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I. ADMINISTRATION OF THE ACT

A. *Jurisdiction*

1. Definitions—employer/employee

The protections of the National Labor Relations Act (Act or NLRA) are conferred upon "employees"¹ but not "supervisors."² The

1. Section 2(3) of the Act, 29 U.S.C. § 152(3) (1976) provides:

(3) 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, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any person who is not an employer as herein defined.

2. Section 2(11) of the Act, 29 U.S.C. § 152(11) (1976) provides:

(11) The term "supervisor" means any individual having authority, in the interest

Ninth Circuit has taken the view that an individual is a supervisor under the meaning of section 2(11) of the Act if he exercises at least one of the powers enumerated in that section *and* uses independent judgment in its exercise.³

During the survey period, in *NLRB v. Big Three Industries, Inc.*,⁴ the Ninth Circuit sustained the National Labor Relations Board's (Board or NLRB) finding that a certain employee was a supervisor.⁵ The court noted that the employee in question directed his unit of employees on a daily basis, administered sick leave and overtime, and assisted in the hiring, discipline, and merit review of other employees. These activities were sufficient to categorize the employee as a supervisor. His part-time performance of the same type of work done by other employees in his unit did not alter the conclusion.⁶

The court's conclusion that the employee in question was a supervisor is consistent with the established rule for making such a determination.⁷ The conjunctive test of performing at least one of the supervisory activities enumerated in section 2(11)⁸ *and* using in-

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.

E.g., *L.A. Young Spring & Wire Corp. v. NLRB*, 163 F.2d 905, 906 (D.C. Cir. 1947) (privileges and benefits of Act limited to "employees" and not "supervisors"), *cert. denied*, 333 U.S. 837 (1948).

3. *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d 834 (9th Cir. 1977); *accord Sweeney & Co. v. NLRB*, 437 F.2d 1127 (5th Cir. 1971); *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968); *NLRB v. Roselon S., Inc.*, 382 F.2d 245 (6th Cir. 1967).

4. 602 F.2d 898 (9th Cir. 1979).

5. *Id.* at 901-02. The Board has the authority and duty to determine the application of the term "supervisor" in the first instance, and the court will generally defer to its interpretation if it has a reasonable basis in law. *E.g.*, *International Ass'n of Bridgeworkers Local 207 v. Perko*, 373 U.S. 701, 706 (1963); *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d 834, 837 (9th Cir. 1977). This rule arises from the general rule that the Board's findings of fact and conclusions therefrom will be sustained if supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *e.g.*, *NLRB v. Heath Tec Div.*, 566 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 832 (1978); *see also* the survey cases: *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 724 (9th Cir. 1980); *NLRB v. Adams Delivery Serv., Inc.*, 623 F.2d 96, 98 (9th Cir. 1980); *NLRB v. J.C. Penney Co., Store No. 29-9*, 620 F.2d 718, 719 (9th Cir. 1980); *NLRB v. Best Prods. Co.*, 618 F.2d 70, 73 (9th Cir. 1980); *NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980); *In re Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1252 (9th Cir. 1979) (*per curiam*); *NLRB v. Albert Van Luit & Co.*, 597 F.2d 681, 686 (9th Cir. 1979) (*per curiam*).

6. 602 F.2d at 902.

7. *See supra* note 3 and accompanying text.

8. *See supra* note 2 for the text of § 2(11).

dependent judgment in its performance was met because the activities described fell within the section 2(11) list and could not have been performed without the use of independent judgment.

Section 2(3) of the Act⁹ defines "employee" broadly with specific exceptions. Illegal aliens are not among those exceptions.¹⁰ Partly because of that fact, the Ninth Circuit held in the 1979 case of *NLRB v. Apollo Tire Co.*,¹¹ that alien employees, regardless of whether they have working papers, are "employees" as defined in section 2(3) of the Act.¹²

The employer in *Apollo* unsuccessfully argued that the Board's policy of not distinguishing between citizens and properly documented aliens on the one hand, and illegal aliens on the other, conflicted with the restrictive immigration policy of the Immigration and Naturalization Act of 1952 (INA).¹³ The court joined the Seventh Circuit, the only other circuit to have addressed this question,¹⁴ in rejecting this argument, basing its decision on several factors: (1) that federal immigration statutes neither prohibit employers from hiring illegal aliens nor prohibit illegal aliens from working and exercising rights protected by the Act;¹⁵ (2) that the INA, which makes it a felony to harbor an illegal alien, provides that employment shall not constitute harboring;¹⁶ and (3) that the Supreme Court has implied that Congress can extend privileges to illegal aliens if it so desires.¹⁷ Because illegal aliens *could* be covered by the Act, the court concluded that they should be; otherwise employers would be encouraged to hire illegal aliens to circumvent the protective provisions of the Act.¹⁸ Thus, the court reasoned, the restrictive provisions and spirit of the INA are strengthened, not weakened, by including illegal alien employees in the definition of "employees" in section 2(3).¹⁹

9. See *supra* note 1 for the text of § 2(3).

10. *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1182 (9th Cir. 1979).

11. 604 F.2d 1180 (9th Cir. 1979). This case arose from the employer's outlandish unfair labor practices against his illegal alien employees, including death threats against the mother of one for her assistance in filing complaints with the Board. The Board issued various cease and desist orders and ordered reinstatement of certain employees. *Id.* at 1181-82.

12. *Id.* at 1182-83.

13. *Id.* at 1182. The INA is codified at 8 U.S.C. §§ 1101-1557 (1979). See § 1182(a)(14), which restricts the entry of alien workers into the United States.

14. See *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978).

15. 604 F.2d at 1183.

16. *Id.*; see 8 U.S.C. § 1324 (1978).

17. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67 (1975)).

18. 604 F.2d at 1183.

19. *Id.*; see *supra* note 1 for the text of § 2(3). The decision to include illegal aliens under the Act was consonant with the design of the Act "to include all employees not specifi-

The employer in *Apollo* argued further that the Board's order to reinstate illegal aliens who were victims of unfair labor practices required it to violate California Labor Code section 2805(a), which prohibits the employment of illegal aliens.²⁰ The court skirted the issue by noting that the statute potentially conflicted with federal immigration laws.²¹ The court's conclusion is at best unsettling: the company may petition for modification of the reinstatement order if section 2805(a) is found to be constitutional²² and if the state authorities subsequently attempt to enforce the section against reinstated alien employees.

Apparently the court would then modify the Board's order not to include reinstatement. This modification would establish two classes of "employees" in California under section 2(3) of the Act. One class, United States citizens and legally documented aliens, would be fully protected by the Act. The other class, illegal alien employees, would be without the remedy of reinstatement provided by the Act.²³ Consequently, illegal aliens would derive little protection from the Act, since any complaining alien could be fired with impunity.

The United States is not an employer according to section 2(2) of the Act²⁴ and is therefore exempt from the Act's requirements. The

cally excepted." *NLRB v. Monterey County Bldg. & Constr. Trades Council*, 335 F.2d 927, 930 n.4 (9th Cir. 1964), *cert. denied*, 380 U.S. 913 (1965). The court did not address the argument raised in *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 362 (7th Cir. 1978), that if illegal alien workers were included in § 2(3), they might be able to control the working conditions of those legally employed. The counter to this reasoning is the same as was expressed by the court in response to the restrictive immigration arguments: by excluding illegal aliens from the protections of the Act, unscrupulous employers will be encouraged to hire them to circumvent the Act. *See* 604 F.2d at 1183.

20. *Id.* at 1183. CAL. LAB. CODE § 2805(a) (West Supp. 1980) provides that: "No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."

21. 604 F.2d at 1184. The statute would unconstitutionally conflict with federal law if the California courts interpret the statute to prevent employment of aliens who are not entitled to lawful residence but who are permitted to work in the United States under the INA. *Id.*

22. *Id.* Section 2805(a) is constitutional and enforceable if the California courts decide that employment of aliens who are permitted to work but not reside in the United States under federal law does not violate the statute. 604 F.2d at 1184; *see DeCanas v. Bica*, 424 U.S. 351 (1976) (§ 2805(a) not unconstitutional as a regulation of immigration and not preempted under supremacy clause by INA). So far, the California courts have not construed § 2805(a) in a manner conflicting with federal law. 424 U.S. at 365.

23. 29 U.S.C. § 160(c) (1976) provides in pertinent part: "If . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue . . . an order requiring such person . . . to take such affirmative action including reinstatement of employees with or without back pay"

24. Section 2(2) of the Act, 29 U.S.C. § 152(2) (1976) defines employer:

(2) The term "employer" includes any person acting as an agent of an employer,

Supreme Court in *NLRB v. E.C. Atkins Co.*²⁵ determined that a private employer, who is otherwise subject to the NLRA, shares the governmental exemption if in performance of a government contract the employer retains so little control over terms and conditions of employment that its employees could be fairly described as working for the government rather than for the employer.²⁶

In *Zapex Corp. v. NLRB*,²⁷ the employer claimed a shared exemption because it subcontracted to work for the Army. The Ninth Circuit in *Zapex* applied a test for shared exemption similar to the "control over employees" test applied by the Supreme Court in *Atkins*, where the Court considered whether the employer or the government exercised "substantial control" over the employees.²⁸ In *Zapex*, the Army exercised control over *Zapex* employees' dress; work facilities were shared with the Army; the Army wielded influence over wages, promotion, and discharge; and employees' positions mirrored Army ranks.²⁹ The court, however, supported the Board's conclusion that the Army did *not* exercise the requisite "substantial control" over the employees. The employer retained substantial control over such bargaining subjects as wages and hours; negotiation of a collective bargaining agreement was not precluded; and there were no significant limitations on the employer in such collective bargaining areas as seniority, grievance procedures, retirement plans, profit sharing, and health insurance.³⁰

The court also rejected the employer's alternative theories of exemption: the Army and employer were joint employers, and the Board abused its discretion by exercising jurisdiction because the "intimate relationship" between the employer and the Army made application of labor laws inappropriate.³¹ The court responded that Board opinions resolving shared exemption issues on the basis of joint employer status

directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

25. 331 U.S. 398 (1947).

26. *Id.* at 412-13. The Court noted that the Board's determination in such matters must be accepted by reviewing courts if it is reasonably based on the evidence and is consistent with the law. *Id.* at 403; *see supra* note 5.

27. 621 F.2d 328 (9th Cir. 1980).

28. *Id.* at 333; *see NLRB v. Atkins*, 331 U.S. 398, 412-13 (1947).

29. 621 F.2d at 331.

30. *Id.* at 333.

31. *Id.*

have implicitly applied the "substantial control" test,³² and therefore the employer's argument failed. Similarly, the court held that the "intimate relationship" question was also a question of "substantial control."³³

2. NLRB preemption of state and federal court jurisdiction

Generally, neither state nor federal courts have jurisdiction over suits involving activity which is arguably subject to section 7 or 8 of the NLRA because such claims come under the exclusive jurisdiction of the NLRB.³⁴ Jurisdictional conflicts between the Board and federal district courts arise, however, when unfair labor practice charges or defenses are involved in suits for violation of a *contract* between an employer and a labor organization.³⁵ These conflicts derive from section 301 of the Labor Management Relations Act (LMRA), which provides that breach of contract suits between an employer and a labor organization may be brought in any federal district court having jurisdiction over the parties.³⁶ This federal jurisdiction to decide contract issues is *not* preempted by the Board simply because the contract breach is either caused or defended by allegations of unfair labor practices.³⁷ The Ninth Circuit has recognized this principle in past decisions: district court jurisdiction to enforce a collective bargaining agreement is not preempted by the Board when the breach involves an unfair labor practice.³⁸

32. *Id.* (citing Toledo Dist. Nurse Ass'n, 216 N.L.R.B. 743 (1975); Massachusetts Soc'y for Prevention of Cruelty to Animals, 203 N.L.R.B. 98 (1973)).

33. 621 F.2d at 333. Other circuits have also equated a shared exemption claim based on an "intimate relationship" with "substantial control." Those cases dealing in terms of "intimate relationships" invariably turn on who exercises what controls over employees. *See, e.g.*, NLRB v. Pope Maintenance Corp., 573 F.2d 898 (5th Cir. 1978) (corporate contractor engaged in maintenance and repair of ground equipment for Air Force had no shared exemption); *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770 (D.C. Cir. 1969) (joint employer with exempt World Bank not exempt); *NLRB v. Howard Johnson Co.*, 317 F.2d 1 (3d Cir.) (operator of restaurant on New Jersey Turnpike did not share exemption of New Jersey Turnpike Authority), *cert. denied*, 375 U.S. 920 (1963).

34. *See* 29 U.S.C. § 157 (1976) (rights of employees); 29 U.S.C. § 158 (1976) (unfair labor practices); *see also* *Sears, Roebuck & Co. v. Carpenters San Diego County Dist.*, 436 U.S. 180, 191-93 (1978); *Association of St. Employees v. Lockridge*, 403 U.S. 274, 287 (1971); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-43 (1959); *Garner v. Teamsters Local 776*, 346 U.S. 485, 490-91 (1953).

35. *Bartenders and Culinary Workers Union Local 340 v. Howard Johnson Co.*, 535 F.2d 1160, 1162 (9th Cir. 1976).

36. 29 U.S.C. § 185 (1976).

37. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

38. 535 F.2d at 1162; *Lodge 1327, International Ass'n of Machinists v. Fraser & John-*

In the 1979 case of *Waggoner v. R. McGray, Inc.*,³⁹ the employer defended against a section 301 action for enforcement of a collective bargaining agreement on the basis that the agreement was an unfair labor practice. The district court⁴⁰ entertained the unfair labor practice defense and granted summary judgment to the employer, but the Ninth Circuit reversed. The Ninth Circuit held that federal courts may not entertain unfair labor practice defenses to section 301 actions to enforce collective bargaining agreements *before* the Board has exercised primary jurisdiction over the unfair labor practice charge.⁴¹ The court reasoned that when, as in this case, there exists an unfair labor practice defense to an action to enforce a collective bargaining agreement, the party complaining of the unfair practice can bring that charge before the Board.⁴² The preemption doctrine applied so that the congressionally established scheme for resolution of unfair labor practice disputes before the Board would be preserved.⁴³

The rule in *Waggoner* is of particular significance because the statute of limitations for filing unfair labor practice charges before the Board is six months.⁴⁴ A party who wishes to challenge an agreement which condones the commission of an unfair labor practice and who asserts the unfair labor practice as a defense to its performance must complain to the Board within six months of the performance of the illegal part of the agreement or lose the unfair labor practice defense.⁴⁵ That party must be careful not to let the statutory period lapse while sparring with its adversary in a section 301 action in district court.

ston Co., 454 F.2d 88, 90 (9th Cir. 1971) (citing *Association of St. Employees v. Lockridge*, 403 U.S. 274, 297-301 (1971)), *cert. denied*, 406 U.S. 920 (1972).

39. 607 F.2d 1229 (9th Cir. 1979).

40. *Waggoner v. R. McGray, Inc.*, 432 F. Supp. 580 (C.D. Cal. 1977), *rev'd*, 607 F.2d 1229 (9th Cir. 1979).

41. 607 F.2d at 1235. Other circuits are divided on the question of district court entertainment of unfair labor practice defenses to contract actions. *Accord* *Huge v. Long's Hauling Co.*, 590 F.2d 457, 461 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979); *Mullins v. Kaiser Steel Corp.*, 466 F. Supp. 911, 916 (D.D.C. 1979), *aff'd*, 642 F.2d 1302 (D.C. Cir. 1980), *cert. granted*, 451 U.S. 969 (1981). *Contra*, *Todd Shipyards Corp. v. Industrial Union of Marine Workers Local 39*, 344 F.2d 107, 109 (2d Cir. 1965).

42. 607 F.2d at 1236.

43. *Id.* The court distinguished *Waggoner* from *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202-03 (1978) because in *Sears*, the party whose claim would be preempted could not have presented the unfair labor practice issue to the NLRB, whereas in *Waggoner*, the party facing preemption could have done so. 607 F.2d at 1236.

44. 29 U.S.C. § 160(b) (1976).

45. *Id.*

3. Stipulation to board jurisdiction

In the 1980 case of *Stephens Institute v. NLRB*,⁴⁶ the employer entered into a stipulation of facts and a settlement agreement with the Board arising out of charges of unfair labor practices made by its employees. The stipulation of facts recognized Board jurisdiction over the employer and the settlement contained the caveat that should the agreement be breached, the General Counsel could reinstitute charges.⁴⁷ The employer committed a breach, charges were reinstated, and the employer lost.⁴⁸ The employer also lost on new charges in a second proceeding.⁴⁹

The employer challenged the Board's jurisdiction in the first proceeding, arguing that, on the basis of contract and equity, and because the agreement was no longer in effect, the stipulation of facts should also be no longer in effect, including the stipulation to jurisdiction.⁵⁰ The Ninth Circuit disagreed because (1) it was the plaintiff who breached the agreement in the first place; (2) reopening of the charges could not affect those facts already in evidence in the case (including jurisdiction), no matter how they were obtained; and (3) the plaintiff did not argue about the stipulation at the hearing but argued the merits.⁵¹

B. NLRB Procedure

1. Amendments to complaints

It is well settled in the Ninth Circuit that the Board may find an unfair labor practice not specifically pleaded in the complaint where the issue has been fully litigated. The Board may properly render a decision based on the issues actually tried, or it can order an amendment to conform to proof.⁵² Due process is not thereby denied.⁵³

46. 620 F.2d 720 (9th Cir.), *cert. denied*, 449 U.S. 953 (1980).

47. *Id.* at 723.

48. *Id.* at 723-24.

49. *Id.* at 724-25.

50. *Id.* at 725.

51. *Id.* at 725-26.

52. *E.g.*, *NLRB v. International Ass'n of Bridge Workers Local 433*, 600 F.2d 770, 775-76 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); *Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1304 (9th Cir. 1978) (*per curiam*); *NLRB v. Klaue*, 523 F.2d 410, 415 (9th Cir. 1975); *Frito Co., W. Div. v. NLRB*, 330 F.2d 458, 465 (9th Cir. 1964); *see NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 349-51 (1938).

53. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. at 349-51; *NLRB v. International Ass'n of Bridge Workers Local 433*, 600 F.2d at 775-76; *Alexander Dawson, Inc. v. NLRB*, 586 F.2d at 1304.

This well-settled law was followed during the survey period in *NLRB v. Bighorn Beverage*,⁵⁴ in which the court held that the administrative law judge (ALJ) properly allowed the General Counsel to amend the complaint after the omitted unfair labor practice allegation had been fully litigated.⁵⁵ Similarly, in *NLRB v. Olympic Medical Corp.*,⁵⁶ the employer contended that it had been denied due process because it was found to have committed unfair labor practices not specified in the complaint and the complaint was not subsequently amended to conform to the issues litigated. The court rejected the defendant's contention because the issues in question had been fully litigated.⁵⁷

In *Clear Pine Mouldings, Inc. v. NLRB*,⁵⁸ the Ninth Circuit disagreed with the employer's contention that the ALJ had erred when he allowed the General Counsel to amend the complaint to include new allegations of violations of the Act. The court so ruled because the ALJ had adjourned the hearings for six weeks to enable the employer to defend against the new allegation, the employer had the opportunity to prepare its defense, and the issue had been fully litigated. The court also reiterated the rule that the Board may render a decision on the issues actually tried or order an amendment to conform to proof.⁵⁹

2. Untimely answers

In contrast to the "extraordinary circumstances" requirement for appellate review of defenses to unfair labor practice charges not raised before the Board,⁶⁰ failure to file a timely answer to a Board complaint will be excused for merely "good cause."⁶¹

In *NLRB v. Zeno Table Co.*,⁶² the General Counsel filed unfair labor practice charges against the defendant employer. Due to various mixups, some of which were arguably attributable to either the em-

54. 614 F.2d 1238 (9th Cir. 1980).

55. *Id.* at 1241.

56. 608 F.2d 762 (9th Cir. 1979).

57. *Id.* at 763.

58. 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

59. *Id.* at 728.

60. See *infra* notes 246-55 and accompanying text for a discussion of judicial review of defenses to unfair labor practice charges not raised before the Board.

61. Board rule § 102.20, 29 C.F.R. § 102.20 (1980) provides in pertinent part:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. . . . All allegations in the complaint, if no answer is filed . . . shall be deemed to be admitted to be true and shall be so found by the Board, unless *good cause* to the contrary is shown. (emphasis added).

62. 610 F.2d 567 (9th Cir. 1979).

ployer or the General Counsel, the employer's counsel did not become aware of the complaint until ten days after the answer was due. He answered two days later with an explanation, but the Board granted the General Counsel's motion for summary judgment because the failure to answer did not arise from an "extraordinary circumstance" and hence the Board "deemed" the allegations of the complaint admitted.⁶³

The Ninth Circuit reversed the Board's order of summary judgment and remanded for reconsideration of whether the employer's answer should be received, and if so, whether a hearing on the merits should be held because the Board based its refusal to receive the defendant's answer on the "extraordinary circumstances" standard of section 10(e) and not on the "good cause" standard of Board Rule section 102.20. The court said that the "good cause" standard is not defined, but appears to be less stringent than the "extraordinary circumstances" standard of section 10(e). While the purpose of section 10(e) is to get the issues tried before the Board first, the purpose of the "good cause" standard is to ensure that the Board makes decisions on the merits despite technical and inadvertent noncompliance with procedural rules.⁶⁴ Also important to the court was the fact that neither the untimely answer nor consideration of the answer would cause apparent prejudice to either party.⁶⁵

3. Six month limitation period on evidence

Section 10(b) of the Act⁶⁶ sets a six month period for the filing of unfair labor practice charges from the time the unfair labor practice occurred. A complaint may be amended, however, to add charges of practices occurring earlier so long as they are closely related to the original charges, occurred within six months of the filing of the original charges, and their addition does not prejudice the defendant.⁶⁷ Be-

63. *Id.* at 568. The complaint was deemed admitted pursuant to Board rule § 102.20. See *supra* note 61 for the text of § 102.20.

64. 610 F.2d at 569.

65. *Id.*

66. 29 U.S.C. § 160(b) (1976) provides in pertinent part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ."

67. *Radio Officers v. NLRB*, 347 U.S. 17, 34 n.30 (1954); *Exber, Inc. v. NLRB*, 390 F.2d 127, 129-30 (9th Cir. 1968); see also *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952); cf. *NLRB v. I.B.S. Mfg. Co.*, 210 F.2d 634, 637 (5th Cir. 1954) (untimely amended charges did not relate back to the original charge since they contained entirely new and different unfair labor practices); accord *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 754 (4th Cir. 1949).

cause the purpose of the charge is to set an inquiry in motion, specifics in the complaint can be drawn out later so long as the defendant has notice that its alleged unfair labor practices are under scrutiny.⁶⁸

In the 1979 case of *NLRB v. Inland Empire Meat Co.*,⁶⁹ a former employee filed an unfair labor practice charge, alleging that he had been unlawfully fired because of his union activities.⁷⁰ He further charged that the employer had violated section 7⁷¹ of the NLRA by "other acts and conduct."⁷² The Board filed a complaint charging that the employer had violated the Act by firing the employee. More than six months after the original charge had been filed, the Board amended the complaint to include charges of specific unfair labor practices committed against other employees.⁷³ The employer attempted to have the amended complaint dismissed, relying on cases which dismissed new charges brought after the six months had run because they were not closely related to the old charges.⁷⁴ The court upheld the amendment which added specific charges covered by the general allegation, however, and adopted the position of the Fifth Circuit, in *NLRB v. Central Power & Light Co.*,⁷⁵ that "the relationship between the charge's specific allegations 'need be close enough only to negate the possibility that the Board is proceeding on its own initiative rather than pursuant to a charge.'"⁷⁶ The practical effect of this view is that unfair labor practices which come to light more than six months after their occurrence can be remedied by inclusion of *general* allegations of violations of the various sections of the Act in original, timely filed charges.

4. Revocation of subpoenas

According to section 11(1) of the Act,⁷⁷ the Board, upon request, must revoke within five days any subpoena which requires production

68. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308 (1959); *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940); see also *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1320-21 (5th Cir. 1970); *NLRB v. Stafford Trucking, Inc.*, 371 F.2d 244, 249-50 (7th Cir. 1966); *Texas Indus., Inc. v. NLRB*, 336 F.2d 128, 132 (5th Cir. 1964).

69. 611 F.2d 1235 (9th Cir. 1979).

70. *Id.* at 1236-37.

71. 29 U.S.C. § 157 (1978).

72. 611 F.2d at 1237.

73. *Id.*

74. *Id.* The employer cited *NLRB v. I.B.S. Mfg. Co.*, 210 F.2d 634 (5th Cir. 1954) and *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949).

75. 425 F.2d 1318 (5th Cir. 1970).

76. 611 F.2d at 1238 (citing *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 n.3 (5th Cir. 1970)).

77. 29 U.S.C. § 161(1) (1978).

of evidence if, in the Board's opinion, the evidence does not relate to any matter under investigation or if the subpoena does not describe with sufficient particularity the evidence subpoenaed. The Ninth Circuit has interpreted this provision broadly to mean that if the specified circumstances in section 11(1) exist, the Board must grant a revocation petition. The Board *may* also revoke a subpoena on any other ground which is consistent with the overall powers and duties of the Board under the Act considered as a whole.⁷⁸

In *NLRB v. Joseph Macaluso, Inc.*,⁷⁹ a mediator who had personal knowledge of facts crucial to the resolution of a labor dispute was subpoenaed to testify at an unfair labor practice hearing. Upon the mediator's motion, the Board revoked the subpoena.⁸⁰ The revocation was upheld by the Ninth Circuit, which concluded that "the complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation," and that "labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence."⁸¹ The effect of this language is that although the Board is not required by *statute* to revoke a mediator's subpoena upon request, the Ninth Circuit will require such a revocation due to the underlying policy involved.⁸²

5. Investigation of election petitions

Section 9(c)(1)(A) of the Act⁸³ provides that the Board shall investigate a petition and may order an election "[w]henver a petition shall have been filed . . . alleging that a substantial number of employees wish to be represented for collective bargaining [by the union]." The Board, as a general rule, will normally investigate and order a hearing on only those petitions which show union support by at least thirty

78. *General Eng'g, Inc. v. NLRB*, 341 F.2d 367, 372-73 (9th Cir. 1965); *accord* *North Am. Rockwell Corp. v. NLRB*, 389 F.2d 866, 873 (10th Cir. 1968) (Board's discretionary revocation of subpoenas upheld). This broad interpretation is consonant with the Board regulation which provides that a subpoena shall be revoked for the specific reasons in § 11(1) "or if for any other reason sufficient in law the subpoena is otherwise invalid." 29 C.F.R. § 102.31(b) (1979).

79. 618 F.2d 51 (9th Cir. 1980).

80. *Id.* at 53.

81. *Id.* at 56.

82. See *supra* note 78 and accompanying text for the text of § 11(1) regarding revocation.

83. 29 U.S.C. § 159(c)(1)(A) (1976).

percent of a company's employees.⁸⁴ This requirement is designed to save expense and effort by screening out frivolous claims.⁸⁵ The Supreme Court and circuit courts have held that the sufficiency of a showing of employee interest is a matter for Board determination and cannot be litigated by the parties.⁸⁶

In *NLRB v. Metro-Truck Body, Inc.*,⁸⁷ the employer challenged the sufficiency of employee interest shown for a Board-ordered union election because many of the employees who had signed authorization cards, used to show the thirty percent interest required to investigate, were subsequently discharged by the defendant as illegal aliens; after subtracting their cards, the union showed less than thirty percent support.⁸⁸ The court ruled against the defendant because it held that the section 9(c)(1)(A) substantial interest requirement is not a jurisdictional prerequisite to Board action but rather is an administrative expedient designed to enable the Board to avoid investigation of frivolous petitions.⁸⁹

84. *NLRB v. Metro-Truck Body, Inc.*, 613 F.2d 746, 749 (9th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).

85. *NLRB v. J.I. Case Co.*, 201 F.2d 597, 599 n.3 (9th Cir. 1953) (citing *In re O.D. Jennings & Co.*, 68 N.L.R.B. 516, 517-18 (1946)); *e.g.*, *NLRB v. Louisville Chair Co.*, 385 F.2d 922, 926 (6th Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968).

86. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309 (1974) (citing *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 287 n.6 (1973) (White, J., dissenting)); *NLRB v. J.I. Case Co.*, 201 F.2d 597, 599 (9th Cir. 1953) (citing *Brad Foote Gear Works, Inc.*, 60 N.L.R.B. 97, 99 n.4 (1945)); *see also, e.g.*, *Committee on Masonic Homes v. NLRB*, 566 F.2d 214, 217 (3d Cir. 1977); *Intertype Co. v. NLRB*, 401 F.2d 41, 43 (4th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969); *NLRB v. Louisville Chair Co.*, 385 F.2d 922, 926-27 (6th Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968); *NLRB v. National Truck Rental Co.*, 239 F.2d 422, 424-25 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1016 (1957); *Kearny & Trecker Corp. v. NLRB*, 209 F.2d 782, 787-88 (7th Cir. 1953); *NLRB v. White Constr. & Eng'g Co.*, 204 F.2d 950, 953 (5th Cir. 1953).

87. 613 F.2d 746 (9th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).

88. *Id.* at 749.

89. *Id.*

The section 9(c)(1)(A) substantial interest requirement is not a jurisdictional prerequisite to NLRB action . . . [but it] is an administrative expedient only, adopted to enable the NLRB to determine for itself whether or not further proceedings are warranted, and to avoid needless dissipation of the Government's time, effort, and funds through investigation of frivolous petitions.

Id. Compare the statement of the rule by the Ninth Circuit and other circuits in earlier opinions cited *supra* note 86 to the Supreme Court's statement in *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309 (1974) (citing *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 287 n.6 (1973) (White, J., dissenting)) ("A union petition to be sure *must* be backed by a 30% showing of employee interest. But the sufficiency of such a showing is not litigable by the parties." (emphasis added)). Unlike the circuit opinions, the Supreme Court's use of "must" points to a 30% showing as a jurisdictional prerequisite for Board action in ordering an election. However, the result of the Supreme Court and circuit opinions is the same: since the substantial interest (30%) issue is non-litigable, the Board's decision will stand.

The court's decision is consistent with its decision in *NLRB v. Apollo Tire Co.*,⁹⁰ in which the court recognized that illegal aliens are employees under the meaning of section 2(3) of the Act and therefore are subject to the Act's protections.⁹¹ The *Metro-Truck* decision provided protection for illegal alien employees and unions, because a contrary ruling would have given employers the ability to fire illegal alien employees who demonstrate union interest in order to defeat the substantial interest requirement.

6. Representation election procedure

The Board has wide discretion in conducting and supervising union representation elections. Board certification of a union without hearing objections to the election may be disturbed only when the Board abuses its discretion.⁹² A party must make a prima facie showing of facts that present "substantial and material factual issues" which, if true, would constitute grounds to set aside the election.⁹³

In *In re Bel Air Chateau Hospital, Inc.*,⁹⁴ the employer, FDI, in one of two consolidated cases, sought to challenge the certification of a union which had won a representation election among its employees on the basis of union discrimination.⁹⁵ The employer contended that the Regional Director and hearing officer committed prejudicial error by failing to enforce its requests for subpoenas of documents concerning possible discrimination by the union.⁹⁶ FDI, however, neither made specific allegations of discrimination nor otherwise provided any basis for showing that the union had engaged in discrimination.⁹⁷ The court

90. 604 F.2d 1180 (9th Cir. 1979). For a full discussion of *Apollo*, see *supra* notes 11-23 and accompanying text.

91. *Id.* at 1182-83; see *supra* note 1 for the text of § 2(3).

92. *E.g.*, *NLRB v. Miramar, Inc.*, 601 F.2d 422, 425 (9th Cir. 1979); *Heavenly Valley Ski Area v. NLRB*, 552 F.2d 269, 271 (9th Cir. 1977) (per curiam); *Home Town Foods, Inc. v. NLRB*, 416 F.2d 392, 394 (5th Cir. 1969). For the general rule on judicial review of Board orders, see *supra* note 5 and cases cited therein.

93. 29 C.F.R. § 102.69(d) (1979); *e.g.*, *Valley Rock Prods., Inc. v. NLRB*, 590 F.2d 300, 302 (9th Cir. 1979) (per curiam); *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 951 (9th Cir. 1978), *cert. denied*, 439 U.S. 1128 (1979); *NLRB v. L.D. McFarland Co.*, 572 F.2d 256, 261 (9th Cir.), *cert. denied*, 439 U.S. 911 (1978); *Alson Mfg. Aerospace Div. of Alson Indus. v. NLRB*, 523 F.2d 470, 472 (9th Cir. 1975) (per curiam); *NLRB v. Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1133 (9th Cir. 1973); *NLRB v. Singleton Packing Corp.*, 418 F.2d 275, 280 (5th Cir. 1969), *cert. denied*, 400 U.S. 824 (1970); *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 825-26 (4th Cir.), *cert. denied*, 389 U.S. 917 (1967).

94. 611 F.2d 1248 (9th Cir. 1979) (per curiam).

95. *Id.* at 1252.

96. *Id.*

97. *Id.*

held that the refusal to enforce the requests for subpoenas was proper because "the Board could properly refuse to conduct a hearing on allegations that the union engaged in discriminatory practices and, therefore, the opportunity to subpoena witnesses, where the objecting party fails to proffer specific evidence that would constitute a prima facie showing of discrimination."⁹⁸ The Board also refused to grant an administrative hearing for failure to proffer specific evidence presenting factual and material issues which would warrant setting aside an election in *NLRB v. Metro-Truck Body, Inc.*⁹⁹ In *Metro-Truck*, the election was challenged on the unsubstantiated basis that ballots were improperly marked¹⁰⁰ and that the union created a racially inflammatory environment.¹⁰¹

By contrast, in *NLRB v. Masonic Homes of California, Inc.*,¹⁰² the Board sought enforcement of its order that the employer bargain with the union certified by the Board in a representation election.¹⁰³ The Board had previously refused the employer an evidentiary hearing on its allegations of union misconduct during the election.¹⁰⁴ The court denied enforcement and remanded because it found that the employer had presented prima facie allegations of union misconduct during the election which, if true, would warrant setting aside the election. The Board therefore had abused its discretion in refusing to hear evidence on these prima facie allegations.¹⁰⁵

Section 554(d)(2) of the Administrative Procedure Act (APA) provides that a hearing officer need not be responsible to the prosecuting agency.¹⁰⁶ Section 159(c)(1) of the NLRA provides that hearings concerning questions of representation may be conducted by an employee of the regional office "who shall not make any recommendations with respect thereto."¹⁰⁷

98. *Id.* (citing *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 951-52 n.4 (9th Cir. 1978), *cert. denied*, 439 U.S. 1128 (1979)).

99. 613 F.2d 746 (9th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).

100. *Id.* at 749.

101. *Id.* at 750-51.

102. 624 F.2d 88 (9th Cir. 1980).

103. *Id.* at 89.

104. *Id.*

105. *Id.* at 91.

106. 5 U.S.C. § 554(d)(2) (1976) provides in pertinent part: "The [administrative] agency employee who presides at the reception of evidence [at an administrative agency hearing] . . . may not (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."

107. 29 U.S.C. § 159(c)(1) (1976) provides in pertinent part:

Whenever a petition shall have been filed . . . by [employee(s) or an individual or

In *In re Bel Air Chateau Hospital, Inc.*,¹⁰⁸ the employer, FDI, challenged the Board's certification of a union after an election on procedural grounds. After the election, the Regional Director assigned an attorney from his own office to act as a hearing officer, who subsequently made recommendations. The employer alleged that this action violated section 554(d)(2) of the APA and section 9(c)(1) of the NLRA.¹⁰⁹ The court tersely rejected these arguments on statutory grounds. Section 554(a)(6) of the APA specifically exempts worker certification proceedings from its requirements.¹¹⁰ Because section 9(c)(1) of the NLRA applies only to pre-election certification proceedings,¹¹¹ the Regional Director's appointment of a post election hearing officer did not conflict with the Act.¹¹²

7. Board deferral to arbitration awards

The Supreme Court in *Gateway Coal Co. v. U.M.W.*¹¹³ recognized the federal policy favoring arbitration of labor disputes. Accordingly, the Court and the Ninth Circuit have sanctioned the Board policy of deferring to arbitration proceedings which covered the same ground as unfair labor practice complaints, unless the proceedings were unfair or irregular, the parties had not agreed to be bound, or the arbitration award was "clearly repugnant to the purposes and policies of the Act."¹¹⁴ A Board deferral decision will not be overturned unless the

union acting on] their behalf alleging that a substantial number of employees . . . wish to be represented for collective bargaining and that their employer declines to recognize their representative . . . if [the Board] has reasonable cause to believe that a question of representation affecting commerce exists [it] shall provide for an appropriate hearing. . . . Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. (emphasis added).

