3-1-1983

Ninth Circuit Survey—Labor Law in the Ninth Circuit: Recent Developments

Recommended Citation

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LABOR LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS

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I. Administration of the Act

A. Jurisdiction

1. Affecting commerce

In enacting the National Labor Relations Act (NLRA), Congress intended to exercise the full extent of its commerce power in regard to both representation proceedings,1 and unfair labor practice cases.2 The Act, therefore, specifies that the National Labor Relations Board (NLRB) has jurisdiction so long as a business is in a class of activity

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that as a whole "affects commerce." The "affects commerce" test, unlike the "in commerce test," does not require a specific showing of a connection between the particular employer and interstate commerce. For example, an intrastate employer who sells merchandise to an employer engaged in interstate commerce is subject to the Board's jurisdiction, even though the merchandise never leaves the state. Jurisdiction will, however, attach when a showing is made that the employer's business generates an amount of interstate commerce that rises above the "de minimus" level.

In *NLRB v. First Termite Control Co.*, the Board petitioned for enforcement of its order requiring a California termite and pest control company (the employer) to cease and desist from committing certain unfair labor practices. The employer contended that the enforcement order should be denied because the evidence used to establish the jurisdictional requirement of interstate commerce was improperly admitted in a hearing before an administrative law judge (ALJ).

In order to establish the requisite amount of interstate commerce, the NLRB introduced evidence that the employer bought approximately $20,000.00 worth of lumber from a California lumber company. The NLRB further introduced a freight bill, prepared by Southern Pacific Railroad, which showed that a substantial amount of the lumber purchased by the lumber company came from outside California. However, the custodian of records for Southern Pacific was not called as a witness. The only witness called to support the admission of the freight bill was the lumber company's bookkeeper, who testified that she had received the freight bill and had paid it. The freight bill was introduced as a writing in order to prove the truth of the statement that the lumber came from another state to California. The court ruled, however, that the challenged freight bill was inadmissible.

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3. Section 152(7) of the Act provides: "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U.S.C. § 152(7) (1976).
5. See *Usery v. Lacy*, 628 F.2d 1226, 1228 (9th Cir. 1980).
8. 646 F.2d 424 (9th Cir. 1981) (amended opinion).
9. Id. at 425.
10. Id.
11. Id. at 425-26.
12. Id. at 426.
13. Id.
hearsay evidence. Furthermore, the court found that the lumber
company's bookkeeper was not the custodian of the record or otherwise
qualified as a witness with regard to the freight bill, as required by Rule
803(6) of the Federal Rules of Evidence. The court, therefore, held
that the jurisdictional requirement of interstate commerce had not been
established. Consequently, it denied enforcement of the NLRB's order
and remanded for an evidentiary hearing.

In NLRB v. Peninsula Association for Retarded Children &
Adults, the NLRB sought enforcement of its order directing a non-
profit organization (the employer) to bargain with a union. The em-
ployer solicited donations of merchandise which it sold to Thrift Vil-
lage, Inc., who in turn sold the merchandise to the public at its two
California stores.

To demonstrate jurisdiction, the Board relied on the fact that
checks for the merchandise sold to Thrift Village by the employer were
mailed from Renton, Washington; that Thrift Village had stores in
Washington, Oregon, and California; and that there was some evidence
that the Renton office was Thrift Village's main office. The record
did not indicate where Thrift Village was incorporated, whether it
shipped merchandise interstate, whether the local operations were con-
trolled by the Renton office or, conversely, whether they were wholly
independent.

The Peninsula Association court ruled that even if the facts sup-
ported the exercise of jurisdiction over Thrift Village, the employer's
link to interstate commerce was too attenuated to support jurisdic-
tion. The Board merely demonstrated that the employer sold mer-
chandise for local sale to a customer who may or may not have been
involved in interstate commerce. The court distinguished NLRB v.
Daboll\(^\text{22}\) and \textit{NLRB v. Smith},\(^\text{23}\) which subjected multistate operations exercising some control over their various outlets to NLRB jurisdiction. This distinction was made on the ground that there was insufficient evidence to show that Thrift Village exercised control over any of its outlets.\(^\text{24}\)

In \textit{NLRB v. Maxwell},\(^\text{25}\) the Ninth Circuit determined that an employer who purchased $6,000.00 worth of goods originating in other states was subject to NLRB jurisdiction.\(^\text{26}\) The particular goods were identified and shown to have been handled only by the importer before being delivered to the employer.\(^\text{27}\) A $1,920.00 order was procured by a local dealer from an out-of-state supplier and was delivered to the employer without the importer's having altered or modified the goods in any way.\(^\text{28}\) Insurance policies from out-of-state companies were taken out on the business by the employer through local agents.\(^\text{29}\)

The Maxwell court declined to follow a 1949 Tenth Circuit case wherein it was held that purchases in interstate commerce worth $6,000.00 did not give a district court jurisdiction under the Labor Management Relations Act (LMRA).\(^\text{30}\) Instead, the court relied on a number of more recent cases in which purchases in interstate commerce worth less than $6,000.00 were not considered de minimus and, therefore, supported jurisdiction.\(^\text{31}\)

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2. Employee and employer definitions

Section 2(3) of the Act\(^\text{32}\) provides that the term "employee" "include[s] any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include \textit{inter alia} . . . any indi-

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\(^{22}\) 216 F.2d 143 (9th Cir.), \textit{cert. denied}, 348 U.S. 917 (1954).
\(^{23}\) 209 F.2d 905 (9th Cir. 1954).
\(^{24}\) 627 F.2d at 204 n.1.
\(^{25}\) 637 F.2d 698 (9th Cir. 1981).
\(^{26}\) \textit{Id.} at 703-04.
\(^{27}\) \textit{Id.} at 704.
\(^{28}\) \textit{Id.}
\(^{29}\) \textit{Id.}
\(^{31}\) 637 F.2d 703 (citing NLRB v. Inglewood Park Cemetery Ass'n, 355 F.2d 448, 450 (9th Cir.) ($3,000.00 sufficient for jurisdiction), \textit{cert. denied}, 384 U.S. 951 (1966)). Von Solbrig Hosp., Inc. v. NLRB, 465 F.2d 173, 174 (7th Cir. 1972) ($1,925.00 sufficient); NLRB v. Aurora City Lines, 299 F.2d 229, 231 (7th Cir. 1962) ($2,000.00 sufficient)). \textit{Contra} Hiatt v. Schlecht, 400 F.2d 875, 877 (9th Cir. 1968) (no district court jurisdiction under LMRA when record only showed that contractor used plumbing fixtures, manufactured out-of-state, worth $5,600.00 to $8,000.00).
individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As indicated, “supervisors” are generally excluded from the coverage of the NLRA. The functions listed in section 2(11) are to be read in the disjunctive. The existence of any one of the powers, regardless of the frequency with which it is exercised, is sufficient to confer supervisory status upon an employee. The “independent judgment” requirement is to be read in the conjunctive. Thus, the exercise or existence of any one of the enumerated powers combined with “independent judgment” is sufficient to make an individual a supervisor.

“Managerial” employees are neither statutorily defined nor expressly excluded from the Act. Nevertheless, such employees have been: (1) judicially defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer,” and (2) judicially excluded from the Act. The goal in excluding managerial employees is to ensure that employees who exercise discretionary authority on behalf of the employer will not

34. See 29 U.S.C. § 164(a) (1976) for the limited protection provided supervisors.
36. Laborers & Hod Carriers Local 341 v. NLRB, 564 F.2d 834, 837 (9th Cir. 1977).
37. NLRB v. Harmon Indus., 565 F.2d 1047, 1049 (8th Cir. 1977) (infrequent exercise of supervisory authority does not, alone, diminish supervisory status of a supervisor); NLRB v. Gray Lines Tours, Inc., 461 F.2d 763, 764 (9th Cir. 1972) (per curiam) (actual existence of supervisory authority rather than its exercise is determinative). A reviewing court should show deference to the Board's determination as to supervisory status because the distinctions to be drawn between gradations of authority are “so infinite and subtle that of necessity a large measure of discretion is involved.” NLRB v. Adrian Eng'g Beneficial Ass'n v. Interlake Co., 370 U.S. 173, 179 n.6 (1962).
38. Congress regarded these individuals as so clearly outside the Act that no specific exclusionary provision was thought necessary. See NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980).
divide their loyalty between employer and union.\footnote{41}

In \textit{Walla Walla Union-Bulletin v. NLRB},\footnote{42} the Ninth Circuit held that substantial evidence supported the Board’s conclusion that the photo, sports, and wire editors of a newspaper were not supervisory personnel and were, therefore, properly included in a bargaining unit.\footnote{43} Additionally, the court held that the editorial page editor of the newspaper was a managerial employee and, therefore, was excluded from the Act’s coverage.\footnote{44}

The photo editor of the Walla Walla Union-Bulletin did not attend monthly managerial meetings. He was involved with the hiring of a summer intern, but only to the extent of making a recommendation to the managing editor, and he did not supervise or discipline other employees. The sports editor handled no employee grievances and received overtime pay only when authorized by the managing news editor. Finally, the wire editor selected news items and passed them on to the news editor for daily discussion and was aided only by a rotating staff assistant in editing and laying out articles and photographs. The court concluded that the evidence did not support the finding that these three editors were granted supervisory authority.\footnote{45}

Although the Board determined that the editorial page editor exercised no supervisory authority,\footnote{46} the court found that this editor should have been excluded from the bargaining unit. He attended meetings with other members of an editorial board that approved, by majority vote, editorial topics. His vote carried the same weight as other mem-

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\textit{Id.} at 688-89. In NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), the Supreme Court concluded that all managerial employees, and not just those in positions susceptible to conflicts of interest in labor relations, were excluded from the protections of the Act. \textit{Id.} at 289. In NLRB v. Yeshiva University, 444 U.S. 672 (1980), the Supreme Court held that university faculty members were managerial employees and, thus, were excluded from the protections of the Act. \textit{Id.} at 679. In \textit{Yeshiva}, the Board argued that the faculty members were not aligned with management because they were expected to exercise “independent professional judgment” while participating in academic governance. \textit{Id.} at 684. The Board contended that because of this independence, there was no danger of divided loyalty and no need for the managerial exclusion. \textit{Id.} The Court found, however, that the faculty’s professional interests could not be separated from those of the institution: “Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university’s objectives are met.” \textit{Id.} at 688. Additionally, the Court emphasized that the independence enjoyed by the faculty would actually increase the chance of divided loyalty between the faculty and its employer. \textit{Id.} at 689-90.

\textit{Id.} at 614-15. The NLRB is empowered to determine the composition of an appropriate bargaining unit. 29 U.S.C. \S 159(b) (1976).

\textit{Id.} at 613.

\textit{Id.} at 614.

\textit{Id.} at 612.
bers of the editorial board, all of whom were management representatives. The court found that his responsibilities placed him in a position of potential conflict of interest between the employer and the union and, therefore, he should have been properly classified as management.47

In NLRB v. Circa Resorts, Inc.,48 the Ninth Circuit found that a stagehand at the Circus-Circus Hotel and Casino in Reno, Nevada, was an employee, and not a supervisor, and could be included in a bargaining unit of stagehands.49 The court ruled that "[a]n employee who gives minor orders or directives is not necessarily a supervisor for purposes of the Act."50

In Hudgens v. NLRB,51 the Supreme Court held that the owner of a shopping center was a statutory "employer" with respect to picketers employed by a company that operated a shoe store in the shopping center.52 In addition, the Court noted that such a statutory "employer" may violate section 8(a)(1) of the Act with respect to employees other than its own.53

Similarly, in Seattle-First National Bank v. NLRB,55 the Ninth

47. Id. at 613; see Illinois State Journal-Register, Inc. v. NLRB, 412 F.2d 37 (7th Cir. 1969). The Journal-Register court held that district circulation managers, who oversaw the distribution of newspapers, but who were limited to making recommendations to their employer with respect to policies and future plans, were not managerial employees. Id. at 42. The court emphasized that the district managers neither formulated nor effectuated the employer's policies nor were they so closely aligned with management as to place them in a position of potential conflict of interest between their employer and their fellow workers. Id.

48. 646 F.2d 403 (9th Cir. 1981).
49. Id. at 406.
50. Id.; see Kaiser Eng'rs v. NLRB, 538 F.2d 1379, 1383-84 (9th Cir. 1976); NLRB v. Swift, 240 F.2d 65, 66 (9th Cir. 1957) (plant clerks who had no power to "hire, discharge, assign or rate employees" were not supervisors within the meaning of the Taft-Hartley Act); accord NLRB v. Doctor's Hosp., Inc., 489 F.2d 772, 776 (9th Cir. 1973) (nurses who give direct orders to auxiliary personnel and occasionally use independent judgment not necessarily part of management or "supervisors" under Act).
52. Id. at 510 n.3.

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 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.

54. 424 U.S. at 510 n.3 (citing Austin Co., 101 N.L.R.B. 1257, 1258-59 (1952)).
55. 651 F.2d 1272 (9th Cir. 1980).
Circuit found that a bank, the owner of a fifty story building, was an employer under the Act. The bank brought a trespass charge against union members who had picketed a restaurant in the building. The union, in turn, filed an unfair labor practice charge against the bank for threatening to have the picketers arrested. The Seattle-First court found that because section 2(3) of the Act does not limit the definition of employee to the employees of a particular employer, the bank was an employer under section 8(a)(1) with respect to the picketers, and thus was subject to an unfair labor practice charge brought on behalf of the picketers.

3. Discretionary jurisdiction

Although the Board has broad statutory jurisdiction over labor disputes “affecting commerce,” under 29 U.S.C. section 164(c) the Board may decline to exercise jurisdiction. Pursuant to this discretionary power, the Board has issued jurisdictional standards in an “effort to reduce the number of complaints reaching it, and in order to make clear the objectivity of its decision to exercise its... jurisdiction in a particular case.” The Board has applied these standards in deciding to treat closely related business concerns as a single employer. Moreover, the Board has considerable discretion in deciding whether to accept an arbitrator’s award and to decline to exercise jurisdiction over an unfair labor practice charge involving a contractual dispute. The Board has also set minimum standards, based on the yearly gross income of an enterprise, for educational institutions and day-care centers.

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56. Id. at 1273 n.2.
58. 651 F.2d at 1273 n.2.
60. 29 U.S.C. § 164(c)(1) (1976) provides in pertinent part:
   The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.
64. Stephenson v. NLRB, 550 F.2d 535, 537 (9th Cir. 1977).
65. The limit for educational institutions is $1,000,000.00. 29 C.F.R. § 103.1 (1980).
66. The limit for day-care centers is $250,000.00. See Salt & Pepper Nursery School No. 2, 222 N.L.R.B. 1295, 1296 (1976).
a. single employer status

Single employer status is characterized as an absence of an "arms length relationship among unintegrated companies." The criteria for determining whether two or more distinct business entities may be treated as a "single employer" for purposes of the Act are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. No single factor is controlling, nor need all criteria be present.

In NLRB v. Associated General Contractors of California, Inc., the Ninth Circuit held that an association of general contractors was required to disclose to a union a roster of the association's membership. The union was concerned primarily with employers changing their names in an attempt to avoid a collective bargaining agreement. The union introduced evidence of common ownership of some union and open shop employers. Although the court noted that common ownership alone would not bind the open shop employers to the agreement and was only one factor to be considered, it found that under a discovery standard, a showing of common ownership was sufficient to permit further investigation. Consequently, it ordered the association to disclose the membership roster.

In NLRB v. Cofer, the Ninth Circuit deviated from its past reliance on the four criteria in determining whether to treat closely related concerns as a single employer. Mr. and Mrs. Cofer and Travelodge International, Inc. (Travelodge) executed a joint venture agreement for the joint operation of the Marysville Travelodge in California. The Cofers and Travelodge each owned a fifty percent interest in the motel. The Board had previously imposed $50,000.00 annual gross

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68. 21 N.L.R.B. Ann. Rep. 14-15 (1956); see NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 384 (9th Cir. 1979); NLRB v. Transcontinental Theaters, Inc., 568 F.2d 125, 129 (9th Cir. 1978); Sakrete of N. Cal., Inc. v. NLRB, 332 F.2d 902, 905 n.4 (9th Cir. 1964), cert. denied, 379 U.S. 961 (1965).
69. NLRB v. Welcome-Am. Fertilizer Co., 443 F.2d 19, 21 (9th Cir. 1971).
70. 533 F.2d 766 (9th Cir. 1980).
71. Id. at 773.
72. Id. at 769.
73. Id. at 770-71.
74. Id. at 771.
75. Id. at 771, 773.
76. 637 F.2d 1309 (9th Cir. 1981).
77. Id. at 1312.
78. Id.
income as the minimum jurisdictional standard for the hotel industry.\textsuperscript{79} This amount could not be met by the motel operation itself or by combining the income from the motel operation with the income from other Cofer ventures.\textsuperscript{80} However, the minimum standard would be met if Travelodge and the Cofers were counted as a single employer.\textsuperscript{81}

The court upheld the Board's jurisdictional determination that the Cofers and Travelodge were a single employer even though that determination was not expressly based on any of the four "single employer" factors.\textsuperscript{82} The court noted that it was unclear whether the Board ever intended these factors to constitute the rule for partnership cases.\textsuperscript{83} Moreover, the Board's heavy reliance upon the joint venture agreement, and especially upon a contractual requirement that Travelodge be consulted prior to any union dealings by the motel, provided a sufficient justification for the finding of single employer status.\textsuperscript{84}

Although the four factors were not explicitly considered, the Cofer decision demonstrates that the Ninth Circuit is inclined to find single employer status if there is a showing of centralized control of labor relations. Of the four factors, centralized control of labor relations may be the most reliable in demonstrating operational integration of two or more business concerns. Thus, any contract provision which gives one employer control over another's labor relations may lead to a determination that the two employers are to be treated as one for purposes of the Act.

\textbf{b. deferral to arbitration}

Arbitration does not affect the Board's jurisdiction to adjudicate unfair labor practices.\textsuperscript{85} However, the Board has considerable discretion whether to accept an arbitrator's award and decline to exercise authority over an alleged unfair labor practice.\textsuperscript{86}

In Spielberg Manufacturing Co.,\textsuperscript{87} the Board first articulated a deferral standard with respect to an arbitrator's award. Under Spielberg, the Board will defer to arbitration if: (1) the proceedings

\textsuperscript{79} Florida Hotel of Tampa, 124 N.L.R.B. 261 (1959).
\textsuperscript{80} 637 F.2d at 1312.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 1312-13.
\textsuperscript{83} Id. at 1312.
\textsuperscript{84} Id. at 1312-13.
\textsuperscript{85} Hawaiian Hauling Serv. v. NLRB, 545 F.2d 674, 675-76 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977).
\textsuperscript{86} Stephenson v. NLRB, 550 F.2d 535, 537 (9th Cir. 1977).
\textsuperscript{87} 112 N.L.R.B. 1080 (1955).
appear to be fair and regular; (2) all parties have consented to be bound by the arbitrator's decision; and (3) the award is not repugnant to the purposes and policies of the Act. In *Stephenson v. NLRB*, the Ninth Circuit approved two additional requirements: (1) the arbitral tribunal must have *clearly decided* the unfair labor practice issue; and (2) the arbitral tribunal must have decided only those issues within its competence. It is clear that the *Stephenson* court intended these requirements to supplement those set forth in *Spielberg*. 

*Clearly decided*, in the context of *Stephenson*, means that the arbitrator's decision must specifically address the statutory issue. The "competence" requirement arises from the proposition that deference is

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88. *Id.* at 1082. These criteria for deferral were clarified in *International Harvester Co.*, 138 N.L.R.B. 923, 927, enforced *sub. nom.* *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964), and were endorsed by the Supreme Court in *Carey v. Westinghouse Corp.*, 375 U.S. 261, 270-71 (1964).

89. 550 F.2d 535 (9th Cir. 1977).

90. *Id.* at 538. The *Stephenson* court followed *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974), in adopting these additional criteria. The *Banyard* criteria, limiting Board deferral to arbitration, were a reaction to the Board's ruling in *Electronics Reprod. Serv. Corp.*, 213 N.L.R.B. 758 (1974). In *Electronics Reproduction*, the Board recognized that parties were purposely withholding evidence of unfair labor practices in proceedings before the arbitrator to assure a second hearing before the Board. *Id.* at 761. To foreclose this practice, the Board declared that it would defer to an arbitral award even where there was no indication that the statutory unfair labor practice issue had been presented to or decided by the arbitrator. *Id.* at 762. In *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 147 (1980), the Board expressly overruled *Electronics Reproduction*. The Board stated:

Our experience with *Electronics Reproduction* has led to the conclusion that it promotes the statutory purpose of encouraging collective-bargaining relationships, but derogates the equally important purpose of protecting employees in the exercise of their rights under Section 7 of the Act.

The Board can no longer adhere to a doctrine which forces employees in arbitration proceeding [sic] to seek simultaneous vindication on private contractual rights and public statutory rights, or risk waiving the latter.

In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. *Id.* at 146-47.

The Board has, in effect, reverted to the *Spielberg* doctrine, which has been interpreted to include the limitation that the Board will not defer to arbitration unless the statutory unfair labor practice issue is both presented to and considered by the arbitrator. *See Yourga Trucking Inc.*, 197 N.L.R.B. 928, 929 (1972); *Aireco Indus. Cases*, 195 N.L.R.B. 676, 677 (1972). As a result, parties may again withhold their statutory claims from the arbitrator to gain a second review by the Board.

91. 550 F.2d at 538 ("We approve the addition of the two requirements, and the resulting five pronged test suggested in *Banyard*.").

92. *Id.* at 538 n.4. It is not necessary for the arbitrator to expressly review the statutory issue in a written memorandum if there is substantial proof that the unfair labor practice issue and evidence were expressly presented to the arbitrator and the arbitrator's resolution
appropriate only when there is a congruence between statutory and contractual issues. In other words, when an unfair labor practice rests on factual issues of contract interpretation, an arbitrator may be in a superior position to resolve the merits of the unfair labor practice. Likewise, when resolution of the unfair labor practice charge involves mainly factual rather than statutory issues, the arbitrator is in as good a position as the Board to make a correct decision.

The Ninth Circuit addressed Board deferral to arbitration in \textit{NLRB v. Max Factor & Co.} and in \textit{Ad Art, Inc. v. NLRB}. In \textit{Max Factor}, a discharged employee filed unfair labor practice charges under section 8(a)(1) and (3) of the Act. Thereafter, the union grieved the discharge under a collective bargaining agreement and proceeded to arbitration. After a hearing on the merits of the unfair labor practice charges, the ALJ found that the employer had violated the Act and ordered reinstatement. Although the ALJ's decision was before the Board, the arbitrator, nonetheless, issued a decision sustaining the discharge. The arbitrator's opinion did not discuss the employee's statutory rights, but noted only that unfair labor practice charges were filed with the Board. No statutory provisions, court cases or Board decisions were cited.

The Board denied the employer's request to defer to the arbitrator's decision and adopted the ALJ's decision. The Board stated three reasons for refusing to defer: (1) deferral to the arbitral award would engender a result repugnant to the purposes and policies of the Act (the Board supplied no analysis to support this contention); (2) the arbitrator did not pass on the unfair labor practice aspect of the case and, therefore, deferral to the arbitration award would not effectuate protection of section 7 rights; and (3) deferral would be unwarranted regardless of the merits under \textit{Spielberg} because the arbitration of that issue is consistent with the Act. \textit{Id.}; see also \textit{Bloom v. NLRB}, 603 F.2d 1015, 1021 (D.C. Cir. 1979).

\textbf{93.} 550 F.2d at 538 n.4.
\textbf{94.} \textit{Id.}; see \textit{Bloom v. NLRB}, 603 F.2d 1015, 1021 (D.C. Cir. 1979).
\textbf{95.} 550 F.2d at 538 n.4; \textit{see} \textit{Collyer Insulated Wire}, 192 N.L.R.B. 837, 842 (1971).
\textbf{97.} 645 F.2d 669 (9th Cir. 1981).
\textbf{98.} 640 F.2d at 199.
\textbf{99.} \textit{Id.} at 199-200.
\textbf{100.} \textit{Id.} at 200.
\textbf{101.} \textit{Id.}
\textbf{102.} \textit{Id.}
\textbf{103.} \textit{Id.} at 202.
\textbf{104.} \textit{Id.} at 202-03.
hearing took place after the hearing before the ALJ and the arbitrator's decision was issued after that of the ALJ.\textsuperscript{105}

The \textit{Max Factor} court termed \textit{Spielberg} the "fountainhead of the deferral policy"\textsuperscript{106} and held that the Board's first reason for refusing deferral, that deferral would be repugnant to the Act, was in itself sufficient to preclude deferral.\textsuperscript{107} The court declined to follow the Third Circuit's decision in \textit{NLRB v. Pincus Brothers Inc.},\textsuperscript{108} wherein it was held that the Board abused its discretion in refusing to defer to an arbitral award. An employee's conduct resulting in discharge was "arguably unprotected" under the Act and, therefore, deferral could not be based on the "clearly repugnant" criterion of \textit{Spielberg}.\textsuperscript{109} Instead, the \textit{Max Factor} court concluded that: (1) a court should not interpret the \textit{Spielberg} criterion differently than the Board itself has, nor differently than the Board has given litigants reason to expect it would be interpreted; (2) the "arguably unprotected" standard is inherently imprecise and burdensome because before the Board could exercise its statutory jurisdiction, it would have to rule out every arguable rationale for finding the employee's conduct unprotected; and (3) enforcing the Act's protections may be so important as to outweigh the interest in encouraging arbitration, even where such conduct is arguably unprotected.\textsuperscript{110}

In reaching its decision to uphold the Board's refusal to defer, the court found it unnecessary to rely on the Board's second reason for refusing deferral, i.e., that the arbitrator did not pass on the unfair la-
Labor practice aspects of the case. Instead, the court strictly adhered to the Spielberg criteria and, in dicta, questioned the necessity of the two additional requirements for deferral adopted by the Stephenson majority. The Max Factor court characterized Stephenson as “holding that deferral was improper even though the Spielberg criteria were met, because the arbitrator had not specifically considered and decided the unfair labor practice issue.” The court reasoned that if the arbitral award is not clearly repugnant to the Act, then deferral should not be precluded because of uncertainty about whether the arbitrator intended to decide the statutory unfair labor practice issues.

The Max Factor court also noted that the policy announced in Spielberg does not depend upon whether the arbitrator's hearing and award preceded the ALJ’s hearing and decision. The court reasoned that “[i]f the sequence of proceedings were determinative, ‘those who would prefer a Board decision would need only to stall the arbitration process.’”

In Ad Art, Inc. v. NLRB, the Ninth Circuit again upheld the Board’s refusal to defer to an arbitration award. In Ad Art, the union grieved an employee discharge under a collective bargaining agreement and demanded arbitration. The arbitrator found the discharge “just and lawful” under the collective bargaining agreement. The Board adopted the ALJ’s recommendation that it refuse to defer to the arbitral decision. The ALJ’s review of the arbitration transcript and decision disclosed that the issue of whether the employee’s activi-
ties were protected under section 7 of the Act\textsuperscript{122} was neither before the tribunal nor decided by it.\textsuperscript{123} The Board also adopted the ALJ's conclusion that the employer violated section 8(a)(1) by discharging the employee for exercising his section 7 rights,\textsuperscript{124} and implicitly found the arbitral award repugnant to the purposes and policies of the Act. The award, therefore, did not meet the third \textit{Spielberg} criterion.\textsuperscript{125} The court held that the Board had correctly applied the \textit{Spielberg} criteria.\textsuperscript{126}

The \textit{Spielberg} criteria were further defined in \textit{Suburban Motor Freight}\textsuperscript{127} to mean that the statutory unfair labor practice issue must be both presented to and considered by the arbitrator in order for there to be a deferral.\textsuperscript{128} The \textit{Ad Art} court found substantial evidence that the arbitrator was not clearly presented with and did not clearly decide the statutory unfair labor practice issue.\textsuperscript{129} The court discussed \textit{Stephenson}'s "clearly decided" requirement that the arbitrator's decision specifically deal with the statutory issue.\textsuperscript{130} The \textit{Ad Art} court also noted that this requirement can be viewed as either an independent requirement as \textit{Stephenson} intended, or as an extension of the \textit{Spielberg} criteria, especially those concerning fair and regular proceedings and results repugnant to the Act.\textsuperscript{131} The court found no fault with the Board's application of this requirement from the latter perspective.\textsuperscript{132} Furthermore, the court held that even if the arbitral issue were mainly factual,\textsuperscript{133} the Board might refuse to defer to the arbitral award if the arbitrator failed to consider statutory issues and the decision differed from one appropriate under the Act.\textsuperscript{134}

Although both the \textit{Max Factor} and \textit{Ad Art} courts found the Board's refusal to defer to an arbitral award proper, the analysis in each case differed. The \textit{Max Factor} court found that the Board's independent determination that an arbitral award was repugnant to the Act was sufficient to preclude deferral.\textsuperscript{135} If, however, the arbitral

\begin{footnotesize}
\textsuperscript{123} 645 F.2d at 674.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 676.
\textsuperscript{126} Id. at 677.
\textsuperscript{127} 247 N.L.R.B. 2 (1980); see supra note 90.
\textsuperscript{128} Id. at 146-47.
\textsuperscript{129} 645 F.2d at 677.
\textsuperscript{130} Id. at 677.
\textsuperscript{131} Id. at 677 n.7.
\textsuperscript{132} Id.
\textsuperscript{133} See supra notes 93-95 and accompanying text.
\textsuperscript{134} 645 F.2d at 677 (citing Max Factor, 640 F.2d at 204).
\textsuperscript{135} 640 F.2d at 203-04.
\end{footnotesize}
award was not repugnant to the Act, failure by the arbitrator to decide
the statutory unfair labor practice issue would not preclude deferral. Conversely, the Ad Art court upheld the Board's decision not to defer
because the arbitrator was not clearly presented with and did not clearly decide the statutory unfair labor practice issue. In effect, the Ad Art court adopted Stephenson's "clearly decided" requirement; the Max Factor court did not.

c. day care centers

The Board has established a jurisdictional standard of $250,000.00
gross annual income for disputes involving both profit and non-profit
day-care centers. Similarly, the Board has established a jurisdic-
tional standard of $1,000,000.00 gross annual revenues for disputes in-
volving profit and non-profit educational institutions.

In Young World, Inc., although the Board held that the educa-
tional institution standard was not applicable to an employer's day-
care center operations, it did not establish a jurisdictional standard for
day-care centers as a class. The Board did, however, subject the
employer to NLRB jurisdiction because it met the "affecting com-
merce" test of section 10(a) of the Act. The following year, in Salt &
Pepper Nursery School No. 2, the Board established the $250,000.00
standard for day-care centers.

In Young World, the Board distinguished the employer's day-care
center operations from those of an educational institution. The Board
emphasized that the centers in question concentrated not on a formal-
ized educational program, but on custodial care which incorporated
learning experiences for young children. The centers cared for chil-
dren aged two and one-half years through eight years and were open
from 6:30 a.m. to 6 p.m. to accommodate working parents. The centers
cared for children of school age both before and after school. More-
over, in contrast to public school systems, the centers did not require

136. Id. at 204; see supra notes 112-14 and accompanying text.
137. 645 F.2d at 677.
140. 216 N.L.R.B. 520 (1975).
141. Id. at 521.
143. 222 N.L.R.B. 1295 (1976).
144. Id. at 1296.
145. 216 N.L.R.B. at 521.
that their teachers be formally educated.\textsuperscript{146}

In past decisions, the Board had exempted employers from NLRB jurisdiction because of their relationship to public entities.\textsuperscript{147} For example, in \textit{Pennsylvania Labor Relations Board},\textsuperscript{148} the Board refused to assert jurisdiction over a non-profit corporation operating a day-care center even though the corporation's income exceeded $1,000,000.00.\textsuperscript{149} The Board opined that because the employer's operations acted as a "head start" program for preschool-age minority children, the employer was an adjunct to the public school system of Pittsburgh.\textsuperscript{150} Thus, the employer shared the school system's exemption from NLRB jurisdiction.\textsuperscript{151} Similarly, in \textit{Rural Fire Protection Co.},\textsuperscript{152} the Board found that a privately owned fire prevention corporation shared a city's exemption from the Board's jurisdiction because the employer's services were intimately related to the exempted operations of the city.\textsuperscript{153}

In more recent decisions, however, the Board has ruled that it shall no longer decline jurisdiction solely because of the relationship between the purposes of the exempt entity and the nature of the services provided to it by an employer.\textsuperscript{154} Instead, the new test, set forth in \textit{National Transportation Service, Inc.}\textsuperscript{155} and \textit{D.T. Watson Home for Crippled Children},\textsuperscript{156} is simply "whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative."\textsuperscript{157}

In \textit{Golden Day Schools, Inc. v. NLRB},\textsuperscript{158} the Ninth Circuit deter-

\textsuperscript{146.} Id.
\textsuperscript{147.} \textit{E.g.}, Laurel Haven School for Exceptional Children, Inc., 230 N.L.R.B. 1197, 1198-99 (1977) (Board refused to assert jurisdictions over a learning center for learning-disabled children which supplemented and was adjunct to the public school systems of Illinois, Missouri, and Louisiana); Perkins School for the Blind, 225 N.L.R.B. 1293, 1294 (1976) (Board refused to assert jurisdiction over subject to direct control by state department of education); Mitchell School, Inc., 224 N.L.R.B. 1017, 1018 (1976) (Board refused to assert jurisdiction over school for handicapped children which was part of a municipal corporation specifically exempt from the Act); Center for Urban Educ., 189 N.L.R.B. 858, 859 (1971) (Board advised that it would refuse to assert jurisdiction over an employer engaged in research and development in aid of public school institutions).
\textsuperscript{148.} 209 N.L.R.B. 152 (1974).
\textsuperscript{149.} Id.
\textsuperscript{150.} Id.
\textsuperscript{151.} Id.
\textsuperscript{152.} 216 N.L.R.B. 584 (1975).
\textsuperscript{153.} Id. at 586.
\textsuperscript{155.} Id.
\textsuperscript{156.} 242 N.L.R.B. 1368, 1370 (1979).
\textsuperscript{157.} 240 N.L.R.B. at 565.
\textsuperscript{158.} 644 F.2d 834 (9th Cir. 1981).
mended that the Board did not abuse its discretion in asserting jurisdiction over a proprietary child care facility (the employer).\textsuperscript{159} The employer argued that it operated as an "adjunct" to the California school system, performing services "intimately connected" with the purposes of the school system.\textsuperscript{160} The court relied on \textit{Watson Home} and held that because the employer, and not the state of California, controlled hiring, firing, employee evaluation, pay raises, grievance procedures, and sick and vacation allowances, the employer "ha[d] sufficient control over the terms and conditions of employment of its employees to bargain effectively with a union representing their interests."\textsuperscript{161} The employer also argued that because its gross income was below the $1,000,000.00 standard for educational institutions, it should not be subject to the Board's jurisdiction.\textsuperscript{162} The court agreed with the ALJ's findings that: (1) the employer's annual income was more than $250,000.00, and (2) the employer was a day-care center whose operations were indistinguishable from those in \textit{Young World, Inc.}\textsuperscript{163}

d. concurrent jurisdiction

In \textit{San Diego Building Trades Council v. Garmon},\textsuperscript{164} the Supreme Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board."\textsuperscript{165} The \textit{Garmon} preemption doctrine, however, has been subject to exceptions.\textsuperscript{166} Section 301 of the Labor Management Relations Act (LMRA)\textsuperscript{167} al-

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\textsuperscript{159} Id. at 836.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 836-37 (citing Young World, Inc., 216 N.L.R.B. 520 (1975)).
\textsuperscript{164} 359 U.S. 236 (1959).
\textsuperscript{165} Id. at 245.
\textsuperscript{166} \textit{E.g.}, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 190-98 (1978) (state court has jurisdiction over trespass claim even though union's activity is arguably protected under the Act); Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962) (§ 301 action in district court not preempted under \textit{Garmon} rule); Bartenders & Culinary Workers Union, Local 340 v. Howard Johnson Co., 535 F.2d 1160, 1162 (9th Cir. 1976) (district court jurisdiction under § 301 to enforce a collective bargaining agreement not preempted by grant of Board jurisdiction over unfair labor practices).
\textsuperscript{167} 29 U.S.C. § 185 (1976). Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.
lows suits for violation of contracts between an employer and a labor organization, or between labor organizations, to be brought in the federal district courts.168

Suits regarding collective bargaining agreements brought in a federal district court under section 301 may involve conduct which is arguably protected or prohibited by section 7 or section 8 of the NLRA. In Smith v. Evening News Association,169 the Supreme Court held that even though an employer's conduct is conceded an unfair labor practice within the jurisdiction of the Board, the Board does not have exclusive jurisdiction over suits involving collective bargaining contracts which are brought or are held to arise under section 301.170 In such a situation, the Board and the district courts have concurrent jurisdiction.171 Thus, where Congress has affirmatively granted jurisdiction to the district courts, the district court and the NLRB share that jurisdiction.172

Federal court jurisdiction over a section 301 action involving a contract breach which is also an unfair labor practice is limited to the contract portion of the dispute.173 Federal courts may not act as the initial arbiters of unfair labor charges in section 301 actions, even when the unfair labor practice is offered as a defense to enforcement of a collective bargaining agreement.174 The Board, on the other hand, has primary jurisdiction to decide the merits of an unfair labor practice

168. Id.
170. Id. at 197.
171. Id.
172. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 297 (1971). Exceptions to the Garmon preemption doctrine are not limited to federal district court jurisdiction. In Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978), the Supreme Court recognized that a state action for trespass against union members may be "conduct that touches 'interests so deeply rooted in local feeling that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act.'" Id. at 195 (quoting Garmon, 359 U.S. at 244). However, the Supreme Court also stated: "The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." 436 U.S. at 202.
defense to enforcement of a collective bargaining agreement in a section 301 action.\textsuperscript{175} A conflict arising between any NLRB decision and either a court decision on the contract or an arbitral award may be resolved at a later date.\textsuperscript{176}

In \textit{Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc.},\textsuperscript{177} a contractor executed a collective bargaining agreement with a labor organization.\textsuperscript{178} The agreement contained an arbitration clause which provided that an arbitrator or a "Joint Judicial Committee," comprised of employee and employer representatives, would arbitrate any disputes or grievances.\textsuperscript{179} The labor organization filed a grievance, and the Joint Judicial Committee assessed damages against the contractor for monies due to the labor organization's trust funds and for liquidated damages under the collective bargaining agreement.\textsuperscript{180} The contractor then filed charges with the Board against the labor organization for unfair labor practices in violation of section 8(e) of the Act.\textsuperscript{181} While the contractor's charges were pending before the Board, the labor organization initiated an action in state court under section 301(a) to enforce the arbitral award.\textsuperscript{182} The enforcement suit was removed to a federal district court, which enforced the arbitral award and noted that the charges pending before the NLRB did not preclude relief because the Board and the federal courts had concurrent jurisdiction.\textsuperscript{183} The district court also stated that a subsequent finding by the Board that the labor organization had violated section 8(e) would not change the result in the court proceeding.\textsuperscript{184} The arbitrator's award was not based on the subsection of the contract which the con-

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\item \textsuperscript{175} Waggoner v. R. McGray, Inc., 607 F.2d 1229, 1236 (9th Cir. 1979).
\item \textsuperscript{176} Smith v. Evening News Ass'n, 371 U.S. 195, 197-98 (1962); Cannery Warehousemen v. Haig Berberian, Inc., 623 F.2d 77, 82 (9th Cir. 1980) (Choy, J., concurring); Waggoner v. R. McGray, Inc., 607 F.2d at 1236.
\item \textsuperscript{177} 639 F.2d 487 (9th Cir. 1980).
\item \textsuperscript{178} Id. at 488.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id. at 489.
\item \textsuperscript{181} Id. at 491; 29 U.S.C. § 158(e) (1976). Section 8(e) provides in pertinent part:
\begin{quote}
It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: \textit{Provided}, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .
\end{quote}
\item \textsuperscript{29} U.S.C. § 158(e) (1976) (emphasis in original).
\item \textsuperscript{182} 639 F.2d at 489.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id.
\end{itemize}
tractor contended to be in violation of section 8(e). Instead, the arbitrator based its award on a subsection of the contract which did not require the contractor "to cease or refrain from . . . doing business with any other person," as proscribed by section 8(e).\(^{185}\)

The *Maloney* court held that a district court may exercise jurisdiction "over an action to confirm an arbitrator's award based upon a collective bargaining agreement, even when such award presents a potential conflict with an NLRB decision."\(^{186}\) The court reiterated the rule that federal courts may not act as initial arbiters of unfair labor practice charges in section 301 actions even when the unfair labor practice is offered as a defense to enforcement of a collective bargaining agreement.\(^{187}\) The court affirmed the district court's confirmation of the arbitral award because: (1) the contractor had failed to demonstrate that the arbitrator's award was contrary to the agreement, and (2) the district court would have reached the same result even if it had found that the labor union had violated section 8(e).\(^{188}\)

**B. NLRB Procedures**

1. Election objections

Under section 9(c)(1) of the Act,\(^{189}\) when a petition has been properly filed alleging that a substantial number of employees wish to be represented by a union for collective bargaining, the Board shall investigate and may order an election and certify its result.

After the filing date of such a petition, the employer and labor organization may enter into a consent election agreement.\(^{190}\) The Board's Rules and Regulations provide for two types of consent election agreements.\(^{191}\) First, under section 102.62(a), the Regional Director\(^{192}\) determines the facts ascertained and the result after the consent

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185. *Id.* at 491-92, 492 n.6.
186. *Id.* at 490 (citing Waggoner v. R. McGray, Inc., 607 F.2d 1229, 1236 (9th Cir. 1979)).
187. 639 F.2d at 491.
188. *Id.* at 491-92.
191. Sections 102.62(a) and (b) each provide that a consent election agreement shall "include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote." 29 C.F.R. §§ 102.62(a), (b) (1981).
192. According to the Code of Federal Regulations, a "regional director" is: the agent designated by the Board as the regional director for a particular region, and shall also include any agent designated by the Board as officer-in-charge of a subregional office, but the officer-in-charge shall have only such powers, duties, and functions appertaining to regional directors as shall have been duly delegated to such officer-in-charge.
election has taken place. The director's rulings and determination of the result of the election are final, subject to review by the Board. Second, under section 102.62(b), the Regional Director conducts the election but the Board determines the facts ascertained and the result of the consent election. In this case, if objections to the election are filed with the Regional Director, that director shall prepare a report with recommendations concerning the objections and send it to the Board in Washington, D.C. At this time, a party may file exceptions to the report. If it appears to the Board that these exceptions raise substantial and material issues with respect to the conduct or result of the election, then the Board may order a hearing on the exceptions before a hearing officer. This officer shall then prepare a report with recommendations and send it to the Board for resolution of any outstanding issues.

The Board enjoys broad discretion in ruling upon election objections. Generally, the Board will only set aside an election if it determines that the objectionable conduct significantly impairs the fairness of the election process. Conversations in the polling area, for example, may have this effect. Sustained conversation, regardless of the content, between representatives of any party and voters waiting to cast ballots triggers the strict rule that a second election be held. However, chance, isolated, innocuous comment or inquiry by a representa-

195. 29 C.F.R. § 102.69(c) (1981).
196. 29 C.F.R. § 102.69(f) (1981); see Valley Rock Prods., Inc. v. NLRB, 590 F.2d 300, 302 (9th Cir. 1979); Heavenly Valley Ski Area v. NLRB, 552 F.2d 269, 271 (9th Cir. 1977); Alson Mfg. Aerospace Div. of Alson Indus., Inc. v. NLRB, 523 F.2d 470, 472 (9th Cir. 1975); see also Vari-Tronics Co. v. NLRB, 589 F.2d 991, 993 (9th Cir. 1979) (party seeking to void consent election may not demand evidentiary hearing before hearing officer to inquire further into possible election improprieties).
198. NLRB v. Metro-Truck Body, Inc., 613 F.2d 746, 748 (9th Cir. 1979), cert. denied, 447 U.S. 905 (1980); NLRB v. Miramar of Cal., Inc., 601 F.2d 422, 425 (9th Cir. 1979); NLRB v. Sauk Valley Mfg. Co., 486 F.2d 1127, 1130 (9th Cir. 1973).
200. Michem, Inc., 170 N.L.R.B. 362, 362-63 (1968). This rule insures that the voters will not be subject to distraction, last minute electioneering, or pressure and that no party shall gain unfair advantage. Id.
tive will not necessarily void an election.\textsuperscript{201}

Additionally, when an employer and a union enter into an agreement authorizing a consent election,\textsuperscript{202} any breach of the agreement will not necessarily require that the election be set aside. The breach must be material or prejudicial.\textsuperscript{203} A party to such an agreement is entitled to expect that other parties and agents of the Board will uphold provisions of the agreement that were calculated to promote fairness in the election.\textsuperscript{204}

In \textit{South Pacific Furniture, Inc. v. NLRB},\textsuperscript{205} an appropriate unit of employees voted in a section 102.62(b) consent election. A union observer stated to employees waiting in a room adjacent to the balloting area, “Come on and vote, exercise your power.”\textsuperscript{206} The employees voted, the union won the election, and the employer objected, claiming that the observer’s statement was impermissible electioneering.\textsuperscript{207} The Regional Director recommended that the Board overrule the objection and certify the union.\textsuperscript{208} The Board refused to order an evidentiary hearing before an officer on the employer’s exceptions and instead, adopted the Regional Director’s recommendation.\textsuperscript{209}

The employer petitioned for review and the Board cross-petitioned for enforcement of its bargaining order.\textsuperscript{210} The Ninth Circuit held that the union observer’s statement was essentially neutral and not a sustained conversation requiring a second election.\textsuperscript{211} Furthermore, because the Regional Director and the Board assumed that the statement to the voters had been made, the employer was not entitled to an evidentiary hearing.\textsuperscript{212}

In \textit{NLRB v. Vista Hill Foundation},\textsuperscript{213} an agreed-to unit of employees voted in a section 102.62(b) consent election.\textsuperscript{214} The union won the election and the employer objected, alleging that a union observer en-

\begin{itemize}
\item \textsuperscript{201} Id. at 363.
\item \textsuperscript{202} 29 C.F.R. § 102.62 (1981).
\item \textsuperscript{203} Grant’s Home Furnishings, Inc., 229 N.L.R.B. 1305, 1306 (1977).
\item \textsuperscript{204} Delta Drilling Co. v. NLRB, 406 F.2d 109, 114 (5th Cir. 1969).
\item \textsuperscript{205} 627 F.2d 173 (9th Cir. 1980).
\item \textsuperscript{206} Id. at 174.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id. at 175.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} 639 F.2d 479 (9th Cir. 1980).
\item \textsuperscript{214} Id. at 480.
\end{itemize}
gaged in improper electioneering. The Regional Director determined that the union observer had three conversations with employees during balloting, but that these conversations were brief and did not involve sustained discussion. Two of the conversations concerned the bad weather and how glad the observer was to see that the employees had come to vote. In the third conversation, not initiated by the observer, an employee asked the observer if he would be the union representative. The observer responded that he would accept the position if the employees chose him. The Regional Director recommended that the Board overrule the employer's objections in their entirety.

The employer subsequently filed exceptions to the Regional Director's report. Included in these exceptions was an affidavit by the employer's election observer stating that the union observer participated in six conversations rather than three. However, the Board rejected the employer's exceptions and certified the union. Later, the employer refused to bargain with the union and the Board granted summary judgment against the employer for such refusal. The Board also concluded that because it had already considered the employer's objections to the election in the certification proceeding, a hearing on the objections was not warranted.

The Board requested enforcement of its bargaining order. The Ninth Circuit upheld the Board's finding that all six conversations were innocuous and, therefore, insufficient to overturn the election. The court noted that it was particularly appropriate to defer to the Board's decision because the Board was in a better position to interpret what "innocuous comment" meant. Furthermore, in evaluating the evidence, the court found that because each conversation alone was insufficient to invalidate the election, the six conversations, taken as a whole, did not achieve this result.

215. Id. at 480-81.
216. Id. at 481.
217. Id.
218. Id.
219. Id. The three additional conversations were similar in content to the initial three.
220. Id.
222. 639 F.2d at 482.
223. Id.
224. Id. at 484-85.
225. Id. at 484. The "sustained conversation/innocuous comment" standard was developed in Michem, Inc., 170 N.L.R.B. 362, 362-63 (1968).
226. 639 F.2d at 484-85.
A different result was reached in *Summa Corp. v. NLRB*.\(^{227}\) In that case, the employer and the union entered into a section 102.62(b) consent election agreement.\(^{228}\) The union won the election and the employer filed objections. The employer specifically alleged that the Board agent who conducted the election improperly allowed the union to employ a greater number of election observers than the employer. This arguably constituted a breach of the parties' election stipulation agreement that an equal number of observers would be allowed for each party.\(^{229}\) The Board overruled the objection and certified the union.\(^{230}\)

The *Summa* court found that a material breach had occurred and invalidated the election.\(^{231}\) The court determined that the agreement indicated the parties' intent to prevent either of them from enjoying a relative advantage at the polls, and that an imbalance in the number of observers, with the Board agent's acquiescence, could create an impression of union predominance and Board partiality.\(^{232}\) Additionally, the court stated that the employer need not prove actual prejudice.\(^{233}\) The court reasoned that a party to a consent election, anticipating the difficulty of proving the impact of a breach upon the voters, has the right to guard against material misconduct through a pre-election contract.\(^{234}\)

The *Summa* court noted that its decision regarding a section 102.62(b) consent election was not necessarily applicable to review of a "pure consent" election conducted pursuant to section 102.62(a).\(^{235}\) The court gave no reason for distinguishing between the two types of consent elections. Arguably, the same standards ought to apply to both section 102.62(a) and 102.62(b) consent elections. The only difference is that, in a section 102.62(a) election, the Regional Director makes the final judgment as to certification and, in a section 102.62(b) election, the Board makes this judgment.\(^{236}\) Moreover, section 102.62(a) election rulings, determinations, and certifications by the Regional Director have the same force and effect as those issued by the Board.\(^{237}\)

\(^{227}\) 625 F.2d 293 (9th Cir. 1980).
\(^{228}\) *Id.* at 294.
\(^{229}\) *Id.*
\(^{230}\) *Id.*
\(^{231}\) *Id.* at 295-96.
\(^{232}\) *Id.* at 295.
\(^{233}\) *Id.* at 296.
\(^{234}\) *Id.* at 295-96.
\(^{235}\) *Id.* at 294 n.1.
\(^{236}\) See *supra* notes 192-97 and accompanying text.
In *St. Elizabeth Community Hospital v. NLRB*[^238] the Ninth Circuit determined that a hospital operated by a religious order raised its first amendment challenge to NLRB jurisdiction in a timely manner[^239]. Such a challenge questions whether the establishment clause and the free exercise clause of the United States Constitution protect a religious organization from the inhibiting effect and impact of the restrictions of the NLRB[^240]. In *NLRB v. Catholic Bishop*[^241], the Supreme Court held that the Board's assertion of jurisdiction over church-operated schools was improper[^242], but avoided the first amendment questions presented by narrowly construing the NLRA[^243]. In 1978, the Ninth Circuit held that a first amendment challenge to Board jurisdiction could not be considered because it was raised for the first time in an enforcement proceeding rather than in prior proceedings[^244].

The *St. Elizabeth* court determined that the first amendment challenge to Board jurisdiction was properly raised as an affirmative defense in the representation proceeding, rather than in the enforcement proceedings, even though the issue was not raised until after the election[^245]. The court remanded the case to the Board for further proceedings on the question of the Board's jurisdiction in light of *Catholic Bishop*[^246].

2. Motion to reopen record

Section 102.48(d)(1)^[247] of the Board's Rules and Regulations provides that "[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for . . . reopening of the record after the Board decision or order."[^248] In *NLRB v. R. & H. Masonry Sup-

[^238]: 626 F.2d 123 (9th Cir. 1980) (per curiam).
[^239]: Id. at 124.
[^240]: See *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1130-31 (7th Cir. 1977).
[^242]: Id. at 507.
[^243]: Id.
[^244]: Id.
[^245]: Polynesian Cultural Center, Inc. v. NLRB, 582 F.2d 467, 472-73 (9th Cir. 1978).
[^246]: 626 F.2d at 125.
[^248]: Id. Section 102.48(d)(1) further provides:

A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding or material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing,
ply, Inc., the Ninth Circuit concluded that the Board did not abuse its discretion in denying an employer's motion to reopen a hearing so that the testimony of the company's president could be taken. The employer's affidavit did not set forth any new evidence, nor did it adequately explain why the company's president could not have been present at the original hearing. In addition, the employer did not move for a continuance until eleven days prior to the commencement of the original hearing.

In Ideal Electric and Manufacturing Co., the Board concluded that in its review of challenged election conduct, none of the conduct that occurred prior to the filing date of the election petition should be considered. In NLRB v. R. Dakin & Co., the Ninth Circuit refused to mechanically apply the Ideal Electric rule and considered a challenge to conduct that had occurred prior to the filing of the election petition. The Dakin court characterized the Ideal Electric rule as simply an evidentiary device aimed at conduct too remote to have interfered with employees' free choice in elections. However, if pre-petition evidence can be shown to be material, then the Ideal Electric rule will not exclude it.

In NLRB v. Anchorage Times Publishing Co., the Ninth Circuit again refused to apply the Ideal Electric rule. The Board had determined that the challenged conduct was relevant to the fairness of the election. The court found interrogations occurring a month and a half before the filing of an election petition to be an unfair labor practice. They were, therefore, correctly considered by the Board in de-

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249. 627 F.2d 1013 (9th Cir. 1980).
250. Id. at 1014.
251. Id.
252. Id.
254. Id. at 1278.
255. 477 F.2d 492 (9th Cir. 1973).
257. 477 F.2d at 494.
258. Id.
259. 637 F.2d 1359 (9th Cir. 1981).
260. Id. at 1363.
261. Id.
terminating if the results of the election should be set aside and the 
employer ordered to bargain.262

C. NLRB Orders and Remedies

1. Bargaining orders

In NLRB v. Gissel Packing Co.,263 the Supreme Court cited the 
section 9(c)264 Board election and certification procedures as those nor-
mally used by a union to obtain recognition as the exclusive bargaining 
representative of an unorganized group of employees.265 The Court 
noted that union representatives may also get recognition and impose 
upon an employer a duty to bargain by presenting convincing evidence 
of majority support (in the form of authorization cards) even when the 
union is not certified as the winner of a Board election.266 The Gissel 
Court approved authorization card majorities when it is shown that the 
cards are reliable indicators that employees wish to be represented by a 
union.267 The narrow issue addressed by the Court was whether card 
majorities are so reliable as to support a bargaining order when, due to 
election interference, a fair election cannot be held or an election that 
was held was in fact set aside.268 The Court concluded that authoriza-
tion cards may be the only way of assuring employee choice if an em-
ployer disrupts the election process.269

The Gissel Court approved the rule established in Cumberland 
Shoe Corp.270 regarding the validity of authorization cards in demon-
strating majority status. The rule provides:

[If the card itself is unambiguous (i.e., states on its face that 
the signatory authorizes the Union to represent the employee for

262. Id. at 1365. See infra Part I. C., Board Orders and Remedies for a discussion of the 
bargaining order.
265. 395 U.S. at 596.
266. Id. at 596-97. Section 8(a) of the Act, 29 U.S.C. § 158(a) (1976), provides: “It 
shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with 
representatives of his employees, subject to the provisions of section 159(a) of this title.”
Section 9(a), 29 U.S.C. § 159(a) (1976), provides in part: “Representatives designated or 
selected for the purposes of collective bargaining by the majority of the employees . . . shall 
be the exclusive representatives . . . in respect to rates of pay, wages, hours of employment, 
or other conditions of employment.”
Section 9(a) does not specify how such a representative is to be chosen.
267. 395 U.S. at 605.
268. Id. at 601 n.18.
269. Id. at 602.
270. Id. at 606 (citing Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963)).
collective bargaining purposes and not to seek election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election.\(^{271}\)

The *Gissel* Court was concerned with the appropriateness of a bargaining order where the employer committed unfair labor practices which caused an election to be set aside and precluded a fair election by undermining a union's majority.\(^{272}\) The Court identified three categories of unfair labor practices as guidelines in determining whether a bargaining order should issue: (1) outrageous and pervasive practices that destroy any possibility of a fair and reliable election where a bargaining order is almost always warranted; (2) less pervasive violations which nonetheless undermine the possibility of a fair election and which make a bargaining order appropriate if the union achieved a majority status at one time; and (3) less extensive unfair labor practices, where a bargaining order is not justified because of the minimal impact on the election process.\(^{273}\) The Ninth Circuit recently applied these categories in determining the propriety of Board bargaining orders.\(^{274}\)

In *NLRB v. Anchorage Times Publishing Co.*,\(^{275}\) the Ninth Circuit, utilizing *Gissel*’s second category, upheld the Board’s decision to issue a bargaining order in a situation where the union enjoyed majority status at some time prior to an election and the employer’s unfair labor practices were sufficiently significant to undermine the opportunity for a

\(^{271}\) 395 U.S. at 606 (emphasis in original). The *Gissel* Court noted:

> [W]e think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled [sic] by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

*Id.* at 606.

