to the section 8(b)(4) charge.<sup>748</sup>

*b. the Norris-LaGuardia Act*

Prior to 1970, a no-strike clause in a collective bargaining agreement was not specifically enforceable in federal courts.<sup>749</sup> In 1970, the Supreme Court, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,<sup>750</sup> held that a federal district court can issue an injunction to stop a strike that breaches a no-strike clause.<sup>751</sup> The federal courts are not precluded from this action by the anti-injunction policies of the Norris-LaGuardia Act.<sup>752</sup> One of the prerequisites for the issuance of a *Boys Markets* injunction to endorse contractual no-strike agreements is that the strike must concern a grievance that both parties are contractually bound to arbitrate.<sup>753</sup> In 1976, the Supreme Court, in *Buffalo Forge Co. v. Steelworkers*,<sup>754</sup> held that a *Boys Markets* injunction cannot be issued against a sympathy strike because sympathy strikes do not concern grievances over which the parties have agreed to arbitrate.<sup>755</sup> It therefore does not come within the narrow *Boys Markets* exception to section 4 of the Norris-LaGuardia Act.<sup>756</sup>

In *J.A. Jones Construction Co. v. Plumbers & Pipe Fitters, Local 598*<sup>757</sup> the Ninth Circuit reaffirmed the *Buffalo Forge* rule and held that a restraining order against a sympathy strike had been wrongfully issued because there could have been no agreement to submit such a

747. *Id.* at 694. 29 U.S.C. § 158(b)(4) (1976) permits "truthful publicity" to inform the public "that a product or products are produced by an employer with whom the labor organization has a primary dispute."

748. 586 F.2d at 694.

749. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962).

750. 398 U.S. 235 (1970).

751. In *Boys Market*, the collective bargaining agreement contained an arbitration provision that was binding on the dispute over which the strike had been called. *Id.* at 238.

752. 29 U.S.C. §§ 101-115 (1976). In 1932, Congress enacted the Norris-LaGuardia Act to restrict the power of the federal courts to issue an injunction against unions engaged in peaceful strikes. It also provided that the workers had a right to organize and engage in collective bargaining. Courts were allowed to issue an injunction only in extreme cases of union picket-line violence. GORMAN, *supra* note 288, at 624-25.

753. 398 U.S. at 243-53.

754. 428 U.S. 397 (1976).

755. *Id.* at 403-04.

756. *Id.* Section 4(a) of the Norris-LaGuardia Act expressly forbids injunctions that prohibit any person from "[c]easing or refusing to perform any work or to remain in any relation of employment." 29 U.S.C. § 104(a) (1976).

757. 568 F.2d 1292 (9th Cir. 1978).



dispute to binding arbitration.<sup>758</sup> In *Jones*, the employer sought to enjoin fourteen unions from a sympathy work stoppage allegedly in violation of agreements between the parties pursuant to section 301 of the LMRA. The district court granted the employer's motion for a temporary restraining order and the unions appealed.<sup>759</sup> Reversing and remanding, the Ninth Circuit held that the temporary restraining order had been wrongfully issued against one of the striking unions because the parties were not bound by a collective bargaining agreement.<sup>760</sup> This "fatal defect" could not be cured by the employer's subcontractor's agreement with the union. With respect to the other unions, the court declined to determine whether the *Buffalo Forge* requirements had been met, due to an incomplete and fragmentary record.<sup>761</sup>

In *San Francisco Electrical Contractors Association v. International Brotherhood of Electrical Workers, Local 6*,<sup>762</sup> the Ninth Circuit followed the *Boys Market-Buffalo Forge* rationale. *San Francisco* demonstrates that the broad anti-labor injunction language of the Norris-LaGuardia Act is to be tempered under section 301 when a union's concerted activities are found to violate no-strike and arbitration clauses in a collective bargaining agreement.<sup>763</sup> In *San Francisco*, the court held that the district court had jurisdiction under section 301 to enter a preliminary injunction against the union because it had engaged in a work stoppage over a grievance that had been resolved in a prior arbitration proceeding. Such an injunction was necessary to enforce the arbitration clause of the collective bargaining agreement by binding the union to the prior arbitrator's award.<sup>764</sup> The court noted

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758. *Id.* at 1295-96.

759. *Id.* at 1293. The principal issue on appeal was whether the district court had erred in refusing to apply the *Buffalo Forge* rule. That case was decided after the issuance of the temporary restraining order but before the court had decided the union's motion for an award of costs and attorneys' fees.

760. *Id.* at 1295.

761. *Id.*

762. 577 F.2d 529 (9th Cir.), *cert. denied*, 439 U.S. 966 (1978). The union had filed a grievance against the employer alleging that the employer's unilateral implementation of a modified lighting system would eliminate a substantial amount of unit work in violation of a work preservation clause in the collective bargaining agreement. The Board summarily rejected the union's unfair labor practice charge on the ground that the instant grievance had been resolved against the union by a prior arbitration award involving the same dispute. The union began a work stoppage, and the district court granted the employer's request for a temporary restraining order. On appeal, the union claimed that the Norris-LaGuardia Act specifically precluded the federal court's jurisdiction to issue an injunction. The employer contended that the injunction served to implement a binding arbitration award and therefore fell within an exception to the Norris-LaGuardia Act.

763. *Id.* at 532-34.

764. *Id.* at 533.

that the *Boys Markets* exception to the Norris-LaGuardia anti-injunction policy, as defined in *Buffalo Forge*, was inapplicable. The court reached this conclusion because the union's concerted activity occurred after the issuance of an arbitration award, not prior to its issuance as it had in *Boys Markets* and *Buffalo Forge*.<sup>765</sup>

### 3. Contract interpretation by the NLRB

#### *a. jurisdiction of the Board*

According to Supreme Court guidelines, the Board may exercise jurisdiction over a contract dispute only when this determination is necessary to decide an unfair labor practice case.<sup>766</sup> Furthermore, this section 10(a) jurisdiction may be exercised even when a party seeks additional relief under section 301.<sup>767</sup> The Ninth Circuit applied these guidelines in *NLRB v. H. Koch & Sons*.<sup>768</sup> The court found that an employer had violated sections 8(a)(1) and 8(a)(5) by refusing to execute a written collective bargaining agreement embodying the terms of an oral agreement concerning employee severance benefits.<sup>769</sup> The Board had correctly determined that the parties were bound by the oral agreement under common law principles of offer and acceptance.<sup>770</sup> The company, therefore, had violated its statutory duty to bargain collectively pursuant to section 8(d), which includes the obligation to execute "a written contract incorporating any agreement reached if requested by either party."<sup>771</sup>

#### *b. Board interpretation of lawful clauses*

The NLRB frequently interprets contractual provisions when a union allegedly commits an unfair labor practice and the employer asserts a contractual defense. In deciding the contractual issue, the Board studies the clause in light of its own experience with the administration of the collective bargaining agreement.<sup>772</sup> During the survey period, the Ninth Circuit sustained the Board's interpretation of contractual

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765. *Id.* at 532-34.

766. *J.I. Case v. NLRB*, 321 U.S. 332, 340 (1944); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 425-30 (1967).

767. *NLRB v. C & C Plywood Corp.*, 385 U.S. at 429-30.

768. 578 F.2d 1287 (9th Cir. 1978).

769. *Id.* at 1287-88.

770. *Id.* at 1290-91.

771. *Id.* at 1290.

772. See ABA LABOR LAW, *supra* note 608, at 455-58; *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430-31 (1967).

clauses in two out of three decisions.<sup>773</sup>

#### D. Grievance Arbitration

##### 1. The arbitration process and the courts

In 1957, the Supreme Court in *Textile Workers Union v. Lincoln Mills*<sup>774</sup> enforced the obligation of the parties to a collective bargaining agreement to arbitrate their grievances. Since that time, the grievance-arbitration procedure has been recognized as a central part of the collective bargaining process.<sup>775</sup> The courts have tended to defer to arbitration awards, resolving any doubts concerning an arbitration clause's coverage in favor of the arbitration process.<sup>776</sup> When an arbitrator does exceed the scope of his authority, however, courts have the power to vacate the arbitration award.<sup>777</sup>

During the survey period, the Ninth Circuit deferred three times to the arbitral process, while in two "rare" decisions the court vacated awards that had exceeded the arbitrator's authority. In *Auto, Marine & Speciality Painters Local 1176 v. Bay Area Sealers, Inc.*,<sup>778</sup> the district court had dismissed a union's petition to compel the arbitration of certain grievances because it found that the union had abandoned the agreement. Reversing, the Ninth Circuit reasoned that the arbitration

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773. *NLRB v. Retail Clerks Local 588*, 587 F.2d 984, 986-87 (9th Cir. 1978) (NLRB interpretation sustained; "new stores clause" asserted by minority union denied new employees freedom of choice and therefore not binding on them); *Boeing Co. v. NLRB*, 581 F.2d 793, 794 (9th Cir. 1978) (NLRB's interpretation of welders' recognition clause reversed; non-union tack-welders outside union's jurisdiction); *NLRB v. Hospital & Inst. Workers Union, Local 250*, 577 F.2d 649 (9th Cir. 1978) (NLRB's interpretation of new agency provision sustained; union not the exclusive bargaining agent for non-member therapists; showing of majority support required).

774. 353 U.S. 448 (1957).

775. The relationship of the courts to the arbitral process was set forth by the Supreme Court in the "Steelworkers Trilogy;" see *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator."); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 575, 578 (1960) ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (The arbitrator interprets the collective bargaining agreement; it is his "construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.").

776. The leading NLRB decision on post-arbitral deferral is *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

777. *City Elec., Inc. v. Local 77, Int'l Bhd. of Elec. Workers*, 517 F.2d 616, 618-19 (9th Cir.), cert. denied, 423 U.S. 894 (1975).

778. 577 F.2d 609 (9th Cir. 1978) (per curiam).

clause was "sufficiently broad" to include "all disputes and grievances," including the defense of abandonment.<sup>779</sup> Such a defense, therefore, was a question for the arbitrator, not the courts.<sup>780</sup>

In *Leyva v. Certified Grocers of California, Ltd.*,<sup>781</sup> wholesale delivery truck drivers sued to recover overtime compensation under both the master collective bargaining agreement and the Fair Labor Standards Act [FLSA]. The court held that the contractual claims for relief were subject to arbitration, despite the fact that the employees wanted broader relief under the contract than the arbitrator was empowered to provide.<sup>782</sup> Similarly, an exception to the arbitration clause, which provided that the arbitrator lacked authority to modify the agreement, did not preclude the arbitrator from determining the controlling contractual language.<sup>783</sup> Absent express provisions for the arbitration of statutory claims, such claims were not subject to the arbitration process.<sup>784</sup>

The Ninth Circuit again deferred to the arbitration process in *Riverboat Casino, Inc. v. Local Joint Executive Board*.<sup>785</sup> The court held that, absent a contrary provision in the collective bargaining agreement, an arbitrator does not exceed his authority by failing to defer to a previous "binding" arbitration award that interprets an identical "good cause" provision regarding excessive absenteeism and tardiness.<sup>786</sup> Contrary to a prior arbitrator's ruling, the arbitrator in this case concluded that an employee's discharge was not for "good cause" and, accordingly, reduced the penalty to a suspension.<sup>787</sup> The arbitrator considered the prior award but concluded that "strict adherence to stare decisis would impair the flexibility of the arbitral process contemplated by the parties."<sup>788</sup> The court declined to vacate the award absent "infidelity" to the collective bargaining agreement.<sup>789</sup>

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779. *Id.* at 610.

780. *Id.*

781. 593 F.2d 857 (9th Cir. 1979).

782. *Id.* at 860. The arbitration clause of the contract provided for a maximum of six months retroactive compensation. The employees sought back pay for four years, a significantly greater amount than that provided for by the clause.

783. *Id.*

784. *Id.* at 861-63. The FLSA claims were outside the scope of the arbitration provisions of both the master contract and the addendum.

785. 578 F.2d 250 (9th Cir. 1978).

786. *Id.* at 250-51. The prior arbitration proceeding involved different parties and a different arbitrator, but it did concern the interpretation of the same "good cause" provision in the collective bargaining agreement.

787. *Id.* at 250.

788. *Id.* at 251.

789. *Id.*

In *Federated Employers of Nevada, Inc. v. Teamsters Local 631*,<sup>790</sup> the Ninth Circuit made clear that it will reverse a district court's enforcement of an arbitrator's award when "the arbitrator [has] ignored the essence of the agreement in making the award."<sup>791</sup> In *Federated Employers*, the arbitrator had granted a modified arbitration award regarding annual wage increases that violated express restrictions in the arbitration clause concerning such modifications. The arbitrator's "implausible" interpretation of the contract precluded its enforcement.<sup>792</sup>

Similarly, in *World Airways, Inc. v. International Brotherhood of Teamsters*,<sup>793</sup> the Ninth Circuit affirmed the district court's order, vacating part of an arbitrator's award that compelled an airline to retrain a demoted pilot and provide him with an opportunity to requalify as a Pilot-in-Command.<sup>794</sup> The court reasoned that the arbitrator's award would have led to the pilot's requalification without the airline's independent assessment of his renewed fitness.<sup>795</sup> Federal law preempted the area of aviation and placed the responsibility of determining judgmental qualifications of pilots on the airlines, not arbitrators. The court concluded that the "strong federal policy in insuring the safety of air travel" outweighed "the [strong] federal policy of resolving labor differences by arbitration."<sup>796</sup>

## 2. Discretionary jurisdiction of the NLRB

Although the NLRB has exclusive jurisdiction over unfair labor practice charges under section 10(a), such jurisdiction is discretionary.<sup>797</sup> This discretionary jurisdiction of the NLRB was in issue in *NLRB v. California Inspection Rating Bureau*.<sup>798</sup> The Ninth Circuit held that the Board had not abused its discretion in exercising jurisdiction over the California Inspection Rating Bureau (now called the Workers' Compensation Insurance Rating Bureau) by requiring it to bargain with a labor organization.<sup>799</sup> The court relied upon the Board's determination that the Bureau was an "employer," not a "political subdivision," of the State of California within the meaning of section

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790. 600 F.2d 1263.