108. 611 F.2d 1248 (9th Cir. 1979) (per curiam).

109. *Id.* at 1252-53.

110. 5 U.S.C. § 554(a)(6) (Supp. II 1978) provides in pertinent part: "This section applies, . . . except to the extent there is involved— . . . (6) the certification of worker representatives."

111. See emphasized language of 29 U.S.C. § 159(c)(1), *supra* note 107.

112. 611 F.2d at 1253.

113. 414 U.S. 368, 377 (1974); *see also* § 203(d) of the LMRA, 29 U.S.C. § 173(d) (1976) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

114. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 270 n.7 (1964); *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 353 (9th Cir. 1979) (quoting *International Harvester Co.*, 138 N.L.R.B. 923, 927 (1962), *aff'd sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964)); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

Board abused its wide discretion¹¹⁵ by departing from its own standards.¹¹⁶

In *NLRB v. Safeway Stores, Inc.*,¹¹⁷ the Ninth Circuit upheld the decision of the Board not to defer to arbitration and enforced a Board order to an employer for the production of information relevant to the merits of a dispute.¹¹⁸ The issue was whether the dispute itself was subject to the collective bargaining agreement and therefore to arbitration.¹¹⁹ The Board proceeded to hear the case before the arbitrator reached a decision, and ordered the employer to produce the requested information. After the Board order, the arbitrator ruled the dispute was nonarbitrable.¹²⁰ The Board at all times refused to defer to the arbitration.¹²¹

The court applied the Board's own standards, enumerated in *Collyer Insulated Wire*,¹²² and held that the Board did not abuse its discretion in failing to defer to arbitration.¹²³ The Board should defer when the issue before it is one of contract interpretation entrusted by the parties to arbitration in the first instance or when resort to arbitration will be *likely* to dispose of the matter in a manner that does not contravene the purposes of the Act.¹²⁴ The dispute before the Board in *Safeway Stores* was whether the employer had committed an unfair labor practice by refusing to produce the requested documents; however, the dispute before the arbitrator was whether the dispute was subject to binding arbitration under the collective bargaining contract. The court held that the unfair labor practice charge was for the Board to decide, and not entrusted to the arbitrator.¹²⁵ The court also found that the Board did not abuse its discretion in failing to defer based on the likelihood that arbitration would dispose of the dispute. The court reasoned that though Board postponement of action until after the arbitrator's award would have rendered the production question moot because of the finding of nonarbitrability, the likelihood of this result was not ob-

115. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964); *e.g.*, *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 407 (9th Cir. 1978).

116. *See, e.g.*, *Hawaiian Hauling Serv., Ltd. v. NLRB*, 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

117. 622 F.2d 425 (9th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

118. *Id.* at 427.

119. *Id.* at 427-28.

120. *Id.* at 428.

121. *Id.*

122. 192 N.L.R.B. 837 (1971).

123. 622 F.2d at 428-29.

124. *Id.* at 428.

125. *Id.*

vicious to the Board at the time of its decision.¹²⁶

In *Douglas Aircraft Co. v. NLRB*,¹²⁷ a dispute between Douglas Aircraft and a fired employee went to arbitration. The arbitrator ordered the employee reinstated but denied him back pay because of his misconduct and his refusal to abide by an agreement worked out by his union and his employer. The agreement had called for reinstatement and arbitration over the back pay issue in exchange for the employee's withdrawal of unfair labor practice charges he had filed with the Board.¹²⁸ The Board refused to defer to the arbitration award and ordered back pay because the arbitrator's conditioning of a back pay award on surrender of an unfair labor practice charge was repugnant to the purposes and policies of the Act, which favors freely bringing all such charges to light.¹²⁹ The court agreed that such an agreement is repugnant to the purposes of the Act.¹³⁰ However, the court held that the Board's refusal to defer was an abuse of discretion because the arbitrator, at the request of the employer and the union, had clarified his decision by indicating that each of the two reasons for refusing back pay was alone sufficient (employee misconduct is a legitimate reason to refuse backpay).¹³¹ The court also noted that the arbitrator's decision, if unclarified, *could* have been read to mean that each reason was alone sufficient, and *should* have been read that way.¹³²

The court adopted the Supreme Court's reasoning in *United Steelworkers v. Enterprise Wheel & Car Corp.*,¹³³ and held that it is bad policy to infer that an arbitrator has overstepped his bounds merely because there is an ambiguity in his opinion. Overzealous dissection of opinions by the Board and courts would deter arbitrators from writing full opinions, and it should not be assumed that the arbitrator has acted improperly.¹³⁴

The court thus narrowly interpreted "repugnant to the Act" as it relates to deferral and gave the Board little discretion in deferring to arbitrators' decisions. The Board, under its own rules as interpreted by the court, may refuse to defer only when the arbitrator's reasoning is

126. *Id.*

127. 609 F.2d 352 (9th Cir. 1979).

128. *Id.* at 353.

129. *Id.*

130. *Id.* at 353 (citing *NLRB v. Industrial Union of Marine Shipbldg. Workers*, 391 U.S. 418, 424 (1968)).

131. *Id.* at 354.

132. *Id.* at 354-55.

133. 363 U.S. 593, 598 (1960).

134. 609 F.2d at 355.

unambiguously repugnant to the Act.¹³⁵ The Board may not refuse to defer if there exists any possible interpretation of an arbitration decision which is not repugnant to the Act.¹³⁶

C. NLRB Orders and Remedies

1. Effect of board orders on arbitration awards

The Supreme Court in *Carey v. Westinghouse Electric Corp.*¹³⁷ articulated in dictum the rule, sometimes referred to as the "supremacy doctrine," that Board decisions override arbitrator decisions. The circuits have taken the supremacy doctrine to heart.¹³⁸

In the 1980 case of *Cannery Warehousemen v. Haig Berberian, Inc.*,¹³⁹ there were conflicting decisions by the Board and by an arbitrator regarding employee representation.¹⁴⁰ The propriety of the Board's decision could not be reviewed because it was not a reviewable final order under section 10(f) of the Act¹⁴¹ and did not fall into the narrow exception to non-reviewability where the Board has violated statutory guidelines.¹⁴² The court held that the Board's order must control be-

135. *Id.*

136. It is important to remember that nothing precludes the Board "from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held." *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964). The Ninth Circuit's holding in *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (9th Cir. 1979), regarding Board deference to an ambiguous arbitrator's decision, was based on its interpretation and application of *Board law* as enumerated in *International Harvester Co.*, 138 N.L.R.B. 923, 927 (1962), *aff'd sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964). 609 F.2d at 354-55. The Board's refusal to defer in this case was an improper departure from its own standards. The Board has wide discretion in setting the standards of whether to defer, but the standard the Board has set for itself, as interpreted by the court, is very narrow. *But cf. Stephenson v. NLRB*, 550 F.2d 535, 537 (9th Cir. 1977) ("But the Board should not defer when the issue presented involves primarily a statutory rather than a contractual or factual issue."). *Douglas Aircraft* involved factual issues. *See* 609 F.2d at 352 (claim by employee that he was fired because of his union activities and claim by employer that firing was based on employee's misconduct).

137. 375 U.S. 261, 272 (1964); *see also Alexander v. Gardener-Denver Co.*, 415 U.S. 36, 50 n.13 (1974) (quoting *Carey*, at 375 U.S. at 272).

138. *E.g.*, *Boire v. International Bhd. of Teamsters*, 479 F.2d 778, 801-02 (5th Cir. 1973); *Local 7-210, Oil, Chemical & Atomic Workers v. Union Tank Car Co.*, 475 F.2d 194, 197-99 (7th Cir.), *cert. denied*, 414 U.S. 875 (1973); *Smith Steel Workers v. A.O. Smith Corp.*, 420 F.2d 1, 7 (7th Cir. 1969). Recall that federal and Board policy favors arbitration of labor disputes. *See supra* notes 113-14 and accompanying text.

139. 623 F.2d 77 (9th Cir. 1980).

140. *Id.* at 78-79.

141. *Id.* at 79 (citing 29 U.S.C. § 160(f) (1976)). Section 160(f) provides for review in the courts of appeals of *final* Board orders. *See infra* notes 235-45 and accompanying text.

142. 623 F.2d at 80 (interpreting *Leedom v. Kyne*, 358 U.S. 184 (1958)).

cause " 'once the Board has acted, either before or after the arbitrator's award, the Board's decision overrides the arbitrator's decision . . . '143 [V]alid Board representation decisions take precedence over conflicting arbitration decisions.'144

2. Reinstatement with backpay

The award of backpay is one device in the Board's arsenal to accomplish the purposes of the Act.¹⁴⁵ When the Board establishes the existence of an unfair labor practice and a gross amount of backpay due, the burden shifts to the employer to prove circumstances which would limit its liability.¹⁴⁶ The Board's conclusions concerning whether circumstances limiting liability have been proven will be upheld if substantial evidence supports them.¹⁴⁷ The Board may make discretionary adjustments when applying this remedy,¹⁴⁸ including the reduction of a backpay award to a discharged employee who does not use reasonable efforts to secure employment elsewhere,¹⁴⁹ since one of the purposes of the Act is promoting production and employment.¹⁵⁰ A discharged worker is not held to the highest standard of diligence in his efforts to secure comparable employment; "reasonable" efforts are sufficient.¹⁵¹

In the 1980 case of *M. Restaurants, Inc. v. NLRB*,¹⁵² a wrongfully discharged employee moved temporarily from the United States to Tai-

143. *Id.* at 81 (quoting *Local 7-210, Oil, Chemical & Atomic Workers v. Union Tank Car Co.*, 475 F.2d 194, 199 (7th Cir.), *cert. denied*, 414 U.S. 875 (1973)).

144. 623 F.2d at 82.

145. Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), provides in pertinent part that the Board may "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]."

146. *NLRB v. Mercy Peninsula Ambulance Serv., Inc.*, 589 F.2d 1014, 1017 (9th Cir. 1979); *NLRB v. United Bhd. of Carpenters Local 1913*, 531 F.2d 424, 426 (9th Cir. 1976); *NLRB v. Superior Roofing Co.*, 460 F.2d 1240, 1241 (9th Cir. 1972) (*per curiam*); *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

147. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951) (general rule); *NLRB v. United Bhd. of Carpenters Local 1913*, 531 F.2d 424, 426 (9th Cir. 1976).

148. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198-200 (1941); *NLRB v. Mercy Peninsula Ambulance Serv., Inc.*, 589 F.2d 1014, 1017 (9th Cir. 1979).

149. *NLRB v. Mercy Peninsula Ambulance Serv., Inc.*, 589 F.2d 1014, 1017 (9th Cir. 1979).

150. *Id.*

151. *Id.* at 1018; *see also Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968); *NLRB v. Ardvin Mfg. Corp.*, 394 F.2d 420, 423 (1st Cir. 1968); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966); *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963).

152. 621 F.2d 336 (9th Cir. 1980).

wan to work at a lower paying job after unsuccessfully searching for work for eighteen months in the geographical area of his former employment. After returning to the United States, he won an order of reinstatement and backpay, less the earnings received in Taiwan, from the Board. The employer alleged that the employee had wilfully incurred a loss of wages, that his move to Taiwan constituted a voluntary departure from the labor market, and contended that backpay liability should be reduced on these grounds.¹⁵³ The court affirmed the Board's award, however, because the Board found substantial evidence that the employee had in fact made reasonable efforts to secure comparable employment and had acted reasonably in moving to Taiwan.¹⁵⁴

The *M. Restaurants* court thus adopted the rule of the Sixth Circuit in *NLRB v. Robert Haws Co.*,¹⁵⁵ that a discharged employee is not confined to the geographical area of former employment; "he or she remains in the labor market by seeking work in any area with comparable employment opportunities."¹⁵⁶ In *Robert Haws*, a discharged employee left his state in search of work.¹⁵⁷ The Ninth Circuit's expansion of this principle to employees leaving the *country* in search of employment is consonant with the purposes of the Act of promoting production and employment. Although a formerly unemployed individual who finds work in a foreign country no longer contributes directly to the national economy, his absence from the welfare and unemployment rolls ameliorates the economic drain on those programs. The net effect is an improvement of the national economy and brighter work prospects for United States workers.

3. Production of evidence

The failure of either an employer or a union to comply with the other's request for information necessary intelligently to evaluate filed grievances violates section 8(a)(5) of the Act.¹⁵⁸ However, it is not an unfair labor practice to refuse to produce information which is irrelevant to any legitimate union collective bargaining need.¹⁵⁹

153. *Id.* at 337.

154. *Id.* at 338.

155. 403 F.2d 979, 981 (6th Cir. 1968).

156. 621 F.2d at 338 (citations omitted).

157. 403 F.2d at 981.

158. 29 U.S.C. § 158(a)(5) (1976); see *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956); see also, e.g., *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 866-67 (9th Cir. 1977).

159. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *Emeryville Research Center, Shell Dev. Co. v. NLRB*, 441 F.2d 880, 883 (9th Cir. 1971); see

[C]ertain types of information, such as wage data [sic] pertaining to employees in the unit, are so intrinsic to the core of the employer-employee relationship that such information is considered presumptively relevant.¹⁶⁰ In those cases, the employer has the burden to prove a lack of relevance¹⁶¹ or to provide adequate reasons as to why he cannot, in good faith, supply such information¹⁶²

In *NLRB v. Acme Industrial Co.*,¹⁶³ the Supreme Court held that the Board may order production of information relevant to a dispute if there is some probability that it would be of use to the union in carrying out its statutory duties and responsibilities.¹⁶⁴ In *Acme*, the Court enforced the Board's order to the employer to produce information regarding an employee grievance which was subject to a compulsory and binding grievance arbitration provision in the collective bargaining agreement.¹⁶⁵ The Seventh Circuit¹⁶⁶ had held that the Board's assertion of jurisdiction improperly preempted the arbitration proceeding and was contrary to the national policy favoring arbitration of labor disputes.¹⁶⁷ The Supreme Court reversed, reasoning that the Board's exercise of jurisdiction to compel production of evidence *aided* the arbitral process rather than intruded upon it.¹⁶⁸ The Court noted that one of the union's responsibilities is to sift out unmeritorious claims and that the production of information which bears on the merits of a claim serves that end.¹⁶⁹ The union should not be put to the expense of arbitration only to learn the claim was without merit.¹⁷⁰

In the 1980 case of *NLRB v. Safeway Stores, Inc.*,¹⁷¹ the Ninth

NLRB v. Pearl Bookbinding Co., Inc., 517 F.2d 1108, 1113 (1st Cir. 1975); *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1204-05 (2d Cir. 1970), *cert. denied*, 401 U.S. 993 (1971).

160. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977) (citing *Emeryville Research Center, Shell Dev. Co. v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965)).

161. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977) (citing *Prudential Ins. Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir.), *cert. denied*, 396 U.S. 928 (1969)).

162. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d at 867 (citations omitted).

163. 385 U.S. 432 (1967).

164. *Id.* at 437.

165. *Id.* at 439.

166. *Acme Indus. Co. v. NLRB*, 351 F.2d 258 (7th Cir. 1965), *rev'd*, 385 U.S. 432 (1967).

167. 385 U.S. at 432. Federal policy favors arbitration of labor disputes. *See supra* notes 113-14 and accompanying text.

168. *Id.* at 438.

169. *Id.*

170. *Id.* at 438-39.

171. 622 F.2d 425 (9th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

Circuit enforced a Board order to an employer for the production of information relevant to the merits of a dispute.¹⁷² The issue was whether the dispute was subject to the collective bargaining agreement and therefore arbitrable. After the Board order to produce, the arbitrator ruled the dispute was nonarbitrable.¹⁷³ The Board refused to defer to the arbitrator and was upheld by the court.¹⁷⁴

The Ninth Circuit, in enforcing the Board order for production, held the rationale in *Acme* controlling. Because the desired information addressed the merits of the grievance and could possibly show the claim unmeritorious and induce the union to withdraw the grievance without incurring the expense of arbitrating whether the dispute was subject to the collective bargaining contract, the Board acted properly in ordering its disclosure.¹⁷⁵ The court also rejected the employer's argument that it was required to produce only information relevant to disputes subject to the collective bargaining contract because there is no such requirement in federal labor law.¹⁷⁶

4. Staying of NLRB orders by bankruptcy court

Old Bankruptcy Rule 11-44 provided that the filing of a Chapter XI (bankruptcy) petition "shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor."¹⁷⁷ This rule was the counterpart to former section 314 of the Bankruptcy Act¹⁷⁸ and made automatic the stays that the bankruptcy court was authorized to impose under section 314 upon application of the debtor.¹⁷⁹ The purpose of rule 11-44 was to protect the assets of the debtor from independent attachment by creditors during the bank-

172. The dispute arose from the retransfer of employees to their original departments based on their failure to meet new production standards. The union requested the production records which it could possibly use to determine whether the employer's allegations of the employees' failures were correct and whether the new standards could fairly be used. The court considered this information presumptively relevant and held that the employer did not rebut the presumption. *Id.* at 430.

173. *Id.* at 427-28.

174. *Id.*; see *supra* notes 117-26 and accompanying text for discussion of the case and its relation to the Board policy favoring deferral to arbitration.

175. *Id.* at 430.

176. *Id.*

177. 11 U.S.C. app., Rule 11-44 (1976). Congress overhauled the bankruptcy law in 1978 by enacting a new version of Title 11 of the United States Code, effective October 1, 1979. See 11 U.S.C. §§ 101-151326 (Supp. III 1979).

178. 11 U.S.C. § 714 (1976).

179. Former § 314 of the Bankruptcy Act, 11 U.S.C. § 714 (1976), provided in pertinent part, "[t]he court may . . . enjoin or stay until final decree in the bankruptcy proceedings the commencement or continuation of suits . . ." (emphasis added).

ruptcy arrangement.¹⁸⁰

With regard to labor proceedings, the Supreme Court held in *Nathanson v. NLRB*¹⁸¹ that the Board, not the bankruptcy court, should liquidate the amount of the backpay award owed by the bankrupt to its employees under a Board order. The Court reasoned that where Congress had entrusted the matter and appropriate remedies to an administrative agency such as the Board, the bankruptcy court should normally stay its hand pending the agency's decision.¹⁸²

During the survey period, in *In re Bel Air Chateau Hospital, Inc.*,¹⁸³ the Ninth Circuit overturned the district court's stay of unfair labor practices under rule 11-44 in two consolidated cases. In one case, *Bel Air*, the Board filed a complaint alleging illegal termination of employees against Bel Air and subsequently against its receiver as its alter ego after Bel Air filed a bankruptcy petition. Its receiver applied for and received a stay of the Board proceedings from the district court after arguing that the provisions of rule 11-44 automatically stayed the Board's proceedings and that the receiver could not be compelled to reinstate employees because it was a different entity from the one that committed the unfair labor practice.¹⁸⁴ In the other case, the facts and charges were similar but the debtor was still operating the business. Thus, there was no "alter ego" issue.¹⁸⁵

It was not clear to the court whether the district court had issued the stay on the basis of the automatic provisions of rule 11-44 or as an exercise of discretion. The court held that if the stay in *Bel Air* was issued on a discretionary basis it must be overturned.¹⁸⁶ The court reasoned that such an exercise of discretion must have been based on a district court finding that the receiver was not the "alter ego" of either the pre-bankruptcy debtor or the debtor in possession, but was instead a new and distinct juridical entity against whom the prior unfair labor practices could not be remedied.¹⁸⁷ The court held that issuance of the stay was in error because "[w]hether a new employer is an 'alter ego' or a 'successor' to an earlier employer is a question of substantive federal labor law, the resolution of which is committed to the Board and the

180. *In re Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1250 (9th Cir. 1979) (per curiam) (citing *Colonial Tavern, Inc. v. Byrne*, 420 F. Supp. 44, 45 (D. Mass. 1976)).

181. 344 U.S. 25 (1952).

182. *Id.* at 30.

183. 611 F.2d 1248 (9th Cir. 1979) (per curiam).

184. *Id.* at 1250.

185. *Id.*

186. *Id.* at 1251.

187. *Id.*

courts that review its determinations."¹⁸⁸ Additionally,

[i]t [was] by no means clear in the event that the Board should determine that Bel Air committed unfair labor practices that it [could] not enforce a remedial order against the Receiver . . .¹⁸⁹ especially in light of established policy against allowing employers to change their legal form as a means of evading their responsibility under the Act.¹⁹⁰

The Ninth Circuit court also held that if the stay was issued automatically pursuant to old rule 11-44, it was issued in error.¹⁹¹ The court relied on the Supreme Court case of *Nathanson v. NLRB*¹⁹² in holding that the Board could not be subject to the automatic stay provisions of rule 11-44.¹⁹³ The court noted that if regulatory proceedings threaten the assets of an estate, a stay may be issued on a discretionary basis.¹⁹⁴

The Ninth Circuit court's interpretation of bankruptcy law is significant because the court in dictum stated that its interpretation "appears harmonious with the new bankruptcy law that recently became effective."¹⁹⁵ Specifically, section 362(a)(1) of the revised Bankruptcy Act¹⁹⁶ provides for a general automatic stay of judicial or administrative proceedings when a bankruptcy petition is filed. Exceptions to the generality of the stay are enumerated in section 362(b),¹⁹⁷ including section 362(b)(4),¹⁹⁸ which prevents the bankruptcy petition from staying "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."¹⁹⁹

188. *Id.* (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942)). "Alter ego" means that the old power structure still exists despite a change in name or apparent control. The Board's order to the "old employer," who is in reality also the "new employer," stays in force. When there is a bona fide discontinuance and a true change of ownership, the new employer is a "successor." The Board's order does not then apply to the new employer. 315 U.S. at 106.

189. 611 F.2d at 1251 (citing *NLRB v. Coal Creek Coal Co.*, 204 F.2d 579 (10th Cir. 1953)); see also *Johnson v. England*, 356 F.2d 44, 49, 51 (9th Cir.), *cert. denied*, 384 U.S. 961 (1966).

190. 611 F.2d at 1251 (citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)); see also *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945).

191. 611 F.2d at 1250-51.

192. 344 U.S. 25, 30 (1952).

193. See *supra* notes 177-80 and accompanying text.

194. 611 F.2d at 1251.

195. *Id.* at 1251.

196. 11 U.S.C. § 362 (Supp. III 1979).

197. 11 U.S.C. § 362(b) (Supp. III 1979).

198. 11 U.S.C. § 362(b)(4) (Supp. III 1979).

199. *Id.*

The Ninth Circuit's statement that new Bankruptcy section 362 appears harmonious with old rule 11-44, as far as stays and administrative proceedings (such as Board proceedings) are concerned, appears correct from the face of the statutes. Old rule 11-44(a) provided for the automatic stay in bankruptcy proceedings, but a party subject to a stay could apply for its discontinuance under old rule 11-44(d).²⁰⁰ The burden was on the party seeking continuation of the stay to establish that he was entitled to continued injunctive relief.²⁰¹ The automatic stay provision in new section 362(a), which takes effect when bankruptcy papers are filed, is congruent to old rule 11-44(a). Additionally, the section 362(b)(4) exception to automatic stays of actions or proceedings by a governmental unit where the enforcement of that unit's police or regulatory power is involved is congruent to old rule 11-44(d). As was the case under old rule 11-44(d), when a section 362(b)(4) exception or objection to the automatic stay provision is alleged, the court will have to determine whether the court proceedings will threaten the assets of the prospective bankrupt, necessitating a stay, or whether there is no such threat, in which case the governmental agency, such as the Board, can proceed against the prospective bankrupt.²⁰²

5. Bargaining orders

a. unfair labor practice basis

An order to an employer to bargain with a union is an appropriate Board remedy when the employer's unfair labor practices between the time of a union's attainment of an authorization card majority and a representation election have tainted the results of the election.²⁰³ The expression of employees' wishes in a fair election is, however, more desirable than a bargaining order based on authorization cards.²⁰⁴

In *NLRB v. Gissel Packing Co.*,²⁰⁵ the Supreme Court categorized degrees of employer unfair labor practices affecting union representation elections which might or might not warrant a bargaining order based on a union card majority. The Court identified three categories of unfair labor practices: (1) outrageous and pervasive practices,

200. Former rule 11-44, 11 U.S.C. app. at 1484 (1976), provided in pertinent part, "[T]he court may, for cause shown, terminate, annul, modify or condition such stay."

201. *In re White Birch Park, Inc.*, 443 F. Supp. 1342, 1345 (E.D. Mich. 1978) (discussion of old rule 11-44).

202. 611 F.2d at 1251.

203. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597, 613-15 (1969).

204. *Id.* at 603.

205. 395 U.S. 575 (1969).

which *might* warrant a bargaining order even though the union never attained majority status; (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.²⁰⁶

In *NLRB v. Chatfield-Anderson Co., Inc.*,²⁰⁷ a majority of the employees signed union authorization cards.²⁰⁸ The employer refused to recognize the union, and the union obtained a Board order for an election.²⁰⁹ Before the election, the employer committed various unfair labor practices to coerce employees to vote against the union. The employer used a carrot and stick approach, promising better conditions if the union lost; and threatening plant closure, raise and bonus withholding, and stricter work rules if the union won.²¹⁰ The union lost the election, but the Board issued a bargaining order because it concluded that the total effect of the employer's unfair labor practices destroyed the possibility of holding a fair election in a reasonable amount of time.²¹¹ The Ninth Circuit reversed the bargaining order and ordered a new election in its place because the unfair labor practices were not extreme enough to fit into either of the first two *Gissel* categories which might warrant a bargaining order.²¹²

b. changed circumstances

Early Supreme Court cases held that the Board could properly ignore events subsequent to the employer's refusal to bargain when deciding to issue a bargaining order.²¹³ Since the Supreme Court's more recent decision in *NLRB v. Gissel Packing Co.*,²¹⁴ in which the Court held that the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the fu-

206. *Id.* at 613-15.

207. 606 F.2d 266 (9th Cir. 1979).

208. *Id.* at 267.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 268; *cf.* *NLRB v. Ultra-Sonic De-Burring, Inc.*, 593 F.2d 123 (9th Cir. 1979) (per curiam); *Hambre Hombre Enters., Inc. v. NLRB*, 581 F.2d 204 (9th Cir. 1978) (cases in which unfair labor practices pervasive enough to warrant bargaining orders).

213. *E.g.*, *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962); *Franks Bros. v. NLRB*, 321 U.S. 702, 703-06 (1944).

214. 395 U.S. 575 (1969).

ture,²¹⁵ the circuits have not agreed on the question of whether and when the Board must consider subsequent events in examining a bargaining order.²¹⁶ In determining whether a bargaining order is appropriate, the Board has consistently refused to consider subsequent events,²¹⁷ even where the law of the circuit was to the contrary.²¹⁸ The desirable features of this rule are that there will be an endpoint to litigation²¹⁹ and that a premium will not be put on continued litigation by employers in the hope that circumstances may change to render a bargaining order inappropriate.²²⁰ In the past, the Ninth Circuit has indicated that the Board should consider events up to the time it decides whether to issue a bargaining order.²²¹

Prior to the 1980 case of *L'Eggs Products, Inc. v. NLRB*,²²² there were no Ninth Circuit cases remanded to the Board that required consideration of events occurring *after* an original Board bargaining order.

215. *Id.* at 614; see also Note, *Bargaining Orders Since Gissel Packing: Time to Blow the Whistle on Gissel?* 1972 Wis. L. REV. 1170, 1179 (1972).

216. *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1352 (9th Cir. 1980) (citing *Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977) (remand because, among other things, Board did not consider effect of passage of three years' time), *reh'g en banc*, 629 F.2d 305 (1980), *cert. denied*, 450 U.S. 996 (1981); *NLRB v. Ship Shape Maint. Co.*, 474 F.2d 434, 443 (D.C. Cir. 1972) (enforcement of bargaining order denied because of events occurring after Board proceedings); *NLRB v. American Cable Sys., Inc.*, 427 F.2d 446 (5th Cir.) (Board must consider changed circumstances, *cert. denied*, 400 U.S. 957 (1970); *NLRB v. Gibson Prod. Co.*, 494 F.2d 762, 766 n.4 (5th Cir. 1974) (*American Cable Systems* rule inapplicable unless remand is necessary on independent ground)).

217. *E.g.*, *Bandag, Inc.*, 228 N.L.R.B. 1045, 1045 n.1 (1977), *modified sub nom.* *Bandag, Inc. v. NLRB*, 583 F.2d 765 (5th Cir. 1978); *Gibson Prod. Co.*, 185 N.L.R.B. 362, 364 (1970).

218. *E.g.*, *Bandag, Inc. v. NLRB*, 583 F.2d 765, 773-75 (5th Cir. 1978) (Clark, J., concurring and dissenting).

219. *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).

220. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944); *NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1153 (9th Cir. 1977); *NLRB v. L.B. Foster Co.*, 418 F.2d 1, 4 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); see also *J.P. Stevens & Co., Gulistan Div. v. NLRB*, 441 F.2d 514, 525 n.16 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971).

221. *NLRB v. Coca-Cola Bottling Co.*, 472 F.2d 140, 141 (9th Cir. 1972) (per curiam). The court held that "the relevant period for determining the appropriateness of the bargaining is as of when it was before the NLRB." *Id.* at 141. From the face of this statement, it is unclear whether the endpoint in time for subsequent events is at the beginning of the Board's proceedings or when it renders a decision. However, the court later stated: "That there is a rapid turnover of employees does not militate against the appropriateness of the bargaining order. This does not mean that the NLRB cannot or should not *reexamine the present circumstances* to see whether a fair election could now be held . . ." *Id.* at 141 (citations omitted; emphasis added). "Reexamination of present circumstances" by the Board after a bargaining order indicates that the time of final decision is the temporal endpoint. The Ninth Circuit, in *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1353 (9th Cir. 1980), read it that way.

222. 619 F.2d 1337 (9th Cir. 1980).

In *L'Eggs*, the court remanded a bargaining order to the Board for reconsideration. The employer moved for leave to adduce additional evidence showing changed circumstances since the original Board order.²²³ The court granted leave because the remand of the bargaining order was for a reason independent of the changed circumstances,²²⁴ and stated that it would not remand bargaining orders to the Board for consideration of events subsequent to the Board's decision when it upheld the Board's order in toto.²²⁵

The court further held that when it remands a bargaining order on an independent ground, it may either "require" the Board to consider new evidence or "allow" the Board to do so (i.e., leaving it to the Board's discretion).²²⁶ As the Board's policy stands, the Board will never take advantage of such an opportunity on its own, since the Board consistently refuses to consider subsequent events upon remand.²²⁷

D. Judicial Review and Enforcement

1. Institution of unfair labor practice charges

Section 3(d) of the Act²²⁸ gives the General Counsel of the Board final authority with respect to the investigation of charges and issuance and prosecution of complaints. The Supreme Court in *Vaca v. Sipes*²²⁹ has stated that "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."²³⁰

Circuit courts, including the Ninth Circuit, have adhered to the view that the General Counsel's decision not to issue a complaint is not reviewable by the Board or courts of appeals.²³¹ Review is available in

223. *Id.* at 1351. The alleged changed circumstances were (1) a large employee turnover and (2) a more pro-union labor policy by a new parent company. *Id.*

224. *Id.* at 1353.

225. *Id.*

226. *Id.* The court adopted the rationale of the Supreme Court in *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944) and the earlier Ninth Circuit case of *NLRB v. Foster Co.*, 418 F.2d 1, 4 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970), against placing a premium on continued litigation by the employer.

227. See *supra* note 154 for Board precedents against consideration of subsequent events upon remand.

228. 29 U.S.C. § 153(d) (1976) provides in pertinent part: "[The General Counsel of the Board] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board"

229. 386 U.S. 171 (1967).

230. *Id.* at 182 (dictum); *accord* *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979) (dictum); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975) (dictum).

231. *E.g.*, *Bays v. Miller*, 524 F.2d 631, 634 (9th Cir. 1975); *Henderson v. ILWU Local 50*,

the district court in limited cases where the Board has acted outside of the Act or unconstitutionally.²³² The Ninth Circuit followed these well established principles in the 1980 case of *Pacific Southwest Airlines v. NLRB*,²³³ in which the court refused to overturn the General Counsel's decision not to issue an unfair labor practice complaint.²³⁴

2. Final order requirement

Section 10(f) of the Act²³⁵ provides for appellate court review of *final* Board orders. Normally, a Board representation decision is not considered a reviewable "final order" within the meaning of section 10(f).²³⁶ The Supreme Court in *Leedom v. Kyne*²³⁷ created an exception to this rule when the federal courts' failure to assert jurisdiction would deprive a party of a right granted by Congress.²³⁸ The Court in *Boire v. Greyhound Corp.*²³⁹ construed this exception narrowly because "[j]udicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid

457 F.2d 572, 578 (9th Cir.), *cert. denied*, 409 U.S. 852 (1972); *NLRB v. IBEW Local 357*, 445 F.2d 1015, 1016 (9th Cir. 1971); *NLRB v. Lewis*, 249 F.2d 832, 838 (9th Cir. 1957), *aff'd*, 357 U.S. 10, 15-16 (1958); *accord* *Bova v. Pipefitters & Plumbers Local 60*, 554 F.2d 226, 228 (5th Cir. 1977); *ILGWU Local 415-475 v. NLRB*, 501 F.2d 823, 830 (D.C. Cir. 1974); *Saez v. Goslee*, 463 F.2d 214, 215 (1st Cir.) (per curiam), *cert. denied*, 409 U.S. 1024 (1972); *Mayer v. Ordman*, 391 F.2d 889, 889 (6th Cir.) (per curiam), *cert. denied*, 393 U.S. 925 (1968); *Balanyi v. IBEW Local 1031*, 374 F.2d 723, 726 (7th Cir. 1967).

232. *Leedom v. Kyne*, 358 U.S. 184, 188 (1958); *Braden v. Herman*, 468 F.2d 592, 593 (8th Cir. 1972) (per curiam), *cert. denied*, 411 U.S. 916 (1973); *Saez v. Goslee*, 463 F.2d 214, 215 (1st Cir.) (per curiam), *cert. denied*, 409 U.S. 1024 (1972); *Balanyi v. IBEW Local 1031*, 374 F.2d 723, 726 (7th Cir. 1967) (citing *Boire v. Miami Herald Publishing Co.*, 343 F.2d 17, 21 (5th Cir.), *cert. denied*, 382 U.S. 824 (1965)); *McLeod v. United Bhd. of Indus. Workers*, 288 F.2d 198, 201 (2d Cir. 1961); *cf.* *NLRB v. IBEW Local 357*, 445 F.2d 1015, 1016 n.2 (9th Cir. 1971) (citing *Retail Store Employees Union Local 954 v. Rothman*, 298 F.2d 330 (D.C. Cir. 1962), which phrased the question of review of the General Counsel's decision not to issue a complaint in terms of whether General Counsel had abused its discretion). This citation in *NLRB v. IBEW* is curious because the case cited was decided in 1962, five years before *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), which in dictum stated that the decision was nonreviewable. *See supra* notes 229-30 and accompanying text.

233. 611 F.2d 1309 (9th Cir. 1980).

234. *Id.* at 1312.

235. 29 U.S.C. § 160(f) (1976).

236. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964); *AFL v. NLRB*, 308 U.S. 401, 407-11 (1940); *see also* *Smith Steel Workers v. A.O. Smith Corp.*, 420 F.2d 1, 6 (7th Cir. 1969); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1163-64 (5th Cir.), *cert. denied*, 394 U.S. 1012 (1969); *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

237. 358 U.S. 184 (1958).

238. *Id.* at 190.