Furthermore, the Court rejected any rule that requires a probe of the employee's subjective motivation. The Court reasoned that in a card challenge, employees are likely to give testimony damaging to the union where company officials have previously threatened reprisals for union activity. *Id.* at 608; accord *L'Eggs Prods.*, Inc. v. NLRB, 619 F.2d 1337, 1350 (9th Cir. 1980).

\(^{272}\) 395 U.S. at 610.

\(^{273}\) *Id.* at 613-15.

\(^{274}\) See, e.g., *NLRB v. Chatfield-Anderson Co.*, 606 F.2d 266, 268 (9th Cir. 1979) (applied *Gissel*’s third category in refusing to enforce bargaining order because threats by company officials, concerning plant closure and lay-offs due to unionization, were mild and had little coercive effect); *NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1150-51 (9th Cir. 1977) (applied *Gissel*’s second category in upholding bargaining order because interrogation of employees about union activities, rescission of wage adjustments, and threats of lay-offs were "less pervasive practices" yet tended to undermine majority strength and impede election process).

\(^{275}\) 637 F.2d 1359 (9th Cir.), *cert. denied*, 454 U.S. 835 (1981).
fair "re-run" election. The union used two different authorization card forms: the first stated the single purpose of authorizing the union to represent the employee in collective bargaining, and the second stated a dual purpose, authorizing representation in collective bargaining and requesting an election. Because both cards unambiguously indicated the signer's intent to be represented for collective bargaining and because the employer did not demonstrate that the clear language of the cards had been cancelled by the act of a union official, the court upheld the Board's determination of union majority status.

Of the acts challenged as unfair labor practices, the court cited the employer's wage increases, granted immediately prior to the election, as the most significant interference with the fair election process. The court noted that these wage increases had the effect of demonstrating to the employees that the employer had the final word on the amount paid to an employee. Thus, the cleverly timed wage increases, along with other employer activities, were classified as falling into Gissel's second category and were sufficiently pervasive to under-

276. Id. at 1368-69.
277. The card read:

AUTHORIZATION FOR REPRESENTATION
I authorize the International Brotherhood of Electrical Workers to represent me in collective bargaining with my employer.

Id. at 1362 n.2.

278. The second card read:

I REQUEST A GOVERNMENT ELECTION
I, the undersigned of my own free will, hereby authorize and designate the National Brotherhood of Electrical Workers of the AFL-CIO and CLC to represent me in collective bargaining with my employer in all matters pertaining to rates of pay, hours of employment, and other conditions of employment. This card is also for the purpose of requesting the N.L.R.B. for an election.

Id.

279. Id. at 1368-69. The court noted that "employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent." Id. at 1368. The court found no such cancellation. Id. at 1369. Moreover, without direct testimony that employees were solicited by representations that their cards would be used only to obtain an election, the court could not overturn the Board's finding that the cards validly demonstrated majority status. Id.

280. Before and after the filing of the election petition, the employer had interrogated employees about their union sympathies; conducted surveillance of union-related employee activities; threatened employees with the loss of their jobs in the event of a vote in favor of the union; terminated an employee for discriminatory reasons; and granted wage increases immediately prior to the election in order to influence employees' votes. Id. at 1363-68.

281. Id. at 1370. Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1976), prohibits "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to give that effect."

282. 637 F.2d at 1370.
mine the possibility of a fair election.\textsuperscript{283}

In \textit{Pay'n Save Corp. v. NLRB},\textsuperscript{284} the Ninth Circuit also enforced a bargaining order. In \textit{Pay'n Save}, the union commenced an organizational campaign and obtained an authorization card majority.\textsuperscript{285} The union also distributed pro-union lapel buttons to employees, and the employer subsequently discharged two leading union adherents for wearing the buttons to work.\textsuperscript{286} No election had taken place. The Board found that the discharge of union adherents for engaging in protected union activities\textsuperscript{287} undermined the union's majority status and made it practically impossible to hold a fair election.\textsuperscript{288} Accordingly, the Board issued a bargaining order.\textsuperscript{289}

The Ninth Circuit characterized the employer's unfair labor practices as falling within \textit{Gissel}'s second category.\textsuperscript{290} The court first found that the union had obtained a valid card majority because the authorization cards were unambiguous and the employer failed to show that the signatures on the cards were obtained by misrepresentation.\textsuperscript{291} In response to the contention that the Board failed to consider the employer's good faith, the court stated that an employer's lack of anti-union animus is irrelevant because bargaining orders are predicated solely upon the serious effects unfair labor practices have on the election process.\textsuperscript{292}

\begin{itemize}
\item \textsuperscript{283} Id.
\item \textsuperscript{284} 641 F.2d 697 (9th Cir. 1981).
\item \textsuperscript{285} Id. at 699.
\item \textsuperscript{286} Id. at 699-700.
\item \textsuperscript{287} The Ninth Circuit has held that, absent "special circumstances," an employee has a right, protected by § 7 of the Act, to wear union buttons. \textit{NLRB v. Essex Wire Corp.}, 245 F.2d 589, 593 (9th Cir. 1957). However, "evidence of a purpose protected by the act" is also required. \textit{NLRB v. Harrah's Club}, 337 F.2d 177, 179 (9th Cir. 1964). In \textit{Pay'n Save}, the court found that the button-wearing was linked to the protected purpose of union organization of employees and that no special circumstances existed. 641 F.2d at 701-02. Thus, the employer's ban on button-wearing was held to violate § 8(a)(1). \textit{Id.}
\item \textsuperscript{288} 641 F.2d at 702.
\item \textsuperscript{289} Id.
\item \textsuperscript{290} Id. at 702. The court quoted from \textit{NLRB v. Peninsula Ass'n for Retarded Children and Adults}, 627 F.2d 202, 203 (9th Cir. 1980), for the three requirements necessary for a bargaining order in a second category case:
\begin{quote}
"First, that the union once had a card majority; second, that the employer committed serious unfair labor practices which, though less "outrageous" and "pervasive" than those which by themselves justify a bargaining order, undermine the union's majority and continue to impede the holding of a fair election; and third, that the likelihood of erasing the effects of the unfair practices and obtaining a fair election by the use of traditional remedies is slight and that on balance the employees will best be protected by entry of a bargaining order."
\end{quote}
\item \textsuperscript{281} 641 F.2d at 702.
\item \textsuperscript{291} Id. at 703.
\item \textsuperscript{292} Id. (citing \textit{Gissel}, 395 U.S. at 594).
\end{itemize}
The employer further argued that an election, rather than a bargaining order, was the proper remedy because a majority of employees signed a petition seeking an election rather than a bargaining order.\(^{293}\) Recognizing the tendency of employees to make statements damaging to unions in order to maintain good relations with management,\(^{294}\) the court disregarded the employer's argument, and instead, agreed with the Board that the petition was strong evidence that the discharges had a chilling effect upon the employees' freedom of choice.\(^{295}\) The court also noted that when a bargaining unit as small as that in *Pay'n Save*\(^{296}\) is subjected to unfair labor practices, the impact of the unfair labor practices is increased, and therefore, the need for a bargaining order is increased.\(^{297}\)

Similarly, in *NLRB v. Davis*,\(^{298}\) the Ninth Circuit enforced a bargaining order arising from unfair labor practices falling within *Gissel*'s second category.\(^{299}\) In *Davis*, the union collected authorization cards from thirteen of seventeen employees.\(^{300}\) Soon thereafter, the employer discharged six employees who had signed authorization cards and "told employees that he would do anything to keep the union out."\(^{301}\)

The union subsequently filed a charge of unfair labor practices with the Board.\(^{302}\) The ALJ concluded that a fair election was infeasible because the employer's misconduct was so pervasive.\(^{303}\) The Board agreed and issued a bargaining order.\(^{304}\) The ALJ rejected the employer's argument that any effect of the prior unfair labor practices had been dissipated because of the hiring of new employees and employee

\(^{293}\) 641 F.2d at 703. The petition was signed about one month after the union adherents had been discharged. It stated that the employees signed the union cards as a step towards an election rather than as evidence of a decision in favor of the union. *Id.*

\(^{294}\) *Id.* (citing *Gissel*, 395 U.S. at 608; *L' Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1350 (9th Cir. 1980)).

\(^{295}\) 641 F.2d at 703.

\(^{296}\) The bargaining unit consisted of only 13 employees. *Id.*

\(^{297}\) *Id.* (citing NLRB v. Bighorn Beverage, 614 F.2d 1238, 1243 (9th Cir. 1980)); accord NLRB v. Eagle Material Handling, Inc., 558 F.2d 160, 168 (3d Cir. 1977); Ann Lee Sportswear, Inc. v. NLRB, 543 F.2d 739, 744 (10th Cir. 1976).

\(^{298}\) 642 F.2d 350 (9th Cir. 1981).

\(^{299}\) *Id.* at 352 n.4.

\(^{300}\) *Id.* at 351.

\(^{301}\) *Id.* at 351-52. The employer threatened to fire pro-union employees, offered wage increases to pro-management employees, threatened not to hire union supporters, threatened reduction in hours for pro-union employees, and stated that he could obtain the discharge of pro-union employees who left his employment to work elsewhere. *Id.*

\(^{302}\) *Id.* at 352.

\(^{303}\) *Id.* at 354.

\(^{304}\) *Id.* at 352.
turnover. The ALJ reasoned that the nature of the employer's conduct was such that it would have a long lasting effect on the employees' freedom to choose a bargaining representative.

The Ninth Circuit relied on the ALJ's findings and enforced the bargaining order. The court distinguished NLRB v. Western Drug, on the ground that in that case an ALJ had made no finding as to whether a fair election could be held. In the instant case, such findings were made and adopted by the Board, which then issued the bargaining order in conformity with the findings. In Western Drug, however, the Board found that because of employee turnover, the employer's prior coercive practices did not taint a future election. The Davis court neglected to address the Western Drug court's reasoning that a bargaining order would deny the new employees the right to choose their bargaining representative.

In NLRB v. Peninsula Association for Retarded Children and Adults, the Ninth Circuit concluded that under the Gissel standards enforcement of a bargaining order was not justified. The Board found that the employer committed four unfair labor practices during the employees' attempt to organize. Three unfair labor practices involved proscribed interrogation of employees, one of which was coupled with a threat, and the fourth involved the employer's refusal to bargain after the union received authorization cards from a majority of employees.

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305. Id. at 354. By the time of the hearing 27 new employees had been hired and only nine of the original employees remained in the work force. Id. at 352. In addition, the six discharged employees had been offered reinstatement and backpay. Id. at 353.

306. Id. at 354. The ALJ stated:

[This] is the type of conduct which employees are apt to relate to other employees and which is rather difficult, probably impossible to forget or discount. Nor are employees likely to miss the point that backpay and offers of reinstatement made some 9 to 11 months after the discharge does [sic] not necessarily compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment.

307. Id. at 356.

308. 600 F.2d 1324 (9th Cir. 1979).

309. 642 F.2d at 355 (citing 600 F.2d at 1326 n.4).

310. 642 F.2d at 355.

311. 600 F.2d at 1326-27.

312. Id. at 1327.

313. 627 F.2d 202 (9th Cir. 1980).

314. Id. at 204.

315. Id. at 203.

316. Id.
The court characterized the employer's violations as mild. In addition, the lapse of four months between the violations and the election militated against a conclusion that a fair election was impeded by the violations. Finally, both the manager responsible for the violations and the workers employed at the time the violations occurred were no longer in the workforce when the election was held. The court concluded that these factors did not support a finding that a fair election could not be held.

In *Sakrete of Northern California, Inc. v. NLRB*, an employer refused to bargain with a card majority bargaining unit because a supervisor was included in the unit. The court held that the employer's objection to the inclusion of the supervisor in the bargaining unit was valid but that he should not have refused to bargain altogether. The court stated, however, that had the exclusion of the supervisor resulted in a non-union majority in the remaining unit, the employer would have been entitled to refuse to bargain.

In *Walla Walla Union-Bulletin, Inc. v. NLRB*, the Ninth Circuit applied the *Sakrete* rationale to an employer's refusal to bargain with a

317. *Id.* at 204. The court noted that of the three interrogations two were concededly noncoercive and one had been initiated by an employee. *Id.* The Ninth Circuit cited cases in which courts declined to enforce bargaining orders where violations as serious or more serious than those which occurred in the instant case took place. *Id.* (citing NLRB v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1978)) (employer solicited and promised to satisfy employee grievances, threatened reprisal, cancelled employee's promised wage increase, and wrongfully discharged employee; First Lakewood Ass'n v. NLRB, 582 F.2d 416 (7th Cir. 1978) (employer conducted coercive interrogations, threatened reprisals for union organizing, created impression of surveillance of union activities, and promised and granted benefits to discourage union support); NLRB v. General Stencils, Inc., 472 F.2d 170 (2d Cir. 1972) (employer threatened plant closure, layoffs, discharges, and loss of privileges if union won election).

318. 627 F.2d at 204-05. The court distinguished NLRB v. Pacific Southwest Airlines, 550 F.2d 1148 (9th Cir. 1977), and NLRB v. Tri-State Stores, Inc., 477 F.2d 204 (9th Cir.), *cert. denied,* 414 U.S. 1130 (1972), which held that lapse of time due to adjudication will not preclude enforcement of a bargaining order, particularly where such delay is caused by the employer. *Id.* at 205 n.2. The court noted, “the period of time between violation of the Act and holding of the election remains highly relevant in assessing the need for a bargaining order.” *Id.*

319. 627 F.2d at 205.

320. *Id.* The court additionally noted that “enforcement of the bargaining order would impose upon current employees the bargaining representative chosen by their predecessors.” *Id.*

321. 332 F.2d 902 (9th Cir. 1964), *cert. denied,* 379 U.S. 961 (1965).

322. *Id.* at 908.

323. *Id.*

324. *Id.*; see Home Stores, Inc., 87 N.L.R.B. 335 (1949).

325. 631 F.2d 609 (9th Cir. 1980).
certified unit. In Walla Walla, the Regional Director had determined that four editors be included in a bargaining unit consisting of a newspaper's employees. The union won the certification election. The employer newspaper refused to bargain on the grounds that the four editors were either supervisors or managers and that the Board had wrongfully included these editors in the bargaining unit.

The court stated that unless the employer demonstrates that improperly included employees affect the unit's majority status, the employer must bargain with a certified unit. The employer, however, may refuse to bargain over the rights of the contested employees in order to obtain judicial review of the bargaining unit determination. The court found that the removal of the four editors from the bargaining unit would not have affected the election outcome, and therefore, the employer's refusal to bargain was an unfair labor practice. Additionally, the court concluded that although three of the four editors were properly included in the bargaining unit, the fourth editor was not.

When a collective bargaining agreement exists and a change in business ownership occurs, the new owner must recognize and bargain with the employees' union if the new owner is found to be a "successor employer." The new owner is a successor employer if he conducts essentially the same business as did the former owner and a majority of the new owner's work force are former employees or would have been former employees absent a refusal to hire because of anti-union animus. If a successor employer unlawfully refuses to retain certain employees who otherwise would have comprised a majority of a bargaining unit, the successor employer is obliged to bargain with the union representing that bargaining unit. Majority status may be presumed if a successor employer has discharged former employees to

326. Id. at 615.
327. Id. at 611.
328. Id.
329. Id.
330. Id. at 615.
331. Id.
332. Id.
333. Id. at 614; see supra notes 298-303 and accompanying text.
334. Kalman v. NLRB, 640 F.2d 1094, 1100 (9th Cir. 1981); see also NLRB v. Edjo, Inc., 631 F.2d 604, 606-07 (9th Cir. 1980); Bellingham Frozen Foods, Inc. v. NLRB, 626 F.2d 674, 678-79 (9th Cir.), cert. denied, 449 U.S. 1125 (1980).
335. 640 F.2d at 1100; see also NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272, 281 (1972); Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609, 611 (9th Cir. 1977).
evade bargaining obligations.\textsuperscript{337}

In \textit{NLRB v. Nevis Industries, Inc.},\textsuperscript{338} an employer, the new owner of a hotel, did not retain the hotel's engineers and refused to bargain with their union representative.\textsuperscript{339} The Ninth Circuit found that the Board's presumption that the union would have represented a majority of the engineers but for the employer's unlawful refusal to retain them\textsuperscript{340} was not rebutted by the employer's claims that the engineers would not have accepted jobs for the lower wages offered.\textsuperscript{341} The court concluded that the Board's order requiring the hotel owner to bargain with the engineers' union was justified.\textsuperscript{342}

2. Reinstatement with backpay

Section 10(c) of the Act\textsuperscript{343} provides in relevant part that if the Board finds that any person has engaged in an unfair labor practice, the Board shall issue

an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act] . . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.\textsuperscript{344}

Reinstatement with backpay is the normal remedy for an unlawful


\textsuperscript{338} 647 F.2d 905 (9th Cir. 1981).

\textsuperscript{339} Id. at 907.

\textsuperscript{340} The Board found that the General Counsel demonstrated that anti-union animus was a motivating factor in the employer's decision not to retain the engineers. \textit{Id.} at 909.

\textsuperscript{341} \textit{Id.} at 911. The court noted that the employer was not bound by the union collective bargaining agreement and could have negotiated for lower wages. \textit{Id.} (citing NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272, 287-88 (1972) (successor employer bound to bargain with incumbent union but not bound by provisions of collective bargaining agreement)). The employer, however, could not have unilaterally set lower wages. \textit{Id.} (citing NLRB v. Enjo, Inc., 631 F.2d 604, 606-08 (9th Cir. 1980) (successor employer who retains all employees from predecessor's bargaining unit must consult with collective bargaining agent before altering terms and conditions of employment)).

\textsuperscript{342} \textit{Id.}

\textsuperscript{343} 29 U.S.C. \textsection 160(c) (1976).

\textsuperscript{344} \textit{Id.}
firing. Under section 10(c), the Board must determine in each case whether reinstatement "will effectuate the policies" of the Act, including avoidance of labor strife, protection of rights guaranteed employees by section 7 of the Act, and other protections for the victimized employee. Reinstatement may be an inappropriate remedy if employee misconduct indicates that the employee has been and remains unfit for the job. As noted, a portion of section 10(c) bars reinstatement of any individual discharged for cause. The legislative history of this provision indicates that it was designed to preclude reinstatement of an individual discharged for misconduct. The legislative history, however, does not indicate that this provision was intended to curtail the Board's power to order reinstatement when the loss of employment stems from an unfair labor practice. Therefore, in determining whether reinstatement is a proper remedy, the Board must balance the employer's misconduct against that of the employee.

In *Golden Day Schools, Inc. v. NLRB*, the Ninth Circuit applied this balancing test to uphold the Board's order of reinstatement with backpay. The court upheld the Board's finding that: (1) thirteen discharged employees were fired, not because of alleged misconduct, but because of union activity; and (2) the employer had improperly interrogated employees concerning their interest in the union.

The employer contended that reinstatement with backpay was inappropriate because the employees were disloyal and unfit for future employment: (1) eight of the thirteen discharged employees met with parents, without prior authority, and responded to the parents' ques-

345. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941); NLRB v. Apico Inns of Cal., Inc., 512 F.2d 1171, 1175 (9th Cir. 1975).
346. *Apico Inns*, 512 F.2d at 1175.
348. *Apico Inns*, 512 F.2d at 1176; see, e.g., NLRB v. Yazoo Valley Elec. Power Ass'n, 405 F.2d 479, 480 (5th Cir. 1968); NLRB v. National Furniture Mfg. Co., 315 F.2d 280, 286-87 (7th Cir. 1963); cf. NLRB v. Max Factor & Co., 640 F.2d 197, 205 (9th Cir. 1980) ("The standard as to forfeit the Act's protection.").
349. See supra text accompanying note 344.
352. NLRB v. Miller Redwood Co., 407 F.2d 1366, 1370 n.2 (9th Cir. 1969); NLRB v. Thayer Co., 213 F.2d 748, 755 (1st Cir. 1954).
353. 644 F.2d 834 (9th Cir. 1981).
354. Id. at 840.
355. Id. at 838-39.
356. Id. at 841.
tions regarding conditions at the employer's day-care center,\textsuperscript{357} and (2) three other employees distributed an anti-employer leaflet while picketing the employer.\textsuperscript{358}

The court termed the coercive interrogations and wrongful discharges egregious and the unauthorized meeting innocuous,\textsuperscript{359} noting that the employees' conduct was not of such nature as to threaten future employer-employee relations.\textsuperscript{360} The court concluded that under the circumstances reinstatement was necessary.\textsuperscript{361} The court also upheld the reinstatement of the employees discharged for distributing disparaging leaflets.\textsuperscript{362} Observing that the leaflets were prepared and distributed in response to unlawful interrogations and discharges, the court held that an employer may not provoke misconduct and then rely on such behavior as a ground for discharge.\textsuperscript{363}

In \textit{F. W. Woolworth Co.},\textsuperscript{364} the Board established a rule for calculating backpay awards. An employee must be made whole for any loss of pay resulting from a wrongful discharge.\textsuperscript{365} Loss of pay is computed on the basis of each separate calendar quarter during the period from the employee's firing to the date of an offer of reinstatement.\textsuperscript{366} If the employee obtains other work during the interim, loss of pay is determined by deducting net earnings during the interim from the amount the employee would have earned for each quarter.\textsuperscript{367}

In \textit{NLRB v. Flite Chief, Inc.},\textsuperscript{368} the Regional Director instituted proceedings to determine the amount of backpay due an employee resulting from his unlawful firing in 1974.\textsuperscript{369} In October, 1978, the Regional Director issued the backpay specification, which alleged that the employer's liability for backpay from July, 1974 to September, 1978

\textsuperscript{357} \textit{Id.} at 839.

\textsuperscript{358} \textit{Id.} at 841. The court noted that it could not condone the leaflet which was written in strong language and made serious and partially true accusations. \textit{Id.}

\textsuperscript{359} \textit{Id.} (citing \textit{NLRB v. Max Factor & Co.}, 640 F.2d 197, 205 (9th Cir. 1980) (court ordered reinstatement of discharged employee who directed offensive and abusive language at employer's personnel manager, spent excessive hours on union affairs, and neglected production work)).

\textsuperscript{360} 644 F.2d at 841.

\textsuperscript{361} \textit{Id.}

\textsuperscript{362} \textit{Id.} at 842.

\textsuperscript{363} \textit{Id.} (citing \textit{NLRB v. M. & B. Headwear Co.}, 349 F.2d 170, 174 (4th Cir. 1965)).

\textsuperscript{364} 90 N.L.R.B. 289 (1950).

\textsuperscript{365} \textit{Id.} at 291.

\textsuperscript{366} \textit{Id.} at 292-93.

\textsuperscript{367} \textit{Id.}

\textsuperscript{368} 640 F.2d 989 (9th Cir. 1981).

\textsuperscript{369} \textit{Id.} at 990.
totaled over $32,000 and set a backpay hearing for January 16, 1979.\textsuperscript{370} On that day, before the hearing, the employee disclosed to the General Counsel that he had additional interim earnings from four separate employers totaling $8,000.\textsuperscript{371} Thus, the employer's alleged liability approximated $24,000.

At the backpay hearing, the ALJ found that the employee had willfully concealed interim earnings in order to obtain more backpay than he was entitled to receive.\textsuperscript{372} The ALJ opined that because of his fraud the claimant should be penalized by disallowing all backpay from the date that the claimant was first employed by a concealed interim employer until the claimant first disclosed these earnings, and the judge recommended an award to the claimant of $5,856.\textsuperscript{373} The Board found that because the claimant "voluntarily" supplied the General Counsel, albeit at the eleventh hour, with additional information (the concealed $8,000), the award should be increased to the full $24,000.\textsuperscript{374}

The Ninth Circuit declined to enforce the Board's increased award.\textsuperscript{375} The court noted that under section 10(c) of the Act the Board is empowered "to take such affirmative action including reinstatement of employees \textit{with or without backpay}, as will effectuate the policies of the Act."\textsuperscript{376} The court concluded that the Board's increased award would reward a claimant for dishonesty.\textsuperscript{377}

Generally, supervisors are excluded from the coverage of the NLRA.\textsuperscript{378} Courts, however, have ordered reinstatement of supervisors in three situations: (1) when a supervisor is disciplined for refusing to commit an unfair labor practice;\textsuperscript{379} (2) when a supervisor is disciplined for testifying before the Board;\textsuperscript{380} and (3) when a supervisor who hired his own crew is discharged as a pretext for terminating his pro-union crew.\textsuperscript{381} In these situations reinstatement has been ordered, but only to

\textsuperscript{370} Id.
\textsuperscript{371} Id. at 990-91.
\textsuperscript{372} Id.
\textsuperscript{373} Id. at 991.
\textsuperscript{374} Id.
\textsuperscript{375} Id. at 992.
\textsuperscript{376} Id. (quoting 29 U.S.C. § 160(c) (1976)) (emphasis added).
\textsuperscript{377} 640 F.2d at 993.
\textsuperscript{378} See \textit{supra} notes 26-31 and accompanying text.
\textsuperscript{379} Belcher Towing Co. v. NLRB, 614 F.2d 88, 91 (5th Cir. 1980); Gerry's Cash Mkts., Inc. v. NLRB, 602 F.2d 1021, 1022 (1st Cir. 1979); Russell Stover Candies, Inc. v. NLRB, 551 F.2d 204, 206-08 (8th Cir. 1977).
\textsuperscript{380} King Radio Corp. v. NLRB, 398 F.2d 14, 21-22 (10th Cir. 1968); NLRB v. Southland Paint Co., 394 F.2d 717, 721 (5th Cir. 1968); Oil City Brass Works v. NLRB, 357 F.2d 466, 470-71 (5th Cir. 1966).
\textsuperscript{381} Pioneer Drilling Co. v. NLRB, 391 F.2d 961, 963 (10th Cir. 1968).
remedy harm done to rank and file employees. 382

In *NLRB v. Nevis Industries, Inc.*, 383 an employer who had recently acquired a hotel refused to retain the supervising chief engineer and his entire engineering crew. 384 The Ninth Circuit enforced the Board’s order to reinstate the engineering crew 385 but denied enforcement of its order to reinstate the chief engineer. 386 The court agreed with the Board that nonretention of the chief engineer may have had a coercive effect on the employees. 387 The court observed, however, that reinstating a supervisor whenever his firing might have a coercive effect on employees would override Congress’ express policy not to protect pro-union activities of supervisors. 388 The court concluded that reinstatement of the employees themselves would eliminate any coercive effect on the employees. 389

The Board has issued an order related to reinstatement to the effect that an employer must retain work in-house when it has been found to have subcontracted a certain part of its operation to avoid unionization. 390 Courts have refused to enforce orders to resume activity in-house when resumption of the subcontracted activity would require a major capital expense. 391

In *NLRB v. R. & H. Masonry Supply, Inc.*, 392 the employer sold and delivered building materials to contractors. 393 All six of the employees signed authorization cards, and the union petitioned for an

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382. Berry Schools v. NLRB, 627 F.2d 692, 698-99 (5th Cir. 1980); NLRB v. Local 962, Pulp & Paper Workers, 498 F.2d 26, 28-29 (9th Cir. 1974), enforced on petition after remand, 510 F.2d 1364 (9th Cir. 1975).
383. 647 F.2d 905 (9th Cir. 1981).
384. Id. at 907.
385. Id. at 911. The court agreed with the Board’s finding that the new owner’s refusal to retain the engineering crew was a violation of §§ 8(a)(1) and (3) of the Act. Id. at 909.
386. Id. at 911.
387. Id. The Board reasoned that “employees cannot be expected to perceive the distinction between the employer’s right to prohibit union activity among supervisors and their right to engage freely in such activity themselves.” Id.
388. Id.; e.g., NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1295 n.8 (5th Cir. 1980).
389. Id.; cf. Pioneer Drilling Co. v. NLRB, 391 F.2d 961, 963 (10th Cir. 1968) (reinstatement of supervisors proper where it is the only means to dissipate coercive effect of employer’s actions, e.g., where discipline of supervisor used as conduit for disciplining employees).
391. NLRB v. Townhouse T.V. & Appliances, Inc., 531 F.2d 826, 831-32 (7th Cir. 1976); NLRB v. American Mfg. Co. of Tex., 351 F.2d 74, 80-81 (5th Cir. 1965).
392. 627 F.2d 1013 (9th Cir. 1980).
393. Id.
Thereafter, the employer fired five employees, elevated the sixth to a managerial position, and sold its trucks. Subsequently, the Board certified the union as the exclusive bargaining agent, but the employer refused to bargain because all but one of its employees had been terminated. Finding the employer in violation of the Act, the Board ordered the employer to cease and desist from unfair labor practices, to reestablish its trucking operation, to offer reinstatement and backpay to the discharged employees, and to bargain with the union.

The Ninth Circuit held that the Board’s unfair labor practice findings were supported by substantial evidence. The court, however, refused to require the employer to reestablish its trucking operations because, due to its small size and minimal profit margin, the employer would have to make an excessive capital outlay to purchase or lease suitable trucks. Because the court refused to require the employer to reestablish its trucking operations, the court declined to enforce the Board’s reinstatement order. Instead, the court remanded the case to the Board, suggesting that a more appropriate remedy would be to compensate employees until they regained equivalent employment or until a bargain or impasse was reached between the employer and the union.

3. Orders to produce evidence

The duty to bargain in good faith, imposed by section 8(a)(5) of the Act, may be violated by an employer’s refusal to furnish information to a union when that information is relevant to the union’s negotiation or administration of a collective bargaining agreement. Information pertaining to wages, hours or conditions of employment of unit employees is presumptively relevant, and must be disclosed unless

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394. Id. at 1013-14.
395. Id. at 1014.
396. Id.
397. Id.
398. Id.
399. Id.
400. Id. at 1015.
402. 647 F.2d at 1015; see, e.g., NLRB v. Townhouse T.V. & Appliances, Inc., 531 F.2d 826, 832 (7th Cir. 1976).
the employer establishes its irrelevance. However, when the information sought concerns nonunit employees or is not ordinarily pertinent to collective bargaining, the union has the initial burden of showing its relevancy. The Board and the courts have employed a liberal, discovery-type standard to determine what constitutes relevant information. If the union has established a reasonable basis to support possible contract violations, then the information sought to help prove such violations is relevant. Refusal to disclose even relevant information, however, is not always a failure to bargain in good faith. An employer's reasons for nondisclosure and the negotiating conduct of the parties must be considered.

In *Press Democrat Publishing Co. v. NLRB*, the Board ordered four newspaper publishing companies (the employers) to disclose to a union, which represented full-time, salaried employees, the aggregate amounts each company paid to independent correspondents for editorial product. The Board found that this information was relevant to the union's wage demands for union members and that the employers' failure to disclose violated their duty to bargain in good faith.

The Ninth Circuit affirmed the Board's determination that the nonunit compensation data were relevant and potentially helpful to the union in framing unit wage demands. Unit and nonunit personnel performed nearly identical work, and the compensation paid to nonunit correspondents was therefore particularly relevant for contract negotiations with unit members.

The court also considered the Board's order that the employers

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405. San Diego Newspaper Guild, Local 195 v. NLRB, 548 F.2d 863, 867 (9th Cir. 1977).
406. *Id.* at 867-68; see also Prudential Ins. Co. of Am. v. NLRB, 412 F.2d 77, 84 (2d Cir.), *cert. denied*, 396 U.S. 928 (1969); Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 69 (3d Cir. 1965).
408. NLRB v. Acme Indus. Co., 385 U.S. at 437-39; P.R. Mallery & Co. v. NLRB, 411 F.2d 948, 954-56 (7th Cir. 1969). This standard applies equally to unit and nonunit information, although as to nonunit information, the burden of proof shifts to the union to show the relevancy of that information. Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 69 (3d Cir. 1965).
409. Shell Oil Co. v. NLRB, 457 F.2d 615, 618 (9th Cir. 1972); Emeryville Research Center v. NLRB, 441 F.2d 880, 885 (9th Cir. 1971).
410. 629 F.2d 1320 (9th Cir. 1980).
411. *Id.* at 1322.
412. *Id.*
413. *Id.* at 1326.
414. *Id.*
disclose the aggregate amount paid for nonunit editorial product. The union had requested disclosure of compensation paid to individual correspondents, but the Board held that individual compensation information should remain confidential. Noting that partial disclosure may be justified upon a clear showing of need for confidentiality, the court determined that neither the Board's findings nor those of the ALJ adequately supported the Board's conclusion that disclosure be modified by confidentiality. Accordingly, the court remanded to the Board for clarification of its reasons for limiting the union's right to disclosure.

In NLRB v. Associated General Contractors, Inc., the Ninth Circuit found that a roster of open shop and open shop specialty members of a general contractors association was relevant to union investigations of collective bargaining contract violations. The association argued that the Board's disclosure order violated its members' first amendment rights of expression and association and would subject them to violence and harassment. The association further argued that disclosure was not justified because it independently reviewed open shop applicants to insure that they were not subject to existing collective bargaining agreements.

The court found that the association's refusal to provide the roster was a failure to bargain in good faith. The court noted that because

415. Id.
416. Id.; see, e.g., Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 (1979) (employer not required to reveal aptitude test questions used for employee promotion because secrecy critical and test questions might fall into hands of employees); Shell Oil Co. v. NLRB, 457 F.2d 615, 620 (9th Cir. 1972) (company not required to reveal identity of nonstriking workers because company showed clear and present danger of harassment).
417. 629 F.2d at 1327.
418. Id. The court noted that the Board should have explored alternative methods of collecting and disclosing data so as not to deny the union access to relevant information. Id.
419. 633 F.2d 766 (9th Cir. 1980).
420. Id. at 772-73. Because the information sought did not directly relate to unit employees, the unions had the initial burden of showing relevancy. The unions met this burden by introducing evidence of common ownership of some union and open shop contractors. Common ownership is one of four factors used by the Board to show that two or more employers may be treated as one and, thus, subject to the same collective bargaining agreement. Therefore, by showing common ownership of some union and open-shop contractors, the union provided a reasonable basis for further investigations of contract violations. Id. In addition, the court stated that the potential misuse of the roster (for organizational purposes) did not make it irrelevant to the union's duties in administering the contract. Id. at 772.
421. Id.
422. Id.
423. Id. at 773.
there was no showing that the unions would engage in violent, harassing, or unlawful conduct upon receipt of the roster, the association's first amendment claim was unfounded. The court cited NLRB v. Gissel Packing Co. for its finding that the association's rights of expression and association were outweighed by the government's interest in regulating (requiring disclosure) "to protect substantial rights of employees or to preserve harmonious labor relations in the public interest." Additionally, the court found that the association's independent view of open shop applicants did not justify nondisclosure. The court reasoned that the association's review would not provide the union with sufficient information to allow the union to determine for itself whether possible contract violations had occurred.

D. Judicial Review and Enforcement

1. Issues not raised before the Board

Section 10(e) of the Act provides in part that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Ninth Circuit's continued adherence to the application of that section is illustrated by its recent ruling in NLRB v. Maxwell. In Maxwell, the Board had relied solely on an ALJ's determination that the employer had violated section 8(a)(1) by discharging an employee for attempting to enforce the overtime provisions of the collective bargaining agreement. The employer did not argue, either before the

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424. Id. at 772.
426. 633 F.2d at 772 n.9.
427. Id. at 772.
428. Id.; see Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 70 (3d Cir. 1965) (employer's argument that it acted in good faith in checking status of nonunit employees without merit and union entitled to information to assist in deciding whether to instigate grievance proceedings and to guide union in contract negotiations).
430. Similarly, under the Board's Rules and Regulations, any exception to a finding of the ALJ not specifically argued before the Board is deemed to have been waived. 29 C.F.R. § 102.46(b) (1980); see Detroit Edison Co. v. NLRB, 440 U.S. 301, 311-12 n.10 (1979); NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318, 322 (1961); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350 (1953); NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 389 (9th Cir.), cert. denied, 444 U.S. 940 (1979).
431. 637 F.2d 698 (9th Cir. 1981).
432. Id. at 701. Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1976), makes it an
Board or before the Ninth Circuit, that the employee's request for overtime pay was not a protected activity under the Act. The employer, however, could have argued that the employee's conduct was not concerted activity, and, therefore, was unprotected.\textsuperscript{433} Because the issue had not been raised, the court refused to consider whether the Board had applied the proper standard in deciding whether the discharge violated the Act.\textsuperscript{434} Thus, the central question presented to the Board in Maxwell was whether the employee was fired because of his attempts to be paid overtime.\textsuperscript{435}

Relying upon the ALJ's determination that he had been discharged for that reason, the Board concluded that such a discharge violated section 8(a)(1). The Ninth Circuit subsequently found substantial evidence to support the Board's decision and ordered the decision enforced.\textsuperscript{436}

2. Scope of review

Section 10(e) of the Act also provides that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."\textsuperscript{437} When a court reviews the substantiality of evidence supporting the Board's decision, it must consider the entire record, including evidence opposing the Board's view.\textsuperscript{438} When reviewing case records, however, courts are obliged to respect Board expertise in certain specialized fields\textsuperscript{439} such as the composition of appropriate bargaining units,\textsuperscript{440} the relevancy of union requests for information,\textsuperscript{441} and representation elections.\textsuperscript{442} Even in matters which do not require Board expertise, a court
may not overturn the Board's choice between two conflicting views even though the court would and could have justifiably made a different choice had the matter been before it de novo.\(^\text{443}\)

\(a\). conflicts between Board and ALJ findings

In Pay'n Save Corp. \textit{v.} NLRB,\(^\text{444}\) the Ninth Circuit recently reaffirmed the proposition that the scope of review does not change merely because the ultimate findings of the Board are contrary to those of the ALJ.\(^\text{445}\) A contrary ALJ decision is simply part of the record and necessarily detracts from support for the Board's decision. However, the standard of review is not altered, and the Board's decision must be upheld if supported by substantial evidence in the record as a whole.\(^\text{446}\)

In Pay'n Save, the Ninth Circuit upheld the Board's conclusion that the employer violated section 8(a)(1) by maintaining and selectively applying a rule prohibiting political or controversial lapel buttons, including union buttons.\(^\text{447}\) The employer discharged two employees for wearing pro-union buttons to work. The Board reversed the ALJ's finding that the employer's ban on controversial buttons had not been disparately applied. Such application of the controversial button rule was necessary for the Board's finding of an unfair labor practice.\(^\text{448}\) Examining the record as a whole, the court found that the Board's decision was supported by substantial evidence.\(^\text{449}\)

\(b\). deference to Board expertise

\(i\). relevancy of union requests for information

An employer may be required to furnish information to a union when that information is relevant to the union's negotiation or administration of a collective bargaining agreement.\(^\text{450}\) The Board's determination as to the relevancy of the information sought is given great

\[^{443}\text{Universal Camera Corp. v. NLRB, 340 U.S. at 488.}\]
\[^{444}\text{641 F.2d 697 (9th Cir. 1981).}\]
\[^{445}\text{Id. at 700 n.3 (citing NLRB v. Big Bear Supermrkts. No. 3, 640 F.2d 924, 928 (9th Cir. 1980)).}\]
\[^{446}\text{NLRB v. Big Bear Supermrkts. No. 3, 640 F.2d at 928; see Loomis Courier Serv., Inc. v. NLRB, 595 F.2d 491, 494 (9th Cir. 1979); NLRB v. Warren L. Rose Castings, Inc., 587 F.2d 1005, 1008 (9th Cir. 1978).}\]
\[^{447}\text{641 F.2d at 697.}\]
\[^{448}\text{Id.}\]
\[^{449}\text{Id. at 701-02.}\]
\[^{450}\text{NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967); Standard Oil Co. of Cal. v. NLRB, 399 F.2d 639, 642 (9th Cir. 1968).}\]
weight by the courts. These determinations are, accordingly, subject to only limited judicial review. Thus, in *K-Mart Corp. v. NLRB*, the Ninth Circuit deferred to the Board’s determination that a union representing employees at one of the employer’s retail distribution centers was entitled to information related to wage increases at the employer’s other distribution centers. The court agreed with the Board that this information was relevant to the union’s negotiations with the employer and enforced the Board’s order. The court reasoned that when an employer defends its wage scale offer by asserting that it is set in accordance with community standards, information regarding wage increases at other distribution centers should be made available to substantiate the employer’s claims. K-Mart’s refusal to furnish this information, therefore, constituted an unfair labor practice.

### ii. representation elections

The Board is presumed to have certain expertise in the supervision of elections, and courts should defer to the Board’s decisions absent an abuse of discretion. In *Michem, Inc.*, the Board promulgated a rule to assist in determining when words spoken between representatives of any party to an election and the voters waiting to cast their ballots are so distracting that the election should be invalidated. Briefly, the *Michem* rule provides that if a representative engages in prolonged conversations with voters, the election should be overturned. However, any chance, isolated, or innocuous comment to a voter will not void the election.

In *NLRB v. Vista Hill Foundation*, the Ninth Circuit upheld the Board’s determination that a representation election was valid. The Board concluded that statements made by a union observer to prospect-

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451. San Diego Newspaper Guild, Local 195 v. NLRB, 548 F.2d 863, 867 (9th Cir. 1977) (Board’s determination of relevancy of union information request given great weight either because it is finding of fact, conclusive if supported by substantial evidence, or because it is mixed question of fact and law within particular expertise of Board).

452. K-Mart Corp. v. NLRB, 626 F.2d 704, 707 (9th Cir. 1980).

453. 626 F.2d 704 (9th Cir. 1980).

454. *Id.* at 707.

455. *Id.*

456. *Id.*

457. Hecla Mining Co. v. NLRB, 564 F.2d 309, 313 (9th Cir. 1977); see Summa Corp. v. NLRB, 625 F.2d 293, 295 (9th Cir. 1980); NLRB v. Bighorn Beverage, 614 F.2d 1238, 1243 (9th Cir. 1980); NLRB v. Metro Truck Body, Inc., 613 F.2d 746, 748 (9th Cir. 1979).


459. *Id.* at 362-63.

460. 639 F.2d 479 (9th Cir. 1980).
tive voters were merely innocuous comments and did not constitute
electioneering.461 Noting that “the Board is presumed to have a certain
expertise in conducting and evaluating elections,”462 the court refused to
allow the employer leave to present additional evidence in the form of
a second affidavit by the employer’s election observer. The affidavit
contained information concerning six conversations overheard by the
observer. The employer had previously provided a similar affidavit to
the Regional Director during the investigation. The court concluded
that because there was a clear inference that the Board considered
everything presented, including the employer’s previous affidavit,463
the second affidavit had no effect on the outcome of the enforcement pro-
ceeding.464 The court noted that deferral to the Board’s decision was
especially appropriate in this case because the Board was in a better
position to interpret the meaning of “innocuous comments” as defined
in Michem and to apply its own standards for evaluating representation
elections.465

c. no de novo review

A reviewing court may not conduct a de novo review of testimony
to make credibility determinations.466 In NLRB v. Anchorage Times
Publishing Co.,467 the Board adopted the ALJ’s findings that an em-
ployer committed unlawful interrogations. On appeal, the employer
argued that testimony in the record tended to undermine particular fac-
tual findings. Noting that in each of the contested findings the conflict
in testimony concerned a question of witness credibility, the Ninth Cir-
cuit concluded that these findings were not subject to dispute.468

461. Id. at 484-85.
462. Id. at 483 (quoting Hecla Mining Co. v. NLRB, 564 F.2d at 313).
463. The court drew its inference from the Board’s statement that it had “‘reviewed the
record in light of the exceptions and the brief.’” 639 F.2d at 482-83. The Board also stated,
“‘[i]n our opinion the Employer’s exceptions raise no substantial or material issue of fact or
law requiring reversal of the Regional Director’s findings, conclusions, and recommendations,
or warranting a hearing.’” Id. at 483.
464. Id.
465. Id. at 484.
468. Id. at 1364.
II. UNFAIR LABOR PRACTICES

A. Discharges

It is an unfair labor practice to discharge an employee for the exercise of section 7 rights.\(^{469}\) An employer who discharges an employee for engaging in a protected activity violates section 8(a)(1) of the Act.\(^{470}\) Additionally, to constitute a violation of section 8(a)(3), the discharge must be discriminatory, with a resulting discouragement of union membership.\(^{471}\) To establish a violation of section 8(a)(1), it is only necessary to demonstrate that the discharge had the effect of interfering with employee rights.\(^{472}\) A violation of section 8(a)(3), however, turns upon whether the discharge was motivated by an anti-union purpose.\(^{473}\)

The Supreme Court has held that where conduct is so destructive of section 7 rights as to carry its own indicia of unlawful motivation, proof of anti-union intent is unnecessary if the employer fails to establish legitimate business reasons for such conduct.\(^{474}\) The Ninth Circuit requires an affirmative showing of unlawful motivation unless the em-

\(^{469}\) 29 U.S.C. § 158(a)(1) and (3) (1976) provide in pertinent part:

[i]t shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.


\(^{472}\) In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965), the Court stated that a violation of section 8(a)(1) presupposes an act which is unlawful even absent a discriminatory motive. In NLRB v. Burnup & Sims, Inc., 379 U.S. at 23, the Court held that section 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct did not occur.


\(^{474}\) NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967) (proof of anti-union motivation unnecessary when employer's conduct could have adversely affected employee rights and when employer does not establish motivation by legitimate objectives); American Ship Bldg. Co. v. NLRB, 380 U.S. at 311 (some instances of employer conduct so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage membership required); NLRB v. Brown, 380 U.S. at 287 (no specific evidence of intent necessary when employer practice inherently destructive of employee rights and not justified by important business ends); NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963) (conduct carrying its own indicia of intent barred per se by Act unless overriding business purpose justifies invasion of union rights); Teamsters, Local 357 v. NLRB,
ployer's actions are inherently destructive of section 7 rights. According to the Ninth Circuit, inherently destructive acts include permanent discharges for participation in union activities, the granting of superseniority to non-strikers, and other actions creating visible and continuing obstacles to the future exercise of employee rights.

Under section 8(a)(3), the employer's real motive for discharge is always decisive. Proof of an anti-union motivation may make unlawful certain employer conduct which would otherwise have been lawful. The Board will be permitted to strike a proper balance when there are both lawful and unlawful motives. In mixed motive cases, the test in the Ninth Circuit had been whether anti-union animus was the moving or dominant cause of the discharge. However, the Ninth

365 U.S. 667, 675 (1961) (some conduct may by its nature imply the required intent; natural foreseeable consequences of certain actions may warrant such inference).

475. Ad Art, Inc. v. NLRB, 645 F.2d 669, 678 n.9 (9th Cir. 1981) (citing NLRB v. Great Dane Trailers, Inc., 388 U.S. at 33) (some conduct so inherently destructive of employee interests that it may be deemed proscribed without need for proof of underlying improper motive); Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721, 726 (9th Cir. 1980) (without finding of anti-union animus, no unfair labor practice unless conduct so inherently destructive of employee rights that foreseeable consequences bear own indicia of motive); NLRB v. Lantz, 607 F.2d 290, 299 (9th Cir. 1979) (where conduct inherently destructive of § 7 rights, no need to prove that improper motive dominant).

476. Portland Willamette Co. v. NLRB, 534 F.2d 1331, 1334 (9th Cir. 1976).

477. NLRB v. Brown, 380 U.S. at 287; Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d at 726; NLRB v. Klaue, 523 F.2d 410, 413 (9th Cir. 1975) (where employer not aware of union activities, discharge cannot be motivated by anti-union animus and violation of § 8(a)(3) will not be found).


480. Ad Art, Inc. v. NLRB, 645 F.2d at 678-79; NLRB v. Adams Delivery Serv., Inc., 623 F.2d at 99 (anti-union animus must be moving cause of discharge to support violation of Act); L'Eggs Products, Inc. v. NLRB, 619 F.2d 1337, 1342 (9th Cir. 1980) (distinguishing NLRB v. Lantz, 607 F.2d at 299, where partial motivation found sufficient to support violation of section 8(a)(3)); NLRB v. Big Horn Beverage, 614 F.2d at 1242 (in mixed motive cases, test is whether business reason or protected union activity is moving cause for discharge); Stephenson v. NLRB, 614 F.2d 1210, 1213 (9th Cir. 1980) (rejected partial motivation theory, which found violation where discharge motivated in any part by anti-union animus, and requiring that anti-union animus be moving or dominant cause of discharge). The following circuits have also adopted the moving cause standard: NLRB v. William S. Carrol, Inc., 578 F.2d 1, 4 (1st Cir. 1978) (primary motivation required for 8(a)(1) and (3) cases); NLRB v. Gentithes, 463 F.2d 557, 560 (3d Cir. 1972) (anti-union animus must be substantial or motivating cause of discharge); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 621 (5th Cir. 1961) (anti-union animus must be dominant motive to support violation). Other circuits have adopted a standard requiring that the discharge be motivated by some extent by anti-union animus, but it need not be the dominant motivation: NLRB v. Gladding Keystone Corp., 435 F.2d 129, 131 (2d Cir. 1970) (discharge must be at least partially motivated by union activities); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569 (4th Cir. 1977) (anti-union animus need only be factor in discharge); NLRB v. Townhouse T.V.
Circuit, in *NLRB v. Nevis Industries, Inc.* 481 adopted the test for mixed motive cases established by the Board in *Wright Line, a Division of Wright Line, Inc.* 482 The *Wright Line* test provides that the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to discharge an employee. Once a prima facie case is established, the burden shifts to the employer to demonstrate that the same decision to discharge would have been made even in the absence of the protected conduct. 483

In *Nevis*, the employer discharged some engineers employed at a hotel. There was evidence that the discharges were due to the employer's desire to de-unionize the hotel. The employer asserted that the discharges were based on the poor work attitude of the engineers. The Board, applying the *Wright Line* test, found the employer in violation of sections 8(a)(1) and (3) of the Act, because the employer's asserted business reasons were merely pretextual. 484

In enforcing the Board's order, the Ninth Circuit held that the "rule articulated by the Board in *Wright Line* is a reasonably defensible interpretation of the Act, and is entitled to acceptance" by the Ninth Circuit. 485 The court found that the *Wright Line* rule is "consistent with the reality that the employer has the best access to proof of motivation," and represents "an acceptable balance between protection of employees' rights and preservation of employers' rights to discharge employees for valid business reasons." 486

The *Wright Line* test now replaces the motivating factor or dominant motive test formerly used by the Ninth Circuit. Most courts addressing alleged violations of section 8(a)(1) or (3), as did the *Nevis* court, will analyze the motives for discharge in accordance with *Wright Line*, but will ultimately make a factual determination that the alleged business motive was or was not pretextual. Under the new rule, however, when there are multiple independent causes of discharge, and at
least one cause is lawful, an employee will no longer be reinstated, even when it can be shown theoretically that the unlawful motives predominated.

The Ninth Circuit recently decided several cases using the moving cause standard. These cases were decided prior to Nevis, and are analyzed here for the purpose of discussing any possible impact of the Wright Line test.

In AdArt, Inc. v. NLRB, the employer allegedly discharged one of its employees for filing grievances and complaints. The employer claimed that the discharge was based on a series of incidents that disrupted the work force and violated company rules. The union filed a grievance over the discharge and proceeded to arbitration. The arbitrator ruled that there was just cause for the dismissal because the employee had violated reasonable company rules by disrupting a management meeting and insisting on filing complaints without a union steward. The Board refused to defer to the arbitrator and found that the discharge was motivated “in large part” by anti-union animus. In enforcing the order, the court held that there was no difference between the Board’s finding that the discharge was motivated “in large part” by anti-union animus and the court’s requirement of a dominant unlawful motive. The court held that while no proof of unlawful motivation is necessary when the employer’s actions are inherently destructive of section 7 rights, the isolated discharge of a single employee, as in this case, is not an inherently destructive act and, therefore, requires proof of specific unlawful motivation.

In NLRB v. Max Factor & Co., an employee was discharged for taking a strong advocacy role in favor of the union. The court supported the Board’s finding that the steward’s use of profane and abusive language during grievance discussions was not so flagrant as to forfeit the protection of sections 8(a)(1) and (3). The court rejected as pretextual the company’s alleged business reasons for discharging the employee. The court identified the standard in this mixed motive case as being first, whether the improper acts of the steward during the conduct of protected activities were so indefensible as to forfeit the Act’s protection, and second, whether those acts were the moving cause for

487. 645 F.2d 669 (9th Cir. 1980).
488. Id. at 679.
489. Id. at 678 n.9 (citing Great Dane Trailers, Inc., 388 U.S. at 33 for the proposition that acts inherently destructive of § 7 rights require no specific proof of motivation, and Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1117 n.2 (9th Cir. 1977), for the proposition that some acts are inherently destructive of § 7 rights while other acts are not).
discharge.491

The court used two separate standards in this case. While neither standard departs from past analyses by the Ninth Circuit, the first standard is not really a mixed motive standard, but rather a determination as to whether or not activity resulting in discharge is a protected activity.

In Golden Day Schools, Inc. v. NLRB,492 employees were discharged for various union activities. The company raised the defense that seven of the employees were discharged for participating in meetings with parents in an effort to induce withdrawal of the children from the school; three other employees were discharged for circulating leaflets that were viewed as being disloyal to the school.493 The court viewed the employer's statements of motivation as self-serving and not conclusive as a cause for discharge.494 Instead, the court found that anti-union animus was the sole motivation behind the discharges and refused to apply the mixed motive test.495

In determining whether the employee-prepared leaflets met the standards justifying discharge as established in NLRB v. Local Union No. 1224, IBEW,496 the court applied the principle that greater leeway should be afforded an employee's reaction to provocative action by an employer.497 This principle is a refinement of the test used by the Ninth Circuit, which requires a showing that the steward's conduct was not so flagrantly improper as to deprive the union activity of protection under the statute.498 In this case, the court decided that the leaflets fell far short of the malicious tone required to justify the discharge.499

In NLRB v. Anchorage Times Publishing Co.,500 an employer denied an employee a part-time position because the employee voted for the union in an upcoming representation election. The employee re-

491. Id. at 204-05.
492. 644 F.2d 834 (9th Cir. 1981).
493. In NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464, 467-68, 472 (1953), the Court upheld the discharge of some employees for distributing a handbill disloyal to the employer. The discharge was supported by § 10(c) of the Act. The critical distinction in that case was that the disloyalty did not occur while the employees were engaged in protected activities.
494. 644 F.2d at 838-39.
495. Id.
496. 346 U.S. 464 (1953).
497. 644 F.2d at 841-42.
498. NLRB v. Max Factor & Co., 640 F.2d at 205.
499. 644 F.2d at 841. The leaflets contained serious charges against the school and its facilities. Not all of the charges were true. Some of the complaints involved cleanliness, teacher's duties, and care of the children. Id.
signed as a result of being denied the part-time work. The court found that the employee was discharged for discriminatory reasons. The court noted that both the employer and the NLRB treated the resignation as a discharge and, therefore, also treated the refusal to provide the employee with part-time work as a discharge. The court affirmed past holdings that although an employer is free to discharge an employee for good reasons, bad reasons, or for no reason at all, there will be a violation of section 8(a)(1) or (3) of the Act if anti-union animus is the moving or "but for" cause of the discharge. The court ruled that the General Counsel of the NLRB must show more than mere circumstantial inferences drawn from a general history of anti-union activity by the employer.

In this case, the finding that the employer's anti-union animus was a critical factor in the discharge was supported by substantial evidence.

In Pay'N Save Corp. v. NLRB, the court found a violation of sections 8(a)(1) and (3) of the Act when employees were discharged for wearing union buttons in violation of a company rule. The court held that the discharges were discriminatory because the company rule which was originally restricted to political buttons, was expanded to include union buttons in response to union activity. The court held that the ban on union buttons was an interference with the employees' protected rights under section 7 and was motivated by anti-union animus. The court noted that Pay'N Save discriminatorily applied its rule because it allowed other employees to wear non-political but potentially controversial buttons.

