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

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LABOR LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS

National Labor Relations Act

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I. Administration of the Act

A. Jurisdiction

1. Definitions

a. confidential employees

The protections of the National Labor Relations Act (Act or NLRA) are conferred upon employees,¹ but the definition of employee is limited.² Although not expressly excluded by the Act, the National Labor Relations Board (Board) has excluded personnel who have a “confidential relationship” with management from bargaining units.³ The rationale behind this rule is that employees should not be placed in a position which may create potential conflicts of interest between the employer and the union.⁴

The United States Supreme Court in *NLRB v. Hendricks County*

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

(3) The term “employee” shall include any employee and shall not be limited to
the employees of a particular employer, unless this subchapter explicitly states
otherwise, and shall include any individual whose work has ceased as a conse-
quence of, or in connection with, any current labor dispute or because of any un-
fair labor practice, and who has not obtained any other regular and substantially
equivalent employment, but shall not include any individual employed as an agri-
cultural laborer, or in the domestic service of any family or person at his home, or
any individual employed by his parent or spouse, or any individual having the
status of an independent contractor, or any individual employed as a supervisor, or
any individual employed by an employer subject to the Railway Labor Act, as
amended from time to time, or by any other person who is not an employer as
herein defined.

² *Id.*

³ See *Union Oil Co. v. NLRB*, 607 F.2d 852, 853 (9th Cir. 1979); *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956); *Ford Motor Co.*, 66 N.L.R.B. 1317, 1318-22 (1946); *Hoover Co.*, 55 N.L.R.B. 1321, 1322-23 (1944).

⁴ Union Oil Co. v. NLRB, 607 F.2d at 853; *Westinghouse Elec. Corp. v. NLRB*, 398 F.2d 669, 670 (6th Cir. 1968); *Retail Clerks Ass’n v. NLRB*, 366 F.2d 642, 645 n.7 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967).
Rural Electric Membership Corp., 5 addressed the issue of whether an employee with mere access to confidential information of his/her employer is impliedly excluded from the definition of "employee" as found in section 2(3) of the Act 6 and thus denied all protections under the Act. A conflict among the circuit courts of appeals had developed challenging the propriety of "the Board's practice of excluding from collective bargaining units only those confidential employees with a 'labor-nexus,' while rejecting any claim that all employees with access to confidential information are beyond the reach of section 2(3)'s definition of 'employee.'"

The labor-nexus test excludes from bargaining units, and thus the protection of the NLRA, only those confidential employees "who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." 7 Under this test, the central inquiry is whether the employee is in a confidential work relationship with a managerial employee responsible for formulating and effectuating labor policy. 9 The criteria for the labor-nexus test are cumulative and both must be met; that is, the confidential relationship must exist between the employer and a managerial employee and the managerial employee must be responsible for labor policy if an employee is to be considered a confidential employee under this rule.

In Hendricks, the Court granted the Board's petition for certiorari to determine whether the United States Court of Appeals for the Sev-

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6. See supra note 1 for text of § 2(3).
7. 454 U.S. at 176. Compare Union Oil Co. of Cal. v. NLRB, 607 F.2d 852, 853-54 (9th Cir. 1979) (computer operators not confidential employees despite alleged access to restricted company information); NLRB v. Allied Prods. Corp., 548 F.2d 644, 648 (6th Cir. 1977) (secretaries are not confidential employees unless the managers for whom they work are sufficiently engaged in labor-management negotiations); Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669, 671 (6th Cir. 1968) (secretary to management personnel participating in labor matters only to extent of furnishing factual data regarding their immediate responsibilities was not a confidential employee); NLRB v. Armour & Co., 154 F.2d 570, 573-74 (10th Cir. 1945) (employees with knowledge of a confidential nature that if disclosed to competitors might result in injury to employer, does not constitute confidential employee status) with NLRB v. Quaker City Life Ins. Co., 319 F.2d 690, 694 (4th Cir. 1963) (inclusion in bargaining unit of office clerk in privity to confidential communications concerning labor relations was improper); NLRB v. Poultrymen's Serv. Corp., 138 F.2d 204, 210-11 (3d Cir. 1943) (secretary who may have access to confidential information pertaining directly to the labor relations of her employer is a confidential employee).
9. Union Oil Co. v. NLRB, 607 F.2d 852, 853 (9th Cir. 1979).
enth Circuit correctly relied on language from a footnote in *NLRB v. Bell Aerospace Co.*\(^\text{10}\) to reject the labor-nexus test in favor of a finding that all employees with mere access to confidential business information of their employers must be excluded from the protections of the Act.\(^\text{11}\) Respondent employers argued that the legislative history surrounding the 1947 Taft-Hartley Amendments to the Act disapproved of the Board's pre-amendment practice of applying the labor-nexus test and that the test had been applied inconsistently.\(^\text{12}\)