239. 376 U.S. 473 (1964).

down in . . . the Act."²⁴⁰

The Ninth Circuit has interpreted *Boire* to preclude invocation of the *Leedom* exception to the final order requirement unless the Board has violated statutes or regulations.²⁴¹ The *Leedom* exception does not in any case extend to possible abuses of discretion involving non-final orders.²⁴² In the 1980 case of *Cannery Warehousemen v. Haig Berberian, Inc.*,²⁴³ there were conflicting decisions by the Board and by an arbitrator regarding employee representation. The issue raised by the employer was the Board's abuse of discretion in failing to defer and not a statutory or regulatory violation on the part of the Board.²⁴⁴ The court refused to decide whether the Board had erred in refusing to defer to the arbitrator's decision because a Board representation decision is not a final order under section 10(f).²⁴⁵

3. Issues not raised before Board

Section 10(e) of the Act²⁴⁶ precludes judicial review of objections to unfair labor practice charges not raised before the Board absent "extraordinary circumstances." The Supreme Court in *NLRB v. Cheney Cal. Lumber Co.*²⁴⁷ interpreted the intent of section 10(e) to be that all controversies of fact, and the allowable inferences from the facts, should be threshed out by the Board so that the courts may have the benefit of the Board's expertise upon review of the problem.²⁴⁸

In the 1980 case of *Stephenson v. NLRB*,²⁴⁹ the Ninth Circuit applied the tough "extraordinary circumstances" standard where issues were raised for the first time at the appellate level. In *Stephenson*, the employee was dismissed because of misconduct; he alleged his firing

240. *Id.* at 481-82.

241. *Local 1547, IBEW v. Local 959, Int'l Bhd. of Teamsters*, 507 F.2d 872, 875 (9th Cir. 1974).

242. *Id.*

243. 623 F.2d 77 (9th Cir. 1980).

244. *Id.* at 80. The court may decide whether the Board abused its discretion in refusing to defer when the appeal is from a final order. *See, e.g.*, *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (9th Cir. 1979) (Board abused discretion in failing to defer to arbitration).

245. 29 U.S.C. § 160(f) (1976).

246. 29 U.S.C. § 160(e) (1976) provides in pertinent part: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of *extraordinary* circumstances." (emphasis added).

247. 327 U.S. 385 (1946) (Supreme Court reversed Ninth Circuit modification of Board order because employer had not argued before Board); *see also* *NLRB v. Allied Prods. Corp., Richard Bros. Div.*, 548 F.2d 644 (6th Cir. 1977).

248. 327 U.S. at 389.

249. 614 F.2d 1210 (9th Cir. 1980) (per curiam).

was motivated by his union activities and filed a grievance under the provisions of his union's collective bargaining agreement. The employee won reinstatement and backpay in arbitration, but he never returned to work because he was unsatisfied with the amount of backpay awarded.²⁵⁰ He then filed a charge with the Board, but the ALJ, without resolving contradictory testimony, deferred to the arbitration award and was affirmed by the Board. On appeal, the Ninth Circuit held that the Board erred in deferring to the arbitration award and remanded the case.²⁵¹

Stephenson did not ask for remand to the ALJ for credibility resolutions during the subsequent Board proceeding. Instead, he relied on the Board Chairman's recitation of both the uncontradicted and contradicted evidence in his dissent and on the General Counsel's statement of position in the earlier Board proceeding.²⁵² The Board then held that Stephenson had been dismissed for cause. Stephenson appealed that decision on many bases, including the Board's failure to resolve the contradicted evidence. Stephenson alleged that the resolution of that evidence in his favor would swing the case his way.²⁵³ The court was not persuaded. It held that Stephenson had waived his right to raise those issues before the court because of his noncompliance with the section 10(e) requirement to raise all objections before the Board.²⁵⁴ The court maintained its strict construction of the "extraordinary circumstances" required to raise a question before the court not raised before the Board.²⁵⁵

The implication of the *Stephenson* case is clear: one must explicitly raise all contentions of fact and law in a Board proceeding to preserve the right of judicial review of the Board's finding. The "extraordinary circumstances" that excuse this condition precedent are narrowly construed. A party who assumes that the Board has addressed an unraised issue may lose the right to judicial review.

4. Election orders—contract-bar rule

A Board-created bar to an election order is the contract-bar rule, which bars a representation election when there is a valid contract for a period not exceeding three years between employer and union, unless

250. *Id.* at 1212.

251. *Id.* at 1212-13.

252. *Id.* at 1213.

253. *Id.* at 1214.

254. *Id.* at 1215.

255. *E.g.*, *NLRB v. STR, Inc.*, 549 F.2d 641, 642 (9th Cir. 1977) (*per curiam*).

the representation petition is filed more than sixty and less than ninety days before the expiration of the agreement.²⁵⁶ If the contract term exceeds three years, a petition will be dismissed if it is outside the sixty to ninety day period preceding the contract's third anniversary date, even though it is filed between sixty and ninety days before the contract's actual expiration date.²⁵⁷ The sixty to ninety day period is strictly construed, and petitions filed on the fifty-ninth day are generally dismissed.²⁵⁸ The Board formulated the contract-bar rule in an effort to strike a balance between the Act's competing goals of promoting industrial stability and employee freedom of choice.²⁵⁹

The Board, in balancing the competing goals of stability and employee choice, has created an exception to the contract-bar rule for contracts that illegally discriminate against non-union employees because such contracts do not establish the kind of stability that the Act was designed to protect.²⁶⁰ The Board has held that a contract which contains a provision extending special benefits to union members only, known as a "members only" clause, will not bar an election petition.²⁶¹ However, the Board has also established that it will not consider extrinsic evidence to determine if ambiguous contract provisions were intended to have, or in fact had, an illegal effect.²⁶² When the Board departs from its application of the contract-bar rule,²⁶³ it must give an explanation so that a reviewing court will be able to determine whether

256. Dalewood Rehabilitation Hosp., Inc. v. NLRB, 566 F.2d 77, 79 n.2 (9th Cir. 1977); Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 488 n.1 (2d Cir. 1975); NLRB v. Bayliss Trucking Corp., 432 F.2d 1025, 1027 n.3 (2d Cir. 1970); Bally Case and Cooler, Inc. v. NLRB, 416 F.2d 902, 905 n.1 (6th Cir. 1969), *cert. denied*, 399 U.S. 910 (1970).

257. Union Carbide Corp., 190 N.L.R.B. 191, 191 (1971).

258. Brown Co., 178 N.L.R.B. 57, 57 (1969).

259. *See* Leedom v. IBEW Local 108, 278 F.2d 237, 242 (D.C. Cir. 1960); Appalachian Shale Prod. Co., 121 N.L.R.B. 1160, 1161 (1958); General Motors Corp., 102 N.L.R.B. 1140, 1142 (1953). The contract-bar rule balances the Act's goals of promoting industrial stability and employee freedom of choice by limiting employees' abilities to change their representation to specific time periods and by maintaining the status quo in employer-union relationships in other time periods.

260. Paragon Prod. Corp., 134 N.L.R.B. 662, 663 (1961); *see* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 55-56 (1976).

261. Radio Frequency Connectors Corp., 126 N.L.R.B. 1076, 1077 (1960).

262. Jet-Pak Corp., 231 N.L.R.B. 552, 553 (1977); Loree Footwear Corp., 197 N.L.R.B. 360 (1972); H.L. Klion, Inc., 148 N.L.R.B. 656 (1964); Keystone Coat, Apron & Towel Supply Co., 121 N.L.R.B. 880, 886 (1958).

263. The Board is not strictly bound by its prior decisions. *E.g.*, NLRB v. J.C. Penney Co., 620 F.2d 718, 719 (9th Cir. 1980); NLRB v. Albert Van Luit & Co., 597 F.2d 681, 686 n.3 (9th Cir. 1979) (*per curiam*).

it abused its discretion²⁶⁴ or acted in a reasoned, deliberate manner.²⁶⁵

In the 1980 case of *Bob's Big Boy Family Restaurants v. NLRB*,²⁶⁶ the Board refused to apply the contract-bar rule and ordered a representation election. The Board did so after finding, based on extrinsic evidence involving ambiguous terms, that the contract contained an illegal "members only" clause. The Board also held that the employer was estopped to deny that the election petition was filed in a timely manner because it had helped create some confusion as to the effective dates of the contract.²⁶⁷ The court remanded because the Board did not explain its departure from policy in considering the extrinsic evidence and did not explain its alternative theory of estoppel by stating whether it had applied the doctrine of equitable estoppel or had created a new exception to its contract-bar rule based on some other principle.²⁶⁸

II. UNFAIR LABOR PRACTICES

A. *Interference with Employees' Section 7 Rights*

Section 8(a)(1) of the National Labor Relations Act²⁶⁹ provides that "it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights" guaranteed in section 7 of the Act.²⁷⁰ To establish a violation of this section, it is

264. Judicial review of Board proceedings is limited to whether the Board abused its discretion. *See supra* note 5.

265. *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965); *NLRB v. Albert Van Luit & Co.*, 597 F.2d 681, 686 n.3 (9th Cir. 1979) (*per curiam*) (an administrative agency such as the Board must explain departure from its own policy).

266. 625 F.2d 850 (9th Cir. 1980).

267. *Id.* at 852.

268. The court indicated the standard for equitable estoppel to be applied by the Board if it intends to apply that doctrine:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Id. at 854.

269. 29 U.S.C. § 158(a)(1) (1976).

270. Section 7 of the NLRA provides that:

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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1976).

only necessary to demonstrate that the employer's actions would reasonably tend to interfere with employee rights.²⁷¹ This section has been construed to require merely a demonstration that the employer's actions have the *effect* of restraint or coercion, not that the employer *intended* to produce the effect.²⁷²

1. Employee filing of grievances against employer

Employees have the protected right to engage in concerted activities for the purpose of mutual aid and protection.²⁷³ The Ninth Circuit has held that concerted activity exists where one person is seeking to induce action by a group.²⁷⁴ The Second Circuit, in *NLRB v. Interboro Contractors, Inc.*,²⁷⁵ held that activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be "concerted" even in the absence of any interest by fellow workers.²⁷⁶ The Third and Fifth Circuits have explicitly disavowed the *Interboro*

271. ABA, THE DEVELOPING LABOR LAW 166 (C. Morris ed. 1971) [hereinafter cited as DEVELOPING LABOR LAW].

272. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795-803 (1945). The Supreme Court in *Republic Aviation* held unlawful a company rule which prohibited solicitation of any kind on company property and which was enforced against employees soliciting for the union during nonworking hours. It was not a defense that the no solicitation rule had been in force well before the advent of the union, had not been motivated by anti-union animus, and had been applied nondiscriminatorily against all forms of in-plant solicitation. In *NLRB v. Burnup & Sims*, 379 U.S. 21, 22-24 (1964), the Court provided security from discharge to employees engaged in protected activities, i.e., conduct specifically protected by § 7, even though the employer had a good faith motive for the discharge. The Court, has consistently emphasized the *effect* of the employer's acts, not the motive behind them. In an effort to reinforce that standard, the Court, in *Textile Workers v. Darlington Co.*, 380 U.S. 263, 269-74 (1965), held that it was not an unfair labor practice for an employer to close its entire business, even if the closing was due to anti-union animus. The Court qualified its holding by stating that such termination must be bona fide, and the employer must not seek to obtain some future benefit at the expense of the employees. *Id.* at 274-77. The underlying reasoning of the Court was clearly that such bona fide closing does not truly have the effect of coercing, restraining, or interfering in organizing activities because such activities have essentially become moot once the employer's doors finally have closed. *Id.*

273. See *supra* note 270; see, e.g., *Walls Mfg. Co. v. NLRB*, 321 F.2d 753, 754 (D.C. Cir.) (writing a letter complaining of sanitary conditions on behalf of fellow employees considered protected activity), *cert. denied*, 375 U.S. 923 (1963); *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545, 50 L.R.R.M. 1940 (1962), *aff'd sub nom. Teamsters Local 79 v. NLRB*, 325 F.2d 1011, 1012 (D.C. Cir. 1963) (refusing, in the course of employment, to cross a picket line located at another employer's place of business considered protected concerted activity), *cert. denied*, 377 U.S. 905 (1964).

274. *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 326 (9th Cir. 1953) (employee's circulation of a petition authorizing him to take action on behalf of fellow employees in regard to their grievances considered concerted activity).

275. 388 F.2d 495 (2d Cir. 1967).

276. *Id.* at 500.

rule on the ground that the pursuit of personal, as opposed to group, goals is not "concerted" activity and is therefore unprotected.²⁷⁷

These principles were applied by the Ninth Circuit during the survey period in *NLRB v. Bighorn Beverage*,²⁷⁸ in which a safety complaint was filed by an employee. The court held that because the source of an employee's claimed rights when filing such a complaint is a collective bargaining agreement, and because such an agreement was not involved in the case, the employee was not engaged in protected concerted activity.²⁷⁹ This theory was originally expressed in an earlier Ninth Circuit decision, *NLRB v. C & I Air Conditioning, Inc.*,²⁸⁰ where an employee was discharged after complaining about the lack of safety on the job site. The court refused to accept the employee's assertion that he had engaged in protected concerted activity and held that the activity was not protected because the employee's efforts were not directed at enforcing provisions of a mutual bargaining agreement.²⁸¹ The court in *Bighorn Beverage* noted that its decision, based upon the theory in *C & I Air Conditioning*, was consistent with that reached by other circuits which have held that the implied concerted action theory is a "legal fiction presenting an unwarranted expansion of the definition of concerted action unsupported by a statutory basis."²⁸²

While it appears that the Second Circuit's theory in *Interboro* has been accepted in principle by the Ninth Circuit, a later decision during the survey period reveals a new wrinkle in its application in the Ninth Circuit. In *NLRB v. Adams Delivery Service, Inc.*,²⁸³ an employee who enlisted the aid of the union to enforce a contractually guaranteed employment right was discharged. The court held that in these circumstances, the employer committed an unfair labor practice even if the employee was not motivated by an intent to enforce a provision of a

277. *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973); *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971).

278. 614 F.2d 1238 (9th Cir. 1980).

279. *Id.* at 1242.

280. 486 F.2d 977 (9th Cir. 1973).

281. *Id.* at 978. The rationale of the court was that the employee's action was a self-serving individual activity and therefore was neither an effort to promote mutual aid and protection of other employees, nor an effort to enforce provisions of a mutual bargaining agreement. *Id.*

282. 614 F.2d at 1242; see *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973) (employee's efforts to gain more favorable contract terms for himself, when including some element of collective effort, not considered protected concerted activity); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884-85 (3d Cir. 1971) (employee's pressing for holiday for himself under collective bargaining agreement not considered protected concerted activity).

283. 623 F.2d 96 (9th Cir. 1980).

collective bargaining agreement.²⁸⁴ The court noted that union participation in the complaint process distinguished this case from the line of decisions which have applied the *Interboro* fiction.²⁸⁵ The court reasoned that “[w]here an employee enlists the aid of the union to enforce a contractually-guaranteed employment right, the need to employ a fiction of group activity vanishes,”²⁸⁶ and concluded that discussion with a union representative to resolve an employment disagreement is a right protected by sections 8(a)(1) and 8(a)(3) of the NLRA.²⁸⁷ The court thereby declined to apply the doctrine of *Interboro* and found direct independent support for its decision in favor of the employee under the NLRA.

2. Employer threats to discourage union activity

Employees have been granted the right by section 8(a)(1) to be protected from employer threats, if such threats have the effect of interfering, restraining, or coercing employees in the exercise of their protected rights.²⁸⁸ The extent of that right was discussed in an early Supreme Court decision, *NLRB v. Virginia Electric & Power Co.*,²⁸⁹ in which the Court noted that conduct, although partially evidenced by speech, may amount to coercion within the meaning of the NLRA if it occurs in combination with other circumstances.²⁹⁰ The Court has emphasized the need to examine the totality of the employer’s activities and the background leading to the employer’s course of conduct.²⁹¹

284. *Id.* at 100.

285. *Id.* at 99-100; *see NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d at 978; *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 206-07 (7th Cir. 1971) (questioning of union officials and co-workers regarding failure to receive expected pay raise considered protected concerted activity); *cf. Pacific Electric Co. v. NLRB*, 361 F.2d 310 (9th Cir. 1966) (activities of employee which resulted in discharge not found to be solely on behalf of employee and therefore held to be concerted).

286. 623 F.2d at 100.

287. *Id.*; *see NLRB v. Lantz*, 607 F.2d 290, 298 (9th Cir. 1979) (violation of § 8(a)(3) found where employees were discharged partially for their expressed desire to obtain union assistance); *NLRB v. R.W. Little, Inc.*, 493 F.2d 1245 (9th Cir. 1974) (violations of § 8(a)(3) found where employer had discharged two employees because of their grievance activities through union); *Inter-Polymer Indus. v. NLRB*, 480 F.2d 631, 633 (9th Cir. 1973) (violation of Act found where employer denied reemployment to employee who had sought assistance of bargaining representative); *NLRB v. Tom Johnson, Inc.*, 378 F.2d 342, 344 (9th Cir. 1967) (violation of Act found where employees were fired because they engaged in protected activities).

288. *See DEVELOPING LABOR LAW*, *supra* note 271, at 75.

289. 314 U.S. 469 (1941).

290. *Id.* at 477.

291. *Id.*

The Court subsequently held, in *NLRB v. Exchange Parts*,²⁹² that section 8(a)(1) prohibits intrusive threats and promises and also prohibits actions immediately favorable to employees, but which were undertaken with the express and calculated purpose of impinging upon the employees' freedom of choice regarding unionization.

The Ninth Circuit has held that threats by employers are among the clearest form of unfair labor practices.²⁹³ In evaluating the effect of such threats, the Board is not obliged to consider facts and incidents shown by testimony in isolation, but can consider them compositely and draw inferences reasonably justified by their "cumulative probative effects."²⁹⁴ Additionally, threats need not be explicit if the language used by the employer or their representative can reasonably be construed as threatening.²⁹⁵

The Ninth Circuit test for such coercion is whether, under all the circumstances, interrogation or other individual verbal communications reasonably tend to restrain or interfere with the employee's exercise of protected rights.²⁹⁶ This test was applied during the survey period in *NLRB v. Chatfield Anderson*.²⁹⁷ In that case, the employer promised economic benefits through retroactive raises, threatened to prolong negotiations with the union while withholding raises and bonuses during that period, and notified its employees of an "open door" policy to improve communications between the employees and management.²⁹⁸ All of these activities occurred during a union election campaign. The court reaffirmed the Ninth Circuit view that threats fall within the category of the clearest form of unfair labor practices,²⁹⁹ and

292. 375 U.S. 405, 409 (1964).

293. *NLRB v. Randall Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978).

294. *NLRB v. Radcliffe*, 211 F.2d 309, 313 (9th Cir. 1954).

295. *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970); *see also NLRB v. Luisi Truck Lines*, 384 F.2d 842, 845 (9th Cir. 1967) (threats of reprisal for union support and promises by employers of benefits for voting against union are clearly coercive and prohibited).

In *Santa Fe Drilling v. NLRB*, 416 F.2d 725 (9th Cir. 1969), the employer was charged with discharging employees because of their union activities and with engaging in various threatening acts toward its employees. The court held that the fact that the company supervisor had questioned employees about their involvement in strike violence occurring with another employer, had mentioned company benefits, and had urged the employees to vote in a representation election supported the conclusion that such discussions were violations of § 8(a)(1). *Id.* at 728. The court reasoned that repeated enumerations of existing benefits in head-on confrontations with employees reasonably could be considered threats of reprisal for union activity, whether or not explicit threats were made. *Id.*

296. *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977).

297. 606 F.2d 266 (9th Cir. 1979).

298. *Id.* at 267.

299. *Id.* at 268.

held that in considering the totality of the circumstances, the threats alone constituted a violation of section 8(a)(1).³⁰⁰

The Ninth Circuit again considered the viability of charges of illegal threats against an employer in *NLRB v. Sacramento Clinical Laboratory, Inc.*³⁰¹ In *Sacramento*, a supervisor stated that if the union was installed, no employee would be able to come and talk to him directly, but would have to go through channels. The court held that such a statement was not a threat in violation of section 8(a)(1), basing its conclusion upon an earlier Ninth Circuit decision that an employer is free to express opinions with respect to the consequences of unionization which have some reasonable basis in fact.³⁰² The *Sacramento* decision was not truly based upon a question of whether the employer's speech was appropriate, but whether the *effect* was coercive. The court reasoned that the mere effect of the statement by the supervisor was to remind the employees of the substantive meaning of collective bargaining.³⁰³ The court also held that the lack of evidence that the supervisor was acting as an agent for management precluded a decision in favor of the employees.³⁰⁴

The same theories were again applied during the survey period in *L'Eggs Products, Inc. v. NLRB*,³⁰⁵ where the employer had stated that it would use "every lawful means possible to avoid unionization."³⁰⁶ Although the court held that the statement did not violate section 8(a)(1), it is interesting to note that while the statement alone was not sufficient evidence of a violation, in combination with the other activities of the employer the statement created an overall coercive atmosphere which supported the finding of other section 8(a)(1) violations.³⁰⁷ *L'Eggs*, therefore, seems to add an "atmosphere of coercion" approach to complement the previous "totality of circumstances" guidelines.

300. *Id.* The court did note that the threats made by the employer were generally mild, and the coercive effect, if any, was not great. The company issued disclaimers which tended to dissipate any coercive impact, and some statements were made by low-level supervisors. The court found, however, that on balance, because many of the statements were promulgated by the company's executive officers and owners, the Board correctly ordered the election set aside because of the company's § 8(a)(1) violations. *Id.*

301. 623 F.2d 110 (9th Cir. 1980).

302. *Id.* at 112 (citing *Hecla Mining Co. v. NLRB*, 564 F.2d 309, 314 (9th Cir. 1977)).

303. 623 F.2d at 112.

304. *Id.* at 114.

305. 619 F.2d 1337 (9th Cir. 1980).

306. *Id.* at 1347.

307. *Id.* The court found that the employer had committed other acts, including actively soliciting revocations of union support and directly aiding employees in revoking union authorization.

An employer's statements to its employees of management's views, arguments, or opinions may not be a violation of section 8(a)(1) if they are protected by section 8(c) of the NLRA.³⁰⁸ Section 8(c) focuses on the "protected" speech of the employer, and enforcement of that section essentially reflects a delineation of the line between coercive expression and the free speech rights protected by the first amendment to the Constitution. Section 8(c) is directed toward the content of the employer's statements, not their effect.³⁰⁹

The Supreme Court, in *NLRB v. Gissel Packing Co.*,³¹⁰ held that the employer's right to free speech in communications with its employees is firmly established and cannot be encroached upon by a union or the Board. The Court held that an employer may therefore express its general views regarding unionism or its specific views regarding a certain union, as long as the expression does not represent a threat of reprisal, force or promise of benefit.³¹¹ The Court further held that an employer may predict the exact results that unionization may have, but only if such views have some basis in objective fact to demonstrate clearly that the probable consequences are beyond its control, or to convey a prior management decision to close the plant in case of unionization.³¹²

The Ninth Circuit in *NLRB v. TRW-Semiconductors, Inc.*,³¹³ recognized that section 8(c) was part of a revision of the NLRA made in an effort to redress what was considered to be an imbalance in the manner in which the NLRA operated against employers and in favor of employees. The court also noted the distinction between "privileged speech," which indicates a prediction of events over which the employer has no control, and "unprivileged speech," in which the employer has made a prediction of events over which it has clear control.³¹⁴ The *TRW* court held that the mere fact that statements by

308. 29 U.S.C. § 158(c) (1976). Section 8(c) 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.

309. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. TRW-Semiconductors, Inc.*, 385 F.2d 753 (9th Cir. 1967).

310. 395 U.S. 575 (1969).

311. *Id.* at 617.

312. *Id.* at 618. The Court also held that the valuation of the exact scope or limit of employer expression must be made in the context of the labor relations setting. The employer's rights, according to the Court in *Gissel*, must not outweigh the employees' equal rights to associate freely and pursue activities clearly protected under the NLRA. *Id.* at 717.

313. 385 F.2d 753, 755 (9th Cir. 1967).

314. *Id.* at 758.

an employer produce fear in the employees, and are intended to do so, does not deprive the employer of the protection of section 8(c).³¹⁵

The Ninth Circuit has also concluded that employers' statements suggesting that the terms of a union contract are disadvantageous or that unfavorable consequences might result from unionization are protected, as long as the statements have a factual basis and are in fact predictions rather than veiled threats of retaliation.³¹⁶ Employer statements which include threats to take action solely within the control of the employer and not based on economic predictions are not protected.³¹⁷

During the survey period, in *NLRB v. Marine World USA*,³¹⁸ the Ninth Circuit held that speech is coercive within the meaning of section 8(c) only if it threatens reprisals or promises benefits, and not if it is merely coercive within the context of section 8(a)(1). The court further stated that the broad language of section 8(a)(1) is not the test of whether statements violate the Act.³¹⁹ The court followed the holdings

315. *Id.* at 759-60. The court noted that such statements must still satisfy the requirement of lack of employer control. The court also held that § 8(c) protects not only those statements, arguments, or opinions that are correct, but also statements that are demonstrably incorrect. *Id.*

316. *See* *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1106 (9th Cir. 1971) (statement by company manager that working conditions might become more difficult due to unionization because company might seek to reduce operating costs considered an opinion of unfavorable circumstances based in fact); *NLRB v. Sonora Sundry Sales*, 399 F.2d 930, 935 (9th Cir. 1968) (statement by employer that employees would receive less pay under union contract not considered a threat).

317. *See* *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 628-29 (9th Cir. 1974). In *Hertzka*, the employer made statements prior to a union election that employees who had been courting the union were "playing with a loaded stick of dynamite," and stated that "we don't have to put up with this, we can close down." *Id.* at 628-29. The court held that such words were not protected by § 8(c) and were clearly threats to take action solely within the power of the employer. *Id.*; *see also* *NLRB v. Four Winds Indus.*, 530 F.2d 74, 78 (9th Cir. 1976). In *Four Winds*, the court held that in making a prediction of what effect unionization may have, an employer must be cautious to ground his statement upon an eventuality that is capable of proof, and not upon any implication that his own effort might cause the economic detriment. The court added that the interpretation of the employer's pre-election speech to determine whether it constituted an unfair labor practice must take place in a context which balances the rights of both parties but recognizes the economically dependent relationship of the employee to the employer. *Id.* at 78.

318. 611 F.2d 1274, 1276 (9th Cir. 1980).

319. *Id.* at 1277. In *Marine World*, the employer's president, prior to scheduling an election date for the union, distributed a memorandum to Marine World employees that described his attempts to obtain the union's consent to a wage increase. On the day before the scheduled election, the president issued another memorandum to the employees that generally criticized the union's performance as the employees' bargaining representative. The president also charged that the union had held up the offered wage increase because they could not take full credit for it. The union received less than 30% of the votes in the election.

of both the Supreme Court and Ninth Circuit with regard to protected language and reiterated the concern over the economically dependent relationship of the employee to the employer, "and the tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."³²⁰

The Ninth Circuit refined the earlier rules with regard to employer opinions and predictions in the recent case of *NLRB v. General Telephone Directory Co.*³²¹ In that case, various general managers and district sales managers had made statements, during a pre-election period, indicating the company's position with regard to the status of scheduled wage increases if the union was elected.³²² The Board found that the company had specifically threatened to withhold a promised wage increase, and to eliminate pay increases through a district sales manager if unionization were pursued.³²³ The court disagreed with the Board's interpretation of the circumstances in which the statements were made, and concluded that the employer had merely made predictions regarding potential market changes which were beyond its control.³²⁴ The court found that the employer's use of the words "budgeted," "extenuating circumstances," and "a negotiable term," when referring to the wage increase, supported the conclusion that the statements were not

It filed objections to the election and charged Marine World with committing unfair labor practices. The Board found that the letters issued by the employer were calculated to discredit the union and to discourage union membership and, thus, were coercive and not protected by § 8(c). *Id.*

320. *Id.* The court further held that while the printed statements of the employer were critical of the union, they did not on their face threaten reprisals or promise benefits depending upon the outcome of the election. However, the court did note that there were potentially "implied" threats or promises in the letters and that the determination of their status must be made by the Board. The court, therefore, remanded the matter to the Board for consideration of the applicability of § 8(c) and directed it to give consideration to any general union hostility on the part of Marine World, as well as its past association with the union, and the intended and perceived message of the two letters with respect to whether they were in fact nonprivileged. *Id.*

321. 602 F.2d 912 (9th Cir. 1979).

322. *Id.* at 914.

323. *Id.* at 916. A regional manager also indicated that budgeted salary increases would become a negotiable term, that the company would start with a blank piece of paper, and that unionization would initiate horse trading. *Id.*

324. *Id.* at 917. The court stated:

the mere fact of a businessman's awareness, and statements to that effect to his employees, of the possible consequences of union representation, does not support, we feel, in the absence of evidence of other anti-union activity, the inference herein made by the Board of threatening or coercive behavior constituting unfair labor practice by the company.

Id.

threats and were reasonably based in fact.³²⁵ The court added to the Ninth Circuit standards regarding privileged speech by holding that the mere fact that statements made were vague and obtuse, even if intentional, does not necessarily lead to the inference that they represented a threat of retaliation.³²⁶

The Ninth Circuit, in *NLRB v. Lantz*,³²⁷ addressed the question of whether an employer's threat to close down its plant in response to union activities was protected by section 8(c). The court held that because the closing would have been both within the employer's sole discretion and for reasons unrelated to economic necessity, the employer's threat was a clear violation of section 8(c).³²⁸

3. Interrogation

A motivation behind the enactment of the NLRA was to put the employee on a more even level of power with his or her employer and to prevent abuses of power by the employer.³²⁹ An employee is quite vulnerable to abuse by his or her employer during interrogation by the employer. The Ninth Circuit has held that interrogation regarding union activity alone does not violate section 8(a)(1) if it does not contain an express or implied threat or promise, or form part of a pattern of restraint or coercion.³³⁰ The court has specifically held that interrogation of employees by employers is not unlawful *per se*,³³¹ but has also

325. *Id.*

326. *Id.* The court concluded that in light of the totality of the circumstances, including the fact that it appeared that the company's representatives intended nothing more than to infer that the advent of unionization could possibly alter the economic circumstances and possibilities, and in applying a realistic view of the business/labor society, the statements of the employer were protected under § 8(c). *Id.* at 920.

327. 607 F.2d 290 (9th Cir. 1979).

328. *Id.* at 298. The employer had made the statement regarding plant closure in response to suggestions by an employee that he would go to the union to resolve a dispute over nonpayment of fringe benefit contributions. The court reasoned that the employer's statements regarding the closedown revealed an obvious anti-union animus. When coupled with testimony about the employer's actual continued operation on a nonunion basis, the employer's expressions were shown not to be privileged. *Id.*

329. In *Garment Workers v. Quality Mfg.*, 420 U.S. 276, 281 (1975), and *NLRB v. Weingarten*, 420 U.S. 251, 256-58 (1975), the Supreme Court revealed its concern for this problem of inequality. In *Garment Workers* (as in its companion case of *Weingarten*), the Court held a denial by an employer of an employee's request that her union representative be present at an investigatory interview which the worker thought might result in disciplinary action was a violation of § 8(a)(1). 420 U.S. at 281. The rationale of the Court included the theory that its holding would allow an employer and employee to deal on more equal and balanced levels in such situations. *Id.*

330. *NLRB v. McCatron*, 216 F.2d 212, 216 (9th Cir. 1954).

331. *NLRB v. Super Toys, Inc.*, 458 F.2d 180, 182 (9th Cir. 1972); *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 728 (9th Cir. 1967).

held that an employer's interrogation of its employees about union activities, unaccompanied by express assurances against reprisal, is inherently coercive and therefore an unfair labor practice.³³²

Three cases decided during the survey period involved interrogation of employees. In *NLRB v. Bighorn Beverage*,³³³ an employer's president interviewed several prospective employees from a state employment agency and questioned each person regarding union membership.³³⁴ From a review of the totality of the circumstances, the court concluded that the questioning violated section 8(a)(1).³³⁵ The court added to the previous Ninth Circuit requirement of express assurances against reprisal by noting that the president should have taken steps to alleviate the inherently coercive impact of the questions concerning union membership.³³⁶ The net effect of such questioning was clearly to discourage employees from exercising their protected right to involve themselves in any organizing activity. While the statements made by the employer did not overtly indicate that it would hire only nonunion sympathizers, the fact that it did not indicate otherwise led to the unavoidable fear by the applicants that this was indeed the employer's intention.³³⁷

A similar result occurred in *NLRB v. Chatfield Anderson*.³³⁸ In *Chatfield*, the employer, through its senior executives, interrogated employees about their union sympathies and activities. The court restated the policy of the Ninth Circuit that coercive interrogation concerning union activities is a violation of the NLRA.³³⁹ In *Chatfield*, the questioning did take place, the supervisors asked questions and gave no assurances against reprisals, and the company advanced no legitimate business reasons for the questioning.³⁴⁰

In *Clear Pine Mouldings, Inc. v. NLRB*,³⁴¹ the court reaffirmed the notion that interrogation of employees concerning union activities is

332. 458 F.2d at 183 (1972).

333. 614 F.2d 1238 (9th Cir. 1980).

334. *Id.* at 1239-40. Each of the individuals interviewed indicated to the president that either he did not belong to a union or that he would be willing to work without any union representation. The court noted that the situation led the interviewees to believe that they had to make such responses to be hired. *Id.*

335. *Id.* During the interviews, the president stated that refusal to cross picket lines would not be an excuse for failing to deliver to customers. *Id.*

336. *Id.* at 1241-42.

337. *Id.*

338. 606 F.2d 266 (9th Cir. 1979).

339. *Id.* at 267.

340. *Id.*

341. 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

not a per se violation of the Act, and restated the Ninth Circuit test of coercion: "whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of their protected § 7 rights."³⁴² The court held that in an employment interview, similar to that of *Bighorn Beverage*,³⁴³ in which the interviewer urged a prospective employee not to join the union, there was a clear implication that answers given by the employee affected his chances of employment. That implication was sufficient to establish violation of section 8(a)(1) even without testimony as to express threats by the employer.³⁴⁴

The three survey cases addressing the issue of interrogation present an employer with rather stringent guidelines for interrogating employees regarding union affiliation or activities. Employers must not only avoid explicit threats, but must also give express assurances against reprisal if any statements could reasonably be perceived as threats.

4. Employer no solicitation rules

"No solicitation" rules promulgated by employers are designed to prevent, for whatever reason, union activities within the time and location restrictions of the rule.³⁴⁵ While neither the Supreme Court nor the Ninth Circuit has addressed this issue in great detail, it is clear that such rules would have to satisfy the standards set by both section 8(a)(1) and the case law which has interpreted it.³⁴⁶ For example, a no solicitation rule during nonworking hours in nonwork areas would reasonably be subject to some scrutiny as being an attempt by an employer to interfere with the protected rights of union organization, but such scrutiny would have to take into consideration the totality of circumstances.³⁴⁷

During the survey period, in *NLRB v. Silver Spur Casino*,³⁴⁸ the Ninth Circuit held that a rule prohibiting employee solicitation or distribution of literature during nonworking hours in nonwork areas is presumptively invalid; however, the court noted that exceptions to the general rule could be made when warranted by special circum-

342. *Id.* at 725.

343. 614 F.2d at 1239-40.

344. 632 F.2d at 725-26.

345. See DEVELOPING LABOR LAW, *supra* note 271, at 84-86.

346. See *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98, 802 n.10 (1945).

347. See DEVELOPING LABOR LAW, *supra* note 271, at 84-87.

348. 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

stances.³⁴⁹ In *Silver Spur*, the employers were engaged in direct service to customers, providing gambling, restaurant, and bar facilities. The court permitted such employers to establish no solicitation rules which proscribe employee efforts to engage in solicitation or distribution of materials for organizing purposes after working hours in areas open to the general public.³⁵⁰ But at the same time, seeming to twist its own language, the court held that rules established by those same employers, preventing solicitation for union organizing purposes on company premises after their shifts were over, were too broad.³⁵¹ The distinction appears to be that no solicitation rules are permissible if they prevent employees from disrupting areas open to the public "in the selling areas of stores and restaurants on the theory that such activity may tend to drive away customers."³⁵² This decision reflects the court's recognition of the problems which employers face when engaged in that type of interaction with the public. At the same time, the court reaffirmed the limitations of employer control over employee solicitation where employer efforts reach the point of interfering with unionizing activity.

In *NLRB v. Olympic Medical Corp.*,³⁵³ the court held that a rule forbidding employees to discuss union issues during work hours, without barring discussions of other nonwork related matters, was a violation of section 8(a)(1). The president of the employer had testified that the company had an unwritten rule barring nonwork related discussion.³⁵⁴ However, due to the poor credibility of the president, and the fact that other employees testified that nonwork related matters were regularly discussed without reprimand, the court found that the company was enforcing a no solicitation rule in a discriminatory manner, and thus was violating the NLRA.³⁵⁵ The holding implies that the Ninth Circuit will sustain rules which have the same effect as no solicitation rules as long as such rules are couched in terms of barring *all* discussion of a non-work nature and are not discriminatorily applied.