In three other recent cases during the survey period, the court found anti-union animus to be the motivating factor in discharges. In NLRB v. Circo Resorts, Inc., a Board finding that two employees were discharged for engaging in union organization was enforced, despite allegations by the employer of economic reasons for the discharges. In NLRB v. R & H Masonry Supply, Inc., the court

501. Id. at 1366-67.
502. Id. at 1367.
503. Id.
504. 641 F.2d 697 (9th Cir. 1981).
505. Id. at 701-02.
506. Id. at 702.
507. Id. at 702.
508. Id. at 701.
509. 646 F.2d 403 (9th Cir. 1981).
510. Id. at 405. The court did not state what the economic reasons were alleged to be, but did note the presence of other statements and circumstances which showed anti-union animus. Id.
enforced a Board finding of illegal discharges where the company contracted out work in order to avoid bargaining with the union. In *Bellingham Frozen Foods, Inc. v. NLRB*, the court upheld a Board finding that the employer violated sections 8(a)(1) and (3) of the Act by terminating an employee for engaging in union activities.

All of the above cases applied the Ninth Circuit’s former mixed motive standard, which required that anti-union animus be the motivating factor before a violation of the Act would be found. The change from the *moving cause* standard to the *Wright Line* test may, however, be more semantical than substantial. The *moving cause* standard, in essence, requires a showing by the General Counsel that the employee would not have been discharged *but for* engaging in protected activities. In either case, the employer has not violated section 8(a)(1) or (3) in situations where the protected activity is a factor in the discharge, but the employer would have discharged the employee for legitimate business reasons in any event. Both tests seek to discover the true motivation for discharge.

Although the *Wright Line* test appears to signal a shift in the burden of proof from the General Counsel to the employer in those situations where the General Counsel sets out a prima facie case of unlawful interference, this shift is more illusory than real. Section 10(c) of the Act requires a violation to be proved by a preponderance of the evidence. The prima facie case that the General Counsel sets out must, therefore, meet that standard. The result is that the General Counsel must prove, under either the *moving cause* standard or the *Wright Line* test, that engaging in a protected activity was ultimately the reason for the employee’s discharge.

### B. Interrogation and Polling

Employer interrogation of employees is violative of the Act when

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511. 627 F.2d 1013 (9th Cir. 1980).
512. *Id.* at 1014. The employer was a small firm that owned its own delivery trucks. After the employer learned that a union was attempting to organize the truck drivers, all of the trucks were sold and the work previously done by the employees was accomplished by individual contracts. Some of the same employees were hired by contract. *Id.*
513. 626 F.2d 674 (9th Cir. 1980).
514. 29 U.S.C. § 160(c) (1976) provides:

> If upon the preponderance of the testimony taken [in a hearing] the Board shall be of the opinion that any person . . . has engaged in or is engaging in any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice.
it is coercive\textsuperscript{515} or tends to interfere with employee rights to organize, form, join, or assist labor organizations.\textsuperscript{516} Although questioning or polling employees about their union sympathies is not a per se violation of section 8(a)(1) of the Act,\textsuperscript{517} courts will find such a violation when the totality of the circumstances indicates that an interrogation is coercive or reasonably tends to restrain or interfere with the exercise of protected rights.\textsuperscript{518}

The Ninth Circuit has used the indicia set forth in Bourne \textit{v. NLRB}\textsuperscript{519} and the tests announced in \textit{Struksnes Construction Co.}\textsuperscript{520} to determine if an interrogation or polling of employees violates the Act.\textsuperscript{521} The Bourne court set out five indicia of a coercive interrogation: (1) a history of employer hostility towards the union, (2) information sought in order to act against the responding or other employees, (3) an interrogator high in the company hierarchy, (4) an unnatural formality in the circumstances of the questioning, and, (5) a truthful employee response to the questions.\textsuperscript{522} The Board, in \textit{Struksnes}, held:

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.\textsuperscript{523}

\begin{enumerate}
\item \textsuperscript{515} NLRB v. Gissell Packing Co., 395 U.S. 575, 583 (1968).
\item \textsuperscript{516} Penasquitos Village, Inc. \textit{v. NLRB}, 565 F.2d 1074, 1080 (9th Cir. 1977); Amalgamated Meat Cutters, Local 364 \textit{v. NLRB}, 435 F.2d 668, 669 (9th Cir. 1970).
\item \textsuperscript{518} A. & R. Transport, Inc. \textit{v. NLRB}, 601 F.2d 311, 313 (7th Cir. 1979); Penasquitos Village, Inc. \textit{v. NLRB}, 565 F.2d 1074, 1080 (9th Cir. 1977); NLRB \textit{v. Monroe Tube Co.}, 545 F.2d 1320, 1328 (2d Cir. 1976); NLRB \textit{v. Crystal Laundry & Dry Cleaning Co.}, 308 F.2d 626, 628 (6th Cir. 1962).
\item \textsuperscript{519} 332 F.2d 47 (2d Cir. 1964).
\item \textsuperscript{520} 154 N.L.R.B. 1062 (1967).
\item \textsuperscript{521} The Ninth Circuit expressly adopted the Bourne indicia in NLRB \textit{v. Hotel Conquistador, Inc.}, 398 F.2d 430, 434 (9th Cir. 1968). The Struksnes tests were adopted in NLRB \textit{v. B.C. Chevrolet, Inc.}, 582 F.2d 491, 495 (9th Cir. 1978), and in NLRB \textit{v. Supertoys, Inc.}, 458 F.2d 180, 182 (9th Cir. 1972).
\item \textsuperscript{522} 332 F.2d 47, 48 (2d Cir. 1964).
\item \textsuperscript{523} 165 N.L.R.B. 1062, 1063 (1967).
\end{enumerate}
In NLRB v. Gissell Packing Co., the Supreme Court specifically adopted the Struksnes tests to determine the legality of polling. The Struksnes tests are designed to analyze whether an employer's attempts to verify a union claim of majority representation in an organization campaign interfered with the employees' right to organize. The Bourne indicia, on the other hand, are designed for application to employer interrogations.

Still another test, formulated by the Board in Johnnie's Poultry Co., was subsequently applied by the Seventh Circuit. This test requires the employer to (1) communicate to the employee the purpose of the questioning, (2) make assurances that there will not be reprisals, (3) assure that employee participation is voluntary, (4) make no coercive statements during the questioning, (5) make the questioning free from an atmosphere of employer hostility, and (6) question the employee only within the necessities of a legitimate purpose. Other circuits have used one or more of the above tests to determine if an unlawful interrogation has taken place.

Although both the Bourne indicia and the Johnnie's Poultry test are designed for application to employer interrogations, they differ in terms of specific factors. A notable difference is the requirement under the Johnnie's Poultry test that the employer provide assurances that the employee's participation in the questioning is voluntary and that there will be no reprisals for refusing to participate. The Bourne indicia do not contain such a requirement, but instead seek to determine whether

525. Id. at 609.
526. 165 N.L.R.B. at 1062-63.
527. 332 F.2d at 48.
528. 146 N.L.R.B. 770, 775 (1964), enf. denied on other grounds, 344 F.2d 617 (7th Cir. 1965).
530. 146 N.L.R.B. at 775.
531. The Fifth and Seventh Circuits have used the Struksnes tests to analyze interrogations. NLRB v. C. & P. Plaza Dept. Store, Div. of C. & P. Shop. Contractor, Inc., 414 F.2d 1244, 1249 (7th Cir. 1969), cert. denied, 396 U.S. 1058 (1970); NLRB v. Southwire Co., 429 F.2d 1050, 1055-56 (5th Cir. 1970), cert. denied, 401 U.S. 939 (1971). The D.C. Circuit, however, has rejected the Struksnes tests, relying instead on the Bourne indicia. Teamsters, Local 633 v. NLRB, 509 F.2d 490, 494 (D.C. Cir. 1974). The Seventh and Fifth Circuits have also rejected the Bourne indicia, see NLRB v. Gogin, 575 F.2d 596, 600 (7th Cir. 1978); NLRB v. Varo, Inc., 425 F.2d 293, 298 (5th Cir. 1970), in addition to the other two tests. The Second Circuit, the originator of the Bourne indicia, has held that only three of the five indicia need be present to sustain a violation. NLRB v. Scolar's Inc., 466 F.2d 1289, 1291 (2d Cir. 1972). The Second Circuit has also held that the absence of any one of the Bourne indicia would not exonerate the employer. NLRB v. Monroe Tube Co., 545 F.2d 1320, 1328 (2d Cir. 1976). Finally, the Second Circuit has rejected the Johnnie's Poultry test. Id.
the employer intends to take action against employees based on the information gained by the questioning. In either case, the courts seek to prohibit questioning in an atmosphere of coercion.

The Ninth Circuit recently employed a combination of the tests set forth above. In *NLRB v. Los Angeles New Hospital*, the employer interrogated members of an authorized grievance committee concerning union organizing. The interrogators did not guarantee immunity against reprisals to the employees. In addition, the employer failed to communicate to the employees a valid purpose for the questioning; the interrogator held the highest position in the employer’s hierarchy; and the employees were asked for the names of others involved in the organizing. All of these facts created the reasonable impression that the information was being sought in order to take action against individual employees. The court, therefore, determined that the employees were subjected to coercive interrogations.

In *NLRB v. Anchorage Times Publishing Co.*, the court found that the employer, during an organization campaign, had interrogated employees about their union sympathies. The interrogations were conducted over a period of several months by high-ranking company officials and contained veiled threats against employees who exhibited union sympathies. The court rejected the employer’s argument that there was no evidence of actual coercive effect, and held, instead, that evidence of actual intimidation is not necessary for an interrogation to violate the Act.

The *Anchorage Times* court also rejected the employer’s argument that the interrogations should not be considered unfair labor practices because such conduct fell outside the critical period in an organizing

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532. 640 F.2d 1017 (9th Cir. 1981).
533. *Id.* at 1019.
534. *Id.* at 1020.
535. *Id.*
536. 637 F.2d 1359 (9th Cir. 1981).
537. One employee approached the general manager of the *Times* regarding management’s failure to reveal wage scales to the employees. The manager asked the employee if there was a conspiracy being plotted by employees in the newsroom and advised the employee that if he was dissatisfied, he could work elsewhere. *Id.* at 1363 n.6.
538. *Id.* at 1364. See also *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977). Other federal circuit courts have reached a similar conclusion. See, e.g., *NLRB v. Donald E. Hernly, Inc.*, 613 F.2d 457, 464 (2d Cir. 1980) (lack of express threats triggers use of *Bourne* indicia).
The employer relied on the so-called "critical period doctrine" enunciated by the Board in *Ideal Electric and Manufacturing Co.* This doctrine establishes a time limit for the consideration of employer or union actions in determining whether a contested election was improperly influenced by unfair labor practices.

The Ninth Circuit determined that the critical period doctrine was merely a guide to the relevancy of employer misconduct directed toward the outcome of an election, and not a time bar on the filing of an unfair labor practice charge concerning unlawful interrogations. However, application of the critical period doctrine to interrogations as independent violations of section 8(a)(1) is not appropriate in the case of a contested election because no court has required an election petition to be filed as a condition precedent to the finding of an unfair labor practice.

Using the same hybrid formula, the court, in *Golden Day School, Inc. v. NLRB*, found interrogations to be coercive and, therefore, violative of section 8(a)(1), when thirteen participants of a union organizing meeting were interrogated about the meeting. Eight of the employees were fired immediately and the remaining five were fired during a picketing demonstration. One employee was asked to renounce her union membership. The court found evidence of strong anti-union bias in the timing, nature and extent of the individual interrogations.

In four additional survey cases, the Ninth Circuit analyzed interrogations in a similar manner. In *NLRB v. Circo Resorts, Inc.*, the Ninth Circuit affirmed violations where the employer's interrogations were accompanied by anti-union statements and a pattern of conduct, including discharges, which evidenced anti-union bias. In *NLRB v. R & H Masonry Supply, Inc.*, the Ninth Circuit enforced a Board

539. 637 F.2d at 1364-65.
541. Employer conduct occurring prior to the filing of an election petition by the union is considered relevant to the outcome of the contested election. *Id.*
542. 637 F.2d at 1365.
543. Compare supra notes 522, 523, 528 and accompanying text.
544. 644 F.2d 834 (9th Cir. 1981).
545. *Id.* at 836-37.
546. *Id.* at 837.
547. *Id.* at 836.
548. *Id.* at 838.
549. 646 F.2d 403 (9th Cir. 1981).
550. *Id.* at 405-06.
551. 627 F.2d 1013 (9th Cir. 1980).
order based upon a violation of section 8(a)(1) of the Act when three employees were questioned regarding the signing of union authorization cards. The court noted that the questioning was accompanied by five discharges and the contracting out of work ordinarily performed by the employees involved in the organizing campaign. In *NLRB v. Davis*, the court upheld an enforcement order where the employer repeatedly interrogated employees about their attitudes toward the union. The interrogations were accompanied by threats of reprisal and by promises of wage increases to discourage union support.

Finally, in *NLRB v. Peninsula Association for Retarded Children and Adults*, the Board found two violations of section 8(a)(1) where the employer held noncoercive interrogations of unit employees. A third violation was found where an interrogation was accompanied by a coercive statement. Without analysis, the court labeled the three violations as relatively insignificant. The court refused to enforce the Board’s bargaining order based on these violations and found that the record failed to establish jurisdiction over the particular employer. The court noted that even if jurisdiction had existed, the violations were too minor to warrant a bargaining order.

C. Surveillance

It is an unfair labor practice to interfere with, coerce, or restrain employees in the exercise of their right to engage in concerted activity by maintaining surveillance over a union. Although merely creating the impression of surveillance is not per se unlawful, if it is accompanied by words or acts which would lead a court to infer unlawful interference with the right to engage in concerted activity, the surveillance will be held unlawful.
In *NLRB v. Anchorage Times Publishing Co.*, a newspaper editor told two employees that management would be watching to see who attended an NLRB hearing on a representation petition. The editor advised one employee to attend the hearing in the normal course of his duties as a labor reporter and advised the other employee to stay away from the hearing. Noting that an impression of surveillance can be as coercive as actual surveillance, the Ninth Circuit concluded that this constituted an unfair labor practice.

### D. Wage Increases

Section 8(a)(1) of the Act prohibits conduct immediately favorable to employees which is expressly undertaken to interfere with their freedom to choose an exclusive bargaining representative. Granting benefits while an election is pending, for example, is a prima facie violation of section 7, and accordingly a violation of section 8(a)(1) because it tends to undermine union support by suggesting that the source of benefits may dry up if the election results in union representation. Management is not, however, precluded from taking reasonable steps to operate its business. Consequently regularly-timed wage increases may be granted unless the timing of the increase is actually motivated by union activities. The presence or absence of such motivation is normally determined by examining the employer's intent.

In *NLRB v. Anchorage Times Publishing Co.*, the employer formulated a program for wage reviews and periodic wage increases prior to the start of a union organizing campaign. The Board found that the

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562. 637 F.2d 1359 (9th Cir. 1981).
563. *Id.* at 1366. The court also found actual surveillance based on the Director of Circulation's request that certain employees attend a union meeting and report back. *Id.* at 1365.
566. *Oshman's Sporting Goods, Inc. v. NLRB*, 586 F.2d 699, 705 (9th Cir. 1978); *NLRB v. Otis Hospital*, 545 F.2d 252, 254-55 (1st Cir. 1976); *NLRB v. Styletek, Div. of Pandel-Bradford, Inc.*, 520 F.2d 275, 280 (1st Cir. 1975); *NLRB v. Gruber's Super Market, Inc.*, 501 F.2d 697, 701 (7th Cir. 1974).
568. *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1130 (9th Cir. 1978).
company deviated from the plan so as to grant fifteen percent of the employees wage increases in the two days immediately preceding the election. Approximately half of these increases were granted three or more weeks later than prescribed in the wage review plan, and approximately one quarter of the increases were granted two or more weeks earlier than scheduled. The court rejected the company's explanation regarding the timing of the increases. It affirmed the Board finding that the company intended the wage increases to influence voting in the election, in violation of section 8(a)(1) of the Act.\(^{570}\)

In *NLRB v. Circo Resorts, Inc.*,\(^{571}\) wage increases were granted to two employees during an organization campaign. The increases were granted following protests by the employees regarding disparity in wages. The Board found a violation of section 8(a)(1) based on the timing of the increases.\(^{572}\) However, relying on its ruling in *Anchorage Times*, the Ninth Circuit deleted that portion of the Board's order relating to wage increases, stating that the Board had not given consideration to the employer's justification for wage increases but rather had based its finding solely on the timing of the increases.\(^{573}\)

In two additional cases, the Ninth Circuit affirmed Board orders where a finding was made that the employer had offered benefits to employees in return for their termination of union activity. In *NLRB v. Max Factor and Co.*,\(^{574}\) the employer offered a union steward either a management position or a scholarship to law school if she would cease her union activities. The court found that the offer violated section 8(a)(1).\(^{575}\)

In *NLRB v. Davis*,\(^{576}\) the employer offered wage increases to employees who supported the employer's anti-union position during a union organizing campaign. The court upheld a Board order finding a violation of section 8(a)(1) on the ground that the employer unlawfully offered wage increases in order to influence the election.\(^{577}\)

**E. Concerted Activity**

Sections 7 and 8(a)(1) of the Act afford employees protection from employer interference with their right to engage in concerted activi-

\(^{570}\) *Id.* at 1368.
\(^{571}\) 646 F.2d 403 (9th Cir. 1981).
\(^{572}\) *Id.* at 405.
\(^{573}\) *Id.* at 405-06.
\(^{575}\) *Id.* at 204.
\(^{576}\) 642 F.2d 350 (9th Cir. 1981).
\(^{577}\) *Id.* at 353-54.
ties. Section 7, however, does not apply to unlawful activities, violence, breaches of contract, or acts of disloyalty to the employer unnecessary to effect legitimate concerted activities. An employee must be acting with or on behalf of other employees and not solely on his or own behalf to rely on section 7. Some concerted activities may be so attenuated in relationship to the individual employee's working conditions that they lose section 7 protection. Protected activities under section 7, however, may include activities outside the scope of the employer-employee relationship.

An employee is engaged in concerted activity when the union aids him or her in filing a grievance, even if the employee's understanding of the contract is proved inaccurate and the grievance unfounded. The Second Circuit, in NLRB v. Interboro Contractors, Inc., held that "[a]ctivities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even if in the absence of such interest by fellow employees." The Ninth Circuit has held that when an individual employee files a safety complaint and no collective bargaining agreement exists, the Interboro doctrine does not apply and the employee is not protected.

578. 29 U.S.C. § 157 (1976) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities 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. § 158(a)(1) provides:

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.


582. Id. at 565; see, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556, 569 (1978) (union newsletter urging employees to write to political officials regarding "right to work" statute closely related to conditions of employment and, therefore, protected); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 n.8 (1945) (solicitation of membership in organizing campaign protected); Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326, 326 U.S. 326, 324 F.2d 1182, 1184 (3d Cir. 1980) (engaging in sympathy strike by honoring lawful primary strike is concerted activity protected by § 7); Gibbs Die Casting Aluminum Corp., 174 N.L.R.B. 75, 79 (1969) (complaints by group of employees to health department about noxious fumes at work site constituted concerted activity).

583. NLRB v. Adams Delivery Serv., Inc., 623 F.2d 96, 100 (9th Cir. 1980); NLRB v. H.C. Smith Constr. Co., 439 F.2d 1064, 1065 (9th Cir. 1971) (per curiam).

584. 388 F.2d 495, 500 (2d Cir. 1967).

585. Id.
under section 7.\(^{586}\) The Ninth Circuit has specifically questioned the \textit{Interboro} doctrine as a "legal fiction presenting an unwarranted expansion of the definition of concerted action unsupported by a statutory basis."\(^{587}\) In \textit{NLRB v. C & I Air Conditioning, Inc.} ,\(^{588}\) the Ninth Circuit held that where an employee refused work due to alleged unsafe conditions, but did not file a grievance, the employee was not protected under section 7. The court distinguished \textit{Interboro} as limited to situations involving enforcement of a collective bargaining agreement.\(^{589}\) Despite its questioning of the \textit{Interboro} doctrine, however, the Ninth Circuit, in \textit{NLRB v. Adams Delivery Service, Inc.} ,\(^{590}\) stated that "[t]he \textit{Interboro} doctrine has been adopted 'in principle' by this court."\(^{591}\)

Recently, in \textit{NLRB v. Maxwell} ,\(^{592}\) an employee was discharged for attempting to collect overtime pay pursuant to a collective bargaining agreement. The employee was the only one to make a complaint and did not file a grievance. The court held that the employee was discharged for attempting to enforce a provision of the collective bargaining agreement and was, therefore, involved in protected activity.\(^{593}\)

In \textit{Caterpillar Tractor Co. v. NLRB} ,\(^{594}\) the employer suspended a union chief steward for sixty days because he assisted an employee in filing a grievance. In addition, the employer had ordered the steward and the employee to use a dirty table outside the premises to write up the grievance. The court held this to be a substantial basis for finding that the employer violated section 8(a)(1) by discouraging resort to the grievance procedure.\(^{595}\)

In \textit{Ad Art, Inc. v. NLRB} ,\(^{596}\) an employee was fired for processing his own grievance. The court stated that "[a]n employer commits an unfair labor practice when it discharges an employee who seeks, with the aid of the union or fellow employees, to grieve complaints."\(^{597}\) The court noted that the administrative law judge did not make a finding as to whether the employee had attempted to "usurp the powers of a union steward" by processing his own grievance, and had thereby lost

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\(^{586}\) NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980).
\(^{587}\) Id.
\(^{588}\) 486 F.2d 977 (9th Cir. 1973).
\(^{589}\) Id. at 978.
\(^{590}\) 623 F.2d 96 (9th Cir. 1980).
\(^{591}\) Id. at 100.
\(^{592}\) 637 F.2d 698 (9th Cir. 1980).
\(^{593}\) Id. at 701.
\(^{594}\) 638 F.2d 140 (9th Cir. 1981).
\(^{595}\) Id. at 141.
\(^{596}\) 645 F.2d 669 (9th Cir. 1980).
\(^{597}\) Id. at 678.
the protection of the Act.598 The court reviewed the record and found that the employee had formerly processed grievances through a steward, but had not done so in the particular instance that ultimately led to his dismissal. The court determined that one instance alone does not establish a pattern of processing one's own grievances.599

In NLRB v. Cofer,600 the court upheld the Board's finding that three employees at a motel were fired because they jointly filed a complaint regarding pay. The court held that when employees unite to seek higher wages from a government agency administering the minimum wage laws, they are engaging in concerted activity protected by section 7 of the Act.601

In NLRB v. Southern California Edison Co.602 an employee was suspended for refusing to cross a picket line to perform assigned work at a customer's place of business.603 The court upheld the Board's interpretation of the Act to protect an employee who honors a lawful picket line at a customer's place of business.604 Noting that refusal to cross a picket line will be protected if motivated by mutual aid and protection,605 the court stated that a sympathy strike to aid other unions generally promotes labor goals and, thus, represents a form of mutual aid and protection.606 The court, however, acknowledged that the right to strike or the right to engage in sympathy strikes may be waived by the collective bargaining agreement.607 It then held that the language and evidence bearing on the parties' intent was insufficient to negate the deference due the Board's determination that no waiver existed.608

F. Solicitation

The right of employees to organize and bargain collectively, as es-

598. Id.
599. Id.
600. 637 F.2d 1309 (9th Cir. 1981).
601. Id. at 1313.
602. 646 F.2d 1352 (9th Cir. 1981).
603. Id. at 1361. The picket line was against a company where Edison, solely for its own benefit, maintained an instrument that gathered experimental data. If the employee had crossed the picket line, it would not have affected the performance of the company's operations. Id. at 1363.
604. Id. at 1364.
605. Id. Section 7 requires that an activity be for mutual aid and protection in order to be afforded the protection provided by the Act. 29 U.S.C. § 157 (1975).
606. 646 F.2d at 1364.
607. Id.
608. Id. at 1369.
established by section 7 of the Act,609 includes the right to communicate at the job site regarding organization.610 "Absent special circumstances relating to production or plant discipline, an employer may not issue a broad rule prohibiting union solicitation by its employees on company property."611 The Board, therefore, is free to characterize particular restrictions on solicitation as presumptive interferences with section 7 rights.612

The Supreme Court has interpreted the Act to require that special consideration be given to the needs of patients in health care institutions in situations where the patients may be affected by union solicitation.613 Thus, bans on solicitation in immediate patient care areas are not presumptively invalid.614 However, when a facility has failed to justify a prohibition as necessary to avoid the disruption of operations or disturbance of patients, the Board may require that a hospital permit solicitation during nonworking time in nonworking areas.615

In NLRB v. Los Angeles New Hospital,616 an employee, during his break time, read union literature to three other employees in a hospital lounge. Hospital management informed him of the ban on solicitation in that room because it was considered to be a part of an adjacent operating room and, therefore, an immediate patient care area. The court, however, found that the lounge was isolated from the operating room and that no patients ever entered it.617 Thus, the court put the burden on the hospital to show that the ban on solicitation was necessary.618

To carry that burden, the hospital alleged that the ban was required because loud noises from the lounge disturbed patient care. The court found the alleged incidents were too isolated to support a showing of sufficient disruption of operations to warrant a complete ban on solicitation.619

In addition to the hospital exception, there are other solicitation bans on company property which are not presumptively invalid. It is well established that an employer is entitled to prohibit union solicita-

611. NLRB v. Essex Wire Corp., 245 F.2d 589, 593 (9th Cir. 1957).
614. Id. at 507; see also NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 779 (1979).
616. 640 F.2d 1017 (9th Cir. 1981).
617. Id. at 1021.
618. Id.
619. Id. at 1022.
An employee, however, has the right to wear union insignia during working hours, except under special circumstances relating to efficiency or plant discipline. Wearing union buttons is not a per se guaranteed right; there must be an express purpose in wearing the buttons which furthers the goal of mutual aid and protection. Moreover, the considerations involved in determining whether the wearing of union insignia during working hours may be banned include the image presented to the public by the employees, safety measures, production of a sanitary or pure product, avoidance of disharmony among employees, and avoidance of distractions for workers in production jobs.

In *Pay'n Save Corp. v. NLRB*, the employer banned all union buttons during an organizational campaign, as well as other insignia that were either political or controversial. The employer argued that its ban on union buttons was justified by its concern over the image projected to the public by its employees. The court enforced the Board’s order striking down the ban against union buttons because there were no special circumstances warranting such a ban. The court noted that Pay'n Save had not uniformly applied its rule and that the circumstances therein were distinguishable from *NLRB v. Harrah’s Club*, and *Davison-Paxon Co., Division of R.H. Macy & Co. v. NLRB*, where bans were upheld, primarily because there was significant employer interest in the dress and presentation of employees to the public. In *Harrah’s Club*, all emblems, badges, buttons, jewelry and other ornaments had been banned for many years. The company rule was confined to employees who came in contact with the public.

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620. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945); NLRB v. Essex Wire Corp., 245 F.2d 589, 593 (9th Cir. 1957).
621. Fabri-Tek, Inc. v. NLRB, 352 F.2d 577, 584-85 (8th Cir. 1965); NLRB v. Essex Wire Corp., 245 F.2d 589, 593 (9th Cir. 1957).
622. NLRB v. Harrah’s Club, 337 F.2d 177, 179 (9th Cir. 1964).
623. Id. at 180.
627. Fabri-Tek, Inc. v. NLRB, 352 F.2d 577, 583 (8th Cir. 1965).
628. 641 F.2d 697 (9th Cir. 1981).
629. Id. at 699-700.
630. Id. at 701.
631. Id. at 701-02.
632. 337 F.2d 177 (9th Cir. 1964).
633. 462 F.2d 364 (5th Cir. 1972).
634. 641 F.2d at 701 n.10.
635. 337 F.2d at 177, 178 n.2.
and did not extend to nonwork areas or places not open to the public. In Davison-Paxon Co., the employees were allowed to wear buttons the size of a dime or nickel. A ban against the wearing of buttons the size of a half-dollar on the selling floor was determined to be reasonable because the company was afraid of antagonizing customers with the larger, bolder buttons. The Pay'n Save court further distinguished Harrah's Club and Davison-Paxon Co. by noting that the buttons were banned in Harrah's Club because of the failure to state an express purpose connected with the employees' concerted activities and in Davison-Paxon Co. in order to avoid animosity between union and anti-union factions.

G. Statements to the NLRB

It is an unfair labor practice to discharge or otherwise discriminate against an employee for filing charges or giving testimony under the Act. It is also an unfair labor practice to interfere with, restrain, or coerce an employee with regard to statements made to the NLRB. Interference with an employee's right to make such statements will be found when an employer intimidates the witness-employee to such a degree that testimony is altered or repudiated. Moreover, the Supreme Court has held that statements made to the Board are exempt from Freedom of Information Act requests unless the witness actually testifies at a hearing. The rationale behind such a rule is that unless these statements are protected from disclosure, the reporting employee would be subject to influence by the employer. Under certain conditions, however, it will not be unlawful for an employer to ask an employee to voluntarily provide a copy of his or her statement to the Board.

636. Id. at 180.
637. 462 F.2d at 365.
638. Id. at 369-70.
639. 641 F.2d at 701.
640. Id.
642. Retail Clerks Int'l Ass'n v. NLRB, 373 F.2d 655, 658 (D.C. Cir. 1967); NLRB v. Winn-Dixie Stores, Inc., 341 F.2d 750, 753 (6th Cir.), cert. denied, 382 U.S. 830 (1965); Henry I. Siegal Co. v. NLRB, 328 F.2d 25, 27 (2d Cir. 1964).
644. Id.
645. NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 481 (2d Cir. 1976) (propriety of request for employee's statement turns on voluntary nature of employee's compliance with request and employer's need for information); Robertshaw Controls Co. v. NLRB, 483 F.2d 762, 767-68 (4th Cir. 1973) (no violation when valid reason exists for obtaining statement and compliance is voluntary with assurances against reprisals); W.T. Grant Co. v. NLRB,
Employer requests for statements have traditionally been treated in one of two ways. In some circuits, these requests are considered per se unlawful if not accompanied by assurances against reprisal or if the employer fails to show a real need for statement in trial preparation.\(^\text{646}\) Other circuits have adopted a rule which calls for a balancing of interests between the employer’s need to prepare for trial and the potential coercion.\(^\text{647}\)

In *NLRB v. Maxwell*,\(^\text{648}\) the Ninth Circuit adopted the rule that there is a per se violation of the Act when an employer requests a copy of an employee’s statement to the Board without assuring the employee that no reprisals will follow from a refusal to supply the statement. The court also specified that this rule remains operative even if there is a showing that the requested statement is needed for trial preparation.\(^\text{649}\)

The employer in *Maxwell* asked an employee for a copy of a statement made to the NLRB, but did not provide assurances against reprisals for failure to comply with the request or show that the statement was needed for trial preparation. There was, however, no evidence that the employee was unwilling to cooperate with the employer, or that he

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\(^{646}\) NLRB v. General Stencils, Inc., 438 F.2d 894, 898 (2d Cir. 1971); Retail Clerks Int’l Ass’n v. NLRB, 373 F.2d 655, 658 (D.C. Cir. 1967); W.T. Grant Co. v. NLRB, 337 F.2d 447, 449 (7th Cir. 1964) (request for information not violative of Act when employee not coerced, compliance with request purely voluntary, and company followed procedure previously approved by Board in Atlantic & Pacific Tea Co., 138 N.L.R.B. 325, 334 (1962)); Texas Indus., Inc. v. NLRB, 336 F.2d 128, 133 (5th Cir. 1964) (in allowing employer to interrogate employee about pending charges court must strike balance between inherent coercive nature of interrogation and employer’s legitimate need to prepare for trial); Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 743 (D.C. Cir. 1950) (employers may interview employees when (1) requested statement is to be used to discover facts within limits of issues raised by the General Counsel’s complaint, (2) request for information does not go beyond necessities of trial preparation, (3) request for information does not pry into extent of employee’s union activity or otherwise restrain employee’s right to join or assist union, and (4) probative value of questions asked by employer are sufficiently relevant to charges made in complaint to justify risk of intimidating employee).

\(^{647}\) NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 480 n.8, 481 (2d Cir. 1976) (per se violations specifically rejected; instead, propriety of request turns upon whether there was voluntary compliance and whether employer needed information); Robertshaw Controls Co. v. NLRB, 483 F.2d 762, 768-69 (4th Cir. 1973) (per se rule set out in Retail Clerks Int’l Ass’n v. NLRB, 373 F.2d 655 (D.C. Cir. 1967), not followed in lieu of standard requiring valid reason for obtaining statements and finding of voluntary compliance with request).

But see Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 743 (D.C. Cir. 1950) (test utilized balances determination of probative value of questions relating to unfair labor practice charges against risk of intimidating employee). This “balance-of-interests” test was also adopted by the Fifth Circuit in Texas Indus., Inc. v. NLRB, 336 F.2d 128, 133 (5th Cir. 1964).

\(^{648}\) 637 F.2d 698 (9th Cir. 1981).

\(^{649}\) Id. at 702-03.
was actually coerced.\textsuperscript{650} It, therefore, appeared that the employee voluntarily provided the employer with a copy of his statement.\textsuperscript{651}

The court found these circumstances analogous to employer interrogation of employees regarding union activities.\textsuperscript{652} The court distinguished requests for statements made to the NLRB from other interrogations because employers' direct requests for employees' statements have an inherent chilling effect on the administration of the Act (\textit{i.e.}, employees will fear reprisal for what they may say to investigating Board agents if they know that employers may obtain copies of their statements).\textsuperscript{653} The court, therefore, established a more stringent "per se" rule rather than the "totality of circumstances" rule because "any less stringent [standard] presents too great a risk of interference with the Board's enforcement of the Act."\textsuperscript{654}

**H. Union Unfair Labor Practices**

It is an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their section 7 rights.\textsuperscript{655} Included within the protection of section 7 is the right to refrain from union activities.\textsuperscript{656} The policy behind this provision is to insulate employees from retaliatory actions taken by employers or unions as a result of their refusal to engage in union organizing activities.\textsuperscript{657} Thus, if a union rule invades or frustrates the policy which prohibits interference with an employee's right to refrain from union activities, it may not be enforced.\textsuperscript{658} A union may not, for example, discriminate against non-union employees when the foreseeable consequence or likely effect of

\textsuperscript{650} Id. at 701.

\textsuperscript{651} Id.

\textsuperscript{652} Id. at 702.

\textsuperscript{653} Id. at 702-03. Additionally, the court noted that "[t]he possibility that an employer's request will have a coercive effect on testimony is even present when the employee's statement is favorable to the employer for 'those known to have already given favorable statements are then subject to pressure to give even more favorable testimony.'" Id. at 702 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 240 (1978)).

\textsuperscript{654} 637 F.2d at 702.

\textsuperscript{655} 29 U.S.C. § 158(b)(1)(A) (1976) ("Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . "). See also Communications Workers, Local 1104 v. NLRB, 520 F.2d 411, 415 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976).

\textsuperscript{656} 29 U.S.C. § 157 (1976) ("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 8(a)(3) . . . ").

\textsuperscript{657} Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).

\textsuperscript{658} Scofield v. NLRB, 394 U.S. 423, 429 (1969); Communications Workers, Local 1104 v. NLRB, 520 F.2d 411, 415 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976).
the discrimination is to encourage union membership.\textsuperscript{659}

Recently, in \textit{International Association of Machinists, Lodge 720 v. NLRB},\textsuperscript{660} a union refused to grant unemployment stamps to non-members. These stamps were used by members to pay for monthly union dues at a drastically reduced rate while they were unemployed. The Ninth Circuit struck down this policy, holding that a union is prohibited from discriminating between dues-paying members and non-members who are required to make dues equivalency payments as a condition of employment.\textsuperscript{661}

It is also an unfair labor practice under section 8(b)(2) of the Act for a labor organization to cause an employer to terminate an employee on some ground other than the employee's failure to tender the periodic union dues and initiation fees uniformly required as a condition of employment.\textsuperscript{662} In contrast, the fairness of union discipline which is designed to protect legitimate interests and which does not interfere with the employer-employee relationship or otherwise violate a policy of the Act, may not be considered by the Board.\textsuperscript{663} It is the consensual basis of union membership which makes disciplinary action against members non-coercive within the meaning of section 8(b)(1)(A).\textsuperscript{664}

In acting to protect a legitimate interest, however, a labor organization may not cause an employee to be discharged for non-compliance with a union security clause or membership requirement without first informing him or her of all obligations.\textsuperscript{665} The union must, for example, provide a statement to the member as to the precise amount and number of months for which union dues are payable, as well as an explanation of the method used in computing such amount.\textsuperscript{666}

In \textit{NLRB v. Construction Teamsters, Local 291},\textsuperscript{667} an employee inadvertently failed to pay his union dues for a three month period. At the start of the next three month period the employee paid his dues. The union mailed the employee a delinquency notice for the earlier

\begin{itemize}
  \item \textsuperscript{659} NLRB v. International Longshoremen’s Union, Local 13, 549 F.2d 1346, 1352-53 (9th Cir.), \textit{cert. denied}, 434 U.S. 922 (1977).
  \item \textsuperscript{660} 626 F.2d 119 (9th Cir. 1980).
  \item \textsuperscript{661} \textit{Id.} at 123.
  \item \textsuperscript{662} 29 U.S.C. § 158(b)(2) (1976).
  \item \textsuperscript{663} NLRB v. Boeing Co., 412 U.S. 67, 78 (1973); NLRB v. Retail Clerks Union, Local 1179, 526 F.2d 142, 145 (9th Cir. 1975).
  \item \textsuperscript{664} NLRB v. Retail Clerks Union, Local 1179, 526 F.2d 142, 145 (9th Cir. 1975).
  \item \textsuperscript{665} General Teamsters, Local 162 v. NLRB, 568 F.2d 665, 668 (9th Cir. 1978); NLRB v. Hotel, Motel and Club Employees’ Union, Local 568, 320 F.2d 254, 258 (3rd Cir. 1963).
  \item \textsuperscript{666} Teamsters Local 122, 203 N.L.R.B. 1041, 1041-42 (1973); Conductron Corp., 183 N.L.R.B. 419, 426 (1970).
  \item \textsuperscript{667} 633 F.2d 1295 (9th Cir. 1980).
\end{itemize}
quarter and at the same time requested that the employer discharge him. When the employee learned of the missing payment he unsuccess-
sessfully sought to apply his later payment to the earlier period. The Board found that the union had failed to notify the employee either of
his loss of good standing or the requirements for restoration to good
standing prior to seeking and securing his discharge. The facts indi-
cated that the union had afforded other employees this opportunity.\textsuperscript{668}
The court held that before a union may cause a member to be dis-
charged from his employment for delinquent dues, the union must take
whatever steps are necessary to ascertain if the delinquency was due to
the member’s ignorance or inadvertance.\textsuperscript{669}

Pursuant to section 8(b)(1)(A) of the Act, it is an unfair labor prac-
tice for a union to restrain or coerce an employee in the exercise of his
right to refrain from engaging in concerted activity.\textsuperscript{670} Although there
is an internal affairs exemption to section 8(b)(1)(A) of the Act, this
exemption does not apply when the union’s application of its internal
rules is contrary to national labor policy.\textsuperscript{671} For example, a union rule
which forbids the crossing of a picket line during a strike is enforceable
against union members by expulsion or a reasonable fine.\textsuperscript{672} The same
rule, however, could not be enforced if the discipline impeded a na-
tional policy against illegal secondary picketing.\textsuperscript{673} It is, therefore, an
unfair labor practice to levy a fine against a union member who re-
frains from engaging in unlawful concerted action promoted by the
union.\textsuperscript{674}

In \textit{NLRB v. Glaziers, Local 1621},\textsuperscript{675} two employees were found
guilty of violating union by-laws by working for an employer and dis-
regarding picket lines. The two employees had entered the premises
through a neutral reserved gate and were working for a neutral subcon-
tractor. The court held that while the picketing was legal, encouraging
the two employees to perform an illegal secondary boycott in violation
of section 8(e) of the Act violated section 8(b)(1)(A) of the Act.\textsuperscript{676}

\begin{footnotes}
\footnotetext[668]{Id. at 1298.}
\footnotetext[669]{Id. at 1299.}
\footnotetext[670]{NLRB v. Retail Clerks Union, Local 1179, 526 F.2d 142, 144 (9th Cir. 1975).}
\footnotetext[671]{Id. at 145.}
\footnotetext[672]{Scofield v. NLRB, 394 U.S. 423, 428 (1969).}
\footnotetext[673]{NLRB v. Retail Clerks Union, Local 1179, 526 F.2d 142, 146-47 (9th Cir. 1975).}
\footnotetext[674]{NLRB v. Retail Clerks Union, Local 1179, 526 F.2d 142, 146-47 (9th Cir. 1975).}
\footnotetext[675]{Morton Salt Co. v. NLRB, 472 F.2d 416, 421 (9th Cir. 1972), \textit{vacated and remanded},
414 U.S. 807 (1973), \textit{on remand}, 510 F.2d 428 (1975).}
\footnotetext[676]{632 F.2d 89 (9th Cir. 1980).}
\footnotetext[677]{Id. at 91-92.}
\end{footnotes}
I. Hot Cargo Agreements

Under section 8(e) of the Act, it is an unfair labor practice for a labor organization and an employer to enter into a hot cargo agree-

ment

whereby the employer agrees to cease doing business with any

other employer. It is also an unfair labor practice under section

8(b)(4)(B) of the Act to force an employer to cease doing business with

any other employer by means of an economic strike or other coercive

action. The prohibition against hot cargo agreements does not, how-

ever, extend to the construction industry for work performed at a con-

struction site. Thus, a labor organization may, without violating

section 8(b)(4)(B), picket or strike to obtain a hot cargo agreement

under the construction industry proviso of section 8(e). Agreements

so obtained are lawful, but only to the extent that they are made in the

context of a collective bargaining relationship, and would reduce

friction between union and non-union workers who are forced to work

in close proximity, as well as protect the continuity of work and bene-


677. A hot cargo agreement is basically a contract between an employer and a labor or-

ganization against a third party whereby the employer agrees to refrain from doing business

with the third party as long as the third party refuses to accede to whatever demands the

labor organization may have made upon it. National Woodwork Mfr's Ass'n v. NLRB, 386

U.S. 612, 634 (1967). Such secondary boycotts were labeled "hot cargo" clauses because of

their prevalence in Teamsters union contracts. Id.

678. Section 8(e) provides:

It shall be an unfair labor practice for any labor organization and any employer to

enter into any . . . agreement . . . whereby such employer . . . agrees to . . . re-

frain from . . . dealing in any of the products of any other employer . . . Provided, That

nothing in this subsection shall apply to an agreement between a labor organ-

ization and an employer in the construction industry relating to the contracting . . . of work to be done at the site of the construction.


679. Section 8(b)(4)(B) provides:

It shall be an unfair labor practice for a labor organization . . . (4)(i) to . . . en-

courage any individual . . . to engage in, a strike or a refusal in the course of his

employment to use . . . any goods . . . or to perform any services . . . (ii) where

in either case an object thereof is (B) forcing or requiring any person to cease using

. . . products of any other . . . manufacturer, or to cease doing business with any

other person, or forcing or requiring any other employer to recognize or bargain

with a labor organization as the representative of his employees unless such labor

organization has been certified as the representative of such employees under the

provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any

primary strike or primary picketing.


681. Construction Laborer's Union, Local 383 v. NLRB, 323 F.2d 422, 425 (9th Cir.

1963).

fits for the employees. In addition, these agreements are enforceable only by judicial means. In Connell Construction Co. v. Plumbers Local 100, the union sought and picketed for an agreement from an employer to use only subcontractors affiliated with the particular signatory union. The union did not represent, nor did it seek to represent, any employees of Connell Construction Company. The Supreme Court found that this type of agreement fell outside the construction industry proviso. The Court declined, however, to rule on whether a union could picket to enforce an otherwise lawful hot cargo clause under section 8(e).

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB consisted of two consolidated cases which presented similar issues. One case involved a collective bargaining agreement which permitted the union to strike in order to enforce a clause which prohibited subcontracting with non-union firms. The other case involved the picketing of an employer by a union in an attempt to secure a similar clause.

The Ninth Circuit first determined that both clauses were designed to force an employer to cease doing business with a non-union subcontractor and were, therefore, subject to section 8(e) of the Act. The court also determined that the clauses fell within the construction industry proviso of section 8(e), regardless of the possibility that the clauses would extend to particular job sites where only non-union workers would be present. This second determination was made in spite of the language in Connell which suggested that section 8(e) extends only to common situs relationships on particular job sites.

The Ninth Circuit supported its view by finding overwhelming practical difficulties in confining the subcontractor agreements only to job sites where actual union/non-union conflict occurred among workers. The court then held that actual conditions in the construction in-

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683. See id. at 628-32.
684. Acco Constr. Equip., Inc. v. NLRB, 511 F.2d 848, 852 (9th Cir. 1975); Construction Laborer's Union, Local 383 v. NLRB, 323 F.2d 422, 424 (9th Cir. 1963). Accord Donald Schriver, Inc. v. NLRB, 635 F.2d 859, 887 (D.C. Cir. 1980).
686. Id. at 619-20.
687. Id. at 633 n.14.
688. 654 F.2d 1301 (9th Cir.) (en banc), cert. granted, 454 U.S. 814 (1981).
689. Id. at 1305-06.
690. Id. at 1307.
691. Id. at 1312-13.
692. 421 U.S. at 633.
dustry were favorable to broad subcontractor clauses in contracts. 693

Finally, the Ninth Circuit, while admitting that Connell could lead to a contrary result, concluded that the Connell Court was most concerned with the existence of a collective bargaining relationship, regardless of the presence or absence of union workers at the job site. 694

The court reaffirmed previous Ninth Circuit standards by finding no violation when a union pickets or strikes to obtain a hot cargo clause protected by section 8(e). 695 However, the court also reaffirmed previous law by finding that strikes or other coercive activity, when used to enforce a lawful section 8(e) clause, violated section 8(b)(4)(ii)(B). 696

A four-judge dissent rejected the majority's reading of Connell and, instead, adopted the view that the section 8(e) construction industry proviso required a collective bargaining relationship between both the parties and job sites where union employees worked. 697 The dissent focused on the overall purpose of section 8(e) to prohibit the secondary boycott from being used as a union organizing device, 698 and on the purpose of the construction industry proviso to avoid job site friction between union and non-union workers. 699 The dissent argued that its reading of Connell met both of those objectives. 700

The dissent's reasoning appears to be more consistent with that of the Connell Court which focused on the above noted goal of avoiding job site friction in the construction industry. The majority's ruling may allow the union to organize those job sites where no union members previously worked by use of coercive picketing. This result seems to be contrary to the section 7 policy against interference with an employee's right to refrain from organizing.

In Swanson-Dean Corp. v. Seattle District Council of Carpenters, 701 the Ninth Circuit applied the result of Pacific Northwest. The court had deferred submission of Swanson-Dean until the en banc decision in Pacific Northwest had been rendered. 702 Because the issue presented to the court in Swanson-Dean was identical to that resolved in Pacific

693. 654 F.2d at 1321-22.
694. Id. at 1322.
695. Id. at 1323. See supra note 684 and accompanying text.
696. Id. at 1324. See also Donald Schriver, Inc. v. NLRB, 635 F.2d 859, 887 (D.C. Cir. 1980), cited with approval in Pacific Northwest, 654 F.2d at 1324.
697. 654 F.2d at 1325 (Sneed, J., dissenting, joined by Choy, Anderson, and Farris, JJ.).
698. Id. at 1327.
699. Id. at 1326.
700. Id. at 1327.
701. 646 F.2d 376 (9th Cir. 1981), cert. denied, 102 S. Ct. 2903 (1982).
702. 646 F.2d at 377.
Northwest, however, the court merely incorporated the Pacific Northwest holding. 703

III. THE REPRESENTATION PROCESS AND UNION ELECTIONS

A. Appropriate Bargaining Units

1. Single plant unit

The Board has exceptionally broad discretion in determining whether a bargaining unit is appropriate, 704 although a single bargaining unit is presumed to be appropriate. 705 When a single plant unit is involved, the Board considers the following factors: "the similarity in skills, interests, duties and working conditions; the functional integration of the plant; interchange and contact among employees; the employers' organizational and supervisory structure; the employees' desires; the bargaining history; and the extent of union organization among employees." 706 The Board's determination will not be overturned unless there has been an abuse of discretion. 707

Recently, in NLRB v. Circo Resorts, Inc., 708 the Board had approved a small bargaining unit of stagehands as being separate from a unit of manual employees although both groups were employed by one hotel and casino complex. The court recognized the critical determinant to be "whether the employees share a substantial community of interest sufficient to justify their mutual inclusion in a single bargaining unit." 709 The administrative law judge found that the stagehands were an appropriate bargaining unit because they performed identical duties, they were trained in this area, and they confined their work to a particular area of the hotel and did not work with other maintenance workers. Giving deference to the Board's determination, the court upheld the bargaining unit. 710

703. Id.

704. Section 9(b) of the NLRA provides in pertinent part that "[t]he Board shall decide . . . whether . . . the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b) (1976); see Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1037 (9th Cir. 1978); NLRB v. Sunset House, 415 F.2d 545, 547 (9th Cir. 1969).

705. NLRB v. Lerner Stores Corp., 506 F.2d 706, 707-08 (9th Cir. 1974).

706. Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1038 (9th Cir. 1978); see Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 153 (1941).

707. See NLRB v. J.C. Penney Co., 620 F.2d 718, 719 (9th Cir. 1980).

708. 646 F.2d 403 (9th Cir. 1981).

709. Id. at 406 (quoting Pacific Southwest Airlines, 587 F.2d 1032, 1038 (9th Cir. 1978)).

710. 646 F.2d at 406.
2. Multiple plant unit

When a multiple plant bargaining unit is involved, the Board considers the following factors: "functional integration of the business, centralized control of management, similarity of working conditions, collective bargaining history, local power to hire and fire, lack of employee interchange, [and] geographical distance."\(^{711}\)

In *Spring City Knitting Co. v. NLRB*,\(^{712}\) the Ninth Circuit addressed whether a single or multiple plant bargaining unit should be designated.\(^{713}\) Spring City had a main plant employing 700 workers in Glendale, Arizona and a smaller plant employing 150 workers in Flagstaff, Arizona, 140 miles away. The Board certified each plant as a separate bargaining unit.\(^{714}\) Certification was based on three factors: (1) "significant autonomy" of local plant managers at their respective plants; (2) lack of significant employee interchange between plants; and (3) the geographical separation between plants.\(^{715}\) The court concluded that it was proper for the Board to rely on these factors and that each was supported by substantial evidence.\(^{716}\)

The court found substantial evidence to support the Regional Director's conclusion that there was a lack of significant interchange between plants over the six year period preceding the hearing. The court stated that the frequency of employee interchange is a "critical factor" in determining whether employees at different plants share a sufficient "community of interest" to justify inclusion in a single plant unit.\(^{717}\) This lack of employee interchange indicated an insufficient community of interest and therefore supported separate bargaining units.\(^{718}\)

Spring City argued that the Regional Director attributed too much authority to the Flagstaff plant managers and that insufficient local autonomy favored a multiple plant unit.\(^{719}\) The evidence showed that the manager had the authority to hire and fire employees. This, together with a low employee interchange, a 140 mile geographic separation between plants, and a lack of collective bargaining history, supported the conclusion that the Regional Director's decision was not an abuse of discretion. Therefore, the court held that the bargaining units chosen

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711. *See* NLRB v. Sunset House, 415 F.2d 545, 548 (9th Cir. 1969).
712. 647 F.2d 1011 (9th Cir. 1981).
713. *Id.* at 1013-16.
714. *Id.* at 1013.
715. *Id.*
716. *Id.* at 1015.
717. *Id.* at 1016.
718. *Id.*
719. *Id.*
3. Managerial and supervisory employees

The Board’s broad discretion in determining the appropriate bargaining unit includes the factual question of whether certain employees are “supervisorial” or “managerial.” Managerial employees are not defined by the NLRA but have been judicially excluded from its coverage by the Supreme Court. The Court has defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” An employee will be excluded as managerial “only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.”

Supervisory employees are specifically defined in section 2(11) of the NLRA and excluded from coverage in section 2(3). An employee who uses independent judgment in the exercise of any of the powers enumerated in section 2(11) is a supervisor and cannot be included in a bargaining unit.

Recently, in *Walla Walla Union Bulletin, Inc. v. NLRB*, the Ninth Circuit addressed whether there was substantial evidence to support the Board’s conclusion that an editorial page editor of a newspaper was not a managerial employee who should be excluded from a bar-

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720. *Id.* at 1016.
721. See *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1311 (9th Cir. 1978); *Laborers and Hod Carriers, Local 341 v. NLRB*, 564 F.2d 834, 837 (9th Cir. 1977); *Kaiser Eng’rs v. NLRB*, 538 F.2d 1379, 1383-84 (9th Cir. 1976).
724. *Id.* at 683 (university faculty person with extensive control over academic, personnel and institutional policies found to be managerial employee and thus excluded from Act’s coverage).
725. 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 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.
726. 29 U.S.C. § 152(3) (1976) provides that “[t]he term ‘employee’ . . . shall not include . . . any individual employed as a supervisor.”
727. See *NLRB v. Harmon Indus., Inc.*, 565 F.2d 1047, 1049 (8th Cir. 1977); *NLRB v. Gray Line Tours, Inc.*, 461 F.2d 763, 764 (9th Cir. 1972).
728. 631 F.2d 609 (9th Cir. 1980).
gaining unit of newsroom employees. Clark, the editor, participated in writing, editing, and selecting certain articles. He also voted with editorial board management representatives in the selection of editorial topics. The Ninth Circuit held that the Board's conclusion was not supported by substantial evidence. The court reasoned that the evidence indicated that Clark was a managerial employee because he exercised "independent discretion and formulate[d] policy independent of his employer." Further, managerial status was favored because his responsibilities created a potential conflict of interest between his employer and the union.

The Walla Walla court also addressed whether the record supported the Board's conclusions that the photo, sports, and wire editors were not supervisors and thus, were appropriately included in the bargaining unit. The court found substantial evidence to support the Board's conclusions. The court's finding rested on the following factors: the photo editor co-ordinated photography without supervising or disciplining other employees and accordingly was found to share a community of interest with the rest of the newsroom employees; the sports editor had no supervisory authority to hire, fire, discipline, or supervise other sports employees nor did he handle any grievances; the wire editor, assisted by a staff, merely selected important news items from the wire services and then passed them on to the news editor.

B. Representation Proceedings and Elections

Section 9(a) of the NLRA provides that a majority of employees may select an exclusive representative to bargain collectively with their employer. Section 9(c) of the Act gives the Board the power to conduct an election upon a petition filed by an employee, union, or employer.

729. Id. at 613. See NLRB v. Yeshiva Univ., 444 U.S. 672, 691 (1980).
730. 631 F.2d at 613.
731. Id.
732. Id. at 612.
733. Id. at 614.
734. Id.
735. 29 U.S.C. § 159(a) (1976) provides in pertinent part:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.
736. 29 U.S.C. § 159(c) (1976) provides:
(1) Whenever a petition shall have been filed, in accordance with such regula-

...
1. Conduct invalidating elections

The Board has broad discretion to establish procedures that insure fair representation elections. A union representation election will usually be set aside only if the election process is "significantly impaired."

a. breach of consent election agreement procedures

A party to an agreement authorizing a consent election is entitled to expect that the other party and the Board representative will uphold those provisions which promote fairness and are consistent with Board policy. An election will be set aside only when a breach of the agreement significantly impairs the fairness of the election.

Recently, in *Summa Corp. v. NLRB,* the Ninth Circuit addressed whether a union's breach of a consent election agreement justified setting aside an election. A consent election stipulation provided for an equal number of employer and union observers at the polling place. The Board agent acquiesced to a union member's request to act as an extra observer, thereby creating a union breach of this provision. The court found that the provision was material to the election process because each party relied on its own observers' presence to challenge voters and to monitor the election process. Neither party wanted the other to gain any advantage in this respect. Further, the court reasoned

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(A) by an employee or group of employees or any individual or labor organization acting in their behalf... or

(B) by an employer...

the Board shall investigate such petition and... shall provide for an appropriate hearing upon due notice... If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

737. NLRB v. Metro-Truck Body, Inc., 613 F.2d 746, 748 (9th Cir. 1979); NLRB v. Sauk Valley Mfg. Co., 486 F.2d 1127, 1130 (9th Cir. 1973).