791. *Id.* at 1265.

792. *Id.*

793. 578 F.2d 800 (9th Cir. 1978) (per curiam).

794. *Id.* at 801.

795. *Id.* at 802-03.

796. *Id.* at 803.

797. *Haleston Drug Stores, Inc. v. NLRB*, 187 F.2d 418, 421 (9th Cir.), cert. denied, 342 U.S. 815 (1951).

798. 591 F.2d 56 (9th Cir.), cert. denied, 442 U.S. 943 (1979).

799. *Id.* at 57.

2(2),<sup>800</sup> and, therefore, subject to the Board's jurisdiction.<sup>801</sup> The court also declined to find that the Board should have exercised its discretionary authority to refuse to assert jurisdiction because of the "unique relationship" and "intimate connection" enjoyed by the Bureau with the State of California, which is exempt from Board coverage.<sup>802</sup> According to the NLRB, this employer was "not the type of nonprofit business or operation over which the Board has declined jurisdiction . . . ; it will effectuate the policies of the Act for the Board to assert jurisdiction in this case."<sup>803</sup>

### 3. Post-arbitral deferral

Section 10(a) of the NLRA empowers the Board to prevent the commission of unfair labor practices.<sup>804</sup> The Board, however, may decline to exercise its jurisdiction, deferring to an arbitration award that deals with unfair labor practices.<sup>805</sup> In 1955, the NLRB, in *Spielberg Manufacturing Co.*,<sup>806</sup> established several conditions that must be met before the Board will defer to an arbitrator's award: (1) the proceedings must be fair and regular; (2) all the parties must have agreed to be bound; and (3) the decision must not be repugnant to the purposes and policies of the NLRA.<sup>807</sup> The District of Columbia Circuit and Ninth Circuit have qualified the *Spielberg* standards in *Banyard v. NLRB*<sup>808</sup> and *Stephenson v. NLRB*.<sup>809</sup> In *Banyard*, the court set out additional prerequisites: "the *Spielberg* doctrine only applies if the arbitral tribunal (A) clearly decided the issue on which it is later urged that the Board should give deference, and (B) the arbitral tribunal decided an issue within its competence."<sup>810</sup> In *Stephenson*, the Ninth Circuit adopted the *Banyard* qualifications.<sup>811</sup>

During the survey period, the Ninth Circuit acknowledged that the

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800. See note 603 *supra*.

801. 591 F.2d at 57. The court relied upon the Board's decision reported at 215 N.L.R.B. 780 (1974).

802. 591 F.2d at 57.

803. 215 N.L.R.B. 780, 782 (1974).

804. 29 U.S.C. § 160(a) (1976).

805. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 270-72 (1964).

806. 112 N.L.R.B. 1080 (1955).

807. *Id.* at 1082.

808. 505 F.2d 342 (D.C. Cir. 1974).

809. 550 F.2d 535 (9th Cir. 1977).

810. 505 F.2d at 347.

811. 550 F.2d at 538. See also *Hawaiian Hauling Serv. v. NLRB*, 545 F.2d 674 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977) (enforcing 219 N.L.R.B. 765 (1975)); *Machinists & Aerospace Workers Lodge 87 v. NLRB*, 530 F.2d 849 (9th Cir. 1976) (enforcing 211 N.L.R.B. 834 (1974)).

Board may rightfully refuse to defer to arbitral awards that are repugnant to the purposes of the NLRA. In *Alfred M. Lewis, Inc. v. NLRB*,<sup>812</sup> for example, the Board had refused to defer to an arbitration award, because the arbitrator had incorrectly concluded that the company had the right to introduce a production quota system without prior bargaining with the union. In upholding the Board's decision, the court noted that the Board had "squarely relied on the *Spielberg* criterion that deference to arbitration will not be given where the arbitral award is repugnant to the purposes and policies of the Act."<sup>813</sup> By failing to bargain with the union, the company had clearly violated section 8(a)(5) of the NLRA. The Board, therefore, had not abused its discretion in refusing to defer to such an award.<sup>814</sup>

## V. CONCERTED ACTIONS

### A. Strikes

A strike is a form of concerted activity in which workers withdraw labor services from an employer in order to force that employer to accept their demands.<sup>815</sup> Although the legality of the strike had been recognized at common law,<sup>816</sup> it was not until 1935 that Congress first declared that the right of workers to engage in strikes was federally protected.<sup>817</sup> Although the strike continues to be preeminent among labor's "economic weapons,"<sup>818</sup> the cost to the employer and to society can be devastating.<sup>819</sup>

#### 1. Classification of strikes

Strikes fall into two categories: economic strikes<sup>820</sup> and unfair la-

812. 587 F.2d 403 (9th Cir. 1978).

813. *Id.* at 407.

814. *Id.* at 408.

815. *The Point Reyes*, 110 F.2d 608, 609-10 (5th Cir. 1940) ("[T]he word strike contains two essential ingredients: There must be the relation of employer and employee, and there must be a quitting of work.").

816. *See Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842).

817. 29 U.S.C. § 163 (1976) states that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *See also* 29 U.S.C. § 157 (1976), *infra* note 860.

818. ABA LABOR LAW, *supra* note 608, at 517.

819. *See Imberman, Strikes Cost More Than You Think*, 57 HARV. BUS. REV. 133 (1979).

820. ABA LABOR LAW, *supra* note 608, at 524. Economic strikes are generally used to force economic demands on an employer, although this is not an absolute requirement. *Id.* at 524-25. A strike that begins as an economic strike may be converted, however, into an unfair labor practice strike if an employer's unfair labor practice prolongs or aggravates the strike. *See* notes 829-37 *supra* and accompanying text.

bor practice strikes.<sup>821</sup> Whether a strike is economic or motivated by an unfair labor practice is critical to the determination of whether strikers have a right to reinstatement and back pay when the labor dispute has ended. Economic strikers are entitled to reinstatement without back pay only if they have not been permanently replaced,<sup>822</sup> while unfair labor practice strikers are entitled to immediate reinstatement with back pay even if that necessitates discharging permanently hired replacements.<sup>823</sup>

It is generally accepted among the circuits, as a matter of law, that a strike is classified as an unfair labor practice strike if an unfair labor practice is a "contributing cause" of the strike.<sup>824</sup> The Ninth Circuit recently registered its accord in *NLRB v. Broadmoor Lumber Co.*<sup>825</sup> The *Broadmoor* court held that an employer's unfair labor practices were not a contributing cause of the strike because the employees viewed the strike as an economic one.<sup>826</sup> The holding in *Broadmoor* should be narrowly applied, however, to those situations in which employees themselves expressly deny that unfair labor practices have contributed to the strike.<sup>827</sup> In the absence of such facts, a strike should be classified as an unfair labor practice strike if unfair labor practices have

821. ABA LABOR LAW, *supra* note 608, at 523-24; *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

822. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

823. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956).

824. *See, e.g., Larand Leisureries, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975) (employer's conduct—union handbill destruction, employee interrogation, picket photos—contributed to strike; unfair labor practice strike from inception); *NLRB v. Columbia Tribune Pub. Co.*, 495 F.2d 1384, 1392 (8th Cir. 1974) (employer's refusal to bargain in good faith contributed to strike; therefore, unfair labor practice strike); *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir.), *cert. denied*, 409 U.S. 850 (1972) (mem.) (unfair labor practice strike since employer's refusal to bargain in good faith and to recognize union were contributing causes); *Southwestern Pipe, Inc. v. NLRB*, 444 F.2d 340, 352 (5th Cir. 1971) (no unfair labor practice involved in strike; discharge of strikers proper). *See also NLRB v. Borg-Warner Corp.*, 216 F.2d 898, 907 (6th Cir.), *rev'd on other grounds*, 356 U.S. 342 (1958) (NLRB to determine whether strike caused by employer's refusal to bargain (*i.e.*, unfair labor practice strike) or by employer's failure to reach agreement on economic issues (*i.e.*, economic strike)); *NLRB v. Stockpile Carbon Co.*, 105 F.2d 167, 176 (3d Cir.), *cert. denied*, 308 U.S. 605 (1939).

825. 578 F.2d 238 (9th Cir. 1978). *Accord*, *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 410 (9th Cir. 1977) (employer's refusal to bargain in good faith found to be contributing cause of strike).

826. 578 F.2d at 242. A majority of bargaining unit employees explicitly denied that unfair labor practices contributed in any way to the strike. *Id.*

827. In most cases, it is highly unlikely that strikers will make this type of denial because of the tremendous economic advantages which attach to the unfair labor practice striker. *See notes 822-23 supra* and accompanying text. It is therefore in the striking employee's best interest to assert that an unfair labor practice contributed in *some* way to the strike. *See, e.g., cases cited in note 824 supra.*



contributed to the strike in any way.<sup>828</sup>

Under certain circumstances, a strike that is originally an economic strike may become an unfair labor practice strike. Such a conversion may be effected if the employer commits an unfair labor practice during the course of an economic strike.<sup>829</sup> The general rule, as expressed by the various circuits, is that if a strike is prolonged or aggravated by the employer's unfair labor practice, the strike changes into an unfair labor practice strike.<sup>830</sup> If there is some question as to whether the unfair practice prolonged the strike, the burden is on the employer to show that the strike would have continued anyway.<sup>831</sup>

Courts consider certain unfair labor practices as having more potential than others to prolong economic strikes and they will automatically convert an economic strike into an unfair labor practice strike.<sup>832</sup> In such cases, an analysis of whether the unfair labor practice actually prolonged that *particular* strike is considered unnecessary.<sup>833</sup> Among the unfair practices in this category are an employer's refusal to bar-

828. *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 410 (9th Cir. 1977).

829. *NLRB v. International Van Lines*, 448 F.2d 905, 911 (9th Cir. 1971), *rev'd on other grounds*, 409 U.S. 48 (1972). Although not necessary to the holding in this case, the Court recognized that a strike becomes an unfair labor practice strike when the employer commits an unfair labor practice during the strike. The issue in *International Van Lines* concerned the reinstatement rights of illegally discharged workers who had not been permanently replaced. It was not necessary to determine whether the strikers became unfair labor practice strikers at the time of permanent replacement because they were entitled to reinstatement solely by virtue of the unlawful discharge. 409 U.S. at 53.

830. *See, e.g.*, *General Teamsters Local 992 v. NLRB*, 427 F.2d 582 (D.C. Cir. 1970) (economic strike converted into unfair labor practice strike when company made unlawful unilateral wage increase during the strike). The unfair labor practice had the effect of prolonging the strike. *Id.* at 586-87. *See also Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720, 729 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964) (strike converted into unfair labor practice strike when, during strike negotiations, employer insisted upon implementing seniority system that discriminated against striking workers); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919, 928 n.8 (2d Cir. 1942) (strike may convert from economic to unfair labor practice if prolonged or aggravated by employer).

831. *See, e.g.*, *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720, 729 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964) (burden on employer to show that strike would have continued even if proposal of superseniority had been withdrawn); *NLRB v. Borg-Warner Corp.*, 236 F.2d 898, 907 (6th Cir. 1956), *rev'd on other grounds*, 356 U.S. 342 (1958) (burden on employer to show that strike would have continued even if employer had not unlawfully insisted on a recognition proposal); *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167, 176 (3d Cir.), *cert. denied*, 308 U.S. 605 (1939) (burden on employer to show that strike would have continued even if employer had not unlawfully interfered with employees' right to organize).

832. *See, e.g.*, *Crosby Chem., Inc.*, 85 N.L.R.B. 791, 797 (1949), *modified*, 188 F.2d 91 (5th Cir. 1951) (employer domination of union "inevitably" prolongs strike). *See generally GORMAN, supra* note 288, at 339-40; Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice II*, 49 VA. L. REV. 1297, 1301-23 (1963); Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 VA. L. REV. 1322, 1344-49 (1959).

833. GORMAN, *supra* note 288, at 339-40.

gain with a union<sup>834</sup> and an employer's domination of a union.<sup>835</sup> In *NLRB v. Top Manufacturing Co.*,<sup>836</sup> the Ninth Circuit held that an economic strike had been automatically converted into an unfair labor practice strike when an employer withdrew recognition from the incumbent union during the strike. The court concluded that this withdrawal of recognition established a prima facie case of unlawful refusal to bargain,<sup>837</sup> and thus Justice Hufstедler found it unnecessary to discuss whether the unfair labor practice actually prolonged the strike.

The sympathy strike, which results when workers refuse to cross another union's picket line at their employer's place of business,<sup>838</sup> is difficult to categorize as either an economic or unfair labor practice strike. Many circuits,<sup>839</sup> including the Ninth,<sup>840</sup> have recognized the sympathy strike's legality and have concluded that sympathy strikers "stand in the shoes of primary strikers for purposes of lawful discipline

834. See, e.g., *NLRB v. Waukesha Lime & Stone Co.*, 343 F.2d 504, 508 (7th Cir. 1965) (employer refused to bargain with union without reason to believe striking union did not represent a majority); *NLRB v. Reliance Clay Prod. Co.*, 245 F.2d 599, 599 (5th Cir. 1957) (per curiam) (employer refused to resume bargaining with striking union, thereby converting economic strike into unfair labor practice strike); *NLRB v. Pecheur Lozenge Co.*, 209 F.2d 393 (2d Cir. 1953), cert. denied, 347 U.S. 953 (1954) (economic strike converted into unfair labor practice strike when employer insisted that a condition precedent to resuming negotiations was employee abandonment of strike); *Black Diamond S.S. Corp. v. NLRB*, 94 F.2d 875, 879 (2d Cir.), cert. denied, 304 U.S. 579 (1938) (employer refused to bargain with economic strikers, converting them into unfair labor practice strikers). See generally Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 VA. L. REV. 1322, 1344-49 (1959).