349. *Id.* at 582.

350. *Id.* at 583.

351. *Id.*

352. *Id.* at 582; *see, e.g.*, *Marriot Corp. (Children's Inn)*, 223 N.L.R.B. 978 (1978); *May Dep't Stores Co.*, 59 N.L.R.B. 976, 981, *enforced as modified*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1976); *Goldblatt Bros.*, 77 N.L.R.B. 1262, 1264 (1948); *see also Beth Israel Hosp.*, 437 U.S. 483, 493 (1978).

353. 608 F.2d 762, 764 (9th Cir. 1979).

354. *Id.*

355. *Id.*

5. Employer withholding or granting benefits to coerce employees

Employees are generally in a dependent relationship with their employer, because the employer has the potential to instill in employees the fear of losing job benefits as a means of coercing them to refrain from engaging in union activities. The employer can use its position to achieve a similar result by providing additional benefits to reward or encourage anti-union activity.³⁵⁶ The Supreme Court has held that such activities, when undertaken with the express intention of impinging upon employee freedom of choice, are unlawful under the NLRA.³⁵⁷ The Court has also held, however, that an employer may take action which appears to violate section 8(a)(1) if such action can be justified by "legitimate and substantial business justifications."³⁵⁸ The inference is that an employer could withhold or grant benefits in an apparently coercive manner if the employer can provide an acceptable justification.

The Ninth Circuit has addressed similar issues in a more specific manner and has consistently held that promises made by employers offering benefits during union elections, including the mere mention of company benefits during discussions with employees, are violations of section 8(a)(1).³⁵⁹ Unquestionably, the same violations should therefore be found when such benefits are *actually* withheld or granted.

During the survey period, in *NLRB v. Swedish Hospital Medical Center*,³⁶⁰ the Ninth Circuit addressed the issue of whether the grant of a one day vacation to nonstrikers had a sufficiently coercive effect on the striking employees to warrant a finding of a section 8(a)(1) violation. The employer claimed that its action was not a violation of the NLRA because the benefit had only a minimal effect upon its employ-

356. See DEVELOPING LABOR LAW, *supra* note 271, at 97-99.

357. *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964).

358. *NLRB v. Fleetwood Trailer*, 389 U.S. 375, 378-80 (1965). In *Fleetwood*, the employer, at the end of a strike by union members, announced that it could not then reinstate the strikers because of production curtailment caused by the strike, but failed to rehire them when the jobs became available at a later date. The Court held that the employer's refusal to reinstate the strikers constituted an unfair labor practice under § 8(a)(1) because the employer failed to show that its action was due to legitimate and substantial business justifications. *Id.*

359. See, e.g., *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970) (combination of promises of benefits and threats of discharge, subcontracting, and plant closure found to be coercive threats); *Santa Fe Drilling v. NLRB*, 416 F.2d 725, 728 (9th Cir. 1969) (employer's discussions of company benefits and urging of employees to vote in representation election found coercive); *NLRB v. Luisi Truck Lines*, 384 F.2d 842, 845 (9th Cir. 1967) (promises by employer of benefits for voting against union clearly coercive and prohibited).

360. 619 F.2d 33, 35 (9th Cir. 1980).

ees' right to strike, was based upon a legitimate business interest, and was a gift, not a term or condition of employment.³⁶¹ The court held that the grant of a one day vacation is not so insignificant a benefit that the employees will not reflect upon it in their participation in future strikes; therefore, the employer's action constituted an interference with the employees' right to engage in union activities.³⁶² The employer asserted the "business justification" that it had to compensate nonstrikers for the additional burdens they bore. However, the court held that the burden was insufficient to outweigh the employees' interest in uninhibited strike activity.³⁶³ Thus, the court, in balancing the Supreme Court standard of "legitimate and substantial business justifications" against the negative "effect" of the action, found that the potential repression of employee organizing activity was by far the more important factor to be considered. However, the *Swedish Hospital* court does not appear to have ruled out the possibility that a more substantial business reason could justify similar grants of benefits which may have some effect on future union activities.³⁶⁴

In *NLRB v. Olympic Medical Corp.*,³⁶⁵ the court held that the employer had violated the NLRA by withholding a periodic wage increase close in time to the filing of a union representation petition. Such activity was clearly part of overt efforts by the employer to influence employees regarding union affiliation and had the net effect of interfering with and coercing employees.³⁶⁶ This decision provided a reaffirmation of the standards and protections considered throughout both the Supreme Court's and Ninth Circuit's application of section 8(a)(1).

B. Employer Discrimination

NLRA section 8(a)(3) provides that it is an unfair labor practice

361. *Id.* at 35. The facts revealed that the employer had granted a compensatory day off to all nurses who either did not strike, abandoned the strike, or were hired during the strike. None of the other nurses who continued the strike received the day off. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* The court also responded to a claim on behalf of the hospital that the holding of *NLRB v. Electro Vector*, 539 F.2d 35, 36 (9th Cir. 1976), should be applied. The court noted that, in *Electro Vector*, the § 8(a)(1) violation was merely a derivative of the § 8(a)(3) violation. Because the § 8(a)(3) violation was denied (because the benefits provided by the employer were not a term or condition of employment), the § 8(a)(1) violation necessarily was unfounded. In *Swedish Hospital*, the question to which the Board and the court addressed themselves concerned interference with § 7 rights, not whether the bonuses were a term or condition of employment, and the court thereby distinguished the cases and rejected the hospital's argument. 619 F.2d at 35.

365. 608 F.2d 762, 763 (9th Cir. 1979).

366. *Id.*

for an employer to discriminate in hiring and retaining employees or in setting any term or condition of employment to encourage or discourage membership in any labor organization.³⁶⁷ Unlike section 8(a)(1),³⁶⁸ section 8(a)(3) focuses primarily on the motive of the employer, and not the effect of its actions.³⁶⁹ The Supreme Court and Ninth Circuit cases which have applied this statute have consistently held in favor of employees who have been discharged because of their union affiliation or for participating in union activities.³⁷⁰

1. Discharge of employee for improper purpose

Both the Supreme Court and Ninth Circuit have held that the crux of a violation of section 8(a)(3) is the determination of the actual motive of the employer behind the discharge of the employee.³⁷¹ However, there has been considerable discussion over the manner in which motive is utilized to prove a section 8(a)(3) violation.

The Supreme Court began its analysis of the improper discharge of employees in the mid-1950's by holding that, although an essential element of a violation of section 8(a)(3) is that the employer's motive in discriminating against the employee be to encourage or discourage membership in a labor organization, specific evidence of intent is unnecessary where the conduct of the employer "inherently encourages or discourages union membership."³⁷² Yet, it was not until *NLRB v. Great Dane Trailers*³⁷³ was decided that a definitive test was established. The Court in *Great Dane* held that when an employer's discriminatory conduct was "inherently destructive" of important

367. 29 U.S.C. § 158(a)(3) (1976).

368. 28 U.S.C. § 158(a)(1) (1976).

369. See DEVELOPING LABOR LAW, *supra* note 271, at 52 (Supp. 1971-1975).

370. See, e.g., *Republic Aviation v. NLRB*, 324 U.S. 793, 795-803 (1945) (a discharge because of a violation of an invalid no solicitation rule held violative of § 8(a)(3)); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941) (employer who refuses to hire a prospective applicant for employment solely because of the applicant's affiliation with a labor union is guilty of an unfair labor practice); *NLRB v. Cantrall*, 201 F.2d 853, 856 (9th Cir. 1953) (employer who requires membership in a labor organization as a prerequisite for employment violates § 8(a)(3)).

371. See, e.g., *NLRB v. Great Dane Trailers*, 388 U.S. 26, 27-30 (1967); *American Shipbuilding Co. v. NLRB*, 416 F.2d 725, 731-32 (9th Cir. 1967); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Pittsburgh-Des Moines Steel v. NLRB*, 284 F.2d 74, 77 (9th Cir. 1960).

372. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954). In *Radio Officers*, the employer was charged with discriminating against nonunion employees because it granted retroactive pay increases and vacation payments to union employees and refused such benefits to other employees solely because they were not union members. *Id.* at 17-25.

373. 388 U.S. 26 (1967).

employee rights, the Board was not required to show an anti-union motivation.³⁷⁴ However, if the effect of the discriminatory conduct on employee rights is "comparatively" minor, an anti-union intent must be shown to sustain the charge if the employer has provided evidence of legitimate and substantial business justifications for its conduct.³⁷⁵

The Ninth Circuit expanded upon the holding of *Great Dane* in *Portland Willamette v. NLRB*.³⁷⁶ The court provided examples of what it considered to be conduct "inherently destructive of the employees' right to strike or engage in collective bargaining."³⁷⁷ The dispositive test in the Ninth Circuit with regard to discharge of employees is stated in *Western Exterminator v. NLRB*.³⁷⁸ The court in *Western Exterminator* held that where the discharge of an employee is motivated by both legitimate business considerations and protected union activity, the test is whether the business reason or the protected union activity is the moving cause for the discharge.³⁷⁹ The court noted that when examining an isolated discharge of an individual worker, it deems the "inherently destructive" analysis inappropriate;³⁸⁰ "[o]therwise, the discharge of an employee who participates in union affairs might violate section 8(a)(3) regardless of whether the employer's motives were entirely proper."³⁸¹ In such cases, "the burden is on the NLRB and reviewing courts to 'determine whether the employer has acted purely [for legitimate purposes] or has sought to damage employee organization.'"³⁸²

Recently, in *NLRB v. Lantz*,³⁸³ the court held that *Western Exterminator* was not applicable. In *Lantz*, the court was faced with making a determination of whether an employer's discharge of two employees

374. *Id.* at 34.

375. *Id.* In *Great Dane*, the employer revoked vacation benefits following initiation of a strike, then later announced that it would grant vacation benefits for employees who had returned to work during the strike. The court noted that the burden is on the employer to show that it was motivated by legitimate business purposes, because proof of such purposes is most accessible to it. *Id.*

376. 534 F.2d 1331 (1976).

377. *Id.* at 1334. In *Portland*, the court specifically stated that permanent discharges for participating in union activities, granting superseniority to strike breakers, and other actions creating visible and continuing obstacles to future exercise of employee rights were inherently destructive. *Id.*

378. 565 F.2d 1114 (9th Cir. 1977).

379. *Id.* at 1118.

380. *Id.* at 1117 n.2.

381. *Id.*

382. *Id.* The court also recognized the fact that the various other circuits are sharply divided on the question of the exact amount of animus that must be shown for a § 8(a)(3) violation. However, in the court's own judgment, the rule that anti-union animus must be the dominant or moving cause is the better standard. *Id.*

383. 607 F.2d 290, 299 (9th Cir. 1979).

was a violation of section 8(a)(3) where there appeared to be multiple reasons for the employer's action, including both anti-union motivation and legitimate business reasons.³⁸⁴ The court in *Lantz* pointed out that in *Western Exterminator*, the court was faced with a review of an isolated discharge of a single employee in which the action of the employer was not inherently destructive of important employee rights. However, in *Lantz*, the court found that the employer's conduct was inherently destructive in that the employees were discharged (or not employed) at least partially because of their expressed desire to procure union assistance to force compliance with the collective bargaining agreement. Such employee activity is protected by section 7 of the NLRA.³⁸⁵ While the facts of the case indicated that there were at least two potential motivations for the employer's acts, the court in *Lantz* found that it was not necessary for the Board to have shown that the improper motive was the moving or dominant one.³⁸⁶ Thus, *Lantz* appears to indicate that another test has been formulated, in which the discharge in question need only be partially due to union activity, and that employer motivation need not be dominant.

In another survey period case, *L'EGgs Products, Inc. v. NLRB*,³⁸⁷ the court took exception to its own language in *Lantz*. In *L'EGgs*, the employer received notice by mail from the union stating that the union was actively engaged in an organizing program to obtain a union contract; the employer reacted by firing five employees.³⁸⁸ The court reaffirmed earlier standards set forth in both the Supreme Court case of *Great Dane* and the Ninth Circuit case of *Western Exterminator* and stated that it did not comprehend the distinction made in *Lantz* in which the court stated that because *Western Exterminator* involved an isolated discharge of a single employee, the action of the employer was not inherently destructive of section 7 rights.³⁸⁹ The court in *L'EGgs* rejected this distinction and found that the discharge in *Western Exterminator* was just as conclusive and permanent as that in *Lantz*. The

384. The facts indicated that after the employer decided to go nonunion, one employee suggested that the employer was "kind of a crook," and that the employee was discharged by the employer allegedly for this remark. The employer claimed in addition that the two employees were not employed by him because of a legitimate closedown of the plant. The employees claimed that they were not employed because of their protected efforts to enforce a union contract and their suggestions that they would go to the union to achieve that end. *Id.* at 299.

385. *Id.*

386. *Id.*

387. 619 F.2d 1337 (9th Cir. 1980).

388. *Id.* at 1340-41.

389. *Id.* at 1342.

court concluded that "*Lantz* should be confined to its facts—discharges for seeking to enforce the contract between the employer and the union."³⁹⁰ Thus, the *L'Eggs* case clearly reinforces the dominant motive test highlighted in *Western Exterminator* and provides an example of an application of the Ninth Circuit's "dominant motive" test.

Several other decisions during the survey period applied the "dominant motive" test to resolve questions regarding allegedly illegal discharges. In *Stephenson v. NLRB*,³⁹¹ the court was faced with a dispute turning on whether the dominant motive behind an employee's discharge was anti-union animus or a legitimate business reason.³⁹² The employee claimed that the *Lantz* theory, under which an employer may be found to have committed an unfair labor practice although a discharge is only *partially* motivated by anti-union animus, was applicable to his case.³⁹³ The court, however, rejected that reasoning, and held that *Western Exterminator's* test for determining whether the discharge of an employee is an unfair labor practice (whether the anti-union animus was the moving or dominant cause for the discharge) was applicable.³⁹⁴ The court found, upon review of the evidence presented, that the dominant motivation for the discharge was a legitimate business reason.³⁹⁵ It is important to note that this case was decided after *Lantz* but before *L'Eggs*, and therefore provides support for the conclusion in *L'Eggs* that the holding in *Lantz* should be confined to its facts.

In *NLRB v. Joseph*,³⁹⁶ the court was faced with a situation in which the employer discharged the least competent worker to make room for a fellow worker whom the Board trial examiner had ordered reinstated in an unrelated proceeding. The employee claimed that he was discharged as a result of his union activities.³⁹⁷ The court held that the dominant motive test applied and found that there was clear evi-

390. *Id.*

391. 614 F.2d 1210 (9th Cir. 1980).

392. *Id.* at 1211-13.

393. *Id.* at 1213.

394. *Id.*

395. *Id.* The facts indicated that the employee had continuously violated company smoking rules, and that he had been found smoking over a container of flammable solvent just prior to the discharge. There was additional testimony by the employer that the company had been warned by fire officials regarding smoking in the working area and that an employee had been previously burned by solvent coming into contact with a hot engine. *Id.*

396. 605 F.2d 466 (9th Cir. 1979).

397. *Id.* at 468. The discharged employee was a witness before the Board in the earlier, unrelated proceeding which had led to the reinstatement order. Because he had essentially testified against the employer, the court noted the potential for a claim of violation of § 8(a)(4) of the NLRA. *Id.* at 467. Section 8(a)(4) of the NLRA provides that it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an em-

dence that the dominant motive behind the termination was a legitimate business reason.³⁹⁸

In *NLRB v. Inland Empire Meat Co.*,³⁹⁹ an employee claimed that he was discharged because of his union activities. The employer argued that there was insubstantial evidence that the employee's discharge was motivated by anti-union animus.⁴⁰⁰ The court, however, found that there was substantial evidence indicating improper motivation by the employer, because the employer was inconsistently applying the rules which that employer claimed the employee had violated.⁴⁰¹ The employer had based its claim of *proper* motivation upon the rules. The court, however, in applying the dominant motive test, found that the inconsistent application of the rules in question supported the finding that the improper motive was the dominant one.⁴⁰²

In another survey case, *NLRB v. Bighorn Beverage*,⁴⁰³ the court held that if an employee is discharged for an allegedly improper motive, the appropriate test is whether the improper motive was the dominant one.⁴⁰⁴ The court combined that test with an additional one which required that the overall circumstances be considered in determining the dominant motive.⁴⁰⁵ The court concluded, on the basis of the overall circumstances, that the dominant motive for the discharge was anti-union animus.⁴⁰⁶

ployee because he has filed charges or given testimony under the Act. 29 U.S.C. § 158(a)(4) (1976).

398. *Id.* at 468. The court noted that the evidence supported the conclusion that the employer's desire to minimize its potential backpay liability was the motivating factor leading to the termination of the employee. Because there was no evidence of anti-union animus, the legitimate business reason was the dominant motive. *Id.*

399. 611 F.2d 1235 (9th Cir. 1979).

400. *Id.* at 1238. The employer claimed that the employee either quit or was discharged because he had violated company grooming policies, that he had in some manner verbally abused a supervisor, failed to return a check to the company on the date of its receipt, and on one occasion, picked up a wrong product when driving the company truck. *Id.*

401. *Id.* The employee in question was the shop steward, and he was told by the employer on the day he was discharged that the company was terminating him and intended to get rid of the union next. He had been informed earlier that the company was going to start at the top and "do a little cleaning up." Although the employee did report to work with long hair and a beard in violation of company policy, there was testimony by fellow employees to the effect that other employees had been seen in violation of such standards without being reprimanded, and that other individual employees who had not returned company checks on time and had not made correct pickups were not reprimanded. *Id.*

402. *Id.*

403. 614 F.2d 1238 (9th Cir. 1980).

404. *Id.* at 1242-43.

405. *Id.*

406. *Id.* The employee had initiated the union organizing activity at the employer's facility and solicited the union card signing campaign, leading to the eventual filing of a petition

2. Reprimand of employee for improper purpose

The standards set by the Supreme Court in *Great Dane Trailers* would appear to apply to all situations in which an employer violates section 8(a)(3) by discriminating against its employees to discourage union activity.⁴⁰⁷ It should be noted that *Western Exterminator* and decisions which have followed have involved discharges of employees.⁴⁰⁸ However, during the survey period, two cases were decided which involved reprimands instead of discharges. In *Clear Pine Mouldings, Inc. v. NLRB*,⁴⁰⁹ the employer had reprimanded an employee, allegedly as part of a deliberate effort to discourage union activity.⁴¹⁰ The court reaffirmed the Ninth Circuit and Supreme Court rules that the employer's motive for engaging in the discriminatory conduct is controlling; without a finding of anti-union animus, there is no unfair labor practice unless the conduct was so inherently destructive of employee rights that the unavoidable and foreseeable consequences of the employer's conduct bear their own indicia of motive.⁴¹¹ In *Clear Pine*, the court did not consider whether the improper motivation was the dominant one, as in discharge cases, but whether it was reasonable to conclude that the employee was reprimanded because of her status as a leading union activist.⁴¹² The court held that it was required to defer to the Board's determination of motive, a matter within the Board's purview.⁴¹³ Therefore, based upon the holding in *Clear Pine*, the standard with regard to employer reprimands is that the Board merely must rely upon evidence of a reasonable inference that the reprimand was motivated by anti-union animus.

In *NLRB v. Best Products*,⁴¹⁴ an employee was suspended for a two month period for what the employer claimed was a leave of ab-

for representation by the union. The employer had earlier interrogated its employees regarding union sympathies, and statements made by the employer after the employee's discharge revealed anti-union animus. *Id.*

407. See DEVELOPING LABOR LAW, *supra* note 271, at 61 (Supp. 1971-1975).

408. See DEVELOPING LABOR LAW, *supra* note 271, at 35 (Supp. 1977).

409. 632 F.2d 721 (9th Cir. 1980).

410. *Id.* at 725.

411. *Id.* The court cited the case of *NLRB v. Triumph Curing Center*, 571 F.2d 462, 474 (9th Cir. 1978), as a recent affirmation of the general rule previously initiated by *Great Dane Trailers*. The court also reaffirmed the holding in *NLRB v. Folkins*, 500 F.2d 52, 53 (9th Cir. 1974), finding that the Board may rely on circumstantial as well as direct evidence, and that its inferences and findings must prevail where they are reasonable and supported by substantial evidence. *Id.*

412. 632 F.2d at 725.

413. *Id.* at 724. See *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 462, 474 (9th Cir. 1979).

414. 618 F.2d 70 (9th Cir. 1980).

sence designed for the employee to regain her health. The employee was actively involved in union matters, particularly during an election campaign. In addition, the company showed a general anti-union animus in its conduct in the prior year's election.⁴¹⁵ The court held that, for disciplinary action to constitute an unfair labor practice, it must be determined that the employer's motivation was unlawful.⁴¹⁶ The court reaffirmed the holding of *Shattuck Denn Mining Corp. v. NLRB*,⁴¹⁷ in which the court had held that the Board may infer the existence of an unlawful motive behind a disciplinary action taken against an employee if the employer's asserted motive is false.⁴¹⁸ However, the court in *Best Products* added that the ultimate finding of an improper motive must still meet the test of substantial evidence. The court was unable to find substantial evidence on the improper motive issue because the claims against the employer were based merely upon inferences.⁴¹⁹ The court held that a general anti-union spirit on the part of the company, absent a history of concerted unlawful conduct, is not evidence of unfair labor practices.⁴²⁰

Best Products complements the reasonable inference approach in *Clear Pine* by providing a refinement of the applicability of circumstantial evidence in determining motive. In *Best Products*, the Board had improperly relied upon the inferences that the employer was generally hostile to union activity; because there was no concrete evidence to support the Board's finding, the court reversed the Board's decision.⁴²¹

C. Union Discrimination

Sections 8(b)(1)(A)⁴²² and 8(b)(2)⁴²³ of the NLRA provide that it is an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their rights of self-organization and collective bargaining, or to discriminate against employees on the basis of membership, or to cause or attempt to cause an employer to discriminate against an employee.⁴²⁴ Violations of these sections often

415. *Id.* at 71-72. This claim was based upon the fact that the employer had asked employees to remove union buttons while in the showroom area, questioned employees regarding union activity, and discriminatorily enforced a no solicitation rule. *Id.*

416. *Id.* at 74.

417. 362 F.2d 466, 470 (9th Cir. 1966).

418. *Id.* at 470.

419. 618 F.2d at 74.

420. *Id.*

421. *Id.*

422. 29 U.S.C. § 158(b)(1)(A) (1976).

423. 29 U.S.C. § 158(b)(2) (1976).

424. *Id.*

occur in connection with hiring hall arrangements between unions and employers and as a result of attempts by unions to prevent any activity which might undermine a strike.⁴²⁵ Several decisions during the survey period addressed these issues and have provided refinements to the previous standards applied in those situations.

1. Enforcement of exclusive hiring hall agreements

The purpose of an exclusive hiring hall arrangement between an employer and a union is to eliminate nonproductive, continuous searching for employment by workers and to avoid similarly unorganized scouting by employers for employees.⁴²⁶ The Supreme Court has held that exclusive hiring hall arrangements are not illegal per se, unless they in fact result in discrimination prohibited by the NLRA.⁴²⁷ The Ninth Circuit similarly has held that such agreements are not illegal per se, but the court has noted that they might violate the NLRA if discriminatory practices are used to supply workers.⁴²⁸ The Ninth Circuit has ruled, additionally, that a contract which includes discriminatory provisions is illegal per se, but a contract which is "fair on its face" is not illegal simply because it does not contain clauses which *prohibit* illegal action.⁴²⁹

During the survey period, the Ninth Circuit addressed the issue of a discriminatory application of an exclusive hiring hall arrangement by a union in *NLRB v. Laborer's International Union, Local 300*.⁴³⁰ In *Laborer's International*, the union was charged with violating sections 8(b)(1)(A) and 8(b)(2) of the NLRA by initially causing the employer to discharge an employee, and then later refusing to refer that employee to a job opening for the same employer who had requested him by name.⁴³¹ Both actions were allegedly taken because of the em-

425. See, e.g., *Booster Lodge v. NLRB*, 412 U.S. 84, 85-87 (1973); *NLRB v. Granite State*, 409 U.S. 213, 215-23 (1972); *Scofield v. NLRB*, 394 U.S. 423, 427-36 (1969); *International Bhd. of Teamsters, Local 357 v. NLRB*, 365 U.S. 667, 668-75 (1961); *NLRB v. International Ass'n of Bridge Workers Local 75*, 583 F.2d 1094, 1095-97 (9th Cir. 1978); *NLRB v. Mountain Pacific*, 270 F.2d 425, 427-28 (9th Cir. 1959).

426. *International Bhd. of Teamsters Local 357 v. NLRB*, 365 U.S. 667, 672-77 (1961).

427. *Id.* The Court also held that discrimination cannot be inferred from the face of a hiring hall agreement when it specifically provides that there will be no discrimination against casual employees because of the presence or absence of union membership. *Id.*

428. *NLRB v. Mountain Pacific*, 270 F.2d 425, 427-28 (9th Cir. 1959).

429. *Id.* The Eighth Circuit has held that a union violates §§ 8(b)(1)(A) and 8(b)(2) if "it or its agent, adversely affects an employee's job for personal or arbitrary reasons." *Fruin-Colnon Corp. v. NLRB*, 571 F.2d 1017, 1023 (8th Cir. 1978).

430. 613 F.2d 203 (9th Cir. 1980).

431. *Id.* at 205.

ployee's activities against the union.⁴³² The court held that the union had in fact violated those sections because the union was inconsistent in its application of the nondiscretionary referral procedure which it was required by contract to follow.⁴³³ The court found that there was sufficient evidence linking the discriminatory application of the hiring hall rules to the employee's dissident activities, and that while the contract itself was not illegal, the discriminatory application of its terms violated the line drawn by both the Supreme Court and the Ninth Circuit with regard to such hiring hall arrangements.⁴³⁴

The union in *Laborer's International* argued that its failure to refer the employee to a job opening, even though the employee was requested by name, was justified under *NLRB v. International Association of Bridge Workers Local 75*.⁴³⁵ In *Bridge Workers*, the Ninth Circuit held that when a union respects its nondiscretionary referral process but refuses to send an employee to a job for which the employee has been requested by name by an employer, it is not violating the NLRA, and the union's motive in taking such action is irrelevant.⁴³⁶ The court in *Laborer's International* noted, however, that the union failed to enforce the hiring hall provisions in a consistent manner, contrary to the union in *Bridge Workers*.⁴³⁷ The court also emphasized that, in *Bridge Workers*, the only example in the record of a violation by the union of its agreement was an "extraordinary situation" where the local granted referral cards to workers hired out of order due to unusual circumstances.⁴³⁸ In *Laborer's International*, the employee's discharge was arranged only after the union's agent was advised of the employee's dissident activities.⁴³⁹ There was no indication that the actions of the agent were the result of extraordinary or unusual circumstances. Based upon the evidence presented, the court concluded that the employee was denied the referral because of his anti-union activities and other

432. *Id.* The union claimed that it had a legal right to remove the employee because he had held the position in violation of the hiring hall provisions of the agreement. As to the refusal to refer the employee, the union argued that it had relied on its attorney's conclusion that the employee was not eligible for the "by name" work request, and that such reliance was in good faith and not for invidious or discriminatory reasons. *Id.*

433. *Id.* at 207-08.

434. *Id.* The facts indicated that the employee was only discharged through the efforts of the union when the union discovered the employee's dissident union activities. There was significant evidence that the union harbored strong animus against the employee. *Id.*

435. *Id.* (citing *NLRB v. International Ass'n of Bridge Workers Local 75*, 583 F.2d 1094 (9th Cir. 1978)).

436. 583 F.2d at 1097.

437. 613 F.2d at 207-08.

438. *Id.*

439. *Id.*

arbitrary considerations.⁴⁴⁰

In another decision during the survey period, *NLRB v. Wismer & Becker*,⁴⁴¹ the Ninth Circuit was faced with another refusal by a union to refer an employee, contrary to a union hall hiring arrangement. The union also caused the employer to fire employees who had been hired during a labor dispute. In *Wismer*, the court was not willing to make a determination as to whether the union's hiring hall practice was discriminatory and therefore violative of the federal law (leaving such judgment to the NLRB as provided by Congress),⁴⁴² but it did set out some general standards by which the Board should be guided in considering such situations.⁴⁴³ The court held that a hiring hall may not be used to restrain or coerce employees in the exercise of their rights to form labor organizations and to bargain collectively or to refrain from such activities. Nor may a hiring hall be used to cause an employer to discriminate against employees to encourage or discourage union membership.⁴⁴⁴ It was also determined, however, that not every union attempt to influence employer action which in turn encourages or discourages union membership violates the Act.⁴⁴⁵ In addition, the court noted that if a union's action directed toward an employer is *intended* to discipline an individual or a particular group for violation of union rules, to encourage individuals to accept the authority of union officers, or to obtain advantages for union members over nonunion members, such action constitutes an unfair labor practice.⁴⁴⁶ The *Wismer* decision also emphasized the importance of ascertaining the union's true motive, which can be determined from inferences derived from circumstantial evidence.⁴⁴⁷

2. Restraint and coercion by unions

Unions have the right to regulate the activities of their members in order to provide effective representation. However, that right is not without boundaries. The Supreme Court has held that internal regula-

440. *Id.* at 210.

441. 603 F.2d 1383 (9th Cir. 1979).

442. *Id.* at 1389.

443. *Id.*

444. *Id.* at 1388.

445. *Id.*

446. *Id.* The court noted that some conduct which inherently suggests the intent of the union may lead the Board to conclude that the encouragement or discouragement of union membership was a "natural foreseeable consequence of the conduct and that the action [sic] must have intended that result." *Id.*

447. *Id.*

tion of union affairs cannot affect a member's employment status.⁴⁴⁸ However, the Court has also held that internal regulation through the assessment of reasonable fines on union members who decline to honor an authorized strike is permissible because such fines are necessary to enable unions to protect their status through reasonable discipline of members who violate rules and regulations governing membership.⁴⁴⁹ In *Scofield v. NLRB*,⁴⁵⁰ union members were fined and suspended by their union for violating a union rule relating to production ceilings. The Court held that section 8(b)(1) allows a union to enforce "a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor law, and is reasonably enforced against union members who are free to leave the union and escape the rule."⁴⁵¹

The Supreme Court has modified the *Scofield* rule in situations where unions have fined employees for violating lawful strikes, but where the employees have resigned from the union before the actual violations occurred. This modification was initiated in *NLRB v. Granite State*,⁴⁵² in which the Court held that it was an unfair labor practice for a union to fine employees who had resigned prior to the alleged violation of a lawful strike, when neither the union-employer contract nor the union's constitution or bylaws defined or limited the circumstances under which a member could resign from the union.⁴⁵³ The Court expressly declined, however, to address the question of the extent to which a contractual restriction on a member's right to resign may be limited by the NLRA. The Court reasoned that absent any contractual or constitutional provision, a court must apply the law which is normally reflected in free institutions: the right of the individual freely to join or resign from associations, "subject of course to any financial obligations due and owing the group with which he was associated."⁴⁵⁴

The Court went a step further in *Booster Lodge v. NLRB*,⁴⁵⁵ in which the union sought enforcement of fines imposed for the strike-breaking activities of employees who had resigned from the union. The union's constitution expressly prohibited members from strike-breaking, but was silent on the subject of voluntary resignation from

448. *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 185-95 (1967).

449. *Id.*

450. 394 U.S. 423 (1969).

451. *Id.* at 430.

452. 409 U.S. 213 (1972).

453. *Id.* at 215-18.

454. *Id.* at 216.

455. 412 U.S. 84 (1973).

the union.⁴⁵⁶ The Supreme Court held that in such a situation, the union committed an unfair labor practice when it sought enforcement of its fines.⁴⁵⁷ There was no indication that the union members were informed, prior to the assessment of fines, that the constitutional provision was to be interpreted as imposing any obligations upon a resignee⁴⁵⁸ and the Court was not inclined to find an "implied" post-resignation commitment against the employees.⁴⁵⁹

The Ninth Circuit applied the Supreme Court standards during the survey period in *NLRB v. Machinists Local 1327*.⁴⁶⁰ In *Local 1327*, the union added to its constitution explicit restrictions on the circumstances under which a member could resign.⁴⁶¹ The union attempted to fine employees who had formally resigned from the union and had later crossed picket lines to return to work during a legal strike.⁴⁶² The court, citing *Booster Lodge*, held that a rule which permits a union to discipline a member for crossing a lawful picket line or returning to work during a strike is a legitimate internal regulation of the conduct of union members, and that the imposition of a fine on a member is lawful.⁴⁶³ The court also held that a union member has the right to resign from a union and that when the member does resign, the union has no more control over that member than it has over a person on the street.⁴⁶⁴ The court, however, refused to consider the validity of the union's restriction regarding a member's right to resign, a question which was not reached by the Supreme Court in either *Granite State* or *Booster Lodge*.⁴⁶⁵

456. *Id.* at 85-86.

457. *Id.* at 88-90.

458. *Id.* at 89.

459. *Id.*

460. 608 F.2d 1219 (9th Cir. 1979).

461. *Id.* at 1222. The applicable constitutional provision read as follows:

Improper Conduct of a Member:

. . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

Id. at 1220.

462. *Id.* at 1221.

463. *Id.*

464. *Id.*

465. *Id.* The court concluded that such a question was expressly reserved by the Board majority in this case. *Id.* The dissent argued that the provision in the union's constitution sought not to condition resignations by members, but rather sought to control the post-

In the recent case of *Dycus v. NLRB*,⁴⁶⁶ the Ninth Circuit was faced with a different sort of union internal regulation. In that case, an employee, after efforts to become a candidate for union office, was transferred from one union local to another without his consent.⁴⁶⁷ The court was required to determine whether the transfer of jurisdiction by the union local was coercive and in violation of section 8(b)(1)(A), or whether it was a proper internal regulation.⁴⁶⁸ The court concluded that the transfer was a proper action by the union, in accordance with its regulations, and was motivated by legitimate business reasons associated with effective union organization and representation.⁴⁶⁹ The employee claimed that regardless of the purpose or intent of the transfer, such transfer without the consent of the members of the bargaining unit restrained him in his exercise of the right to choose freely his collective bargaining representative. The court, however, ruled against the employee, finding that the transfer, in effect, was a valid disclaimer by the first local of its interest in representation of his bargaining unit, and was a noncoercive offer by the second local to assume the role of representative.⁴⁷⁰ In making this determination, the court in *Dycus* was essentially reiterating the standard of *Scofield v. NLRB*.⁴⁷¹ The court noted that the action "contravened no national labor policy, and reflected a legitimate union interest."⁴⁷²

resignation conduct of employees who were no longer union members, and concluded that it is unlawful for a union to fine a former member for post-resignation conduct otherwise protected by § 7 of the Act. The dissent also argued that the Supreme Court decisions should have been applied, because they hold that the disciplinary power of a union is restricted to those employees who are members of the union. *Id.* at 1222-23 (Kennedy, J., dissenting).

466. 615 F.2d 820 (9th Cir. 1980).

467. *Id.* at 823.

468. *Id.* Following the transfer from one local to another, the employee was declared ineligible as a candidate for office because he was no longer a member of the local from which he transferred. There was evidence that the transfer was motivated by improper purposes, because as a member of the initial local, the employee often spoke out against the union's policies and administration. *Id.*

469. *Id.* at 825.

470. *Id.* at 826.

471. 394 U.S. at 430.

472. 615 F.2d at 826.

III. THE REPRESENTATION PROCESS AND UNION ELECTIONS

A. Representation Proceedings and Elections

1. Eligibility to vote

a. supervisors

Section 9(c) of the Act⁴⁷³ provides the mechanism under which employees may hold a representation election to designate a collective bargaining agent. Supervisors, however, are not employees under section 2(3) of the Act⁴⁷⁴ and cannot vote in representation elections.⁴⁷⁵ Section 2(11) of the Act⁴⁷⁶ includes as supervisors those individuals who exercise authority, using independent judgment over other employees for the interest of the employer.⁴⁷⁷

During the survey period, in *NLRB v. Big Three Industries*,⁴⁷⁸ an employee's ballot in a representation election was successfully challenged before the Board by the union because the employee was a supervisor and therefore could not be included in the bargaining unit. The employee in question performed both supervisory and non-supervisory tasks as a part of his daily routine. His supervisory duties included directing unit employees on a daily basis, administering sick leave and overtime, and assisting in the hiring, discipline, and merit review of other employees.⁴⁷⁹ These factors were sufficient to persuade the Ninth Circuit that the Board acted within its discretion in finding that the employee was a supervisor.⁴⁸⁰ The employee's part-time performance of work performed by other unit employees did not

473. 29 U.S.C. § 159(c) (1976).