738. See, e.g., NLRB v. Heath Tec Div./San Francisco, 566 F.2d 1367, 1372 (9th Cir.) (rumors that employees would be deported for failing to vote does not significantly impair election), *cert. denied,* 439 U.S. 832 (1978); Heavenly Valley Ski Area v. NLRB, 552 F.2d 269, 272 (9th Cir. 1977) (union's material misrepresentations regarding overtime pay and end of season bonus not significant impairment, because employer had opportunity to reply); NLRB v. G.K. Turner Assoc., 457 F.2d 484, 487 (9th Cir. 1971) (cumulative impact of union misrepresentations regarding company profits, sympathy strikes, union fines, discharge of supervisors, and initiation fee waivers held significant impairment of election requiring nullification).

739. See generally Delta Drilling Co. v. NLRB, 406 F.2d 109, 114 (5th Cir. 1969); M.W. Breman, 115 N.L.R.B. 247 (1956).

740. See, e.g., Grant's Home Furnishing, Inc., 229 N.L.R.B. 1305, 1306 (1977) (Board agent's breach of consent election agreement in arriving five minutes late not prejudicial).
that the union breach, coupled with the Board agent’s acquiescence, could have created an impression in the voters’ minds of union predominance and Board partiality.\footnote{743} For these reasons, the court set aside the election even without a showing of actual prejudice to the employer.\footnote{744}

\textit{b. electioneering}

The Board has generally banned electioneering at or near a polling place.\footnote{745} In \textit{Michem, Inc.},\footnote{746} the Board adopted a standard determining whether conversations at the polling place between representatives of either party and employees waiting to vote necessitated a new election. The Board applied a strict rule against prolonged conversations or last minute electioneering.\footnote{747} The Board emphasized, however, that an innocuous comment or inquiry by a party to a voter would not necessarily void an election.\footnote{748}

In two recent cases employers sought to nullify elections because union observers or officials allegedly engaged in prohibited electioneering. In the first, \textit{NLRB v. Vista Hill Foundation},\footnote{749} a union observer allegedly engaged in six separate conversations with voters, each lasting less than two minutes. The Ninth Circuit upheld the Board’s conclusion that the election had been properly conducted.\footnote{750} The court noted that the Board impliedly found that all six conversations were of the type referred to in \textit{Michem, Inc.}, as “chance, isolated, innocuous comment or inquiry.”\footnote{751} In reviewing the Board’s decision, the court focused on the length and nature of the exchanges. Four of the conversations were merely greetings and comments about the weather. Two conversations bore directly on the election. In one, a voter asked the union observer if he would be the union representative if the union was approved. In another conversation, the observer stated that if the employee voted for the union then he (the observer) "would not be in so much trouble" with the employer. The court recognized that the

\begin{footnotesize}
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\item \footnote{743}{Id.}
\item \footnote{744}{Id. at 295-96.}
\item \footnote{745}{Peerless Plywood Co., 107 N.L.R.B. 427, 430 (1953).}
\item \footnote{746}{170 N.L.R.B. 362 (1968).}
\item \footnote{747}{Id. at 362 ("[T]he potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations.").}
\item \footnote{748}{Id. at 363.}
\item \footnote{749}{639 F.2d 479, 484 (9th Cir. 1980).}
\item \footnote{750}{Id. at 485.}
\item \footnote{751}{Id. at 484 (quoting Michem, Inc., 170 N.L.R.B. 362, 363 (1968)).}
\end{itemize}
\end{footnotesize}
latter comment "begins to approach the kind of electioneering con-
demned in Michem." The court, however, deferred to the Board's
finding that both comments were innocuous. It concluded that no
individual conversation involved in Vista Hill was sufficient to support
reversal of the election and that the six conversations in the aggregate
did not constitute the type of "prolonged conversations" that represent
a "potential for distraction, last minute electioneering, and unfair
advantage." 

The dissent in Vista Hill pointed out that there were other voters
in line that probably heard the two conversations that bore directly on
the election. These five to seven additional voters may have been
influenced to vote for the union because of the conversations they over-
heard. Because the election was so close (forty to thirty-two in favor
of the union), the dissent concluded that the election should have been
set aside. The dissent further suggested that the union observer en-
gaged the voters in conversation in order to ingratiate himself to the
union and thereby to influence the voters.

Although the dissent's points are well taken, it fails to take into
account the deferential review standard applied to a Board decision
based on its own expertise in applying its own standards for evaluating
a representation election. Assuming this review standard was
proper, the majority opinion correctly applied it to arrive at the appro-
priate result.

In the second case, South Pacific Furniture, Inc. v. NLRB, employees were waiting in a room adjacent to the balloting area when a
union observer stated "[c]ome on and vote, exercise your power." The court recognized that "sustained" or "prolonged" conversation at
the polls, regardless of its context necessitate a new election. The
court, however, declined to characterize the "essentially neutral state-
ment" by the observer as a conversation, much less as a sustained
one. Further, the court concluded that the statement was not elec-

752. 639 F.2d at 484.
753. Id.
754. Id. at 484-85 (quoting Michem, Inc., 170 N.L.R.B. 362 (1968)).
755. 639 F.2d at 485 (Choy, J., dissenting).
756. Id.
757. Id. at 480, 485.
758. Id. at 485.
759. See id. at 484.
760. 627 F.2d 173 (9th Cir. 1980).
761. Id. at 174.
762. Id. at 175 (quoting Michem, Inc., 170 N.L.R.B. 362 (1968)).
763. 627 F.2d at 175.
tioneering because it could not have inhibited the free choice of the voters in selecting their representatives.\textsuperscript{764}

c. ballots

A ballot in a representation election that does not conform to the proper designation procedure will not be counted unless the voter's intent has been clearly manifested.\textsuperscript{765} Ballots with marks in both squares have been held to be both invalid\textsuperscript{766} and valid\textsuperscript{767} by the Board depending upon whether there was a clear manifestation of the voter's intent.

Recently, in \textit{NLRB v. Leonard Creations of California, Inc.},\textsuperscript{768} a voter had marked a ballot with a completed “X” in the “No” box, and with a slash in one direction and a half slash in the other direction in the “Yes” box. The Ninth Circuit found little support for the Board's conclusion that the voter's intent was unclear. The court stated that the voter's intent to vote “no” was clearly indicated by the completed “X” in the “No” box\textsuperscript{769} and held that the ballot should have been counted.\textsuperscript{770}

d. unfair labor practices prior to an election

If, prior to an election, an employer engages in unfair labor practices, the election may be set aside.\textsuperscript{771}

\textsuperscript{764} Id.

\textsuperscript{765} \textit{Id.}

\textsuperscript{766} \textit{NLRB v. Metro-Truck Body, Inc.}, 613 F.2d 746, 749 (9th Cir. 1979) (ballot insertion of “si” in “yes” box properly counted as “yes” vote), \textit{cert. denied}, 447 U.S. 905 (1980); \textit{NLRB v. Sauk Valley Mfg. Co.}, 486 F.2d 1127, 1133 (9th Cir. 1973); \textit{accord NLRB v. Tobacco Processors, Inc.}, 456 F.2d 248 (4th Cir. 1972) (improper not to count as “no” votes, vote ballots with blank face and “no” written on back); \textit{NLRB v. Titche Goettinger Co.}, 433 F.2d 1045, 1048 (5th Cir. 1970) (“no” written on blank side of ballot sufficient to reject union representation).

\textsuperscript{767} \textit{Id.}

\textsuperscript{768} \textit{See, e.g.}, Caribe Indus. and Elec. Supply Inc., 216 N.L.R.B. 168-69 (1975) (ballot void where marked with vertical line in “No” square and complete “x” in “Yes” square); Gerber Plastic Co., 110 N.L.R.B. 269, 270 (1954) (ballot void when marked with short diagonal line in “Yes” square and heavily marked “x” with wavy line in “No” square).

\textsuperscript{769} \textit{Id.}

\textsuperscript{770} \textit{See, e.g.}, Abtex Beverage Corp., 237 N.L.R.B. 1271 (1978) (ballot with “x” in both “Yes” and “No” boxes held valid when “No” box was obliterated with circular markings indicating intent to vote “Yes”); Belmont Smelting & Refining Workings, Inc., 115 N.L.R.B. 1481-83 (1956) (diagonal line in “Neither” box and clear and complete “x” in a different box held valid vote).

\textsuperscript{771} \textit{Id.}

\textsuperscript{772} \textit{Id. at 113.}

\textsuperscript{773} \textit{Id.}

\textsuperscript{774} \textit{Id.}

\textsuperscript{775} \textit{NLRB v. Chattfield-Anderson Co.}, 606 F.2d 266, 268 (9th Cir. 1979) (unfair labor practices committed by employer prior to election justified its nullification).
e. miscellaneous

In NLRB v. Belcor, Inc., the Ninth Circuit addressed whether the Board should have ordered a hearing on certain factual issues raised by an employer in support of its claim that an election should be set aside before issuing a bargaining order. The employees had voted for the union by a substantial margin. Belcor, the employer, filed a number of objections regarding the conduct of the election.

The Regional Director, without conducting a hearing, overruled these objections and issued a report to the Board recommending that it also overrule the objections. The Board adopted the Regional Director's report and certified the union as the employees' bargaining representative. Belcor then refused to bargain with the union and was charged with violating section 8(a)(1) and (5) of the NLRA. Refusing to consider Belcor's objections to the conduct of the election, the Board ordered Belcor to bargain with the union.

The Ninth Circuit reaffirmed the rule that if there is a material issue of fact created by the Regional Director's report and the corresponding exceptions to it, a hearing must be held. Thus, the issue became whether Belcor's exceptions raised any material issues of fact necessitating a hearing.

Belcor introduced employee affidavits stating that prior to the election a union adherent had promised the affiants initiation fee waivers in return for their signatures on recognition slips. Eight employees may have signed for this reason. The Board, however, argued that the union adherent's illegal offers could not be attributed to the union itself. The Ninth Circuit concluded that the evidence could support a finding that the union either authorized or condoned the union adherent's conduct and that the Board erred in failing to resolve the issue without a hearing.

Belcor also offered evidence that the "24 hour rule" adopted by the Board in Peerless Plywood Co. was violated. This rule bans...
mandatory meetings of employees for campaign speeches twenty-four hours before an election. Belcor proffered an index card that referred to a mandatory meeting at someone's house, within twenty-four hours of the elections. Because the Regional Director’s report concluded that the employees treated the meeting as an informal get-together without any supporting documentation, the court held that resolution of the issue required a hearing.

2. Contract bar rule

Under section 9(c)(1) of the NLRA, the Board may hold a representation election when it finds that a question of representation exists; the Board, however, has limited the application of this section under the contract bar rule. The rule bars a representation election when there is a valid collective bargaining agreement in existence for a period not to exceed three years unless the petition for redetermination of a union’s representation status is filed more than sixty and less than ninety days before the contract ends. The rule’s purpose is to preserve stability between the parties to the agreement and to give employees an opportunity to change or eliminate their union. The rule is not applied, however, when there is a union schism or when the union is defunct. In determining whether to impose a contract bar when an incumbent union issues a valid disclaimer of representational interest, the Board has usually balanced the need to preserve industrial stability with the need to protect the employees’ opportunity to change

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780. Id. at 429.
781. 652 F.2d at 861. Belcor’s evidence regarding coercion, sabotage, electioneering, improper use of voting lists, lack of Spanish ballots, and union misrepresentation was rejected by the court as failing to raise any material issue of fact requiring a hearing. Id. at 861-62.
783. 29 U.S.C. § 159(c)(1) (1976) provides in pertinent part that “the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.”
784. General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962) (contract bars petition filed earlier than 90 days before end of its three year term); see Bob’s Big Boy Family Restaurants v. NLRB, 625 F.2d 850, 851 (9th Cir. 1980) (contract bars petition filed 59 days before end of three year term); see also Pioneer Inn Assoc. v. NLRB, 568 F.2d 835, 838-39 (9th Cir. 1978) (contract bar rule applied to employer who refused to adhere to contract because of doubt of union majority representation).
786. Hershey Chocolate Corp., 121 N.L.R.B. 901, 906-10 (1958) (basic intra-union conflict resulting in employer being confronted with two labor organizations, both claiming employee representation), enforcement denied on other grounds, 297 F.2d 286 (3d Cir. 1961).
787. 121 N.L.R.B. at 911 (union unwilling and unable to represent employees at time its status questioned).
their bargaining representative. Recently, however, in *American Sunroof Corp.-West Coast, Inc.*, the Board did not apply this balancing approach but concluded that the contract did not bar an election of a new union following an incumbent union's valid disclaimer of interest.

In *NLRB v. Circle A & W Products Co.*, the Ninth Circuit addressed whether a collective bargaining agreement barred an election of a new union after the incumbent union formally disclaimed representational interest. The incumbent union, Local 49, had represented Circle A & W's employees when a three year collective bargaining agreement went into effect on January 1, 1977. On March 30, 1977, the employees voted to remove a union security clause which gave Local 49 the authority to require union membership as a condition of employment. As a result, Local 49 formally disclaimed its representational interest in the employees. Subsequently, a new union, Local 206, filed a representation petition. At the representation hearing the Regional Director rejected Circle A & W's contention that the contract barred Local 206's petition and directed that an election be held. Local 206 was then elected as the bargaining representative. Following Circle A & W's refusal to bargain with Local 206, the Board issued a bargaining order.

At the hearing, Circle A & W argued that employees may obtain a new bargaining representative during the term of the contract only when there is a union schism or when the union is defunct. Although it recognized this argument, the court relied on the recent Board decision in *American Sunroof Corp.-West Coast, Inc.*, where the Board held that the contract bar defense was not applicable under similar circumstances despite the employer's interest in the stability of the contract. The court ruled that a new bargaining representative could not be obtained if the motive underlying severance from the in-

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790. *Id.* at 1129. The disclaimer was prompted by a petition for deauthorization filed and signed by 39 of 40 employees. The petition requested an election to decide whether the employees desired to remove a union security clause in the collective bargaining agreement. *Id.* at 1128.
792. *Id.* at 925.
793. *Id.*
794. *Id.*
796. 647 F.2d at 925-26.
cumbent union was to avoid the collective bargaining contract.\textsuperscript{797} The court further ruled that this illegal motive may be presumed when a union disclaimer is "insignificant, minor, or contrary to the policies of the Act."\textsuperscript{798}

Despite the Board's failure to articulate its reasons for not applying the contract bar rule, the court enforced the bargaining order.\textsuperscript{799} The court's conclusion rested on Circle A & W's failure to allege that it was the intent of Local 49 or the employees to avoid the collective bargaining agreement.\textsuperscript{800} Circle A & W's assertion that the sole reason for the change in bargaining representative was the dispute over the union security clause supported the inference of a legitimate disagreement of policy between Local 49 and the employees, rather than an attempt to avoid the collective bargaining agreement.\textsuperscript{801}

The dissent noted the current uncertainty regarding the application of the contract bar rule when a union makes a valid disclaimer of interest.\textsuperscript{802} It pointed out that the majority contributed to this uncertainty by endorsing the relevant policies of the pre-American Sunroof precedent while upholding the inapplicability of the contract bar rule solely on the grounds of Local 49's valid disclaimer.\textsuperscript{803} For these reasons, the dissent concluded that the case should have been remanded to the Board with instructions to explain its decision suspending the contract bar rule.\textsuperscript{804}

\textbf{C. Recognition without Election}

Union recognition is not limited to the Board election and certification procedures established under section 9(c) of the NLRA. An employer has a duty to bargain whenever the union presents "convincing evidence of majority support."\textsuperscript{805} Majority status can be established through a showing of convincing support by a union.\textsuperscript{806} Additionally, majority support may be shown by a union's presenting cards signed by a majority of employees authorizing union representation in collective

\textsuperscript{797} Id. at 926.
\textsuperscript{798} Id. There are circumstances, however, where an employee's right to effective representation will require a new representative. Id. at 926 n.2.
\textsuperscript{799} Id. at 926.
\textsuperscript{800} Id.
\textsuperscript{801} Id. at 926-27.
\textsuperscript{802} Id. at 927.
\textsuperscript{803} Id.
\textsuperscript{804} Id.
\textsuperscript{805} NLRB v. Southland Paint Co., 394 F.2d 717, 724 (5th Cir. 1968).
\textsuperscript{806} See, e.g., NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940); Century Mills, Inc., 5 N.L.R.B. 807 (1938).
A union may obtain recognition by a Board-issued bargaining order when an employer commits unfair labor practices which either preclude a fair election or justify setting it aside. In *NLRB v. Gissel Packing Co.*, the Supreme Court held that a bargaining order was proper when it was shown that the union had obtained a card majority. The Court further held that the employer’s unfair labor practices tended to “undermine majority strength and impede the election processes” such that a fair election or rerun election was precluded.

1. Representation by a majority of authorization cards

The *Gissel* Court adopted the rule that unambiguous union authorization cards may be counted to determine majority status to support a bargaining order unless it was proved that an employee was told that the card would be used *solely* to obtain an election. The Ninth Circuit recently decided three cases in which an employer challenged the validity of union authorization cards used by the Board to justify a bargaining order.

In *NLRB v. Anchorage Times Publishing Co.*, the Board concluded that seven employees had not been improperly solicited when told that the authorization cards would be used to arrange an election. The employees’ affidavits indicated they could not remember whether this was the cards’ sole purpose. The Ninth Circuit stated that without direct testimony of improper solicitation, it could not substitute the Board’s factual finding with a determination that “Union adherents had ‘deliberately and clearly’ cancelled the card’s Union authorization purpose.” For this reason, the court upheld the Board’s finding that the authorization cards were valid.

809. *Id.* at 596-97.
810. *Id.* at 614.
811. *Id.* at 606-09. The Court stated that “employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.” *Id.* at 606; *see* Cumberland Shoe Corp., 144 N.L.R.B. 1268, 1269 (1963).
813. *Id.* at 1369.
814. *Id.*
In *NLRB v. Davis*, the Ninth Circuit upheld the Board's finding that the union had obtained a valid signature card majority. The court's decision rested on management's failure to prove that the union had represented that the cards were *solely* for arranging an election.

Finally, in *Pay'n Save Corp. v. NLRB*, the Ninth Circuit held that union cards, which unambiguously authorized union representation, were valid and could properly be used to find majority support. The court reasoned that the retailer-employer had failed to show that any signatures were obtained by any misrepresentations.

2. Unfair labor practices

   a. free election process undermined

   A bargaining order is properly issued when the Board finds that an employer's unfair labor practices are so severe as to undermine union majority strength and impede the election process. In *NLRB v. Anchorage Times Publishing Co.*, the union held a card majority but lost the election. The election was subsequently set aside because of the employer's unfair labor practices. The Board issued a bargaining order after finding that the employer's unfair labor practices were pervasive and severe enough to prevent a fair rerun election. The employer had subjected employees to unlawful interrogations, surveillance, threats, and discharge because of union sympathies, and had increased wages immediately prior to the election. Finding substantial evidence to support the Board's conclusion, the Ninth Circuit upheld the order.

   In *NLRB v. Davis*, an employer committed unfair labor practices by discharging employees who had signed union authorization cards, by threatening discharge for participation in union activities, and by making certain anti-union statements. The Ninth Circuit agreed with the Board's conclusion that the employer's conduct would have a long-lasting and possibly permanent effect on the employees' freedom
to choose a bargaining agent. Therefore, any remedy short of a bargaining order would have been ineffective.

In Pay'n Save v. NLRB, the Ninth Circuit held that an employer had committed an unfair labor practice by suspending and later discharging two employees for wearing union campaign buttons during a union organizational campaign. Pay'n Save alleged an unwritten policy prohibiting employees from wearing political, controversial, or offensive insignia on store jackets. The policy was intended to avoid offending customers. The employer argued that its union button ban was justified as a “special consideration” because it involved a legitimate concern about the image conveyed to customers. The court recognized the rule that absent “special considerations,” the right to wear union buttons to work is protected by section 7 of the NLRA.

In support of its argument, Pay'n Save relied on NLRB v. Harrah's Club and Davison-Paxon Co. v. NLRB.

The Ninth Circuit found both cases distinguishable. In Harrah's Club, the court found a “special consideration” in the need by an employer “to project a certain type of image to the public.” However, Pay'n Save was distinguished from Harrah's Club because the latter involved no union organizational campaign. Although the Fifth Circuit, in Davison-Paxon, had upheld a ban on union buttons during an organizational campaign, this case was distinguished from Pay'n Save because it involved animosity between union and anti-union factions at the store, justifying the union button ban. Further, in Pay'n Save, the court found that substantial evidence supported the Board's finding of discriminatory enforcement of the button rule, whereas no selective enforcement was found to exist in Harrah's Club or Davison-Paxon. The Pay'n Save court concluded that this selective enforcement constituted an unfair labor practice. Moreover, the court enforced the bargaining order because it found Pay'n Save's unfair labor practices had a “tendency to undermine majority strength and impede
the election process." 837

In *NLRB v. Circo Resorts*, 838 the Ninth Circuit held that a hotel-casino employer had committed unfair labor practices during the organization of stagehand employees by interrogating them concerning their union sympathies, and by discharging two employees who had been soliciting union authorization card signatures. 839 Although the court found the practices insufficient to require a bargaining order as a matter of law, 840 considering the union's majority status and the greater need for an order when a small bargaining unit is involved, the court deemed the bargaining unit appropriate. 841 The court noted that these practices tended to undermine the union's majority strength and interfered with a fair election. 842

Finally, in *NLRB v. Cofer*, 843 an employer committed unfair labor practices when it terminated four motel maids, who constituted a card majority, for organizing to seek higher wages. The employer argued that the Board's bargaining order should not have been issued because (1) the Board erred in finding that a bargaining demand had been made by the union; (2) the employee terminations had occurred before the employer knew that the union was involved; and (3) there was no evidence that a free representation election would not now be possible. 844

The Ninth Circuit rejected the first contention, as it found substantial evidence to support the Board's finding that a bargaining demand had been made. 845 The second contention was rejected because the court considered immaterial the employer's awareness of the union's role when the employees were fired. The court reasoned that because a bargaining order could have been issued to protect the maids' organizational activity had they taken all the actions themselves, and because the employer was aware of the maids' early concerted efforts to obtain wage increases to comport with the minimum wage, a bargaining order could properly be issued even if the employer was not aware of a subsequent incidental acquisition of an already existing union

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837. *Id.* at 703 (quoting *Gissel*, 395 U.S. at 614).
838. 646 F.2d 403 (9th Cir. 1981).
839. *Id.* at 405.
840. *Id.* at 406.
841. *Id.*
842. *Id.*
843. 637 F.2d 1309 (9th Cir. 1981).
844. *Id.* at 1314-15.
845. *Id.* at 1314.
sponsored.\(^{846}\)

The third contention was rejected because whether a fair election is possible is determined as of the time the election was or could have been held and not at the time of enforcement.\(^{847}\) Otherwise, an employer could refuse a bargaining demand and hope that the delay would cause a favorable change in the circumstances.\(^{848}\) Therefore, because of the severity of the unfair labor practices suffered by the majority of the motel maids, the court enforced the bargaining order.\(^{849}\)

**b. minimal impact on the election process**

In *NLRB v. Gissel Packing Co.*,\(^{850}\) the Supreme Court identified a category of "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order."\(^{851}\) In *NLRB v. Peninsula Association for Retarded Children and Adults*,\(^{852}\) an employer committed unfair labor practices by interrogating employees prior to an election. The Ninth Circuit held that the Board's bargaining order was not justified.\(^{853}\) The court based its holding on the following factors: (1) two of the three interrogations were non-coercive; (2) all interrogations occurred at least four months prior to the election; and (3) the manager directly responsible for the violations, and most of those employed at the time the violations occurred were no longer working for the employer when the election was held.\(^{854}\) The court concluded that these factors, taken together, indicated the bargaining order was not warranted.\(^{855}\)

### 3. Union recognition by a successor employer

Section 8(a)(5) of the NLRA makes it an unfair labor practice for
an employer "to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section [9(a)]."856 This section has been applied to successor employers.

In \textit{NLRB v. Burns International Security Services, Inc.},857 a majority of an employer's security guard employees were represented by a union which had a collective bargaining agreement with the guard's prior employer. The successor employer had taken over for the predecessor when the latter lost its contract to provide security protection for a factory. The successor then hired the predecessor's old guards, who constituted a majority of its employees. The Supreme Court held that a successor employer may be ordered to bargain with an incumbent union when the bargaining unit remains unchanged and a majority of the employees hired by the successor are represented by the union.858 The Court stated that Board certification of a union carries an almost conclusive presumption that the union's majority status continues for a reasonable time when the same employer is involved.859 The Court extended this presumption to a successor employer. A change of employers is presumed not to affect Board certification as long as a majority of employees continue to be employed by the successor.860 A successor employer may rebut this presumption by establishing either that the union no longer represents an employee majority, or that there are circumstances indicating a good faith doubt about the union's majority status.861

In \textit{NLRB v. Edjo, Inc.},862 the Ninth Circuit applied the presumption to a successor employer, Edjo, who had purchased a trucking business from an employer whose twenty-one drivers were represented by a union. Edjo hired all twenty-one of its predecessor's drivers and, in addition, hired eight new drivers. In support of its refusal to bargain with the union, Edjo argued that the union lacked majority support because eight of the rehired employees had expressed dissatisfaction

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\item 856. 29 U.S.C. § 159(a) (1976) provides in pertinent part: Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.
\item 857. 406 U.S. 272 (1972).
\item 858. \textit{Id.} at 281.
\item 859. \textit{Id.} at 279 n.3.
\item 860. \textit{Id.} at 279; see, e.g., \textit{NLRB v. Denham}, 469 F.2d 239, 244 (9th Cir. 1972) (presumption applied to successor employer where predecessor employer voluntarily recognized union).
\item 861. \textit{NLRB v. Denham}, 469 F.2d 239, 244 (9th Cir. 1972).
\item 862. 631 F.2d 604 (9th Cir. 1980).
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with the union. The Board, however, applied a “new hire presumption,” which means that newly hired employees will be considered as supporting the union in the same proportion as the original employees. Edjo failed to rebut this latter presumption. The court found that the Board's use of the “new hire presumption” was consistent with Burns International. The court concluded that Edjo had a duty to bargain with the union and enforced the bargaining order.

Judge Blumenfeld, in a concurring opinion, concluded that the Board's use of the “new hire presumption” was unnecessary because the facts indicated that Edjo was not a successor employer but rather a parent to the predecessor. Further, even if Edjo was a successor, the use of the “new hire presumption” was not necessary because Edjo intended to and did retain all of the predecessor's employees, and it was thus appropriate for him to consult with their union before employment terms were fixed.

IV. THE COLLECTIVE BARGAINING PROCESS

A. Negotiation of the Collective-Bargaining Agreement

1. The duty to bargain in good faith

To effectuate the purpose of the NLRA, section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to
refuse to bargain collectively with the representatives of its employees. Under a parallel section of the Act it is an unfair labor practice for a labor organization to refuse to bargain collectively with the employer. Under the Act, parties to a collective bargaining process have a mutual obligation to meet and confer in good faith. As with other provisions of the Act, the courts have been called upon to define what constitutes “good faith” bargaining by both management and labor.

a. surface bargaining

Although the parties are required to bargain collectively in good faith to negotiate an agreement, section 8(d) of the Act expressly provides that neither party is under a statutory duty to make any concession or agree to any proposal that arises during the contract negotiations. The absence of a statutory duty to reach an agreement, coupled with the express obligation that the parties must meet and confer, requires the Board and the courts to distinguish between “surface” and “hard” bargaining.

One commentator stated that the purpose of the surface bargain-
ing prohibition is to protect "the bargaining status of the union." Accordingly, most decisions which have found the presence of surface bargaining have focused on the conduct of employers. Labor organizations, however, have also been found to engage in surface bargaining.

Because an employer might have several valid and complex reasons for refusing to accept a seemingly reasonable union proposal, commentators have suggested that the Board should not "draw an inference of bad faith from the unreasonableness of [the employer's] position." When the Board undertakes to review the reasonableness of a party's proposal, it runs the risk of impinging upon the freedom enjoyed by the parties to negotiate their own contract.

In *Queen Mary Restaurants Corp. v. NRLB*, the Ninth Circuit observed that an attempt to distinguish surface from hard bargaining "often forces the trier [of fact] to draw difficult inferences from conduct to motivation." Despite the professed reluctance of courts to inquire into the motivation of an allegedly intransigent party, the Ninth Circuit made this inquiry in *K-Mart Corp. v. NRLB*. The court upheld the Board's finding that the employer had engaged in surface bargaining. The ludicrousness of the employer's proposals convinced the court that the Board's finding was supported by substantial evidence and should be upheld. The court reasoned that a wage offer which included no increase in fringe benefits, contained salary raises ranging from 4% for starting employees to less than 1% for those with up to eighteen months experience, and which had no increase for employees with more than eighteen months experience was evidence that the employer was not bargaining seriously.

b. refusal to furnish requested information

An employer has an obligation to provide the union with certain

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878. Id.
879. *E.g.*, NLRB v. Selvin, 527 F.2d 1273, 1277-78 (9th Cir. 1975).
883. 560 F.2d 403 (9th Cir. 1977).
884. Id. at 407.
885. 626 F.2d 704 (9th Cir. 1980).
886. Id. at 707 & n.3. The court agreed with the Administrative Law Judge's characterization of these wage proposals as "meager" and held that the employer's delay in presenting its proposal was "substantial evidence to support the inference [of surface bargaining]." *Id.* at 707.
relevant information concerning the collective bargaining process. A liberal, discovery-type standard is used to determine if the information requested is relevant to the union’s duties. An employer’s failure to furnish the requested information constitutes a violation of the duty to bargain in good faith. The Ninth Circuit has held certain information to be presumptively relevant, but when the requested information does not fall into this category, the union has the threshold burden of proving its relevancy to the bargaining process.

In NLRB v. Associated General Contractors, Inc., the Ninth Circuit held that a multi-employer bargaining unit’s refusal to furnish the union with a roster of contractors, whose firms were in the Open Shop or Open Shop Specialty classifications, was a violation of its duty to bargain in good faith. The court found that the information sought by the unions was relevant to their investigation of potential contract violations by individual members of the unit. The court further concluded that the information should have been disclosed under the liberal, discovery-type standard of relevancy even though no actual violations had been established.

The court accepted the unions’ position that they needed the information to conduct their own investigation of possible contract violations. The unit claimed that disclosure was unnecessary because it had conducted its own review, but the court rejected this argument on the ground that a review by the unit was not responsive to the union’s need to conduct its own determination of the status of contract violations. The court also held that the potential misuse of the roster by the union for organizational purposes did not make it irrelevant to the unions’ duties in administering the contract. The court dismissed the unit’s

890. Information regarding wages, hours, or conditions of employment is presumptively relevant and must be furnished to the union unless the employer can rebut the presumption by proving a lack of relevance. Western Mass. Elec. Co. v. NLRB, 573 F.2d 101, 105 (1st Cir. 1978); San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 867 (9th Cir. 1977).
891. San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 867-68; Prudential Ins. Co. of Am. v. NLRB, 412 F.2d 77, 84 (2d Cir.), cert. denied, 396 U.S. 928 (1969); Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 68 (3d Cir. 1965).
892. 633 F.2d 766 (9th Cir. 1980).
893. Id. at 771.
894. Id. at 772.
argument that disclosure would subject its members to violence and harassment,\(^8^9\) and would constitute a violation of its first amendment rights.\(^8^9\)

In *Press Democrat Publishing Co. v. NLRB*,\(^8^9\) the Ninth Circuit upheld the Board's determination that information regarding amounts paid to independent correspondents by newspaper publishers for editorial product was relevant to wage demands made by the union.\(^8^9\) The Board, however, had also determined that the employers' need for confidentiality regarding compensation to individual employees outweighed the union's interest in receiving wage information about specific nonunit individuals. The Board, therefore, fashioned a decree ordering disclosure of only the total amount paid to nonunit correspondents for editorial product.\(^9^0\) The Ninth Circuit found the record devoid of evidence supporting the Board's conclusion regarding confidentiality and remanded the case to the Board for clarification of its order.\(^9^1\)

In *K-Mart Corp. v. NLRB*,\(^9^2\) the Ninth Circuit followed the general rule that information necessary to substantiate an employer's assertions regarding the propriety of its wage scale must be furnished to the union upon request. The court ordered the employer to furnish the union with information regarding wage increases at the employer's distribution centers. The court held that this information was necessary to substantiate the employer's assertion that its policy was to establish

\(^8^9\)633 F.2d at 772 (citing Shell Oil Co. v. NLRB, 457 F.2d 615, 618-19 (9th Cir. 1972)).

The court found no "clear and present" danger which would accrue to the employer or its members that might justify a refusal to furnish the roster.

\(^8^9\)633 F.2d at 772 n.9.

\(^8^9\)629 F.2d 1320 (9th Cir. 1980).

\(^8^9\)Id. at 1326. The Board had found that the information was relevant to the union's wage demands, a mandated subject of bargaining, because the unit and nonunit workers performed virtually identical editorial functions and furnished editorial material to the same employer. Furthermore, the union was legitimately concerned about the use of nonunit correspondents to perform unit work. *Id.*

\(^9^0\)Id.

\(^9^0\)Id. at 1327. The Board has broad discretion in providing remedies for violations of the Act. *NLRB v. Seven Up Bottling Co.*, 344 U.S. 344, 346 (1953). Its orders may be reviewed for abuse of discretion, however, because the Act does not contemplate the Board's being given a "blank check for arbitrary action." 629 F.2d at 1327 (citing Detroit Edison Co. v. *NLRB*, 440 U.S. 301, 316 (1979)).

\(^9^2\)626 F.2d 704 (9th Cir. 1980).
wage rates in accordance with local community standards.903

2. The effect of a change in the bargaining unit

When an employer is charged with refusing to bargain,904 a presumption arises that the union represented a majority of the unit employees at the time of the refusal.905 An employer may rebut this presumption by demonstrating a "good faith" reasonable doubt as to union majority support at the time of its refusal.906 The employer's "good faith" doubt is objectively measured by what he or she knows rather than by a subjective test of why he or she seeks to use that knowledge.907 The employer's "reasonable doubt" must be supported by unambiguous indicia of non-majority support for the union.908 The strict standard of proof required by the Ninth Circuit to support this "reasonable doubt" was illustrated in \textit{NLRB v. Tahoe Nugget, Inc.}.909 The \textit{Tahoe Nugget} court rejected seven factors advanced by the employer as evidence of the loss of the union's majority status. These factors were: (1) employee discontent, as evidenced by statements derogating the union allegedly made by employees to management; (2) high employee turnover; (3) union inactivity, as shown by the fact that no grievances had been processed over a span of years; (4) low level of employee membership in the union; (5) the union's financial difficulties; (6) a history of amicable bargaining between the parties; and (7) admissions made by union leadership regarding the level of union support. The court considered each of these factors in turn and found that

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  \item \textit{Id}. at 707 (citing NLRB v. Truitt Mfg., 351 U.S. 149 (1956)). In \textit{Truitt}, the Supreme Court held that information was relevant when it was needed to verify an employer's claim, made during a bargaining session, that it could not afford a wage increase. \textit{Id}. at 152-53. The Ninth Circuit relied heavily upon \textit{General Electric Co. v. NLRB}, 466 F.2d 1177, 1184 (6th Cir. 1972) ("Where, as here, the employer defends its wage scale by contending it is 'proper,' and implements a policy of paying wages commensurate with the local wage standards, then good faith bargaining requires the production of reasonable proof to substantiate his claims.").
  \item \textit{Id}. at 707 (citing NLRB v. Truitt Mfg., 351 U.S. 149 (1956)). In \textit{Truitt}, the Supreme Court held that information was relevant when it was needed to verify an employer's claim, made during a bargaining session, that it could not afford a wage increase. \textit{Id}. at 152-53. The Ninth Circuit relied heavily upon \textit{General Electric Co. v. NLRB}, 466 F.2d 1177, 1184 (6th Cir. 1972) ("Where, as here, the employer defends its wage scale by contending it is 'proper,' and implements a policy of paying wages commensurate with the local wage standards, then good faith bargaining requires the production of reasonable proof to substantiate his claims.").
  \item 909. \textit{Id}.
they were singly and collectively unpersuasive. The court found that “the inferences of loss of union support are ambiguous.”

In *Sahara-Tahoe Corp. v. NLRB*, the employer offered evidence of lack of union support similar to that rejected by the court in *Tahoe Nugget*. The employer demonstrated that unit members had crossed a picket line set up by a separate unit of employees within the union and that more than 30% of the employees in the unit had signed a petition entitled “Employees . . . who do not want to belong to any culinary union.”

In reviewing the evidence, the Board gave little weight to the petition because it was worded ambiguously, undated, and untimely. The Board further concluded that the crossing of the picket line was only marginally relevant because the employer had not shown that the picket line was instituted to create a work stoppage.

The Ninth Circuit upheld the Board’s findings. The court noted, however, that “evidence of a 30% support for decertification with other indicia of nonsupport for the union can establish an employer’s good faith reasonable doubt of the union’s majority status and justify its refusal to bargain.” Under the facts of this case, the court concluded that the petition by itself or coupled with the other evidence did not unambiguously demonstrate a lack of employee support for the union.

The court held that the employer needed unequivocal evidence of the union’s nonmajority status in order to arrive at a good faith reasonable doubt justifying a refusal to bargain since “[i]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious champion of its employees, a role no one has asked it to assume.”

3. Effect of a change in the employing unit

An employer who takes over a business is not bound to honor a pre-existing labor contract entered into by the preceding owner unless

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910. *Id.* at 308.
912. *Id.* at 555.
913. *Id.* at 557.
914. *Id.* at 555.
915. *Id.* at 556 (citing J. Ray McDermott & Co. v. NLRB, 571 F.2d 850, 859 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978); National Cash Register Co. v. NLRB, 494 F.2d 189, 194 (8th Cir. 1974)).
916. 648 F.2d at 557.
917. *Id.* (quoting *Tahoe Nugget*, 584 F.2d at 301).
the Board makes a factual finding that the successor employer has assumed the contract. When the bargaining unit remains intact, however, the new employer has a duty to bargain with the incumbent union. This duty to bargain extends to unions that have been voluntarily recognized by the predecessor as well as those which have been certified as the majority representative. The duty to bargain with the incumbent union is not imposed on the successor immediately upon his or her purchase of the previous owner’s stock or assets. The duty arises when the new owner has hired his or her full complement of employees.

In *NLRB v. Burns International Security Services, Inc.*, the Supreme Court enunciated the “perfectly clear” test, whereby a successor employer will be required to consult with the employees’ bargaining representative before it fixes terms and conditions when it is perfectly clear by the employer’s conduct that it plans to retain all the employees in the unit.

In *Bellingham Frozen Foods, Inc. v. NLRB*, the Ninth Circuit held that a successor employer cannot unilaterally change the terms and conditions of employment of those employees that were retained from the predecessor. In *Bellingham*, the successor employer asked the retained employees in the production and maintenance unit to stay on and assured them that they would be paid at the prevailing rate at the time of the changeover. The new employer also indicated that it had no plans for, nor did it announce, any changes in terms and conditions of employment. When the employer subsequently denied any obligation to bargain with the incumbent union and unilaterally changed several of the pre-existing terms and conditions of employment, the union called a strike and filed a complaint with the Board.

The Ninth Circuit upheld the Board’s order that the successor employer bargain with the agent of the production and maintenance unit.

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919. Id. at 284; see also *NLRB v. Dent*, 534 F.2d 844, 846 (9th Cir. 1976).
923. Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees’ bargaining representative before he fixes terms.
924. 626 F.2d 674 (9th Cir. 1980), cert. denied, 449 U.S. 1125 (1981).
925. Id. at 677.
employees, that it redress any injuries suffered by employees by its refusal to bargain, and that it discontinue those unfair labor practices that precipitated the strike. The Bellingham court applied the "perfectly clear" test and found that the employer, by its conduct at the time of the takeover and by virtue of its maintenance of the pre-existing working conditions for a week after the changeover, had made it "perfectly clear" that it intended to retain all the employees in the production and maintenance unit.

The union also charged that a member of the clerical staff of the predecessor had been wrongfully terminated. The fact that a successor employer is obligated to bargain with the agent for one bargaining unit does not mean, however, that it is deemed a successor employer for all purposes and must therefore bargain with representatives of each of its bargaining units. Because the new employer had indicated its intention to provide its own clerical staff at the time of the changeover and did not hire any of the predecessor clerical staff, the employer was held not to be a successor employer with respect to the clerical unit. Accordingly, the court set aside the Board's order reinstating the discharged clerical worker.

In instances where new employees are added to the extant bargaining unit, the Board will apply a "new hire" presumption that union support in the new employee group is equivalent to that in the existing unit. In NLRB v. Edjo, Inc., the new employer purchased the stock of the predecessor employer's trucking company and retained all twenty-one of the predecessor's drivers. It immediately hired eight new drivers and refused to recognize or bargain with the incumbent union. The union filed an unfair labor practice charge with the Board, citing the new employer's refusal to bargain with or recognize the incumbent union, as well as the new employer's discontinuance of payments to the union pension fund.

The employer defended on the ground that it possessed a good faith belief that the union no longer enjoyed a majority status among the unit employees. The employer asserted that eight of the holdover

926. Id. at 678.
927. Id. at 679.
929. 626 F.2d at 681.
930. See, e.g., Tahoe Nugget, 584 F.2d at 306; NLRB v. Crimpex, Inc., 517 F.2d 501, 503 n.3 (1st Cir. 1975).
931. 631 F.2d 604 (9th Cir. 1980).
932. Id. at 606.
employees were dissatisfied with the union and that by combining those eight with the eight newly-hired employees, the unit was composed of sixteen employees (of twenty-nine total) who did not wish union representation. The Ninth Circuit upheld the Board's use of the "new hire" presumption in holding that the new employer was in fact a successor employer and was therefore obligated to bargain with the union.

In Hospital and Institutional Workers Local 250 v. Pasatiempo Development Corp., the successor employer purchased a convalescent hospital after the previous owner's collective bargaining agreement had expired. The successor subsequently discharged a holdover employee, and the union petitioned to compel arbitration of the dismissal.

Because the contract between the predecessor employer and the union had expired before the new employer discharged the employee, the court held that the successor had no duty to arbitrate under the preexisting labor contract. The court also rejected the union's contention that the new employer agreed to arbitrate by maintaining the terms and conditions of the expired labor contract and giving an oral agreement to arbitrate. The court held that the oral promise did not reflect the employer's intention to submit the matter to arbitration. The new employer's maintenance of the terms and conditions of employment was merely consistent with its duty to bargain with the union as a successor employer.

4. Effects of a strike

In NLRB v. Lion Oil Co., the Supreme Court held that a contract may be both renewed and negotiable. The Lion Oil Court also found that a strike in support of modification demands which occurs
after the giving of the statutorily prescribed notice\(^\text{941}\) is not a violation of section 8(d)(4),\(^\text{942}\) which prohibits a party from terminating or modifying a collective bargaining agreement.\(^\text{943}\)

The Ninth Circuit relied on Lion Oil in reaching its decision in KCW Furniture, Inc. v. NLRB.\(^\text{944}\) In KCW Furniture, the parties signed a three year agreement which was renewed automatically each year thereafter unless either party gave "Notice of Opening" or "Notice of Termination" within the time periods required under the contract. The union sent a timely notice of opening to the employer, who responded some seven months later. Negotiations took place after the date for automatic renewal had passed, yet neither side had given the notice of termination which was required to end the agreement. When negotiations proved unfruitful, the parties declared an impasse and the employer implemented the terms of its final offer.\(^\text{945}\)

The union filed an unfair labor practice charge with the Board, who issued a complaint charging the employer with unilaterally changing the terms and conditions of employment during the term of a valid labor agreement.\(^\text{946}\) The employer offered two defenses to the charge. First, it contended that the contract's duration and renewal clause was ambiguous, arguing that a contract could be either renewed or negotiable, but not both.\(^\text{947}\) The Ninth Circuit dismissed this contention, citing the Lion Oil holding in which the Supreme Court clearly recognized that a contract could be both renewed and negotiable.\(^\text{948}\)

The employer next contended that the Board's construction of the duration and renewal clause in the contract rendered that clause illegal.

\(^{941}\) 29 U.S.C. § 158(d) (1976) provides in pertinent part that:
where there is in effect a collective-bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification — (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.

\(^{942}\) 352 U.S. at 292-93.

\(^{943}\) 29 U.S.C. § 158(d)(4) (1976) provides in pertinent part that neither party may terminate or modify a collective bargaining agreement:

unless the party desiring such termination or modification . . . (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

\(^{944}\) 634 F.2d 436 (9th Cir. 1980).

\(^{945}\) Id. at 438.

\(^{946}\) Id.

\(^{947}\) Id. at 439.

\(^{948}\) Id.
since it would then be contrary to the requirement found in section 8(d)(4) of the NLRA. The employer argued that the original contract contained an express reservation of the parties' right to economic recourse in negotiations, except during the interval between notice of opening and the expiration date. This reservation was alleged to be illegal in light of the proscription of section 8(d)(4) against resorting to strikes by a party seeking to terminate or modify a collective bargaining agreement.

The Ninth Circuit disagreed. The court cited the holding of Lion Oil, in which the Supreme Court had interpreted the term "expiration date" to mean not only the termination date of the bargaining contract, but also an agreed date during the existence of a valid contract at which time the parties could modify its terms and conditions. The Supreme Court had, therefore, reasoned that section 8(d)(4) does not prohibit strikes which occur after the required notice is given, if the contract itself provides that it may be reopened for purposes of modification. The Ninth Circuit concluded that the employer's unilateral implementation of its final offer was an unfair labor practice because the collective bargaining agreement was never terminated.

B. Administration of the Collective Bargaining Agreement

1. Grievance arbitration

Once a collective bargaining agreement has been reached, the parties may choose to use the collective bargaining procedure to resolve any conflicts which arise under the original agreement, or they may agree to submit those conflicts to arbitration. Although the collective bargaining process and arbitration are both used as vehicles for resolving labor disagreements, the procedures are not always interchangeable.

In Aluminum Company of America v. International Union, the Ninth Circuit cited the difference between the two procedures as one ground for its holding that the employer's attendance control plan was not subject to arbitration. The company unilaterally implemented an

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949. 634 F.2d at 439; see supra note 943.
950. Id. at 440.
951. Id. (citing 352 U.S. at 290).
952. 352 U.S. at 291.
953. 634 F.2d at 441.
954. A party who is unsuccessful in resolving a labor dispute through collective bargaining may not always seek resolution of that same dispute through arbitration. See, e.g., Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 408-09 (9th Cir. 1978).
955. 630 F.2d 1340 (9th Cir. 1980).
attendance control plan which called for a review of an employee’s attendance record whenever the employee had accumulated a given number of unexcused absences, tardies, or early leaves from work over a twenty-six week period. Under the plan, the employer reserved the right to impose either a five-day or open suspension upon an employee whose attendance continued to be irregular following a written warning.956

The union filed a grievance, claiming the plan was “unfair,” and the arbitrator found the grievance to be subject to arbitration. The arbitrator based his finding of arbitrability on the ground that the attendance control plan might lead to the suspension or discharge of an employee, an act which might be violative of the agreement’s “just cause” provision.957

The Ninth Circuit recognized the strong presumption in the law for the arbitrability of grievances.958 The court noted, however, that the application of any company policy might lead to a violation of the agreement’s “just cause” provision, and held that the company’s attendance control plan was not a proper subject for arbitration. The court found no intent by the parties to vest an arbitrator with the jurisdiction to decide the fairness of a company policy which had not been the subject of collective bargaining. Rather, the parties had intended to leave such disputes as might arise under the “just cause” provision to the collective bargaining process. The court found that the two methods of resolving disputes are not interchangeable because “a party may not always seek to have resolved through arbitration those matters which it was not successful in resolving through bargaining.”959

This result is sound, for the opposite holding might have caused the employers to refuse a labor contract containing a “just cause” provision. If the court had held that an arbitrator can acquire jurisdiction over any grievance arising from violations of company policy under a “just cause” provision, an employer’s right to manage its operation would have been severely curtailed. Most, if not all, employers would probably resist the inclusion of any “just cause” provision in their labor

956. Id. at 1341 n.1.
957. Article 1 of the agreement provided:
   Section 3. Direction of the Working Forces — Except as may be limited by the provisions of this Agreement the operation of the plant and the direction of the working forces, including the right to hire, lay off, suspend, dismiss and discharge any employee for proper and just cause are vested exclusively with the Company.
   Id. at 1342-43.
958. Id. at 1343 (citing United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960)); International Ass'n of Machinists v. Howmet Corp., 466 F.2d 1249 (9th Cir. 1972).
959. 630 F.2d at 1344.
agreements. A “just cause” provision benefits both parties, and the *Aluminum Company* holding is appropriate because it does not penalize the employer whose labor agreement contains such a provision.

As in *Aluminum Company*, the Ninth Circuit also looked to the intent of the parties in deciding whether a specific grievance was arbitrable in *Syfy Enterprises v. Northern California State Association of IATSE Locals*. In *Syfy*, an arbitrator found that the employer owned two theaters which had not been expressly included in the collective bargaining agreement. Having found that the operation of those theaters was subject to the agreement, the arbitrator then ordered the employer to make the theaters’ employees whole for any losses they had suffered by not being accorded wages and working conditions equal to those enjoyed by other employees subject to the agreement.

The Ninth Circuit rejected the employer’s claim that the arbitrator lacked jurisdiction to decide the issue, finding instead that the parties had expressly agreed to have the issue decided by arbitration. The employer further argued that the decision should have been voided because the arbitrator had considered evidence apart from the contract itself. The Ninth Circuit rejected this contention, holding that the arbitrator had properly examined the history of the bargaining that led to the agreement in order to ascertain the intent of the parties with respect to the reach of the contract.

The Ninth Circuit, in *United Steelworkers of America, AFL-CIO v.*

961. Id. at 125.
962. Id. The court cited *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) for the proposition that the employer was bound by the decision because it had agreed to submit the matter to arbitration. The *Steelworkers* Court noted that:

> Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Yet to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.

*Id.* at 582. See *International Bhd. of Teamsters v. Washington Employers, Inc.*, 557 F.2d 1345, 1349 (9th Cir. 1977) (“[A]rbitration is a matter of contract and a party is bound by an award only if he agreed to submit the issue to arbitration.”).

963. 631 F.2d at 125-26. Evidence that is extrinsic to the labor contract itself may be relied upon by arbitrators who seek to know the intent of the parties at the time the agreement was reached. See, e.g., *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) (“The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.”).
Bell Foundry Co.,964 reversed the district court's holding that employee discharges were not arbitrable under the collective bargaining agreement. In Steelworkers, as part of the negotiations following expiration of a previous contract, the employer sent the union a proposal on November 21. The proposal expressly stated that it would remain open until December 1. On November 23, the employer sent a clarification of one provision of its offer and acceded to the union's request that the offer remain open "for a couple more days."965 On November 30, the employer mailed discharge notices to four striking employees. The union accepted the employer's offer on December 1 and accepted the employer's clarification after the employer brought it to the union's attention. The contract that was agreed upon contained a provision for the arbitrability of discharges.966

The Ninth Circuit held that the discharged employees had a right under the contract to have their discharges arbitrated. The court's opinion seems destined for challenge, however, because of its internal inconsistency. The court held that the modification of the original offer did not revoke that offer and reversed the trial court on the ground that the second contract had been formed at the time the discharges were effective.967 In reaching this holding, the court began with the observation that the issue of contract formation is governed not by the Uniform Commercial Code but by general contract law.968 The court then stated its agreement with the employer's position that the subsequent modification of the offer had the effect of revocation, citing secondary authority for this proposition.969 Having concluded that a modification of an offer acts as a revocation, the court then reversed itself and held that the modification of the original offer did not revoke that offer.

964. 626 F.2d 139 (9th Cir. 1980).
965. Id. at 140 n.2.
966. Id. at 140.
967. Id. at 141-42. The court offered two grounds for this holding, explaining "[t]here appears to be no case holding that a refinement of language such as that involved here operates as a revocation of an offer, and we are offered no practical justification for so holding." Id. at 141.
968. Id. at 140; see Teamsters Local 524 v. Billington, 402 F.2d 510 (9th Cir. 1968).
2. Judicial enforcement of the collective bargaining agreement

a. scope of section 301

Section 301(a) of the Labor Management Relations Act provides that any district court having jurisdiction over the parties may hear "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations" regardless of the amount in controversy or the citizenship of the parties. Section 301, however, does not grant a district court jurisdiction to hear an intraunion dispute which does not affect external labor relations.

In *Lucas v. Bechtel Corp.*, the Ninth Circuit reversed the district court's dismissal of a union complaint brought under section 301. The complaint alleged that the employer had paid, under color of a Stabilization Agreement with the International and its constituent unions, lower wages than to which the union employees were entitled. The Ninth Circuit held that the district court had dismissed the complaint without permitting the union to complete discovery. Moreover, the record did not support the employer's claim that section 301 jurisdiction was lacking because the controversy was merely an intraunion dispute. The court, therefore, remanded the case to the district court for a full exposition of the facts underlying the complaint.

Federal courts have jurisdiction over actions brought to enforce collective bargaining agreements even where the conduct in question is permitted or prohibited by the NLRA. In *Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc.*, the Ninth Circuit

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971. Id. § 185(a).
972. Stelling v. IBEW Local 1547, 587 F.2d 1379, 1384 (9th Cir. 1978) ("[I]f a controversy is related only to a union dispute which will not affect external labor relations, § 301 does not provide a basis for jurisdiction.").
973. 633 F.2d 757 (9th Cir. 1980).
974. Id. at 758.
975. Id. at 759.
976. Id. at 760.
977. The Supreme Court noted that:

In § 301 of the Taft-Hartley Act, 61 Stat. 156, Congress authorized federal courts to exercise jurisdiction over suits brought to enforce collective-bargaining agreements. We have held that such actions are judicially cognizable, even where the conduct alleged was arguably protected or prohibited by the National Labor Relations Act because the history of the enactment of § 301 reveals that "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'"

978. 639 F.2d 487 (9th Cir. 1980).
upheld the district court's refusal to stay arbitration confirmation proceedings until after an unfair labor practice dispute between the parties could be heard by the NLRB. Although the employer had agreed not to subcontract any work to a nonsignatory in its agreement with the union, it did so anyway. When the subcontractor refused to make contributions to the union trust fund as the contract required, the union filed a grievance against the employer. The employer did not appeal the subsequent arbitration award entered against it but filed unfair labor practice charges with the NLRB. The union then filed suit to enforce the arbitration award.

The Ninth Circuit held that the pending NLRB dispute did not preclude federal court jurisdiction over the arbitration award enforcement suit and affirmed the district court's assumption of jurisdiction to hear the dispute. The court also found that the district court had improperly considered the employer's defense that the subcontracting clause it had violated was contrary to law and, therefore, unenforceable. However, because of the district court's finding that the result of the arbitration award enforcement suit would have remained unchanged even if the union had engaged in unfair labor practices, the Ninth Circuit affirmed the decision.

b. statute of limitations

Section 301 of the NLRA contains no statute of limitations governing actions brought under it. In the absence of a congressional directive on the issue, the Supreme Court has held that "timeliness of a § 301 suit, . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." The Supreme Court applied this rule of reference to the state statute of limitations for actions brought under section 301 in United Parcel Service, Inc. v. Mitchell. The United Parcel Court held that New York's ninety-day statute of limitations period for actions to vacate arbitration awards barred a suit brought by an employee against his union and the employer. The employee had been discharged after the employer charged him with falsifying time cards and with other dishonest acts. The employee denied the charges and was represented

979. Id. at 490.
980. Id. at 488-89.
981. Id. at 490-92.
984. Id. at 58.
by his union before a grievance panel. The panel upheld the employee's discharge in a decision which was binding on all the parties to the collective bargaining agreement.

Seventeen months after the arbitration decision, the employee brought suit in district court under section 301 of the NLRA, alleging a breach of duty of fair representation by the union and breach of the collective bargaining contract by the employer. The district court granted summary judgment in favor of the defendants on the ground that the employee's action was one to vacate the arbitration award and was therefore time-barred by application of New York's ninety-day statute of limitation period. The Second Circuit reversed, holding that the trial court should have applied New York's six-year limitation period for actions alleging breach of contract.