The Supreme Court held that the Board's application of the labor-nexus test was proper and should be applied to determine whether individuals are to be excluded from bargaining units as confidential employees.\(^\text{13}\) In rejecting respondents' contentions, the Court emphasized the Board's pre-amendment practice of consistently applying the labor-nexus test\(^\text{14}\) and concluded that nothing in the Taft-Hartley Act's legislative history supported any inference that Congress intended to alter or disapprove of the Board's pre-amendment policy.\(^\text{15}\) The Court also

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\(^{10}\) 416 U.S. 267, 283-84 n.12 (1974). Footnote 12 states in pertinent part:

In 1946 in *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

\(^{11}\) See *Hendricks County Rural Elec. Membership Corp. v. NLRB*, 627 F.2d 766 (7th Cir. 1980) (*Hendricks I*), and *Malleable Iron Range Co. v. NLRB*, 631 F.2d 734 (7th Cir. 1980). The Seventh Circuit had rejected the Board's application of the labor-nexus test in *Hendricks County Rural Elec. Membership Corp.*, 236 N.L.R.B. 1616, 1619 (1978), and held that all secretaries working in a confidential capacity, even though not assisting in labor relations, must be excluded from the Act. *Hendricks*, 603 F.2d 25, 30 (7th Cir. 1979) (*Hendricks I*). On remand, 247 N.L.R.B. 498 (1980), the Board once again applied the labor-nexus test to which the court of appeals denied enforcement. *Hendricks*, 627 F.2d at 770 (Hendricks II). Similarly, in *Malleable Iron Range Co. v. NLRB*, 631 F.2d 766 (7th Cir. 1980), an unreported opinion, the Seventh Circuit denied enforcement of the Board's finding in *Malleable Iron Range Co.*, 244 N.L.R.B. 485 (1979), in which the Board had applied the labor-nexus test and refused to exclude eighteen employees from a collective bargaining unit because they had access to confidential business information. *Id.* *See Hendricks*, 454 U.S. at 175.

\(^{12}\) 454 U.S. at 173-74, 177.

\(^{13}\) *Id.* at 176.

\(^{14}\) *Id.* at 179-80. The Court cited over fifty NLRB cases decided between 1941 and 1946 in which the Board applied the labor-nexus test to identify those individuals to be classified as confidential employees. *Id.* at 179-80, nn.11-12.

\(^{15}\) 454 U.S. at 181-83. The Court explained that when the NLRA was amended, both the Senate and the House of Representatives proposed definitions of "employee." *Id.* at 181; S. 1126, 80th Cong., 1st Sess. § 2(3) (1947); H.R. 3020, 80th Cong., 1st Sess. § 2(3) (1947).
found that the footnote in *Bell Aerospace* was mere dictum that could not be squared with congressional intent.\(^6\)

The Court found no merit to the argument that the Board had applied the labor-nexus test inconsistently.\(^7\) To the contrary, a review of the Board's decisions demonstrated that the Board had consistently applied the labor-nexus criterion for over 40 years and had never followed a practice of excluding all employees with mere access of confidential business information "from the full panoply of rights afforded by the Act."\(^8\)

Four Justices,\(^9\) while concurring with the Court's holding that employees with mere access to confidential information of their employers should not, for that reason, be excluded from the NLRA as confidential employees,\(^10\) dissented from the Court's application of the labor-nexus test to executive secretaries.\(^11\) The dissenting Justices emphasized that "a basic purpose of the Taft-Hartley Act was to establish a sharp line between management and labor"\(^12\) and that the labor-nexus test is but a means to achieve that end.\(^13\) Mr. Justice Powell rejected the Board's adherence to the labor-nexus test in the cases of confidential secretaries, arguing that the labor-nexus, as it now standards, "is antithetical to any common-sense view or understanding of the role of confidential secretaries."\(^14\)

### b. supervisors

Unlike confidential employees, the NLRA specifically excludes supervisors\(^15\) from its protections, privileges and benefits.\(^16\) The Ninth

\[\text{Both Houses explicitly excluded "supervisor" from the definition of "employee"; however, only the House proposal included confidential employees within its definition of supervisor. 454 U.S. at 181-82. The Senate proposal, containing no reference to confidential employees, prevailed and was subsequently adopted. Id. at 183-84; 93 CONG. REC. 6393 (1947) (House); id. at 6536 (Senate).}\]

\[\text{16. 454 U.S. at 186-87; see supra note 10.}\]

\[\text{17. 454 U.S. at 188.}\]

\[\text{18. Id. at 189; but see Pullman Standard Div. of Pullman, Inc., 214 N.L.R.B. 762 (1974), where the Board included persons with regular "access to confidential information concerning anticipated changes which may result from collective bargaining negotiations" as confidential employees. 214 N.L.R.B. at 762-63.}\]

\[\text{19. Justice Powell, the Chief Justice, Justice Rehnquist, and Justice O'Connor, joined, concurring in part and dissenting in part.}\]

\[\text{20. 454 U.S. at 192.}\]

\[\text{21. Id.}\]

\[\text{22. Id. at 193.}\]

\[\text{23. Id. at 194.}\]

\[\text{24. Id. at 196-97.}\]