474. 29 U.S.C. § 152(3) (1976).

475. See *NLRB v. Doctor's Hosp. of Modesto, Inc.*, 489 F.2d 772 (9th Cir. 1973).

476. 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, reward, or discipline other employees, or responsibility 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.

477. See *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d 834, 837 (9th Cir. 1977); *accord Sweeny & Co. v. NLRB*, 437 F.2d 1127, 1131 (5th Cir. 1971); *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631, 634-35 (6th Cir. 1968).

478. 602 F.2d 898 (9th Cir. 1979). For a full discussion of this case and the distinction between employees and supervisors, see *supra* notes 1-8 and accompanying text in Part I: ADMINISTRATION OF THE ACT.

479. 602 F.2d at 902.

480. *Id.* (citing *Dynamic Mach. Co. v. NLRB*, 552 F.2d 1195 (7th Cir.), cert. denied, 434 U.S. 827 (1977)); see *NLRB v. Broyhill Co.*, 514 F.2d 655, 658 (8th Cir. 1975).

alter this conclusion.⁴⁸¹

b. plant and office "clericals"

Employees who work in production and maintenance may be properly joined in a bargaining unit with clerical employees whose work is closely tied to production, and who have substantially the same working hours and fringe benefits as clericals, because they share the same *community of interest*.⁴⁸² Clerical employees who may be included in the same bargaining unit with production and maintenance workers are termed *plant clericals*, while those who may not be included because they work apart from production are termed *office clericals*.⁴⁸³

Disputes arise when clerical employees are added to existing production employee bargaining units, or when they are allowed to vote with production employees for representation. These disputes revolve around the issue of whether the clerical employees are plant or office clericals and can thus be included in the unit.⁴⁸⁴ The Ninth Circuit, in resolving whether clerical or other employees may be properly included or added to an existing bargaining unit during an election, has focused on whether the disputed employees share a *community of interest* with the other unit members.⁴⁸⁵ In *Pacific Southwest Airlines v. NLRB*,⁴⁸⁶ the Ninth Circuit outlined six factors the Board considers in determining whether there is sufficient common interest to render a bargaining unit, or the inclusion of an employee in a bargaining unit, appropriate:

- (1) similarity in skills, interests, duties, and working conditions;
- (2) functional integration of the plant, including interchange and contact among employees;
- (3) the employer's organizational and supervisory structure;
- (4) the employees' desires;

481. 602 F.2d at 902 (citing *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545, 550 (9th Cir. 1960)).

482. *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038, 1040 (9th Cir. 1978).

483. *Id.* at 1038-39.

484. *See, e.g.*, *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038-46 (9th Cir. 1978) (clerical employees improperly added to existing production workers' bargaining unit); *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1312-13 (9th Cir. 1978) (*per curiam*) (union's challenge to clerical employee's ballot in production workers' representation election overruled because clericals properly included within unit).

485. *See Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032 (9th Cir. 1978); *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1312-13 (9th Cir. 1978) (*per curiam*).

486. 587 F.2d 1032 (9th Cir. 1978).

- (5) bargaining history; and
- (6) the extent of union organization among the employees.⁴⁸⁷

During the survey period, in *NLRB v. Big Three Industries*,⁴⁸⁸ the Ninth Circuit reaffirmed its direct approach of determining whether employees share a substantial *community of interest* when reviewing disqualification of clericals' ballots in production employees' representation elections. In *Big Three*, the Board sustained challenges to two ballots in a plant workers' representation election because they were cast by *office clericals* rather than *plant clericals*.⁴⁸⁹ The Ninth Circuit extensively reviewed the clericals' activities in light of the first three factors enumerated in *Pacific Southwest Airlines* and concluded that they lacked a sufficient *community of interest* with the plant employees to be classified as *plant clericals*.⁴⁹⁰

c. retired employees

As a general rule, to be eligible to vote in a representation election, an employee must work in the designated bargaining unit during the eligibility period and on election day.⁴⁹¹ A worker on a leave of absence is presumed to continue as an employee and is eligible to vote unless it is established by clear communication or overt act that the employment relationship has been terminated.⁴⁹²

During the survey period, in *Universal Paper Goods Co. v. NLRB*,⁴⁹³ the Ninth Circuit upheld a union's challenge to an employee's ballot in a representation election on the basis of the employee's retirement. Prior to the representation election, the president of the employer company said to the employee, "I hear you're planning to leave us," and subsequently gave her a retirement check. She was later honored by her coworkers at a retirement party, and her departure

487. *Id.* at 1038 (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 153 (1941); *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976)); 14 NLRB ANN. REP. 32, 33 (1949); DEVELOPING LABOR LAW, *supra* note 271, at 201, 231.

488. 602 F.2d 898 (9th Cir. 1979).

489. *Id.* at 902.

490. *Id.* at 903-04.

491. *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1308 (9th Cir. 1978) (per curiam); *accord* *Westchester Plastics of Ohio, Inc. v. NLRB*, 401 F.2d 903, 907 (6th Cir. 1968); *Macy's Mo.-Kan. Div. v. NLRB*, 389 F.2d 835, 842 (8th Cir. 1968); *Trailmobile Div., Pullman, Inc. v. NLRB*, 379 F.2d 419, 423 (5th Cir. 1967).

492. *Valley Rock Prods., Inc. v. NLRB*, 590 F.2d 300, 303-04 (9th Cir. 1979); *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1308 (9th Cir. 1978) (per curiam); *accord* *Trailmobile Div., Pullman, Inc. v. NLRB*, 379 F.2d 419, 423 (5th Cir. 1967).

493. 638 F.2d 1159 (9th Cir. 1979) (per curiam).

was announced in the company bulletin.⁴⁹⁴

The employee then quit work, but unknown to her, the company chairman instructed the personnel director to place her on a two-month leave of absence so she could return if she wanted to.⁴⁹⁵ The employer, also without her knowledge, continued to pay for her health insurance.⁴⁹⁶

The employee had applied for Social Security benefits, but without communicating with anyone in the company, she then decided to forego retirement. She voted against the union in the representation election and returned to work six days later.⁴⁹⁷

The Ninth Circuit held that her ballot was invalid because she had, by her acts, overtly demonstrated her retirement. The employer's unilateral placement of her on a temporary leave of absence and her uncommunicated alleged change of heart about retirement were insufficient to alter the court's conclusion.⁴⁹⁸

d. employers' blood relatives and spouses

Section 2(3) of the Act provides in pertinent part that "[t]he term 'employee' shall include any employee, . . . but shall not include . . . any individual employed *by his parent or spouse*. . . ."⁴⁹⁹

Section 9(b)⁵⁰⁰ states in part that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof"

The Board has, at various times, chosen one section over the other in determining whether to include or exclude an employer's blood relative from a designated bargaining unit. When section 2(3) has been applied, blood relatives have faced absolute exclusion, whereas under section 9(b), the Board has decided each case on its facts. In early Board decisions, absolute exclusion of blood relatives under section 2(3) was the rule.⁵⁰¹ The Board changed this policy after the Sixth Cir-

494. *Id.* at 1159.

495. *Id.* at 1159-60.

496. *Id.* at 1160.

497. *Id.*

498. *Id.*

499. 29 U.S.C. § 152(3) (1976) (emphasis added).

500. 29 U.S.C. § 159(b) (1976).

501. *E.g.*, Peter A. Mueller & Sons, Inc., 105 N.L.R.B. 552 (1953); Louis Weinberg Assocs., 13 N.L.R.B. 66, 69 (1939).

cuit held, in *NLRB v. Sexton*,⁵⁰² that exclusion based solely on family relationships other than those specified in section 2(3), namely, parent or spouse, was improper.

Subsequent to *Sexton*, the Board required that employees related to corporate shareholders or officers enjoy some special status, privilege, benefit, or favored treatment resulting from the blood relationship with management before they would be disqualified from voting.⁵⁰³ The Board then departed from both the special status concept and the section 9(b) analysis discussed in *Foam Rubber City Number 2 of Florida, Inc.*,⁵⁰⁴ and focused on whether the challenged employee shared a *community of interest* with the others in the bargaining unit. In *Foam Rubber*, the Board held that spouses or blood relatives of substantial shareholders of corporate employers must be excluded from bargaining units because they are necessarily more closely identified with management than with their fellow employees.⁵⁰⁵

Since *Foam Rubber*, the Board has taken varying approaches to the disqualification of blood relatives and spouses of shareholders and management. The Board has applied the *special status* test alone;⁵⁰⁶ interpreted *Foam Rubber* as requiring disqualification of relatives of individuals owning fifty percent or more stock in closed corporations, while considering *community of interest*⁵⁰⁷ or *special status*⁵⁰⁸ otherwise; and considered the degree of ownership of the employee's relatives within the *community of interest* analysis.⁵⁰⁹

The Seventh Circuit, in *NLRB v. Caravelle Wood Products, Inc. (Caravelle I)*,⁵¹⁰ criticized the Board's *Foam Rubber* formulation excluding children and spouses of "substantial" shareholders as a repeal of the discretion granted the Board by section 9(b).⁵¹¹ The court saw no reason to give the Board total discretion to disqualify blood relatives

502. 203 F.2d 940, 940 (6th Cir. 1953) (per curiam).

503. See *Cherrin Corp. v. NLRB*, 349 F.2d 1001 (6th Cir. 1965), cert. denied, 382 U.S. 981 (1966); *International Metal Prods. Co.*, 107 N.L.R.B. 65 (1953).

504. 167 N.L.R.B. 623 (1967).

505. *Id.* at 624. Before *Foam Rubber*, the Board interpreted § 2(3) to exclude the children of a sole shareholder. See *Bridgeton Transit*, 123 N.L.R.B. 1196 (1959); *Colonial Craft, Inc.*, 118 N.L.R.B. 913 (1957); *Peter A. Mueller & Sons, Inc.*, 105 N.L.R.B. 552 (1953).

506. See *NLRB v. Warner*, 587 F.2d 896, 902 (8th Cir. 1978) (*special status* test dispositive factor in *community of interest* test); *Pareas of Crescent City, Inc.*, 194 N.L.R.B. 616 (1971); *Buckeye Village Mkt., Inc.*, 175 N.L.R.B. 271 (1969).

507. See *Tops Club, Inc.*, 238 N.L.R.B. 928 (1978); *Toyota Midtown, Inc.*, 233 N.L.R.B. 797 (1978); *Cerni Motor Sales, Inc.*, 201 N.L.R.B. 918 (1973).

508. See *Tops Club, Inc.*, 238 N.L.R.B. 928 (1978).

509. See *Parisoff Drive-In Mkt., Inc.*, 201 N.L.R.B. 813 (1973).

510. 466 F.2d 675 (7th Cir. 1972).

511. *Id.* at 678.

under section 9(b) because it could not do so under section 2(3).⁵¹² Instead, the court provided a list of factors for the Board to consider, including (1) the percentage of stock the parent or spouse owned; (2) the number of shareholders related to one another; (3) whether the shareholders actively engaged in management or held a supervisory position; (4) the number of relatives employed as compared with the total number of employees; and (5) whether the relative lived in the same household or was partially dependent upon the shareholder.⁵¹³ In *NLRB v. Caravelle Wood Products, Inc. (Caravelle II)*,⁵¹⁴ the Seventh Circuit approved the *Caravelle I* formula, dubbing it the *expanded community of interest* test.⁵¹⁵

During the survey period, in *Linn Gear Co. v. NLRB*,⁵¹⁶ the Ninth Circuit confronted the divergent lines of authority concerning employers' relatives and bargaining units. In *Linn Gear*, the Board granted a motion for summary judgment disqualifying the son of the employer's majority shareholder from voting in a representation election. The Ninth Circuit, after reviewing the several lines of authority, vacated and remanded, holding that the *expanded community of interest* test set forth in *Caravelle I* would be the standard adopted by the Ninth Circuit. In expanding the factors listed in *Caravelle I*, the court added (1) the activity, if any, of the employee in the union; (2) the total number of employees as against the number of blood related employees; and (3) the overall ties and social activities of the family involved.⁵¹⁷

2. Election procedures

a. *primary and runoff elections*

Section 9(c) of the Act⁵¹⁸ empowers the Board to investigate representation petitions and to oversee representation elections. Section 9(c)(3)⁵¹⁹ provides, in part, that "[i]n any election where none of the choices on the ballots receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving

512. *Id.*

513. *Id.* at 679.

514. 504 F.2d 1181 (7th Cir.), *reh'g en banc* denied, 510 F.2d 257 (7th Cir. 1974).

515. *Id.* at 1187.

516. 608 F.2d 791 (9th Cir. 1979).

517. *Id.* at 796; *see Parisoff Drive-In Mkt., Inc.*, 201 N.L.R.B. 813 (1973) (degree of employee's family ownership of employer corporation considered in *community of interest* analysis).

518. 29 U.S.C. § 159(c) (1976).

519. 29 U.S.C. § 159(c)(3) (1976).

the largest and second largest number of valid votes cast in the election.”

Section 102.70(d) of title 29 of the Code of Federal Regulations⁵²⁰ provides in pertinent part that the Board shall certify any election in which “two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots . . . and . . . all eligible voters have cast valid ballots. . . . Only one such further election pursuant to this paragraph may be held.”

During the survey period, in *Sohio Petroleum Co. v. NLRB*,⁵²¹ a small group of a larger unit of employees voted in favor of separate union representation in a referendum. In that referendum, nine employees expressed their preference for one union, seven expressed preference for another, while eight cast votes for *no union*. A third union received no votes.⁵²²

A representation election was then held in which a choice was offered between *no union* and the two unions receiving votes in the referendum. The first union received nine votes, the second received one, and ten votes were cast for *no union*. In a runoff election between the first union and *no union*, the first union prevailed fourteen votes to five. As a result, the Board certified the union as the bargaining representative.⁵²³

The employer challenged the offer of three choices in the second election as being violative of the provision of section 9(c)(3) of the Act which requires runoff elections between the top two choices in the primary election. The court dismissed this contention because the first election was only a referendum on whether the employees desired separate representation for their unit and was not a primary representation election.⁵²⁴ The employer also contended that the results of the second election should have been certified under the provision in title 29 of the Code of Federal Regulations, section 102.70(d), which requires Board certification of elections in which two or more choices received the same number of ballots and another choice received no ballots.

The court, without elaborating, stated that the employer's suggested procedure was not supported by the regulations.⁵²⁵ The court was correct, because the language of title 29 of the Code of Federal

520. 29 C.F.R. § 102.70(d) (1980).

521. 625 F.2d 223 (9th Cir. 1980).

522. *Id.* at 225.

523. *Id.*

524. *Id.* at 226.

525. *Id.*

Regulations, section 102.70(d), addresses tie votes between two choices and not votes in which ties result from the aggregation of second and third choices. This is evident from the proviso in the regulation which states that it applies to situations in which "another choice receives *no* ballots."⁵²⁶

The court's decision was also correct under section 9(c)(3), which provides for runoff elections between the top two choices when no choice receives a majority of votes. That was precisely the situation in this case. Curiously, the court did not look to section 9(c)(3) in its analysis.⁵²⁷

*b. investigation of election petitions*⁵²⁸

*c. invalidation of elections*⁵²⁹

*d. the contract-bar rule*⁵³⁰

B. Appropriate Bargaining Units

Section 9(b) of the Act⁵³¹ empowers the Board to designate an appropriate bargaining unit to secure for employees the fullest freedom in exercising their rights. When determining an appropriate bargaining unit, the Board balances individual freedom against the need for efficiency and stability.⁵³² Under section 9(b), employee freedom must be paramount.⁵³³

Board determinations of appropriate bargaining units will not be

526. 29 C.F.R. § 102.70(d) (1980) (emphasis added).

527. In *Sohio*, the employer also contended that placement of the union on the first ballot was improper because it had originally disclaimed interest in representing the unit. The employer protested that because it relied on the disclaimer, it did not offer evidence to rebut the union's qualifications during the election. The court summarily rejected this argument because the union timely petitioned to appear on the ballot, the employer made no showing that the union's placement on the ballot was prejudicial, and the employer offered no evidence that the union was unqualified to represent the unit. 625 F.2d at 226.

528. See *supra* notes 80-88 and accompanying text in Part I: ADMINISTRATION OF THE ACT.

529. See *supra* notes 89-102 and accompanying text in Part I: ADMINISTRATION OF THE ACT.

530. See *supra* notes 249-61 and accompanying text in Part I: ADMINISTRATION OF THE ACT.

531. 29 U.S.C. § 159(b) (1976).

532. See, e.g., *Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971); *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1037 (9th Cir. 1978).

533. *Pacific Southwest Airlines v. NLRB*, 587 F.2d at 1037; see also *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352, 1354-55 (9th Cir. 1970); *accord Retail, Wholesale and Dep't Store Union v. NLRB*, 385 F.2d 301, 305 (D.C. Cir. 1967).

overturned by the courts unless there has been an abuse of discretion because the issue of determining bargaining units is within the particular expertise of the Board.⁵³⁴ The Board is not required to select the most appropriate unit; it need only select a unit which is not clearly inappropriate.⁵³⁵ The Board decides each case on its own facts⁵³⁶ and is not strictly bound by its prior decisions.⁵³⁷

Critical to the determination of a bargaining unit's appropriateness is whether the unit's employees share a *community of interest*.⁵³⁸ Factors used to gauge the *community of interest* and resulting appropriateness of bargaining units include: (1) similarity in skills, interests, duties and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the employees' desires; (5) bargaining history; and (6) the extent of union organization among the employees.⁵³⁹

During the survey period, in *Sohio Petroleum Co. v. NLRB*,⁵⁴⁰ Board certification of a small group of a larger unit of employees was challenged by the employer as arbitrary and inappropriate. The larger group of employees worked in all facets of oil production on Alaska's North Slope. The smaller group of employees staffed the central power station which provided power for the employer's as well as another major oil company's North Slope operations.⁵⁴¹

The Board based its decision, that the power station employees shared a sufficient *community of interest* to constitute an appropriate bargaining unit, on the following facts: (1) they were not directly involved in oil production but acted, rather, as a "*de facto* public utility" supplying power to the two oil companies; (2) the power facility had its own complex of buildings and separate supervision; and (3) power sta-

534. *E.g.*, *Beck Corp. v. NLRB*, 590 F.2d 290, 292 (9th Cir. 1978); *Pacific Southwest Airlines v. NLRB*, 587 F.2d at 1037.

535. *Beck Corp. v. NLRB*, 590 F.2d at 292; *NLRB v. Retail Clerks Local 588*, 587 F.2d 984, 987 (9th Cir. 1978); *accord Banco Credito y Ahorro Ponceno v. NLRB*, 390 F.2d 110, 112 (1st Cir.), *cert. denied*, 393 U.S. 832 (1968).

536. *Pacific Southwest Airlines v. NLRB*, 587 F.2d at 1038.

537. *NLRB v. Albert Van Luit & Co.*, 597 F.2d 681, 686 n.3 (9th Cir. 1979).

538. *Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. at 172-73.

539. *Pacific Southwest Airlines v. NLRB*, 587 F.2d at 1038; *see also, e.g.*, *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 153 (1941); *NLRB v. Big Three Indus.*, 602 F.2d 898, 903 n.5 (9th Cir. 1979) (survey period case); *NLRB v. Retail Clerks Local 588*, 587 F.2d at 987; *see supra* note 487 and accompanying text for additional authority.

540. 625 F.2d 223 (9th Cir. 1980).

541. *Id.* at 225.

tion employees generally had prior experience in powerhouse work, and were never temporarily exchanged with the employer's other North Slope employees.⁵⁴² Although there was merit to the employer's contention that one unit for all the North Slope employees would better serve the needs of both employees and employer, the court sustained the Board's unit certification because the evidence in the record supported the Board's finding that the power station employees shared a *community of interest*. Thus the bargaining unit was not inappropriate.⁵⁴³

Board certification of a subunit of a larger group of employees was also challenged as inappropriate by the employer in *NLRB v. J.C. Penney Co., Store No. 29-9*.⁵⁴⁴ In *J.C. Penney*, the department store employer consisted of a main store and an automobile center. The Board certified the employees of the automobile center as a bargaining unit.⁵⁴⁵

The Ninth Circuit sustained the Board's certification of the employees as a separate bargaining unit because of the substantial evidence which supported the Board's finding that they shared a *community of interest* apart from the other employees. Facts in the record supporting the Board's conclusion included (1) the automobile center employees were all skilled in the sale and installation of automobile parts, while the other employees were involved in the sale of a wide range of other consumer goods; (2) the automobile center employees worked longer hours, though all employees received the same fringe benefits; (3) little temporary or permanent transfer between the two groups of employees occurred; (4) all automobile center work, other than the storage of excess parts, was conducted at the automobile center, located 100-200 feet from the main store; and (5) there was no indication that the other employees sought union representation, nor any history of collective bargaining between the employer and its employees.⁵⁴⁶

542. *Id.* at 226.

543. *Id.*

544. 620 F.2d 718 (9th Cir. 1980).

545. *Id.* at 719.

546. *Id.* at 720; *see also* *NLRB v. Retail Clerks Local 588*, 587 F.2d at 987-88 (unit of drug store employees carved out from employees of a chain of combination food and drug stores not inappropriate).

C. *Recognition without an Election: Bargaining Orders*⁵⁴⁷

IV. COLLECTIVE BARGAINING

A. *The Duty to Bargain in Good Faith*

Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act (NLRA), taken together, impose a continuing mutual duty on an employer and the representative of a majority of its employees to "bargain collectively."⁵⁴⁸ Both sections make it an unfair labor practice to refuse to bargain in good faith. The definition of good faith collective bargaining was embodied in section 8(d) twelve years after the 1935 enactment of the NLRA.⁵⁴⁹ No static definition of "good faith" has been developed,⁵⁵⁰ and the Board and the courts approach "good faith" questions on a case by case basis.⁵⁵¹

547. See *supra* notes 197-221 and accompanying text in Part I: ADMINISTRATION OF THE ACT.

548. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976) was included in the original Wagner Act passed in 1935, and made it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." National Labor Relations Act § 8(b)(3), 29 U.S.C. § 158(b)(3) (1976), which makes it an unfair labor practice for a labor organization to "refuse to bargain collectively with an employer," was not enacted until the NLRA was amended by the Taft-Hartley Act (the Labor Management Relations Act) in 1947.

549. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976), defines collective bargaining as
the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession

550. ABA, THE DEVELOPING LABOR LAW, 83-97 (Supp. 1976) [hereinafter cited as DEVELOPING LABOR LAW]. In its first Annual Report, the Board discussed some guidelines of good faith:

Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground. . . . The Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining.

1 NLRB ANN. REP. 85-86 (1936).

551. DEVELOPING LABOR LAW, *supra* note 550, at 83. Courts have, of course, attempted to define "good faith" in the course of their opinions. For example, the Fourth Circuit in *NLRB v. Highland Park Mfg.*, 110 F.2d 632, 637 (4th Cir. 1940), regarded good faith as requiring that the parties "negotiate in good faith with the view of reaching an agreement if possible." See also *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956) ("While Congress did not compel agreement . . . , it did require collective bargaining, in the hope that agreements would result."); *NLRB v. Southwestern Porcelain Steel Corp.*, 317 F.2d 527, 528 (10th Cir. 1963) (parties may not come to the bargaining table with a "predetermined position not to bargain"); *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231-32 (5th Cir. 1960) (tactics employed while bargaining made collective bargaining futile; there must be an attempt to reach

1. Indicia of good and bad faith

a. *surface bargaining/dilatory tactics*

Surface bargaining and dilatory tactics during negotiations have been recognized by the Board and courts as evidence of bad faith,⁵⁵² though neither alone is sufficient to demonstrate a *per se* violation of the Act.⁵⁵³ Although these activities embrace different concepts, they overlap to some extent. Surface bargaining means going through the motions of bargaining without intending to reach an agreement.⁵⁵⁴ Dilatory tactics, on the other hand, consist of unreasonable delays or tactics calculated to frustrate bargaining.⁵⁵⁵

During the survey period, in *Clear Pine Mouldings, Inc. v. NLRB*,⁵⁵⁶ the Ninth Circuit found the employer's refusal to make counterproposals a dilatory tactic, and therefore affirmed a Board find-

an agreement); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) (the parties must meet with a present intention to find a basis for agreement); *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939) (good faith requires the entering "into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement.").

552. DEVELOPING LABOR LAW, *supra* note 550, at 84-85.

553. As the number of incidents of surface bargaining or dilatory tactics increase, so does their "persuasiveness" as indicators of the lack of good faith. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1421 (1958). It should be emphasized that the § 8(d) requirement to bargain in good faith does not compel the parties to reach an agreement. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952) (explaining the statutory language of § 8(d)).

554. For examples of surface bargaining in the Ninth Circuit, see *NLRB v. West Coast Casket Co.*, 469 F.2d 871, 874-75 (9th Cir. 1972) (the cancellation of many meetings, refusal to return phone calls, and failure to provide counterproposals until long after promised, showed a "lack of . . . 'spirit'" and was therefore a § 8(a)(5) violation); *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 718-19 (9th Cir. 1972) (although bargaining sessions were held, employer, who made only stylistic or typographical objections to a proposed contract, proposed a contract with a seven-week span, and insisted on the right to withdraw his contract proposals at any time, held to be engaging in a "cat and mouse game" and not hard bargaining); see also *NLRB v. My Store, Inc.*, 345 F.2d 494, 498 (7th Cir.) (refusal to bargain on wages based on job classifications, failure to supply information, delay in making counteroffers, and failure to reach any substantial agreements held to indicate surface bargaining), *cert. denied*, 382 U.S. 927 (1965).

555. See, e.g., *Inter-Polymer Indus.*, 196 N.L.R.B. 729, 761-62 (1972) (employer representatives' delaying meetings, discussing irrelevant experiences, offering irrelevant counterproposals, shifting positions, forcing proposals or marathon bargaining sessions, and insisting on the location of meetings held to be dilatory tactics); see also *General Motors Acceptance Corp. v. NLRB*, 476 F.2d 850, 855 (1st Cir. 1973) (insistence that union come to New York for meetings and the scheduling of only a few meetings held to be dilatory conduct); *NLRB v. Southwestern Porcelain Steel Corp.*, 317 F.2d 527, 530 (10th Cir. 1963) (unreasonable delays in scheduling meetings considered dilatory conduct); *NLRB v. Vander Wal*, 316 F.2d 630, 633 (9th Cir. 1963) (procrastination in execution of written agreement declared a dilatory tactic).

556. 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

ing of a section 8(a)(5) violation for actions tantamount to a refusal to bargain. In *Clear Pine*, the employer delayed making any counterproposals for five months after negotiations began, until the conclusion of negotiations between the union and the employer's competitors.⁵⁵⁷

The court, while speaking in terms of dilatory tactics, often used language associated with surface bargaining, and took into consideration the company's dilatory actions together with the bargaining table conduct.⁵⁵⁸ This case presents a good example of the interplay between surface bargaining and dilatory tactics, for the employer used the tactic of surface bargaining to delay agreement until its competitors had reached agreements.

b. proposals and demands

The Ninth Circuit has held that the content of bargaining proposals is relevant in determining bad faith. The Board must take "some cognizance of the reasonableness of the position taken . . . in the course of bargaining negotiations."⁵⁵⁹ However, this principle must be read in light of the section 8(d) mandate that bargaining in good faith does not require the agreement to any proposals or the making of any concessions.⁵⁶⁰

557. *Id.* at 727. The employer's bad faith was further indicated because his only proposal was a sketchy agreement he knew would be unacceptable. *Id.* at 729. The employer never presented concrete counterproposals, but only "complained of having to negotiate prior to its competitors." *Id.* The employer made no economic proposals until learning of competitors' wage settlements. *Id.* at 728.

558. *Id.* at 728-29. Initially, the court spoke of "hard" bargaining, a term associated with surface bargaining.

559. *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972) (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953)).

560. For text of § 8(d), see *supra* note 549. The Board cannot "emasculate and render ineffective Section 8(d) . . . by an arbitrary finding that the Company had a 'bad state of mind' or 'improper motivation,' simply because [the Board] disapproved of the Company's proposals." *Gulf State Mfg., Inc. v. NLRB*, 579 F.2d 1298, 1326 (5th Cir. 1978). The Ninth Circuit has also followed this rule:

We may also assume arguendo that in certain exceptional cases the extreme or bizarre character of a party's proposals may give rise to a persuasive inference that they were made only as a delaying tactic or that they should be viewed as a facade concealing an intention to avoid reaching any agreement. . . . We believe, however, that such a principle, if accepted at all, must be narrowly restricted. Otherwise, the policy supporting section 8(d) . . . would be impermissibly undermined.

NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 29 (9th Cir.), *cert. denied*, 393 U.S. 914 (1968); see also *H.K. Porter v. NLRB*, 397 U.S. 99, 108 (1970) (allowing Board to compel agreement when parties are unable to agree would violate the fundamental premise upon which the Act is based—private bargaining under governmental supervision, without any official compulsion over the contractual terms); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978) (a strong company's refusal to succumb to a weak union's

In *Clear Pine Mouldings, Inc. v. NLRB*,⁵⁶¹ the employer's only proposal was made with the knowledge that it would be found unacceptable.⁵⁶² The Board held that the employer engaged in bad faith dilatory bargaining, and the Ninth Circuit affirmed. The employer's offer of a clearly unacceptable proposal was an important factor in convincing the court that the Board's finding of dilatory bargaining was supported by substantial evidence.⁵⁶³

2. *Per Se* violations

a. *unilateral changes*

Unilateral changes by an employer in employment conditions which are a mandatory subject of bargaining have been regarded as *per se* violations of section 8(a)(5).⁵⁶⁴ The Ninth Circuit, in *NLRB v. Sky Wolf Sales*,⁵⁶⁵ held that the employer's unilateral initiation of wage increases and dependent health benefits on its own terms violated section 8(a)(5).⁵⁶⁶

In *Clear Pine Mouldings, Inc. v. NLRB*,⁵⁶⁷ the Ninth Circuit held that a unilateral health plan change made by the employer was a *per se* refusal to bargain.⁵⁶⁸ The court, while recognizing that pressures by

economic weapons and company's use of this advantage to restrain as many rights as possible not inconsistent with statutory duty to bargain in good faith).

561. 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

562. The Board decision relied on the unacceptable proposal as an indicium of bad faith. *See Clear Pine Mouldings, Inc.*, 238 N.L.R.B. 69 (1978).

563. 632 F.2d at 729.

564. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In *Katz*, the Court did not expressly hold that unilateral action was a *per se* violation. However, the Court did hold that:

Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. . . . It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of § 8(a)(5), without also finding the employer guilty of over-all subjective bad faith.

Id. at 747; *see also* *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1332-38 (7th Cir.) (unilateral implementation of written warning disciplinary system, call-in rule, and 60-day probationary period held *per se* violations of § 8(a)(5)), *cert. denied*, 439 U.S. 911 (1978); *NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768, 772 (9th Cir. 1965) (new wage program, unilaterally implemented, constitutes failure to bargain in good faith without reference to subjective motive of employer). Note, however, that unilateral changes in conditions may also be indicative of bad faith analysis separate and apart from *per se* analysis. *See* DEVELOPING LABOR LAW, *supra* note 550, at 323.

565. 470 F.2d 827 (9th Cir. 1972).

566. *Id.* at 830.

567. 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

568. *Id.* at 729-30. During months of delay, and a month and one-half long strike, the employer failed to submit substantive proposals. It finally presented a package proposing a

health and welfare trustees created a dilemma for the company, stated that it could not "condone Clear Pine's conduct in offering to negotiate about a plan that it had, in fact, already unilaterally adopted."⁵⁶⁹ Because the company chose to act alone, the court affirmed the Board's finding of sections 8(a)(5) and 8(a)(1) violations.⁵⁷⁰

b. refusal to execute a written agreement

Collective bargaining, under the good faith definition of section 8(d), includes the obligation to execute, upon request by either party, a written agreement embodying oral agreements reached during negotiations.⁵⁷¹ The refusal to do so is considered a refusal to bargain and a *per se* violation of section 8(a)(5).⁵⁷² The Supreme Court, in *NLRB v. Strong*,⁵⁷³ found that an employer, seeking to withdraw from a multi-employer group after an agreement had been reached, had violated section 8(a)(5) by refusing repeated demands to sign the contract.⁵⁷⁴ The Court thus extended the section 8(d) execution obligation to agreements negotiated on a party's behalf prior to its withdrawal from a bargaining organization.⁵⁷⁵

During the survey period, in *NLRB v. Electra-Food Machinery, Inc.*,⁵⁷⁶ the employer justified its refusal to execute an oral agreement by contending that the union constitution prohibited an agreed upon open shop clause.⁵⁷⁷ The court rejected this argument, reasoning that internal union matters do not relieve an employer from its bargaining obligation.⁵⁷⁸ The court further reasoned that permitting "critical ex-

health and welfare plan and an eight percent wage increase which had been implemented two weeks prior to the proposal. *Id.*

569. *Id.* at 730. The dilemma was created because the trustees of the health and welfare plans refused to accept contributions that did not meet industry settlement standards. *Id.* at 726-27. The court, therefore, took into account the decision the company had to make, but concluded that the company should have presented a health and welfare plan to the union and then should have negotiated it with them before adopting it. *Id.* at 730.

570. *Id.*

571. 29 U.S.C. § 158(d) (1976) provides in pertinent part that: "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees . . . [to] execut[e] a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal"

572. 29 U.S.C. § 158(a)(5) (1976); *see supra* note 548.

573. 393 U.S. 357 (1969).

574. *Id.* at 359. The Court also held that the NLRB had the power to require payment of fringe benefits in the collective bargaining agreement. *Id.* at 360.

575. *Id.* at 359-61.

576. 621 F.2d 956 (9th Cir. 1980).

577. *Id.* at 957.

578. *Id.* at 958 (citing *NLRB v. Cheese Barn, Inc.*, 558 F.2d 526, 529-30 (9th Cir. 1977))

amination" of union constitutions by employers would be offensive.⁵⁷⁹

3. The duty to furnish information

An employer is obligated to furnish requested information needed by the collective bargaining representative for the proper performance of its duties.⁵⁸⁰ In *NLRB v. Truitt Manufacturing Co.*,⁵⁸¹ for example, the Supreme Court held that the Board could consider an employer's refusal to furnish financial information during the course of wage increase negotiations as indicative of bad faith.⁵⁸² The facts of the case determine the relevancy of the information. As the information becomes more important to the representative, because of the issues raised in collective bargaining, the employer's duty to furnish it becomes mandatory.⁵⁸³

The Ninth Circuit, in *San Diego Newspaper Guild Local 95 v. NLRB*,⁵⁸⁴ recognized the employer's duty to provide requested information when the union would not be able to bargain meaningfully without it.⁵⁸⁵ The court also discussed the burdens of proving the relevance of the requested information to the bargaining process. When

(members of union have right to decide on the extent of authority of their bargaining unit); *Houchens Mkt. of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 211-12 (6th Cir. 1967)).

579. 621 F.2d at 958 (citing *Stelling v. IBEW*, 587 F.2d 1379, 1388-89 (9th Cir. 1978) (absent bad faith, constitutional provision subject only to union scrutiny), *cert. denied sub nom. Darby v. IBEW*, 442 U.S. 944 (1979); *Adams Potato Chips, Inc. v. NLRB*, 430 F.2d 90, 92 (6th Cir. 1970) (employer refused to sign based on a vacation clause), *cert. denied*, 401 U.S. 975 (1971); *Vestal v. Hoffa*, 451 F.2d 706, 709 (6th Cir. 1971) (court will not interfere with fair and reasonable interpretation of union constitution by union officials), *cert. denied*, 406 U.S. 934 (1972)).

580. *E.g.*, *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 92 (9th Cir. 1966).

581. 351 U.S. 149 (1956).

582. *Id.* at 152.

Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. . . . [A] refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.

Id. at 152-53.