The Supreme Court found that the discharged employee brought his action under section 301(a) of the LMRA and "the indispensable predicate for such an action is not a showing under traditional contract law that the discharge was a breach of the collective bargaining agreement, but instead a demonstration that the Union breached its duty of fair representation." The Court concluded that the employee's characterization of his suit as one for breach of contract did not control the issue of which limitation period attached because the employee was required to prevail on his claim of breach of the union's duty to represent him fairly at arbitration before he could press his claim of breach of contract by the employer.

The *United Parcel* holding supports the policy of effecting the "relatively rapid disposition of labor disputes" which the Court had earlier enunciated in *(108,803),(891,808)*. *United Parcel* is also consistent with the policy of judicial restraint with respect to overturning arbitration awards, a policy expressed by the Court in *Hines v. Anchor Motor Freight, Inc.* and *United Steelworkers v. Warrior & Gulf Navi-

985. Id.  
986. Id.  
987. Id.  
988. N.Y. CIV. PRAC. LAW § 7511(a) (McKinney 1980) provides: "An application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him."  
989. Id. § 213(2).  
990. 624 F.2d 394, 397-98 (2d Cir. 1980).  
991. 451 U.S. at 62.  
992. Id. at 63.  
994. 424 U.S. 554, 571 (1976) (except when employee's representation by union is "dishonest, in bad faith, or discriminatory," arbitration decision should be left undisturbed).
The statute of limitations period of the forum state governs actions brought under section 301. In *Waggoner v. Dallaire*, the Ninth Circuit applied California's four-year limitations period for actions brought to enforce a monthly payments provision of a written contract. The court reversed the trial court's ruling that the trustee's action to recover allegedly delinquent trust fund contributions from the employer was time-barred. The court held that because the trustees brought their action on May 6, 1977, their claims for monthly trust fund contributions from May 6, 1973 were timely under the forum state's limitations period.

The Ninth Circuit reversed each of the trial court's substantive rulings and remanded the case for further proceedings. In remanding, the Ninth Circuit instructed the trial court on the measure of damages to be awarded the trustees upon a finding in their favor. The district court did not reach the damage issue, but it indicated that if it had been called upon to consider the question, it would have awarded the trustees an amount which represented contributions only for any hours an employee had worked in positions covered under the Master Labor Agreement.

c. exhaustion of remedies

The general rule in deciding whether a section 301 action brought by an employee against an employer or the union for an alleged breach of the collective bargaining agreement is "ripe" is that such a suit will be barred if the employee has failed to exhaust the grievance machinery under the collective bargaining agreement. Hence, the court in *Waggoner v. Dallaire* held that the trustee's claims were not barred by the forum state's limitations period.

995. 363 U.S. 574, 581 (1960) ("[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.")


997. 649 F.2d 1362 (9th Cir. 1981).


999. 649 F.2d 1362, 1365 (9th Cir. 1981).

1000. The Ninth Circuit reversed the district court's rulings that: (1) the collective bargaining agreement was an unenforceable adhesion contract; (2) an oral agreement between the employer and a union official was an effective modification of the collective bargaining contract's employee benefit trust provision; and (3) the trustee's claims were barred by application of the statute of limitations. The court affirmed the district court's ruling that the trustee's motion to disqualify the trial judge for personal bias was untimely because the motion was made almost nine months after trial, after entry of a minute order awarding judgment to the employer, and the trustees had made no showing of "good cause" for their delay in filing the motion. *Id.* at 1367-70.

1001. *Id.* at 1369.
be entertained only after the employee has exhausted the grievance and arbitration procedures established under that agreement.\textsuperscript{1002} 

In \textit{Clayton v. UAW},\textsuperscript{1003} the United States Supreme Court considered another section 301(a) action brought by an employee, charging the union with breach of its duty of fair representation and the employer with breach of the collective bargaining agreement. In \textit{Clayton}, the employee asked his union to file a grievance on his behalf on the ground that he had been dismissed without just cause.\textsuperscript{1004} The union initiated a request for arbitration but withdrew that request before arbitration proceedings had begun, notifying the employee of its withdrawal after the time for requesting arbitration had expired.\textsuperscript{1005} 

The district court dismissed the employee's suit against the union and the employer because he had failed to exhaust the union's internal appeals procedure.\textsuperscript{1006} The Ninth Circuit upheld the dismissal of the suit against the union but reversed the dismissal as to the employer on the ground that the internal union appeals procedure could not have resulted in either a reactivation of his grievance or in his reinstatement, the relief he sought in his section 301 action.\textsuperscript{1007} 

The Supreme Court held that an employee need not exhaust an internal union appeals procedure before bringing a section 301 suit if that procedure could not result in his reinstatement as an employee or the reactivation of his grievance.\textsuperscript{1008} The Court, therefore, affirmed the reversal of the employee's suit against the employer and reversed the dismissal of his suit against the union.\textsuperscript{1009} 

The Court created a three prong test to decide whether a section 301 plaintiff is required to exhaust internal union procedures. A district court may properly excuse the employee's failure to exhaust internal union procedures if it finds the existence of (1) such hostility to the employee by union officials that he could not receive a fair hearing of his claim; or (2) internal union procedures which would be inadequate either to reactivate the employee's grievance or otherwise afford him the full range of relief sought in the section 301 suit; or (3) an unreasonable delay of the employee's opportunity to obtain a judicial hearing on

\footnotesize{\begin{itemize}
\item \textsuperscript{1003} 451 U.S. 679 (1981).
\item \textsuperscript{1004} \textit{Id.} at 682.
\item \textsuperscript{1005} \textit{Id.}
\item \textsuperscript{1006} \textit{Id.} at 683-84.
\item \textsuperscript{1007} \textit{Id.} at 684.
\item \textsuperscript{1008} \textit{Id.} at 685.
\item \textsuperscript{1009} \textit{Id.}
\end{itemize}}
the merits caused by the time necessary to exhaust the internal union procedures.1010

The plaintiff in Clayton made no claim that union officials would be so hostile to him that he would be unable to receive a fair hearing of his claim were he required to exhaust his union's internal appeals procedure. In fact, the employee conceded that he would have received an impartial hearing of his claim.1011 Because there was no allegation of union hostility in Clayton, the issue was neither crucial to the case, nor was it argued by the parties. Accordingly, the "hostility" component of the three-prong Clayton test must be considered dictum and, therefore, not controlling upon future section 301 suits.

With respect to the second prong of the Clayton test, the inadequacy of the internal union procedures to reactivate the employee's grievance or otherwise provide him or her with the relief he or she seeks by way of a section 301 suit, the Court ignored an important purpose which can be served by requiring those procedures to be exhausted. The internal union procedures have as their goal the resolution of disputes between the employee and the union. It is this "resolution" quality which the Court addressed in the second factor of the Clayton test. However, the internal union procedure also serves as a forum for fact-finding. During the course of this fact-finding, the employee may discover facts which lead him or her to change the theory of a subsequent section 301 suit or to the realization that he or she has no cause of action at all. The effect of this fact-finding process, which is served by employing the internal union appeal procedure, was expressed in Justice Rehnquist's dissent: "Resort to the union appeals procedures gives the union an opportunity to satisfy the employee that its decision not to pursue a grievance was correct. If successful on this score, litigation is averted."1012

The third prong of the Clayton test provides that a district court may exercise its discretion to excuse a plaintiff from exhausting internal union procedures before bringing a section 301 suit if exhaustion would unreasonably delay the employee's opportunity for a judicial hearing on the merits of the claim. Because resort to internal procedures necessarily results in delay of the employee's section 301 action, it is clear that this factor will be invoked only upon a determination that the particular delay at issue would be an "unreasonable" one.

The requirement that a delay not be unreasonable poses several

1010. Id. at 689.
1011. Id. at 689-90.
1012. Id. at 700 (Rehnquist, J., dissenting).
problems for the district court. First, a plaintiff desiring to invoke this third *Clayton* prong to excuse his or her failure to exhaust internal remedies must demonstrate the prospective unreasonableness of the delay caused by resorting to the internal procedures. The employee must present proof of, and the court must pass judgment on, the scenario that would have taken place had he or she been forced to proceed through the internal appeal process.

This focus on the purely prospective injuries to the plaintiff as a consequence of the delay caused by potential exhaustion of the internal union procedure necessarily requires the district court to weigh evidence which is speculative. It is unrealistic to expect a district court to sift through evidence of prospective injury and arrive at a just result.

Finally, assuming that the district court is able to assess the prospective injury to plaintiff which would result from the delay caused by exhaustion of the internal union appeal process, the court must then under the third prong of the *Clayton* test decide whether that delay is unreasonable. Given the absence of direction from the Court to district courts on factual circumstances which would constitute an unreasonable delay, it may be safely predicted that this third prong of the *Clayton* test will spawn a body of case law in each of the circuits on the issue of just what length and type of delay is "unreasonable." Because the *Clayton* holding is destined to increase judicial intervention in the collective-bargaining process, it will serve to undermine the Court's previously stated policy of encouraging private resolution of grievances arising out of the collective bargaining process.\(^{1013}\)

d. *federal substantive law*

A section 301 claim is governed by federal substantive law, rather than by state law.\(^{1014}\) The Ninth Circuit, therefore, applied federal law regarding termination of contracts in *Kaylor v. Crown Zellerbach, Inc.*\(^{1015}\) In *Kaylor*, Crown Zellerbach used an in-house trucking operation to ship its goods and contracted with various companies to supply it with drivers. The driver supply companies, who were solely responsible for the drivers' wages and benefits, signed collective bargaining agreements with the union. Crown Zellerbach was not a signatory to those labor agreements.\(^{1016}\)

Crown Zellerbach informed one of its driver supply companies

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1015. 643 F.2d 1362 (9th Cir. 1981).
1016. Id. at 1365.
that if its agreement was terminated, Crown Zellerbach would require the successor supply company to offer its employees the same wage and benefit levels offered by the predecessor supply company.\textsuperscript{1017} In 1975, Crown Zellerbach discontinued its in-house trucking operation and hired a common carrier to ship its goods. The common carrier offered to hire the employees of the driver supply company it succeeded and also offered to “dovetail” the employees into its existing driver seniority list.\textsuperscript{1018} Believing that “dovetailing” would put some of them out of work, the employees refused the common carrier’s offer of employment. The NLRB dismissed a claim of unfair labor practice brought against Crown Zellerbach, and the employees filed suit.\textsuperscript{1019}

The Ninth Circuit held that Crown Zellerbach and the driver supply companies had established an employment contract but had not entered into a collective bargaining agreement.\textsuperscript{1020} The court found that an employment contract for an indeterminate period is terminable at will under either federal\textsuperscript{1021} or state law.\textsuperscript{1022} The court concluded that Crown Zellerbach had not committed an unfair labor practice and affirmed the NLRB’s dismissal of the employee’s claim.\textsuperscript{1023}

Collective bargaining agreements are enforceable in federal court against both employers and unions under LMRA section 301.\textsuperscript{1024} This statute does more than merely confer jurisdiction on federal courts to hear controversies arising from alleged breaches of collective bargaining agreements. In \textit{Textile Workers Union v. Lincoln Mills},\textsuperscript{1025} the Supreme Court found that section 301 also “authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements.”\textsuperscript{1026}

The body of federal law which has developed since \textit{Textile Workers} includes Supreme Court rulings that an employee may sue his or

\begin{enumerate}
\item \textsuperscript{1017} Id.
\item \textsuperscript{1018} Id. at 1365-66.
\item \textsuperscript{1019} Id.
\item \textsuperscript{1020} Id. at 1367 n.2. The contract did not cover conditions of employment, but merely identified those employees who would be employed by successor driver supply companies. Id.
\item \textsuperscript{1021} Id. at 1367; see Boeing Airplane Co. v. NLRB, 174 F.2d 988, 991 (D.C. Cir. 1949).
\item \textsuperscript{1022} See Pratt v. Local 683, Film Technicians of the Motion Picture & Television Indus., 260 Cal. App. 2d 545, 67 Cal. Rptr. 483 (2d Dist. 1968).
\item \textsuperscript{1023} 643 F.2d at 1368. Because federal courts have no jurisdiction to entertain claims of conspiracy, the Ninth Circuit affirmed the district court’s grant of summary judgment against the employees on their claim that the union and the employers conspired to block the collective bargaining agreement. Id.
\item \textsuperscript{1024} 29 U.S.C. § 185(a) (1976).
\item \textsuperscript{1025} 353 U.S. 448 (1957).
\item \textsuperscript{1026} Id. at 451.
\end{enumerate}
her employer directly for the employer's breach of the collective bargaining agreement, and that the employer may not bring a section 301 action against the union when the union has not condoned its members' breach. Additionally, the Court held in Atkinson v. Sinclair Refining Co., that section 301 does not authorize an employer's suit for damages against individual union officers and members whose union violates the no-strike clause in a collective bargaining agreement. The Atkinson Court expressly reserved the question of whether the employer could bring a section 301 damages action against individual union members who violate a no-strike provision while acting "in their personal and nonunion capacity" and not on behalf of their union.

In Complete Auto Transit, Inc. v. Reis, the Supreme Court decided the question left open by Atkinson. Citing the legislative history of the statute, the Court held that an employer may not bring a section 301 action against individual employees for violating the no-strike provision of their collective bargaining agreement. The Court reasoned that the legislative history of the statute demonstrates that Congress intended section 301 to be a vehicle by which employers could bring damage suits against unions for breach of a no-strike provision in a collective bargaining agreement but not against individuals.

An employer may make contributions to a trust fund on behalf of its employees. Because an independent contractor is not an "employee" within the meaning of that term as defined in the NLRA, employer contributions to trust funds on behalf of an independent contractor are not authorized by that statute. In determining whether a particular individual is an employee or independent contractor, the reviewing courts apply common law agency principles. The Ninth Circuit has considered the factors found in the Restatement (Sec-

1030. Id. at 249.
1031. Id. at 249 n.7.
1033. Id. at 417.
1034. Id.
1035. 29 U.S.C. § 186 (1976) makes it unlawful for an employer to pay money to employees under certain enumerated situations. However, 29 U.S.C. § 186(c)(5) (1976) provides that this general prescription is not applicable to "money or other things of value paid to a trust fund . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents."
1037. Id. at 256.
The Ninth Circuit applied these tests in *Waggoner v. Northwest Excavating, Inc.*\(^{1040}\) In *Northwest Excavating*, the trustees of union trust funds brought suit under section 301 to recover trust fund contributions allegedly owed by the employer. The employer had refused to make the contributions on the ground that the repair and maintenance workers and the owner-operators of construction equipment used by the employer were not employees.\(^{1041}\)

The Ninth Circuit affirmed the holding of the trial court that the owner-operators were independent contractors rather than employees.\(^ {1042}\) The court reasoned that the owner-operators were supervised by the general contractor rather than the employer; they were free to renegotiate their rate of pay with the general contractor; and the employer’s only involvement was to record the number of hours worked by the owner-operator.\(^ {1043}\)

The Ninth Circuit also affirmed the district court’s finding that the maintenance and repair person was an independent contractor since he set his own hours and billing rates, was not supervised by the employer, and had other customers besides the employer.\(^ {1044}\) The court further found that by assigning to this independent contractor routine repair work that had previously been performed by union employees, the em-

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1038. *Restatement (Second) Agency* § 220(2) lists these factors:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular operation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

1040. 642 F.2d 333 (9th Cir. 1981), vacated and remanded, 102 S.Ct. 1417, aff’d on remand, 685 F.2d 1224 (9th Cir. 1982).
1041. *Id.* at 335.
1042. *Id.* at 337.
1043. *Id.*
1044. *Id.*
ployer was in breach of the Master Labor Agreement.\textsuperscript{1045}

A court that reviews an arbitration award is not permitted to pass on the merits of that award.\textsuperscript{1046} The Ninth Circuit acceded to this limitation on the power of reviewing courts in \textit{Amalgamated Transit Union v. Aztec Bus Lines}.\textsuperscript{1047} In \textit{Aztec Bus Lines}, an arbitrator ordered a two-week suspension without pay as a sanction for an employee who had operated a bus with faulty equipment, despite his knowledge that company policy called for him to take the vehicle out of operation.\textsuperscript{1048}

The employer had sought to dismiss the employee and therefore challenged the arbitrator's decision in district court on the ground that the decision offended the public policy of promoting public safety on the highways.\textsuperscript{1049} In affirming the district court's grant of summary judgment in favor of the union, the Ninth Circuit noted that the effect of the arbitrator's decision would not be to condone the violation of any statute.\textsuperscript{1050}

\section*{V. Concerted Actions}

\subsection*{A. Strikes}

1. Sympathy strikes

Section 7 of the NLRA protects the right to strike.\textsuperscript{1051} Section 7 also protects employees engaged in sympathy strikes which involve honoring picket lines established by other employees of a common employer.\textsuperscript{1052} This protection has been extended to employees honoring a

\begin{small}
\textsuperscript{1045} Id. at 337-38. The Master Labor Agreement provided, in part, that the signatory contractors had the right to use independent contractors to perform major repairs on machinery and equipment, but "[a]ll other maintenance and repairs which are normally and customarily performed by persons in the classification of Heavy Duty Repairman/Welder shall be performed by employees covered by this Agreement." \textit{Id}. at 338.

\textsuperscript{1046} \textit{See} \textit{United Steelworkers v. Enterprise Wheel & Car Corp.}, 363 U.S. 593 (1960).

\textsuperscript{1047} 654 F.2d 642 (9th Cir. 1981).

\textsuperscript{1048} \textit{Id}. at 643-44.

\textsuperscript{1049} \textit{Id}. at 643.

\textsuperscript{1050} \textit{Id}. at 644.

\textsuperscript{1051} 29 U.S.C. § 157 (1976). Section 7 of the NLRA provides in pertinent part that employees "shall have the right to . . . assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."); \textit{see}, \textit{e.g.}, \textit{NLRB v. Erie Resistor Corp.}, 373 U.S. 221, 233 (1963) (section 7 guarantees employees' right to engage in concerted activity, which includes right to strike).

\textsuperscript{1052} \textit{Delaware Coca-Cola Bottling Co. v. General Teamster Local 326}, 624 F.2d 1182, 1184 (3d Cir. 1980) (refusal of production and maintenance employees to cross picket line established by driver employees at employer's plant protected); \textit{W-I Canteen Service, Inc. v. NLRB}, 606 F.2d 738, 743 (7th Cir. 1979) (refusal to cross picket line at employer's Rockford, Illinois plant in support of strike by fellow employees who worked at employer's Madison, Wisconsin plant protected). \textit{See}, \textit{e.g.}, \textit{NLRB v. C.K. Smith & Co.}, 569 F.2d 162, 165 (1st
picket line at their employer's customer's place of business, when such activity is for "mutual aid or protection." Activity for "mutual aid or protection" is not limited to the employer-employee relationship. An employee's right "to engage in protected activity must be balanced against the employer's legitimate and substantial business interests."

a. employer's place of business

In *NLRB v. Southern California Edison Co.*, the Ninth Circuit addressed whether section 7 protects employees honoring a picket line established by a sister union representing different employees of a common employer. Two bargaining units of Southern California Edison employees were represented by different unions. Edison an-

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1053. *See, e.g.*, Redwing Carriers Inc., 137 N.L.R.B. 1545, 1546-47 (1962) (section 7 protects drivers who refused to cross a picket line established at customer's place of business to make certain deliveries for their carrier employer), enforced *sub nom*. Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964); NLRB v. Alamo Express, Inc., 430 F.2d 1032, 1036 (5th Cir. 1970) (section 7 protects truckers who refuse to cross picket line of another union to make routine pickup of merchandise at customer's place of business); Teamsters Local 657 v. NLRB, 429 F.2d 204, 205 (D.C. Cir. 1970) (per curiam) (employees refusal to cross picket line at another employer's place of business is protected activity under NLRA); NLRB v. Rockaway News Supply, 197 F.2d 111, 113 (2d Cir. 1952), *aff'd on other grounds*, 345 U.S. 71 (1953).

1054. *See, e.g.*, Kaiser Eng'rs v. NLRB, 538 F.2d 1379, 1384-85 (9th Cir. 1976) (section 7 protects employees' concerted activity in lobbying for changes in national labor policy regarding job security).


1056. 646 F.2d 1352 (9th Cir. 1981).

1057. *Id.* at 1362.

1058. The primary striking unit of employees was represented by the Utility Workers of America, and the potential sympathy strikers were represented by the International Brotherhood of Electrical Workers. *Id.* at 1358.
ticipated a strike by one unit and threatened to discipline and permanently replace employees in the other unit who refused to cross their sister union's picket line. Recognizing that the Board's interpretation of the NLRA must be upheld if "reasonably defensible," the court upheld the Board's finding that the threatened employees had a statutory right to honor their sister union's picket line. The court concluded, therefore, that the threatened employees had a right under section 7 to honor the picket line of their striking sister union.

b. customer’s place of business

In Southern California Edison, the Ninth Circuit also considered whether section 7 protects employees who refuse to cross a lawful picket line at their employer's customer's place of business. Blum, an Edison employee, had been assigned to service a malfunctioning polyphase meter and to change a magnetic tape recorder cartridge located on the premises of an Edison customer, Freightliner Corporation. The data recorded on the tape, which would shortly expire, was solely for Edison's use and did not benefit Freightliner. Blum refused to cross the picket line established at Freightliner. He was replaced by another employee and the work was completed. The next day, Blum notified Edison that he was ready to perform any work which did not require him to cross a picket line. Subsequently, Blum was suspended for five days pursuant to a company policy providing for suspension when an employee refuses to perform regularly assigned duties. The Board concluded that section 7 gave Blum the right to honor the picket line at Freightliner.

Edison argued that Blum's conduct lacked the "mutuality" required by section 7 because he had no direct economic interest in the dispute at Freightliner and because his refusal to cross the picket line did not affect Freightliner. The court recognized that respect for the integrity of the picket line is a major source of strength in the collective bargaining process. Because the primary strikers know that they are

1059. Id. at 1362.
1060. Id. at 1369.
1061. Id.
1062. Id. at 1362.
1063. Id. at 1363.
1064. Id.
1065. Id. (citing NLRB v. Union Carbide Corp., 440 F.2d 54, 56 (4th Cir.) (section 7 protects sympathy strikers who as matter of principle refuse to cross picket line maintained by primary striking employees where both have common employer), cert. denied, 404 U.S. 826 (1971)).
supported by sympathy strikers "the solidarity so established is 'mutual aid' in the most liberal sense." The court then summarily upheld as "reasonably defensible," the Board's conclusion that Blum's activity was protected by the NLRA.

c. business justification

The Board in *Southern California Edison* found that Edison's threat to replace any employee who honored a picket line at the Edison premises was lawful. It held, however, that Edison's threat to discipline these employees violated section 8(a)(1) of the NLRA. Recognizing that section 8(a)(1) protects employees engaging in lawful activity "from even the idle threat of retaliation," the Ninth Circuit upheld the Board's conclusion as a "reasonably defensible" interpretation of the Act.

The Board also found that both the replacement and suspension of Blum had no legitimate business justification. The Ninth Circuit was unable to find substantial evidence supporting the Board's determination regarding Blum's replacement. Because the magnetic tape Blum was to change would shortly expire, and because Edison had an important interest in repairing the polyphase meter, the replacement was permissible in order to "maintain reasonable, normal business operations." The court, however, upheld the Board's finding that the suspension lacked business justification, primarily because Edison had relied on the no-strike provision of the contract to justify the suspension, rather than on business necessity.

2. Waiver of the right to strike

a. express contractual waiver

The right to strike and to engage in sympathy strikes may be

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1066. *Southern Cal. Edison*, 646 F.2d at 1364 (quoting Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664, 668-69 (1967)).
1067. 646 F.2d at 1364.
1068. Id. at 1368.
1069. Id.
1070. Id. See NLRB v. Albion Corp., 593 F.2d 936, 939 (10th Cir. 1979) (statement by employer that employee would never work for employer again held violation of § 8(a)(1)).
1071. See *supra* notes 1063-64 and accompanying text for a factual discussion of the case.
1072. 646 F.2d at 1369.
1073. Id.
1074. Id.
1075. Id.
waived by a collective-bargaining agreement.1076 A contractual waiver of a statutory right, however, must be "clear and unmistakable."1077 A broad no-strike clause, coupled with other indicia of intent to waive the right to engage in sympathy strikes, has been held sufficient to constitute a waiver.1078 There is a split of authority over whether a general no-strike clause precludes sympathy strikes.1079 The collective bargaining agreement's language and the factual circumstances of the labor controversy are analyzed to determine whether the right has been waived.1080

In Southern California Edison, the Ninth Circuit upheld the Board's determination that the collective bargaining agreement's broad no-strike clause, even with a preamble acknowledging the employer's duty to render continuous public service, failed to constitute a "clear and unmistakable" waiver of the right to engage in sympathy strikes.1081 The union's history of unsuccessfully negotiating a picket line clause indicated that the union understood the right had been waived and that it sought to regain this right.1082 The court stated that a union's failure to negotiate a contractual confirmation of a right does not constitute a waiver,1083 it is evidence of a waiver, but only if it

1076. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279 (1956) (Court assumed that employees could contractually waive right to strike against employer's unfair labor practices but held no such waiver in contract).
1077. See Delaware Coca-Cola Bottling Co. v. General Teamster Local 326, 624 F.2d 1182, 1184 (3d Cir. 1980) (broad no-strike clause not "clear and unmistakable waiver" of right to engage in sympathy strike); Gary Hobart Water Co. v. NLRB, 511 F.2d 284, 287-89 (7th Cir. 1975) (general no-strike clause did not constitute clear and unmistakable waiver of right to engage in sympathy strike).
1078. See W-I Canteen Serv., Inc. v. NLRB, 606 F.2d 738, 745 (7th Cir. 1979) (broad no-strike clause coupled with picket line clause, which permitted only specific sympathetic activity at locations other than employer's premises, held to preclude sympathy strike at employer's premises); Montana-Dakota Util. Co. v. NLRB, 455 F.2d 1088, 1092-93 (8th Cir. 1972) (broad no-strike clause coupled with picket-line clause prohibiting discharge of sympathetic strikers held to permit discipline of employees who honored lawful picket line).
1080. See W-I Canteen Serv., Inc. v. NLRB, 606 F.2d 738, 743 (7th Cir. 1979); Iowa Beef Processors v. Amalgamated Beef Cutters, 597 F.2d 1138, 1144 (8th Cir.), cert. denied, 444 U.S. 840 (1979).
1081. 646 F.2d at 1365; but cf. Montana-Dakota Util. Co. v. NLRB, 455 F.2d 1088, 1093-94 (8th Cir. 1972) (contractual recognition of employer's duty of continuous operation as public service recognized as factor in finding waiver of right to engage in sympathy strikes without employer discipline).
1082. 646 F.2d at 1366.
1083. Id.
shows that the union thought the right had been waived by other contractual provisions and that the union sought to regain the right.\textsuperscript{1084}

The Board found that the proposed picket line clause was never connected to the no-strike clause and that the negotiations failed to indicate that a refusal to cross a picket line was prohibited by the no-strike clause.\textsuperscript{1085} The union stated that it sought to clarify its rights and to end the possible confusion among supervisors with respect to picket line crossing. The Board concluded that the union's bargaining history was not unequivocal evidence of a waiver. The court upheld this conclusion because it was "reasonable and not inconsistent with the Act's policies."\textsuperscript{1086}

\begin{itemize}
\item[\textbf{b. waiver by arbitration clause}]\end{itemize}

In \emph{Boys Markets, Inc. v. Retail Clerks Union, Local 770},\textsuperscript{1087} the Supreme Court stated that "a no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration."\textsuperscript{1088} Accordingly, the promise to arbitrate carries with it a concomitant implied waiver of the right to strike.\textsuperscript{1089} Absent an express agreement to the contrary, the duty not to strike is limited to disputes over arbitrable issues.\textsuperscript{1090} Thus, a strike over an unarbitrable issue will not violate a general no-strike clause because the issue would be beyond the scope of the no-strike obligation.\textsuperscript{1091}

In \emph{Southern California Edison}, the Ninth Circuit addressed whether the union had waived its right to engage in sympathy strikes by operation of an arbitration clause.\textsuperscript{1092} The arbitration clause provided that only "grievances involving interpretation or application of this Agreement may be submitted to arbitration."\textsuperscript{1093}

The court concluded that because the dispute between Freightliner

\begin{itemize}
\item 1084. \emph{Id.}
\item 1085. \emph{Id.}
\item 1086. \emph{Id.}
\item 1088. \emph{Id.} at 248.
\item 1089. \emph{See} Gateway Coal Co. v. UMW, 414 U.S. 368, 381 (1974).
\item 1090. \emph{Id.} at 382. ("[A]n agreement to arbitrate and the duty not to strike should be construed as having coterminous application.").
\item 1091. \emph{See} NLRB v. Gould, Inc., 638 F.2d 159, 164-65 (10th Cir. 1980) (right to engage in sympathy strike not waived by no-strike clause where issue underlying primary strike was not arbitrable); Delaware Coca-Cola Bottling Co. v. NLRB, 624 F.2d 1182, 1187 (3d Cir. 1980).
\item 1092. 646 F.2d at 1364-68.
\item 1093. \emph{Id.} at 1367.
\end{itemize}
(the Edison customer) and its own employees' union involved neither Edison nor Blum's (the employee) union, it was not arbitrable under the latter's collective-bargaining agreement and was therefore beyond the scope of the no-strike obligation. The court rejected Edison's argument that Blum was obliged not to engage in a sympathy strike until after arbitrating the question of whether the sympathy strike violated the agreement. The court reasoned that because the underlying dispute was not arbitrable between Edison and Blum's union, Blum was not required to refrain from his sympathy strike pending arbitration of the strike's permissibility. For this reason, the court concluded that the sympathy strike could not be enjoined pending arbitration of the scope of the no-strike clause.

3. Strike injunctions

The Norris-LaGuardia Act prohibits federal courts from enjoining acts related to concerted activity in cases growing out of or involving labor disputes. In Boys Markets the Supreme Court established an exception to the Act's prohibition when the collective bargaining agreement contains mandatory grievance and arbitration procedures, and where the court determines that the parties are required to arbitrate the grievance underlying the strike.

In Buffalo Forge Co. v. United Steel Workers, the Supreme Court narrowed the Boys Market exception to exclude injunctions against sympathy strikes. The Court reasoned that because neither the causes nor the issue underlying the sympathy strike were subject to the arbitration procedures of the sympathy striker's collective bargaining agreement, and because the sympathy strike did not deny or evade an obligation to

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1094. Id.
1095. Id. at 1368.
1096. Id.
1097. Id. See Buffalo Forge Co. v. United Steel Workers, 428 U.S. 397, 407-08, 408 n.10 (1976).
1099. E.g., 29 U.S.C. § 104 (1976) provides in pertinent part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing . . . any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

1100. 394 U.S. at 240-55.
1101. 428 U.S. 397 (1976) (district court had no jurisdiction to issue injunction against sympathy strike by production and maintenance employees supporting primary strike by clerical employees during negotiations for collective bargaining contract).
arbitrate, there was no possible basis for implying from the arbitration clause a promise to refrain from sympathy strikes.\textsuperscript{1102} The Court further decided that where there is a dispute over whether a sympathy strike violated a no-strike clause, a district court's jurisdiction was limited to determining whether the dispute was arbitrable under the contract.\textsuperscript{1103} The Court stated, however, that an injunction may not issue, pending arbitration of the scope of the no-strike clause, because to hold otherwise would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts . . . for the purpose of preliminarily dealing with the merits of factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act.\textsuperscript{1104}

The Ninth Circuit has consistently followed and applied the anti-injunction exception developed by the Supreme Court in \textit{Buffalo Forge}.\textsuperscript{1105} In \textit{Matson Plastering Co. v. Operative Plasterers & Cement Masons International Association},\textsuperscript{1106} the Ninth Circuit questioned whether the district court had jurisdiction to issue a preliminary injunction against a union strike.\textsuperscript{1107} The strike was over the employer's refusal to pay an assessment levied by the union for late payments to the union trust fund. A dispute between the union and employer arose over whether the strike was prohibited by the no-strike clause of the collective bargaining agreement. The union had refused to arbitrate this issue and argued that the district court lacked jurisdiction to issue the preliminary injunction against the strike under the Norris-LaGuardia Act. The employer claimed the district court did have jurisdiction

\textsuperscript{1102} \textit{Id.} at 407-08.
\textsuperscript{1103} \textit{Id.} at 406-07.
\textsuperscript{1104} \textit{Id.} at 410-11.
\textsuperscript{1105} See, \textit{e.g.}, \textit{J.A. Jones Constr. Co. v. Plumbers and Pipefitters Local 598}, 568 F.2d 1292 (9th Cir. 1978) (restraining order against sympathy strike wrongfully granted where there was no collective bargaining agreement and thus no obligation to arbitrate); \textit{Martin Hage-land, Inc. v. United States Dist. Court}, 460 F.2d 789 (9th Cir. 1972) (no injunction may issue where collective bargaining agreement contains no mandatory arbitration clause and specifically reserves union's right to strike); \textit{Pacific Maritime Ass'n v. Longshoremen's and Warehousemen's Union}, 454 F.2d 262 (9th Cir. 1971) (strike injunction proper where prior arbitration decision held that strike violated contract).
\textsuperscript{1106} 633 F.2d 1307 (9th Cir. 1980), \textit{cert. denied}, 454 U.S. 816 (1981).
\textsuperscript{1107} \textit{Id.} at 1308.
because the case fell within the *Boys Market* exception.\textsuperscript{1108}

The Ninth Circuit stated that *Buffalo Forge* was controlling and held that the district court had no jurisdiction to issue the preliminary injunction against the strike by the union.\textsuperscript{1109} The court reasoned that *Buffalo Forge* clearly indicated that the district court lacked jurisdiction to interpret the contract’s no-strike clause. The court did have jurisdiction, however, to resolve the question of whether the strike’s legitimacy was arbitrable under the contract.\textsuperscript{1110} Further, the court recognized, based upon *Buffalo Forge*, that where it is unclear that the strike is over an arbitrable issue and is in violation of a no-strike clause, an injunction may not issue pending the arbitrator’s decision.\textsuperscript{1111} The court vacated the injunction and remanded to the district court to determine whether the parties were required to arbitrate the issue of the no-strike clause’s applicability.\textsuperscript{1112}

4. Employer’s remedies for illegal strikes

Section 301(a) of the LMRA authorizes damage suits in federal district courts for collective bargaining agreement violations.\textsuperscript{1113} An action by an employer against a union for breach of the collective bargaining agreement’s no-strike clause is within the scope of section 301.\textsuperscript{1114} The union may be held liable if it authorizes, ratifies, or otherwise participates in a strike which violates the agreement.\textsuperscript{1115} Section 301(b), however, does not permit an employer to recover damages from the individual union officers and members when the union entity violates a no-strike clause.\textsuperscript{1116}

\begin{thebibliography}{1116}
\bibitem{1108} Id.
\bibitem{1109} Id. at 1309.
\bibitem{1110} Id.
\bibitem{1111} Id.
\bibitem{1112} Id.
\bibitem{1113} 29 U.S.C. § 185(a) (1976) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, 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.

\bibitem{1114} Atkinson v. Sinclair Refining Co., 370 U.S. 238, 247-49 (1962) (Court based decision on Congressional intent underlying section 301(b) that union be solely liable in damages for injury caused by it and that individual members be exempt from enforcement of money judgment; § 301(b) was response by Congress to *Danbury Hatters* case, Loewe v. Lawlor, 208 U.S. 274 (1908); Lawlor v. Loewe, 235 U.S. 522 (1915), where individual union members held liable in damages for union directed boycott of plaintiff’s hats).


\bibitem{1116} 370 U.S. at 247-49.
\end{thebibliography}
In *Complete Auto Transit, Inc. v. Reis*, the Supreme Court addressed whether an employer may sue individual union members under section 301(a) for violating a no-strike clause by engaging in a wildcat strike in their personal and non-union capacity. Although the employees’ wildcat strike clearly violated the collective-bargaining agreement’s no-strike clause, the Court held that section 301(a) did not sanction the damage action against the individual employees regardless of whether their union participated in or authorized the strike. The Court’s decision rested on the legislative history of section 301. This history “clearly reveal[ed] Congress’ intent to shield individual employees from liability for damages arising from their breach of the no-strike clause . . . even though [this result] might leave the employer unable to recover for his losses.”

In a footnote, the Court stated that other remedies were available: for example, an employer may sue the union entity for damages, discharge the striking employees, request the union to discipline the employees, or obtain an injunction. In his concurring opinion, however, Justice Powell suggested that these other remedies are illusory.

In a dissenting opinion, Chief Justice Burger, joined by Justice Rehnquist, concluded that by holding that an employee, acting in an individual non-union capacity, may breach the contract with impunity, the majority ignored the long established common law principle of individual accountability for voluntary actions. At common law, an individual who voluntarily enters into an agreement, either personally

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1118. *Id.* at 402.
1119. *Id.* at 415-17; see also Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers Int’l Union, 452 F.2d 49, 54 (7th Cir. 1971) (section 301 does not subject wildcat strikers to liability for damages caused by violating no-strike clause).
1120. 451 U.S. at 407.
1121. *Id.* at 407-08.
1122. *Id.* at 416-17 n.18.
1123. *Id.* at 420 (Powell, J., concurring). Justice Powell reasoned that a suit against the union for damages is rarely feasible because proof that the union ratified the strike would be lacking. *Id.* at 422-23. Discharge of the employees would be unrealistic because (1) it would cripple production; (2) certain selective discharges may be illegal, and may aggravate the strike; and (3) the discharge may not be sustained by the arbitrator. *Id.* at 421-22. As a practical matter the union will not discipline its members for striking, and even if it did, it is unlikely to be effective. Finally, injunctive relief is generally unavailable. *Id.* at 420. But even if obtained, the employees would be disinclined to obey it, and any enforcement of penalties for contempt, if ordered, would be difficult. *Id.*
1124. *Id.* at 425 (Burger, C.J., dissenting).
or through an agent, is liable in damages for breach.\textsuperscript{1125}

The dissent also pointed out that the majority's holding would tend to destabilize harmonious industrial relations between employer and employees.\textsuperscript{1126} Employers would be less likely to enter into a mutually satisfactory collective bargaining agreement if they were liable to employees for breach, while employees were not liable to them for the same breach.\textsuperscript{1127} It would not be the employer's fault for jeopardizing industrial harmony, as the majority suggested, if it could sue employees because it would be the employees' breach which broke the peace in the first place.\textsuperscript{1128} The dissent concluded that if employees knew they could be held personally liable for a breach of the contract without union approval, it would result in fewer unauthorized strikes, enhanced union authority, and greater industrial harmony.\textsuperscript{1129}

The dissent appears to be the better reasoned opinion. If the collective bargaining process is to work, all parties must be bound by the collective bargaining agreement, including all employees acting through their union-agent. Otherwise, the contract takes on an illusory gloss.

5. The effect of termination and modification provisions on the right to strike.

Under Section 8(d)(4) of the NLRA, a party wishing to terminate or modify a collective bargaining agreement must give sixty days notice to the other party or wait until the expiration date of the contract, whichever is longer, before resorting to a strike or lock-out.\textsuperscript{1130} In \textit{NLRB v. Lion Oil Co.}, \textsuperscript{1131} the Supreme Court interpreted the term "expiration date" in section 8(d)(4) to refer not only to the termination date of a bargaining contract but also to a date when the contract by its own terms was subject to modification.\textsuperscript{1132} The Court held that the notice and waiting requirements of section 8(d)(4) are satisfied when a

\begin{itemize}
  \item \textsuperscript{1125} \textit{Id.} at 427.
  \item \textsuperscript{1126} \textit{Id.}
  \item \textsuperscript{1127} \textit{Id.} at 427-28.
  \item \textsuperscript{1128} \textit{Id.} at 428.
  \item \textsuperscript{1129} \textit{Id.} at 429.
  \item \textsuperscript{1130} 29 U.S.C. § 158(d) (1976) provides, in pertinent part:
  
  No party to such contract shall terminate or modify . . . [a collective bargaining agreement] unless the party desiring such termination or modification . . .
  
  (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.
  \item \textsuperscript{1131} 352 U.S. 282 (1957).
  \item \textsuperscript{1132} \textit{Id.} at 290.
\end{itemize}
bargaining contract provides a date after which modifications may be negotiated and adopted by the parties, and where a strike by the union in support of its modification demands occurs after both the date the proposed modifications may become effective and the sixty day notice period, but before the date the contract could be terminated.\textsuperscript{1133}

In \textit{KCW Furniture, Inc. v. NLRB},\textsuperscript{1134} the Ninth Circuit addressed whether a valid collective bargaining agreement existed when an employer unilaterally changed the wages, hours and working conditions of its employees.\textsuperscript{1135} The contract’s “duration and renewal” clause provided that the contract was to continue in full force until April 1, 1977, and thereafter, on a year to year basis by automatic renewal. The agreement could be modified by either party by giving a “Notice of Opening” at least sixty days before the yearly April 1 expiration date. The “Notice of Opening” would not forestall the automatic renewal.\textsuperscript{1136} The right to strike in support of modification demands was reserved except for the period between the notice and the expiration date. The contract was terminable by either party by giving a “Notice of Termination” between sixty and ninety days before the expiration date.\textsuperscript{1137}

On January 12, 1977, the union sent KCW the requisite “Notice of Opening.” No agreement had been reached by September 30, 1977, and in October of 1977, KCW made unilateral changes in the terms and conditions of employment. The Board found that the contract was in effect when the changes were made and therefore held that KCW had committed an unfair labor practice under section 8(b)(5) of the NLRA.\textsuperscript{1138}

KCW argued that the duration and renewal clause could not be construed to permit the contract to be both renewed and negotiable and that the Board’s interpretation as such rendered the clause in violation of section 8(d)(4) of the NLRA.\textsuperscript{1139} The Ninth Circuit held that the duration and renewal clause, as interpreted by the Board, was valid under \textit{Lion Oil}.\textsuperscript{1140} The court stated that \textit{Lion Oil} sanctioned a contractual provision granting the right to negotiate during the term of an automatically renewed collective bargaining agreement and the right to

\begin{itemize}
\item \textsuperscript{1133} \textit{Id.} at 292-93.
\item \textsuperscript{1134} 634 F.2d 436 (9th Cir. 1980).
\item \textsuperscript{1135} \textit{Id.} at 438-39.
\item \textsuperscript{1136} \textit{Id.} at 437.
\item \textsuperscript{1137} \textit{Id.} at 438.
\item \textsuperscript{1138} \textit{Id.}
\item \textsuperscript{1139} \textit{Id.} at 439.
\item \textsuperscript{1140} \textit{Id.} at 441.
\end{itemize}
strike in support of the proposed modifications upon giving sixty days notice to modify the contract.\textsuperscript{1141} The court found it insignificant that the contract was not terminable by notice for one year as opposed to sixty days in \textit{Lion Oil}.\textsuperscript{1142} In either case, the contract was in effect during modification negotiations and "a strike was authorized—by implication in \textit{Lion Oil} by express provision here."\textsuperscript{1143}

\section*{B. Pickets}

Section 7 of the NLRA guarantees employees the right to picket in support of a primary strike.\textsuperscript{1144} When exercise of this right conflicts with the private property rights of another, however, a proper accommodation must be resolved "with as little destruction of one [right] as is consistent with the maintenance of the other."\textsuperscript{1145} In \textit{Hudgens v. NLRB},\textsuperscript{1146} the Supreme Court stated that "[t]he locus of that accommodation... may fall at differing points along the spectrum depending on the nature and strength of the respective [section] 7 rights and private property rights asserted in any given context."\textsuperscript{1147} The Court stated that it was the Board's primary responsibility to accommodate the rights of the parties involved. It then remanded the case to the Board to make that determination.\textsuperscript{1148}

On remand, the Board held that the private property rights of the owner of a large shopping mall had to yield to the section 7 rights of employees who picketed during an economic strike in front of an employer's retail store within the mall. The Board reasoned that the only way the employees could effectively reach the store's potential custom-

\begin{footnotes}
\textsuperscript{1141} Id.
\textsuperscript{1142} Id. at 440.
\textsuperscript{1143} Id. The \textit{Lion Oil} Court held that a union's strike during modification negotiations did not breach the contract. 352 U.S. at 293. The fact that the agreement provided a means for both modification and termination was insufficient to support an inference that the parties did not contemplate "that economic weapons might be used to support demands for modification before the notice to terminate was given." Id. at 293-94. In \textit{KCWFurniture}, there was no express or implied waiver of the right to strike during such period. 634 F.2d at 440.
\textsuperscript{1144} See, e.g., United Steelworkers v. NLRB, 376 U.S. 492, 499 (1964): "Congress intended to preserve the right to picket during a strike a [sic] gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations." (footnote omitted).
\textsuperscript{1145} NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (employer's refusal to permit distribution of union literature on company-owned parking lot did not impede employees' right to self-organize because employees could be reached effectively by other less burdensome means).
\textsuperscript{1146} 424 U.S. 507 (1976).
\textsuperscript{1147} Id. at 522.
\textsuperscript{1148} Id. at 522; see NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).
\end{footnotes}
ers was to picket in front of that store.\textsuperscript{1149} The Ninth Circuit was presented with a similar issue in \textit{Seattle-First National Bank v. NLRB}.\textsuperscript{1150} In that case, a bank owned a fifty story building containing a restaurant involved in an economic strike. The Board concluded that the Bank, an employer for purposes of the Act,\textsuperscript{1151} had committed an unfair labor practice by threatening to have two employees arrested for trespassing while picketing in the foyer located on the forty-sixth floor.\textsuperscript{1152} The Bank argued that the picketers should have been barred from the forty-sixth floor and confined to the entrance of the building. The Ninth Circuit upheld the Board’s determination, concluding that the least amount of injury to the bank’s property rights and the employees’ section 7 rights could have been achieved by allowing the employees to picket in the forty-sixth floor foyer in a “manner that does not impede the use of [the] facilities on that floor not associated with the restaurant.”\textsuperscript{1153}

The reasoning employed in \textit{Seattle-First} was similar to that utilized by the Board in \textit{Hudgens}. The court found that the effectiveness of a picket line depends on its location.\textsuperscript{1154} Employees could not fully implement their section 7 rights without confronting customers and non-striking employees at the restaurant entrance.\textsuperscript{1155} If the picketers were restricted to the building entrance, customers and non-striking employees could not be reached as effectively, and the employees’ section 7 rights would be “substantially diluted.”\textsuperscript{1156} Further, the court recognized that the proper accommodation between the rights of both parties may vary depending on the nature and strength of the section 7 rights involved.\textsuperscript{1157} Because the right to picket in support of an economic strike is “at the core of section 7,” the court determined that the union should be allowed to picket in an effective manner whenever possible during an economic strike.\textsuperscript{1158}

Finally, the court held that the Board’s order requiring the Bank to cease interference with the union’s economic strike activity was too broad.\textsuperscript{1159} The order did not restrict the number and behavior of the

\begin{footnotesize}
\textsuperscript{1150} 651 F.2d 1272 (9th Cir. 1980).
\textsuperscript{1151} \textit{Id.} at 1273 n.2.
\textsuperscript{1152} \textit{Id.} at 1273.
\textsuperscript{1153} \textit{Id.} at 1275.
\textsuperscript{1154} \textit{Id.} at 1276. \textit{See} United Steelworkers v. NLRB, 376 U.S. 492, 499-500 (1964).
\textsuperscript{1155} 651 F.2d at 1276.
\textsuperscript{1156} \textit{Id.}
\textsuperscript{1157} \textit{Id.}
\textsuperscript{1158} \textit{Id.} \textit{See supra} note 1145 and accompanying text.
\textsuperscript{1159} 651 F.2d at 1277.
\end{footnotesize}
picketers, and thus, there was a possibility that it would permit a large boisterous group of picketers to disturb other businesses or otherwise to cause congestion leading to violence or damage to the Bank’s property.1160 Consequently, the court remanded the case to the Board for appropriate revision of the order.1161

VI. THE EMPLOYEE AND THE UNION

A. The Right to Fair Representation

A union has a statutory duty under the NLRA and the LMRA to represent an employee-member fairly in its collective bargaining with the employer, as well as in its enforcement of the resulting collective bargaining agreement.1162 A breach of this duty occurs when a union’s conduct in processing an employee’s grievance is arbitrary, discriminatory, or in bad faith.1163

An employee may bring suit in district court against his or her union for breach of the duty of fair representation and against the employer for breach of the collective bargaining agreement under section 301(a) of the LMRA.1164 As a general rule, an employee who seeks a remedy for breach of the collective bargaining agreement must exhaust any exclusive grievance and arbitration procedures provided in the agreement before bringing a section 301 suit against his or her union or employer.1165 Exhaustion is not required if the employee shows that the union, which controls the grievance and arbitration procedures, wrongfully refused to seek arbitration.1166

The circuits are divided over whether an employee should be required to exhaust internal union appeals procedures prior to bringing a section 301 suit against an employer or union. In suits against the union, the Second, Sixth, Seventh, and Ninth Circuits require exhaustion unless the available remedies are inadequate or if the use of internal procedures would be futile.1167 Exhaustion is excused by the Tenth

1160. Id.
1161. Id.
1162. Vaca v. Sipes, 386 U.S. 171, 177 (1967); Buzzard v. IAM Workers Local 1040, 480 F.2d 35, 40 (9th Cir. 1973).
1166. Vaca v. Sipes, 386 U.S. 171, 185 (1967); see also Beriault v. Local 40, 501 F.2d 258, 262 (9th Cir. 1974).
1167. Buzzard v. IAM Workers Local 1040, 480 F.2d 35, 41 (9th Cir. 1973); accord Tinsley
and District of Columbia Circuits when union hostility would preclude a fair hearing.\textsuperscript{1168}

In suits against the employer, the Second, Third, Sixth, Eighth, and Ninth Circuits have ruled that an employee's failure to exhaust internal procedures may not be asserted as a defense.\textsuperscript{1169} The Seventh, Tenth, and District of Columbia Circuits, however, hold that exhaustion may be required where the internal union procedures could result in reactivation of the employee's grievance.\textsuperscript{1170}

In suits against both the union and employer, the issue of exhaustion of internal union appeals procedures regarding the union has been analyzed separately from that regarding the employer. The result has been a procedural discrepancy such that exhaustion may be required with respect to the union, but not with respect to the employer.\textsuperscript{1171}

The Supreme Court granted certiorari to resolve the conflict among the circuits over the exhaustion requirement in \textit{Clayton v. International Union, UAW}.\textsuperscript{1172} In \textit{Clayton}, the union made a timely request to arbitrate an employee's grievance but later withdrew the request. Although the union constitution required exhaustion of internal union appeals procedures before bringing suit, the employee filed a section 301(a) suit against the union for breach of its duty of fair representation and against his employer for breach of the collective bargaining agreement.\textsuperscript{1173} He sought damages from both the employer and the union and reinstatement to his job.\textsuperscript{1174} The Court addressed whether his failure to exhaust internal union appeal procedures established by his union's constitution barred his section 301 suit against both the union

\textsuperscript{1168} Fizer v. Safeway Stores, Inc., 586 F.2d 182, 183-84 (10th Cir. 1978); Winter v. Local 639, 569 F.2d 146, 149 (D.C. Cir. 1977).

\textsuperscript{1169} Retana v. Apartment Elevator Operators Union, 453 F.2d 1018, 1027 n.16 (9th Cir. 1972) (dictum); accord Johnson v. General Motors, 641 F.2d 1075, 1083 (2d Cir. 1981); Geddes v. Chrysler Corp., 608 F.2d 261, 264 (6th Cir. 1979); Peterson v. Rath Packing Co., 461 F.2d 312, 315 (8th Cir. 1972); Brady v. TWA, 401 F.2d 87, 102 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969).

\textsuperscript{1170} Varra v. Dillon Co., 615 F.2d 1315, 1317-18 (10th Cir. 1980); Baldini v. Local 1041, 581 F.2d 145, 150 (7th Cir. 1978); Winter v. Local 639, 569 F.2d 146, 150-51 (D.C. Cir. 1977).

\textsuperscript{1171} \textit{See, e.g.}, Fizer v. Safeway Stores, Inc., 586 F.2d 182, 183-84 (10th Cir. 1978) (exhaustion of internal union appeals procedures required with respect to union but not employer); Winter v. Local 639, 569 F.2d 146, 149-51 (D.C. Cir. 1977);

\textsuperscript{1172} \textit{Id.} at 682-83.

\textsuperscript{1173} \textit{Id.} at 690.
and the employer.\textsuperscript{1175}

The Court recognized the trial courts' discretion to require exhaustion of internal union appeals procedures\textsuperscript{1176} and stated that three factors should be considered when this discretion is exercised:

[F]irst, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.\textsuperscript{1177}

A court may properly excuse an employee's failure to exhaust internal remedies if any of these factors are found to exist.\textsuperscript{1178}

The \textit{Clayton} Court focused on the adequacy of relief available under the union's internal appellate procedure and found that the union could neither reactivate the employee's grievance nor reinstate him in his job.\textsuperscript{1179} The Court concluded that the relief available under the union appeals procedures was inadequate,\textsuperscript{1180} and, therefore, the national labor policy of encouraging "'rapid disposition of labor disputes'" would not be served by requiring exhaustion.\textsuperscript{1181} Exhaustion would only delay the employee's section 301 action, not eliminate it. Moreover, the employee would be required to prove de novo that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement regardless of the outcome of the internal appeal.\textsuperscript{1182}

The union argued that even if exhaustion was not required with respect to the employer, it should have been required with respect to the union because the relief sought against the union in the section 301 suit was available through internal union procedures.\textsuperscript{1183} The Court

\textsuperscript{1175.} \textit{Id.} at 682.
\textsuperscript{1176.} \textit{Id.} at 689.
\textsuperscript{1177.} \textit{Id.}
\textsuperscript{1178.} \textit{Id.}
\textsuperscript{1179.} \textit{Id.} at 690-91.
\textsuperscript{1180.} \textit{Id.} at 691-92.
\textsuperscript{1182.} 451 U.S. at 693.
\textsuperscript{1183.} \textit{Id.} at 694-95. The Court noted that the record was unclear as to whether the relief sought by the employee against the union was available through the internal appeals procedures. \textit{Id.} at 690-91 n.17.
rejected this argument and reversed the Ninth Circuit on this point.\textsuperscript{1184} The Court explained that a trial court which required exhaustion before the employer could be sued, but not before the union could be sued, would confront “two undesirable alternatives.”\textsuperscript{1185} If the action against the employer were stayed pending resolution of the internal appeals procedures, the court would effectively be requiring exhaustion with respect to the employer, thus violating national labor policy.\textsuperscript{1186} On the other hand, if the court permitted the suit against the employer to proceed and tolled the statute of limitations in the suit against the union pending exhaustion, the result could be two separate section 301 suits based on the same facts, proceeding at different paces in the same court.\textsuperscript{1187} To avoid this dilemma, the Court held that exhaustion of internal union remedies is not a prerequisite to a section 301 suit against both employer and union if internal union appeals procedures will neither reactivate the employee’s grievance nor grant the employee complete relief sought through a section 301 suit.\textsuperscript{1188}

\textbf{B. Discipline of Union Members}

Generally, Congress has not placed any limitation on a union’s handling of its internal affairs.\textsuperscript{1189} Union regulations that affect a member’s employment status are regulated, however, under section 8(b)(1)(A) of the NLRA.\textsuperscript{1190} A union may enforce a rule which reflects a legitimate union interest, does not impair national labor policy, and is reasonably enforced against members who are free to leave the union and escape the rule.\textsuperscript{1191} The contractual nature of union membership renders discipline of members non-coercive within the meaning of section 8(b)(1)(A).\textsuperscript{1192} When a union rule contravenes national labor policy, however, disciplinary action for a violation of such rule is coercive and constitutes an unfair labor practice under section 8(b)(1)(A).\textsuperscript{1193}

In \textit{NLRB v. Construction and Building Material Teamsters, Local...}
291, the union caused an employee to be discharged from employment for inadvertently failing to pay union dues, without first giving the employee notice of his membership suspension and an opportunity to restore himself to good standing.1195 A security provision in the collective bargaining agreement provided that only members in good standing could retain employment.1196 The court held that the union's fiduciary duty of fair representation and fair dealing came into play because the sanction for nonpayment of dues interfered with the member's employment and relations with his employer.1197 The court held that sections 8(b)(2) and (1)(A) of the Act, read with that duty in mind, required the union to make certain that the member's delinquency was not due to the member's ignorance or inadvertence before causing his or her discharge as a sanction.1198

In *NLRB v. Glaziers and Glassworkers Local 1621*,1199 the union disciplined two members for working with a neutral employer behind a union-recognized picket line although the employees had entered the construction site through a neutral gate off-limits to picketing.1200 The neutral employer was a subcontractor of the general contractor who was involved in the dispute.1201 The court held that the union's use of coercive discipline against the members impaired national labor policy against secondary boycotts and thus violated section 8(b)(1)(A) of the NLRA.1202 The court explained that "'[a] contrary decision would undermine the right of the [secondary employer] to remain neutral in a labor dispute in which [it is] not involved.'"1203

C. Union Votes

The courts will not disturb a union's reasonable interpretation of its constitution, rules, or procedures without proof of bad faith or com-

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1194. 633 F.2d 1295 (9th Cir. 1980).
1195. *Id.* at 1296.
1196. *Id.*
1197. *Id.* at 1299; *NLRB v. Hotel, Motel & Club Employees Union, Local 568, 320 F.2d 254, 258 (3d Cir. 1963); see also General Teamsters Local 162, Int'l Bhd. of Teamsters, 568 F.2d 665, 668-69 (9th Cir. 1978); H.C. Macaulay Foundry Co. v. NLRB, 553 F.2d 1198, 1201 (9th Cir. 1977).
1198. 633 F.2d at 1299.
1199. 632 F.2d 89 (9th Cir. 1980).
1200. *Id.* at 90.
1201. *Id.*
1202. *Id.* at 92-93.
1203. *Id.* at 93 (citing Bricklayers and Stonemasons Union, Local 2 v. NLRB, 562 F.2d 775, 787 (D.C. Cir. 1977) (contract clause permitting employees to treat neutral gate as imaginary picket line impaired policy against secondary boycotts and violated § 8(e) of N.L.R.A.).
pelling circumstances. In *Busch v. Givens*, the union’s president was charged by a member with breach of fiduciary duty under Title V of the Labor Management Reporting and Disclosure Act of 1959 for refusing to fund the attendance of certain delegates to a national union convention. The delegates had been elected under the 1974 union constitution. The president refused funding because a 1978 amendment to the constitution restricted delegate status to particular union officers. The union constitution provided two steps for lawful amendment: majority ratification of a written proposed amendment at a regular meeting and a submission of the proposed amendment to a referendum of the entire asserting membership. The 1978 amendment had been presented to the membership by referendum prior to ratification by majority vote at a regular meeting. The complaining member challenged the amendment’s validity, asserting that the constitution could not be interpreted to permit the referendum step to be performed first. The court declined to revise the union’s interpretation of its constitution because the constitution itself did not prescribe a particular sequence for the amendment steps, and the outcome of the amendment process would be unaffected by the order of votes. Either sequence would guarantee an open debate of the proposed amendment and an opportunity for the membership to reject the proposed amendment at an open meeting.