835. See, e.g., *Crosby Chem. Inc.*, 85 N.L.R.B. 791, 797 (1949), modified, 188 F.2d 91 (5th Cir. 1951) (economic strike automatically converted when employer dominated union and directed activities of that union against another union); *NLRB v. Crowley's Milk Co.*, 208 F.2d 444 (3d Cir. 1953) (economic strike converted when employer provided preferential assistance to one union over another).

836. 594 F.2d 223 (9th Cir. 1979) (per curiam).

837. *Id.* at 224.

838. "[N]onstriking employees who refuse as a matter of principle to cross a picket line maintained by their fellow employees have 'plighted [their] troth with the strikers, joined in their common cause, and [have] thus become . . . striker[s] [themselves].'" *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 55 (4th Cir.), cert. denied, 404 U.S. 826 (1971) (quoting *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1301 (5th Cir. 1970)) (brackets in original) (employee refusal to cross picket lines in sympathy with strikers is activity protected by § 7).

839. E.g., *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 55 (4th Cir.), cert. denied, 404 U.S. 826 (1971); *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1301 (5th Cir. 1970); *NLRB v. Louisville Chair Co.*, 385 F.2d 922, 928 n.3 (6th Cir. 1967), cert. denied, 390 U.S. 1013 (1968); *Truck Drivers Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), cert. denied, 379 U.S. 916 (1964); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942).

840. E.g., *NLRB v. Coast Delivery Serv., Inc.*, 437 F.2d 264, 270 (9th Cir. 1971); *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 905 (9th Cir. 1953).

and replacement."<sup>841</sup> In other words, if the underlying strike is classified as an unfair labor practice strike, then a sympathy strike will be similarly classified for reinstatement purposes. The classification of sympathy strikers was considered by the Ninth Circuit during the survey period in *General Teamsters Local 162 v. NLRB*.<sup>842</sup> In that case, three employees refused to cross picket lines set up by a sister union at their employer's shop.<sup>843</sup> Permanent replacements had been hired for the three sympathy strikers; the court held that the strikers were entitled to the same reinstatement rights as the primary economic strikers.<sup>844</sup> The court found it unnecessary to inquire into the nature of the primary strike because the sympathy strikers conceded that it was for economic reasons.<sup>845</sup>

## 2. Rights of strikers

Employees who join a strike have a certain number of protected rights. Among these are the right to retain employee status while on strike,<sup>846</sup> the right not to be fired for engaging in concerted activities,<sup>847</sup> and the right to engage in concerted activities free from interference or inducements.<sup>848</sup> The NLRA clearly designates the proper status of strikers in section 2(3), which includes in the definition of "employee" "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute."<sup>849</sup>

The Supreme Court outlined the status of strikers in the 1938 case of *NLRB v. Mackay Radio & Telegraph Co.*,<sup>850</sup> when it noted that "if

841. *NLRB v. C.K. Smith & Co.*, 569 F.2d 162, 166 (1st Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (affirmed NLRB policy that, when sympathy striker supports an unfair labor practice strike against a common employer, sympathy striker enjoys same reinstatement rights as primary striker). See *Pilot Freight Carriers, Inc.*, 224 N.L.R.B. 341, 342 (1976); *Hoffman Beverage Co.*, 163 N.L.R.B. 981, 982 (1967) (sympathy strikers given same reinstatement rights as primary strikers).

842. 568 F.2d 665 (9th Cir. 1978).

843. *Id.* at 667.

844. *Id.* at 668-70.

845. *Id.* at 669.

846. See notes 849-54 *infra* and accompanying text.

847. See note 855-64 *infra* and accompanying text.

848. See notes 865-87 *infra* and accompanying text.

849. 29 U.S.C. § 152(3) (1976) provides, in pertinent part:

The term "employee" shall include any employee and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

850. 304 U.S. 333 (1938).

men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees [*sic*] for . . . remedial purposes."<sup>851</sup> The Ninth Circuit followed *Mackay's* interpretation of section 2(3) in the recent case of *NLRB v. Murray Products, Inc.*<sup>852</sup> In *Murray*, the court held that "[e]mployees who are not working because of a labor dispute continue to be 'employees' of their employer unless they have obtained regular and substantially equivalent work elsewhere."<sup>853</sup> The significance of strikers retaining their employee status is that they continue to enjoy NLRA protections while on strike.<sup>854</sup>

Closely allied to the right of workers to retain their employee status while on strike is their right not to be discharged prior to permanent replacement.<sup>855</sup> Applying this principle, the Supreme Court, in the 1972 case of *NLRB v. International Van Lines*,<sup>856</sup> held that it was an unfair labor practice to fire striking employees before their positions have been filled.<sup>857</sup> The Court noted that it is a violation of sections 8(a)(1)<sup>858</sup> and 8(a)(3)<sup>859</sup> of the NLRA to discharge these employees when they engage in activity protected by section 7.<sup>860</sup>

The Ninth Circuit has consistently held that the discharge of eco-

851. *Id.* at 347. See also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (striking workers retain employee status).

852. 584 F.2d 934 (9th Cir. 1978).

853. *Id.* at 938. The language in the opinion echoes the statutory language of NLRA § 2(3), 29 U.S.C. § 152(3) (1976), set forth in note 849 *supra*.

854. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). See also Note, *Labor Law—Reinstatement: Expanded Rights for Economic Strikers*, 58 CALIF. L. REV. 511, 511-12 (1970).

855. A fundamental distinction between economic and unfair labor practice strikers is that the latter are protected against both discharge *and* permanent replacement, while economic strikers may be permanently replaced and are protected against discharge only until such replacement occurs. *NLRB v. Comfort, Inc.*, 365 F.2d 867, 874 (9th Cir. 1966).

856. 409 U.S. 48, 50 (1972) (employer discharged four striking employees before replacing them).

857. *Id.* at 52-53.

858. 29 U.S.C. § 158(a)(1) (1976) provides that "[i]t 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."

859. 29 U.S.C. § 158(a)(3) (1976) provides in part that "[i]t shall be 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."

860. 409 U.S. at 53. 29 U.S.C. § 157 (1976) 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, and shall also have the right to refrain from any or all of such activities . . . .

conomic strikers prior to their permanent replacement is an unfair labor practice.<sup>861</sup> This principle was applied in *NLRB v. Long Beach Youth Center, Inc.*<sup>862</sup> The court in *Long Beach* held that the employer had violated section 8(a)(1) by terminating seventeen employees who were engaged in a strike.<sup>863</sup> The court reasoned that the mass firings interfered with the employees' right to strike, an activity protected by section 7.<sup>864</sup>

In addition to the right to be free from unlawful termination, strikers have the right to strike without interference or inducements by their employer. This right is protected by section 8(a)(1), which forbids the coercion of employees in the exercise of their section 7 rights.<sup>865</sup> The decisions in this area distinguish between an employer's proper expression of views or opinions, which are sanctioned by section 8(c), and coercive statements made by an employer which contain threats of reprisal or promises of benefits.<sup>866</sup>

The Supreme Court made this distinction in *NLRB v. Virginia Electric & Power Co.*,<sup>867</sup> noting that the NLRA does not enjoin "the employer from expressing its view on labor policies or problems."<sup>868</sup> The Court determined whether coercion had occurred by examining

861. *See, e.g.*, *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 750 (9th Cir. 1951) (19 economic strikers unlawfully discharged prior to being permanently replaced). The *Globe* court held that strikers were "clearly engaged in a concerted activity for 'mutual aid or protection' within the intendment of § 7" and that "[t]heir discharge for engaging in the strike was accordingly a violation of § 8(a)(1) and (3) of the Act." *Id.* at 750. *See also* *NLRB v. Comfort, Inc.*, 365 F.2d 867, 874 (9th Cir. 1966) (employer unlawfully discharged economic strikers prior to replacement); *NLRB v. McCatron*, 216 F.2d 212, 215 (9th Cir. 1954) (economic strikers unlawfully discharged prior to replacement); *NLRB v. Cowles Pub. Co.*, 214 F.2d 708, 710-11 (9th Cir.), *cert. denied*, 348 U.S. 876 (1954) (employees illegally discharged one hour after strike began).

862. 591 F.2d 1276 (9th Cir. 1979).

863. *Id.* at 1278. The court, however, did not analyze the unfair labor practice as a violation of § 8(a)(3). Such an analysis was unnecessary because the strikers were unorganized workers and none were members of any labor union. *Id.* at 1277-78. Section 8(a)(3) only proscribes conduct that serves to encourage or discourage membership in a labor organization; this type of conduct was never an issue in the case. *See* note 859 *supra* for the text of NLRA § 8(a)(3).

864. 591 F.2d at 1278.

865. *See* notes 858 & 860 *supra* for the text of sections 8(a)(1) and 7.

866. 29 U.S.C. § 158(c) (1976) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

867. 314 U.S. 469 (1941).

868. *Id.* at 477.

the totality of circumstances surrounding the employer's activities.<sup>869</sup> In examining these activities, courts may consider the employer's statements. The Supreme Court, in *May Department Stores v. NLRB*,<sup>870</sup> held these statements to be "part of the totality of Company activities . . . properly received . . . as evidence of the unilateral action of the employer."<sup>871</sup>

The circuit courts of appeals have uniformly interpreted what types of statements made to strikers constitute coercion prohibited by section 8(a)(1). For example, an employer's solicitation that urges strikers to return to work has been held to be an unfair labor practice when accompanied by promises of benefits or threats of reprisal.<sup>872</sup> On the other hand, letters sent to striking employees informing them of the employer's intentions and asking them to indicate whether they intend to return to work have not been held to be sufficiently coercive to constitute an unfair labor practice.<sup>873</sup> Mere predictions or expressions of opinion "not coupled with a threat to use the employer's economic power to make the prediction a reality" have also been considered permissible.<sup>874</sup> In the 1978 case of *NLRB v. Triumph Curing Center*,<sup>875</sup> the

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869. *Id.* "If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act."

870. 326 U.S. 376 (1945).

871. *Id.* at 386.

872. *See, e.g., Swarco Inc. v. NLRB*, 303 F.2d 668, 670 (6th Cir. 1962), *cert. denied*, 373 U.S. 931 (1963) (supervisors solicited economic strikers to return to work, promising seniority over employees who did not return); *NLRB v. Borg-Warner Corp.*, 236 F.2d 898, 905 (6th Cir. 1956) (company solicited striking employees through newspaper and radio advertising, calling them to return to work; the ads stressed the advantages of returning and the unreasonableness of the union's demand); *American Rubber Prod. Corp. v. NLRB*, 214 F.2d 47, 54 (7th Cir. 1954) (foreman solicited economic strikers to abandon their union and return to work; solicitation accompanied by threats of reprisal and promises of benefit); *NLRB v. Clearfield Cheese Co.*, 213 F.2d 70, 73-74 (3d Cir. 1954) (foreman solicited strikers individually to return to work, promising benefits if they did and termination if they did not return by certain date); *NLRB v. James Thompson & Co.*, 208 F.2d 743, 748 (2d Cir. 1953) (employer's promise that, if union leader called off strike, employees would "all be satisfied" held to be vague promise of benefit sufficient to find an unfair labor practice).

873. *See, e.g., Rubin Bros. Footwear Inc. v. NLRB*, 203 F.2d 486, 487 (5th Cir. 1953) (letters sent to economic strikers requesting them to indicate whether they would return to work when plant opened not an unfair labor practice); *NLRB v. Penokee Veneer Co.*, 168 F.2d 868, 871 (7th Cir. 1948) (letters sent to striking employees to ascertain how many desired to return to work on the terms previously offered not an unfair labor practice).

874. *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720, 733 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964) (statements by minor supervisory employee that if enough strikers returned to work company would put in effect contract offered to union and that if not, the company would move the plant to cheaper labor area, not an unfair labor practice). *See also NLRB v. Rockwell Mfg. Co.*, 271 F.2d 109, 117 (3d Cir. 1959) (vague non-coercive warnings, not coupled with threats to use economic power to enforce them, not unfair labor practice).

875. 571 F.2d 462 (9th Cir. 1978).

Ninth Circuit followed the generally accepted rule, which prohibits an employer from promising economic benefit to strikers.<sup>876</sup> In *Triumph*, supervisors had talked to economic strikers, offering them jobs at another plant if they withdrew from the union and abandoned their strike.<sup>877</sup> The court held that these offers "represent the type of promises of economic benefit . . . prohibited by the Act."<sup>878</sup>

During the survey period, the Ninth Circuit also found improper coercion in *NLRB v. Broadmoor Lumber Co.*<sup>879</sup> In *Broadmoor*, the employer had talked to strikers and promised to meet any union demand if they returned to work without forcing him to sign a collective bargaining agreement.<sup>880</sup> The court found the employer's promise to be an unfair labor practice under section 8(a)(1).<sup>881</sup> In *NLRB v. Yama Woodcraft, Inc.*,<sup>882</sup> however, the court held that an employer may inform economic strikers of its intention to continue operations by hiring replacements, without violating section 8(a)(1).<sup>883</sup> In *Yama*, the employer notified economic strikers, after an impasse in negotiations, that it intended to maintain operations by replacing striking employees.<sup>884</sup> Following notification, the company did not exhibit any conduct calculated to undermine the union, a frequently cited reason for prohibiting an employer from directly soliciting striking employees.<sup>885</sup> Since no additional promises were made<sup>886</sup> and no advantage offered to those employees who sidestepped the union, the employer did not violate section 8(a)(1).<sup>887</sup>

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876. *Id.* at 470-71.