583. *Id.* at 153-54; *see also NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967) ("no question" of employer's duty to provide information for the carrying out of the duties of the bargaining representative).

584. 548 F.2d 863 (9th Cir. 1977).

585. *Id.* at 866-67. However, simply because the information requested is relevant, it does not follow that all failures to produce are unlawful refusals to bargain. *See, e.g.*, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956) ("Each case must turn upon its particular facts.") (footnote omitted); *Shell Oil Co. v. NLRB*, 457 F.2d 615, 618 (9th Cir. 1972) (failure to produce relevant evidence is not a *per se* violation).

the information relates to a subject at the core of the employee-employer relationship, such as wages, the presumption is that the information is relevant, and the burden is on the employer to show its irrelevancy.⁵⁸⁶ When the information is not clearly relevant, the union must show its relevance.⁵⁸⁷ The circuits are in general agreement about the duty to provide relevant information.⁵⁸⁸

During the survey period, in *NLRB v. Silver Spur Casino*,⁵⁸⁹ the Ninth Circuit upheld the Board's decision that an employer's refusal to furnish the union a copy of a new insurance plan violated section 8(a)(5). The employer in *Silver Spur* unilaterally implemented a new insurance program.⁵⁹⁰ Because insurance benefits are a mandatory subject of collective bargaining,⁵⁹¹ information about the new plan was clearly relevant to negotiations.

4. Impasse

It is well established that an employer's withdrawal from a multi-employer unit after the commencement of bargaining is a breach of the duty to bargain in good faith and violates section 8(a)(5).⁵⁹² However, such a withdrawal during the course of negotiations may be permitted if an "unusual circumstance" exists.⁵⁹³ An impasse in negotiations between the union and part of the employer group is an "unusual circum-

586. 548 F.2d at 867; *see, e.g.*, *Prudential Ins. Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir.) (information of names and addresses of unit members held presumptively relevant), *cert. denied*, 396 U.S. 928 (1969). *But see* *Emeryville Research Center, Shell Dev. Co. v. NLRB*, 441 F.2d 880, 885 (9th Cir. 1971) (bona fide objection to form in which information is requested along with offers to meet needs in a mutually satisfactory form shifts burden to union to show relevancy of desired information).

587. 548 F.2d at 867; *see* *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967) (information requested by union concerning employer's movement of machinery was necessary for the performance of the union's representative duties).

588. *See, e.g.*, *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1113 (1st Cir. 1975) (list of employee addresses held relevant and necessary due to union's inability to communicate through handbills); *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1204-05 (2d Cir. 1970) (refusal by employer to give home addresses of employees who were widely dispersed held violation of § 8(a)(5)), *cert. denied*, 401 U.S. 993 (1971).

589. 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

590. *Id.* at 583.

591. *Id.*

592. *See, e.g.*, *McAx Sign Co. v. NLRB*, 576 F.2d 62, 67-68 (5th Cir. 1978) ("The Board has repeatedly held that withdrawal from a multi-employer bargaining unit is untimely if attempted after the commencement of negotiations.") (citing *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 57 (10th Cir. 1966); *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967); *NLRB v. Sklar*, 316 F.2d 145, 150 (6th Cir. 1963)), *cert. denied*, 439 U.S. 1116 (1979).

593. *NLRB v. Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975).

stance" which may warrant an employer's withdrawal.⁵⁹⁴

During the survey period, in *Authorized Air Conditioning Co. v. NLRB*,⁵⁹⁵ the employer attempted to justify its withdrawal during negotiations from a multiemployer bargaining unit by alleging an impasse in negotiations. The Ninth Circuit sustained the Board's finding that there was no evidence of any impasse and held that the withdrawal was therefore an unfair labor practice.⁵⁹⁶

5. Defenses to the duty to bargain

a. construction industry proviso

An employer must bargain collectively with a union selected by a majority of workers.⁵⁹⁷ An employer may not grant exclusive recognition to a union that has not obtained majority recognition.⁵⁹⁸ However, an employer in the building and construction industry will not be found to have committed an unfair labor practice if, in reliance on section 8(f) of the Act, it enters into a prehire agreement with a union that has not attained majority status prior to the execution of the agreement.⁵⁹⁹ In *NLRB v. Local 103, International Association of Bridge Workers*,⁶⁰⁰ the Supreme Court held that an employer does not commit an unfair labor practice under section 8(a)(5) by refusing to honor a prehire agreement if the union fails to establish in the unfair labor

594. See, e.g., *NLRB v. Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir.) (impasse during negotiations is defense to unfair labor practice charges for single employer's withdrawal during negotiations), *cert. denied*, 423 U.S. 893 (1975); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 184 (5th Cir. 1974) (no unfair labor practice where company employer refused to accept agreement made with a multiemployer unit after the employer had withdrawn from unit during an impasse); *NLRB v. Beck Engraving Co.*, 522 F.2d 475, 482 (3d Cir. 1975) (selective strike does not create *per se* unusual circumstance allowing withdrawal, but if unusual circumstance exists, withdrawal would be valid); *NLRB v. Acme Wire Works, Inc.*, 582 F.2d 153, 156-57 (2d Cir. 1978) (finding of impasse would justify withdrawal during negotiations though the court found no impasse in this case); *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1172-73 (8th Cir. 1972) (withdrawal held timely since "irreconcilable differences" had been reached). *But cf.* *Bill Cook Buick, Inc.*, 224 N.L.R.B. 1094, 1096 (1976) (impasse not unusual circumstance).

595. 606 F.2d 899 (9th Cir.), *cert. denied*, 445 U.S. 950 (1980).

596. *Id.* at 906-07.

597. 29 U.S.C. § 158(a)(5) (1976); see *supra* note 548.

598. 29 U.S.C. § 159(a) (1976); *ILGWU v. NLRB*, 366 U.S. 731, 738 (1961).

599. 29 U.S.C. § 158(f) (1976). Section 158(f) provides in part: "It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement . . . with a labor organization . . . because . . . the majority status of such labor organization has not been established . . ." Section 158(f) was added to the NLRA in a 1959 amendment under the Labor-Management Reporting and Disclosure Act. Pub. L. No. 86-257, § 705(a), 73 Stat. 545.

600. 434 U.S. 335 (1978).

practice proceeding that it ever had majority support.⁶⁰¹

During the survey period, in *Authorized Air Conditioning Co. v. NLRB*,⁶⁰² a majority of employees became union members after a prehire agreement was entered into.⁶⁰³ The employer attempted to justify its refusal to honor the agreement by asserting the union's lack of majority support.⁶⁰⁴ However, the court held that a rebuttable presumption of the union's majority status was created once a majority of the employer's employees joined the union. The employer could not overcome the presumption and base its defense for refusing to bargain upon a lack of majority support.⁶⁰⁵

b. waiver

Although the NLRA requires that an employer collectively bargain with its employees "in respect to rates of pay, wages, hours of employment, or other conditions of employment,"⁶⁰⁶ the Supreme Court, in *NLRB v. Columbian Enameling & Stamping Co.*,⁶⁰⁷ held that an employer is not required to seek out the employees or their representatives for their participation in the collective bargaining process.⁶⁰⁸ A corollary to this rule is that when a union has sufficiently clear and timely notice of an employer's plans to change conditions which are subject to bargaining, but makes no protest or effort to bargain, it waives its right to bargain.⁶⁰⁹ The Ninth Circuit observed these rules in *NLRB v. Johnson*,⁶¹⁰ where it held that a letter describing changes in employment, presented as a *fait accompli*, was not proper notice. The

601. *Id.* at 345.

602. 606 F.2d 899 (9th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

603. *Id.* at 905.

604. *Id.*

605. *Id.* at 906.

606. 29 U.S.C. § 158(a)(5) (1976).

607. 306 U.S. 292 (1939).

608. *Id.* at 297.

609. *See, e.g.*, *ILGWU v. NLRB*, 463 F.2d 907, 918 (D.C. Cir. 1972) (no waiver based on union's "suspicion or conjecture" that relocation would take place); *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 383-84 (2d Cir. 1967) (employer's statement concerning possibility of moving and subcontracting held to be sufficient notice; union's failure to take action held to be a waiver); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961) (conjecture or rumor not adequate substitute for employer's notice of change in working conditions; no waiver by union). Unilateral changes in conditions which are subject to bargaining without prior notice by an employer are *per se* unfair labor practices. *See supra* notes 564-70 and accompanying text.

610. 368 F.2d 549 (9th Cir. 1966). An employer decided to stop using its own union employees to install carpeting, and began using outside laborers as part of a contracting out agreement. The court found that this change in working conditions was a mandatory subject of bargaining, and discussed the waiver issue in a footnote. *Id.* at 551 n.1.

union, which did not act, was deemed not to have waived its right to bargain.⁶¹¹

During the survey period, in *Sun Maid Growers v. NLRB*,⁶¹² the employer fired three employees after denying rumors that it intended to replace them.⁶¹³ The employer knew the rumors were true.⁶¹⁴ After the employer fired the employees, it refused to discuss the firings with a union representative,⁶¹⁵ claiming that because the union failed to request the employer to bargain on its decision to replace the employees, it had waived its bargaining rights.⁶¹⁶ The court, without elaboration, found the employer's contention meritless.⁶¹⁷

6. Loss of union's majority status

Section 8(a)(5) of the NLRA requires that an employer bargain with the representative selected by a majority of its employees.⁶¹⁸ Within a reasonable time after certification or voluntary recognition of the union, the employer may rebut the union's presumption of majority status,⁶¹⁹ and assert the loss of majority status as a defense to the duty to bargain.⁶²⁰

611. *Id.*; *cf.* *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 383-84 (2d Cir. 1967) (employer's statement of intention to change conditions sufficient as formal notice to union).

612. 618 F.2d 56 (9th Cir. 1980) (*per curiam*).

613. *Id.* at 58.

614. *Id.*

615. *Id.*

616. *Id.* at 59.

617. *Id.* (citing *ILGWU v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972)).

618. 29 U.S.C. § 158(a)(5) (1976). 29 U.S.C. § 159(a) (1976) requires that the bargaining representative be designated or selected by the majority of the employees. Thus, the employer is only required to bargain with a union which has the majority backing of its employees. In an unfair labor practice case alleging a § 8(a)(5) violation, the General Counsel must show that the union represented a majority of the employees of the bargaining unit at the time the employer refused to bargain. *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

619. The reasonable time, absent unusual circumstances, is usually one year. *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d at 297; *NLRB v. Lee Office Equip.*, 572 F.2d 704, 706 (9th Cir. 1978).

620. The union's majority status is irrebuttably presumed for one year. After one year, the presumption becomes rebuttable. *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d at 297. Thus, after the one year period, if an employer can rebut the presumption of majority status, the loss of majority is a valid defense. To rebut the presumption, a "clear, cogent, and convincing" showing must be made by the employer that the union's status was no longer a majority, or that the employer had a good faith reasonable doubt as to majority support at the time of refusal to bargain. *Id.* at 297; *see also Pioneer Inn Assocs. v. NLRB*, 578 F.2d 835, 839 (9th Cir. 1978) (reasonable good faith doubt must be based on objective evidence and must be "clear, cogent, and convincing") (quoting *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 674-75 (9th Cir. 1972)); *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976) (em-

The Ninth Circuit addressed a union's loss of majority status as a defense in *NLRB v. Tahoe Nugget, Inc.*⁶²¹ The employers in *Tahoe Nugget* asserted two defenses: (1) objective facts sufficient to support a reasonable doubt as to the union's majority support, and (2) the employers' good faith belief that the union had lost majority support.⁶²² The Ninth Circuit held the "good faith" defense was satisfied as long as the employer was aware of "facts manifesting lack of union support and employer misconduct did not contribute to the loss of support."⁶²³ The employers argued that by withdrawing from the multiemployer unit, the presumption of majority support should cease because recognition was based only on majority support within the larger unit.⁶²⁴ In rejecting this argument, the court reasoned that the employers' voluntary conduct in joining the multiemployer unit amounted to a declaration that a majority of its employees favored the union.⁶²⁵ Also important to the court was the policy of industrial peace, which would be undermined if single employers could negate a union's majority support presumption by withdrawal from multiemployer units.⁶²⁶

The court upheld the Board's determination that the employers' evidence was insufficient to rebut the presumption, irrespective of whether the points raised were examined singly or cumulatively.⁶²⁷ The court held that because of the subjectivity and ambiguity of some of the evidence, more reliable evidence of lost support had to be shown before a unilateral break in the bargaining relationship could be condoned.⁶²⁸

During the survey period, in *NLRB v. Carda Hotels, Inc.*⁶²⁹ and *NLRB v. Sierra Development Co.*,⁶³⁰ the Ninth Circuit summarily en-

ployer must show refusal to bargain predicated on "reasonably grounded good faith doubt of majority support"), *cert. denied*, 434 U.S. 818 (1977).

621. 584 F.2d 293 (9th Cir. 1978). In 1959, a multiemployer association was established as a voluntary unit. The defendant employers later joined the association and recognized the union as the bargaining representative although no election was ever held in the defendant employers' single unit or in the multiemployer unit. The employers then withdrew from the multiemployer association and refused to bargain. *Id.* at 296.

622. *Id.* at 298.

623. *Id.* at 300.

624. *Id.* at 302.

625. *Id.* at 303.

626. *Id.* at 303-04.

627. *Id.* at 304-08. The factors were employee discontent, turnover, union inactivity, low membership, financial difficulties of the union, bargaining history, and admissions. *Id.* at 304-05.

628. *Id.* at 308.

629. 604 F.2d 605 (9th Cir. 1979) (per curiam).

630. 604 F.2d 606 (9th Cir. 1979) (per curiam).

forced Board orders rejecting the employers' claims of lack of majority status as a defense to their refusal to bargain.⁶³¹ Both cases arose from the same factual setting as in *Tahoe Nugget* and in *Sahara-Tahoe Corp. v. NLRB*,⁶³² and the court therefore rejected identical arguments to the effect that withdrawal from a multiemployer group was justified by a good faith reasonable doubt.⁶³³

In *NLRB v. Silver Spur Casino*,⁶³⁴ the court again addressed employers' defenses of loss of union majority status against a charge of refusal to bargain.⁶³⁵ In *Silver Spur*, the employers alternatively asserted good faith reasonable doubt and actual loss of majority.⁶³⁶ The employers argued that the presumption of majority support should not survive the employer's withdrawal from a multiemployer unit.⁶³⁷ The court, however, reaffirmed its holding in *Tahoe Nugget* that the presumption survives the employer's withdrawal, noting that the presumption is grounded in the policy of industrial peace as well as in probability.⁶³⁸ The court, noting that the evidence did not differ materially from that considered in *Tahoe Nugget* and *Sahara-Tahoe*, upheld the Board's finding that the employer failed to establish good faith reasonable doubt because the evidence on the record introduced by the employers presented only an equivocal inference of loss of majority support.⁶³⁹ The court also rejected arguments that there had been an actual loss of majority status by the union. As to one of the employers, the court simply affirmed the Board's finding that the evidence fell short of actually proving lost support.⁶⁴⁰ The other employers argued that the Board's disallowance of certain evidence⁶⁴¹ and quashing of a subpoena of a Board field examiner⁶⁴² precluded a showing of actual majority loss, and that the case, therefore, should be remanded. How-

631. *Carda Hotels*, 604 F.2d at 606; *Sierra Development*, 604 F.2d at 607.

632. 581 F.2d 767 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

633. 604 F.2d at 606-07.

634. 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

635. *Id.* at 576. The employers were, as in *Tahoe Nugget*, members of the Reno Employers Council. The employers in this case withdrew, and subsequently told the union they would negotiate new individual collective bargaining agreements. The union accordingly filed § 8(a)(5) charges and the Board ordered the employers to bargain.

636. *Id.* at 576, 578-79.

637. *Id.* at 577.

638. *Id.* at 578; *accord* *NLRB v. Sierra Dev. Co.*, 604 F.2d 606, 606-07 (9th Cir. 1979) (*per curiam*); *NLRB v. Carda Hotels, Inc.*, 604 F.2d 605, 605-06 (9th Cir. 1979) (*per curiam*); *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767, 771 (9th Cir.), *cert. denied*, 442 U.S. 917 (1979).

639. 623 F.2d at 579.

640. *Id.*

641. *Id.* at 580.

642. *Id.* at 579-80.

ever, the court upheld the Board's actions.⁶⁴³

The employers also argued that the Board had demanded more evidence than should be required to rebut the presumption.⁶⁴⁴ They asserted that other circuits have found the presumption rebutted upon similar or weaker evidence than in their case.⁶⁴⁵ While accepting that other circuits impose a lesser burden to rebut the presumption, the court held, however, that the policies and goals of the Act were best served by the current Ninth Circuit view.⁶⁴⁶

7. Dual employer operations: the "double breasted" issue

An employer may violate the section 8(a)(5) requirement to bargain in good faith by engaging in "double breasting," a practice in which the employer, whose original company is bound by a collective bargaining agreement, establishes additional or separate companies and fails to include the separate companies' nonunion employees in the collective bargaining agreement between the union and the established unionized company.⁶⁴⁷ Such a situation occurred in *South Prairie Construction Co. v. Local 627, IUOE*.⁶⁴⁸ The Supreme Court delineated the factors considered by the Board for a finding that two companies are in actuality a "single employer."⁶⁴⁹ The factors, as developed in Board decisions, consist of an "interrelation of operations," common

643. *Id.* at 579-81. The employers tried to subpoena a Board field examiner to testify concerning informal investigative material. The Board refused to permit this and the court affirmed, finding a valid evidentiary privilege in "informal deliberations of all prosecutorial agencies." *Id.* at 580 (quoting *Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1376 n.1 (8th Cir. 1975)). The employers also sought to question a union agent to get records showing actual union membership. The court found the introduction of this evidence unnecessary because it would not have had enough weight, in light of the other evidence, to rebut the presumption. 623 F.2d at 580-81.

644. *Id.* at 581.

645. *Id.* The employers cited twelve cases where the presumption of majority status was deemed rebutted. *Id.* at 581 n.9. Of these cases, the court felt that there were only three cases in which other circuits could have found the presumption of majority support rebutted upon similar or weaker evidence than in *Silver Spur*. They were *W & W Steel Co. v. NLRB*, 599 F.2d 934, 938-40 (10th Cir. 1979); *Star Mfg. Co. v. NLRB*, 536 F.2d 1192, 1195 (7th Cir. 1976); and *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 546-47 (7th Cir. 1970).

646. 623 F.2d at 581.

647. See DEVELOPING LABOR LAW, *supra* note 550, at 196 and cases cited therein. Although the cases described therein resulted in findings of § 8(a)(5) violations, "double breasting" may also result in an unfair labor practice violation under §§ 8(b)(1), 8(b)(3), 8(b)(4), 8(e), and 301. *Id.*

648. 425 U.S. 800 (1976) (per curiam).

649. *Id.* at 801-02 n.3. The union filed suit alleging that §§ 8(a)(1) and 8(a)(5) were violated by the failure of *South Prairie and Peter Kiewit Sons' Co.* (both wholly owned subsidiaries of Peter Kiewit Sons', Inc.) to include the former as employees in the latter's collective bargaining agreement with the union. *Id.*

management and ownership, and a central operation of labor-management relations.⁶⁵⁰ The court of appeals found that the facts of the case mandated a finding that the union and non-union companies should have been considered as single employers, even though the Board had held otherwise. The Supreme Court upheld this part of the appellate court decision.⁶⁵¹

The Ninth Circuit, in *NLRB v. Don Burgess Construction Corp.*,⁶⁵² applied the *South Prairie* criteria to two interconnected employers. The court applied the four factors⁶⁵³ but emphasized that no single factor was controlling,⁶⁵⁴ nor was it necessary that all the factors be present in any one case.⁶⁵⁵ The court held that all four factors weighed against the employers, and in taking the facts as a whole, that the two companies comprised a single employer.⁶⁵⁶

In *NLRB v. Lantz*,⁶⁵⁷ the Ninth Circuit utilized a "double breasting" approach in finding that an employer's two companies were actually a single employer.⁶⁵⁸ The court rejected the employer's argument and found evidence on the record that all the factors were present and that the Board's finding should be upheld.⁶⁵⁹

B. The Subjects of Bargaining

1. Executive decisions

Section 8(d) of the Act places an obligation on the employer and the representative of its employees to "confer in good faith with respect

650. *Id.* at 802 n.3. "[I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership." 425 U.S. at 802 n.3 (quoting *Radio Union v. Broadcast Service*, 380 U.S. 255, 256 (1965)) (citation omitted).

651. 425 U.S. at 802-03.

652. 596 F.2d 378 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). The president of one employer entered a partnership with his carpentry foreman to operate a subcontracting company.

653. *Id.* at 385-86.

654. *Id.* at 384 (citing *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971)).

655. 596 F.2d at 384. "Single employer status ultimately depends on 'all the circumstances of the case' and is characterized as an absence of an 'arm's length relationship found among unintegrated companies.'" *Id.* (quoting *Local 627, IUOE v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *modified sub nom.* *South Prairie Constr. Co. v. Local 627, IUOE*, 425 U.S. 800 (1976)).

656. 596 F.2d at 385-86.

657. 607 F.2d 290 (9th Cir. 1979).

658. *Id.* at 295-98.

659. *Id.*

to wages, hours, and other terms and conditions of employment."⁶⁶⁰ In *NLRB v. Wooster Division of Borg-Warner Corp.*,⁶⁶¹ the Supreme Court held that it is lawful to insist upon matters within the scope of these mandatory subjects. An unfair labor practice charge may result if there is a refusal to bargain over these subjects.⁶⁶²

In *Fibreboard Paper Products Corp. v. NLRB*,⁶⁶³ the Supreme Court held that contracting out plant maintenance work previously performed by unit employees is a mandatory subject of collective bargaining under the phrase "terms and conditions of employment."⁶⁶⁴ Justice Stewart, in his concurring opinion, made an effort to clarify the Court's decision. He emphasized that the Court was not holding that an employer has a duty to bargain over "managerial decisions, which lie at the core of entrepreneurial control," and concluded that while subcontracting decisions are not "in themselves" conditions of employment, they may have the effect of terminating employment.⁶⁶⁵ Where such an effect is present, subcontracting becomes a mandatory subject of bargaining.

The Ninth Circuit, in *NLRB v. Transmarine Navigation Corp.*,⁶⁶⁶ held that a managerial decision to terminate a business was not a mandatory subject of bargaining.⁶⁶⁷ The company's decision to terminate its business and reinvest, based on changed economic conditions, was purely managerial, and not a mandatory subject of collective bargaining.⁶⁶⁸ The court indicated, however, that an employer is still obli-

660. 29 U.S.C. § 158(d) (1976).

661. 356 U.S. 342 (1958). The employer in this case insisted upon the inclusion of a "ballot" clause, requiring a pre-strike secret vote of employees as to the employer's last offer, and a "recognition" clause, excluding a previously certified international union and substituting an uncertified local. *Id.* at 343-44. The Court held that because neither clause fell within the ambit of § 8(d)'s "wages, hours, and conditions of employment," they were not mandatory subjects and, therefore, could not be insisted upon. *Id.* at 349-50. The employer seeking "ballot" and "recognition" clauses could only propose, not insist upon, such subjects. *Id.*

662. 29 U.S.C. § 158(a)(5) (1976).

663. 379 U.S. 203 (1964).

664. *Id.* at 210-13.

665. *Id.* at 223-24 (Stewart, J., concurring).

666. 380 F.2d 933 (9th Cir. 1967).

667. *Id.* at 939.

668. *Id.* The *Transmarine* court found the factual situation presented in *Fibreboard* distinguishable. The court surveyed a number of other circuits for their interpretations of *Fibreboard* and approved the approach taken in the Third and Eighth Circuits. *Id.* at 937-40. Compare *NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897, 902-03 (8th Cir. 1965) (unilateral decision to terminate a branch office, with no anti-union sentiment, held *not* a mandatory subject of bargaining) and *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965) (decision to close plant for economic reasons involving

gated to notify the union of a managerial decision to allow the union an opportunity to bargain over the rights of employees affected by the decision.⁶⁶⁹

During the survey period, in *NLRB v. International Harvester Co.*,⁶⁷⁰ the Ninth Circuit held that the employer's decision to transfer executives as part of a marketing reorganization (causing the closure of several branch offices) was not a mandatory subject of bargaining because the decision "involved the sale of significant assets, fundamental changes in marketing structure, and a significant reallocation of capital."⁶⁷¹ The court, as in *Transmarine*, qualified the employer's lack of duty to bargain by stating that the employer was still bound to bargain over employee rights altered by the decision.⁶⁷²

2. Health plans

Health plans are included in the area of mandatory subjects of bargaining.⁶⁷³ During the survey period, in *Clear Pine Mouldings, Inc. v. NLRB*,⁶⁷⁴ the Ninth Circuit upheld the Board's finding of an unfair labor practice resulting from the company's implementation of a new health and welfare plan without the union's knowledge.⁶⁷⁵ The employer argued that implementation of the new plan was not unilateral because the union had notice, that it was entitled to act because it had

a major change in the economic direction of the company held *not* a mandatory subject of bargaining) *with* *NLRB v. American Mfg. Co. of Texas*, 351 F.2d 74, 80 (5th Cir. 1965) (anti-union motivation in subcontracting without notice to union held mandatory, in accordance with decision announced in *Fibreboard*) and *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512, 516-17 (5th Cir.) (discontinuance of certain operations for economic reasons held subject to mandatory bargaining, under *American Manufacturing*), *cert. denied*, 385 U.S. 935 (1966). The court, in distinguishing the two Fifth Circuit cases, pointed out that anti-union sentiment is the key factor. 380 F.2d at 938.

669. *Id.* at 939; *see also* *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965) (employer faced with economic necessity of moving or consolidating operations under no duty to bargain over the decision, but must bargain over rights of affected employees); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961) (decision to relocate held not mandatory subject because it was clearly within management discretion, but effects of relocation must be bargained over).

670. 618 F.2d 85 (9th Cir. 1980).

671. *Id.* at 87.

672. *Id.* at 88.

673. *NLRB v. Sir James, Inc.*, 446 F.2d 570, 570 (9th Cir. 1971) (*per curiam*) (early unilateral discontinuance of health and welfare payments an unfair labor practice); *Hinson v. NLRB*, 428 F.2d 133, 137 (8th Cir. 1970) (*per curiam*) (payments by employer into the Union's health, welfare, and retirement fund held to be mandatory bargaining subject).

674. 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

675. *Id.* at 729. At the third of five bargaining sessions, the subject of health and welfare plans was raised, but the company stated that because the proposed premiums were too high, it would pay only the current premiums. *Id.* at 727.

bargained to an impasse with the union, and that there was no material change between the old and new plans.⁶⁷⁶ The court found no actual notice of a new plan, despite the fact that plans and premiums were discussed during negotiations,⁶⁷⁷ and that there was no specific showing by the employer that the two plans were identical.⁶⁷⁸ The court also held that there could have been no impasse in bargaining because the employer never apprised the union of the new plan's terms.⁶⁷⁹

C. Enforcement of Agreements Under Section 301

1. The scope of section 301

The Supreme Court held in *Smith v. Evening News Association*,⁶⁸⁰ that in cases arising under section 301 of the LMRA,⁶⁸¹ the district courts have jurisdiction to enforce collective bargaining agreements, even though the conduct sought to be enforced arguably falls within the unfair labor practice jurisdiction of the Board.⁶⁸² However, an attempt to sidestep the bargaining and representation process through a section 301 action to enforce a contract clause will not be upheld by the

676. *Id.* at 729-30.

677. *Id.* at 729.

678. *Id.* at 730. The court distinguished *Connecticut Light & Power Co. v. NLRB*, 476 F.2d 1079, 1082 (2d Cir. 1973), in which a specific showing was made that the plans were identical. In the instant case, the employer's manager testified that he did not know whether the plans were identical, and the union contended they were not. 632 F.2d at 730.

679. *Id.* at 729.

680. 371 U.S. 195 (1962).

681. 29 U.S.C. § 185(a) (1976). Section 301(a) provides that:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, 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.

Two purposes are stated in the preamble to the LMRA (Taft-Hartley Act), enacted in 1947: to further structuralize the mediation procedure between parties, and to equalize union and employer responsibilities. Congressional reaction to the Board's "overzealous regulation of employer conduct through its unfair labor practice jurisdiction" after the enactment of the NLRA was a compelling factor in promoting the Act. R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 5 (1976). By giving jurisdiction to the district courts under § 301, Congress further delegated the Board's previously exclusive power in the labor field.

682. 371 U.S. at 197. The Court noted the possibility of concurrent jurisdiction over both unfair labor practices and the enforcement of contracts: "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Id.* In other words, jurisdiction is not destroyed in a § 301 action simply because there is also an unfair labor practice charge. *See also* *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-18 (1974) (§ 301 action lies to enforce no-strike clause, despite its viability as an unfair labor practice claim before the Board).

district courts.⁶⁸³

In *Local 3-193, International Woodworkers v. Ketchikan Pulp Co.*,⁶⁸⁴ decided during the survey period, the employer had acquired new operations but had refused to recognize the union as its employees' representative. The union brought suit in state court for interpretation and enforcement of a clause in the collective bargaining agreement concerning representation and appropriate bargaining units. The employer removed the suit to district court, assuming that the complaint stated a claim for relief under section 301 of the LMRA.⁶⁸⁵ Although the company's refusal to bargain over the new operations was an apparent unfair labor practice, the union did not file unfair labor practice charges with the Board.⁶⁸⁶

The court indicated that identification of an appropriate bargaining unit and self-determination in representation should be left to the Board.⁶⁸⁷ The court thus found it had jurisdiction limited solely to an interpretation of the clause in question, leaving the remaining issues to the Board's determination.⁶⁸⁸

683. *See, e.g.*, *South Prairie Const. Co. v. Local 627, IUOE*, 425 U.S. 800, 803-04 (1976) (court of appeals "invaded the statutory province of the Board" when it failed to remand § 9 question of who was appropriate bargaining unit); *NLRB v. Retail Clerks Local 588*, 587 F.2d 984, 986 (9th Cir. 1978) (contractual usurpation of § 7 rights frowned upon); *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352, 1357 (9th Cir. 1970) (Board's discretion under § 9(b) cannot be limited by a contract between a union and employer).

684. 611 F.2d 1295 (9th Cir. 1980).

685. *Id.* at 1296-97.

686. *Id.* at 1297. The clause in the collective bargaining agreement gave the union authority over certain employees in southeastern Alaska. The employer acquisitions were in southeastern Alaska, but these new operations were "geographically distinct, had no interchange of employees, and were autonomously operated by subsidiary corporations." *Id.* Both the union and the employer urged the court to interpret the contract under § 301, and if unfair labor practices were found, complaints could then be filed with the Board. *Id.* at 1298.

687. *Id.* The court noted the principles of concurrent jurisdiction, but stated:

there is a critical difference between an unfair labor practice charge and the basic policy of the National Labor Relations Act vesting primary (if not exclusive) jurisdiction in the NLRB in two decisive areas of labor-management relations: (1) the designation of an exclusive bargaining agent, and (2) identification of an appropriate collective bargaining unit under Section 9 of the Labor Management Relations Act (29 U.S.C. § 159).

Id.

688. *Id.* at 1301. "[W]e conclude that Congress did not intend by enacting Section 301 to vest in the courts initial authority to consider and pass upon questions of representation and determination of appropriate bargaining units. The court does have jurisdiction to interpret Article I of the labor agreement between these parties." *Id.* The Court found that the sole operative effect of the clause would be to waive the employer's right to demand an election to prove union majority support. *Id.* If the clause was meant to determine the appropriate bargaining area or unit outside the collective bargaining agreement's reach, or if it was

a. exhaustion of remedies

A union's failure to exhaust exclusive remedies provided for in the collective bargaining agreement precludes judicial action under section 301 of the LMRA to enforce that agreement.⁶⁸⁹ These remedies are presumed exclusive when the parties do not specifically agree that the grievance and arbitration remedies are *not* exclusive.⁶⁹⁰ In *Vaca v. Sipes*,⁶⁹¹ the Supreme Court stated that an exception to the exhaustion rule exists when an employee can show that the union, having sole power to invoke arbitration, "wrongfully" refused to seek arbitration.⁶⁹²

During the survey period, in *Clayton v. ITT Gilfillan*,⁶⁹³ an employee sued his employer in district court for wrongful discharge under section 301 of the LMRA and sued his union, which refused to press for arbitration under the collective bargaining agreement, for breach of its duty of fair representation. The union constitution provided for internal grievance procedures for members aggrieved by any action of the local and required members to exhaust those remedies before appealing to a civil court or governmental agency. Under the union constitution, an employee could receive damages only for the local's breach of its duty of fair representation.⁶⁹⁴ Both the union and the employer raised the employee's failure to exhaust internal union remedies as a defense. The district court dismissed the suits against the union and the employer.⁶⁹⁵

The Ninth Circuit affirmed the dismissal in favor of the union but reversed the judgment in favor of the employer.⁶⁹⁶ The court upheld the dismissal in favor of the union in part because the employee could receive no more in a court action for damages than he could have received by going through the internal procedure. The district court's

meant to give the union authority to act as a bargaining agent apart from the authority it had initially been granted by the unionized employees, then it was a contractual usurpation of the rights under §§ 7 and 9 and was thus "illegal and unenforceable." *Id.*

689. *Vaca v. Sipes*, 386 U.S. 171, 184 (1967); *see also* *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965); *Otero v. IUE*, 474 F.2d 3, 4 (9th Cir. 1973) (*per curiam*) (grievance and arbitration procedure as the sole and exclusive remedy).

690. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657-59 (1965).

691. 386 U.S. 171 (1967).

692. *Id.* at 185. To be a wrongful act, the failure to seek arbitration must be "arbitrary, discriminatory, or in bad faith." *Id.* at 190; *see also* *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976).

693. 623 F.2d 563 (9th Cir. 1980).

694. *Id.* at 566.

695. *Id.* at 566-67.

696. *Id.* at 571.

requirement of exhaustion of internal remedies was also appropriate so that facts and issues could be hammered out.⁶⁹⁷

The court reversed the judgment in favor of the employer because union remedies could not have given the employee adequate relief against it. The employee sought reinstatement while the union constitution provided for damages only. An award of damages against the local would not get the employee his job back or force the local to press for arbitration.⁶⁹⁸ The court remanded to the district court for a determination of the employer's liability. The district court concluded that the employer would be liable if the union's failure to arbitrate was "wrongful" in the *Vaca* sense, and that the discharge was a breach of contract.⁶⁹⁹

b. federal substantive law

In suits brought in district court to enforce agreements under section 301 of the LMRA the court must apply federal substantive law "fashion[ed] from the policy of our national labor laws."⁷⁰⁰ Despite the duty to apply federal substantive law in section 301 actions, state law may be used to help develop federal policy "if [the state law is] compatible with the purpose of § 301."⁷⁰¹ The Supreme Court, in *Local 174, Teamsters Union v. Lucas Flour Co.*,⁷⁰² emphasized that "the subject matter of § 301(a) is 'peculiarly one that calls for uniform law,'"⁷⁰³ and that consistency in the enforcement of labor contracts is of fundamental importance.⁷⁰⁴

697. *Id.* at 566-67.

698. *Id.* at 569-70.

699. *Id.* at 570. The Court noted that exhaustion of internal remedies could, in some cases, be of concern to the employer. *Id.* at 569 n.6 (citing *Harrison v. Chrysler Corp.*, 558 F.2d 1273, 1278-79 (7th Cir. 1977) (exhaustion may be required before employer is sued if appeal could result in reversal of union's refusal to press grievance and grievance could be reinstated under forms of collective bargaining agreements)). The Ninth Circuit decided another "exhaustion" case during the survey period in *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321 (9th Cir. 1980). The court held that all remedies in the collective bargaining agreement were complied with in an action by an employee against both union and employer, and therefore a failure to exhaust could not bar the action in the case. *Id.* at 1328.

700. *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

701. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 457 (1957).

702. 369 U.S. 95 (1962).

703. *Id.* at 103.

704. *Id.* at 104.