VII. PROCEEDINGS UNDER OTHER ACTS

A. Labor Management Relations Act

Section 302 of the Labor Management Relations Act (LMRA or Act) prohibits employers from contributing money or anything else of value to employee representatives. This restriction is intended to

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1205. 627 F.2d 978 (9th Cir. 1980).
1206. Id. at 979.
1207. Id. at 980 n.5.
1208. Id. at 981.
1209. Id. at 980-81.
1210. Id. at 981.
1211. 29 U.S.C. § 186 (1976) provides in part:
(a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay . . . any money or other thing of value—
(l) to any representative of any of his employees who are employed in an industry affecting commerce; or
(1) prevent employers from influencing union officials with contributions, and (2) prevent union officials from extracting contributions from employers. Under section 302(c)(5), however, employers may make payments to employee pension plans, provided these plans are established for "the sole and exclusive benefit of the employee of such employer." Authority to "restrain violations" of the Act is vested in the federal court system under section 302(e).

1. Judicial review of pension plan eligibility requirements

Courts recognize that trustees administering employee pension funds possess the requisite experience and ability to design appropriate eligibility standards for participation in the plan. Trustees are, therefore, given wide discretion in creating eligibility requirements. Accordingly, many courts construe section 302(e) to allow judicial review only of "structurally deficient" plans, while precluding review of actions involving daily plan administration.

Despite their broad discretion, however, trustees owe employees a fiduciary duty not to impose unreasonable or arbitrary eligibility standards for participation in pension plans. When such standards are alleged to exist, the Ninth Circuit generally asserts jurisdiction under section 302(e).

a. validity of break-in-service rule

Employee pension plans normally contain conditions and prohibitions which employees must observe before they are eligible to receive

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1213. 29 U.S.C. § 186(c)(5) (Supp. V 1981) provides that "[t]he provisions of this section shall not be applicable... with respect to money or other thing of value paid to a trust fund established... for the sole and exclusive benefit of the employees of such employer."

1214. 29 U.S.C. § 186(e) (1976) provides that "[t]he district courts of the United States... shall have jurisdiction... to restrain violations of this section."

1215. Sailer v. Retirement Fund Trust, 599 F.2d 913, 914 (9th Cir. 1979); Tomlin v. Board of Trustees of Constr. Laborers, 586 F.2d 148, 151 (9th Cir. 1978); Giler v. Board of Trustees of Sheet Metal Workers, 509 F.2d 848, 849 (9th Cir. 1975); Lee v. Nesbitt, 453 F.2d 1309, 1311 (9th Cir. 1972).

1216. See Turner v. Local 302, Int'l Bhd. of Teamsters, 604 F.2d 1219, 1227 (9th Cir. 1979).

1217. Alvares v. Erickson, 514 F.2d 156, 166-67 (9th Cir. 1975); Lee v. Nesbitt, 453 F.2d 1309, 1311 (9th Cir. 1972).

1218. See, e.g., Wilson v. Board of Trustees, 564 F.2d 1299, 1309-1300 (9th Cir. 1977).
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pensions. Many plans, for example, require employees to work a minimum number of years in employment covered under the plan. Not uncommon in such plans is a "break-in-service rule," which essentially cancels all years of credit an employee earned prior to a "break" or temporary termination of employment as defined by the rule. Many employees who have had a break in employment may, thus, be denied pensions because age, infirmity, or injury prevented them from accruing the minimum number of years required after the break occurred.

The Ninth Circuit has held that break-in-service rules are not per se invalid. Instead, the court examines the application of the rule in the plaintiff's circumstances to determine if it is arbitrary and unreasonable.

In a prior decision, Lee v. Nesbitt, the Ninth Circuit indicated that even when the employee's break in service was involuntary, the rule may be reasonable. The Lee court found, however, that the rule was unreasonably applied given the circumstances of the plaintiff's case. The break occurred after the employee had accrued the minimum fifteen years required to receive benefits, and was directly due to the unavailability of work.

In another prior decision, Burroughs v. Board of Trustees of Pension Trust, the Ninth Circuit held that a break-in-service rule was unreasonable where the employee was not given notice of the rule. According to the court, this denied him the opportunity to protect himself by complying with it.

Recently in Ponce v. Construction Laborers Pension Trust, the

1219. Wilson v. Bd. of Trustees, 564 F.2d 1299, 1300 (9th Cir. 1977).
1220. Id.
1221. 453 F.2d 1309 (9th Cir. 1972).
1222. Id. at 1311.
1223. Id. at 1312. Later decisions indicate a trend on the part of the Ninth Circuit to construe Lee more broadly. Recognizing that application of the break-in-service rule in each instance would be unreasonable, the court has required that the voluntariness of the break be determined. See, e.g., Sailer v. Retirement Fund Trust, 599 F.2d 913, 915 (9th Cir. 1979) (court indicated that under standard break-in-service rule question of employee's voluntariness must be considered; the plan in issue, however, contained mitigating clause allowing employee to avoid divestiture of his credit by filing notice requesting that his credit be vested, and, therefore, court declined to establish exacting burden of justification for rules that mitigate potentially harsh effects of break rules); Wilson v. Board of Trustees, 564 F.2d 1299, 1301 (9th Cir. 1977) (employee who mistakenly thought the amount of his covered employment was sufficient to prevent break in employment did not suffer involuntary break in employment).
1225. Id. at 1131.
1226. 628 F.2d 537 (9th Cir. 1980).
Ninth Circuit addressed two challenges to a pension plan's break-in-service rule. The rule operated to cancel accrued employment when an employee with less than fifteen years of service failed to complete at least 300 hours of work in each of two consecutive years.\footnote{1227}

In one appeal, construction workers with ten years of service under the plan were denied pensions because of the break-in-service rule.\footnote{1228} They claimed the rule was arbitrary on its face and unrelated to any legitimate trust purpose because the rule applied to only a few otherwise eligible employees.\footnote{1229} In affirming the lower court's judgment, the Ninth Circuit advanced three reasons for rejecting the plaintiffs' challenge.

The court first suggested that because of the limited review granted under section 302(e), courts are less concerned about pension rules excluding a low percentage of plan members than those excluding a high percentage of participants.\footnote{1230} In the court's view, section 302(c)(5) was not intended to remedy the burden imposed on a few individuals excluded from the plan, but instead, was intended to insure that plan trustees would award benefits to "as many intended employees as is economically possible."\footnote{1231}

The court next observed that break-in-service rules serve to promote employers' legitimate interest in encouraging employees' continuous employment. It concluded that the low exclusion rate indicated the rule achieved its intended purpose.\footnote{1232} Finally, the court countered the plaintiff's claim that the low exclusion rate did not contribute to the actuarial soundness of the plan. The court found authority indicating that exclusion of even one employee influences the plan's actuarial soundness by making funds available to other plan beneficiaries.\footnote{1233} As the \textit{Ponce} case indicates, the Ninth Circuit will uphold break-in-service rules which exclude low percentages of participants. Conversely, rules which exclude high percentages of employees warrant closer scrutiny.

The second appeal in \textit{Ponce} involved a plaintiff who claimed that the same break-in-service rule was arbitrarily and capriciously applied to the circumstances of his case. Essentially, the rule, which was en-

\footnote{1227. \textit{Id.} at 539-40.} \footnote{1228. \textit{Id.} at 540.} \footnote{1229. \textit{Id.} at 542.} \footnote{1230. \textit{Id.}} \footnote{1231. \textit{Id.} (quoting Gaydosh v. Lewis, 410 F.2d 262, 266 (D.C. Cir. 1969)).} \footnote{1232. 628 F.2d at 542.} \footnote{1233. \textit{Id.} at 542-43 (citing Wilson v. Board of Trustees, 564 F.2d 1299, 1302 (9th Cir. 1977))).}
acted with the plan in 1962, was applied to cancel approximately three years of credit which the employee had earned prior to 1950.\textsuperscript{1234}

The employee became disabled and was denied a pension because the rule was applied to a period in 1950 and 1951 when the employee had failed to earn any pension benefits. This application cancelled the credit he accrued prior to 1950. Although the employee earned approximately fourteen years of credit after 1952, he did not satisfy the requirement of fifteen years of service necessary to receive benefits under the plan.\textsuperscript{1235}

The employee claimed that the use of the rule to cancel his credit earned prior to 1950 was arbitrary and capricious because he had no notice of its requirements at that time. He further argued that the holding in \textit{Burroughs} dictated that plan participants have notice of all eligibility requirements.\textsuperscript{1236}

The Ninth Circuit found the employee’s reliance on \textit{Burroughs} misplaced. According to the court, the notice requirement of \textit{Burroughs} is triggered when plan trustees fail to notify employees of a break-in-service rule but nevertheless apply the rule to breaks occurring after the rule’s enactment. It protects employees who could have avoided their break had they been notified of the existence of the rule.\textsuperscript{1237} The “fundamentally unfair” conduct of the \textit{Burroughs} trustees was not involved in \textit{Ponce}, however, because the plaintiff’s break occurred before the rule’s enactment. The court accordingly affirmed the district court’s judgment in favor of the defendant, and in so doing declined to forbid application of a break-in-service rule to breaks occurring before the rule’s inception.\textsuperscript{1238}

\subsection*{b. minimum year service requirement}

Courts have suggested that a pension plan is structurally defective when it unreasonably denies pensions to a large number of participants.\textsuperscript{1239} The Ninth Circuit implemented this proposition in \textit{Ponce} by imposing a strict standard on trustees to justify pension rules which exclude a high percentage of participants.\textsuperscript{1240}

The plaintiffs in \textit{Ponce} had also challenged the plan’s fifteen year

\begin{itemize}
\item \textsuperscript{1234} 628 F.2d at 540.
\item \textsuperscript{1235} Id.
\item \textsuperscript{1236} 628 F.2d at 545.
\item \textsuperscript{1237} Id.
\item \textsuperscript{1238} Id.
\item \textsuperscript{1239} See, e.g., \textit{Burroughs} v. Bd. of Trustees of Pension Trust, 542 F.2d 1128, 1131 (9th Cir. 1977).
\item \textsuperscript{1240} 628 F.2d at 541-42.
\end{itemize}
minimum service requirement, which mandated that employees complete at least fifteen years of work to qualify for pensions. The plaintiffs claimed the rule excluded an excessively high percentage of plan participants. They introduced evidence that less than four percent of the participants actually qualified for and received pension benefits, in significant contrast to the national average of eight percent for plans requiring eleven or more years of work. Specific objection was directed at the trustees’ 1970 decision to more than double pension benefit levels rather than lower the fifteen-year requirement in order to increase the number of plan beneficiaries.

The Ninth Circuit, acknowledging the discretion granted pension trustees, declined to impose precise exclusion rate guidelines. The court, however, focused on the purpose of section 302(c)(5), which was to guarantee pensions to as many participants as was economically possible. With this in mind, the court established the rule that “when a [pension plan] vesting requirement is shown to exclude an unusually high percentage of plan participants, the burden shifts to the trustees to show the reasonableness of the requirement.”

Applying the new standard to the facts before it, the court found the trustees’ explanation for their 1970 decision to more than double benefits while retaining the fifteen-year requirement insufficient to sustain their burden. The trustees believed that the benefit increase would act as an incentive to the participants, who were construction workers, and would thereby eliminate their high drop-out rate. The court, however, noting the cyclical nature of the construction industry and its high rate of work-related injuries, found the trustees’ justification speculative absent documentation that the increased benefits would reduce the drop-out rate. In conclusion, the court stated that “absent a substantial and verifiable justification, it is arbitrary and capricious for trustees both to maintain a vesting requirement with a high exclusion rate and at the same time to pay an unusually high level of benefits.” The court then vacated the district court’s summary judgment in favor of the defendant and remanded the case.

Justice Anderson, in a concurring opinion, expressed concern that
the court's holding would be construed too restrictively and would im-
pinge on the broad discretion granted pension trustees. More specifi-
cally, he feared that on remand the court's language would foreclose
consideration of all of the factors which render the construction labor
force unique in such situations.\textsuperscript{1249}

2. Refund to employer of pension plan payments made after
expiration of collective bargaining agreement

Under section 302(c)(5)(B) of the Act,\textsuperscript{1250} employer payments to
pension funds established under section 302(c)\textsuperscript{1251} must be made pursu-
ant to the terms of a written agreement. Pension payments made to
employees in a manner not authorized by the agreement have been
prohibited,\textsuperscript{1252} as have those where the employer has failed to sign the
pension agreement.\textsuperscript{1253}

Courts, however, have held that section 302(c)(5)(B) does not re-
lieve employers of their duty during collective bargaining to continue
payments to pension plans upon expiration of collective bargaining
agreements. The terms of such pension plans are held to survive the
expiration date of the agreement because section 8(a)(5) of the Na-
tional Labor Relations Act\textsuperscript{1254} requires employers to maintain the sta-
tus quo respecting wages and working conditions during the bargaining
process.\textsuperscript{1255}

In \textit{Producers Dairy Delivery Co. v. Western Conference of Team-
sters Pension Trust Fund},\textsuperscript{1256} the Ninth Circuit denied the employer's
claim for a refund of payments made to a pension fund after the expi-
ration of the written agreement. The employer in \textit{Producers Dairy} had
continued to contribute to the pension fund during negotiations for a
new collective bargaining agreement. Those contributions were dis-

\textsuperscript{1249} Id. at 545 (Anderson, J., concurring).
\textsuperscript{1251} Id. § 186(c).
\textsuperscript{1252} See, \textit{e.g.}, Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106,
1109 (9th Cir. 1976) (illegal for fund to pay benefits based on retroactive contributions not
authorized by provisions of fund agreement).
\textsuperscript{1253} See \textit{Moglia v. Geoghegan}, 403 F.2d 110, 117-18 (2d Cir. 1968), \textit{cert. denied}, 394 U.S.
\textsuperscript{1255} See \textit{Peerless Roofing Co. v. NLRB}, 641 F.2d 734, 736 (9th Cir. 1981) (employer
obligation to make trust fund payments survives expiration date of collective bargaining
agreement under employer's duty to maintain status quo); \textit{Clear Pine Mouldings, Inc. v. NLRB},
632 F.2d 721, 729 (9th Cir. 1980) (employer has continuing duty not to make unilat-
eral changes in health care plan upon expiration of agreement), \textit{cert. denied}, 451 U.S. 984
\textsuperscript{1256} 654 F.2d 625 (9th Cir. 1981).
continued after the unresolved negotiations resulted in a union strike. The employer then sued the pension fund to recover all contributions made after the expiration date of the collective bargaining agreement on the theory that section 302(c)(5)(B) prohibited the trust from retaining contributions made without a written agreement. The district court awarded the employer a refund on contributions made after the date the negotiations had reached an impasse.

The Ninth Circuit reversed, holding that the LMRA did not create a right of action for employers to recover payments made after an impasse had been reached. The court reasoned that establishing an employer’s right to a refund would be detrimental to the beneficiaries of the fund, whom the Act was intended to protect. The court suggested that employers could stop pension contributions when they believed an impasse had been reached and could raise impasse as a defense if the union brought unfair labor practice charges.

B. The Labor-Management Reporting and Disclosure Act

1. Trusteeship over union local

The Labor-Management Reporting and Disclosure Act (LMRDA or Act) provides for the imposition of a “trusteeship” by a labor organization over a subordinate body in order to assure that the financial, political, and contractual activities of the subordinate body comply with the objectives of the labor organization. The LMRDA also provides for the institution of judicial proceedings by individual members and subordinate units against labor organizations that have improperly subjected such a member or unit to trusteeships. Federal district courts are authorized to grant “such relief (including injunctions) as may be appropriate.”

1257. Id. at 627.
1258. Id.
1259. Id. at 628.
1260. Id.
1261. Id.
1263. 29 U.S.C. § 402(h) (1976) defines trusteeship as “any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.”
1264. Trusteeships are permitted “for the purpose[s] of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out legitimate objectives of such labor organization[s].” Id. § 462.
1265. Id. § 464.
1266. Id.
In *Higgins v. Harden* the Ninth Circuit construed and applied the trusteeship sections of the LMRDA to a labor organization’s supervision of a subordinate body. In *Higgins*, the functions of a union local were assumed by an international union, and local leaders were either fired or forced to resign. One of the local leaders brought suit in federal court for a determination of the propriety of and the remedies for the international’s activity. The trial court concluded that a trusteeship had been improperly imposed, that dismissal from employment pursuant thereto was improper, that back pay and attorney’s fees should be awarded to those dismissed, and that compensation for emotional anguish was inappropriate.

The LMRDA sections governing the trusteeship power were enacted to address abuses by labor organizations. As a result, a trusteeship has been broadly defined. Acting in accordance with this general concept, the *Higgins* court determined that a trusteeship was imposed when the international union terminated a local officer’s authority to participate in collective bargaining and to review and approve expense accounts. This ruling was simply a literal application of section 402(h) of the Act. There appears to be no established rule for defining methods of supervision or control that impose trusteeships. Trial courts, however, have construed section 402(h) broadly. The scope of a trusteeship appears to be limited only by the resourcefulness of labor organizations in manipulating their subordinate locals.

For a trusteeship to be presumed valid, it must conform to the

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1267. 644 F.2d 1348 (9th Cir. 1981).
1268. Id. at 1350.
1270. Benda v. International Ass’n of Machinists & Aerospace Workers, 584 F.2d 308, 312 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979) (citing R. SLOVENKO, SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 443-47 (1961)).
1272. 644 F.2d at 1350-51. The constitution of the international union provided for the exercise of “direct supervision, direction and control” of the local unions. Id. at 1350 n.1.
1273. See, e.g., Benda v. International Ass’n of Machinists & Aerospace Workers, 584 F.2d 308, 312 n.1 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979).
1274. See, e.g., Brennan v. UMW, 475 F.2d 1293, 1296 (D.C. Cir. 1973) (per curiam) (international’s contention that subordinate districts are merely arms of international did not defeat finding of trusteeship); Cross v. UMW, 353 F. Supp. 504, 507-08 (S.D. Ill. 1973) (when international appointed local officers to negotiate collective bargaining terms, although label “semi-autonomous” applied, trusteeship existed); Executive Bd. Local Union No. 28, IBEW v. IBEW, 184 F. Supp. 649, 651-52 (D. Md. 1960) (supervision by international’s agent, dismissal of local president, and imposition of new unpopular local bylaws found to be trusteeship); see also Comment, Landrum-Griffin and the Trusteeship Imbroglio, 71 YALE L.J. 1460, 1478-95 (1962) (revocation-reissuance of local charters, assistance in lo-
constitution and by-laws of the subordinating body,\textsuperscript{1275} and it must be authorized or ratified at a hearing before the labor organization's executive board or a similar constitutionally authorized body.\textsuperscript{1276} This does not mean that all trusteeships are presumed invalid when no hearing is held prior to their imposition. The Ninth Circuit has validated pre-hearing trusteeships in "emergency" situations,\textsuperscript{1277} and the Second Circuit has validated pre-hearing trusteeships when imposed in "good faith."\textsuperscript{1278} Greater discretion is left to the district courts in the Fifth Circuit in determining validity.\textsuperscript{1279}

Although the court mentioned the flexible application of the hearing requirement of section 464(c) of the Act, \textit{Higgins} was decided on the basis of a section 462 violation of the constitution of the imposing entity. The court's discussion of "emergency conditions"\textsuperscript{1280} was rendered moot by a provision in the defendant labor organization's constitution requiring a hearing "not less than 4 days and not more than one week after" imposition of a trusteeship.\textsuperscript{1281}

2. Damages

\textit{a. attorney's fees}

To assure that the purpose of a law is accomplished, an award of attorney's fees is often essential. Nevertheless, under the American or general rule "absent statute or enforceable contract, litigants pay their own attorney's fees."\textsuperscript{1282} However, when a court exercises its equitable powers and "overriding considerations indicate the need for such a re-

\begin{thebibliography}{99}

\bibitem{1275} 29 U.S.C. \S 462 (1976).
\bibitem{1276} \textit{Id.} \S 464(c).
\bibitem{1277} \textit{See, e.g.,} Hotel \& Restaurant Employees Int'l Union v. Rollison, 615 F.2d 788, 792-93 (9th Cir. 1980) (partial trusteeship imposed without hearing held valid because it protected both parties' interests in view of long-lived animosity between local officers and international union); Retail Clerks Local 770 v. Retail Clerks Int'l Ass'n, 479 F.2d 54, 55 (9th Cir. 1973) (imposition of trusteeship denied pending hearings; international union failed to show emergency when implementation of local's noncomforming contracts delayed by international's order).
\bibitem{1278} National Ass'n of Letter Carriers v. Sombrotto, 449 F.2d 915, 921 (2d Cir. 1971) (local bears burden of proof to show that pre-hearing trusteeship not imposed in good faith).
\bibitem{1279} Bailey v. Dixon, 429 F.2d 1321, 1322 (5th Cir. 1970) (per curiam) (district court's injunction of pre-hearing trusteeship upheld as within court's discretion despite international's argument that trusteeship could be ratified at later hearing).
\bibitem{1280} 644 F.2d at 1351.
\bibitem{1281} \textit{Id.} at n.2.
\end{thebibliography}
covery,” an award of attorney’s fees is appropriate.1283

In the context of the LMRDA’s bill of rights for labor organization members,1284 the Supreme Court in Hall v. Cole1285 expressly allowed recovery of attorney’s fees when a defendant acts in bad faith or when a plaintiff’s action confers a substantial benefit to other union members.1286 The Fifth Circuit extended the Hall holding to improper trusteeship cases, noting that an award of attorney’s fees was consistent with Congress’ intent to protect members’ rights.1287 When the resources of a labor organization are compared with those of an individual, this extension is justified. In Higgins, the Ninth Circuit joined the Fifth Circuit in allowing attorney’s fees as appropriate relief under section 464(a) of the Act.1288

The relevant factors for determining the amount of an attorney’s fee award were originally set forth in a Fifth Circuit decision addressing Title VII of the Civil Rights Act of 1964.1289 These factors are expressly recognized in most circuits,1290 including the Ninth.1291 The broad acceptance of these factors demonstrates their rationality. There seems to be less agreement, however, about the extent to which a trial court must articulate its reliance on the factors. This is especially true in the Ninth Circuit.1292 The Higgins court, finding no information in the district court’s record to support an award of attorney’s fees, re-

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1286. Id. at 14.
1287. McDonald v. Oliver, 525 F.2d 1217, 1227 (5th Cir.), cert. denied, 429 U.S. 817 (1976).
1288. 644 F.2d at 1352-53.
1292. Compare Kessler v. Associates Fin. Serv. Co. of Hawaii, 639 F.2d 498, 500 (9th Cir. 1981) (no formal findings necessary when transcript reflected consideration of factors) with...
manded for an explanation of the award. Contrary to the LMRDA's purpose, requiring a statement of the basis for an attorney's fees award seems to assist labor organizations and frustrate members. It would be virtually meaningless, however, to require consideration of these factors without requiring a record of that consideration.

b. damages for emotional distress

The LMRDA does not provide for the recovery of damages resulting from emotional distress. The Ninth Circuit has adopted the general rule that unless an actual injury has been proven, recovery for emotional distress is precluded. This rule was followed in Higgins. In contrast, punitive damages may be awarded without establishing that actual injury was suffered. This is consistent with a refusal to award emotional distress damages without a showing of actual injury because punitive damages are deterrent-oriented rather than compensation-oriented, and they can be justified by simply showing that a wrongful act was done.

c. back pay awards

When employees are wrongfully dismissed, appropriate relief may include recovery of back pay from employers. If, however, dismissed employees have also received unemployment compensation from state-administered insurance programs, they would have received compensation greater than what they would have received in the absence of the wrongful discharge. In Higgins, the Ninth Circuit addressed for the first time the deductibility of unemployment compensation from a back pay award under the LMRDA.

The Higgins court noted that in the context of the National Labor Relations Act, the Supreme Court in NLRB v. Gullett Gin Co. held that it was within the discretion of the NLRB to ignore the receipt of

1293. 644 F.2d at 1352-53.
1294. Bise v. IBEW, Local 1969, 618 F.2d 1299, 1305 (9th Cir. 1979), cert. denied, 446 U.S. 980 (1980); Ross v. IBEW, 544 F.2d 1022, 1025 n.2 (9th Cir. 1976); International Bhd. of Boilermakers v. Rafferty, 348 F.2d 307, 315 (9th Cir. 1965).
1295. 644 F.2d at 1353.
1298. 644 F.2d at 1353.
unemployment compensation when making back pay awards. Similarly, the Tenth and Fifth Circuits have applied the discretionary rule of Gullett to uphold back pay awards that ignore unemployment compensation under the Age Discrimination in Employment Act. Other circuits have upheld back pay awards in which unemployment compensation has been deducted as also being within the discretion of the district courts.

In Higgins, the Ninth Circuit applied Gullett to a LMRDA back pay award and affirmed the trial court's decision not to deduct unemployment compensation from the back pay award. By not deducting such payments, an employee is allowed double recovery. The Higgins court determined, however, that although employers pay the premiums on the unemployment insurance, the benefits may be considered a collateral source of recovery. Borrowing a common law tort concept, the court held that double recovery from a collateral source is permissible, so long as that source is not created by the entity responsible for the primary source of recovery. The Higgins court noted that the determination of whether the payments were collateral was a question of fact for the trial court.

This ruling is probably correct, so long as trial courts properly apply their discretion. The purpose of back pay awards is to compensate, not punish. If the trial court does not discern the precise way in which a particular unemployment insurance plan is administered, its award may overcompensate the employee and punish the employer. Despite the inherent problems in granting greater discretion to the district courts, the Higgins solution seems satisfactory; all states have their own peculiar unemployment compensation plans, which cannot be accommodated by a general edict from a federal circuit court. A district court is in the best position to determine whether, under all the facts, it

1300. 644 F.2d at 1353 (citing 340 U.S. at 364).
1303. 644 F.2d at 1353.
1304. Id.
1306. 644 F.2d at 1353.
is equitable to deduct unemployment compensation from a back pay award.

3. Rerun election procedures

Section 482(b) of the LMRDA\textsuperscript{1308} requires that the Secretary of Labor initiate civil suits against labor organizations if, after investigation of complaints by members, he or she determines that there is probable cause to believe that the Act has been violated. If such a suit results in a determination that the election requirements of the Act have been violated,\textsuperscript{1309} section 482(c)\textsuperscript{1310} requires the Secretary to supervise a rerun election. Rerun elections are to be conducted, "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization."\textsuperscript{1311}

A challenge to the procedures imposed by the Secretary for conducting a rerun election may be made before the election by an appropriate motion to the district court, accompanied by supporting affidavits.\textsuperscript{1312} The district court must determine, after an evidentiary hearing that may be conducted upon the affidavits, whether the Secretary's proposed procedures violate the union's constitution and section 482(c) of the Act. In drafting the rerun election procedures, the Secretary may not set aside unchallenged provisions of a union's constitution unless the provisions are unlawful or impractical.\textsuperscript{1313} If a union challenges the Secretary's determination to set aside constitutional provisions, the Secretary must show, by a preponderance of the evidence, that the constitutional provisions are unlawful.\textsuperscript{1314}

In \textit{Millwrights Local Union No. 1914 v. Carroll},\textsuperscript{1315} the Secretary of Labor obtained a judgment from the district court setting aside the results of a union election on the ground that the union's constitutional

\textsuperscript{1308} 29 U.S.C. § 482(b) (1976).
\textsuperscript{1310} 29 U.S.C. § 482(c) (1976).
\textsuperscript{1311} \textit{Id}.
\textsuperscript{1312} \textit{See} Brennan v. Local 551, UAW, 486 F.2d 6, 8 (7th Cir. 1973).
\textsuperscript{1313} 29 U.S.C. § 482(c) (1976); \textit{see} Trbovich v. UMW, 404 U.S. 528, 537 n.8 (1972); Usery v. Local 639, Int'l Bhd. of Teamsters, 543 F.2d 369, 376 (D.C. Cir. 1976), \textit{cert. denied}, 429 U.S. 1123 (1977).
\textsuperscript{1314} 29 U.S.C. § 482(c) (1976); \textit{cf} Brennan v. Local 551, UAW, 486 F.2d 6, 8 (7th Cir. 1973) (union that objects to any action taken by the Secretary in supervisory capacity incurs heavy burden of persuasion and proof; judicial action warranted only when there is procedural irregularity, evidence of bias, or proof that Secretary's action manifestly arbitrary).
\textsuperscript{1315} 654 F.2d 548 (9th Cir. 1981).
rules governing eligibility to run for office were unlawful. The Secretary decided that a rerun election must be conducted, in part, by the use of absentee ballots. Contending that the use of absentee ballots violated its constitution and bylaws and thus the requirements of section 482(c), the union filed a motion in district court seeking clarification of the court's judgment. After the district court denied the motion, the union filed a petition for a writ of mandate before the Ninth Circuit. The Ninth Circuit upheld the district court's denial of the motion because the union improperly challenged the Secretary's election procedures. Instead of filing a motion for clarification of the district court's judgment setting aside the election and directing a new election, the union should have filed supporting affidavits and moved for an evidentiary hearing on the alleged violation of its constitutional provision prohibiting absentee ballots.

4. Union officials' fiduciary duties

Congress adopted the LMRDA to protect the rights of employees and the general public in their dealings with labor organizations. Section 501(a) of Title V of the LMRDA codifies the fiduciary duties the holders of certain positions within a labor organization owe to that organization and its members. These fiduciary duties are subject to two different types of interpretation. The generally accepted view is that union officials have a fiduciary obligation when performing any activity. This is the position adopted by the Ninth Circuit.

1316. Id. at 549.
1317. Id.
1318. Id.
1319. Id.
1320. Id. at 550.
1321. Congress explained the need for the LMRDA in 29 U.S.C. § 401(b) (1976):

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

1322. 29 U.S.C. § 501(a) (1976) states that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group."

Second Circuit, however, holds that the “money or property” of the union must be affected for there to be a breach of duty under section 501.\(^\text{1325}\)

The relationship between the labor organization and the employee is most clearly defined in the union’s constitution and bylaws. The union officials specified in section 501(a) have fiduciary obligations both to their organization and to the individual members to insure that the union-member relationship, as defined by the union’s constitution and bylaws, is preserved.

If a holder of a fiduciary position breaches his or her duty, the labor organization or its governing board may bring suit in federal court against that individual to recover damages or receive other appropriate relief.\(^\text{1326}\) Upon failure of the organization or its governing board to bring suit, any member of the organization may sue the offending officer.\(^\text{1327}\) In some circuits, suits are limited to an officer’s misbehavior as it affects money or property. The Ninth Circuit, however, allows a suit for breach of fiduciary duty for any activity.\(^\text{1328}\)

In *Busch v. Givens*,\(^\text{1329}\) the Ninth Circuit exercised section 501 jurisdiction over a suit by union members against a local union president. The relief sought was an injunction against the president’s attempt to block payment of expenses for union members’ attendance at a national convention. The union members contended that an amendment to the union local’s constitution, reducing the number of delegates compensated for attending the national convention, was improperly en-

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1326. 29 U.S.C. § 501(b) (1976) provides in part:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board of officers refuse or fail to sue to recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.

1327. *Id*.


1329. 627 F.2d 978 (9th Cir. 1980).
acted.\textsuperscript{1330} The procedure for enacting an amendment required that the proposal first be passed by a majority of the members present and voting at a meeting of the local and then be presented to the entire membership by means of a referendum.\textsuperscript{1331} The challenged amendment in \textit{Busch} was submitted as a referendum before being approved at a meeting.\textsuperscript{1332}

Citing no authority, the district court stated that it was “clear” that an amendment could be made by referendum only after a meeting vote.\textsuperscript{1333} In reversing the lower court's decision, the Ninth Circuit explained that the constitutional provision had no order requirement. The Ninth Circuit reasoned that because the union official's interpretation of the constitution's amendment requirements was not unreasonable, made in bad faith, or made as a result of other extenuating circumstances, it would not disturb the official’s interpretation.\textsuperscript{1334}

In interpreting constitutions of labor organizations, courts universally accept this approach.\textsuperscript{1335} This well-established rule thrusts the burden in a judicial contest over the interpretation of a constitution or set of bylaws onto the party challenging the interpretation of labor organization's officers. Although this may give entrenched union officials an advantage in their constitutional dealings with the members, the interests of judicial economy are served by such deference. If every interpretation could easily be challenged in the courts, the result would be a multiplicity of suits under LMRDA section 501(b). This is not to say that a court may never overrule an official's interpretation; on the contrary, when “bad faith or other compelling circumstances” are found, this seems mandated.\textsuperscript{1336} In \textit{Busch}, it appears that the district court did not overstep its authority, but rather failed to give adequate reasons for its holding.

\textsuperscript{1330} \textit{Id.} at 979 & nn.1 & 3. \\
\textsuperscript{1331} \textit{Id.} at 980 n.5. \\
\textsuperscript{1332} \textit{Id.} at 979-80. \\
\textsuperscript{1333} \textit{Id.} at 980. \\
\textsuperscript{1334} \textit{Id.} at 980-91 (citing Stelling v. IBEW Local 1547, 587 F.2d 1379, 1389 (9th Cir. 1978)). \\
\textsuperscript{1335} The traditionally-cited formulation of the rule was articulated in Vestal v. Hoffa, 451 F.2d 706, 709 (6th Cir. 1971), \textit{cert. denied}, 406 U.S. 934 (1972): “Courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution, and will interfere only where the official's interpretation is not fair or reasonable.” \textit{Id.} at 709. \textit{See also} Busch v. Givens, 627 F.2d at 981; Local 334, United Ass'n of Journeymen v. United Ass'n of Journeymen, 628 F.2d 812, 815 (3d Cir. 1980), \textit{rev'd on other grounds}, 462 U.S. 615 (1981). \\
\textsuperscript{1336} Stelling v. IBEW Local 1547, 587 F.2d 1379, 1389 (9th Cir. 1978), \textit{cert. denied}, 442 U.S. 944 (1979).
Consistent with the concept that union officials' interpretations of union constitutions can be overruled if they were made in bad faith or were improper for other reasons is the rule that officials cannot interpret those constitutions so as to circumvent the amendment process. It was determined, however, that the defendant-officer in Busch did not act improperly to circumvent the amendment process.

C. The Fair Labor Standards Act

1. Child farmworker waivers

The Fair Labor Standards Act of 1938 (FLSA) was enacted in part to stop the spread and perpetuation of conditions detrimental to “the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” After amendment in 1974, the FLSA prohibited nearly all agricultural employment of child laborers under age twelve. Under the 1977 amendment, however, the Secretary of Labor could waive the prohibition with respect to ten- and eleven-year-old children harvesting short-season crops. Before granting such a waiver, the Secretary must find, based upon objective data submitted by the applicant, that “the level and type of pesticides and other chemicals used [on the crop] would not have an adverse effect on the health or well-being of” those permitted to work under the waiver provision.

The Secretary of Labor has promulgated administrative regulations for determining whether the health and well-being of children employed pursuant to a waiver are being adversely affected. These regulations were amended to create a presumption that the use of two particular chemicals (Captan and Benomyl) under certain circumstances was not harmful to ten- and eleven-year-old children. Ultimately, however, the regulations recognized that under no circumstances was the use of those chemicals safe enough to permit

1338. 627 F.2d at 981.
1340. Id. § 202 (1976).
1344. 29 C.F.R. § 575.5(d) (1978).
issuance of waivers. 1346

Regulations promulgated by the Secretary of Labor to effectuate the purposes of 29 U.S.C. section 213(c) may be judicially reviewed on the grounds of substantive indiscretion1347 and procedural impropriety.1348 The scope of review of the substance of an administrative rule is narrow. A court may not substitute its judgment for that of the administrative agency if there is a reasonable basis for the agency's conclusion.1349 In reviewing findings of fact upon which administrative rules are promulgated, a court may only review the evidence before the administrative agency; it may not conduct its own full-fledged and independent evidentiary hearing.1350

The procedural requirements for administrative rulemaking dictate that all rules be made upon notice, either through publication in the Federal Register or by actual notice to affected parties.1351 An exception exists, however, where an agency states in its rule that notice is "impracticable, unnecessary, or contrary to the public interest."1352 Additionally, in such circumstances public hearings are not necessary prior to the effective date of a rule.1353

The rules promulgated by the Secretary of Labor under section 213(c)(4) were challenged on both substantive and procedural grounds by a farmers' association in Washington State Farm Bureau v. Marshall.1354 The plaintiff sought a permanent injunction and a declaration to prevent the Secretary's denial of applications for waivers based on the presumption that an adverse effect on the health and well-being of children working under the waiver would result if they were employed in fields treated with Captan or Benomyl.1355 The district court granted the requested order and permitted denial of waiver applica-

1347. A court must set aside administrative rulings found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1977).
1348. A court must set aside administrative rulings found to be "without observance of procedure required by law." Id. § 706(2)(D).
1350. Camp v. Pitts, 411 U.S. 138, 142 (1973); Asarco, Inc. v. United States E.P.A., 616 F.2d 1153, 1159-60 (9th Cir. 1980).
1352. Id. § 553(b)(B).
1353. Angel v. Butz, 487 F.2d 260, 262 (10th Cir. 1973), cert. denied, 417 U.S. 967 (1974);
1354. 625 F.2d 296 (9th Cir. 1980).
1355. Id. at 301.
tions only if these chemicals had been used in violation of modified Environmental Protection Agency guidelines for the general public.\footnote{1356}

The Ninth Circuit reversed, finding that, as a matter of law, adoption of the regulations used to grant waivers was not arbitrary or capricious, regardless of whether the Secretary was requiring a "reasonable assurance" or an "absolute assurance" of no adverse effect on health and well-being.\footnote{1357} Additionally, the Ninth Circuit found that in reviewing the Secretary of Labor's activity, the district court had failed to confine itself properly to the administrative record created by the agency, and instead had conducted a trial de novo.\footnote{1358} The Ninth Circuit also found that the district court had erred in holding that there was not good cause for avoiding notice and hearing requirements when the Secretary adopted the final regulations, which presumed that Captan and Benomyl were harmful to ten- and eleven-year-olds. Because the purpose of the regulations was to protect child laborers from carcinogenic pesticides, the waiver of notice requirements was justified. The plaintiff could later show that low levels of exposure to the two chemicals rendered their use safe and thus obtain waivers, without putting children's health at risk.\footnote{1359}

2. Overtime pay requirement

a. appropriate remedy

Section 207(a) of the FLSA requires that employees working in excess of forty hours in one week in industries affecting commerce be paid at least one and a half times their regular rate of pay for the excess hours.\footnote{1360} The purpose of the overtime compensation statute is to encourage the employment of more workers by placing a premium on an individual's work in excess of a specified amount per week.\footnote{1361} The Secretary of Labor may bring suit in federal district court to restrain activity in violation of both the overtime compensation provision and the provision against the withholding of unpaid wages and overtime compensation.\footnote{1362}

\footnote{1357. 625 F.2d at 304-05. See National Assoc. of Farmworkers' Org. v. Marshall, 628 F.2d 604, 620 (D.C. Cir. 1980) (absolute certainty of child harvesters' safety required).}
\footnote{1358. 625 F.2d at 305.}
\footnote{1359. Id. at 308.}
\footnote{1360. 29 U.S.C. § 207(a)(1) (1976).}
\footnote{1362. 29 U.S.C. § 217 (1976) states:}
A court may grant equitable relief in a FLSA suit brought by the Secretary of Labor. The trial court therefore has considerable discretion in fashioning a remedy for violations of the Act. A court's discretion in fashioning remedies to effectuate the statutory purpose, however, must be guided by sound legal principles, not by its own inclination. For example, in Mitchell v. Robert De Mario Jewelry, Inc., the Supreme Court held that in cases of improper employee dismissal after institution of a FLSA action, there is "little room for the exercise of discretion not to order reimbursement."  

In determining proper overtime compensation, the Supreme Court has held that when an employee is paid a fixed weekly wage, his or her regular rate of compensation is the quotient of the amount paid over the hours actually worked. The Ninth Circuit has ruled that this quotient equals the regular hourly rate "absent explicit proof of another mutually agreed upon rate of pay." Known as the "fluctuating work-week" method, this formula has been adopted by the Department of Labor. The utilization of this quotient as the regular rate is unaffected by any provisions of an employment agreement reciting alternate methods of computation. Employers and employees may fix an hourly rate in order to achieve a guaranteed weekly income, so long as minimum pay requirements are actually met.  

In Marshall v. Chala Enterprises, Inc. the Ninth Circuit re-
viewed an employment agreement under which gasoline service station attendants were paid fixed lump sums for sixty-hour work weeks. Each hour an employee did not work resulted in a straight one-sixtieth reduction in weekly salary, while increases in pay were based on lump sum increases rather than on hourly rate increases. These factors convinced the court that the employees were receiving a straight weekly wage for sixty hours of work. The district court, in the suit brought by the Secretary of Labor, refused to grant restitutionary or prospective injunctions on the ground that the compensation paid was "reasonable." The Ninth Circuit reversed and remanded, directing that the regular rate of pay be calculated by using the fluctuating work-week method and that a restitutionary injunction issue, compelling payment at one and one-half times the rate for past overtime hours. The court held that, under Mitchell, there was little room for discretion not to order backpay for overtime violations. It also directed that the refusal to grant a prospective injunction be reconsidered.

b. employer's knowledge

For purposes of the FLSA, the term "'employ' includes to suffer or permit to work." The accepted view is that for one to be employed, he or she must be suffered or permitted to work "with the knowledge of the employer."

In Forrester v. Roth's I.G.A. Foodliner, Inc., the plaintiff made a claim under section 207(a) of the FLSA for uncompensated overtime work. In reporting the hours worked, he reported regular time hours (forty per week) and some overtime hours, for which he was properly

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1372. Id. at 800-01.
1373. Id. at 801.
1374. Id.
1375. Id. at 804.
1376. Id. at 802.
1377. Id. at 804; cf. Dunlop v. Saghatelian, 520 F.2d 788 (9th Cir. 1975) (restitutionary and prospective injunctive relief denied). The Chala court held that the denial of injunctive relief in Dunlop was justified only because of the extreme circumstances of the case. 645 F.2d at 803.
1380. 646 F.2d 413 (9th Cir. 1981).
paid. However, he deliberately did not report other overtime hours. The district court held that his FLSA claim was estopped by his failure to disclose the extra overtime hours. The Ninth Circuit affirmed the ruling on the ground that because the employee had prevented the employer from acquiring knowledge of alleged unpaid overtime hours, there was no evidence that the employer suffered or permitted the employee to work in violation of section 207(a).

c. common carrier exemption

Section 213(b)(1) of the FLSA exempts from section 207's overtime requirements "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of title 49." Section 304(a) of Title 49 requires the Interstate Commerce Commission (ICC) to "regulate common carriers by motor vehicle . . . and to that end the Commission may establish reasonable requirements with respect to . . . qualifications and maximum hours of service of employees." A "common carrier by motor vehicle" is "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property." Section 1655(e) of Title 49 transfers to the Secretary of Transportation all powers and duties of the ICC relating to qualifications, maximum hours of employment, and safety of equipment under section 304.

The Ninth Circuit addressed the common carrier exemption in Marshall v. Aksland. In Marshall the defendant, owner of a trucking line, at one time engaged in interstate commerce and complied with all Department of Transportation regulations. Although he lost his interstate contracts when certain of his shippers withdrew their business pursuant to a collective bargaining agreement with a union, he nonetheless continued his compliance with the regulations and endeavored,

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1381. Id. at 414. The reporting of hours was done on weekly time sheets filled out by the employee and turned in to the store manager.
1382. Id. No reason was given as to why the employer did not report the other overtime hours.
1383. Id.
1384. Id. at 414-15.
1387. Id. § 305(a)(14).
1388. Id. § 1655(e).
1389. 631 F.2d 600 (9th Cir. 1980).
through advertising and other solicitation, to regain interstate accounts. The Secretary of Labor sued to enforce the FLSA overtime compensation provisions as applied to the defendant. The district court held that the carrier was exempt under 29 U.S.C. section 213(b)(1), and the Ninth Circuit affirmed.

The Marshall decision rests heavily upon a literal interpretation of the statutory language. The applicability of the common carrier by motor vehicle exemption depends upon whether an employer is “holding itself out” to the general public as an interstate carrier by motor vehicle. For the exemption to apply, the employer must be seeking interstate business in good faith. It is not necessary, however, that the employer have realistic prospects for obtaining interstate contracts.

As noted above, the FLSA maximum hours requirements do not apply to employees subject to jurisdiction under the Motor Carrier Act of 1935. In United States v. American Trucking Associations, Inc., the Supreme Court held that jurisdiction under the Motor Carrier Act of 1935 was limited to “those employees whose activities affect the safety of operation” of the motor carrier industry. In 1941, the Interstate Commerce Commission stated that “‘safety of operation’... means the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone.” The ICC also “limited [its jurisdiction] to those employees who devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles” in interstate commerce. Applying this jurisdictional standard to various classes of employees, the ICC concluded that it had jurisdiction over drivers, mechanics, loaders, and helpers but lacked jurisdiction over any other class of employees. Dispatchers were specifically considered and re-

1390. Id. at 601-02.
1391. Id. at 601.
1392. Id.
1393. Id. at 602 (citing 49 U.S.C. § 303(a)(14) (1976) for the application of the 29 U.S.C. § 213(b)(1) exemption to those who merely hold themselves out to the general public as interstate carriers by motor vehicle).
1394. 631 F.2d at 603.
1395. Id.
1396. See supra text accompanying notes 1384-89.
1398. 310 U.S. 534 (1940).
1399. Id. at 553 (emphasis added).
1400. Ex parte No. MC-2, 28 I.C.C. 125, 139 (March 4, 1941).
1401. Id.
1402. Id.
jected as members of a class subject to the ICC's jurisdiction.\textsuperscript{1403}

In 1943, the Supreme Court ruled that the FLSA does not apply to areas where the ICC (or the Secretary of Transportation) has the power to regulate employee wages and hours, even if such power has not been exercised.\textsuperscript{1404} In 1947, the Court determined that the ICC had correctly defined the class of employees subject to its jurisdiction under the Motor Carrier Act of 1935.\textsuperscript{1405} In \textit{Pyramid Motor Freight Corp. v. Ispass},\textsuperscript{1406} however, the Court explained that although the ICC's classifications of employees were correct, determination of whether an individual employee was within a particular class was a factual question subject to determination on a case-by-case basis.\textsuperscript{1407}

When the ICC defined the classifications of employees subject to its jurisdiction, it did not include dispatchers because their activities, although related to safety, did not proximately cause safety violations.\textsuperscript{1408} The ICC did not, however, clearly define the term "dispatcher." The First and Eighth Circuits have taken the position that to determine whether an employee falls within a classification exempted from FLSA coverage, one must look at whether that person's activities have a substantial effect on motor vehicle safety, not whether a substantial portion of the person's time is spent in activities affecting safety.\textsuperscript{1409} This position deviates from the ICC specification that a substantial amount of employee time be spent in safety-related activities.\textsuperscript{1410}

In \textit{Marshall v. Union Pacific Motor Freight Co.},\textsuperscript{1411} the Ninth Circuit considered whether certain employees labeled as "dispatchers" were subject to regulation by the Secretary of Transportation and therefore exempt from FLSA overtime benefits. The employees scheduled the arrival, departure, loading, and unloading of truck trailers and were responsible for the safe movement of vehicles within truck termin-

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\bibitem{1403} Id. at 134-35, 139.
\bibitem{1406} 330 U.S. 695 (1947).
\bibitem{1407} Id. at 707.
\bibitem{1408} 28 I.C.C. at 135. "[I]t is clear that . . . [dispatchers'] errors in judgment are not the proximate causes of . . . accidents, and that the dispatchers engage in no activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce." \textit{Id.}
\bibitem{1409} Crooker v. Sexton Motors, Inc., 469 F.2d 206, 209 (1st Cir. 1972) (citing Yellow Transit Freight Lines, Inc. v. Balven, 320 F.2d 495, 498 (8th Cir. 1963)).
\bibitem{1410} See supra text accompanying note 1401.
\bibitem{1411} 650 F.2d 1085 (9th Cir. 1981).
\end{thebibliography}
nals. They also inspected trailers for damage and made sure that hazardous materials were properly labeled and documented. On some limited occasions the employees performed actual loading operations. The Ninth Circuit held that the employees were not subject to the jurisdiction of the Secretary of Transportation.

In reaching its conclusion, the court deferred to the judgment of the Secretary of Transportation. The court appeared to be heavily influenced by the label of "dispatcher" as applied to the employees in question. Although it noted a proximate cause test, the court did not elaborate upon the manner or degree to which safety was affected by the employees' activities. The court merely concluded that the employees did not spend a substantial amount of time in safety-related work. It thus appears that as long as employees are classified as "dispatchers," the Ninth Circuit will require the employer to give them FLSA benefits. This seems true regardless of what duties outside of the traditional "dispatcher" role are assigned to such employees.

D. Occupational Safety and Health Act

1. Rulemaking procedures

The Occupational Safety and Health Act of 1970 (OSHA) provides for inspection of workplaces by the Secretary of Labor to assure healthful working conditions and the preservation of human resources. It also provides for the establishment of rules and regulations by the Secretaries of Health and Labor for carrying out such inspections. The Secretary of Labor has promulgated rules for

1412. Id. at 1088.
1413. Id. at 1090.
1414. Id. "Normally, whether duties directly affect safety of operation of interstate motor carriers and constitute a substantial part of the employees' activities is a matter for the Secretary of Transportation to determine . . . . Decisions regarding in which duties affect safety, and in what manner, require the Secretary's special knowledge and experience." Id. (emphasis in original).
1415. Id.
1416. Id. at 1091.
1417. Id. "Unless and until the Secretary considers the issue of what effect, if any, the new duties of dispatchers have upon the existing classification, . . . . dispatchers . . . are entitled to the protection and benefits of section 7 of the Fair Labor Standards Act." Id. (footnote omitted).
1419. Id. § 657(a) (1976).
1420. Id. § 651(b).
1421. Id. § 657(g)(2) provides:
   The Secretary [of Labor] and the Secretary of Health [and Human Services] shall each prescribe such rules and regulations as he may deem necessary to carry out
selected employer inspection sites\textsuperscript{1422} and procedures to be taken in the event an employer does not voluntarily permit inspection.\textsuperscript{1423}

Such rulemaking is subject to the Administrative Procedure Act (APA).\textsuperscript{1424} Under the APA, there are two types of administrative rules: legislative rules, subject to notice and comment requirements, and interpretative rules, not subject to such requirements.\textsuperscript{1425} Legislative rules, which have the force of law, may be promulgated only when, as in the case of OSHA, a statute specifically authorizes them. Interpretative rules are made either without specific statutory authorization, or pursuant to such authorization, but without fulfillment of notice and comment requirements. Courts accord varying degrees of deference to interpretative rules, depending on judicial technical expertise, a case's specific circumstances, and the particular regulation's history.\textsuperscript{1426}

Several courts have held that rules which have a "substantial impact" on the affected parties must comply with the notice and comment procedure even though the agency intended the rule to be interpretative.\textsuperscript{1427} The Ninth Circuit has not yet determined whether to adopt the "substantial impact" doctrine despite conflict in district court decisions.\textsuperscript{1428} Furthermore, no clear statement has been announced by the Supreme Court to direct the lower courts on this issue.\textsuperscript{1429}
In *Stoddard Lumber Co. v. Marshall*, the Ninth Circuit held that APA notice and comment requirements do not apply to OSHA inspection selection procedures. In *Stoddard*, the employer was selected for a general schedule inspection pursuant to OSHA inspection selection procedures but the employer refused to permit the OSHA inspector to enter the premises to execute the inspection warrant. The employer claimed the warrant was invalid because it was issued under an OSHA regulation which had not been promulgated in compliance with the APA notice and comment requirements and, therefore, the selection procedures were per se unreasonable.

The Ninth Circuit held that the challenged procedures were not subject to the notice and comment procedure, reasoning that the procedures were neither promulgated by the Secretary of Labor as legislative rules nor had sufficient "substantial impact" to justify a notice and comment procedure. By rejecting any requirement of notice and comment for the inspection selection process, the court gave the Secretary of Labor complete discretion in its selection of what to inspect under OSHA, subject only to fourth amendment restrictions. This comports with the purpose of OSHA to provide for the health and safety of "every working man and woman in the Nation."