877. *Id.* at 470.

878. *Id.* at 471.

879. 578 F.2d 238 (9th Cir. 1978).

880. *Id.* at 240. The employees had been recently organized and struck to force employer to sign a collective bargaining agreement with the union.

881. *Id.* at 241.

882. 580 F.2d 942 (9th Cir. 1978).

883. *Id.* at 945.

884. *Id.* at 944.

885. *See, e.g., Swarco Inc. v. NLRB*, 303 F.2d 668, 673 (6th Cir.), *cert. denied*, 373 U.S. 931 (1963) (supervisors promised strikers superseniority if they returned to work); *NLRB v. Clearfield Cheese Co.*, 213 F.2d 70, 73-74 (3d Cir. 1954) (foreman solicited strikers individually).

886. 580 F.2d at 944.

887. The court stated, however, that the direct contact would not have been permissible in the absence of an impasse. "Once negotiations have reached an impasse, however, the employer is under no obligation to continue bargaining with the union . . . and may communicate directly with its employees." *Id.* at 945 (citations omitted).

In *Yama*, the court found that an impasse had been reached when the parties deadlocked on critical economic issues. Neither party attempted to negotiate other non-economic issues after that point, yet the court held that a total impasse had been reached, permitting the employer to deal directly with its striking employees. *Id.* at 945. The court

### 3. Unorganized employees' right to strike

The right of unorganized employees to engage in concerted activities without employer interference was sustained by the Supreme Court in *NLRB v. Washington Aluminum Co.*<sup>888</sup> Since the *Washington Aluminum* decision, the Ninth Circuit has consistently upheld the right of unorganized workers to strike in protest of working conditions.<sup>889</sup> During the survey period, the court continued to follow that principle. For example, in *NLRB v. Long Beach Youth Center, Inc.*,<sup>890</sup> a work stoppage in protest of working conditions by seventeen unorganized employees was held to be protected by section 7.<sup>891</sup>

Labor organizations representing health care workers are required to give ten days notice before engaging in a work stoppage, pursuant to section 8(g).<sup>892</sup> The first federal case to interpret that section's notice provision, *NLRB v. IBEW*,<sup>893</sup> concluded that it applied solely to unions representing health care institution employees, not to other unions performing unrelated work on the premises.<sup>894</sup> The Ninth Circuit, interpreting section 8(g) in *Kapiolani Hospital v. NLRB*,<sup>895</sup> held that the notice requirement applied only to labor organizations at health care institutions, not to unorganized employees.<sup>896</sup> The court determined

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indicated that a multiplicity of issues was not required to find an impasse; a single "critical" issue can create an impassable situation. *Id. Accord*, *American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 627 n.13 (D.C. Cir. 1968) (deadlock on one critical issue created impasse).

888. 370 U.S. 9 (1962) (seven unorganized employees walked out to protest intolerably cold working conditions).

889. *See NLRB v. Robertson Indus.*, 560 F.2d 396 (9th Cir. 1976) (20 unorganized workers walked off job to protest intolerable working conditions); *Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631 (9th Cir. 1969) (four unorganized workers walked out to protest working conditions).

890. 591 F.2d 1276 (9th Cir. 1979).

891. *Id.* at 1278. The 17 employees called in sick to protest working conditions. Although they had planned to apply for union membership, they were not then union members, nor was a union responsible for the work stoppage. *Id.*

892. 29 U.S.C. § 158(g) (1976) provides in part that "[a] labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention."

893. 548 F.2d 704 (7th Cir.), *cert. denied*, 434 U.S. 837 (1978) (picketing by electrical workers' union against electrical contractor performing work at hospital not subject to ten day notice requirement).

894. *Id.* at 709.

895. 581 F.2d 230 (9th Cir. 1978).

896. *Id.* at 234. The court held that the notice requirement applied only to "labor organizations" as defined by § 2(5) of the NLRA. Section 2(5) defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing



that a single unrepresented clerk who refused to cross a picket line was not required to give a ten-day notice under the section because she was not a member of a labor organization.<sup>897</sup> The *Kapiolani* court noted that the legislative intent of section 8(g) was to insure continuity of health care to the community and to protect the well-being of patients who might be jeopardized by large scale unanticipated strikes.<sup>898</sup> The court concluded that there was little danger of massive disruption of health care services due to brief work stoppages by individuals or small groups of unorganized employees; therefore, the statute was not intended to apply to them.<sup>899</sup>

#### 4. Waiver of the right to strike

Although the right to strike is protected by the NLRA,<sup>900</sup> the Supreme Court in *Boys Market, Inc. v. Retail Clerks Local 770*<sup>901</sup> determined that "a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration."<sup>902</sup> In other words, the right to strike may be waived by the inclusion of a promise in a collective bargaining agreement to submit disagreements to binding arbitration.<sup>903</sup> The

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with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1976).

897. 581 F.2d at 234.

898. *Id.* (citing Walker Methodist Residence, 227 N.L.R.B. 1630 (1977)).

899. *Id.* Similarly, in *NLRB v. Long Beach Youth Center, Inc.*, 591 F.2d 1276 (9th Cir. 1979), the Ninth Circuit held that a work stoppage by a small group of unorganized hospital employees was not subject to the § 8(g) notice requirement. *Id.* at 1278. The *Long Beach* court agreed with the *Kapiolani* court in holding that § 8(g) applies only to labor organizations as defined by § 2(5) of the NLRA. *Id.* The court noted that "[w]hether a particular group is a labor organization is a question of fact, and the Board's finding should be upheld if supported by substantial evidence." *Id.* In *Long Beach*, the NLRB had determined that the employees were not a labor organization under § 2(5) principally because their first organizational meeting did not occur until *after* the work stoppage had begun. *Id.*

900. See note 817 *supra*.

901. 398 U.S. 235 (1970).

902. *Id.* at 248.

903. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 381 (1974). See also *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 387, 407 (1976) ("The *quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery.") But see *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 261 (1962) (there is no "inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation").

The rationale for finding an implied no-strike promise is that "[s]triking over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute." *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). Such strikes may be enjoined by the district court once it is determined that the underlying dispute is over an arbitral grievance. *Id.* at 406-07.

existence of the express or implied no-strike agreement creates an exception to the section 4 prohibition<sup>904</sup> against issuing injunctions forbidding strikes.<sup>905</sup>

According to the Supreme Court in *Buffalo Forge Co. v. United Steelworkers*, a sympathy strike, however, is not subject to an injunction, notwithstanding the presence of a mandatory arbitration clause.<sup>906</sup> The Court held that the sympathy strike had not been conducted over any dispute that was "even remotely subject to the arbitration provisions of the contract."<sup>907</sup> Therefore, the rationale that led the Court in *Boys Market* to allow injunctions against strikes was not applicable to a sympathy strike situation.<sup>908</sup>

The Ninth Circuit has consistently followed the Supreme Court rule regarding the waiver of the right to strike when the contract contains mandatory arbitration provisions.<sup>909</sup> During the survey period, in *J.A. Jones Construction Co. v. Plumbers Local 598*,<sup>910</sup> the court recognized that a promise not to strike is the *quid pro quo* for an agreement by management to submit to binding arbitration.<sup>911</sup> In *Jones*, however, the court held that the necessary consideration for the waiver of the right to strike was not present because there had been no collective bargaining agreement between the parties.<sup>912</sup> Absent such an agreement, there was no promise by the employer to submit to binding arbitration, and thus the necessary *quid pro quo* for the union's obligation not to strike was missing.<sup>913</sup>

Although it is well settled that an agreement to submit to arbitra-

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904. 29 U.S.C. § 104 (1976) provides in part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) ceasing or refusing to perform any work or to remain in any relation of employment.

905. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 402-03 (1976).

906. 428 U.S. 397, 407-08 (1976).

907. *Id.* at 407.

908. *Id.* See note 903 *supra*.

909. See, e.g., *Martin Hageland, Inc. v. United States District Court*, 460 F.2d 789 (9th Cir. 1972) (no mandatory arbitration clause agreed to; therefore, no injunction against strike could be issued); *Pacific Maritime Ass'n v. International Longshoremen's Union*, 454 F.2d 262 (9th Cir. 1971) (injunction proper against strike if valid arbitration agreement exists); *Emery Air Freight Corp. v. Local 295, International Bhd. of Teamsters*, 449 F.2d 586 (9th Cir. 1971) (strike was not over grievance subject to arbitration; injunction was improper).

910. 568 F.2d 1292 (9th Cir. 1978).

911. *Id.* at 1292.

912. *Id.* at 1294-95.

913. *Id.*

tion is the *quid pro quo* for a no-strike agreement, the Supreme Court in *Drake Bakeries Inc. v. Bakery Workers*<sup>914</sup> rejected the premise that the two clauses "are exact counterweights in every industrial setting."<sup>915</sup> The Ninth Circuit followed that rule in *NLRB v. Tomco Communications, Inc.*,<sup>916</sup> the court rejected the argument that a no-strike clause is evidence of bad faith simply because the range of subjects covered by the no-strike clause is broader than that for the arbitration clause.<sup>917</sup> The court therefore held that the no-strike clause was still valid.

The *Tomco* court logically interpreted the *Drake Bakeries* decision, which had rejected the claim that the arbitration clause and the no-strike clause are exact counterweights, to preclude a finding that a no-strike clause invariably gives rise to an implied promise to submit to arbitration.<sup>918</sup> The court determined that the *Drake Bakeries* rule mandates that "[a]n agreement to arbitrate may be sufficient, but it is not necessary, consideration for an agreement not to strike."<sup>919</sup> The court justified this bias toward arbitration by recognizing that it was part of "the broader federal policy favoring the substitution of collective bargaining for industrial strife."<sup>920</sup> The significance of this interpretation by the court is that if an arbitration clause is present in a collective bargaining agreement, the court will infer a no-strike clause covering those areas subject to arbitration.<sup>921</sup> On the other hand, if there is a no-strike clause in the agreement, but no arbitration clause, the court will uphold the no-strike clause without implying an arbitration obligation.<sup>922</sup>

### B. Lockouts

The lockout is to the employer what the strike is to the employee.<sup>923</sup> Whereas a strike is the "cessation of work by employees in an effort to get for the employees more desirable terms,"<sup>924</sup> a lockout is the "cessation of the furnishing of work to employees in an effort to get

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914. 370 U.S. 254 (1962).

915. *Id.* at 261 n.7.

916. 567 F.2d 871 (9th Cir. 1978).

917. *Id.* at 879.

918. *Id.*

919. *Id.*

920. *Id.*

921. *See* note 903 *supra*.

922. 567 F.2d at 879.

923. *See generally* Denbo, *Is the Lockout the Corollary of the Strike?*, 14 LAB. L.J. 400 (1963).

924. *Iron Molders' Union v. Allis Chalmers Co.*, 166 F. 45, 52 (7th Cir. 1908) (Grosscup, C.J., concurring).

for the employer more desirable terms."<sup>925</sup>

The scope of the lockout was outlined by the Supreme Court in *American Ship Building Co. v. NLRB*.<sup>926</sup> In that case, the employer had locked out its employees solely as a means of bringing economic pressure in support of its bargaining position.<sup>927</sup> The Court held that "where the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of section 8(a)(3)<sup>928</sup> is shown."<sup>929</sup> Under the holding in *American Ship Building*, after reaching an impasse in negotiations, an employer is free to lock out its employees to improve its bargaining position.<sup>930</sup> That the lockout may dissuade employees from adhering to the position that they had initially adopted is not sufficient justification for barring its use by an employer.<sup>931</sup> The Court observed that "there is nothing in the Act which gives employees the right to insist on their contract demands free from the sort of economic disadvantage which frequently attends bargaining disputes."<sup>932</sup>

The use of the lockout does not necessarily carry the implication that the employer acted to discourage union membership or otherwise discriminate against union members.<sup>933</sup> In addition, a lockout does not violate sections 7<sup>934</sup> or 13<sup>935</sup> simply because it permits an employer to preempt the possibility of a strike.<sup>936</sup> As the Court noted in *American Ship Building*, a work stoppage, the object of any strike, has in fact occurred at that point, and the union is not precluded from accomplishing other objectives by ancillary measures such as picketing.<sup>937</sup>

The Ninth Circuit closely followed the rules set out by *American*

925. *Id.*

926. 380 U.S. 300 (1965).

927. *Id.* at 313.

928. See note 859 *supra* for text of § 8(a)(3).

929. 380 U.S. at 313.

930. *Id.* at 318. The Court described the situation that existed to create the impasse: "[A]fter extended negotiations, the parties separated without having resolved substantial differences on the central issues dividing them and without having specific plans for further attempts to resolve them." *Id.* at 303. See note 887 *supra* for a discussion of what constitutes an impasse. See also *NLRB v. Brown*, 380 U.S. 278, 284 (1965).

931. 380 U.S. at 309.

932. *Id.* at 313.

933. *Id.* at 312.

934. See note 860 *supra* for text of § 7.

935. See note 817 *supra* for text of § 13.

936. 380 U.S. at 310. There is nothing that "would imply that the right to strike carries with it the right exclusively to determine the timing and duration of all work stoppages. The right to strike as commonly understood is the right to cease work—nothing more." *Id.*

937. *Id.* at 310 n.10.