The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimu-

In *Rehmar v. Smith*,⁷⁰⁵ the Ninth Circuit held that in section 301 actions, state cases interpreting commercial insurance contracts were inapplicable, because using their principles would not be consistent with the federal labor policy of treating parties to collective bargaining agreements as parties of equal strength. Labor agreements dealing with benefits to survivors are presumably made by parties of equal bargaining strength, while commercial insurance contracts are standardized and offered to a party of lesser strength on a take-it or leave-it basis.⁷⁰⁶ During the survey period, in *Gordon v. ILWU-PMW Benefit Funds*,⁷⁰⁷ the Ninth Circuit, relying on *Rehmar*, held that the district court's application of California probate and insurance law to a death benefit provision in a collectively bargained employee welfare plan was erroneous.⁷⁰⁸

D. Grievance Arbitration

1. The arbitration process and the courts

When two plausible interpretations of a collective bargaining agreement exist, the question of interpretation should be left to the arbitrator and should not be disturbed by the courts.⁷⁰⁹ "A mere ambiguity in the opinion accompanying an award which permits the inference that the arbitrator may have exceeded his authority is not a reason for refusing to enforce the award."⁷¹⁰ The Ninth Circuit has followed this basic rule."⁷¹¹

late the smooth functioning of that process thus strikes at the very core of federal labor policy.

Id.; see also *International Union v. Hosier Cardinal Corp.*, 383 U.S. 696, 702 (1966) (uniformity needed most in the areas of formation of collective bargaining agreements and their speedy resolution); *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1110 (9th Cir. 1979) (survey period case) (reliance on state corporate law proper if consistent with the federal policy of uniform interpretation and enforcement of collective bargaining agreements).

705. 555 F.2d 1362 (9th Cir. 1976).

706. *Id.* at 1368-69.

707. 616 F.2d 433 (9th Cir. 1980).

708. *Id.* at 438-39.

709. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-99 (1960). It was the arbitrator's construction which was "bargained" for, and his interpretation should therefore stand. *Id.* at 599. The *Enterprise Wheel* decision is only one decision of the so-called "Steelworker's Trilogy." See also *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (court function limited when arbitrator given all issues of contract interpretation); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (industrial peace substantially aided by arbitration procedures in the collective bargaining agreement). Taken together, these three cases laid the foundation for arbitration review in the courts.

710. 363 U.S. at 598.

711. *E.g.*, *Alyeska Pipeline Serv. Co. v. Teamsters*, 557 F.2d 1263, 1267 (9th Cir. 1977).

During the survey period, in *International Association of Machinists Aerospace Workers Local 389 v. San Diego Marine Construction Corp.*,⁷¹² the Ninth Circuit refused to accept the employer's arguments that two of the arbitrator's decisions should be reversed. The employer argued that the arbitrator's interpretation of one part of the collective bargaining agreement was incorrect and that his opinion demonstrated he acted improperly in interpreting another part.⁷¹³ The court followed well established precedent and rejected both arguments.⁷¹⁴

2. The scope of arbitration

It is axiomatic that a party need arbitrate only those disputes that are within the scope of the arbitration clause.⁷¹⁵ Unless the parties have explicitly agreed to the contrary, courts decide which issues the parties have agreed to submit to arbitration.⁷¹⁶ During the survey period, in *Amalgamated Clothing and Textiles Workers v. Ratner Corp.*,⁷¹⁷ the Ninth Circuit made an initial finding that a successor employer was bound by the collective bargaining agreements in question.⁷¹⁸ A dispute arose under one of the collective bargaining agreements which made arbitrable the scope of the entire arbitration agreement.⁷¹⁹ As a result, the court compelled the employer to arbitrate the issue.⁷²⁰

712. 620 F.2d 736 (9th Cir. 1980).

713. *Id.* at 738-39.

714. *Id.*

715. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."). See generally *Burke v. Adams & Ells of Ells, Inc.*, 603 F.2d 114, 116 (9th Cir. 1979) (per curiam) ("Trustees of employee benefit funds cannot be compelled to arbitrate a dispute in accordance with a collective bargaining agreement to which they are not signatories when the defendant-employer has never requested arbitration.").

716. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964); see also *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 861 (9th Cir.) (unless parties have explicitly agreed to the contrary, courts and not arbitrator decide whether the parties have agreed to submit specific issues to arbitration), *cert. denied*, 444 U.S. 827 (1979); *Las Vegas Local Joint Executive Bd. v. Las Vegas Hacienda, Inc.*, 383 F.2d 667, 668 (9th Cir.) (whether or not one is a party to an agreement is a question for the court), *cert. denied*, 390 U.S. 958 (1967). See generally *Kodiak Oil Field Haulers, Inc. v. Teamsters Local 959*, 611 F.2d 1286, 1290 (9th Cir. 1980) (in case where employer challenged choice of arbitrator as violating bargaining agreement, district court authorized to use past conduct and bargaining history of parties in construing arbitration clause).

717. 602 F.2d 1363 (9th Cir. 1979).

718. See *infra* notes 721-24 and accompanying text.

719. 602 F.2d at 1367.

720. *Id.* at 1370-71.

3. Successor-employer's duty to arbitrate

A party will be compelled to arbitrate if its collective bargaining agreement invokes the duty to arbitrate.⁷²¹ A successor to an employer bound by an arbitration clause may be bound by that original clause. The Supreme Court, in *John Wiley & Sons v. Livingston*,⁷²² held that "similarity and continuity of operations across the change in ownership"⁷²³ should be factors in determining whether the successor-employer should be compelled to arbitrate.⁷²⁴

The Supreme Court again looked at the successor-employer's duty to arbitrate in *Howard Johnson Co. v. Detroit Local Joint Executive Board*.⁷²⁵ The Court refused to compel arbitration when a successor-employer completely bought out the old owner under terms repudiating the assumption of the predecessor's obligations and retained only a few of the predecessor's employees.⁷²⁶ The Court distinguished *Wiley* because similarity and continuity of operations across the change of ownership was lacking. Additionally, the union could realistically enforce the predecessor's contractual obligations because the predecessor remained in operation with substantial assets, while in *Wiley*, the original employer had disappeared through a merger.⁷²⁷

During the survey period, in *Amalgamated Clothing and Textile Workers v. Ratner Corp.*,⁷²⁸ the Ninth Circuit held that an employer's corporate reorganization would not defeat its duty to arbitrate. The court reasoned that the arguments for imposing the duty to arbitrate were even stronger than in the two prior cases of *Wiley* and *Howard Johnson* because all the personnel in *Amalgamated* remained employed after the corporate reorganization.⁷²⁹

721. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974).

722. 376 U.S. 543 (1964).

723. *Id.* at 551. The Court held that the duty to arbitrate would not always survive a change in ownership, but the wholesale transfer of Interscience employees to Wiley, with no interruption, necessarily led to a conclusion that arbitration was compelled. *Id.*

724. Interscience, the company that had contracted with the union, merged with John Wiley. Wiley kept most of Interscience's employees, but entered into no contract with the union. The union, asserting that it represented all the employees covered by the initial agreement, petitioned to compel arbitration. *Id.* at 544-46. The Court reasoned that compelling arbitration was consonant with the federal policy of settling labor disputes by arbitration. If a mere change in corporate structure could destroy a previously contracted duty to arbitrate, the fundamental policy would be destroyed. *Id.* at 549.

725. 417 U.S. 249 (1974).

726. *Id.* at 250-52.

727. *Id.* at 256-65. See generally Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1974).

728. 602 F.2d 1363 (9th Cir. 1979).

729. *Id.* at 1369.

V. CONCERTED ACTIONS

A. Strikes

Combination and concerted action are the essential elements of the labor union movement. While devices like picketing, handbilling, and refusing to patronize are significant phases of concerted action, virtually the entire structure of a labor union's self-help program rests on one simple practice—the refusal to work. The strike⁷³⁰ is the most simple and widely known manifestation of this practice. While there is a constitutional right to free speech and constitutional protection against involuntary servitude, there is no absolute constitutional right to strike.⁷³¹ The right to strike is subject to the legislative protections and regulation embodied in the Labor Management Relations Act of 1947 (LMRA).⁷³² Strikes may, however, be declared illegal if unlawful

730. Although widely known, utilized and litigated, the labor strike has eluded precise legal definition. A strike has been described as "the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused." *Jeffrey-De Witt Insulator Co. v. NLRB*, 91 F.2d 134, 138 (4th Cir.), cert. denied, 302 U.S. 731 (1937); see also *The Point Reyes*, 110 F.2d 608, 609-10 (5th Cir. 1940) (In defining the term *strike*, "[t]here must be the relation of employer and employee, and there must be a quitting of work.").

731. In *Dorchy v. Kansas*, 272 U.S. 306 (1926), the Court stated that "[n]either the common law, nor the Fourteenth Amendment, confers the absolute right to strike." *Id.* at 311. For a discussion of some of the constitutional issues raised by strikes, boycotts, and picketing, see *Cox, Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951).

732. 29 U.S.C. §§ 141-187 (1976). There are many sections of the LMRA that deal with the right to strike. Section 7 of the NLRA, 29 U.S.C. § 157 (1976), for example, provides in part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" Section 8(b)(4)(B) of the NLRA, 29 U.S.C. § 158(b)(4)(B) (1976), which regulates secondary picketing and boycotts, provides that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or any primary picketing." Section 13 of the NLRA, 29 U.S.C. § 163 (1976), which preserves the right to strike provides that "[n]othing in this Act 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." Section 502 of the LMRA, 29 U.S.C. § 143 (1976), provides:

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

The other sections of the LMRA dealing with the right to strike are § 8(d), 29 U.S.C. § 158(d) (1976), which requires that a party serve notice of its intention to terminate or modify a collectively bargained agreement and prohibits a strike for the notice period, and

means are utilized to achieve a lawful purpose⁷³³ or if a lawfully conducted strike is used to accomplish an unlawful objective.⁷³⁴ A strike which has an objective proscribed by the National Labor Relations Act (NLRA) is illegal.⁷³⁵

Consistent with these principles, a strike having an objective or purpose to force an employer to join a multiemployer association⁷³⁶ has been held by the Board to violate section 8(b)(4)(A)⁷³⁷ of the NLRA.⁷³⁸ Not until the 1980 case of *Frito-Lay, Inc. v. Local 137, International Brotherhood of Teamsters*⁷³⁹ did the Board or the Ninth Circuit face the question of whether the illegal objective must be to force *actual* membership in an existing multiemployer organization.⁷⁴⁰ In *Frito-Lay*, the union argued that section 8(b)(4)(A) proscribed coercive

§ 8(g), 29 U.S.C. § 158(g) (1976), which requires that a labor organization give ten days notice of its intention to engage in a strike, picketing or any other concerted activity at a health care facility. For a discussion of the statutory protection and regulation afforded the right to strike, see DEVELOPING LABOR LAW, *supra* note 550, at 521-23 (1971).

733. *See, e.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253 (1939) (strike initiated and conducted by seizure and retention of employer's property held to be illegal even though triggered by employer's unfair labor practices).

734. *E.g.*, Southern S.S. Co. v. NLRB, 316 U.S. 31, 40 (1942) (strike in violation of federal mutiny statute).

735. 29 U.S.C. § 158(b)(7) (1976).

736. A multiemployer association is a consensual arrangement in which employers voluntarily join an association; the multiemployer association and the union voluntarily enter into negotiations culminating in a contract. The Board has held that an employer may freely withdraw, subject only to the requirement that notice of withdrawal must be timely and unequivocal unless there is mutual consent. *See, e.g.*, Anderson Lithographic Co., 124 N.L.R.B. 920, 928-29 (1959), *enforced sub nom.* NLRB v. Jeffries Banknote Co., 281 F.2d 893 (9th Cir. 1960). For a topical treatment of the multiemployer association, see [2 Labor Relations] LAB. L. REP. (CCH) ¶ 26610 (1972).

737. 29 U.S.C. § 158(b)(4)(A) (1976).

738. *See, e.g.*, United Mine Workers Local 1854 (Amax Coal Co.), 238 N.L.R.B. 1583, 1587 (1978); Glass Workers Local 1892, (AFL-CIO), 141 N.L.R.B. 106, 116 (1963).

739. 623 F.2d 1354 (9th Cir.), *cert. denied*, 449 U.S. 1013 (1980).

740. In *Frito-Lay*, the plaintiff had been a member of a multiemployer organization between 1960 and 1973 and had entered into a number of collective bargaining agreements negotiated by the multiemployer organization with the defendant union during this period. Before entering into negotiations for a contract to succeed the agreement due to expire on February 28, 1974, the employers of the multiemployer organization gave timely notice of withdrawal, thereby dissolving the multiemployer organization. The union, evidently dissatisfied with the breakup of the employer organization, had, during the ensuing separate negotiations, conditioned the approval of Frito-Lay's proposals upon the acceptance of those proposals by the other former members of the multiemployer organization. On many occasions during the contract negotiations, the union representatives suggested that the employers confer together to work out contract provisions that would be substantially identical for all members. *Id.* at 1356-57.

On May 12, 1974, unable to secure agreements that were sufficiently similar through separate bargaining, the union struck all employers, and Frito-Lay brought an action for damages suffered as a result of an unlawful strike. The district court concluded that the

union conduct only when it was directed at forcing an employer to become an actual member of an existing employer association.⁷⁴¹ In other words, actual membership should be required before a violation of the section could be found.

The Ninth Circuit had little problem in disposing of the union's argument. The court pointed out that in forming a multiemployer organization no formalities are required. The "individual employers need only express an unequivocal intention to be bound in collective bargaining by group rather than individual action."⁷⁴² Recognizing the potential informality of multiemployer organizations, the court reasoned that congressional intent to combat forced multiemployer bargaining should not be circumvented by the form of the employer participation in multiemployer bargaining. The court stated:

we think it unlikely that Congress sought in section 8(b)(4)(A) to prohibit a union from forcing an employer to become a formal member of an employer organization but to permit a union to force competing employers to bargain together as an informal group. Attributing that interpretation to the section would allow a union to force employers to engage in multiemployer bargaining so long as the Union did not make the mistake of requiring the employers involved to become members of a formal, existing employer organization.⁷⁴³

The court concluded that section 8(b)(4)(A) must be construed to prohibit coercive conduct aimed at forcing participation in multiemployer organizations without regard to the formalities of membership or existence of such an organization.⁷⁴⁴

The union next argued that the actions that had been attributed to it during the contract negotiation period constituted approved tactics in furtherance of its legitimate efforts to secure uniform contracts for its members.⁷⁴⁵ Conceding that the tactics employed by the union may have been acceptable collective bargaining techniques, the court re-

union's conduct evidenced an intent to force the employers to reconstitute the employer organization, thereby violating § 8(b)(4)(A). *Id.* at 1357.

741. *Id.* at 1358.

742. *Id.* (citing *Komatz Constr. Co. v. NLRB*, 458 F.2d 317, 321 (8th Cir. 1972)).

743. *Id.*

744. *Id.* at 1359.

745. *Id.* Among other things, the union had conditioned its acceptance of Frito-Lay's proposal upon the acceptance of those proposals by the other companies with which they were negotiating. When the proposals were submitted for ratification, the union implemented group voting procedures under which the employees of all the companies concerned voted on the proposals despite the companies' protestations. *Id.* at 1357.

sponded that such tactics "although innocent in and of themselves, can in context become part of an illegal overall pattern of conduct."⁷⁴⁶ Such tactics may therefore be used to mask illegitimate union motives.⁷⁴⁷ Thus, the court reasoned, there is a violation of section 8(b)(4)(A) if a substantial object of the union's actions was to force multiemployer bargaining, in spite of the fact that otherwise lawful tactics were used.⁷⁴⁸ This holding simply restates the proposition that the use of otherwise legitimate methods will not save union action where the objective of such action is proscribed.

B. Pickets

Peaceful picketing is traditionally one of organized labor's most effective techniques for achieving strike objectives.⁷⁴⁹ In *NLRB v. International Rice Milling*,⁷⁵⁰ the United States Supreme Court articulated some of the distinctions between primary and secondary objectives of picketing activity.⁷⁵¹ Decided on the same day as *Rice Milling* was another landmark case of equal importance to the primary-secondary distinction: *NLRB v. Denver Building & Construction Trades Council*.⁷⁵² *Denver Building* further refined the primary-second-

746. *Id.* at 1360.

747. *Id.*

748. *Id.*

749. The statutory restrictions on the right to engage in picketing are contained in §§ 8(b)(4) and (8)(b)(7) of the NLRA, 29 U.S.C. §§ 158(b)(4), (7) (1976). Section 8(b)(4) protects primary picketing and proscribes picketing aimed at secondary objectives. *See* *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 671 (1951) (primary pickets have the right, at the primary location, to appeal directly to customers, suppliers, fellow employees, and striker replacements not to cross the picket lines); *cf.* *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 688-89 (1951) (union having a dispute with construction contractor cannot picket the project to force termination of the subcontractor). Section 8(b)(7) of the NLRA was added by the 1959 amendments, Pub. L. No. 86-257 § 704(c), 65 Stat. 601 (1959). Section 8(b)(7) restricts recognition or organizational picketing by uncertified unions and prohibits the picketing of any employer for the purpose of forcing an employer to recognize or bargain with a union, or forcing employees to accept a union as their bargaining agent. For a detailed examination of § 8(b)(7), see [3 Labor Relations] LAB. L. REP. (CCH) ¶ 5150 (1974). There are other statutory restrictions on picketing. For example, under § 602 of the Labor-Management Reporting Disclosure Act (LMRDA) of 1959, 29 U.S.C. § 522 (1976), extortionate picketing is made a federal crime. *See generally* [3 Labor Relations] LAB. L. REP. (CCH) ¶ 5130 (1974).

750. 341 U.S. 665 (1951).

751. In *Rice Milling*, the United States Supreme Court held that pickets in a dispute with a primary employer can seek to persuade neutral employees appearing at the primary line not to cross the line in support of the picket. If any employees of another employer honor the line, there is a secondary effect of a primary object. *Id.* at 671. Thus, so long as the object is primary, picketing is lawful even though there may be a secondary effect.

752. 341 U.S. 675 (1951).

dary distinction in the context of picketing at a construction site where employees of more than one employer were on site.⁷⁵³

1. Common-situs picketing

Prior to *Denver Building*, the Board fashioned and followed a set of standards called the *Moore Dry Dock* rule⁷⁵⁴ to determine whether picketing a common-situs⁷⁵⁵ violated the section 8(b)(4) secondary activity ban. The United States Supreme Court approved the use of the *Moore Dry Dock* rule and its application to common-situs picketing in *Local 761, International Union of Electrical Workers v. NLRB (General Electric)*.⁷⁵⁶ The Ninth Circuit, while recognizing the efficacy of the *Moore Dry Dock* rule, has limited its use to an evidentiary tool.⁷⁵⁷ Thus, the inference of primary activity, raised by compliance with the *Moore Dry Dock* rule, may be dissipated if a secondary objective is indicated by the "totality of the circumstances."⁷⁵⁸

This very result was recently obtained in *Allied Concrete, Inc. v. NLRB*.⁷⁵⁹ In *Allied Concrete*, the striking union's pickets followed the trucks of the subcontractor, with whom the union had the primary dispute, to the construction site where deliveries were made. Responding to the pickets, employees of the general contractor walked off the job.⁷⁶⁰ The Board held that the union's picketing of the primary em-

753. *Denver Building* involved the picketing of a general contractor at the construction site where an electrical subcontractor used nonunion employees. After all of the building tradesmen refused to cross the picket line, the general contractor terminated the subcontractor. The Supreme Court held that each employer on a construction site should be treated as a separate employer. Since the union could have made the project an all-union job only by forcing the general contractor to terminate the subcontractor, the picketing of the entire project violated § 8(b)(4) because one of its objects was to force the termination of the subcontractor. *Id.* at 689.

754. *In re Sailors Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547 (1950). The Board in *Moore Dry Dock* established a four-part test for determining the legality of common-situs picketing:

(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*; (c) the picketing [*sic*] 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.

Id. at 549 (footnotes omitted).

755. When two or more employers are engaged in separate tasks on the same premises, the location is generally referred to as a "common-situs."

756. 366 U.S. 667, 679 (1961).

757. *International Ass'n of Bridge Workers Local 433 v. NLRB*, 598 F.2d 1154, 1157 (9th Cir. 1979); *accord Carpenters Dist. Council v. NLRB*, 560 F.2d 1015, 1018 (10th Cir. 1977).

758. 598 F.2d at 1157.

759. 607 F.2d 827 (9th Cir. 1979).

760. *Id.* at 829.

ployer's trucks on the construction site did not violate section 8(b)(4) because the picketing had met the *Moore Dry Dock* test and was "the only effective way" to pressure the employer.⁷⁶¹ Although the court did not disturb the Board's findings with respect to the *Moore Dry Dock* rule, the Ninth Circuit reversed the Board's decision. The court stated that the Board "fail[ed] to recognize that the reserve gate provided a reasonable alternative which would have accomplished the legitimate purposes of the picketing, without involving secondary employees."⁷⁶² Further, the court restated its position on the union's "duty to 'picket with restraint'"⁷⁶³ when a union engaged in a labor dispute pickets a common-situs job site.

The opinion in *Allied Concrete* did not address the issue of whether it was of any significance that the president of Allied had established the reserved gate and made all the decisions concerning wording, location and establishment of the signs reserving a gate for his employees and other gates for the employees of the general contractor.⁷⁶⁴ The court merely stated that the gate, "which was properly established, put the Union on notice" as to those areas where the union was to limit its picketing.⁷⁶⁵ Thus, in the Ninth Circuit, the way is clear for primary employers in common-situs cases to reserve gates for picketing, and upon notice to the union, to limit picketing directed at the primary employer to those areas.

2. Product picketing

The question of *product picketing* was first addressed by the Supreme Court in *NLRB v. Fruit and Vegetable Packers Local 760 (Tree Fruits)*.⁷⁶⁶ In *Tree Fruits*, the Court held that picketing the con-

761. Teamsters Local 83 (*Allied Concrete*), 231 N.L.R.B. 1097, 1098 (1977). The Board, in *Allied Concrete*, relied on International Bhd. of Teamsters Local 807 (*Schultz Refrigerated Services*), 87 N.L.R.B. 502 (1949). The Board in *Schultz Refrigerated Services* held that the picketing of a primary employer's trucks at his customers' premises was lawful primary activity and did not violate § 8(b)(4) when the trucks could be identified with the "actual functioning of the primary employer's business at the *situs* of the labor dispute," and there was no other place available for effective picketing. *Id.* at 505-06.

762. 607 F.2d at 831.

763. *Id.* at 830 (quoting *Carpenters Local 470 v. NLRB*, 564 F.2d 1360, 1363 (9th Cir. 1977)).

764. This issue was apparently viewed as one of some importance by the Board. The Board pointed out that the "parties who traditionally establish reserved gates" were the site owners or the general contractor. As viewed by the Board, "[s]ection 8(b)(4)(i) and 8(b)(4)(ii)(B) is [sic] intended to protect the rights of neutral employers and was [sic] not designed for the aid and convenience of primary employers." 231 N.L.R.B. at 1099.

765. 607 F.2d at 831.

766. 377 U.S. 58 (1964).

sumer entrances of large grocery stores to dissuade customers from purchasing apples which were packed by firms which the union was striking did not violate section 8(b)(4)(B).⁷⁶⁷ Analyzing the legislative history of section 8(b)(4) and its amendments,⁷⁶⁸ the Supreme Court upheld the union's right to picket the product peacefully.⁷⁶⁹ The Court perceived a distinction between picketing that limits its appeal to a boycott of a specific product, such as occurred in *Tree Fruits*, and that which urges a total boycott of the neutral party's business.⁷⁷⁰

The *Tree Fruits* primary product picketing at a secondary site has been limited by the Supreme Court in *NLRB v. Retail Store Employees Local 1001 (Safeco)*.⁷⁷¹ In *Safeco*, the Court held that where product picketing can reasonably "be expected to threaten neutral parties with ruin or substantial loss,"⁷⁷² such picketing will constitute a violation of section 8(b)(4). The *Safeco* Court distinguished *Tree Fruits*, where the product picketed was but one item of many that the neutral party carried in its retail stock,⁷⁷³ from *Safeco*, where the product picketed generated over ninety percent of Safeco's gross income.⁷⁷⁴ The Court also anticipated situations in which secondary picketing could be directed against a product representing a significant portion of a neutral's business but significantly less than that represented by a single dominant

767. *Id.* at 71. 29 U.S.C. § 158(b)(4)(B) (1976) provides in part:

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

.....
 (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or refusal in the course of his employment to use . . . or otherwise handle or work on any goods . . . or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce . . . where in either case an object thereof is—

.....
 (B) forcing or requiring any person to cease using . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . .

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful any primary strike or primary picketing

.....
 768. 377 U.S. at 63-71. In reviewing the legislative history behind the 1959 amendments to the NLRA, 29 U.S.C. §§ 151-166 (1947), *as amended* by Pub. L. No. 86-257 (1959), the Supreme Court concluded that where peaceful picketing was at issue, the Court would not outlaw such picketing "unless 'there is the clearest indication in the legislative history' . . . that Congress intended to do so." 377 U.S. at 63 (quoting *NLRB v. Drivers Local No. 639*, 362 U.S. 274, 284 (1960)).

769. 377 U.S. at 71-73.

770. *Id.* at 63-64 n.7.

771. 447 U.S. 607 (1980).

772. *Id.* at 614.

773. *Id.* at 613.

774. *Id.* at 609.

product.⁷⁷⁵ The legality of the picketing would turn on whether the appeal to consumers to boycott the product would reasonably be likely to threaten the neutral with ruin or substantial loss.⁷⁷⁶ The Court left the resolution of this issue to the expertise of the Board.⁷⁷⁷

The product picketing permitted by *Tree Fruits* is qualified by the *merged products* or *integrated products* doctrine.⁷⁷⁸ The Board and the courts in construing *Tree Fruits* have held that product picketing is illegal when the product picketed is *merged* or *integrated* into products of the neutral employer.⁷⁷⁹ In cases where the consumer cannot separate the product picketed from the other components of the merged product, picketing aimed at a boycott of the picketed product is "tantamount to urging the prospective purchaser not to deal with the secondary employer."⁷⁸⁰ This activity is clearly prohibited by section 8(b)(4)(ii)(B).⁷⁸¹

In *Maxey v. Butchers' Local 126*,⁷⁸² the Ninth Circuit upheld the district court's application of the *integrated products* doctrine to a situation in which a union both picketed and threatened to picket customers of an employer with whom the striking union had a dispute.⁷⁸³ In *Maxey*, the primary employer was a meat processing company engaged in preparation of meat products for resale to restaurants and other institutions in and around Fresno, California. The union picketed some of the restaurants and threatened to picket other customers of the primary employer.⁷⁸⁴

The issue, as framed by the court, was whether the union sought to appeal to consumers to boycott the meat products or whether the union sought to induce the customers, namely, the restaurants, to cease doing

775. *Id.* at 615-16 n.11.

776. *Id.*

777. *Id.*

778. *See, e.g.*, *K & K Constr. Co. v. NLRB*, 592 F.2d 1228, 1234 (3d Cir. 1979); *NLRB v. Cement Masons Local 337*, 468 F.2d 1187, 1190-91 (9th Cir. 1972); *American Bread Co. v. NLRB*, 411 F.2d 147, 154 (6th Cir. 1969); *Honolulu Typographical Union No. 37 v. NLRB*, 401 F.2d 952, 955-56 (D.C. Cir. 1968); *Local 248, Meat & Allied Food Workers*, 230 N.L.R.B. 189, 190-91 (1977).

779. *See K & K Constr. Co. v. NLRB*, 592 F.2d 1228, 1234 (3d Cir. 1979); *NLRB v. Cement Masons Local 337*, 468 F.2d 1187, 1190-91 (9th Cir. 1972); *American Bread Co. v. NLRB*, 411 F.2d 147, 154 (6th Cir. 1969); *Honolulu Typographical Union No. 37 v. NLRB*, 401 F.2d 952, 955-56 (D.C. Cir. 1968); *Local 248, Meat & Allied Food Workers*, 230 N.L.R.B. 189, 190-91 (1977).

780. *K & K Constr. Co. v. NLRB*, 592 F.2d 1228, 1232 (3d Cir. 1979).

781. *NLRB v. Cement Masons Local 337*, 468 F.2d 1187, 1191 (9th Cir. 1972).

782. 627 F.2d 912 (9th Cir. 1980).

783. *Id.* at 915.

784. *Id.* at 914.

business with the primary employer.⁷⁸⁵ The latter object is clearly forbidden under section 8(b)(4).⁷⁸⁶ But an appeal to consumers would be permitted under *Tree Fruits*, were it not for the *integrated products* doctrine.⁷⁸⁷ The Ninth Circuit found that the evidence supported the district court's findings that the union sought to coerce the restaurants to cease doing business with the primary employer and that the primary products were integrated in the neutral products.⁷⁸⁸

VI. THE EMPLOYEE AND THE UNION

A. *The Union's Duty of Fair Representation*

A union which serves as an exclusive collective bargaining representative has a statutory duty to represent fairly all employees in its bargaining unit.⁷⁸⁹ A unit member may sue the union for breach of that duty if there is evidence the union engaged in arbitrary or discriminatory conduct, or acted in bad faith.⁷⁹⁰

The law of fair representation permits a union to negotiate for and agree to contract provisions involving disparate treatment of distinct classes of workers so long as the union does not act arbitrarily or in bad faith.⁷⁹¹ This may result in an agreement containing terms favorable to some employees and unfavorable to others.⁷⁹²

During the survey period, in *Williams v. Pacific Maritime Association*,⁷⁹³ a group of employees sued their union for breach of its duty of fair representation after they lost all prospects of working for the employer as longshoremen under a new collective bargaining agreement. Longshoremen had for many years been classified either as preferred employees, referred to as Class A, or as limited registered longshore-

785. *Id.* at 915.

786. 29 U.S.C. § 158(b)(4)(B) (1976).

787. 627 F.2d at 915.

788. *Id.*

789. The duty of fair representation has been read into various labor statutes, including § 8(b)(1)(A) of the NLRA. *See Vaca v. Sipes*, 386 U.S. 171, 177-78 (1967); *cf. Dycus v. NLRB*, 615 F.2d 820, 826-27 (9th Cir. 1980) (union which unequivocally and in good faith disclaimed further interest in representing employee's unit had no duty of fair representation because it was no longer the exclusive representative of that unit).

790. *Stephens v. Postmaster Gen.*, 623 F.2d 594, 596 (9th Cir. 1980) (per curiam) (citing *Vaca v. Sipes*, 386 U.S. 171, 190 (1965)); *see also Beriault v. Local 40, ILWU*, 501 F.2d 258, 263-64 (9th Cir. 1974).

791. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-39 (1953); *Duggan v. IAM*, 510 F.2d 1086, 1088 (9th Cir.), *cert. denied*, 421 U.S. 1012 (1975); *Beriault v. Local 40, ILWU*, 501 F.2d at 263-64.

792. *E.g.*, *Beriault v. Local 40, ILWU*, 501 F.2d at 260.

793. 617 F.2d 1321 (9th Cir. 1980), *cert. denied*, 449 U.S. 101 (1981).

men, referred to as Class B.⁷⁹⁴

Class A longshoremen received priority for available work while Class B workers had limited rights to available work and were subject to stricter rules and more stringent penalties. Class B longshoremen could, for example, be deregistered at any time for "cause," including pilferage, intoxication, assault, unexcused failures to be available for work, and dropping hours from time sheets to facilitate the receipt of new work ("chiseling"). The option remained open to them, however, to apply periodically for promotion to Class A status.⁷⁹⁵

As the longshoremen's industry became mechanized, fewer, but more highly skilled workers were needed. The union thus agreed with the employer to reclassify qualified Class B workers to Class A, and to deregister the rest. The standards by which Class B workers were judged included the number of times the worker had "chiseled," had been late in paying hiring hall fees, had been unavailable when needed for work, and had been the subject of employer complaints for intoxication or pilferage.⁷⁹⁶

Employees who were not reclassified to Class A sued the union for breach of its duty of fair representation in negotiating the standards.⁷⁹⁷ The Ninth Circuit found for the union on the ground that it had not acted arbitrarily or in bad faith because the standards themselves and the provisions according differential treatment to Class B had a rational basis.⁷⁹⁸ The court also held that the union had not breached its duty to warn Class B workers of conduct that might lead to their deregistration. The court reasoned that because previous agreements provided that Class B workers would be deregistered for reasons similar to those specified in the new standards there was no obligation on the part of the union to give such warning.⁷⁹⁹

In upholding the union's action because it had a "rational basis,"⁸⁰⁰ the court placed a light burden of fair representation upon unions. Under the rational basis or "not in bad faith or arbitrary" test,⁸⁰¹

794. *Id.* at 1323-24.

795. *Id.*

796. *Id.* at 1324.

797. The union asserted that the suit was barred because the employees had failed to exhaust internal union remedies. The court countered that claims alleging breach of the duty of fair representation in *negotiating* the collective bargaining agreement are not subject to the exhaustion requirement. *Id.* at 1328 (citing *Beriault v. Local 40, ILWU*, 501 F.2d at 266).

798. 617 F.2d at 1331, 1333-34.

799. *Id.* at 1331-32.

800. *Id.* at 1330.

801. *Id.*

a union need not negotiate an agreement that is desirable for all bargaining unit members. It is sufficient if the agreement eventually consummated is somehow justifiable.

The duty of good faith representation is not breached by a union if it refuses to process an employee grievance against an employer because it has reasonably found that the grievance is unmeritorious.⁸⁰² The Ninth Circuit followed this well-settled rule during the survey period in *Fristoe v. Reynolds Metals Co.*⁸⁰³ In *Fristoe*, the aggrieved employee was fired after an off-premises altercation with his supervisor which arose from a job-related dispute. The employer based its firing on the signed statements of two eyewitnesses, the contents of which disclosed that the employee provoked the fight.⁸⁰⁴

The collective bargaining agreement provided that arbitration was the exclusive remedy for employee grievances.⁸⁰⁵ At the employee's request, the union filed a grievance over the discharge, and processed it through the first three steps of the procedure. After failing to obtain employee reinstatement, the union decided not to pursue the arbitration further because of evidence unfavorable to the employee.⁸⁰⁶

The employee then sued the employer for breach of the collective bargaining agreement and the union for breach of its duty of fair representation.⁸⁰⁷ The Ninth Circuit upheld the district court's grant of summary judgment for the union on the ground that it had neither acted arbitrarily nor refused to press the grievance in a hostile manner.⁸⁰⁸ The court noted that the union had justifiably determined that the employee's case was a bad one, and its refusal to process it any further was consonant with the goals of the grievance and arbitration system.⁸⁰⁹

802. *Vaca v. Sipes*, 386 U.S. at 191; *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756-57 (9th Cir. 1977).

803. 615 F.2d 1209 (9th Cir. 1980).

804. *Id.* at 1210-11.

805. *Id.* at 1214.

806. *Id.* at 1211.

807. *Id.* at 1210. As a general rule, when a collective bargaining agreement provides that arbitration will be the exclusive remedy for employee grievances, an employee may not instead bring the employer to court. *Id.* at 1214 (citing *Vaca v. Sipes*, 386 U.S. 171, 186 (1967)). However, this rule is excepted when the employee shows that the union breached its duty of fair representation by failing to pursue arbitration. 615 F.2d at 1214 (citing *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-69 (1976); *Vaca v. Sipes*, 386 U.S. at 186). Because the employee failed to show any breach on the part of the union, he could not maintain a cause of action against the employer.

808. 615 F.2d at 1215.

809. *Id.* (citing *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756-57 (9th Cir. 1977)).

B. Discipline of Union Members

Section 7 of the NLRA⁸¹⁰ guarantees the right of employees to form, assist, or join labor organizations or to refrain from doing so.⁸¹¹ Section 8(b)(1)(A) of the Act⁸¹² declares that a union's restraint of employees' section 7 rights is an unfair labor practice, though the union has the right to prescribe rules for acquisition and retention of union membership.

A union does not violate section 8(b)(1) by fining members for working during a lawful strike authorized by its membership and by suing to collect the fines. Such action has been construed to fall within the ambit of the union's control over its internal affairs.⁸¹³

The United States Supreme Court, in *NLRB v. Granite State Joint Board, Textile Workers' Union*,⁸¹⁴ held that absent any restrictions in a union's constitution upon a member's right to resign, a union cannot fine a member for resigning and then crossing a picket line. The basis for this rule is the union's lack of control over the former member.⁸¹⁵ The Court, however, left open the question of whether and when a union may, through its constitution and bylaws, define or limit the circumstances under which a member may resign from the union.⁸¹⁶

During the survey period, in *NLRB v. Machinists' Local 1327, IAM*,⁸¹⁷ a union sought to collect fines levied against members who resigned after a strike had started and subsequently crossed the picket line. The union's constitution prohibited members from dishonoring strikes or lockouts without permission, and provided that any resignation submitted within fourteen days of a strike's commencement would not relieve the member's obligation of honoring the strike for its duration.⁸¹⁸

The NLRB, in a divided opinion, determined that the constitutional provision was an unlawful attempt to regulate post-resignation

810. 29 U.S.C. § 157 (1976).