2. OSHA inspection warrants
   
   a. probable cause

   In *Marshall v. Barlow's, Inc.*, the Supreme Court extended fourth amendment protection to commercial inspections. Prior to *Barlow's*, the Secretary of Labor urged Congress to authorize warrantless OSHA inspections. In *Barlow's*, the Supreme Court rejected this view and held that warrantless searches are presumptively unreasonable. In extending fourth amendment protection to commercial procedures. In these licensing procedures the AEC had required that detailed public hearings be conducted prior to permitting the operation of a nuclear power plant.
inspections, the Court stated that the probable cause required for a criminal warrant is not required "[f]or purposes of an administrative search."\footnote{1442} Rather, the Court stated that probable cause justifying an administrative search may be based "on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"\footnote{1443}

The Seventh Circuit, in \textit{Marshall v. Chromalloy American Corp.},\footnote{1444} held that the \textit{Barlow's} probable cause standard did not require the Secretary of Labor to present accident statistics concerning the individual employer in order to obtain an inspection warrant.\footnote{1445} In \textit{Chromalloy}, probable cause was satisfied by showing in the warrant application that there was a high incidence of injury in the foundry industry.\footnote{1446}

In \textit{Stoddard Lumber Co. v. Marshall}\footnote{1447}, the Ninth Circuit adopted the Seventh Circuit's position holding that individual statistics of the employer's accident and illness rates were not required to satisfy the \textit{Barlow's} probable cause standard. The warrant challenged in \textit{Stoddard Lumber} provided details of the OSHA inspection selection plan, an affidavit stating that the employer was selected pursuant to the selection plan, and statistics relating to the national injury rate in the lumber industry. The court held this evidence sufficient to support a finding of probable cause for the issuance of the inspection warrant.\footnote{1448} The Ninth Circuit agreed with the Seventh Circuit's reasoning that a requirement for individual statistics in every search warrant would result in a "full-blown" hearing and unwarranted consumption of the Department of Labor's enforcement energies.\footnote{1449}

\textbf{b. ex parte warrants}

Section 1903.4 of Title 29 of the Code of Federal Regulations\footnote{1450} authorizes OSHA Area Directors to issue "compulsory process," which

\footnote{1442} \textit{Id.} at 320.
\footnote{1443} \textit{Id.} (quoting \textit{Camara v. Municipal Court}, 387 U.S. 523, 538 (1967)).
\footnote{1444} 589 F.2d 1335 (7th Cir.), \textit{cert. denied}, 444 U.S. 884 (1979).
\footnote{1445} \textit{Id.} at 1342.
\footnote{1446} \textit{Id.} at 1343.
\footnote{1447} 627 F.2d 984 (9th Cir. 1980).
\footnote{1448} \textit{Id.} at 988-89.
\footnote{1449} \textit{Id.} at 988.
\footnote{1450} 29 C.F.R. § 1903.4(a) (1980) provides that if a Department of Labor Compliance Safety and Health Officer is refused admission to a place of employment, he or she shall report the refusal to his or her Area Director. The Area Director, after consultation with the Regional Solicitor, "shall take appropriate action, including compulsory process." Section 1903.4 states that "[f]or purposes of this section, the term compulsory process shall mean the
includes ex parte applications for inspection warrants, when OSHA inspectors have been refused entry to an employer’s premises. In *Barlow’s* the Supreme Court stated in dictum that the process contemplated by section 1903.4 should provide notice to the employer.\(^{1451}\) In *Cerro Metal Products v. Marshall*,\(^{1452}\) the Third Circuit relied in part on the *Barlow’s* dicta to hold that section 1903.4 does not empower OSHA directors to seek ex parte inspection warrants.\(^{1453}\) The *Cerro* court’s holding was also based on the nature of an amendment to section 1903.4, and on the Secretary of Labor’s interpretation of section 1903.4 in field operations manuals.\(^{1454}\)

In *Stoddard* the employer challenged a search warrant which was obtained by the Secretary of Labor through ex parte proceedings. The employer argued that the court should adopt the Third Circuit rule that section 1903.4 does not give the Secretary power to seek inspection warrants through ex parte proceedings.\(^{1455}\)

The Ninth Circuit, however, adopted the view taken by the dissent in *Cerro*.\(^{1456}\) The *Stoddard* court held that the Secretary of Labor is permitted to seek warrants under section 1903.4, regardless of the modifications in regulations or the dicta in *Barlow’s*.\(^{1457}\) This decision is consistent with the congressional declaration of policy when OSHA was enacted.\(^{1458}\) If there were no provisions for ex parte inspection warrants, the notice necessary for a hearing on a warrant would enable employers to conceal before inspection dangerous conditions which OSHA was designed to alleviate.

\(^{1451}\) 436 U.S. at 318.
\(^{1452}\) 620 F.2d 964 (3d Cir. 1980).
\(^{1453}\) *Id.* at 979.
\(^{1454}\) *Id.* at 975-82. The Third Circuit interpreted *Barlow’s* to mean that power to seek compulsory process is not power to seek ex parte inspection warrants. *Id.* at 978-79 (citing 436 U.S. at 318 n.14 & 320 n.15). It then stated that courts could exercise their discretion in following an amendment to section 1903.4, which defined “compulsory process” as including ex parte warrants, because the amendment was an interpretative regulation. 620 F.2d at 981-82. It further noted that the OSHA Compliance Operations Manual had not remained consistent in its interpretation of what should be done if an employer refused to permit an OSHA inspection. *Id.* at 979.
\(^{1455}\) 627 F.2d at 989.
\(^{1456}\) *Id.* at 990 (citing 620 F.2d at 984 (Seitz, J., dissenting)).
\(^{1457}\) 627 F.2d at 990.
\(^{1458}\) One of the methods for safeguarding the health and welfare of employees is “by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition.” 29 U.S.C. § 651(b)(10) (1976).
E. The Railway Labor Act

The Railway Labor Act (RLA),\textsuperscript{1459} enacted in 1926, originally applied only to employer-employee relationships in the railroad industry. In 1936, the RLA was amended to extend its coverage to relationships between air carriers and their employees.\textsuperscript{1460} The provisions of the original Act were incorporated into and expanded by the additions pertaining to air carriers.\textsuperscript{1461} Congress authorized the creation of the National Air Transport Adjustment Board,\textsuperscript{1462} which, like the National Railroad Adjustment Board,\textsuperscript{1463} resolves disputes between employers and employees arising from the interpretation and application of employment agreements. Decisions of both Boards are enforceable in federal district courts\textsuperscript{1464} to the same degree as are other civil suits.

The right to immediate appeal of a contempt order of either Board or a district court depends upon the civil or criminal nature of the contempt order. Criminal contempt rulings are final orders and are immediately appealable.\textsuperscript{1465} Generally, civil contempt rulings are interlocutory and are reviewable only after a final decree has been entered.\textsuperscript{1466} The civil or criminal character of the contempt order therefore becomes significant.

Notwithstanding this general rule, the law of the Ninth Circuit is that a nonparty is entitled to an immediate appeal of a civil contempt order.\textsuperscript{1467} The Second Circuit has held that where a preliminary injunction can only be challenged by the appeal of a contempt ruling, the injunction will be examined in reviewing the contempt order.\textsuperscript{1468} If a circuit were to adopt both of these rules, a third party could achieve

\textsuperscript{1460} Id. §§ 181-188 (1976).
\textsuperscript{1461} The provisions 45 U.S.C. §§ 151-152 & 154-63 were incorporated into id. § 181; the provisions of id. § 153 were incorporated into id. §§ 184-185.
\textsuperscript{1462} Id. § 185 (1976).
\textsuperscript{1463} See id. § 153.
\textsuperscript{1464} Id. §§ 153(p) (authorizing enforcement of National Railroad Adjustment Board decisions) and 185 (authorizing enforcement of National Air Transport Adjustment Board decisions by reference to § 153).
\textsuperscript{1466} Fox v. Capital Co., 299 U.S. 105, 107 (1936); Drummond Co. v. District 20, UMW, 598 F.2d 381, 383 (5th Cir. 1979); David v. Hooker, Ltd., 560 F.2d 412, 415 (9th Cir. 1977).
\textsuperscript{1468} Vincent v. Local 294, Int'l Bhd. of Teamsters, 424 F.2d 124, 128 (2d Cir. 1970).
interlocutory review of a preliminary injunction, which would otherwise be properly reviewed only at the case’s conclusion.

Neither the label applied by a court when issuing a contempt order nor the nature of the contemptuous activity is dispositive of a contempt order’s character.\textsuperscript{1469} Rather, the court’s intent in issuing the contempt order governs. An intent to punish the party violating an outstanding court order or to vindicate the court’s challenged authority is indicative of criminal contempt. An intent to compel compliance with an outstanding court order or to compensate a party for another’s non-compliance is an indication of civil contempt.\textsuperscript{1470} Moreover, a contempt order may be simultaneously criminal and civil.\textsuperscript{1471}

The Ninth Circuit recently applied these concepts in \textit{Union of Professional Airmen v. Alaska Aeronautical Industries, Inc.},\textsuperscript{1472} to an action arising under the RLA. In \textit{Alaska Aeronautical}, an air carrier was ordered, through a preliminary injunction, to reinstate certain dismissed pilots and cease interference with union organizational activities. When it refused to comply, a contempt order was issued requiring the air carrier and its president, a nonparty to the action, to pay $17,500 to the union for damages and attorneys’ fees. After the air carrier complied with the contempt order, the carrier and its president appealed the order prior to final adjudication of the case.\textsuperscript{1473} The Ninth Circuit ruled that the contempt order was civil and was therefore appealable only in conjunction with a final order.\textsuperscript{1474} In addition, it held that the carrier’s payment of the contempt penalty cancelled any right of its president to appeal as a nonparty.\textsuperscript{1475}

The Ninth Circuit’s decision that the contempt order was of a civil nature is well founded. It did not rely upon the district court’s label, but instead examined the substance of the contempt order. The court found that at the time the order was issued, the employer was not complying with an outstanding court order and that the district court had imposed the penalty both to compensate the union and to compel compliance. The court correctly observed that these are touchstones of civil

\begin{thebibliography}{9}
\bibitem{} 1470. United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980).
\bibitem{} 1471. United States v. UMW, 330 U.S. 258, 299 (1947) ("[T]he same acts may justify a court in resorting to coercive and to punitive measures.").
\bibitem{} 1472. 625 F.2d 881 (9th Cir. 1980).
\bibitem{} 1473. \textit{Id.} at 882-83.
\bibitem{} 1474. \textit{Id.} at 883.
\bibitem{} 1475. \textit{Id.} at 884.
\end{thebibliography}
The court found no evidence of an intent to punish or to vindicate the district court's authority. Evidence of one of these factors is necessary for a finding of coexisting criminal contempt.

The court's ruling that the union president's appeal was moot and its subsequent dismissal of that appeal, appear to be correct. The court implied that if a nonparty and a party are held in contempt for violating a preliminary injunction, and the nonparty pays the penalty imposed by the contempt order, that nonparty would have an immediate right to appeal. If the Ninth Circuit were to adopt the Second Circuit's position on the reviewability of preliminary injunctions, a review of the underlying preliminary injunction would then be available along with the review of the contempt order.

This would be an undesirable situation. By ignoring a preliminary injunction, as did the air carrier in Alaska Aeronautical, and allowing a nonparty to incur a contempt charge, a party could receive a premature review of the injunction. This problem was not confronted in Alaska Aeronautical because the nonparty had no financial interest in the appeal. If such an interest had been arranged by his corporation, however, and if the Second Circuit's position on review of contempt orders had been adopted, the disposition of this case would have been much different. Such premature appeal of preliminary decisions would serve to inhibit the ability of the National Railroad Adjustment Board, the National Air Transport Adjustment Board, and the district courts to resolve disputes.

F. Sex Discrimination in Employment Under Title VII

Title VII of the Civil Rights Act of 1964 (the Act) was enacted to assure equal employment opportunities and to eliminate discriminatory practices which have fostered unfavorable job environments for certain groups of citizens. Certain Title VII violations are shown by means of a three-step process. First, the plaintiff must establish a prima facie case of discrimination. To do so, the plaintiff need only show that the challenged policy, whether or not it is facially neutral,
has a substantially disproportionate impact on his or her group.\footnote{1481} Next, the employer may defend by showing that its policy is directly related to a bona fide occupational qualification.\footnote{1482} Finally, the plaintiff may respond to the employer's justification by presenting evidence of a prior history of discrimination to demonstrate that the challenged policy is a pretext for additional invidious discrimination.\footnote{1483} The plaintiff may also show that non-discriminatory devices are available to meet the employer's job-related needs.\footnote{1484}

In \textit{Wambheim v. J.C. Penney Co.},\footnote{1485} the Ninth Circuit examined the requirements for a prima facie showing of sex discrimination under Title VII. Two female employees of J.C. Penney Co. (Penney) instituted a class action suit against Penney alleging that two of the company's medical coverage plans—its head-of-household rule and its maternity benefits policy—violated Title VII of the Act.\footnote{1486} The district court granted Penney's motion for summary judgment on the ground that plaintiffs had failed to establish a prima facie case of discrimination.\footnote{1487}

Penney's facially discriminatory head-of-household rule was changed to a facially neutral one in 1971.\footnote{1488} Prior to 1971, only men were entitled to medical coverage for their spouses. The revised rule allowed both sexes spousal coverage only if the employee earned more than 50\% of the combined income of the spouses. It also excluded earnings from stocks, bonds, savings accounts, disability benefits, social security, and pensions.\footnote{1489} Plaintiffs produced evidence to demonstrate that as a result of the small percentage of women in management positions, only 37\% of the women covered by the plan were entitled to spousal coverage compared to 95\% of the men.\footnote{1490} They also intro-

\footnote{1481. Since it was first articulated in Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971), the "disparate impact" theory has become a recognized means of demonstrating a prima facie case under Title VII. See Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Blake v. City of Los Angeles, 595 F.2d 1367, 1372 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980).}
\footnote{1483. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).}
\footnote{1485. 642 F.2d 362 (9th Cir. 1981).}
\footnote{1486. \textit{Id}. at 363.}
\footnote{1487. \textit{Id}.}
\footnote{1488. \textit{Id}. at 364.}
\footnote{1489. \textit{Id}.}
\footnote{1490. \textit{Id}. Of a workforce composed of 70\% women, 60\% of the women occupied low-salary positions compared to 33\% of Penney's male employees. "Women occupied 6.7\% of the profit-sharing management positions and 35.5\% of the lower level management." \textit{Id}.}
duced facts demonstrating Penney's different hiring and promotional policies for men and women, its medical insurance plan's history, and its refusal to include all earnings in its definition of income to support their claim that the new head-of-household rule was a pretext for continued discrimination against women.\textsuperscript{1491}

The Ninth Circuit, in line with the Supreme Court's decision in \textit{Dothard v. Rawlinson},\textsuperscript{1492} held that plaintiffs showing that Penney's head-of-household rule created a disparate impact on women was sufficient to establish a prima facie case.\textsuperscript{1493} The court, therefore, reversed the district court's summary judgment.

Plaintiffs also challenged Penney's maternity benefits policy, which provided such benefits only to married women, as "sex-plus" discrimination.\textsuperscript{1494} They claimed that this policy had a disparate impact on women because of the disparity in spousal coverage under the head-of-household rule.\textsuperscript{1495} The district court, however, held that no disparate impact resulted, reasoning that the policy equally excluded dependents of single men.\textsuperscript{1496}

Disapproving the lower court's examination of the language of the maternity benefits rule in isolation, the Ninth Circuit held that consideration of the impact of the rule in light of the operation of Penney's entire medical plan and various employment practices was essential.\textsuperscript{1497} Although it noted that exclusion of maternity benefits,\textsuperscript{1498} and

\begin{footnotes}
\item[1491] \textit{Id.} at 364, 365-66 n.5.  
\item[1493] 642 F.2d at 365. The \textit{Dothard} Court unequivocally held that a prima facie case of discrimination is established by showing that a facially neutral policy operates in a substantially disparate manner. 433 U.S. at 329. \textit{See also} Furnco Const. Corp. v. Waters, 438 U.S. 567, 575-76 (1978) (policy denying available jobs to qualified applicants based on job superintendent's lack of knowledge of applicant's abilities constituted prima facie Title VII case); Nashville v. Satty, 434 U.S. 136, 141 (1977) (policy denying employees returning from pregnancy leave their accumulated seniority constituted prima facie Title VII case).  
\item[1494] 642 F.2d at 365. "Sex-plus" refers to discrimination based on sex plus a facially neutral factor such as marriage.  
\item[1495] \textit{Id.}  
\item[1496] \textit{Id.} at 366.  
\item[1497] \textit{Id.}  
\item[1498] \textit{Id.} (citing General Electric Co. v. Gilbert, 429 U.S. 125 (1976)). \textit{Gilbert} involved a Title VII challenge against an employer for failure to include pregnancy in its disability insurance policy. The Court found no evidence that the insurance package favored men over women. It, therefore, found no disparate impact on women. 429 U.S. at 139-40. The \textit{Gilbert} Court held that 42 U.S.C. § 2000e-2(a)(1) does not require employers to pay greater benefits to one sex than the other because of their different biological roles. \textit{Id.} at 139.  
\item[1499] The Supreme Court, in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), cautioned that \textit{Gilbert} does not allow an employer to impose a more substantial burden on women than men. \textit{Id.} at 142. It recognized that under \textit{Gilbert}, even a facially neutral benefit plan will
\end{footnotes}
provisions based on marital status have been upheld, the court nonetheless recognized that such policies in combination with the head-of-household rule could have a disparate impact on women. The court thus reversed and remanded, directing the district court to examine the impact of the maternity benefits policy within the operation of the entire medical plan, as well as within Penney's hiring policies. Evaluating the impact of a company policy within the context of its entire benefit plan conforms with the Supreme Court's approach in determining "disparate impact."

G. Longshoremen's and Harbor Workers' Compensation Act

1. Eligibility

In Southern Pacific Co. v. Jensen, the Supreme Court excluded from eligibility for state compensation the family of a longshoreman killed on a gangplank between a ship and a pier. In response, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act) to provide compensation for longshoremen and harbor workers who are injured on navigable waters and who are otherwise ineligible for state relief. The ensuing forty-two year struggle to define the scope of federal versus state compensation was resolved in Nacirema Operating Co. v. Johnson. The Nacirema Court explained that only Congress can determine the scope of federal coverage. The Court determined that in enacting the LHWCA Congress adopted the standard originally set forth in Southern Pacific, finding that Congress intended to draw the line of federal coverage at

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1499. 642 F.2d at 366. The court cited and distinguished Grayson v. Wickes Corp., 607 F.2d 1194 (7th Cir. 1979), and Stroud v. Delta Airlines Inc., 544 F.2d 892 (5th Cir.), cert. denied, 434 U.S. 844 (1977), because no disparate impact was shown in either case. 642 F.2d at 366 n.8.
1500. 642 F.2d at 366.
1501. Id.
1502. See General Electric Co. v. Gilbert, 429 U.S. at 136 (1976), where the Court viewed the impact of the pregnancy exclusion within the context of the whole disability plan. See also Dothard v. Rawlinson, 433 U.S. at 329-30, where the Court held that the height and weight requirements of Alabama's prison guard program, when combined, resulted in a discriminatory impact on women.
1503. 244 U.S. 205 (1917).
1504. Id. at 217-18.
1508. Id.
the water's edge and holding that injuries sustained by longshoremen on piers permanently affixed to shore are not compensable under the Act.\textsuperscript{1509}

Congress expanded the geographical area governed by the Act when it increased federal benefit levels and coverage in 1972.\textsuperscript{1510} It recognized that the landward shift of modern longshoring operations, combined with the \textit{Nacirema} rule, would limit many injured workers to inadequate state compensation systems.\textsuperscript{1511} The 1972 amendments also introduced a new employment status requirement, thereby creating a dual "situs-status" test for compensation eligibility.\textsuperscript{1512} Under this test, the injury must occur in one of the areas delineated in section 903(a),\textsuperscript{1513} and the employee must be "engaged in maritime employment" at the time of his or her injury.\textsuperscript{1514}

Precise definitions of "maritime employment" have not been established because of Congress' failure to define this term in either the statute or the Act's legislative history.\textsuperscript{1515} The Supreme Court, in \textit{Northeast Marine Terminal Co. v. Caputo},\textsuperscript{1516} did note, however, that "maritime employment" includes more than the work of "longshoremen and persons engaged in longshoring operations."\textsuperscript{1517} Similarly,

\begin{itemize}
\item \textsuperscript{1509} \textit{Id.} at 223-24. Justice Douglas, in dissent, noted the incongruity of a test determining coverage based upon "where the body falls." \textit{Id.} at 225 (Douglas, J., dissenting). He advocated a "status oriented" approach, whereby longshoremen would be entitled to coverage for all injuries suffered in the course of their work. \textit{Id.} at 224.
\item \textsuperscript{1510} 33 U.S.C. §§ 903(a), 906, 910 (1976).
\item \textsuperscript{1511} \textit{Northeast Marine Terminal Co. v. Caputo}, 432 U.S. 249, 262 (1977).
\item \textsuperscript{1512} \textit{P.C. Pfeiffer Co. v. Ford}, 444 U.S. 69, 73 (1979). Prior to 1972, an employee injured on navigable waters was covered as long as his or her employer had at least one employee engaged in maritime employment, regardless of whether the injured person was so engaged. \textit{Pennsylvania R.R. v. O'Rourke}, 344 U.S. 334, 341-42 (1953). The 1972 amendments introduced the requirement that the injured worker be "engaged in maritime employment." 33 U.S.C. § 902(3) (1976).
\item \textsuperscript{1513} 33 U.S.C. § 903(a) (1976) provides:
\begin{quote}
Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).
\end{quote}
\item \textsuperscript{1514} \textit{Id.} § 902(3) states:
\begin{quote}
The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
\end{quote}
\item \textsuperscript{1515} \textit{Northeast Marine Terminal Co. v. Caputo}, 432 U.S. 249, 265 (1977).
\item \textsuperscript{1516} 432 U.S. 249 (1977).
\item \textsuperscript{1517} \textit{Id.} at 265 n.25. \textit{See also} \textit{P.C. Pfeiffer Co. v. Ford}, 444 U.S. 69, 77-78 n.7 (1979).
\end{itemize}
the Ninth Circuit, in *Weyerhaeuser Co. v. Gilmore*, defined "maritime employment" as work having "a realistic relationship to the traditional work and duties of a ship's service employment." The latter definition was recently re-examined by the Ninth Circuit in *Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs*. Duncanson-Harrelson, a marine construction company, appealed an Administrative Law Judge's (ALJ's) and Benefits Review Board's (Board's) compensation awards to two of its employees who were injured while working on dock construction projects. The company claimed that neither employee was engaged in maritime employment because the 1972 amendments to the LWHCA only covered employees loading, unloading, repairing, building, or breaking a vessel.

Claimant Hatchett was injured while constructing a "dolphin," a tie-up point off the dock for incoming ships. Because Hatchett's work served an essential maritime purpose for ship mooring and exposed him to the "perils of the sea," the ALJ concluded that he was a maritime employee within the meaning of the Act. Similarly, claimant Hed, injured while constructing an off-shore oil tanker dock, was held to be engaged in maritime employment. The Board concluded that his work contributed to commerce on navigable waters because it provided a place for oil to be unloaded from oil tankers.

The Ninth Circuit affirmed the decisions of the ALJ and the Board holding that it had been correctly determined that the claimants were engaged in "maritime employment" and were within the Act's situs coverage at the time of their injuries. Following recent Fourth and Fifth Circuit decisions which held that dock construction work—

1518. 528 F.2d 957 (9th Cir.), cert. denied, 429 U.S. 868 (1976).
1519. *Id.* at 961 (citing Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972); Onle v. South Carolina Elec. & Gas Co., 488 F.2d 758, 759 (4th Cir. 1973); Crosson v. Vance, 484 F.2d 840, 847 (4th Cir. 1973)).
1520. 644 F.2d 827 (9th Cir. 1981).
1521. *Id.* at 829.
1522. *Id.* at 830.
1523. *Id.*
1524. *Id.*
1525. *Id.* at 830-31.
1526. In Brown & Root, Inc. v. Joyner, 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980), the two claimants were involved in the construction of a shipbuilding yard which included a dry dock. *Id.* at 1088. The court, citing pre-1972 cases which held that constructing and repairing dry docks was maritime employment, concluded that the maritime character of such work was not redefined by the 1972 amendments. *Id.* at 1089-90.
1527. In Trotti & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980), an employee injured while doing carpentry work on a pier under construction was found to be engaged in
ers were involved in maritime employment, the court found it unnecessary to decide if the employees were also "harbor workers" as the Board had concluded. The court suggested that application of Weyerhaeuser's "relationship to maritime activity" test was sufficient because the concept of maritime employment includes more than the work of "longshoremen" and "harbor workers." Specifically, the court noted that the employee does not have to be both a harbor worker or longshoreman and also engaged in maritime employment. The statute merely indicates that longshoremen and harbor workers are included within the concept of "maritime employment" for purposes of the Act.

2. Compensation: scheduled benefits

To achieve its remedial purpose, the LHWCA requires employers to compensate employees injured in the course of employment, irrespective of the employer's fault. The Act serves to shift part of the injured employee's burden onto the industry. Generally, LHWCA provisions are to be construed liberally to achieve the Act's remedial objectives and "to avoid incongruous or harsh results."

Section 908 of the Act sets forth a compensatory scheme with formulas for computing the amount of compensation awards. The scheme encompasses four categories of disability: permanent total disability, temporary total disability, permanent partial disability, and temporary partial disability. The "permanent partial disability" category contains two compensation formulas. The first, in sections 908(c)(1)-(20), enumerates specific injuries for which the claimant is entitled to two-thirds of his or her average weekly wages for a specified number of weeks, regardless of impairment to earning capacity.

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1528. Id. at 1221-22. In Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981), the claimant, injured while moving concrete mooring blocks located on the banks of a navigable canal, was found to be engaged in maritime activity because "[m]oving the blocks directly furthered maritime commerce." Id. at 113.
1529. 644 F.2d at 831.
1530. Id. at 831 n.1.
1532. Id. (citing Jamison v. Encarnacion, 281 U.S. 635, 640 (1930)).
1534. The four categories of disability are covered by 33 U.S.C. §§ 908(a) (permanent total disability), 908(b) (temporary total disability), 908(c) (permanent partial disability), and 908(e) (temporary partial disability).
1535. 33 U.S.C. § 908(e) (1976) provides in pertinent part:

In case of disability partial in character but permanent in quality the compensa-
The second, in section 908(c)(21), provides that "in all other cases" the claimant is entitled to two-thirds of the difference between his or her pre-injury average weekly wages and his or her post-injury wage-earning capacity for the duration of the disability.\textsuperscript{1536}

In \textit{Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs},\textsuperscript{1537} the Supreme Court held that sections 908(c)(1)-(20) provide the exclusive remedy for workers whose injuries fall within its schedule. The claimant employee sustained a five to twenty percent loss of the use of one leg and suffered an impairment of earning capacity exceeding forty percent.\textsuperscript{1538} His injury, classified as a "permanent partial disability," entitled him to benefits under section 908(c)(2).\textsuperscript{1539} He filed for compensation under section 908(c)(21), however, which provided him with a substantially greater award.\textsuperscript{1540}

The Court of Appeals for the District of Columbia Circuit, with one judge dissenting, affirmed the ALJ and Board decisions allowing the claimant compensation calculated under section 908(c)(21).\textsuperscript{1541} Relying on the remedial nature of the Act and a recent trend in state law and Board decisions against awarding exclusive remedies under scheduled benefits, the circuit court held that section 908(c)(21) provided a "remedial alternative" when the scheduled benefits fail adequately to compensate the impairment of a worker's wage-earning abilities.\textsuperscript{1542}

\footnotesize{

\textsuperscript{1536} Id. \S 908(c)(21).
\textsuperscript{1537} 449 U.S. 268 (1980).
\textsuperscript{1538} Id. at 271.
\textsuperscript{1539} Id. at 271-72 n.4.
\textsuperscript{1540} Id. at 272 & n.5. Under \S 908(c)(2), the claimant would have received approximately $3,200 to $12,800 depending on the final determination of the degree of his disability, whereas under \S 908(c)(21), he was awarded $86.76 per week for the duration of his working life, which could total over $100,000. Id. at 283 n.25.
\textsuperscript{1541} Id. at 273-74.
}
The Supreme Court reversed, finding nothing in the text of the statute authorizing application of section 908(c)(21) as an alternative to the scheduled benefits. Rather, the Court maintained that a literal reading of the statute foreclosed an election of remedies. The Court focused on the phrase preceding the scheduled benefits, which states that those benefits “shall be paid to the employee, as follows.” The Court also read the “all other cases” phrase of section 908(c)(21) to preclude any suggestion that it meant “all of the foregoing” as well. Further, the Court found no support in the Act’s legislative history for interpreting section 908(c)(21) as an alternative to scheduled remedies.

The Supreme Court rejected the circuit court’s reliance on the state court and Board trends. It pointed out that federal courts are not authorized to write state law into federal statutes. The Court also noted that because the Board is not a policymaking agency, its construction of the Act carries no special weight. The Court, instead, relied on the application of the statute during its first fifty years of administration and the 1964 district court case, Williams v. Donovan, to support its finding that relevant judicial authority supports a literal reading of the statute.

The Supreme Court explained that the LHWCA, like other compensation statutes, does not purport to offer complete compensation for all of an injured worker’s economic loss as evidenced by its maximum remedy of two-thirds of actual earning loss. It found the use of fixed schedule benefits consistent with the Act’s attempt to compromise between the interests of employers and those of disabled employees.

The Court recognized the possibility of incongruous results from strict adherence to the scheduled benefits, but stated that it could not avoid incongruities by ignoring or rewriting the statute. It
noted, however, that although frequent incongruities would justify legislative review of the statute, sympathy for the claimant was an insufficient basis for approving a recovery not authorized by Congress.\textsuperscript{1555}

In dissent, Justice Blackmun protested that the majority had departed from the guiding principles “by reaching, rather than avoiding, a harsh and incongruous result.”\textsuperscript{1556} He would have ruled that the scheduled benefits should be construed in view of the statute’s definition of “disability” as an economic concept. Under this construction, Justice Blackmun read “all other cases” to include “any case in which the worker does not wish to accept the compensation offered in subsections (1) to (20), but elects to bear the burden of proving the difference between his wages before the injury and his wage-earning capacity afterwards.”\textsuperscript{1557} According to Justice Blackmun, this construction is more consistent with the Act's purpose.\textsuperscript{1558} He found nothing in the legislative history to indicate that the prompt and certain relief of the scheduled benefits was to be considered paramount to providing adequate relief.\textsuperscript{1559}

Justice Blackmun suggested a workable flexibility which is not expressly prohibited by the statute's language. The majority, instead, chose a restrictive, expedient reading of the statute which will be advantageous to employers’ interests and disadvantageous to some disabled employees. It would appear to be more consistent with the purpose of the Act to give the injured employee, for whom the Act was created, the option of bearing the heavier burden and any delay entailed in computing compensation based on loss of wage-earning capacity under section 908(c)(21).

\textit{H. Mine Safety and Health Act}

The Federal Mine Safety and Health Act of 1977 (the Act)\textsuperscript{1560} was enacted to improve safety and health conditions in mines.\textsuperscript{1561} Participation of miners in the enforcement of the Act is encouraged for its effective operation.\textsuperscript{1562} Section 813(f) provides for safety inspections of mines and allows a miners’ representative to accompany and aid the

\textsuperscript{1555} Id. at 284.
\textsuperscript{1556} Id. at 286 (Blackmun, J., dissenting).
\textsuperscript{1557} Id. at 288.
\textsuperscript{1558} Id.
\textsuperscript{1559} Id. at 288-89.
safety inspector in an investigation and "to participate in pre- and post-
inspection conferences held at the mine." If the miners' representa-
tive is an employee at the mine, section 813(f) protects him or her from
any wage loss during his or her inspection participation. Moreover,
the inspector may be accompanied by additional representatives if he
or she decides that it will aid the inspection. However, only one
miners' representative is entitled to protection from wage loss during
participation.

Inspectors are authorized to issue written citations to mine opera-
tors who violate any provision of the Act. The citation must iden-
tify which provision or rule was violated and specify a reasonable time
in which the condition must be corrected. Failure to correct the
violation within the designated time is grounds for a withdrawal order
under section 814(b). Under that section, the operator is ordered to
remove all persons from the area affected by the violation until an au-
thorized representative of the Secretary of Labor (Secretary) decides
that the violation has been abated.

In Magma Copper Co. v. Secretary of Labor, the Ninth Circuit
addressed the application of the above limitation on wage protection
for employees' participation in mine inspection. Two Department of
Labor inspectors went to Magma Copper Company (Magma) to con-
duct an inspection of the entire milling complex, which occupied an
area of several miles. Intending to inspect different areas of the
mill, the inspectors requested the aid of two miners' representatives.
Magma agreed, yet claimed that section 813(f) entitled only one of the
participants to be paid during the inspection. Unwilling to subject a
miner to loss of wages during the inspections, the inspectors proceeded
with only one miners' representative. The inspectors then issued a
citation and withdrawal order under section 814(b) against Magma for

1564. Id.
1565. Id.
1566. Id.
1567. Id. § 814(a).
1568. Id.
1569. Id. § 814(b).
1570. Id.
1571. 645 F.2d 694 (9th Cir. 1981).
1572. Id. at 695. Magma's milling complex included a receiving bin, a mine crusher, a
mill crusher, a concentrator building, a molybdenum plant, and a filter plant. The mill was
1573. 645 F.2d at 695.
1574. Id.
1575. Id.
its refusal to pay a second miners' representative.\textsuperscript{1576}

Magma protested the citation and withdrawal order in an action against the Secretary before an Administrative Law Judge (ALJ). The Federal Mine Safety and Health Review Commission (Commission) reversed the ALJ's vacation of the citation and order.\textsuperscript{1577}

The Ninth Circuit affirmed the Commission's holding, adopting the qualified application of the payment limitation sentence released in an Interpretative Bulletin issued by the Department of Labor.\textsuperscript{1578} The Bulletin provided that only when one inspector requests additional miner assistance does the Act limit pay protection to one employee. In instances where several inspectors are necessary to carry out separate aspects of the inspection, however, the payment protection extends to one employee accompanying each inspector.\textsuperscript{1579}

The court noted mine disaster incidents which instigated the legislative reform in mine inspections, specifically the Scotia disaster which claimed the lives of twenty-three miners and three federal inspectors.\textsuperscript{1580} The dangerous condition causing the fatal gas explosion had been deceptively concealed during one-person inspections of the mine. The tragedy is proof of the inadequacy of one-person inspections in

\textsuperscript{1576} Id.


\textsuperscript{1578} 645 F.2d at 696. The Bulletin indicates that the general rule of section 813(f) "is that the participation right gives rise to a corresponding protection against loss of pay." 43 Fed. Reg. 17,546, 17,549 (1978). Viewing the payment limitation sentence within the context of the Act, the Bulletin read it to modify merely the sentence directly preceding it:

To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.

\textsuperscript{1579} Id. (quoting 30 U.S.C. § 813(f) (Supp. V 1981) (emphasis in original)).

\textsuperscript{1580} 645 F.2d at 698.

According to the Bulletin, only one employee is entitled to participation compensation when one inspector is involved or when several inspectors conduct a concerted inspection. Yet, it distinguishes situations when more than one inspector is needed, "such as when the mine is so large that it is necessary to send several inspectors in order to most effectively or efficiently conduct inspection activity," or when several inspectors inspect different areas of the mine. In these situations, the Bulletin directed that each employee singly aiding one of the inspectors is protected from pay loss. Otherwise, "an anomaly would result in that the decision to send several inspectors, rather than a single inspector, to a mine would adversely impact the protection against loss of pay, thereby eroding the participation right itself." \textit{Id.} The Bulletin further stated that the manner in which inspectors were assigned would thus determine the scope of the statutory right. \textit{Id.}

\textsuperscript{1579} Id.

\textsuperscript{1580} 645 F.2d at 698.
Unwilling to risk a reoccurrence of the deception which led to the Scotia disaster, the Ninth Circuit rejected Magma's narrow rendition of section 813(f) in favor of the Department of Labor's interpretation, which is consistent with the goals of the statute.1582

The Ninth Circuit's approach promotes the goals envisioned by Congress: miner participation to encourage safety-oriented behavior and the refinement of danger detection skills among mine employees. This approach may encourage litigation relating to the circumstances or conditions warranting the payment of two or more employees accompanying investigation teams at a particular mine. However, the expansion of the wage protection will help achieve needed employee participation and awareness to reduce the risk of accidents associated with the hazards of the mining industry.

I. Age Discrimination in Employment Act of 1967

Under the Age Discrimination in Employment Act of 1967 (ADEA or Act),1583 discrimination based on an employee's age is unlawful. The ADEA primarily stemmed from the Civil Rights Act of 1964, which barred employment discrimination based on race, religion, and sex.1584 The goal of the ADEA is to promote the employment of older persons through educational and remedial programs which are designed to cure employment problems of the aged.1585

The Act contains three exceptions to the rule against employer age discrimination: (1) when age is a valid occupational qualification necessary for normal business operation, (2) when the employer is observing the terms of a bona fide employee benefit plan, and (3) when the

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1581. The report on the Scotia disaster revealed that Scotia personnel regularly engaged in deceptive concealment of violations during one-person inspections. For instance, air from a section of the mine not under inspection would be pumped into the area currently being inspected so that area would meet required ventilation levels. STAFF OF HOUSE COMM. ON EDUCATION AND LABOR SUBCOMM. ON LABOR STANDARDS, 94TH CONG., 2D SESS., SCOTIA COAL MINE DISASTER 28, 28-29 (Comm. Print 1976).
1582. 645 F.2d at 698-99.
1583. 29 U.S.C. §§ 621-634 (1976). According to id. § 623(a): "It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."
1585. Id. See also 29 U.S.C. § 621(b) (1976), which states that the purpose of the Act is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."
rules are violated for good cause. In 1978, Congress revised the second exemption by prohibiting forced retirement based on age.

1. Pre-amendment application of the ADEA

   a. retroactivity of the 1978 amendments

   In general, statutory changes apply retroactively except when the statute or legislative history direct to the contrary, or when manifest injustice would result. Considerations of justice and legislative intent have been advanced by circuit courts to support the position that the 1978 ADEA amendments are to be given prospective application only.

   In Los Angeles Department of Power and Water v. Manhart, the Supreme Court enunciated a general prohibition against retroactive application of laws related to pension funds absent specific mandate because severe economic consequences may result from such

1586. 29 U.S.C. § 623(f) (1976) provides that:

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited . . . where age is a bona fide occupa-

(2) to observe the terms of a bona fide seniority system or any bona fide employee

benefit plan such as a retirement, pension, or insurance plan, which is not a subter-

(3) to discharge or otherwise discipline an individual for good cause.

1587. Id. § 623(f)(2) (Supp. 1979) provides:

(f) It shall not be unlawful for an employer . . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee

benefit plan such as a retirement, pension, or insurance plan, which is not a subter-

(3) because of the age of such individual.

(Emphasis added).


1589. See Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 411-13 (5th Cir. 1980) (de-

application. In *Aldendifer v. Continental Air Lines, Inc.*, the Ninth Circuit, without supporting analysis, ruled the amendments to be prospective. In *Equal Employment Opportunity Commission v. Shell Oil Co.*, however, the Ninth Circuit concluded that retroactive application of the amendments would be inconsistent with congressional intent and would be manifestly unjust.

**b. mandatory retirement under pre-amendment construction**

Prior to the 1978 amendments, section 623(f)(2) of the ADEA permitted forced retirement based on age if the discharge was authorized by a bona fide retirement plan which was not established in order to evade ADEA goals. Such a plan, however, cannot be advanced as a reason for not hiring any individual. The exemptions contained in section 623(f)(2) were intended to further the employment of older persons without burdening employers by requiring them to include such employees in existing retirement plans.

In *United Air Lines, Inc. v. McMann*, the employer uniformly enforced its policy of retiring employees at its retirement plan's designated age. The Supreme Court construed the plan as one requiring mandatory retirement at the designated age, rather than one permitting the employer the option to retire the employee at the designated age. The employer was "observing the terms" of a plan within the meaning of section 623(f)(2).

The Ninth Circuit recently applied the *McMann* analysis in *Aldendifer*. The FAA bans airlines from retaining first officers over

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1591. *Id.* at 721.
1592. 650 F.2d 171 (9th Cir. 1981).
1593. *Id.* at 173.
1594. 637 F.2d 683 (9th Cir. 1981).
1596. 29 U.S.C. § 623(f)(2) (1976); see supra note 1584.
1597. United Air Lines, Inc. v. McMann, 434 U.S. 192, 200, 202, 203 n.9 (1977). The *McMann* court found that the legislative history of the ADEA suggested an intent to preserve, rather than undermine, the numerous pension plans in existence at the time the ADEA was passed. *Id.* at 199.
1599. *Id.* at 196-97. The Court accepted the Fourth Circuit's reasoning that under the circumstances the plan required mandatory retirement at age 60. See *McMann v. United Air Lines, Inc.*, 542 F.2d 217, 219 (4th Cir. 1976), rev'd on other grounds, 434 U.S. 192 (1977).
1600. 650 F.2d 171 (9th Cir. 1981).
age sixty, although second officers are not similarly restricted. 

Three of the employer's first officer pilots attempted to reduce their rank to second officer prior to their sixtieth birthdays. Their bids were rejected for safety reasons and each pilot was involuntarily retired pursuant to a pension plan designating sixty as the normal retirement age. The pilots claimed that their rejected bids and subsequent forced retirement violated the ADEA.

Although the plan did not expressly require retirement at age sixty, it designated sixty as the normal retirement age. Evidence showed that the employer had rejected rank reduction bids of other sixty-year-old first officers and that twenty-one of twenty-three pilots retired at age sixty. The Ninth Circuit, persuaded by McMann, construed the employer's plan as requiring mandatory retirement at age sixty based on the employer's "uniform retirement practices" and on "the specific terms of the pension plan." The court, therefore, affirmed the district court's judgment that the employer's actions fell within the section 623(f)(2) exceptions to the ADEA.

c. involuntary retirement at the employer's option under pre-amendment construction

While the McMann Court held that section 623(f)(2) allowed mandatory retirement, it declined to address the conflict raised by two bulletins issued by the Department of Labor concerning the legality of plans providing for involuntary retirement at the employer's option. In a bulletin issued shortly after the ADEA's enactment, the Department stated that this practice would not invalidate the plan under section 623(f)(2). The Department revised its position in a 1975 report to Congress, stating that plans which contain provisions for mandatory retirement at the employer's option under section 623(f)(2) are not necessarily invalid if the plans meet certain criteria.

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1601. Id. at 172.
1602. Id. The employer testified that second officers possessing more experience than a first officer in the cockpit could diminish the younger first officer's authority during a crisis and jeopardize cockpit discipline.
1603. Id.
1604. Id.
1605. Id. at 173.
1606. Id. The court noted that those who did not retire served in management positions pursuant to post-retirement provisions of the plan.
1607. Id.
1608. Id.
1609. 434 U.S. at 197 n.4.
1610. 29 C.F.R. § 860.110(a) (1982) states: "The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar, as the exception provided in section [623](f)(2) is concerned."
pre-sixty-five retirements are unlawful if applied at the option of the employer. In *Marshall v. Hawaiian Telephone Co.*, the Ninth Circuit rejected the Department of Labor’s 1975 guidelines. The court refused to adopt the anomalous approach that forced retirement at a certain age complies with the Act, while retirement at the employer’s option violates it.

In *Equal Employment Opportunity Commission v. Shell Oil Co.*, the Ninth Circuit applied the pre-amendment construction of section 623(f)(2) to a retirement plan provision which authorized involuntary retirement only for “ill health or other cause.” Relying on this provision, the employer retired thirteen employees because of their age. The Secretary claimed that because age did not constitute “other cause,” the employer violated the terms of its plan. The court rejected the Secretary’s argument and concluded that the *Hawaiian Telephone* decision recognized age as a valid “cause” for involuntary retirement under the terms of an optional plan. The Ninth Circuit, therefore, held that the retirements were authorized by the plan.

In another decision concerning a retirement occurring before the
1978 ADEA amendments, the Ninth Circuit emphasized that a plan must expressly provide for involuntary retirement in order for employers validly to force retirement under section 623(f)(2) pre-amendment exemptions. In *Benzel v. Valley National Bank of Arizona*, an employee who was threatened with involuntary retirement voluntarily retired in 1977. The employer’s retirement plan, however, did not authorize involuntary retirement.

The Ninth Circuit reversed the district court’s grant of summary judgment for the employer. It held that pre-amendment section 623(f)(2) did not authorize involuntary retirement when the provision was not included in the retirement plan. The court refused to extend the exemption of former section 623(f)(2) to plans not expressly authorizing involuntary retirement. The court stated that the 1978 amendments indicated that Congress did not intend to allow such an exemption, even when the terms of a plan expressly authorize it.

2. Rebuttal of a prima facie case under the ADEA

Because both the ADEA and Title VII of the Civil Rights Act were designed to eliminate employment discrimination, courts may appropriately apply the Title VII burdens of persuasion to ADEA cases. The burdens of persuasion under Title VII were articulated in *McDonnell Douglas Corporation v. Green*. The plaintiff must initially establish a prima facie case; the employer may rebut the plaintiff’s case by advancing nondiscriminatory reasons for its actions. The employer’s reasons, however, must be framed clearly enough to allow the plaintiff a full opportunity to challenge them as

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1620. 633 F.2d 1325 (9th Cir. 1980).
1621. *Id.* at 1326.
1622. *Id.*
1623. *Id.* at 1327. *Accord, EEOC v. Baltimore & Ohio R.R.*, 632 F.2d 1107, 1110-11 (4th Cir. 1980) (involuntary retirement before mandatory retirement age prohibited where plan does not expressly grant employer option of retiring employees early, and past employer practices of discretionary retirement did not make such action valid); *Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 486 (7th Cir. 1980) ("[A]n employer does not observe the terms of the plan unless the plan expressly sanctions the decision to force the employee to retire early . . . .")
1624. 633 F.2d at 1327.
1625. *Id.*
1630. *Id.*
The plaintiff then may show that the employer's rationale merely masked discrimination. The Ninth Circuit applied these burdens of persuasion to the ADEA in *Sutton v. Atlantic Richfield Co.* In *Sutton*, the employee testified that he was forced to retire, was replaced by a younger man, and was told by a vice president that the company desired to replace certain older executives. The employer presented substantial evidence that age was not the reason for compelling the employee's retirement. The evidence indicated that the forced retirement resulted from the employee's repeated breach of corporate protocol. Moreover, the employee had been informed of his unacceptable performance. The employer offered Sutton the choice of either improving his conduct to the satisfaction of a skeptical management, or accepting retirement under an expired retirement plan which provided greater benefits than the plan in force. The district court found unconvincing the employee's demonstration of pretext, which was merely a challenge of the credibility of the employer's proffered rebuttal. The Ninth Circuit indicated that the employee may have established a prima facie case of age discrimination, but held that the employer sufficiently rebutted any such presumption. In addition, Sutton failed to show that the employer's reasons were not legitimate. Although the Ninth Circuit's review of the credibility determinations made by the trial judge was limited, the court held that the evidence fully supported the trial court's findings.

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1631. *Id.* at 1094.
1632. *Id.* at 1093.
1633. 646 F.2d 407 (9th Cir. 1981).
1634. *Id.* at 409. The district court discredited the employee's testimony and found he had failed to establish a prima facie case. It also ruled that had the employee maintained his initial burden, the employer's reasons for its actions were sufficient to rebut the employee's prima facie case of discrimination. The employee failed to demonstrate that the employer's reasons were pretextual. *Id.* at 412.
1635. *Id.* at 410.
1636. *Id.* Personality and management conflicts had developed between the employee and his new supervisor. The employee bypassed his immediate superiors and failed to disclose to them the contents of an executive committee report he presented to the employer's chief executive. The report, which the chief executive declined to implement, suggested the removal of the employee's immediate superiors. *Id.*
1637. *Id.* at 410-11.
1638. *Id.* at 411.
1639. *Id.* at 412.
1640. *Id.*
1641. *Id.* at 412-13.
In actions brought under the ADEA, the plaintiff bears the ultimate burden of proving that the employer discriminated against him because of age. Employment decisions, however, may be based on a number of reasons. Courts, therefore, have developed standards for determining if the employer’s reliance on the employee’s age was sufficient to constitute an ADEA violation. The narrowest view requires a finding that age was the sole reason behind the employer’s action. Another test applied by many courts requires that age be a determinative factor. A third position requires that age be a contributing factor in the employer’s decision.

The Ninth Circuit, in *Kelly v. American Standard, Inc.*, adopted the determinative factor test for establishing an ADEA violation. A fifty-seven year old employee was discharged from his sales position with the employer. He was a victim of the employer’s national personnel reduction program. The employee introduced statistical evidence demonstrating a pattern of age discrimination in the discharge program as well as evidence of remarks made to him concerning his replacement by a younger employee and the employer’s intention to reduce the average age of its sales representatives. The employer denied making the statements and claimed that the employee was discharged “because he was the least effective member of the Seattle sales

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1642. Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980).
1643. See, e.g., Brennan v. Reynolds & Co., 367 F. Supp. 440, 444 (N.D. Ill. 1973) (statute serves to prevent termination based on age alone; otherwise, plaintiff must prove discharge was not for “good cause”).
1645. See, e.g., Kentroti v. Frontier Airlines, Inc., 585 F.2d 967, 974 (10th Cir. 1978) (recovery available if “one factor in the decision was age”); Wilson v. Sealtest Foods, Div. of Kraftco Corp., 501 F.2d 84, 86 (5th Cir. 1974); Coates v. National Cash Register Co., 433 F. Supp. 655, 660-61 (W.D. Va. 1977) (jury properly instructed to determine if employer’s decision was based “in whole or in part on age”; or . . . ‘one of the reasons for . . . discharge was . . . age’).
1646. 640 F.2d 974 (9th Cir. 1981).
1647. Id. at 977.
1648. Id.
force."\(^{1649}\) The jury, however, returned a verdict for the employee.\(^{1650}\)

On appeal, the employer challenged the jury instruction that the plaintiff should prevail if age "made a difference in determining whether or not [he] was retained or discharged."\(^{1651}\) The employer claimed that an ADEA violation exists only if age was the "sole factor" in the discharge. It argued that the section 623(f)(1) exceptions to the mandates of ADEA, "where age is a bona fide occupational qualification . . . , or where the differentiation is based on reasonable factors other than age,"\(^{1652}\) would be meaningless if age could not be considered.\(^{1653}\)

The Ninth Circuit explained that age may be one factor, but an ADEA violation occurs when age is a determinative factor in the discharge.\(^{1654}\) Whether age is a determining factor is a question of fact to be resolved by a jury.\(^{1655}\) The court further held that if the jury had found that the employee was discharged because he was the least effective sales representative, rather than because of age, the termination would have been based on a reasonable factor other than age.\(^{1656}\) The Ninth Circuit, adhering to the "determinative factor" test, therefore, upheld the jury instruction. It rejected the "sole factor" test as placing an unwarranted burden of proof on the employee since employers can always advance business reasons for their actions.\(^{1657}\)

3. Calculation of damages under the ADEA

The ADEA proscriptions against age discrimination are enforced through the "powers, remedies, and procedures" of designated sections of the Fair Labor Standards Act (FLSA).\(^{1658}\) Successful claimants can
recover lost wages and benefits and an additional equal amount as "liquidated damages" for "willful" violations of the Act.\textsuperscript{1659}

\textit{a. standards of willfulness}

Two standards of "willful" have emerged in federal courts to determine an award of liquidated damages under the ADEA. One requires only that the discriminatory discharge be voluntary, knowing or intentional. The Third Circuit, in \textit{Wehr v. Burroughs Corp.}\textsuperscript{1660} enunciated this standard of willfulness. In \textit{Wehr}, the court held that a willful ADEA violation did not require proof of an employer's knowledge of the implications of its actions under the ADEA. The employer must merely have knowingly and voluntarily, as opposed to inadvertently, discharged the employee.\textsuperscript{1661} The second, more stringent, standard requires an employer's awareness of a possible ADEA violation.\textsuperscript{1662}

In \textit{Kelly}, the Ninth Circuit adopted the more relaxed standard for "willful" violations of the ADEA. The employee in \textit{Kelly} had successfully challenged his discharge under the ADEA.\textsuperscript{1663} The district court held that a "willful" violation had not occurred, and therefore, denied the employee's request for liquidated damages.\textsuperscript{1664} The Ninth Circuit, however, rejected the lower court's definition of "willful" which re-

\textsuperscript{1659} Id. Although willful violations are required for liquidated damages under the ADEA, they are not required for such damages under the FLSA. \textit{See} 29 U.S.C. \textsection 216(b) (1976), which provides in part that "[a]ny employer who violates [this Act] shall be liable to the employee[s] . . . in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages."

\textsuperscript{1660} 619 F.2d 276 (3d Cir. 1980).

\textsuperscript{1661} Id. at 283.

\textsuperscript{1662} \textit{See}, e.g., Mistretta v. Sandia Corp., 639 F.2d 588, 595 (10th Cir. 1980) (willful violation found where employer knew of possible impropriety under ADEA); Loeb v. Textron, Inc., 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) (defining more stringent standard of willful). \textit{See also} Hays v. Republic Steel Corp., 531 F.2d 1307, 1310 (5th Cir. 1976), where the Fifth Circuit quoted the district court's definition of "willful" as an intentional act done with awareness of its "implication under a wage act." This definition was derived from a previous Fifth Circuit decision, Coleman v. Jiffy June Farms, 458 F.2d 1139 (5th Cir. 1971), \textit{cert. denied}, 409 U.S. 948 (1972). The \textit{Hays} court did not expressly accept or reject the lower court's definition of "willful" because the appeal addressed a different issue.

\textsuperscript{1663} 640 F.2d at 977. \textit{See} \textit{supra} notes 1646-57 and accompanying text for a discussion of the facts of \textit{Kelly}.

\textsuperscript{1664} 640 F.2d at 979.
quired the employer's knowledge of ADEA implications. The court noted that the definition applied by the district court had been derived from a case interpreting "willful" under the FLSA statute of limitations.

The *Kelly* court distinguished the willfulness required under the FLSA statute of limitations from that required under the ADEA liquidated damages provision. Under section 255(a) of the FLSA, actions must be brought within two years. If the employer's actions were willful, however, the limitation period is three years. The court explained that the three year provision was intended to prevent employers with knowledge of the FLSA from delaying employees' lawsuits by misleading them as to their rights.

The court described liquidation damages under the ADEA as a substitute for punitive damages and thus a deterrent to intentional violations of the ADEA. It adopted the *Wehr* "knowing and voluntary" test of willfulness to determine awards of liquidated damages. The Ninth Circuit stated that the district court's standard of "willful" would, in effect, encourage employers to know as little as possible about the ADEA in order to avoid liability for liquidated damages. It therefore concluded that the *Wehr* standard would best effectuate the purposes of the ADEA and remanded the case for a determination of liquidated damages under that standard.

The *Kelly* court noted that the employee's evidence of discrimination might establish willfulness under the "knowing and voluntary" test, yet it did not foreclose the possibility that the lower court might find that the discrimination was inadvertent. The Ninth Circuit, however, offered no guidance as to what would constitute an *inadvertent* discriminatory discharge. It adopted the *Wehr* standard of willfulness, which requires only that the discharge itself be voluntary rather than accidental. This test seems to render ADEA liquidated dam-

1665. *Id.* at 979-80.
1666. *Id.* at 979.
1668. *Id.*
1669. 640 F.2d at 979. Employers would only have reason to mislead or delay employees when they realized that their actions may have violated an employment act. *Id.*
1670. *Id.*
1671. *Id.* at 980.
1672. *Id.*
1673. *Id.* at 980-81.
1674. *Id.* at 981.
1675. *Id.*
1676. 619 F.2d at 283.
ages automatic because it is difficult to imagine a situation where an employer has accidentally “discharged” an employee. The employer, therefore, bears a heavy burden in disproving willful ADEA claims.

b. availability of the FLSA “good faith” defense under the ADEA

The ADEA specifically incorporates sections 211, 216, and 217 of the FLSA to enforce its anti-age discrimination provisions. While section 216(b) of the FLSA imposes on employers liability for liquidated damages for all violations of the FLSA, section 626(b) of the ADEA limits awards of liquidated damages to “willful” violations of the ADEA. Conversely, section 260 of the Portal-to-Portal Act of 1947 (PPA) grants courts discretion to deny or limit liquidated damages in FLSA actions where an employer shows that it acted in good faith and reasonably believed it had not violated the FLSA.

The Fifth Circuit, in *Hays v. Republic Steel Corp.* held that the “good faith” provision of the PPA also applied to ADEA violations because it amended the FLSA provisions incorporated into the ADEA. In a subsequent case, *Lorillard v. Pons*, the Supreme Court, in a footnote, explained that the good faith provision of the PPA mitigated the automatic operation of the liquidated damages clause with regard to all FLSA violations. The Court further stated that although sections 255 and 259 of the PPA are expressly incorporated into section 626(e), the ADEA makes no reference to section 260 of the PPA. The *Pons* Court, therefore, suggested that the FLSA good faith defense was not available in ADEA actions.