*Ship Building* in *NLRB v. Golden State Bottling Co.*<sup>938</sup> The *Golden State* court stated that an employer's lockout, "used as a means of bringing pressure on his employees in support of his bargaining position," is not a violation of section 8(a)(1) or section 8(a)(3) absent a showing that the employer intended "to injure a labor organization or to evade his duty to bargain collectively, or to discourage union membership."<sup>939</sup> During the survey period, the court was consistent in applying the same rule in *NLRB v. Tomco Communications, Inc.*<sup>940</sup> The *Tomco* court held that a lockout instituted after an impasse and used to support an employer's "lawful bargaining position" was entirely proper.<sup>941</sup>

A type of lockout that does not require an analysis of the employer's motivation is one that occurs when an employer liquidates his business. The Supreme Court held in *Textile Workers Union v. Darlington Manufacturing Co.*,<sup>942</sup> that "when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."<sup>943</sup> A partial closing on the other hand, motivated by discriminatory objectives, was held to be improper.<sup>944</sup> The Ninth Circuit recently echoed the *Textile Workers* holding in *Great Chinese American Sewing Co. v. NLRB*.<sup>945</sup> In that case, an employer closed down one of his two plants merely to "chill unionism."<sup>946</sup> The *Great Chinese American* court found that the

938. 401 F.2d 454 (9th Cir. 1965).

939. *Id.* at 456-57. In *Golden State*, the employer had locked out his employees to support his bargaining position. Immediately following the lockout, the union split into two groups. *Id.* at 455. The court determined that the disruption in union activities had not been a "necessary" consequence of the lockout. *Id.* at 457. The lockout, therefore, was not an unfair labor practice *per se* simply because of the disruption it caused. *Id.*

940. 567 F.2d 871 (9th Cir. 1978).

941. *Id.* at 884. The court emphasized that the lockout was only as good as the bargaining position of the employer. "As the company's bargaining position was lawful, so was the lockout in support of its position." *Id.* In *Tomco*, after reaching an impasse in negotiations, the employer made its final offer and locked out its employees when the union refused to accept it. *Id.* at 876. The court held that the employer's bargaining position was lawful in this instance; therefore, the lockout in support of its position was also lawful. *Id.* at 884.

942. 384 U.S. 263 (1965).

943. *Id.* at 273-74. See also *NLRB v. Brown*, 380 U.S. 278, 283 (1965) (employer may completely liquidate his business without violating either § 8(a)(1) or § 8(a)(3)).

944. 384 U.S. at 275. "[A] discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees of much the same kind as that found to exist in . . . 'temporary closing' cases." *Id.* at 274-75.

945. 578 F.2d 251 (9th Cir. 1978).

946. *Id.* at 255 (citing *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965)). The company president spoke to an assembly of employees, promising them a wage increase if they rejected the election of a union, and threatened to close the plant if they did

lockout was unlawful because it had been motivated by an anti-union animus.<sup>947</sup> The court noted, consistent with the holding in *Textile Workers*, that if the employer had *completely terminated* his business rather than partially closing it down, his action would have been lawful even if motivated by anti-union reasons.<sup>948</sup>

### C. Work Assignment Disputes

A "work assignment" or "jurisdictional" dispute arises when there is "a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another."<sup>949</sup> A strike or threat of a strike over a work assignment dispute, aimed at forcing an employer to assign particular work to one group of employees over another, is an unfair labor practice<sup>950</sup> under section 8(b)(4)(D).<sup>951</sup> The Supreme Court in *NLRB v. Plasterers' Local 79*,<sup>952</sup> stated that section 8(b)(4)(D) is interlocked with section 10(k),<sup>953</sup> which directs the NLRB, once a strike is threatened, "to 'hear and determine' the dispute out of which the alleged unfair labor practice arose."<sup>954</sup> The Board is then required by section 10(k) "to decide which union or group of employees is entitled to the disputed work."<sup>955</sup> The outcome of a section 10(k) hearing will determine "[w]hether the 8(b)(4)(D) charge [against the

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not. *Id.* at 253. After the union filed unfair labor practice charges, the employer shut down its plant and discharged all of the workers. The few who had renounced the union were given jobs at the employer's other plant. *Id.* at 254.

947. *Id.* at 255.

948. *Id.* See also note 944 *supra* and accompanying text.

949. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 263 (1964). See also *NLRB v. Radio & Television Broadcast Eng'rs Local 1212*, 364 U.S. 573, 579 (1964) (jurisdictional dispute is "a dispute between two or more groups of employees over which is entitled to do certain work for an employer").

950. See *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 123 (1971); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 263 (1964).

951. 29 U.S.C. § 158(b)(4)(D) (1976) provides:

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

(4) . . . (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—

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . .

952. 404 U.S. 116, 124 (1971).

953. 29 U.S.C. § 160(k) (1976).

954. 404 U.S. at 124 (quoting § 10(k)).

955. *Id.*

union] will be sustained or dismissed."<sup>956</sup> If the striking union "persists in its conduct despite a section 10(k) decision against it, a section 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist."<sup>957</sup>

The Ninth Circuit has consistently followed this rule.<sup>958</sup> In *Chamber of Commerce v. NLRB*,<sup>959</sup> a union ordered its members to stop work on a contractor's project until the contractor complied with a work preservation clause<sup>960</sup> in the union's collective bargaining contract.<sup>961</sup> The contractor was not a party to that contract and already had an agreement with another union covering the same work.<sup>962</sup> In order to comply with the union's demands, the contractor would have had to reassign the work to the demandant union.<sup>963</sup> The *Chamber of Commerce* court properly held that this demand by the union, which was intended to force the employer to reassign work, violated section 8(b)(4)(D).<sup>964</sup>

In *Stromberg-Carlson Communications, Inc. v. NLRB*,<sup>965</sup> the court narrowly interpreted section 8(b)(4)(D). The union in the case had picketed a jobsite of the employer in an effort to secure *future* work, disclaiming any desire for work currently in progress.<sup>966</sup> The court held that section 8(b)(4)(D) did not apply since the target of union activity was not the assignment of any "particular work."<sup>967</sup> This holding is in accord with *Plasterers' Local 79*,<sup>968</sup> in which the Supreme Court determined that the "applicability of § 8(b)(4)(D) is premised on conflicting claims of unions or groups of employees for the same job; ab-

956. *Id.*

957. *Id.* at 127.

958. *See, e.g., NLRB v. International Longshoremen's Local 50*, 504 F.2d 1209, 1212 (9th Cir. 1979), *cert. denied*, 420 U.S. 973 (1975) (no question that a union has violated section 8(b)(4)(D) by engaging in coercive activity to force the assignment of work "assuming that the Board's § 10(k) decision is valid").

959. 574 F.2d 457 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978).

960. A work preservation clause requires an employer to give a union all work "traditionally done by them." *See National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 635 (1967).

961. 574 F.2d at 460.

962. *Id.*

963. *Id.* at 463.

964. *Id.* The Board, pursuant to § 10(k) had awarded the work to the other union. The demandant union continued to picket and to threaten strikes against the general contractor after the Board decision against it. That activity was held to be an unfair labor practice under § 8(b)(4)(D).

965. 580 F.2d 939 (9th Cir. 1978).

966. *Id.* at 941.

967. *Id.*

968. 404 U.S. 116 (1971). *See* text accompanying notes 952-57 *supra*.

sent such an actual conflict, it would be futile to proceed under that section.<sup>969</sup>

The Supreme Court in *Carey v. Westinghouse*<sup>970</sup> recognized a potential problem regarding work assignment disputes. The NLRA does not provide a mechanism for resolving a "jurisdictional" controversy unless one of the unions involved strikes or threatens to strike.<sup>971</sup> The threat of a strike gives the Board the authority to resolve the dispute under section 10(k).<sup>972</sup> The *Carey* Court concluded that arbitration procedures should be used to fill the gap in the event of a work assignment dispute that lacks the threat of concerted activity.<sup>973</sup>

The Ninth Circuit also recognized, in *Burke v. Ernest W. Hahn, Inc.*,<sup>974</sup> that section 8(b)(4)(D) does not operate prior to a strike threat.<sup>975</sup> The *Burke* court found, however, that the conflict in question was not a jurisdictional dispute.<sup>976</sup> Therefore, the court did not decide how a claim should be resolved when it arises out of a work assignment controversy that has not resulted in a strike or strike threat.

#### D. Boycotts

A boycott is an attempted withdrawal of services or patronage from an employer, the object of which is to disrupt the employer's ongoing business relationships with its suppliers or purchasers, thereby weakening the employer's resistance to union demands.<sup>977</sup> A "primary" boycott occurs when a union requests other businesses to refrain from dealing with the union's employer (the *primary* employer).<sup>978</sup> A "secondary" boycott, on the other hand, occurs when union pressure is directed towards a neutral employer.<sup>979</sup> In order to protect employers from such pressure, Congress enacted section 8(b)(4)(B).<sup>980</sup> If a union's

969. *Id.* at 135.

970. 375 U.S. 261 (1963).

971. *Id.* at 263-64.

972. *Id.* at 264.

973. *Id.* at 266, 272.

974. 592 F.2d 542 (9th Cir. 1979).

975. *Id.* at 545.

976. *Id.* The actual controversy involved the payment by Hahn to employee trust funds. The question involved a determination of which of two different funds he was required to contribute money. The court determined that such a controversy was not within the meaning of section 8(b)(4)(D). *Id.* at 544-45.

977. See GORMAN, *supra* note 288, at 240.

978. *Id.*

979. See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 623 (1967) (central aspect of a "secondary boycott" is "pressure tactically directed toward a neutral employer in a labor dispute not his own").

980. 29 U.S.C. § 158(b)(4)(B) (1976).



objective is to influence a neutral employer, then its conduct will fall within the prohibition of that section.<sup>981</sup>

A common form of the secondary boycott occurs in connection with the "hot cargo" clause, a provision in a collective bargaining agreement which specifies that the employer may not compel employees to handle non-union made materials.<sup>982</sup> The hot cargo clause is thereby designed to put pressure on neutral employers who are not a party to the agreement, an essential goal of the secondary boycott. Section 8(e),<sup>983</sup> enacted in 1959, outlawed the use of the hot cargo clause.<sup>984</sup> The statute, however, contains a proviso exempting the construction industry when contracting or subcontracting of work is to be performed at a construction site.<sup>985</sup> The rationale behind the proviso, as interpreted by the Supreme Court in *National Woodwork Manufacturer's Association v. NLRB*,<sup>986</sup> was to allow these agreements for "certain secondary activities on the construction site because of the close community of interests there."<sup>987</sup> According to *National Woodwork*, however, the ban on "secondary objective agreements" still applies to

981. See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689 (1952). It is not necessary to find that the *sole* object of the pressure was secondary before the section is violated. *Id.* As long as *one* of the union's objectives was to influence a neutral employer, the conduct is prohibited by § 8(b)(4)(B). See *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 530 n.17, 531 (1977).

982. *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 112 (1958) (Douglas, J., dissenting).

983. 29 U.S.C. § 158(e) (1976) provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable [*sic*] and void.

984. Prior to the enactment of § 8(e), the mere execution of a "hot cargo" clause and the voluntary observance of the clause by the employer was not considered an unfair labor practice. See *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958) (hot cargo clause itself not considered unlawful). The enactment of § 8(e), however, rendered the clause itself unlawful. See *National Woodwork Mfr's Ass'n v. NLRB*, 386 U.S. 612, 634 (1967).

985. The construction industry proviso to NLRA § 8(e) provides that:

nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

29 U.S.C. § 158(e) (1976).

986. 386 U.S. 612 (1967).

987. *Id.* at 638-39. See also *Acco Constr. Equip., Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975) (purpose of § 8(e) proviso was to alleviate friction on the construction site).

the construction industry when contracting for non-jobsite work.<sup>988</sup>

The Ninth Circuit followed the holding of *National Woodwork* in the recent case of *International Union of Operating Engineers, Local 701 v. NLRB*.<sup>989</sup> In *International*, a clause in the collective bargaining agreement between the union and a general contractor required that all persons repairing the contractor's equipment "at or near" a jobsite comply with that agreement.<sup>990</sup> The court held the provision unlawful because it affected secondary employers, such as equipment dealers or manufacturers, by trying to force them to comply with the agreement with the contractor.<sup>991</sup> The court rejected the argument that the clause came under the construction industry proviso to section 8(e) and held that the proviso applied strictly to work performed at the jobsite.<sup>992</sup> The court emphasized that "at the jobsite" means *on* the site, not "at or near" as the union had argued.<sup>993</sup>

The Supreme Court in *National Woodwork* also determined that the prohibition against secondary pressure in section 8(b)(4)(B) does not encompass employees' activity "to pressure their employer to preserve work traditionally done by them," since that is primary activity.<sup>994</sup> Due to the primary nature of the conduct, the Court decided that section 8(e) "does not prohibit agreements made and maintained for that purpose."<sup>995</sup> In *NLRB v. Enterprise Association of Pipefitters*,<sup>996</sup> however, the Court held that, although the work preservation clause itself may be valid, an attempt to enforce it by secondary activity proscribed by section 8(b)(4)(B) remains an unfair labor practice.<sup>997</sup>

The *Pipefitters* Court established the standard to be applied in cases involving the enforcement of work preservation clauses.<sup>998</sup> That standard requires the application of the "right to control" test under which a union commits an unfair labor practice by coercing "an em-

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988. 386 U.S. at 639.

989. 578 F.2d 841 (1978).

990. *Id.* at 842 n.1. In order to comply with the agreement, the employers repairing the equipment were required to use only members of the International Union of Operating Engineers for all repair and servicing work. *Id.*

991. *Id.* at 842.

992. *Id.*

993. *Id.*

994. 386 U.S. at 635.