811. See *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466, 476 (2d Cir. 1976).

812. 29 U.S.C. § 158(b)(1)(A) (1976).

813. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967); see also *NLRB v. Granite State Joint Bd., Textile Workers' Union*, 409 U.S. 213, 215 (1972).

814. 409 U.S. 213 (1972).

815. *Id.* at 215-17; see also *Booster Lodge 405, IAM v. NLRB*, 412 U.S. 84, 88 (1973); *Bise v. IBEW Local 1969*, 618 F.2d 1299 (9th Cir. 1979), cert. denied, 449 U.S. 101 (1980) (damages awarded to union members who legally resigned under union's constitution and crossed picket line during strike, then rejoined union after strike, for union's attempt to fine them).

816. 409 U.S. at 216.

817. 608 F.2d 1219 (9th Cir. 1979).

818. *Id.* at 1220.

conduct rather than a restriction upon the right to resign.⁸¹⁹ The Ninth Circuit, in a split opinion, disagreed with the Board's characterization, and determined that the constitutional provision was a restriction on members' right to resign.⁸²⁰

Because the Supreme Court in *Granite State*⁸²¹ left open the question of the legality of constitutional restrictions on members' right to resign,⁸²² the Ninth Circuit remanded *Machinists'* to the Board for consideration and resolution based upon its expertise in the labor relations field.⁸²³

The dissent argued that the employees were no longer subject to union control as members because union membership entails the right to have a voice in the union's continuing course of action.⁸²⁴ One cannot be a "member" by merely remaining subject to union discipline.⁸²⁵ The dissent's opinion appears better reasoned than the majority's. The union's anti-strikebreaking provision was a contractual obligation undertaken by members. The Ninth Circuit should have decided whether the contractual provision violated the NLRA, rather than recharacterizing it as a restriction on the right to resign.

C. Union Elections

Section 411(a)(1)⁸²⁶ of Title I of the Labor-Management Reporting and Disclosure Act (LMDRA)⁸²⁷ guarantees equal voting and nominating rights to union members in union elections. Section 412⁸²⁸ permits a private civil action for relief, including injunctive relief, for a union's violation of its members' rights. Section 482(a)⁸²⁹ of Title IV of the LMDRA permits a union member who has exhausted internal union remedies to file a complaint with the Secretary of Labor alleging his or her union's violation of its constitution and bylaws in the conduct of an election. Section 482(b)⁸³⁰ empowers the Secretary to bring a civil action in district court against the union to set aside the election if he or she deems the complaint valid.

819. *Machinists' Local 1327, IAM*, 231 N.L.R.B. 719 (1977).

820. 608 F.2d at 1222.

821. 409 U.S. 213 (1972).

822. *Id.* at 217.

823. 608 F.2d at 1222-23.

824. *Id.* at 1223.

825. *Id.*

826. 29 U.S.C. § 411(a)(1) (1976).

827. The LMDRA is codified in 29 U.S.C. §§ 401-531 (1976).

828. 29 U.S.C. § 412 (1976).

829. 29 U.S.C. § 482(a) (1976).

830. 29 U.S.C. § 482(b) (1976).

Often, a union's election conduct may potentially subject it to actions under both Titles I and IV. The Supreme Court, in *Calhoun v. Harvey*,⁸³¹ held that a union member seeking to challenge the discriminatory effect of a union's candidate eligibility requirements may do so only under Title IV of the LMDRA and not under Title I.⁸³² Title IV preempts Title I in such cases.

The circuits have divided on the question of whether Title IV preempts Title I in all cases where they overlap, particularly when an *individual* is discriminated against in the course of an election.⁸³³ During the survey period, the Ninth Circuit, in *Kupau v. Yamamoto*,⁸³⁴ adopted the view that Title I remedies are not necessarily preempted by the existence of Title IV claims. Under the Ninth Circuit view, one may pursue a Title I action if he or she has been discriminated against in the exercise of his or her Title I rights, regardless of other claims.⁸³⁵

In *Kupau*, the plaintiff defeated an incumbent for union office. Prior to the election, the plaintiff was assured by the international union's general president and by his local's election committee that he was eligible to run. After the election, the defeated incumbent protested that the plaintiff was ineligible. The officers of the union, most of whom had run on a common slate with the incumbent, bypassed ordinary procedure by failing to invite unit officers representing the rank and file to the hearing. The plaintiff was declared ineligible and

831. 379 U.S. 134 (1964).

832. *Id.* at 138.

833. Title IV was held not to preempt Title I when an individual was discriminated against in an election in *Depew v. Edmiston*, 386 F.2d 710 (3d Cir. 1967). Suits under Title I were permitted without specific analysis of the relation between Title I and Title IV in *Bunz v. Moving Picture Mach. Operators Local 224*, 567 F.2d 1117 (D.C. Cir. 1977); *Pignotti v. Local 3, Sheet Metal Workers Int'l Ass'n*, 343 F. Supp 236 (D. Neb. 1972), *aff'd*, 477 F.2d 825 (8th Cir.), *cert. denied*, 414 U.S. 1067 (1973); *Stettner v. International Printing Ass'n*, 278 F. Supp. 675 (E.D. Tenn. 1967). Preemption of Title I remedies because of the existence of Title IV claims has been criticized by commentators. See Comment, *Titles I and IV of the LMDRA: A Resolution of the Conflict of Remedies*, 42 U. CHI. L. REV. 166 (1974); Note, *Pre-election Remedies Under The Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of Titles I and V*, 74 COLUM. L. REV. 1105 (1974); Note, *Union Elections and the LMDRA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 409 (1972); James, *Union Democracy and the LMDRA: Autocracy and Insurgency in National Union Elections*, 13 HARV. C.R.-C.L. L. REV. 247 (1978). *Contra Driscoll v. IUOE Local 139*, 484 F.2d 682 (7th Cir. 1973) (challenge to requirement that all candidates for union office execute non-Communist affidavit actionable under Title IV but not Title I), *cert. denied*, 415 U.S. 960 (1974); *McDonough v. Local 825, Int'l Union of Operating Eng'rs*, 470 F.2d 261, 264 (3d Cir. 1972) (Title IV exclusive remedy when election already conducted); *but cf.* *Depew v. Edmiston*, 386 F.2d 710 (3d Cir. 1967) (Title I remedy permissible when injunction sought prior to election).

834. 622 F.2d 449 (9th Cir. 1980).

835. *Id.* at 455 (citing *Depew v. Edmiston*, 386 F.2d 710 (3d Cir. 1967)).

the officers refused to seat him.⁸³⁶

The plaintiff filed a complaint in district court under Title I and won a preliminary injunction ordering his installation. The incumbent then filed a complaint with the Secretary of Labor under Title IV. The Secretary found the incumbent's allegation that the plaintiff's installation would violate Title IV meritorious and filed an independent action in district court. The plaintiff was not allowed by the district court to intervene.⁸³⁷

The cases were consolidated for appeal. The plaintiff appealed the district court's refusal to allow his intervention in the Title IV suit while the defendant appealed on two grounds: (1) that the plaintiff's Title I remedies were preempted by the existence of Title IV claims the plaintiff failed to pursue,⁸³⁸ and (2) that the record did not support the granting of the preliminary injunction.⁸³⁹

The court affirmed the injunction and held that preemption was not applicable to the case because the plaintiff alleged discrimination against himself as an individual, in violation of his Title I rights.⁸⁴⁰ The court also dismissed the Secretary of Labor's Title IV complaint because the incumbent had obtained the relief requested in the union proceedings. Since there was no real dispute between the incumbent and the union, both of whom had sought to invalidate Kupau's election, use of Title IV by the Secretary was inappropriate. Title IV could legitimately be utilized to coerce a recalcitrant union, but not to overturn a valid decision of a district court.⁸⁴¹

*D. Union Security: Union Hiring Halls and Union Discrimination*⁸⁴²

VII. OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act of 1970 (OSHA)⁸⁴³ was enacted by Congress "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to

836. *Id.* at 452.

837. *Id.* at 452-53.

838. Note that the preemption issue revolved around Title IV claims the plaintiff might have brought and not the Title IV claim that the incumbent brought.

839. 622 F.2d at 453.

840. *See supra* notes 833-35 and accompanying text.

841. 622 F.2d at 458.

842. *See supra* notes 416-39 and accompanying text in Part II: UNFAIR LABOR PRACTICES.

843. 29 U.S.C. §§ 651-678 (1976).

preserve our human resources."⁸⁴⁴ Among other requirements, each employer must comply with two key provisions of the Act. First, the employer must furnish a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to the employees (general duty clause).⁸⁴⁵ Second, the employer must comply with OSHA standards promulgated by the Secretary of Labor (Secretary).⁸⁴⁶

A. General Duty Clause

The general duty clause was enacted to cover serious hazards at the workplace to which no specific standard applied.⁸⁴⁷ During the initial years of the Act's existence, the general duty clause was used as an interim measure to prohibit hazardous conduct either while specific standards were being considered for promulgation or before a recently enacted standard had become effective.⁸⁴⁸ Recently, however, the general duty clause has been employed in cases of unusual violations not covered by specific promulgated standards.⁸⁴⁹

A significant and distinctive element of general duty clause violations is that they are limited to *recognized* hazards. A hazard is considered *recognized* if it is: (1) preventable;⁸⁵⁰ (2) of common knowledge in the employer's industry;⁸⁵¹ (3) detectable either through the senses or instrumentation;⁸⁵² or, (4) if the employer had knowledge of the hazardous condition.⁸⁵³ It was this final feature that was at the heart of the

844. *Id.* § 651(b).

845. *Id.* § 654(a)(1).

846. *Id.* § 654(a)(2).

847. See S. REP. NO. 1282, 91st Cong., 2d Sess. 9, 10, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5177, 5186 [hereinafter cited as Senate Report].

848. See *American Smelting & Ref. Co. v. OSHRC*, 501 F.2d 504, 512 (8th Cir. 1974) (use of general duty clause proper where specific standard not yet effective); *Hidden Valley Corp.*, 1 O.S.A.H.R.C. 62, 71 (1972) (respondent employer subject to general duty clause where violation occurred prior to effective date of specific standard).

849. See *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 909-10 (2d Cir. 1977) (employee crushed by falling bricks); *Richmond Block, Inc.*, 6 O.S.A.H.R.C. 180, 201 (1974) (employee killed while cleaning the inside of cement mixer).

850. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) (hazard not *recognized* if informed safety experts would concur that methods to eliminate condition were not feasible).

851. *Brennan v. OSHRC (Vy Lactos Laboratories, Inc.)*, 494 F.2d 460, 464 (8th Cir. 1974) (a *recognized* hazard includes hazards generally recognized in the industry).

852. *American Smelting & Ref. Co. v. OSHRC*, 501 F.2d 504, 511 (8th Cir. 1974) (*recognized* hazards are not limited to those conditions which can be recognized directly by human senses without the assistance of technical instruments).

853. *Brennan v. OSHRC (Vy Lactos Laboratories, Inc.)*, 494 F.2d 460, 464 (8th Cir. 1974) (a hazard is *recognized* under the general duty clause where an employer has actual knowl-

controversy in *Magma Copper Co. v. Marshall*.⁸⁵⁴

In *Magma*, the Occupational Safety and Health Review Commission (Commission)⁸⁵⁵ found Magma Copper Co. (Magma) guilty of a "serious violation"⁸⁵⁶ of the general duty clause. The citation for violating the general duty clause was issued after an investigation of an explosion in Magma's plant. The explosion took place when an employee mistakenly connected a pneumatic tool hose to a pure oxygen supply instead of to the compressed air supply. When the tool was activated, the residual hydrocarbons in the hose came into contact with the pure oxygen and exploded. The accident occurred despite extensive safety precautions taken by Magma.⁸⁵⁷ The citation proceeded on the assumption that despite the existing safety precautions, the lack of noninterchangeable fittings on the power supply hoses created an explosion hazard.⁸⁵⁸

The Secretary sought to prove, by expert testimony, that the lack

edge of the hazard); *accord* *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) (to constitute a *recognized* hazard, the dangerous potential of a condition or activity must actually be known to the employer or known generally in the industry). *But see* *Titanium Metals Corp. v. Usery*, 579 F.2d 536, 541 (9th Cir. 1978) (a *recognized* hazard may be found to exist even if the employer is completely ignorant of potential for harm).

854. 608 F.2d 373 (9th Cir. 1979).

855. The Commission was established under § 12(a) of OSHA. 29 U.S.C. § 661(a) (1976). The Commission was created to adjudicate contested matters resulting from the Secretary's issuance of citations and proposed penalties. The establishment of an independent adjudicatory panel differed significantly from other traditional administrative organizations as represented by the FTC, NLRB, ICC, and other agencies. For an exposition on the differences between these administrative agencies, see Moran, *A Court in the Executive Branch of Government: The Strange Case of the Occupational Safety and Health Review Commission*, 20 WAYNE L. REV. 999 (1974).

856. 608 F.2d at 374. The company was found to be in violation of 29 U.S.C. § 654(a)(1) (1976) which provides in part: "Each employer . . . shall furnish . . . a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." "[A] serious violation [of § 654(a)(1)] shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result . . ." 29 U.S.C. § 666(j) (1976); *see* *Dorey Elec. Co. v. OSHRC*, 553 F.2d 357, 358 (4th Cir. 1977) (absence of guardrails on the edges of fourth floor uncompleted apartment building held to be a serious violation); *Shaw Constr., Inc. v. OSHRC*, 534 F.2d 1183, 1184 (5th Cir. 1976) (construction company committed a serious violation of trenching regulations where three-foot high soil banks and large chunks of asphalt were placed within two feet of construction trench where vibrations caused by passing traffic and construction equipment might cause debris to fall into trench in which workers may be present).

857. 608 F.2d at 375. The oxygen supply system was installed some 25 to 30 feet from the air compressor system. The two systems were color coded, and a warning sign was posted close to the oxygen outlet in a well lit area. Additionally, the employees were wearing prescribed safety apparel at the time of the accident. *Id.*

858. *Id.*

of noninterchangeable hose fittings in the oxygen system was a *recognized* hazard.⁸⁵⁹ The Secretary's expert testified only as to the use of the portable oxygen units in hospitals and in welding work. The court held, in accordance with *Brennan v. Smoke-Craft Inc.*,⁸⁶⁰ that such testimony was not testimony based on expertise in a relevant industry, and as a consequence, the testimony was insufficient to carry the Secretary's burden to show a serious violation.⁸⁶¹

The Secretary also argued that proof of an employer's actual knowledge of a hazard is sufficient to prove that the hazard was *recognized*. The Secretary contended that by implementing the safety precautions that it did, Magma had actual knowledge of the hazard and thus the hazard was *recognized*.⁸⁶² The court rejected this argument, holding that "[w]here evidence of [an] employer's actual knowledge is relied on as proof that a hazard is 'recognized,' under the general duty provision of the Act, the Secretary has the burden of demonstrating . . . that the employer's safety precautions were unacceptable in his industry, or a relevant industry."⁸⁶³ The standard adopted by the court was what "a reasonably conscientious safety expert familiar with the pertinent industry" would believe was unacceptable in the industry.⁸⁶⁴

The court's reasoning paralleled that of the First Circuit in *Cape & Vineyard Division v. OSHRC*.⁸⁶⁵ In *Cape*, the court considered a specific OSHA standard⁸⁶⁶ dealing with protective equipment and found the wording of the regulation to be too general to afford an employer adequate notice.⁸⁶⁷ The First Circuit demonstrated its concern over the

859. *Id.*

860. 530 F.2d 843 (9th Cir. 1976).

861. *Id.* at 845. The court in *Smoke-Craft* pointed out that in determining whether a condition would result in a violation of OSHA provisions, a determination would have to be made with reference to the customs in a relevant industry. In the absence of a relevant industry custom or practice, the determination that must be made is whether the evidence supports a conclusion "that a reasonably prudent man familiar with the industry would find necessary to protect against [the hazard complained of]." *Id.*

862. 608 F.2d at 376.

863. *Id.* at 377.

864. *Id.* (footnote omitted).

865. 512 F.2d 1148 (1st Cir. 1975).

866. 29 C.F.R. § 1910.132(a) (1980).

867. The regulation states:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices and protective shields and barriers, shall be provided, used and maintained in a sanitary and reliable condition wherever *it is necessary* by reason of hazards or processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Id. (emphasis added).

lack of adequate notice to the employer by stating that “[a] regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an employer unless read to penalize only conduct unacceptable in light of the common understanding and experience of those working in the industry.”⁸⁶⁸ The Ninth Circuit found that adequate notice, as outlined in *Cape*, must exist before an employer may be charged with violating the general duty clause of the Act based on the employer’s actual knowledge.⁸⁶⁹ Thus, the court imposed the objective standard to ensure that adequate notice would be provided.⁸⁷⁰

B. OSHA Standards

In addition to conforming to the requirements of the general duty clause, OSHA also requires that employers comply with standards promulgated by the Secretary.⁸⁷¹ The standards may be divided into three classes based on the method in which they were promulgated: (1) existing standards⁸⁷² adopted under section 6(a) of the Act,⁸⁷³

868. 512 F.2d at 1152 (citing *Ryder Truck Lines v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974)).

869. 608 F.2d at 377.

870. *Id.* It would seem patently unfair and counterproductive to allow the Secretary to use the employer’s safety precautions to show actual knowledge and thus a *recognized* hazard without requiring some judicial assessment of the existing safety measures. Employers would tend not to implement safety precautions for fear that such measures would be used to show their knowledge of a hazard and thus violations of the general duty clause.

871. 29 U.S.C. § 654(a)(2) (1976). Section 654(a) provides in part: “Each employer . . . (2) shall comply with occupational safety and health standards promulgated under this chapter.”

872. Existing standards were of two categories: national consensus standards or established federal standards existing under other federal acts. 29 U.S.C. § 652(9) (1976) defines a national consensus standard as:

any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

29 U.S.C. § 652(10) (1976) states: “The term ‘established Federal standard’ means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970.”

873. 29 U.S.C. § 655(a) (1976) authorizes the Secretary to adopt existing federal standards and national consensus standards without resort to lengthy rulemaking procedures, for two years after the effective date of the Act. It appears that Congress reasoned that existing federal standards had already been exposed to procedural scrutiny by other government agencies, and that national consensus standards were developed after obtaining diverse views from interested parties. Thus, Congress was of the belief that the adoption of these

- (2) new standards promulgated pursuant to section 6(b);⁸⁷⁴ and
 (3) emergency temporary standards adopted under section 6(c).⁸⁷⁵

1. Judicial review

The Secretary's rulemaking authority may be reviewed in two ways. First, any party that may be adversely affected by a standard may obtain pre-enforcement review by filing a petition, within sixty days of promulgation, with the United States Court of Appeals for the circuit in which the party resides or has his or her principal place of business.⁸⁷⁶ The second method of review, available to "[a]ny person adversely affected or aggrieved by" a final order of the Commission,⁸⁷⁷ is to file a petition pursuant to section 11(a) of OSHA.⁸⁷⁸ Petitions for review under section 11(a) must also be filed within sixty days in the relevant circuit.⁸⁷⁹

In *Atlantic & Gulf Stevedores, Inc. v. OSHRC*,⁸⁸⁰ the Third Circuit held that the scope of review of a Commission order in an enforcement proceeding was coextensive with the review available for a pre-enforcement petition challenging the procedural and substantive validity of the

standards would afford employees immediate protection without infringing on the procedural rights of employers. Senate Report, *supra* note 847, at 5182.

874. 29 U.S.C. § 655(b) (1976) requires that to promulgate new standards or modify or revoke an existing OSHA standard, the Secretary must comply with the detailed rulemaking procedures specified in the body of the section. These procedures contemplate the use of an advisory committee to make recommendations to the Secretary and also require publication of proposed rules in the Federal Register for public comment.

875. 29 U.S.C. § 655(c) (1976) allows the Secretary to adopt emergency standards if he or she determines that employees are exposed to "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." Because of the grave danger involved, an emergency temporary standard is not subject to the specific requirements embodied in 29 U.S.C. § 655(b) (1976). For a contrast between the promulgation requirements of permanent versus emergency temporary standards, see *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120, 124 (5th Cir. 1974).

876. 29 U.S.C. § 655(f) (1976) provides in part:

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard

877. 29 U.S.C. § 660(a) (1976).

878. *Id.* Section 11(a) provides in part:

Any person adversely affected . . . by an order of the Commission . . . may obtain review of such an order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside

879. *Id.*

880. 534 F.2d 541 (3d Cir. 1976).

allegedly violated standard.⁸⁸¹ Thus, the validity of the standard could be reviewed in an enforcement proceeding.

In the 1980 case of *Noblecraft Industries, Inc. v. Secretary of Labor*,⁸⁸² the Ninth Circuit adopted the view, outlined in *Atlantic & Gulf Stevedores*, that the validity of a standard may be challenged in an enforcement proceeding. In *Noblecraft*, the Secretary argued that judicial review of the validity of a promulgated national consensus standard is barred if the sixty day statutory time period expires before a cited employer challenges the standard.⁸⁸³ The Ninth Circuit rejected this argument, citing explicit language in the legislative history of the section which applied the sixty day limitation only to pre-enforcement review of standards.⁸⁸⁴

The Secretary advanced a similar argument a short time later in *Marshall v. Union Oil Co.*,⁸⁸⁵ relying on the Eighth Circuit's decision in *National Industrial Constructors, Inc. v. OSHRC*.⁸⁸⁶ The Ninth Circuit declined to follow the position adopted by the Eighth Circuit,⁸⁸⁷ holding instead that an employer may challenge the procedural validity or the substantive validity of the promulgated standards during an enforcement proceeding.⁸⁸⁸ Quoting from the Supreme Court's decision

881. *Id.* at 550-51.

882. 614 F.2d 199 (9th Cir. 1980).

883. *Id.* at 201. The Secretary relied on 29 U.S.C. § 655(f) (1976) as support for his argument. For the pertinent language of this section, see *supra* note 876.

884. 614 F.2d at 201. The legislative history relied on by the court reads as follows: "While [§ 655(f)] would be the exclusive method for obtaining pre-enforcement judicial review of a standard, the provision does not foreclose an employer from challenging the validity of a standard during an enforcement proceeding." Senate Report, *supra* note 847, at 5184.

885. 616 F.2d 1113, 1116-17 (9th Cir. 1979).

886. 583 F.2d 1048 (8th Cir. 1978). National challenged a regulation for which it had been cited on the ground that the regulation was not promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. § 533 (1976), and consequently was not an "established federal standard." See *supra* note 872. The Eighth Circuit rejected National's attack on the ground that it was a procedural attack precluded by 29 U.S.C. § 655(f) (1976). See *supra* note 876 and accompanying text. The Eighth Circuit in effect read Senate Report No. 1282, see *supra* note 847, to allow a substantive challenge to a regulation in an enforcement proceeding, but held that a procedural attack is different. The Eighth Circuit held that a procedural attack may only be raised in a pre-enforcement proceeding, subject to the challenge being raised within sixty days from promulgation. 583 F.2d at 1051-53. The court based its holding on policy grounds, stating that "[t]he agency's interest in finality, coupled with the burden of continuous procedural challenges raised whenever an agency attempts to enforce a regulation, dictates against providing a perpetual forum in which the Secretary's procedural irregularities may be raised." *Id.* at 1052.

887. 616 F.2d at 1117.

888. *Id.* at 1118.

in *Association of Data Processing Service Organizations v. Camp*,⁸⁸⁹ the court stated: "There is no presumption against judicial review and in favor of administrative absolutism . . . unless that purpose is fairly discernible in the statutory scheme."⁸⁹⁰ The court could find no congressional authorization to distinguish between procedural challenges and substantive challenges and therefore upheld Union Oil's right to challenge the validity of the procedure used by the Secretary to promulgate the standard in question.⁸⁹¹

2. Promulgation

Under OSHA, the Secretary is required to adopt, as occupational safety and health standards, any existing standard,⁸⁹² unless he or she determines that a particular standard or standards would not result in improved safety and health for employees.⁸⁹³ Existing standards may be partially or fully adopted. Partial adoptions may be effected by modifications made by the Secretary in changing advisory language to mandatory language or by omissions, deletions, or any combination thereof. These promulgation procedures have been the basis of recent litigation.⁸⁹⁴ Two of the above mentioned cases decided by the Ninth Circuit during the survey period, *Union Oil* and *Noblecraft*, provide examples of changes from advisory language to mandatory language and modifications of standards by omissions.

Union Oil involved changing the word "should," as contained in an adopted American National Standards Institute (ANSI) standard, to "shall."⁸⁹⁵ The Ninth Circuit held that the change from an advisory

889. 397 U.S. 150 (1970).

890. 616 F.2d at 1117 (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)).

891. 616 F.2d at 1118.

892. For a description of the types of existing standards, see *supra* note 872.

893. 29 U.S.C. § 655(a) (1976) provides: "the Secretary shall . . . by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees."

894. See, e.g., *Marshall v. Pittsburgh-Des Moines Steel Co.*, 584 F.2d 638 (3d Cir. 1978) (Secretary could not alter meaning of ANSI standard); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977) (Secretary's change of wording of ANSI standard from an advisory "should" to a mandatory "shall" rendered the regulation unenforceable because the appropriate rulemaking procedures were not followed).

895. 616 F.2d at 1115. Union Oil contended that the Secretary had improperly promulgated a standard when he adopted an ANSI standard, qualifying it as an OSHA standard. The standard in question was the occupational safety and health regulation, 29 C.F.R. § 1910.28(a)(3) (1980). As formulated by ANSI, the standard provided that "[g]uardrails and toeboards *should* be installed . . ." *National Standards Institute, American National Standard Safety Requirements for Scaffolding* ¶ 3.3 (1969) (emphasis added). The Secretary,

standard to a mandatory one⁸⁹⁶ was substantial enough to render the standard unenforceable as an existing standard.⁸⁹⁷

Union Oil and other similar decisions appear to overlook the dilemma faced by the Secretary. On the one hand, changing "should" to "shall" is impermissible in adopting national consensus standards; on the other hand, retaining the word "should" makes compliance optional and thus renders enforcement powers useless. This means that to adopt any of the existing standards couched in advisory language, the Secretary would have to resort to stricter and more burdensome rulemaking procedures,⁸⁹⁸ a result that appears to be directly contrary to the purposes of the section allowing the adoption of existing standards.⁸⁹⁹

In *Noblecraft*, the court was required to determine the significance of omissions in the adoption of an ANSI standard.⁹⁰⁰ In reversing the Commission's ruling that an omitted headnote was merely explanatory and thus not a material change in the meaning and application of the adopted standard, the Ninth Circuit held that the omissions did materi-

however, changed the wording of the regulation to read "[g]uardrails and toeboards *shall* be installed . . ." 29 C.F.R. § 1910.28(a)(3) (1980) (emphasis added); 616 F.2d at 1115.

896. The court pointed out that "ANSI's 1969 standards have the following definitions: . . . Mandatory rules of this standard are characterized by the word *shall*. If a rule is of an advisory nature it is indicated by the word *should*, or is stated as a recommendation. [Emphasis in original.]" *Id.* at 1115 n.3.

897. *Id.* at 1116. The standard invalidated in *Union Oil* was precisely the same standard invalidated in *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1116 (10th Cir. 1977). With respect to changing the wording of an adopted standard to make the standard mandatory, the Ninth, Third, and Tenth Circuits are in accord in holding such standards invalid as national consensus standards. See *supra* note 894 and the cases cited therein.

898. See *supra* note 874 and accompanying text.

899. In dissent, Commissioner Cleary, in *Pan Am. Airways*, 4 O.S.H.C. 1203 (1976), argued that because ANSI is a private organization, all of the ANSI standards were originally only recommendations. Thus, in granting the Secretary power to adopt ANSI standards as national consensus standards, Congress authorized that optional standards be made mandatory.

900. 614 F.2d at 203. *Noblecraft* contended that the consensus nature of an ANSI standard was destroyed because the Secretary omitted portions of the source standard in adopting 29 C.F.R. § 1910.213(h)(1) (1980). *Noblecraft* emphasized two omitted portions. The first read: "*Scope*. This code is intended as a guide for the safe installation, operation, and maintenance of wood-working machinery, including cooperage operations and the making of veneer, but excluding the manufacture of structural plywood . . ." 614 F.2d at 203. The second omitted portion emphasized by the petitioners read:

NOTE: It is recognized that the standards for saw guards in 4.1 are not perfectly applicable to all operations for which saws are used. The standards given are those which woodworkers have agreed are most generally useful. Since there are a considerable number of cases not satisfactorily met by these standards, the enforcing authority should exercise rather wide latitude in allowing the use of other devices which give promise of affording adequate protection . . .

Id.

ally change the character of the existing standard.⁹⁰¹ Thus, the validity of the standard as it read could not be upheld unless it was promulgated in accordance with the provisions of the Administrative Procedure Act.⁹⁰² In addition, the court pointed out that the omitted portions of the source standards made it clear that the standards were intended to apply only to some uses to which radial arm saws were put and not to all uses. Thus, the court remanded the question of whether the standard as originally drafted by ANSI applied to the particular radial arm saws at issue.⁹⁰³

3. Degree of violation

OSHA provides a number of penalties that may be assessed by the Commission for varying degrees of violations.⁹⁰⁴ Violations are generally classified as *de minimis*,⁹⁰⁵ non-serious,⁹⁰⁶ serious,⁹⁰⁷ repeated,⁹⁰⁸

901. *Id.* at 204.

902. *Id.*

903. *Id.*

904. The penalty ranges provided by OSHA for each of the degrees of violations are as follows: *de minimis* notice—\$0.00; non-serious violation—\$0.00 to \$1,000.00; serious violation—\$0.00 to \$1,000.00; repeated violation—\$0.00 to \$10,000.00; willful violation—\$0.00 to \$10,000.00; and a failure to abate notice—\$0.00 to \$1,000.00 per day. 29 U.S.C. § 666 (1976).

905. 29 U.S.C. § 658(a) (1976) refers to *de minimis* violations as those violations "which have no direct or immediate relationship to safety or health." In *Lee Way Motor Freight, Inc. v. Secretary of Labor*, 511 F.2d 864, 869 (10th Cir. 1975), the court held that a *de minimis* notice is not proper where there is a direct and immediate relationship to employee safety and health; 29 U.S.C. § 658(a) (1976) allows the Secretary to issue a notice in lieu of a citation "with respect to *de minimis* violations." In such cases, there are no penalties when no citations have been issued. See OSHA FIELD OPERATIONS MANUAL Ch. VII (B) 2b(3) (1977).

906. OSHA does not specifically define a non-serious violation, but because there are express definitions for both *de minimis* and serious violations, a non-serious violation is somewhere between the two. 29 U.S.C. § 666(c) (1976) provides that "[a]ny employer who has received a citation for a violation . . . , and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to \$1,000 for each such violation." This language would seem to require that the Secretary make a specific determination that a violation is non-serious.

907. See *supra* note 856 and cases cited therein.

908. 29 U.S.C. § 666(a) provides that "[a]ny employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than \$10,000 for each violation."

There appears to be a split among the circuits as to the minimum number of prior violations that would serve as a basis for supporting a citation for a "repeated" violation. The Ninth Circuit, in *Todd Shipyards Corp. v. Secretary of Labor*, 566 F.2d 1327 (9th Cir. 1977) (*per curiam*), has held that one prior violation will support a repeated violation citation where a subsequent violation of the same character has occurred. *Id.* at 1331. This is to be contrasted with the position taken by the Third Circuit in *Bethlehem Steel Corp. v.*

or willful.⁹⁰⁹ Decisions of the courts and the Commission have established three elements of a willful violation. The Secretary must establish that the employer (1) had knowledge of the standard or other requirement of the Act,⁹¹⁰ (2) committed a subsequent violation, and (3) committed the violation voluntarily with either intentional disregard of the standard or plain indifference to the Act's requirements.⁹¹¹

During the survey period, the Ninth Circuit decided *National Steel and Shipbuilding Co. v. OSHRC*,⁹¹² in which the court was required to define *willful* as used in the Act. National Steel had petitioned the court to review an order of the Commission which had found that National Steel had willfully violated a safety standard contrary to section 5(a)(2) of OSHA.⁹¹³ National Steel argued that the Third Circuit's definition of willfulness, as enunciated in *Frank Irey Jr., Inc. v. OSHRC*,⁹¹⁴ should apply. In *Irey*, the Third Circuit adopted a definition of willfulness much more stringent than that used in other circuits which have addressed the issue.⁹¹⁵ The Third Circuit requires that the Secretary show a "flaunting" of the Act in order to sustain a finding of a willful violation.⁹¹⁶

Rejecting the Third Circuit's view, the Ninth Circuit held that the Commission is not required to find that an employer had an evil motive before it can find a willful violation.⁹¹⁷ The *National Steel* court pointed out that the majority of the circuits do not follow the *Irey* defi-

OSHRC, 540 F.2d 157 (3d Cir. 1976). In *Bethlehem Steel*, the court held that two violations of the same character without more could not be the basis for a repeated violation citation. *Id.* at 162; see also *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 839 (4th Cir. 1978) (Fourth Circuit specifically rejects Third Circuit definition of repeated violation and aligns itself with the Ninth Circuit view).

909. 29 U.S.C. § 666(a) (1976); see *supra* note 908. OSHA does not define what acts constitute a willful violation.

910. *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777, 779 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976).

911. *Id.*; accord *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 319 (5th Cir. 1979).

912. 607 F.2d 311 (9th Cir. 1979).

913. 29 U.S.C. § 654(a)(2) (1976).

914. 519 F.2d 1200 (3d Cir. 1975), *aff'd on other grounds sub nom.* *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).

915. The *Irey* court stated that "[w]illfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply." 519 F.2d at 1207. Other circuits have not followed this definition, see, e.g., *F.X. Messina Constr. Corp. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974) (bad purpose not required to sustain citation for willful violation).

916. 519 F.2d 1207; see *supra* note 909.

917. 607 F.2d at 315-16.

tion of willful.⁹¹⁸ The court reasoned that the Third Circuit's concern that a less restrictive definition would not preserve the distinction between willful and serious violations was more apparent than real. The court pointed out that:

"To prove a willful violation, the Secretary must show that the employer acted voluntarily, with either intentional disregard of or plain indifference to OSHA requirements [whereas] . . . [t]he gravamen of a serious violation is the presence of a 'substantial probability' that a particular violation could result in death or serious physical harm."⁹¹⁹

It is therefore clear that in the Ninth Circuit, as in the majority⁹²⁰ of the circuits, a showing of evil motive is not required to sustain a finding of a willful violation.⁹²¹ On that basis, the Ninth Circuit affirmed the Commission's finding that National Steel willfully violated the OSHA safety standard in question.⁹²²

918. *Id.* at 314-15.

919. *Id.* at 315 (quoting *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318-19 (5th Cir. 1979) (footnote omitted)).

920. The other circuits which share this view are the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits. *See, e.g.*, *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 317-19 (5th Cir. 1979); *Empire-Detroit Steel Div. v. OSHRC*, 579 F.2d 378, 385 (6th Cir. 1978); *Western Waterproofing Co. v. Marshall*, 576 F.2d 139, 142-43 (8th Cir. 1978), *cert. denied*, 435 U.S. 965 (1979); *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777, 779-81 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976); *United States v. Dye Constr. Co.*, 510 F.2d 78, 81-82 (10th Cir. 1975); *F.X. Messina Constr. Corp. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974).

921. In *Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303 (D.C. Cir. 1978), the D.C. Circuit refused to be drawn into the definitional controversy. The court suggested that the *Irey* definition represented only a "difference in emphasis." "[I]ntentional disregard of, or plain indifference to, OSHA regulations could well be considered an 'obstinate' refusal to comply." *Id.* at 1305.

922. 607 F.2d at 317. Moreover, the court indicated in the instant case that, based on the findings of the administrative law judge in the lower proceedings, it was the court's belief that the Commission would have found willfulness even if the *Irey* standard had been applied. *Id.* at 316 n.7.