Although the *Pons* Court did not directly address the availability

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1677. 29 U.S.C. § 626(b) (1976); see supra note 1658.
1678. 29 U.S.C. § 216(b) (1976); see supra note 1659.
1680. Id. § 260 provides in part:
   In any action commenced . . . under the Fair Labor Standards Act of 1938, . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.
1681. Id.
1682. 531 F.2d 1307 (5th Cir. 1976).
1683. Id. at 1311-12.
1685. Id. at 581-82 n.8.
1687. Id. § 626(e), amended as id. § 626(e)(1) (Supp. III 1979), provides that “[s]ections 255 and 259 of this title shall apply to actions under this chapter.”
1688. 434 U.S. at 581-82 n.8.
of the FLSA good faith defense in ADEA actions, circuit courts have relied on the *Pons* footnote to reject the *Hays* interpretation and to hold that the FLSA good faith defense is not available under the ADEA.\footnote{1689} These circuit courts have concluded that the ADEA's willfulness test serves the same function as the good faith defense under the FLSA.\footnote{1690}

In *Kelly*, the Ninth Circuit followed the recent trend pronouncing the FLSA good faith defense inapplicable to ADEA violations. The district court in *Kelly* denied liquidated damages because it found that the employer's action fell within the good faith provisions of the Portal-to-Portal Act.\footnote{1691} The Ninth Circuit, observing that the PPA was enacted before the ADEA, stated that Congress would have specifically incorporated section 260 into section 626(b) if it intended it to apply.\footnote{1692} The court found persuasive the recent reliance on *Pons* by some circuits and held that the FLSA good faith defense was not applicable to the liquidated damages provisions of the ADEA.\footnote{1693}

The *Kelly* court further doubted that an employer who willfully violated the ADEA could nevertheless have acted in good faith.\footnote{1694} This observation, however, appears contradictory in view of the Ninth Circuit's willful standard. Under its standard, a "willful" violation is a voluntary, rather than an inadvertent, act of the employer and does not require employer knowledge of ADEA implications. Conceivably, an employer could voluntarily discharge an employee under a good faith or reasonable belief that it was not violating the ADEA or FLSA, whereas under the narrower standard of "willful," a "good faith" defense would be difficult to prove because the employer would impliedly have acted with the knowledge that its conduct may have violated the ADEA.\footnote{1695}

The ADEA's "willful" qualification, intended as a substitute for

\footnote{1689. See, e.g., Goodman v. Heublein, Inc., 645 F.2d 127, 129-30 (2d Cir. 1981); Wehr v. Burroughs Corp., 619 F.2d 276, 279 n.5 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1020 (1st Cir. 1979).}

\footnote{1690. Goodman v. Heublein, Inc., 645 F.2d 127, 129 (2d Cir. 1981); Wehr v. Burroughs Corp., 619 F.2d 276, 279 n.5 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1020 (1st Cir. 1979).}

\footnote{1691. 640 F.2d at 981.}

\footnote{1692. Id.}

\footnote{1693. Id. at 982.}

\footnote{1694. Id.}

\footnote{1695. See, e.g., Mistretta v. Sandia Corp., 639 F.2d 588, 595 (10th Cir. 1980) (finding of willful violation with knowledge of ADEA consequences foreclosed employer's good faith defense, even if court were to find that such defense is available under ADEA), rev'd in part and remanded, 649 F.2d 1383 (1981).}
the FLSA good faith defense, renders the Ninth Circuit's standard questionable. A standard requiring a willful violation of the ADEA, rather than a willful discharge, would better serve the function of the "willful" provision for liquidated damages.

c. prejudgment interest under the ADEA

The ADEA provides that damages arising from violations of its provisions are to be considered "unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of [the FLSA]." The Act further authorizes courts to "grant such legal or equitable relief" appropriate to realize the purposes of the ADEA.

Neither the ADEA nor the FLSA expressly authorizes awards of prejudgment interest. In FLSA actions, however, courts have allowed such awards. The recovery of interest has been justified on the theory that a violating employer should not be unjustly enriched by the use of the employee's money. On the other hand, courts have not allowed prejudgment interest where maximum amounts of liquidated damages were awarded under section 216(b) of the FLSA. Because liquidated damages may be viewed as compensation for delays in payment to employees, recovery of interest on unpaid wages and liquidated damages would essentially grant employees double compensation for the same damages.

Federal authority for awarding prejudgment interest in ADEA ac-

1696. 29 U.S.C. § 626(b) (1976); see supra note 1659.
1701. See, e.g., Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 715-16 (1945) (denied recovery of interest on mandatory liquidated damages awards under section 216(b) of FLSA in a decision rendered before § 260 of Portal-to-Portal Act enacted giving courts discretion.
tions is strikingly scarce. In *Hoffman v. Nissan Motor Corp.*,\(^{1702}\) a district court denied prejudgment interest to an employee who recovered liquidated damages under section 626(b) of the ADEA.\(^{1703}\) The *Hoffman* decision is consistent with FLSA cases awarding prejudgment interest because none of these cases allowed liquidated damages.\(^{1704}\)

In *Kelly*, the Ninth Circuit held that awards of prejudgment interest are available under the ADEA.\(^{1705}\) The court upheld the district court's award of prejudgment interest based on the ADEA provision authorizing courts “to grant such legal or equitable relief . . . appropriate to effectuate the purposes of [the Act].”\(^{1706}\) The court also relied on FLSA cases allowing prejudgment interest to support its holding.\(^{1707}\)

The *Kelly* court, however, did not address the denial of prejudgment interest in FLSA cases where liquidated damages were awarded.\(^{1708}\) The absence of discussion leaves open the possibility that the Ninth Circuit might authorize prejudgment interest in ADEA actions even when awards of liquidated damages are granted. Such a result would unwisely allow double compensation because liquidated damages and prejudgment interest serve essentially the same compensatory function.

**d. attorneys' fees on appeal**

The ADEA authorizes an award of reasonable attorney fees to a plaintiff successful at the trial level.\(^{1709}\) The appellate court, however, retains discretion to award attorney fees for successfully litigated appeals.\(^{1710}\) In ADEA cases, attorney fees are awarded on appeal to the successful party where the complexity and time required to dispose of the issues raised warrant reimbursement.\(^{1711}\) Because the appeal addressed complex issues of first impression, the *Kelly* court granted the

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1703. *Id.* at 360.
1704. *Id.*
1705. 640 F.2d at 982.
1706. *Id.* (quoting 29 U.S.C. § 626(b) (1976)). The district court awarded Kelly $27,000 for lost income and pension recovery. It also awarded eight percent prejudgment interest, which the Ninth Circuit reduced to six percent on the agreement of the parties.
1707. 640 F.2d at 982.
1708. *See supra* text accompanying notes 1660-76.
1709. 29 U.S.C. § 626(b) (1976) incorporates *id.* § 216(b), which in pertinent part provides: “[T]he court in such action shall, in addition to any judgment awarded to the plaintiff . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.”
employee's request for attorney fees and remanded the determination of the award to the trial court. In calculating the attorney fees, the Ninth Circuit directed the trial court to consider (1) the number of hours of preparation, (2) the attorney's experience, (3) the number and complexity of the issues, (4) the amount of wasted or duplicated effort, and (5) the customary fees charges for equivalent litigation services in the community.

e. deduction of unemployment compensation from back pay awards

Under section 626(b) of the ADEA, courts are entitled to grant the relief they deem appropriate to further ADEA goals. Circuit courts have acknowledged the district courts' discretion in determining whether to offset unemployment compensation benefits from back pay awards.

The Supreme Court, in *NLRB v. Gullett Gin Co.* articulated the "collateral source" rule in its holding that the National Labor Relations Board had not abused its discretion in declining to offset unemployment compensation from back pay awards in an action filed under the National Labor Relations Act. The Court reasoned that unemployment compensation is a benefit awarded by the state and it therefore stems from a collateral source rather than directly from employer funds. Some courts have relied on Gullett's "collateral source" rule in refusing to deduct unemployment compensation from back pay awards.

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1712. 640 F.2d at 986.
1717. *Id.* at 364.
1718. *See, e.g.*, *EEOC v. Sandia Corp.*, 639 F.2d 600, 624-26 (10th Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977); *Pedreyra v. Cornell Pre-
In *Naton v. Bank of California*, the Ninth Circuit indicated its approval of the "collateral source" rule in ADEA actions. The court held, however, that the district court had not erred in deducting unemployment compensation payments from an award of back pay damages. The bank employee in *Naton* was terminated at the age of sixty-one pursuant to a bank-wide personnel reduction. In the action filed by the employee under the ADEA, the jury found that age was a determining factor in the employee's discharge. The district court subtracted the employee's unemployment compensation benefits from his back pay award because the employee and employer had contributed to the state fund providing the benefits. The employee challenged the deduction as improper because the unemployment compensation benefits were issued from a collateral source.

The Ninth Circuit expressed uncertainty about the application of the "collateral source" rule where the employer has contributed to the unemployment compensation fund. The court, however, did not hold the rule applicable. It held that regardless of a finding that the benefits were from a collateral source, the district court could elect to deduct the unemployment benefits under its discretionary authority as granted to the courts by section 626(b) of the ADEA. The Ninth Circuit's recognition of the district court's authority to deduct unemployment compensation from damages under the ADEA indicates that it would also uphold a lower court's election not to deduct such benefits from ADEA awards, provided they derive from a collateral source.

f. deduction of sick pay and vacation allowances

Another issue arising under ADEA section 626(b) is whether courts may appropriately refuse to subtract benefits derived from the


1719. 649 F.2d 691 (9th Cir. 1981).
1720. *Id.* at 699.
1721. *Id.* at 700.
1722. *Id.* at 693.
1723. *Id.* at 698.
1724. *Id.* at 699.
1725. *Id.*
1726. *Id.* at 700.
employer, rather than from a collateral source. Where the benefits are earned by the employee and accrued to him or her as employment compensation, it has been held that no offset from damages should be made. If, however, the benefits are incidental to termination, \textit{i.e.}, would not have been received if the employee had not been terminated, offset from back pay awards is appropriate.\textsuperscript{1728}

The \textit{Naton} court adopted the earned or incidental to termination dichotomy in deciding whether subtraction of sick pay and vacation pay from back pay awards was appropriate under the ADEA. After his termination an employee received sick leave and vacation pay benefits from the employer.\textsuperscript{1729} The employer's policy required that these benefits be used prior to retirement or to facilitate early retirement. Sick leave and vacation pay benefits were not due as additional monetary compensation upon retirement.\textsuperscript{1730} In \textit{Naton}, the employee appealed the district court's deduction of the amount received for sick pay and vacation pay from the employee's damage award.\textsuperscript{1731}

The Ninth Circuit noted that if upon retirement the employee would have been entitled to compensation for the accrued sick pay and vacation pay in addition to his regular pay, such benefits would have been part of his compensation and the district court would have erred in deducting them from the award.\textsuperscript{1732} The court, however, found that the employer's evidence supported the conclusion that the employee would not have received the sick pay and vacation pay but for his termination. It therefore held that the deduction was proper.\textsuperscript{1733}

The Ninth Circuit, in the \textit{Naton} decision, suggested that a district court's discretion under the ADEA is limited in that benefits received entirely from the employer can be included in damages only if the employee would have been entitled to the awards as additional employment compensation. In turn, such cases depend on the particular employer's policies with respect to the noncollateral benefits in ques-

\textsuperscript{1727} See, \textit{e.g.}, EEOC v. Sandia Corp., 639 F.2d 600, 626 (10th Cir. 1980) (no offset of vacation allowance earned and accrued by employee).

\textsuperscript{1728} See, \textit{e.g.}, EEOC v. Sandia Corp., 639 F.2d 600, 626 (10th Cir. 1980) (offsetting of severance pay made by employer correct because it would not have been made if termination had not occurred and thus went beyond the relief necessary to make plaintiff whole); Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975); Coates v. National Cash Register Co., 433 F. Supp. 655, 663 (W.D. Va. 1977); Combes v. Griffin Television, Inc., 421 F. Supp. 841, 844-45 (W.D. Okla. 1976).

\textsuperscript{1729} Naton, 649 F.2d at 700.

\textsuperscript{1730} Id.

\textsuperscript{1731} Id.

\textsuperscript{1732} Id.

\textsuperscript{1733} Id.
tion. This approach is functional since it relieves from potential double liability those employers who seek to allay an employee’s discharge through severance pay and other benefits.

g. recovery for emotional distress

Pursuant to section 626(b) of the ADEA, courts have discretion to grant legal or equitable relief “including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed unpaid minimum wages.” While this section seemingly provides courts with broad remedial powers, circuit courts addressing the issue have denied recovery of damages for pain and suffering under the ADEA.

Such courts reason that the ADEA’s remedial scheme is intended to prevent psychological damage arising from age-related discrimination by compelling employer compliance with the Act. Under the scheme, employer noncompliance entitles the employee to reinstatement or promotion, lost wages, and, in some cases liquidated damages. Courts indicate that these remedies are sufficient to alleviate psychological damage. Moreover, courts have found allowance of damages for pain and suffering as not consistent with the ADEA’s purpose of resolving alleged violations through mandatory administrative conciliation efforts. Thus, courts conclude that to award emotional dam-

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1737. The ADEA directs that administrative remedies must be pursued prior to the filing of a private suit. Specifically, individuals who intend to sue must give the Secretary of Labor 60 days notice of such intent. The Secretary then must attempt to remedy the unlawful practice through informal conciliation methods. 29 U.S.C. § 262(d) (1976). If such efforts
ages in private litigation would encourage employees to avoid agreeing to administrative resolutions, in which such damages are not provided.\textsuperscript{1738}

Some district courts, on the other hand, have allowed recovery for emotional distress.\textsuperscript{1739} Those courts believe that a broader remedial reading of the discretion granted under section 626(b) of the ADEA better reflects the purposes of the Act and Congressional intent.\textsuperscript{1740}

In \textit{Nat}on, the Ninth Circuit held that damages for pain and suffering could not be recovered under the ADEA.\textsuperscript{1741} The \textit{Nat}on court affirmed the district court's order striking the employee's prayer for damages for pain and suffering.\textsuperscript{1742} The court reasoned that such damages would obstruct the conciliation process, and it failed to find that Congress had authorized them by implication. Further, the court viewed the remedies expressly authorized by the ADEA as sufficient to achieve the Act's purpose.\textsuperscript{1743}

\textbf{J. Employee Retirement Income Security Act}

1. Offset of workers' compensation from pension payments

The Employee Retirement Income Security Act\textsuperscript{1744} (ERISA) was passed in 1974 in response to an extensive study of private pension plans throughout the country.\textsuperscript{1745} Congress engineered this complex system of laws to protect beneficiaries who in the past had been deprived of benefits because pension plans had terminated due to lack of

\begin{itemize}
\item \textsuperscript{1741} 649 F.2d at 699.
\item \textsuperscript{1742} Id. at 698.
\item \textsuperscript{1743} Id. at 699.
\item \textsuperscript{1745} Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980).
\end{itemize}
ERISA attempts to insure the receipt of promised benefits to employees upon their retirement once those benefits become vested, although it also establishes minimum vesting requirements entitling more employees to benefits.

Under section 203(a), ERISA entitles employees to a "nonforfeitable" right to their retirement benefits once they satisfy the statute's minimum vesting requirements. Section 203(a), however, specifically exempts certain pension plan provisions from the nonforfeiture rule. The Act defines "nonforfeitable" as the participant's unconditional claim to benefits under a pension plan "which is legally enforceable against the plan." In Nachman Corp. v. Pension Benefit Guaranty Corp., the Supreme Court emphasized that "nonforfeitable" means that the "claim to the benefit," not the benefit itself, is "unconditional and 'legally enforceable against the plan.'" The Court further stated that forfeiture contemplates a total loss of benefits; therefore, "nonforfeitable" describes the "quality of the participant's right to a pension rather than a limit on the amount he may col-

1746. *Id. at 362; see 29 U.S.C. 1001(a) (1976)*, which announces in pertinent part the Congressional policy behind ERISA:

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees . . . and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; . . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; . . . that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

1747. 446 U.S. 359, 375 (1980).


1749. 29 U.S.C. § 1053(a) (1976) provides: "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraph (1) and (2) of this subsection."

1750. *See 29 U.S.C. § 1053(a)(3) (1976)* which delineates plan provisions which are not to be treated as forfeitures. For example, there are pension plan provisions denying payment upon the participant's death under § 1053(a)(3)(A); suspending payment while the employee is employed under § 1053(a)(3)(B); applying plan amendments retroactively under § 1053(a)(3)(C); and, allowing forfeiture of benefits in certain circumstances when employees who have vested rights in less than fifty percent of their benefits withdraw their mandatory contribution benefits from the plan under § 1053(a)(D)(i)-(iv).


1753. *Id. at 371.*
In sum, the term "nonforfeitable" does not itself guarantee a particular level of benefits to participants under a pension plan.

Section 204 of ERISA enumerates the minimum benefit accrual requirements for pension plans. Under this section, Congress has preserved, with certain limitations, the commonly employed practice of integrating an employee's benefits received under the Social Security Act and the Railroad Retirement Act with pension funds to compute benefit levels.

In Alessi v. Raybestos-Manhattan, Inc., the Supreme Court held that pension provisions which offset workers' compensation benefits from retirement benefits were authorized under ERISA. Alessi involved consolidated cases in which the plaintiffs challenged pension terms that subtracted workers' compensation payments from their pensions. In both cases, the district courts found the offsets in violation of section 203(a) of ERISA as unauthorized forfeitures. Furthermore, both district court judges held that an IRS-issued Federal Treasury Regulation authorizing such offsets was invalid because it contravened the purpose of ERISA. The employers successfully obtained a reversal of the district court rulings from the Third Circuit in their consolidated appeal.

1754. Id. at 372-73.
1758. See 29 U.S.C. §§ 1054(b)(1)(B)(iv), 1054(b)(1)(C), 1054(b)(1)(G) (1976). But see 29 U.S.C. § 1056(b) (1976), which limits such integration, in that "a plan may not decrease benefits of such participant by reason of any increase in the benefit levels payable under Title II of the Social Security Act . . . or the Railroad Retirement Act of 1937 . . ., if such increase takes place after September 2, 1974."
1760. Id. at 508.
1761. Id. at 508-09; see 26 C.F.R. §§ 1.411(a)-4(a) (1980), which provides that "nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other [f]ederal or [s]tate law and which are taken into account in determining plan benefits."

Although the Treasury Regulation was issued under an antiforfeiture provision appearing in the Internal Revenue Code pension plan requirements (26 U.S.C. § 411(a) (1976)), ERISA expressly authorized application of Treasury Department Regulations issued under the tax code pension provision to analogous provisions of ERISA. See 29 U.S.C. § 1202(c) (1976), which provides that "[r]egulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 [of Title 26] . . . shall also apply to the minimum participation, vesting, and funding standards set forth in . . . [this chapter which includes 29 U.S.C. § 1053(a)]."

The plaintiffs argued that because workers' compensation offsets were not among those specifically exempted from the nonforfeitable rule, they were illegal forfeitures. The Supreme Court, however, disagreed and affirmed the Third Circuit's decision.1763

The Court initially pointed out that the plaintiffs' argument bypassed the threshold issue of defining what benefits, once vested, become nonforfeitable under section 203(a).1764 It then held that the statutory definition of "nonforfeitable" guarantees only a legally enforceable "claim" to benefits, not a particular amount or method of calculation. The Court observed that ERISA leaves the determination of benefit levels and calculations to the parties creating the plan, provided they are within the parameters set forth under section 204 of the Act.1765

The Court then turned to the benefit computation practices permissible under section 204. The Court noted ERISA's authorization of pension fund integration1766 with benefits derived under the Social Security Act and the Railroad Retirement Act.1767 The Court concluded that Congress, in authorizing such integration, did not find it necessary to exempt the practice under section 203's nonforfeiture provision. Specifically, the Court found the employers' offsetting provision similar to the integration system in that the employees were entitled to an established pension level, whereas pension payments were reduced by the amount received through workers' compensation.1768 The Court concluded, therefore, that Section 203 was equally inapplicable to the challenged offsetting practice. Furthermore, the Court found the practice to be consistent with the Act's goal of promoting private pension plans, while allowing certain avenues of cost reduction for employers.1769

The Court then upheld the validity of the challenged IRS regulation1770 which authorized workers' compensation reductions in pension

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1763. 451 U.S. at 509.
1764. Id. at 511.
1765. Id. at 511-12.
1766. Id. at 514. The Alessi Court defined integration as "a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees." Id. Such a system allows the employees as a group to benefit from a higher pension level and the employer to maintain the high level by drawing from other sources which depend on employer contributions. Under an integration system, however, an individual employee might attain the established pension level through a combination of the pension payments and payments from other sources. Id.
1767. Id.
1768. Id. at 516.
1769. Id. at 516-17.
benefits covered under ERISA. The Court concluded that because the integration was not per se prohibited by Section 203(a), it was not limited to Social Security and Railroad Retirement benefits. The Court also rejected the claim that workers' compensation disability awards were too different from Social Security and Railroad Retirement awards to justify similar integration. The Court noted that both the Social Security and Railroad Retirement Acts provide disability benefits, while ERISA made no distinction among the types of benefits which could be integrated.

In addition, the Court stated that Congress was aware of IRS rulings which allowed workers' compensation offsets within the realm of permissible integration and chose to leave them in effect when ERISA was passed. In conclusion, the Court held that workers' compensation offsets from pension payments are permitted under ERISA because "Congress . . . permitted integration along the lines already approved by the IRS, which had specifically allowed pension benefit offsets based on workers' compensation."

2. Normal retirement age under section 203

Under section 203(a) of ERISA, pension plans must provide that employees have a "nonforfeitable" right to retirement benefits upon their reaching "normal retirement age." The term "normal retirement age" is defined in 29 U.S.C. section 1002(24) as the earlier of: (A) the normal retirement age defined in the plan or (B) the later of (i) age sixty-five or (ii) ten years after the participant joined the plan.

Section 203(a) has been construed to require that pension benefits be nonforfeitable only upon reaching the normal retirement age. Therefore, section 203(a) does not require payment of benefits to employees before they reach normal retirement age.

In *Hurn v. Retirement Fund Trust of Plumbing, Etc.*, the Ninth Circuit adopted the stance that section 203(a) provides no protection from benefit suspension before the employee reaches normal retirement age.

1771. 451 U.S. at 518.
1772. Id. at 519.
1773. Id. at 519-20.
1774. Id. at 521.
1778. 648 F.2d 1252 (9th Cir. 1981).
The plaintiff employee was receiving early retirement benefits which were suspended while he held office as a union official. During the period of suspension, the employee was fifty-eight and fifty-nine. The employee's suit was dismissed by the district court for failure to state a claim under section 1053(a) of ERISA.

The Ninth Circuit affirmed the lower court's judgment. The pension plan to which the plaintiff belonged designated sixty-five as the normal retirement age. The court held, therefore, that sixty-five was the normal retirement age for section 1053(a) purposes. Because the employee was not sixty-five during the benefit suspension period, the court concluded that no claim was stated under section 1053(a).

3. Preemption of state law

a. state law indirectly related to pension plans

Section 514(a) of ERISA provides that ERISA's provisions shall preempt any state law relating to employee benefit plans. This provision illustrates Congress' intent to place certain pension plan regulations under exclusive federal control.

In Alessi v. Raybestos-Manhattan, Inc., the Supreme Court addressed the issue of whether ERISA's preemption provision invalidated a New Jersey Worker's Compensation Act which prohibited the offset of worker's compensation awards from employee retirement benefits. The Alessi Court interpreted ERISA to allow such offsets, which placed the New Jersey statute in conflict with ERISA.

The district courts both held that ERISA did not preempt the New Jersey statute. The Third Circuit reversed and construed section 514(a) as having broad preemptive parameters. According to the Third Circuit, the New Jersey statute was preempted by section 203(a) of ERISA because its sole purpose was to establish a statutory requirement

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1779. Id. at 1253-54.
1780. Id. at 1253.
1781. Id.
1782. 29 U.S.C. § 1144(a) (1976) provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws [that] relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

1784. Id. at 511.
1785. Id. at 516. The Alessi Court found that workers' compensation offsets from pension benefits did not violate the anti-forfeiture provision of section 203(a) of ERISA. Id.
for pension plans.\textsuperscript{1787}

The Supreme Court also determined that the New Jersey statute was preempted by ERISA, but found it unnecessary to define the outer parameters of the preemptive provision. Rather, the Court reasoned that the New Jersey statute related to pension plans within the meaning of section 514(a) because it eliminated a method of calculating pension benefits which is permitted under ERISA.\textsuperscript{1788} ERISA's preemption provision was held to apply equally to state laws which indirectly interfere through workers' compensation laws, as it does to direct intrusions under pension regulation statutes. Furthermore, because the Alessi pension plans were products of collective bargaining, the Court found preemption further justified by the federal interest in eliminating state interference in labor-management negotiations.\textsuperscript{1789}

\textit{b. state domestic laws impliedly exempted from ERISA's preemption provision}

ERISA's preemption provision states generally that the Act supersedes state laws relating to employee benefit plans.\textsuperscript{1790} Another ERISA provision, section 206(d)(1), prohibits assignment or alienation of pension plan benefits.\textsuperscript{1791} Plan participants and plan administrators have relied on ERISA's preemption and nonalienation provisions to challenge the enforcement of state court orders to pay part of participants' pension benefits directly to their ex-spouses to satisfy state court alimony and support orders or divorce decrees. Circuit courts have thus far rejected such challenges.

The Ninth Circuit, in \textit{Stone v. Stone}\textsuperscript{1792} and \textit{Carpenters Pension Trust for Southern California v. Kronschnabel},\textsuperscript{1793} held that ERISA does not preempt state court orders requiring pension plan trustees directly to pay a participant's ex-spouse his or her community property share of the participant's pension benefits.\textsuperscript{1794} Neither opinion offered any rationale why ERISA did not preempt such state court orders. Rather, in both cases the court found controlling the Supreme Court's summary dismissal of the appeal of the California state court case, \textit{In re

\begin{footnotesize}
\textsuperscript{1787} Id. See 29 U.S.C. § 1053(a) (1976).
\textsuperscript{1788} 451 U.S. at 524.
\textsuperscript{1789} Id. at 525-26.
\textsuperscript{1790} 29 U.S.C. § 1144(a) (1976).
\textsuperscript{1792} 632 F.2d 740 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981).
\textsuperscript{1793} Id. at 745.
\textsuperscript{1794} Id. at 742; id. at 748.
\end{footnotesize}
Marriage of Campa.\textsuperscript{1795} The court felt bound by Campa's holding that ERISA does not preempt the enforcement of community property laws.\textsuperscript{1796}

Prior to Stone and Kronschnabel, the Second Circuit, in American Telephone and Telegraph Co. v. Merry,\textsuperscript{1797} had rejected a literal reading of ERISA's preemption provision and held that state court garnishments of pension benefits to satisfy court-ordered family support payments are "impliedly excepted" from ERISA's preemption and nonalienation provisions.\textsuperscript{1798} The strong public policy and state interest in enforcing family support obligations weighed heavily in the court's conclusion that Congress did not intend ERISA to preempt this area of state law.\textsuperscript{1799}

In Operating Engineers' Local 428 Pension Trust Fund v. Zamborsky,\textsuperscript{1800} the Ninth Circuit adopted the implicit exemption approach described in the Second Circuit's Merry decision.\textsuperscript{1801} In Zamborsky, the trustees of a union pension fund appealed a district court's refusal to enjoin enforcement of a state court's garnishment order requiring the trustees to pay a participant's ex-spouse part of the participant's benefits to satisfy court-ordered spousal payments.\textsuperscript{1802} The original divorce decree awarded the plan participant his employment benefits as his sole separate property, and also ordered him to pay his ex-wife $200 per month in spousal support.\textsuperscript{1803} When the participant stopped paying the required spousal support, his ex-wife obtained a state garnishment order requiring the pension plan trustees to pay her the accrued payments, as well as $200 per month thereafter from the participant's benefits.\textsuperscript{1804} The trustees relied on ERISA's preemption and nonalienation provisions in seeking an injunction against the garnishment order.\textsuperscript{1805} Although a temporary restraining order was issued, the

\textsuperscript{1796} 632 F.2d at 742; \textit{id.} at 747-48. The Kronschnabel court discussed the impact of Supreme Court summary dismissals of state court appeals for want of a substantial federal question and concluded that the dismissal of Campa operated as a decision on the merits. Therefore, the decision prevented lower courts from reaching opposite conclusions than those reached in the dismissed case. \textit{id.} at 747.
\textsuperscript{1797} 592 F.2d 118 (2d Cir. 1979).
\textsuperscript{1798} \textit{id.} at 121.
\textsuperscript{1799} \textit{id.} at 122-24.
\textsuperscript{1800} 650 F.2d 196 (9th Cir. 1981).
\textsuperscript{1801} \textit{id.} at 198-99.
\textsuperscript{1802} \textit{id.} at 197.
\textsuperscript{1803} \textit{id.}
\textsuperscript{1804} \textit{id.} at 198.
\textsuperscript{1805} \textit{id.}
district court denied the trustees' subsequent request for a permanent injunction.\textsuperscript{1806}

The Ninth Circuit held that the garnishment order was impliedly exempted from ERISA's preemption provision.\textsuperscript{1807} The court stated that the principles of domestic relations law, specifically, that the substance of domestic relations law is determined by the states and that when state law in this area conflicts with federal statutes, review is limited to determining whether "Congress has 'positively required by direct enactment that state laws be pre-empted.'"\textsuperscript{1808} Further, the domestic relations law "must do 'major damage' to 'clear and substantial' federal interests before . . . [it] will be overridden."\textsuperscript{1809} Neither a direct enactment nor major damage to federal interests was found by the court regarding the garnishment at issue. Rather, the court concluded that, owing to ERISA's concern for family welfare, to preempt this garnishment order would be contrary to ERISA's purpose.\textsuperscript{1810}

The trustees then argued that the garnishment conflicted with ERISA's nonalienation provision and was thus impliedly preempted. The court, however, found no such conflict.\textsuperscript{1811} It concluded that compliance with both the federal and state laws was possible. A literal interpretation of section 206(d)(1), the court held, merely required that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."\textsuperscript{1812} The trustees satisfied section 206(d)(1) by requiring that benefits not be assigned. Furthermore, the court did not find the garnishment to be an "obstacle" to the congressional purpose of ensuring that benefits be available for retirement purposes.\textsuperscript{1813}

In further support of its conclusion, the court reasoned that Congress intended greater rights to attach to the spousal maintenance award here than to the community property awards of \textit{Stone} and \textit{Kronschnabel} because spousal support is related to need, while community property awards are not.\textsuperscript{1814}

The court's literal interpretation of section 206(d)(1) is problematic. Essentially, the court held that the trustees' duty under section

\textsuperscript{1806} \textit{Id.} at 197-98.
\textsuperscript{1807} \textit{Id.} at 200.
\textsuperscript{1808} \textit{Id.} at 199 (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)).
\textsuperscript{1809} 650 F.2d at 199.
\textsuperscript{1810} \textit{Id.} at 199-200.
\textsuperscript{1811} \textit{Id.} at 200-01.
\textsuperscript{1812} \textit{Id.} at 201 (quoting 29 U.S.C. § 1056(d)(1) (1976)).
\textsuperscript{1813} 650 F.2d at 201.
\textsuperscript{1814} \textit{Id.} at 202.
206(d)(1) is discharged once they insert a nonalienation provision in the pension plan. A more reasonable reading would invest trustees with responsibility to see that the provision is enforced. Otherwise, they have no responsibility to protect participants’ benefits from any state garnishment order. Concededly, state garnishment orders unrelated to family obligations might be challenged under the preemption provision. However, participants would have more security knowing that the nonalienation provision is substantially more than a mere provision in the plan.

Congress could not have intended nor should courts hold that most provisions in ERISA may be complied with merely by inclusion in a pension plan without a concomitant obligation of enforcement. In fact, ERISA gives participants a cause of action when the provisions or terms of a pension plan have been violated by trustees or employers. Furthermore, the trustees in Merry voiced concern that compliance with a state garnishment order similar to that in Zambrosky would subject them to breach of fiduciary duty claims under section 404(a)(1) of ERISA. There is no doubt, therefore, that ERISA itself recognizes that the nonalienation provision is more than a mere formality.

Rather than resolving the trustees’ conflicts challenge with a literal compliance approach to the nonalienation provision, it would have been wiser for the Ninth Circuit to follow the Second Circuit’s holding in Merry that state garnishment orders for spousal support are impliedly exempted from ERISA’s nonalienation provision.

K. Sherman Antitrust Act

1. Labor exemption from the antitrust laws
   a. statutory labor exemption

   Section 1 of the Sherman Antitrust Act, enacted in 1890, prohibits combinations or conspiracies in restraint of trade. The Supreme Court’s early application of the antitrust laws to enjoin union activities as unlawful restraints of trade caused strong union protest. In response, Congress passed the Clayton Act of 1914. Section 20 of the Clayton Act prohibits federal courts from issuing injunctions in la-

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1817. See 592 F.2d at 121-25.
1819. See, e.g., Loewe v. Lawlor, 208 U.S. 274 (1908) (Danbury Hatters Case).
bor disputes between employees and employers. Under section 6 of the Act, labor organizations and their members are immunized from antitrust liability when they are lawfully pursuing legitimate labor objectives.

The relief accorded labor under the Clayton Act was severely undermined by the Supreme Court in *Duplex Printing Press Co. v. Deering*, which restricted the Clayton labor exemptions to union activities between employees and their own employer. This narrow interpretation of section 20 of the Clayton Act rendered the Act substantially ineffective in curtailing court issued injunctions against union activities.

The subsequent enactment of the Norris-LaGuardia Act in 1932 provided more effective protection for labor organizations. Under section 4 of the Norris-LaGuardia Act, federal courts are prohibited from issuing injunctions against certain union activities arising in the context of labor disputes. Section 5 of the Act further restricts the injunctive power of the courts by prohibiting injunctions against the activities enumerated in section 4 when they are issued on the ground that those participating in the labor dispute "are engaged in an unlawful combination or conspiracy." The term "labor dispute" is broadly defined under section 13(c) to include "any controversy concerning terms or conditions of employment." In response to *Duplex Printing*, section 13(c) of Norris-LaGuardia expressly extends the scope of labor disputes beyond the "proximate relation of employer and employee." In the Norris-LaGuardia Act, Congress also announced the public policy of the United States favoring employees' freedom to engage in labor activities.

In *United States v. Hutcheson*, the Supreme Court interpreted the Norris-LaGuardia Act expansively to effectuate Congress' efforts to stop the use of the antitrust laws as a vehicle for interference in labor activities. The *Hutcheson* Court held that the interplay between the two Acts demonstrated Congress' intent to include the labor activities defined in the Norris-LaGuardia Act within section 20 of the Clayton

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1823. 254 U.S. 443 (1921).
1828. Id.
1830. 312 U.S. 219 (1941).
Act, thus exempting labor organizations from the antitrust act.\textsuperscript{1831} The Court articulated the rule that the statutory labor exemption to the antitrust laws under section 20 would apply "so long as a union acts in its self-interest and does not combine with non-labor groups."\textsuperscript{1832}

Despite the general rule denying antitrust exemption to union combinations with nonlabor groups, the Supreme Court has extended the statutory exemption to union regulation of independent contractors when the contractors' practices affect wages and working conditions of union members.\textsuperscript{1833} Under such circumstances the independent contractors are held to be "labor groups" involved in "labor disputes" within the meaning of the Norris-LaGuardia Act.\textsuperscript{1834}

In \textit{American Federation of Musicians v. Carroll},\textsuperscript{1835} the Supreme Court articulated the rule that independent contractors are "labor groups" involved in "labor disputes" if there is "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors."\textsuperscript{1836} In \textit{Carroll}, the Court upheld union regulations requiring independent booking agents to adopt certain business practices promulgated by the union. The agents were intermediaries through which union musicians obtained orchestra engagements. The \textit{Carroll} Court held that these agents had an "economic interrelationship" with the union musicians and that the union regulations were reasonably related to the union's interest in maintaining union wage scales.\textsuperscript{1837}

The Supreme Court applied the \textit{Carroll} test to union regulations imposed on theatrical agents similar to those involved in \textit{Carroll}. In \textit{H.A. Artists & Associates, Inc. v. Actors' Equity Association},\textsuperscript{1838} the agent regulation system, which was challenged as a violation of antitrust laws, was initially adopted by the union in 1928 to curtail the widespread agent abuses against union members. Essentially, the union required agents who represented union members to obtain union

\begin{itemize}
\item \textsuperscript{1831} \textit{Id.} at 236.
\item \textsuperscript{1832} \textit{Id.} at 232.
\item \textsuperscript{1835} 391 U.S. 99 (1968).
\item \textsuperscript{1836} \textit{Id.} at 106 (quoting Carroll v. American Fed'n of Musicians, 241 F. Supp. 865, 887 (1965)).
\item \textsuperscript{1837} \textit{Id.} at 115.
\item \textsuperscript{1838} 451 U.S. 704, 721-22 (1981).
\end{itemize}
licenses. The licenses established restrictions on agents' commissions, set scale wage levels for union members, provided for termination of agency contracts if the agents failed to procure employment for union members within a specified period of time, and required agents to pay franchise fees.\textsuperscript{1839} The Supreme Court held that agent regulations are included within the labor exemption to the antitrust laws.\textsuperscript{1840} The Court clarified the \textit{Carroll} test by confirming the rule that where no direct wage or job competition exists between the union and the group it regulates, the independent group is a labor group if "there is 'some . . . economic interrelationship affecting legitimate union interests.'"\textsuperscript{1841} The agents' role in the entertainment industry was the basis for the Court's conclusion that the economic interrelation test was satisfied.\textsuperscript{1842} The Court observed that agents are an essential vehicle through which union actors and actresses procure employment. They perform essentially the same services that unions perform for their members in most nonentertainment industries, such as negotiating wages, and terms and conditions of employment for the actresses and actors they represent. Furthermore, because agents' fees are a negotiated percentage of members' wages, the Court concluded that without union regulation of agency fees the union would be unable to maintain minimum wages for its members. It therefore held that the regulations fell within the labor exemption because they were necessary to ensure payment of minimum wages to union members.\textsuperscript{1843} The Court also held that the regulations promoted legitimate union interests.\textsuperscript{1844} Although the Supreme Court upheld the agency's regulatory scheme in \textit{H.A. Artists}, it held that the franchise fees levied upon the licensed agents were an impermissible component of the regulatory system.\textsuperscript{1845} The Court's decision appeared to be grounded both on its failure to find any cases holding that a union may impose fees on agents who represent union members\textsuperscript{1846} and on \textit{Carroll}, which did not expressly sanction union extraction of such fees. The union's claim that the fees served basic purposes of the system by covering its administration costs was held to be an inadequate justification. The Court sug-

\begin{itemize}
\item \textsuperscript{1839} \textit{Id.} at 709-10.
\item \textsuperscript{1840} \textit{Id.} at 714-15.
\item \textsuperscript{1841} \textit{Id.} at 721-22 (citing \textit{Carroll}, 391 U.S. at 106).
\item \textsuperscript{1842} 451 U.S. at 721-22.
\item \textsuperscript{1843} \textit{Id.} at 720 (citing \textit{Carroll}, 391 U.S. at 112).
\item \textsuperscript{1844} \textit{Id.} at 721.
\item \textsuperscript{1845} \textit{Id.} at 722.
\item \textsuperscript{1846} \textit{Id.} at 722 n.29.
\end{itemize}
gested that the revenues lost from discontinuing the fees could be offset by increasing members' dues. It also concluded that elimination of the franchise fees would not necessarily affect any legitimate union interest.\footnote{1847}

In a separate opinion, Justice Brennan\footnote{1848} concurred in all the majority's holdings with the exception of its treatment of the franchise fees. Brennan, instead, agreed with the Second Circuit's holding that the fee, which was incident to a legitimate regulatory scheme and commensurate in amount with the purpose for which it was sought, was consistent with the labor policies which justify the labor antitrust exemptions. Therefore, in Brennan's view, the fee system should also have been entitled to exemption from antitrust challenge.\footnote{1849}

In the final analysis, \textit{H.A. Artists} confirms the Supreme Court's position, first set forth in \textit{Carroll}, that union regulation of agents in the entertainment industry falls within the labor exemption from the federal antitrust laws. The Supreme Court in \textit{H.A. Artists}, however, went further than the \textit{Carroll} Court when it expressly excluded a union's extraction of fees covered by agents from the antitrust exemption afforded to regulatory schemes.

\textit{b. nonstatutory labor exemption}

As previously stated, the statutory labor exemption to the antitrust laws generally does not extend to union combinations with nonlabor groups.\footnote{1850} To effectuate the policy favoring collective bargaining agreements, however, a limited nonstatutory exemption is accorded to agreements between unions and employers which restrict competition in wages and working conditions.\footnote{1851} On the other hand, the antitrust exemption does not extend to union-employer agreements that allow employers to violate the antitrust laws.\footnote{1852}

More recently, in \textit{Connell Construction Co. v. Plumbers & Steamfitters Local 100} (1975), the Supreme Court upheld the validity of certain union-employer agreements that restricted competition in wages and working conditions.\footnote{1853} These agreements were found to be consistent with the labor policies which justify the labor antitrust exemption.

\begin{itemize}
  \item \textit{Connell Constr. Co. v. Plumbers & Steamfitters Local 100}, 421 U.S. 616, 622 (1975);
  \item \textit{UMW v. Pennington}, 381 U.S. 657, 662 (1965);
  \item \textit{Allen Bradley Co. v. Local 3, IBEW}, 325 U.S. 797, 811 (1945);
\end{itemize}
ters Local 100, the Supreme Court, in a five to four decision, refused to extend the nonstatutory antitrust exemption to union-employer agreements that excluded nonunion subcontractors from competing in the job market sought by the union. In Connell, the union was a party in a multiemployer bargaining agreement with a mechanical contractors association. At issue, however, was the union's effort to obtain agreements from the general building contractors to subcontract their mechanical work to mechanical subcontractors that had collective bargaining agreements with the union. Those general contractors who refused to sign the agreement were picketed into submission. Moreover, the union expressly disclaimed interest in organizing the current employees of the general contractors.

Although the union's organizational goals were legal, the Court held that the methods used were not immune from antitrust challenge. The union's method had the effect of sheltering members of the subcontractors association from outside competition in areas covered by the agreements between the union and the general contractors. The Court further found that competition would also be eliminated in those areas covered by the multiemployer agreement which were unrelated to wages, hours and working conditions. The union's success in obtaining agreements from general contractors would have given the union control over the market for mechanical subcontracting while those same agreements made nonunion subcontractors ineligible to compete for portions of the available work. The Court concluded that the anticompetitive effects of the agreements constituted a direct restraint on the market and contravened antitrust policies to an extent not justified by national labor policies.

In California State Council of Carpenters v. Associated General Contractors of California, Inc., the Ninth Circuit addressed an unusual case in which an employers' organization claimed antitrust immunity for its conspiracy against union subcontractors. Two unions in California State Council filed an antitrust action against an employers' organization, the Associated General Contractors of California (AGCC),

purchase equipment solely from union manufacturers who sold only to union contractors (created industry-wide price and wage increase).

1854. Id. at 619.
1855. Id. at 625.
1856. Id. at 623-25.
1857. Id. at 625.
alleging that the AGCC had conspired with other industry employers to boycott union signatory subcontractors. The district court viewed the unions' charge as one arising against an employer in a normal labor dispute and, therefore, dismissed the claim as unactionable under federal antitrust law.\textsuperscript{1859}

On appeal, the unions claimed that the AGCC's conduct was similar to that which subjected the union in \textit{Connell} to antitrust liability. The AGCC, however, maintained that employer conspiracies against unions are not subject to the antitrust laws. Even if actionable, AGCC claimed that its conduct fell within the labor antitrust exemption.\textsuperscript{1860}

The Ninth Circuit agreed with the unions' characterization of the AGCC's conduct as "virtually the obverse" of the \textit{Connell} situation in its attempt to coerce employers to hire only nonunion subcontractors.\textsuperscript{1861} The court therefore held that the \textit{Connell} rationale was equally applicable to permit cognizance of the unions' antitrust claim. It reasoned that AGCC's conduct constituted a potential restraint of trade by excluding union subcontractors from competing in a portion of the job market.\textsuperscript{1862}

The court further held that AGCC's activity did not fall within the labor antitrust exemption.\textsuperscript{1863} The exemption had never been extended to nonlabor groups' anticompetitive conduct.\textsuperscript{1864} The court concluded that such an extension would contravene the pro labor purpose behind the exemption.\textsuperscript{1865} The court observed that because the statutory labor exemption does not apply to union-nonlabor conspiracies, it should not extend to anticompetitive behavior on the part of employer groups acting alone.\textsuperscript{1866}

The AGCC's conspiracy was also found to be unentitled to the nonstatutory labor exemption to the antitrust laws.\textsuperscript{1867} The Ninth Circuit construed \textit{Connell} as limiting the nonstatutory labor exemptions to union-employer agreements concerning wages and working conditions. AGCC's conduct involved neither an agreement with a union nor wages or working conditions.\textsuperscript{1868}

\bibitem{1859}Id. at 529-30.
\bibitem{1860}Id. at 530.
\bibitem{1861}Id. at 532.
\bibitem{1862}Id.
\bibitem{1863}Id. at 533-34.
\bibitem{1864}Id. at 533.
\bibitem{1865}Id.
\bibitem{1866}Id.
\bibitem{1867}Id. at 536.
\bibitem{1868}Id.
In dissent, Judge Sneed voiced concern that the threat of antitrust liability might force all of the employers involved to sign collective bargaining agreements with the union.\textsuperscript{1869} He also disagreed with the majority's conclusion that the unions' claim was actionable under the antitrust laws. According to Judge Sneed, the only injury suffered by the unions was impairment of their organizational efforts to represent a greater portion of the work force.\textsuperscript{1870} Such injuries, he concluded, are actionable only under the labor laws.\textsuperscript{1871}

The AGCC's subsequent petition for a rehearing and rehearing en banc was denied. The denial of the petition was accompanied by an explanation designed to alleviate AGCC's fears that the decision might discourage multiemployer bargaining.\textsuperscript{1872} The court pointed out that a vast difference exists between employer agreements designed to promote collective bargaining and those that seek destruction of collective bargaining by denying union subcontractors access to the market.\textsuperscript{1873} The former type of employer agreement can be certified through NLRB and union approval. The court further pointed out that multiemployer agreements are not in themselves violations of antitrust laws. Only those with anticompetitive designs or effects can trigger antitrust liability.\textsuperscript{1874}

2. Union standing to bring private antitrust action

Section 4 of the Clayton Act\textsuperscript{1875} authorizes private antitrust actions for treble damages by "any person . . . injured in his business or property" resulting from a violation of the antitrust laws. This remedy was enacted to provide compensation for private injuries and to further the antitrust goal of free competition.\textsuperscript{1876}

Read literally, the statute grants relief to any person injured by reason of an antitrust violation. Unwilling to allow the vast litigation

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1869} Id. at 541 (Sneed, J., dissenting).
\item \textsuperscript{1870} Id. at 542.
\item \textsuperscript{1871} Id.
\item \textsuperscript{1872} Id. at 543.
\item \textsuperscript{1873} Id.
\item \textsuperscript{1874} Id. at 543-44.
\item \textsuperscript{1875} 15 U.S.C. § 15 (1976) provides in pertinent part:
\begin{quote}
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
\end{quote}
\item \textsuperscript{1876} In re Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974); In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 128 (9th Cir.), cert. denied, 414 U.S. 1045 (1973).
\end{enumerate}
\end{footnotesize}
envisioned by section 4's broad language, circuit courts have devised various standing doctrines restricting the availability of private antitrust actions. The Supreme Court, however, has offered no guidelines for antitrust standing, nor has it directly taken issue with the circuits over their restrictive readings of section 4.1877

The "direct injury" test employed by some circuits requires that the plaintiff suffer "direct" rather than remote or indirect injury from antitrust violations in order to have standing to sue.1878 This test tends to focus on the relationship between the antitrust violator and the victim, and denies standing to injured claimants who are separated from the violator by an intermediate victim. The Ninth Circuit has criticized this approach because it forecloses valid claims merely because of the presence of intermediate victims.1879 The tendency in some "direct injury" circuits to automatically deny standing to those labeled "creditor," "landlord," "lessor," "franchisor," and "supplier" has also been criticized.1880

The Third and Sixth Circuits have recently adopted a more flexible "zone of interests" test to determine antitrust standing.1881 Under this approach, standing is conferred on those who suffer injuries which are "arguably within the zone of interests to be protected" by the antitrust laws.1882 The Third Circuit has stated that the test is met if the "plaintiff is one 'whose protection is the fundamental purpose of the antitrust laws.'"1883 This approach seeks to lessen the plaintiffs' burden in establishing standing, and to further the underlying policy considerations of the antitrust laws.

1877. See, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972) (acknowledgment in dictum that "lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."); Perkins v. Standard Oil Co., 395 U.S. 642, 646-47 (1969) (while noting that Court of Appeals had denied recovery for similar incidental injuries from antitrust violations, Court allowed plaintiff recovery as principal victim of defendant's illegal pricing practices but no test for standing offered).


1880. Id.


The Ninth Circuit applies the "target area" test, which falls somewhere in between the stricter "direct injury" approach and the more lenient "zone of interests" test. Under the "target area" approach, a plaintiff has standing to sue if he or she is "within the target area of the antitrust violation" and "was not only hit, but was aimed at." More precisely, plaintiffs have standing if they are within the area of the economy which the antitrust violators reasonably could have foreseen would be adversely affected by their illegal activities.

Several circuits have held that unions may have standing to sue under the antitrust laws. Unions have been brought within section 4's injury to "business" on the theory that they are in the business of representing and organizing employees who may be injured by employer conspiracies directed against the union.

In California State Council of Carpenters v. Associated General Contractors, Inc., the Ninth Circuit applied the target area test to determine...
mine the unions’ standing to sue employers for treble antitrust damages. In *California State Council*, two unions brought an antitrust action against an employer organization’s alleged conspiracy to boycott subcontractors with collective bargaining agreements with the union.

The Ninth Circuit held that the unions had satisfied the target area test of standing. The unions’ complaint satisfied factual causation because it alleged that the employers’ conspiracy injured the unions’ business of organizing employees, negotiating and policing collective bargaining agreements, and obtaining employment for union members. Applying the target area test, the court held that the unions had standing to sue on the grounds that the injury to the unions’ business was not only foreseen by the employers, but was, in fact, the intended result of the boycott.

In a footnote, the court expressed its willingness to apply the more flexible “zone of interests” standing test introduced in the Third and Sixth Circuits. The court further suggested in footnotes that, in future cases, plaintiffs denied standing under the traditional target area test should still be given standing if to do so would further the policies underlying the antitrust laws.

In a dissenting opinion, Judge Sneed asserted that the injury to the unions’ organizational and representative efforts was not actionable under the antitrust laws. Although Judge Sneed cited no authority, he claimed that such injury to unions was actionable only under the labor laws. Therefore, the dissenting judge apparently espouses the position that unions do not have standing to sue under the antitrust laws.

According to Judge Sneed, only the union signatory employers who were victimized by the boycott had standing to sue because they were directly harmed by the boycott. He viewed the injury to the unions as analogous to the merely incidental injury which employees of a

speculativeness of the union’s alleged injury; and the nature of the union’s injury. *Id.* at 4145-46.

In a dissent, Justice Marshall, criticized the majority’s holding, asserting that it resulted in an unwarranted restriction of the broad remedial language of section 4 of the Clayton Act. *Id.* at 4147 (Marshall, J., dissenting). He particularly objected to the import of the majority’s decision in the instant case, i.e., foreclosing the intended victim of the conspiracy, the union, from proving its injury as a result of the antitrust violation. In Marshall’s view, antitrust violators should not escape liability merely because harm is indirectly rather than directly inflicted on the intended victim. *Id.* (Marshall, J., dissenting).

1889. 648 F.2d at 537.
1890. *Id.* at 538.
1891. *Id.* at 538 n.18.
1892. *Id.*
1893. *Id.* at 542 (Sneed, J., dissenting).
boyoccted employer might suffer. Therefore, he argued that allowing standing to the unions here would, in effect, also allow standing to the employees of the boycotted employers, a result which would be contrary to previous Ninth Circuit decisions which denied antitrust standing to injured employees.

Judge Sneed's attempt to analogize the unions' position in this case to that of employees who are incidentally injured by the boycott fails. His analysis ignores consideration of both the motive and the intended victim of the antitrust activity. The majority's finding that the unions were the target aimed at more accurately analyzes the situation.

The employers here were boycotted solely because of their union affiliation. By refusing union signatory employers access to the job market, the defendant employers were attempting to strike at the unions. By way of illustration, if one of the union employers managed to extricate itself from the collective bargaining agreement with the union, it would no longer be a target of the boycott. Conversely, a nonunion employer not previously boycotted would become a boycott target if it signed a collective bargaining agreement with one of the unions. Therefore, it does not follow that the unions' injury is merely an incidental, rather than intended, result of the boycott. More precisely, the unions were the primary target aimed at through the indirect route of the boycott of union employers.

Judge Sneed appears to favor an approach closer to the "direct injury" test of antitrust standing, at least for unions. On the other hand, the majority of the court indicated its preference for a more lenient standing test. As decided by the majority, furthermore, unions may be appropriate plaintiffs in private antitrust actions under the target area standing test in the Ninth Circuit.

3. Federal preemption over state antitrust laws

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, the Supreme Court addressed federal preemption of state antitrust laws in antitrust actions involving labor organizations. The Court set forth the rule that federal preemption is required when the union

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1894. *Id.* at 543.
1895. *See*, *E. & J. Gallo Winery Co.*, 604 F.2d 645, 646 (9th Cir. 1979) (farm-worker employees of grower-employer victimized by price discrimination denied standing because their alleged injury of reduced availability of work was too remote from activities of defendants); *Contreras v. Grower Shipper Vegetable Ass'n*, 484 F.2d 1346, 1347 (9th Cir. 1973) (standing denied to agricultural workers who claimed reduced work availability resulting from defendants' price fixing), *cert. denied*, 415 U.S. 932 (1974).
activity at issue "is closely related to [union] organizational goals."\textsuperscript{1897} This broad federal preemption in cases involving union organizational efforts was advocated because the federal antitrust statutes, unlike many state antitrust laws, have been specially tailored to create the proper accommodation between federal labor and antitrust policies in an effort to avoid conflict with the labor policy favoring employee organization.\textsuperscript{1898} The \textit{Connell} Court, however, did not completely foreclose the possibility that some union agreements with nonlabor groups may be subject to state antitrust laws. The controlling factor according to the Court "is the risk of conflict with the NLRA or with federal labor policy."\textsuperscript{1899}

In \textit{California State Council}, the Ninth Circuit relied on \textit{Connell} to hold that the unions' state antitrust claims against the employers' conspiracy were preempted by federal antitrust laws.\textsuperscript{1900} Although the court acknowledged that the \textit{Connell} holding was limited to union organizational activities, it found the \textit{Connell} reasoning equally applicable on the issue of preemption of the unions' state antitrust claims.\textsuperscript{1901} No further explanation was given for the court's cursory conclusion.

The court apparently attached no significance to the fact that it was presented with the reverse situation of that before the \textit{Connell} Court. \textit{Connell} involved an employer's antitrust action against a union, challenging its method of organization,\textsuperscript{1902} whereas \textit{California State Council} involved an antitrust suit brought by two unions against an employers' organization that was waging a boycott against union signatory employers.\textsuperscript{1903} The \textit{California State Council} court, furthermore, made no attempt to determine whether application of the state antitrust laws to the employer conspiracy would constitute a risk of conflict with federal labor policy. \textit{Connell} suggested that such an analysis should be applied where the challenged activity does not involve union organizational efforts. Without additional explanation, the \textit{California State Council} decision suggests that the Ninth Circuit has construed \textit{Connell} to give broad federal preemption of state antitrust laws whenever a labor union is a party to the suit.

\begin{flushright}
\textsuperscript{1897} \textit{Id.} at 637.  \\
\textsuperscript{1898} \textit{Id.} at 636.  \\
\textsuperscript{1899} \textit{Id.} at 637.  \\
\textsuperscript{1900} 648 F.2d at 540.  \\
\textsuperscript{1901} \textit{Id.}  \\
\textsuperscript{1902} 421 U.S. at 618-19.  \\
\textsuperscript{1903} 648 F.2d at 529. 
\end{flushright}
I. **Administration Of The Act**  
*Theodore A. Chester, Jr.*

II. **Unfair Labor Practices**  
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III. **The Representation Process And Union Elections**  
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VII. **Proceedings Under Other Acts**
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   D. *Steven K. Johnson*
   E. *Steven K. Johnson*
   F. *Lynn Lee*
   G. *Lynn Lee*
   H. *Lynn Lee*
   I. *Lynn Lee*
   J. *Lynn Lee*
   K. *Lynn Lee*