995. *Id.*

996. 429 U.S. 507 (1976).

997. *Id.* at 520-21. "[R]egardless of whether an agreement is valid under § 8(e), it may not be enforced by means that would violate § 8(b)(4)." *Id.* at 521.

998. *Id.* at 521. See also Leslie, *Right to Control: A Study In Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904, 908-10 (1976) (description of the "right to control" test).

ployer in order to obtain work that the employer has no power to assign."<sup>999</sup> The Ninth Circuit, in *Chamber of Commerce v. NLRB*,<sup>1000</sup> followed the standard adopted by the Supreme Court in *Pipefitters*. The *Chamber of Commerce* decision conformed with the "right to control" test, noting that its earlier decision, which had rejected the test, was no longer valid.<sup>1001</sup> The court found improper secondary activity because the union had pressured three subcontractors to either shut down or allow the union to perform work, the assignment of which the subcontractors could not control.<sup>1002</sup> The court determined that the union had engaged in improper conduct since its actual object was to pressure the general contractor who *did* have control over the assignment of work.<sup>1003</sup>

An exception to the rule prohibiting union attempts to influence anyone other than a primary employer is the "publicity" proviso to section 8(b)(4)(B).<sup>1004</sup> The proviso permits a labor organization to advise the public that a product has been made by an employer with whom the union has a primary dispute. The three qualifications to the proviso are that: (1) the labor organization must have a primary labor dispute with the employer; (2) the publicity may not influence employees of employers other than the primary employer; and (3) the publicity may not take the form of picketing.<sup>1005</sup>

The Supreme Court has indicated that a broad range of publicity is acceptable under the publicity proviso. In *Branch 496, National Association of Letter Carriers v. Austin*,<sup>1006</sup> the Court noted that the federal policy favored "uninhibited, robust and wide open debate in labor disputes."<sup>1007</sup> In addition, the Court, in *Linn v. Plant Guard Workers Lo-*

999. 429 U.S. at 521.

1000. 574 F.2d 457 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978).

1001. *Id.* at 462 n.9. Prior to the Supreme Court decision in *Pipefitters*, the Ninth Circuit had been on both sides of the fence on the right to control test. In *Associated Gen. Contractors v. NLRB*, 514 F.2d 433 (9th Cir. 1975), the court favored the test, while in *Western Monolithics Concrete Prod., Inc. v. NLRB*, 446 F.2d 522 (9th Cir. 1971), *modified*, 429 U.S. 507 (1976), the court joined with the majority of circuits rejecting the test. *See NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 527 n.15 (1976). The Supreme Court resolved the split among the circuits in its decision in *Pipefitters*, specifically approving of the approach taken by the Ninth Circuit in *Associated. Id.*

1002. 574 F.2d at 462.

1003. *Id.*

1004. 29 U.S.C. § 158(b)(4)(B) (1976).

1005. *Id.* *But see NLRB v. Fruit Packers Local 760*, 377 U.S. 58, 63-64 (1964) (prohibition against picketing does not extend to consumer picketing to publicize labor dispute against producer).

1006. 418 U.S. 264 (1974).

1007. *Id.* at 273.

*cal 114*,<sup>1008</sup> acknowledged the "congressional intent to encourage free debate on issues dividing labor and management."<sup>1009</sup> Similarly, the Ninth Circuit has given the publicity proviso a broad application.<sup>1010</sup> In the 1978 case of *Hasbrouck v. Sheet Metal Workers Local 232*,<sup>1011</sup> the court held that the publication of a "Do Not Patronize List"<sup>1012</sup> was not an unfair labor practice.<sup>1013</sup> The court reiterated the language of section 8(b)(4)(B) requiring the existence of a primary labor dispute before publication.<sup>1014</sup> The *Hasbrouck* court held that, since there was a primary labor dispute,<sup>1015</sup> the publication of the list was acceptable.<sup>1016</sup>

### E. Pickets

Picketing, as the term is commonly understood, consists of a "patrol" of persons bearing signs, in the "immediate vicinity of the employer's premises, to discourage employees and others from entering upon those premises."<sup>1017</sup> The Supreme Court, in *NLRB v. International Rice Milling Co.*,<sup>1018</sup> determined that picketing is not secondary activity per se, even though it may induce individual employees of neutral employers to avoid dealing with the primary employer.<sup>1019</sup> If the *object* of the picketing, however, is to influence a neutral employer, then the activity is prohibited by section 8(b)(4)(B).<sup>1020</sup>

A problem in determining the propriety of picketing activity arises

1008. 383 U.S. 53 (1966).

1009. *Id.* at 62.

1010. *See, e.g.*, *Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434, 436 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966) (publicity proviso to be given as broad an application as the statutory prohibition against union activities in section 8(b)(4)(B)).

1011. 586 F.2d 691 (9th Cir. 1978).

1012. The union had published a list in a local newspaper asking consumers not to patronize certain businesses. The employer's name was included in that list. *Id.* at 692.

1013. *Id.* at 694.

1014. *Id.*

1015. A "labor dispute" is defined by 29 U.S.C. § 152(9) (1976) as including "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons . . . regardless of whether the disputants stand in the proximate relation of employer and employee."

1016. 586 F.2d at 694.

1017. Note, *Picketing by an Uncertified Union: The New Section 8(b)(7)*, 69 YALE L.J. 1393, 1396 (1960). *See also* *NLRB v. United Furniture Workers*, 337 F.2d 916, 940 (2d Cir. 1964) (union representatives need not physically hold picket signs as long as pickets are associated with signs); *NLRB v. Local 182 Int'l Bhd. of Teamsters*, 314 F.2d 53, 57-58 (2d Cir. 1963) (placing signs in snowbank and retiring to nearby cars is picketing).

1018. 341 U.S. 665 (1951).

1019. 341 U.S. at 671 (picketers induced men in charge of a truck belonging to a neutral employer to refuse to cross picket line to pick up goods).

1020. *Id.*

in "common situs" cases in which two employers are performing separate tasks on common premises. The Supreme Court, in *Local 761, International Union of Electrical Workers v. NLRB (General Electric)*,<sup>1021</sup> approved of the application of an NLRB standard, known as the "Moore Dry Dock" rule,<sup>1022</sup> to picketing of a primary employer working on the premises of a secondary employer.<sup>1023</sup> The Court warned against a mechanical application of the test, but held that picketing would be presumed to be "primary," and therefore lawful, if the "Moore Dry Dock" standard has been complied with.<sup>1024</sup> In *General Electric*, the Court outlined a method by which the secondary employer at a common situs may insulate his employees from the union's dispute with the primary employer. The court authorized the employer to set up separate gates through which primary and secondary employees may enter the premises.<sup>1025</sup> Pickets may operate only at the gate used by primary employees. A qualification on the use of the separate gate system to protect neutral employers from interference is that work done by the neutral employers must be unrelated to the normal operations of the struck employer.<sup>1026</sup>

The Ninth Circuit, while recognizing the use of the "Moore Dry Dock" standards as outlined by *General Electric*, has refused to apply the "unrelated work" doctrine to cases involving a general contractor and neutral subcontractors working together at a construction jobsite. The court, in *Carpenter's Local 470 v. NLRB*,<sup>1027</sup> held that the relatedness qualification in *General Electric* applied only to an industrial plant

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1021. 366 U.S. 667 (1961).

1022. The "Moore Dry Dock" rule is derived from *Sailor's Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547 (1950), in which the NLRB held that picketing a secondary employer's premises is primary activity if it meets the following conditions:

(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; and (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

92 N.L.R.B. at 549 (emphasis in original).

1023. 366 U.S. at 677.

1024. *Id.* The Court noted that, although compliance with the rule is presumptive of primary activity, non-compliance with one or more of the conditions in the rule is *not* presumptive of illegal secondary activity. *Id.* The court concluded that the application of the "Moore Dry Dock" rule, limiting the effects of picketing to the employer against whom the dispute is directed, carries out the dual objective "of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *Id.* at 679 (quoting *NLRB v. Denver Bldg. Council*, 341 U.S. 675, 692 (1951)).

1025. 366 U.S. at 680-81.

1026. *Id.* at 680.

1027. 564 F.2d 1360 (9th Cir. 1977).

or commercial enterprise.<sup>1028</sup> In 1979, the Ninth Circuit in *International Association of Bridge Workers v. NLRB*<sup>1029</sup> continued to follow this decision, one which aligns the Ninth Circuit with several other circuit courts of appeals.<sup>1030</sup>

## VI. OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act (OSHA),<sup>1031</sup> enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions,"<sup>1032</sup> was a response to the substantial burden placed on interstate commerce by work-related deaths and injuries.<sup>1033</sup> It was passed in an effort to consolidate existing federal regulations governing occupational health and safety<sup>1034</sup> and to create a comprehensive scheme of safety guidelines for the benefit of employees.<sup>1035</sup> Pursuant to these objectives, Congress authorized the

1028. *Id.* at 1362.

1029. 598 F.2d 1154 (9th Cir. 1979). *Bridge Workers* involved union picketing at a construction site; the main issue was whether the "neutral" employer had properly set up the reserve gate system. *Id.* at 1156. The affirmative recognition of the gate by the picketing union was held to override minor technical imperfections (*e.g.*, gate signs) on the part of the employer. *Id.* at 1158.

1030. It is not clear from a reading of *General Electric* whether the distinction between industrial plants and construction sites is warranted. See 366 U.S. at 680. That is the basis, however, upon which the circuit courts are distinguishing the cases. See *Linbeck Constr. Corp. v. NLRB*, 550 F.2d 311, 316 (5th Cir. 1977) (relatedness qualification not applicable to construction sites); *NLRB v. Nashville Bldg. & Constr. Trades Council*, 425 F.2d 385, 390-91 (6th Cir. 1970) (contractors and subcontractors on construction site neutral with respect to each other's labor disputes; relatedness is not an issue); *Markwell & Hartz, Inc. v. NLRB*, 387 F.2d 79, 83 (5th Cir.), *cert. denied*, 391 U.S. 914 (1968) (relatedness qualification not an issue where subcontractor and contractor on same construction site).

1031. 29 U.S.C. §§ 651-678 (1976).

1032. *Id.* § 651(b); *Dale M. Madden Constr., Inc. v. Hodgson*, 502 F.2d 278, 279 (9th Cir. 1974) ("The controlling purpose of the Act is to reduce safety hazards and improve working conditions.").

1033. Congress had found that hazardous working environments hinder interstate commerce causing a loss of productive hours, decreased health and efficiency, and untold death and misery to its victims. S. REP. NO. 1282, 91 Cong., 2d Sess. 2-3, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5177-78.

1034. Section 653 of OSHA, 29 U.S.C. § 653 (1976), expressly provides that OSHA safety and health standards preempt corresponding but less effective safety and health standards of the following statutes: Act of June 30, 1936 (Walsh-Healey), 41 U.S.C. §§ 35-45 (1976); Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1976); Act of Aug. 23, 1958, 33 U.S.C. § 941 (1976); Act of Aug. 9, 1969, 40 U.S.C. § 333 (1976); National Foundation of Arts & Humanities Act, 20 U.S.C. §§ 951-968 (1976).

1035. *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161 (3d Cir. 1978) (OSHA standards tell "employers just what they are required to do in order to prevent or minimize danger to employees"); *Arkansas-Best Freight Sys., Inc. v. OSHRC*, 529 F.2d 649, 653 (8th Cir. 1976) ("Act is intended to prevent the first injury"); *Brennan v. OSHRC*, 513 F.2d 1032, 1039 (2d Cir. 1975).

Secretary of Labor to create mandatory safety and health standards<sup>1036</sup> enforceable against employers engaged in businesses affecting interstate commerce<sup>1037</sup> and established the Occupational Safety and Health Review Commission (OSHRC) to carry out adjudicatory functions under the Act.<sup>1038</sup>

### A. General Duty Clause

In order to eliminate hazardous conditions in the workplace, OSHA establishes two basic requirements for employers:<sup>1039</sup> (1) under section 654(a)(2)<sup>1040</sup> employers must comply with those safety and health standards promulgated, pursuant to the Act, and (2) in the absence of applicable standards, employers have a general obligation under section 654(a)(1) to furnish their employees with a place of employment free from recognized hazards that may cause death or serious physical harm.<sup>1041</sup> An action alleging a violation of this general duty

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1036. The Secretary of Labor has the authority to establish safety regulations that will serve the objectives of the Act. 29 U.S.C. § 655 (1976). By definition, a standard is "a rule or regulation established in accordance with law or other competent authority, which designates safe and healthful conditions or practices by which work must be performed to prevent injury or illness." Heath, *The Implementation and Philosophy of the William Steiger Occupational Safety and Health Act of 1970*, 25 U. FLA. L. REV., 249, 250 (1973).

The Secretary is additionally authorized, when necessary, to promulgate "emergency temporary standards" to take immediate effect upon their publication in the Federal Register. 29 U.S.C. § 655(c) (1976). These emergency standards are enacted only when employees are exposed to hazards that gravely endanger their lives or are physically harmful and when the standard is necessary to protect the employees from such danger. *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120, 130 (5th Cir. 1974).

1037. 29 U.S.C. § 651(b)(3) (1976). Section 652 defines an employer as "a person engaged in a business affecting commerce who has employees" except "the United States or any state or political subdivision of a State." *Id.* § 652(5).

1038. *Id.* § 651(b)(3). The basic function of the Commission is to hear, at its discretion, appeals from persons aggrieved by a hearing examiner's determination. The Commission is composed of three members appointed by the President of the United States. Each member serves a six-year term; vacancies are filled only for the remaining number of years left in an unexpired term. Removal of a member may be effected by the President for malfeasance, inefficiency, or neglect of duty in office. *Id.* § 661.

1039. Congress placed on employers the primary responsibility for assuring a safe working environment, because of their control over it. *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1088 (7th Cir. 1975).

1040. An employer's basic duty under the Act is defined as follows: "Each employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter." 29 U.S.C. § 654(a) (1976).

1041. *Id.* § 654(a)(1). This section of the Act is commonly referred to as "the general duty clause." See generally Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988, 992 (1973).

clause can only be maintained if three essential factors are established. The Secretary of Labor must prove that an alleged hazard is (1) recognized, (2) preventable through reasonable measures, and (3) the type of hazard likely to cause death or serious physical injury.<sup>1042</sup>

### 1. Recognized hazards

A recognized hazard is "a condition that is known to be dangerous, . . . [although] not necessarily by each and every individual employer, . . . taking into account the standard of knowledge in the industry."<sup>1043</sup> It is a condition with a potential for harm that experts in the industry would consider when prescribing a safety program.<sup>1044</sup> The determination that a hazard is recognized is made on a case-by-case basis, with the burden of proving its existence and recognition by the particular industry on the Secretary of Labor.<sup>1045</sup>

In *Titanium Metals Corp. of America v. Usery*,<sup>1046</sup> the Ninth Circuit held that a recognized hazard existed in the titanium industry. Using an objective test to determine industry recognition, the court found that extreme flammability was associated with the accumulation of titanium particles and that the industry was aware of the safety hazard presented.<sup>1047</sup> In addition, the court determined that "[a]n activity or practice may be a 'recognized hazard' even if the employer is ignorant of the activity or practice or its potential for harm."<sup>1048</sup> The record indicated, however, that the employer had experienced numerous minor fires caused by the ignition of titanium dust and had implemented a safety program to combat the danger.<sup>1049</sup> Given this abundant evidence, the court found that the danger clearly was a "recognized hazard."<sup>1050</sup>

The *Titanium Metals* court also held that the lack of precise OSHA standards on titanium dust levels did not make the danger of accumu-

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1042. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973).

1043. *Id.* at 1265 n.32 (citing 116 CONG. REC. 38377 (1970)).

1044. *Id.*

1045. *Titanium Metals Corp. of America v. Usery*, 579 F.2d 536, 538, 540 (9th Cir. 1978) (per curiam).

1046. *Id.*

1047. *Id.* at 541.

1048. *Id.* (citing *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973)).

1049. *Id.* at 539. The employer's safety program to lower the level of titanium dust accumulation consisted of periodic washdowns of the reactor and sweepdowns of working areas after each shift. The court found, however, that this program was unsupervised and at times not done at all. *Id.* at 542.

1050. *Id.* at 541.



lation less "recognized," nor did it relieve the employer of its general duty to minimize hazardous accumulations.<sup>1051</sup> Rather, the court reasoned that, given the volatile nature of titanium, the lack of precise standards "arguably imposes an even greater duty on [the employer] . . . [to adopt] feasible measures to assure the safety of its employees, [and] to err, if at all, on the side of greater, not lesser, caution."<sup>1052</sup>

## 2. Preventable hazards

OSHA was not intended to hold employers strictly liable for unsafe working conditions.<sup>1053</sup> Rather, it was only intended to require that work environments be free from unsafe conditions whenever possible.<sup>1054</sup> In order to prove that a recognized hazard is preventable, the Secretary must articulate the particular precautionary measures to be taken by an employer as well as the feasibility and likely utility of such actions.<sup>1055</sup>

In *Titanium Metals*, the Ninth Circuit sustained a general duty clause violation when it found that accumulations of titanium dust could be prevented. The Secretary had met his burden of proof; the Secretary's metallurgy expert testified that the best way to minimize titanium dust fires was by isolating the titanium particles.<sup>1056</sup> The record showed that this could be accomplished by more frequent washdowns of the plant's reactor, better supervision of employee sweepdowns, and the removal of sparking tools from the work site.<sup>1057</sup>

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1051. *Id.* at 543.

1052. *Id.* Although the court did not expressly support its holding on the absence of precise standards, its ruling accords with other circuits. *E.g.*, *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977); *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011 (7th Cir. 1975); *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973). *See* 29 C.F.R. § 1910.5(f) (1979).

1053. *See* *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 571 (5th Cir. 1976) (employer not responsible for "the unforeseeable, implausible, and therefore unpreventable acts of his employees"); *Brennan v. OSHRC*, 501 F.2d 1196 (7th Cir. 1974) (employer not liable for violation of general duty clause when inexperienced employee was killed while unloading a truck, after the employer had explicitly told him to stay away from the trucks).

1054. *See* *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973), wherein the court stated:

Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program. Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible.

1055. *Id.* at 1268. *Accord*, *Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979).

1056. 579 F.2d at 544.

1057. *Id.* *See* note 1049 *supra*.

### 3. Causation

The Secretary must also demonstrate that the hazard is one which is "causing or [is] likely to cause death or serious physical harm."<sup>1058</sup> Minor injuries will not establish a general duty clause violation.<sup>1059</sup> In evaluating this causal element, the analysis focuses not on the probability of an accident, but rather on the potential for serious physical harm should an accident occur.<sup>1060</sup> Applying this analysis to the facts of the case, the *Titanium Metals* court did not focus on the probability of a fire, but rather on its potential to spread, once ignited, and its likelihood of causing serious physical injury.<sup>1061</sup> The Ninth Circuit agreed with the lower courts determination that "[w]hatever the cause of [a fire], the several weeks' accumulations of dust and fines presented a dangerous situation that could well have resulted in death or serious injury to [Titanium Corp.] employees."<sup>1062</sup>

#### B. Serious Violations

The declared purpose of OSHA is to protect employees from hazardous working conditions.<sup>1063</sup> Serious violations of OSHA are those conditions which have a "substantial probability of causing death or serious physical harm."<sup>1064</sup> Employers who maintain these conditions in violation of OSHA may be assessed up to \$1,000 as a penalty for each violation.<sup>1065</sup> To determine whether a violation is serious, courts do not evaluate the probability that an accident will occur, but rather the probability of serious harm should an accident occur.<sup>1066</sup>

In *California Stevedore & Ballast Co. v. OSHRC*,<sup>1067</sup> the employer

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1058. 29 U.S.C. § 654(a)(1) (1976).

1059. This statement is implicit in § 654(a)(1), which requires only that the employer keep his workplace free from hazards causing *serious* harm.

1060. *Titanium Metals Corp. of America v. Usery*, 579 F.2d at 543 (citing *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975)).

1061. *Id.*

1062. *Id.* at 542.

1063. *Kent Nowlin Constr. Co. v. OSHRC*, 593 F.2d 368, 371 (10th Cir. 1979) (OSHA regulations are designed to compel maintenance of safe working conditions, not merely to assess penalties for injuries already suffered by workers).

1064. 29 U.S.C. § 666(j) (1976).

1065. *Id.* § 666(b).

1066. *Shaw Constr., Inc. v. OSHRC*, 534 F.2d 1183, 1185 (5th Cir. 1976) (substantial probability of serious injury to workers in trench if debris fell into it; held a serious violation to maintain debris); *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 831 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976) (substantial probability of serious harm if cave-in occurred; held a serious violation).

1067. 517 F.2d 986 (9th Cir. 1975).

was cited for a serious violation of an OSHA regulation.<sup>1068</sup> His workers had left an unsecured beam in place while unloading through the hatch of a ship. The record showed that there was very little chance that the beam would become dislodged and fall into the hold but, if it did fall, there was a high probability that serious injury would result. The *Stevedore* court held that the Secretary need not prove that there was a "substantial probability" that the beam would fall,<sup>1069</sup> only that if it did fall, there would be a "substantial probability" of death or serious physical harm. It reasoned that "Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey [a] regulation."<sup>1070</sup> It concluded that "[i]f the harm that the regulation was intended to prevent is death or serious physical injury, then its violation is serious per se."<sup>1071</sup>

### C. Repeat Violations

Heavier sanctions are imposed on employers who violate the Act "repeatedly."<sup>1072</sup> In the Ninth Circuit, a citation alleging a repeat violation of OSHA will be sustained only if (1) at least one prior violation has occurred and (2) the violations are "substantially similar."<sup>1073</sup> The Third Circuit also requires that the violations demonstrate a "flouting" of the Act's provisions.<sup>1074</sup>

#### 1. Prior violations

The circuits do not agree on the number of prior violations necessary to warrant a repeat citation. This disagreement stems primarily from the interpretation of the word "repeatedly." The Ninth Circuit in *Todd Shipyards v. Secretary of Labor (Shipyards I)*<sup>1075</sup> and the Fourth

1068. *Id.* at 987. The employer was cited for a violation of 29 C.F.R. § 1918.43(e) (1979). At first the citation was inadvertently labeled "non-serious." It was changed, however, to a "serious" violation on review before the Commission. The Ninth Circuit upheld this amendment by the Commission.

1069. 517 F.2d at 988. The court noted that when a specific standard is the basis of a serious violation charge, the Secretary is not required to show that there is the slightest possibility that an accident might occur. *Id.* at 988 n.1.

1070. *Id.* at 988. The court found it important that serious harm could occur even though an accident may be unlikely. By designating violations of standards protective of human life as serious, the court intended to discourage employers from violating them.

1071. *Id.* at 988 n.1.

1072. Repeated violations give rise to discretionary fines up to \$10,000 for each new violation. 29 U.S.C. § 666(a) (1976)

1073. *Todd Shipyards Corp. v. Secretary of Labor (Shipyards I)*, 566 F.2d 1327, 1329-30 (9th Cir. 1977).

1074. *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157 (3d Cir. 1976).

1075. 566 F.2d 1327, 1330-31, 1330 n.5 (9th Cir. 1977).

Circuit in *George Hyman Construction Co. v. OSHRC*<sup>1076</sup> interpreted this term as meaning "more than once," thus allowing a repeat citation to be issued based on one prior violation.<sup>1077</sup> The Third Circuit in *Bethlehem Steel Corp. v. OSHRC*,<sup>1078</sup> however, found that the term "repeatedly" in its adverbial form literally means "often repeated," "constantly," or "frequently" and thus established the rule that a requirement must be violated "more than twice" to constitute a repeat violation.

## 2. Substantial similarity

In *Todd Shipyards Corp. v. Secretary of Labor (Shipyards II)*,<sup>1079</sup> the employer was cited for three violations of section 1916.47(a) of the Code of Federal Regulations, which requires that scaffolds and ladders be provided for employees working at elevations more than five feet above a solid surface. The violations, although of the same regulation, were not factually identical and did not occur on the same vessel. As a result, the ALJ held that they were not "repeated." The Ninth Circuit, reviewing this decision, held that violations do not have to be identical to constitute a repeat violation.<sup>1080</sup> It reasoned that in most industries, especially shipbuilding, it would be nearly impossible to find two violative conditions which were factually identical.<sup>1081</sup> It thus concluded that a showing of "substantial similarity" between violations would be sufficient to meet the criteria of a repeat violation.<sup>1082</sup>

## 3. "Flouting" the Act

Another area of controversy concerning repeat violations is whether an employer's repeated violations must constitute a "flouting" of the Act, demonstrated by an employer's willful disregard of the Act's requirements. Section 666(a) of OSHA prohibits "[a]ny employer from willfully or repeatedly" violating its provisions.<sup>1083</sup> The Third Circuit contends that since "willfully" and "repeatedly" are in the same section, this strongly suggests that "the objective conduct which 'repeat-

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1076. 582 F.2d 834, 839 (4th Cir. 1978).

1077. Additional support for the Ninth and Fourth Circuits' definition is provided by the OSHA Field Operations Manual's definition of "repeatedly." A repeat citation may issue when, "upon reinspection, another violation of the previously cited section . . . is found." OSHA Field Operations Manual, Ch. VIII, § (B)(5)(a) (1975).

1078. 540 F.2d 157, 160-62 (3d Cir. 1976).

1079. 586 F.2d 683, 684 n.3 (9th Cir. 1978).

1080. *Id.* at 685.

1081. *Id.* at 685 n.6.

1082. *Id.* at 687.

1083. 29 U.S.C. § 666(a) (1976).

edly' encompasses must be similar to that which would raise an inference of willfulness."<sup>1084</sup> Rejecting this view, the Ninth Circuit in *Shipyards II* held that an employer can "repeatedly" violate the requirements of the Act without displaying a "flouting" of its standards.<sup>1085</sup> It concluded that flouting the Act is not an element of a repeat violation for Congress did not intend to equate repeated violations with willful ones.<sup>1086</sup>

The Fourth Circuit likewise found that Congress did not mean to require a showing of employer intent for a repeat violation.<sup>1087</sup> It argued that willful violation citations and repeat violation citations were designed to reach different problems. "The crux of the repeated violation penalty is failure to correct safety hazards."<sup>1088</sup> Subsequent violations of OSHA standards indicate that an added incentive is necessary to gain compliance from the employer. "Willful violations, on the otherhand, contemplate an intentional disregard for the Act's safety standards" and are designed to prevent an employer from consciously disregarding safety standards of which he has actual knowledge.<sup>1089</sup> Given the distinctions drawn by the Ninth and Fourth Circuits between willful and repeated, it is clear that an employer can be charged with "repeatedly" violating the Act without "flouting" its requirements.<sup>1090</sup>

#### D. OSHA Inspections

In order to assure compliance with standards promulgated pursuant to the Act, section 657(a) of OSHA authorizes the Secretary of Labor to conduct inspections of employers' premises.<sup>1091</sup> In the past,

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1084. *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157, 162 (3d Cir. 1976). The court suggested several factors to be considered in determining whether an employer has flouted the Act: "the number, proximity in time, nature and extent of violations, their factual and legal relatedness, the degree of care of the employer in his efforts to prevent violations of the type involved, and the nature of the duties, standards or regulations violated." *Id.*

1085. 586 F.2d at 686. The Ninth Circuit noted, however, that a penalty can only be assessed for a repeat violation if the employer "knew or should have known" that a violation existed. *Id.*

1086. *Id.*

1087. *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 840 (4th Cir. 1978).

1088. *Id.*

1089. *Id.*

1090. The Ninth and Fourth Circuits have implicitly adopted the approach of the OSHA Field Operations Manual, which does not require that an employer "flout" the Act to establish a repeat violation. Rather, it provides: "Repeat violations differ from willful violations in that they may result from an inadvertent, accidental, or ordinary negligent act." OSHA Field Operations Manual, Ch. VIII, § (B)(5)(b) (1975).

1091. 29 U.S.C. § 657(a) (1976).

these inspections had been conducted without a search warrant. The Act authorized Compliance Safety and Health Officers, upon presentation of their credentials, "to enter without delay, at reasonable times, any . . . workplace . . . where work is performed by an employee of an employer; to inspect and investigate . . . all pertinent conditions; . . . to question privately any employer, owner, operator, agent or employee; and to review records required by the Act."<sup>1092</sup> This authorization, allowing warrantless inspections of business establishments, was held unconstitutional by the Supreme Court in *Marshall v. Barlow's, Inc.*<sup>1093</sup> in 1978.

### 1. Warrant requirement

In *Barlow's*, an OSHA inspector, after presenting his credentials, requested permission to inspect the working areas of Barlow's plant. The owner refused the request.<sup>1094</sup> The Court held that section 657(a) violated an employer's fourth amendment right to be free from unreasonable searches and seizures.<sup>1095</sup> Considering prior decisions, which had limited administrative searches made without a warrant,<sup>1096</sup> the Court determined that a warrant requirement would not impose a serious burden on the Act's inspection system.<sup>1097</sup> The element of surprise, claimed by the Secretary to be essential to effective enforcement of the Act, could be maintained, when necessary, through the issuance of an *ex parte* warrant.<sup>1098</sup> The *Barlow's* Court further noted that "the great majority of businessmen can be expected . . . to consent to inspection

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1092. 29 C.F.R. § 1903.3 (1979).

1093. 436 U.S. 307 (1978).

1094. Following Barlow's refusal to permit the inspection, the Secretary sought compulsory process in accordance with 29 C.F.R. § 1903.4 (1979) to compel Barlow's to permit the inspection. The District Court of Idaho ordered Barlow's to admit the inspector. Again refusing, Barlow's got its own injunction against the warrantless search. A three-judge court was convened, finding in Barlow's favor that the fourth amendment required a search warrant for this type of inspection. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437, 442 (D. Idaho 1977).

1095. 436 U.S. at 325. In a subsequent decision, the Seventh Circuit found § 657(a) constitutional as long as a search warrant is obtained before inspection. It stated that the "Court made it clear . . . that despite Congress' failure to include a warrant requirement in § 657(a), if process was obtained that satisfied the Fourth Amendment requirements, inspections under § 657(a) would be perfectly permissible." *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1125 (7th Cir. 1978) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 n.23 (1978)).

1096. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967).

1097. 436 U.S. at 316.

1098. *Id. See See v. Seattle*, 387 U.S. 541, 545 n.6 (1967) ("the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved").

without a warrant."<sup>1099</sup> When an employer refuses consent, the Act's procedure for inspection requires the Secretary to seek compulsory process.<sup>1100</sup>

## 2. Probable cause

Realizing that inspections are crucial to the enforcement of the Act, the *Barlow's* Court adopted a modified standard of probable cause.<sup>1101</sup> Under that standard, probable cause may be based "not only on specific evidence of an existing violation, but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"<sup>1102</sup> The Seventh Circuit, interpreting *Barlow's*, requires more than a mere statement that "a desired search is part of an inspection and investigation program pursuant to the Act" as a basis for probable cause.<sup>1103</sup> Rather, the magistrate must be provided with sufficient evidence from which it can be determined that an inspection program exists, that it is reasonable, and that the inspection of the particular employer's establishment fits within the program.<sup>1104</sup>

### E. Procedure

#### 1. Exhaustion of remedies

During the survey period, the Ninth Circuit decided two cases in which employers challenged OSHA's jurisdiction in federal district

1099. 436 U.S. at 316.

1100. *Id.* at 317, 318. In December of 1978, 29 C.F.R. § 1903.4 was modified to clarify the meaning of "compulsory process" and to ensure that its provisions met the *Barlow's* requirements. This section now defines "compulsory process" as "the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent." 29 C.F.R. § 1903.4 (1979). This change was a response to a district court's determination that, in its original form, the section did not provide the Secretary with the authority to proceed ex parte to obtain a warrant. *Cerro Metal Products v. Marshal*, 467 F. Supp. 869 (E.D. Penn. 1979). *Contra*, *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1125 (7th Cir. 1978) (warrant obtained pursuant to § 657(a) and § 1903.4 in its original form is perfectly permissible under *Barlow's*).

1101. 436 U.S. at 320. In defining probable cause the *Barlow's* Court stated that the Secretary's "entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises." *Id.*

1102. *Id.* (quoting *Camara v. Municipal Court*, 357 U.S. 523, 538 (1967)).

1103. *In re Northwest Airlines*, 587 F.2d 12, 15 (7th Cir. 1978).

1104. *Id.* *Marshall v. Chromalloy American Corp.*, 589 F.2d 1335, 1343 (7th Cir. 1979) (probable cause found in warrant application: desired inspection was part of a "[n]ational-local plan designed to achieve sufficient reduction in the high incidence of occupational injuries found in the metal working and foundry industry").

court without previously exhausting their administrative remedies.<sup>1105</sup> In *Marshall v. Able Contractors, Inc.*,<sup>1106</sup> OSHA officers cited the employer for violations of the Act. The employer contested OSHA jurisdiction on the ground that he was not an employer affecting interstate commerce, arguing that the Secretary must first conduct a pre-inspection evidentiary hearing to determine jurisdiction. The Ninth Circuit rejected this argument and held that the proper time to raise issues of statutory coverage is on administrative appeal while contesting the validity of a citation.<sup>1107</sup> To require a jurisdictional hearing before inspection "would totally frustrate OSHA's express objective of establishing a system of enforcement without undue delay."<sup>1108</sup>

In *Marshall v. Burlington Northern*,<sup>1109</sup> the employer obtained an injunction against a proposed OSHA inspection of its railroad yard on the ground that OSHA jurisdiction had been preempted by the Federal Railroad Administration.<sup>1110</sup> The Ninth Circuit quashed the injunction because the employer failed to exhaust his administrative reme-

1105. The OSHRC, composed of three members appointed by the President, takes notice of employer objections to the Act—based primarily on citations issued by the Secretary of Labor—and designates one of its hearing examiners to preside over the case. 29 U.S.C. § 661 (1976). Following a hearing, the recommended decision and order of the hearing examiner becomes a final order within 30 days unless the Commission orders a review. *Id.* § 661(i). Following such a review, the Commission can issue orders based on findings of fact or conclusions of law, affirming, modifying, or reversing the examiner's determination, or may direct other appropriate relief. Any person adversely affected or aggrieved by an order of the Commission may obtain a review of such order in a United States Court of Appeals. *Id.* § 660(a).

1106. 573 F.2d 1055 (9th Cir. 1978) (per curiam).

1107. 573 F.2d at 1057. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946) (Congress authorized the government, not the judiciary, to make determinations of agency jurisdiction in the first instance). *Accord*, *Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir. 1977) ("agencies are created to apply their statutory authority in the first instance and . . . considerations of agency expertise and efficiency counsel the courts not to interfere before the agency has acted").

1108. 573 F.2d at 535. Only a *clear* showing of irreparable injury from anticipated agency action will excuse a litigant from exhausting his administrative remedies and permit judicial intervention in the agency process. Litigation expenses, however, even if substantial and nonrecoverable, do not constitute irreparable injury. *Christensen v. FTC*, 549 F.2d 1321, 1324 (9th Cir. 1977).

1109. 595 F.2d 511 (9th Cir. 1979).

1110. Section 653(b)(1) precludes OSHA jurisdiction where "other Federal agencies, and State agencies" have exercised "statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." 29 U.S.C. § 653(b)(1) (1976). Also, the Act expressly provides that its jurisdiction does not extend to federal employees. *Id.* § 652(4). Currently there is legislation pending in Congress which will extend the Act's protection to include United States postal workers. This legislation, introduced by Senator Wilson of California, has been passed in the House of Representatives and has been assigned to the Senate Committee on Governmental Affairs. H.R. REP. NO. 487, 96th Cong., 1st Sess. (1979). As of January 1980, the Senate had not acted on the bill.



dies. Accordingly, it held that the proper procedure for challenging the Act's coverage is to raise the jurisdictional issue together with other defenses on administrative appeal before the OSHRC.<sup>1111</sup>

## 2. Final orders

Under section 660 of OSHA, any person adversely affected or aggrieved by a "final order" of the Commission may obtain a review of such "order" in any United States Court of Appeals.<sup>1112</sup> Two types of orders are reviewable: (1) a hearing examiner's determination, which becomes a final order within thirty days provided no Commission member directs a review, and (2) a decision by the Review Commission, once it elects to review a case. The three-member Commission's determination, however, is not a "final order," unless it is based on the "affirmative vote of at least two members."<sup>1113</sup> When less than two members join in a decision, the issue becomes whether a "final order" of the Commission has been rendered.<sup>1114</sup>

This precise question was dealt with by the Ninth Circuit in the 1978 case of *Cox Brothers, Inc. v. Secretary of Labor*.<sup>1115</sup> In *Cox*, the employer contested the issuance of three OSHA citations at its construction site. The ALJ sustained all three violations and levied a \$1,100 fine. The Commission, sitting with only two members, elected to review the determination but was equally divided on all three violations. It then "affirmed [the ALJ's decision] by an equally divided Commission." The Ninth Circuit held that this was not a final order and therefore not reviewable.<sup>1116</sup> Relying on section 666(i) of the Act,<sup>1117</sup> the court concluded that a one-to-one affirmance of an ALJ's

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1111. 595 F.2d at 513 (citing *In re Restland Memorial Park*, 540 F.2d 626, 628 (3d Cir. 1976)).

1112. 29 U.S.C. § 660(a) (1976). The findings of the Commission if based on substantial evidence are conclusive on review. Courts generally accord the Commission considerable deference in reviewing an administrative record. *See Brennan v. OSHRC*, 501 F.2d 1196 (7th Cir. 1974) (OSHRC is presumed to have technical expertise and experience in the field of job safety; a court must therefore defer to findings and analysis of the Commission).

1113. 29 U.S.C. § 661(e) (1976) provides: "For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members."

1114. It is possible for less than two members to join in a decision when, for example, (1) there are only two members sitting on the Commission (a quorum) and they cannot agree on a decision; or (2) when three members are sitting on the Commission, but no two members vote the same way. *See George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834 (4th Cir. 1978) (one commissioner voted for remand, another for affirmance, and the third for reversal).

1115. 574 F.2d 465 (9th Cir. 1978).

1116. *Id.* at 466.

1117. *See* note 1105 *supra*.

decision is not the "affirmative vote of at least two members" and thus provided no final order for the Court of Appeals to review.<sup>1118</sup> Accordingly, the court dismissed Cox's petition for review.<sup>1119</sup>

The *Cox* court's interpretation of "official action" was rejected by the Fourth Circuit in *George Hyman Construction Co. v. OSHRC*.<sup>1120</sup> In *Hyman*, the employer was cited for repeatedly violating the Act. The violations were sustained by an ALJ. Upon review, the Commission was divided on whether the violations were repeated. Consequently, one Commissioner voted to remand, a second Commissioner voted to affirm, and the third voted to reverse. As a result, the Chairman of the Commission directed that the ALJ's decision become the final action of the Commission. On appeal, the court found there was a reviewable order. It held that when there is no "official action" of the Commission, because of the lack of an "affirmative vote of at least two members," the ALJ's decision shall constitute a "final order."<sup>1121</sup> It noted that allowing the ALJ's decision to stand is analogous "to the case of split decision affirmances by a court of appeals or the Supreme Court under which the lower court decision is allowed to stand."<sup>1122</sup>

<i>James Boyle</i>	—The Representation Process and Union Recognition (III)
<i>Nicholas Cipiti</i>	—Occupational Safety and Health Act (VI)
<i>Alfred Clark III</i>	—Administration of the NLRA (I)
<i>Mark D. Sachar</i>	—Concerted Actions (V)
<i>Carol Sherman</i>	—Collective Bargaining (IV)
<i>Catherine Stevenson</i>	—Unfair Labor Practices (II)

1118. 574 F.2d at 466.

1119. *Id.* The Ninth Circuit's interpretation of the quorum requirement finds support in the Fifth Circuit. In *Shaw Constr., Inc. v. OSHRC*, 534 F.2d 1183 (5th Cir. 1976), the court held that a one-to-one affirmance of an ALJ's decision did not comply with the statutory requirement of § 661(e). Instead of dismissing the petition for review as the *Cox* court had done, the Fifth Circuit remanded the case back to the Commission to determine the substantive issue previously decided by a split vote.

1120. 582 F.2d 834 (4th Cir. 1978).

1121. *Id.* at 836; *Bristol Steel & Iron Works v. OSHRC*, 601 F.2d 717 (4th Cir. 1979) (one-to-one vote by OSHRC constitutes affirmance of ALJ's decision).

1122. 582 F.2d at 837 n.5.