Circuit has advanced the position that an individual is a supervisor under the meaning of section 2(11) if he or she exercises any one of the powers enumerated in that section and uses independent judgment in conjunction with the exercise of the power.\footnote{Walla Walla Union-Bulletin, Inc. v. NLRB, 631 F.2d 609, 613 (9th Cir. 1980); NLRB v. St. Francis Hosp., 601 F.2d 404, 420 (9th Cir. 1979).} At the same time, however, the Board must not construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights.\footnote{McDonnell Douglas Corp. v. NLRB, 655 F.2d 932, 935-36 (9th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); accord Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir.), cert. denied, 400 U.S. 831 (1970).} Thus, occasional and limited acts of supervision do not necessarily establish the existence of a supervisory power.\footnote{In re Bel Air Chateau Hosp., Inc., 611 F.2d 1248, 1252 (9th Cir. 1979) (occasional and limited acts of supervision do not necessarily establish the existence of a supervisory power); accord NLRB v. Security Guard Serv., Inc., 384 F.2d 143, 146-47 (5th Cir. 1967).} Applying these rules to the specific facts in \textit{NLRB v. Dick Seidler Enterprises},\footnote{666 F.2d at 385 (quoting Walla Walla Union-Bulletin, Inc. v. NLRB, 631 F.2d at 613).} the Ninth Circuit upheld the Board's finding that a head bartender was not a supervisor, even though his duties included hiring, firing, training, evaluating, disciplining and scheduling employees, ordering, inventorying, receiving a salary and bonus, and possessing keys.\footnote{Id. at 385; compare note 15, supra.} The court justified its decision by emphasizing that judicial deference to the Board's expertise is particularly compelling when distinguishing between employees and supervisors, because the distinctions to be made are "so infinite and subtle" that they necessitate the Board's experience and informed discretion.\footnote{Id. at 385; compare note 15, supra.}

\textbf{c. political subdivisions}

Although the NLRA expressly excludes certain "employers" from its protections, state or federal political subdivisions are not included within the definition of employer,\footnote{Section 2(2) of the Act, 29 U.S.C. § 152(2) (1976), provides: (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political} and as such, employees of political
subdivisions are not included within the coverage of the NLRA.\textsuperscript{34}

In Ayres \textit{v}. International Brotherhood of Electrical Workers,\textsuperscript{35} the Ninth Circuit applied the "public entity" test used by the United States Supreme Court in \textit{NLRB v. Natural Gas Utility District},\textsuperscript{36} to determine whether a public utility district should be classified as a political subdivision. The test requires that the entity in question be "administered by individuals who are responsible to public officials or to the general electorate."\textsuperscript{37}

In \textit{Ayres}, the court upheld the Board's finding that the public utility district in question\textsuperscript{38} was a political subdivision in that the utility district is formed by a vote of the public under the authority of state law; its commissioners are elected and subject to recall; it holds public meetings and adopts its budget subject to public hearings; it is granted the power of eminent domain, and its revenue is exempt from federal taxation.\textsuperscript{39} Thus, employees of the public utility district were not entitled to coverage under the NLRA nor under the Labor Management Relations Act.\textsuperscript{40}

The definition of "employees"\textsuperscript{41} expressly provides that employees protected by the Act "shall not be limited to the employees of a particular employer."\textsuperscript{42} Accordingly, the Ninth Circuit in \textit{NLRB v. Villa

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\textsuperscript{34} Section 2(3) of the Act, 29 U.S.C. § 152(3) (1976), provides in pertinent part: "(3) The term 'employee' shall include any employee, . . . but shall not include any individual employed . . . as a supervisor, or by any . . . person who is not an employer as herein defined."

\textsuperscript{35} 666 F.2d 441 (9th Cir. 1982).

\textsuperscript{36} 402 U.S. 600 (1971).

\textsuperscript{37} \textit{Id.} at 605 (citing \textit{Natural Gas Util. Dist.}, 167 N.R.L.B. 691, 691-92 (1967)).

\textsuperscript{38} Clark County, Washington, Public Utility District of which the plaintiff, William Ayres, was an employee. 666 F.2d at 442.

\textsuperscript{39} 666 F.2d at 442.

\textsuperscript{40} Subchapter II of the LMRA was enacted in 1935 as the Wagner Act, commonly referred to as the NLRA. In section 2 of Subchapter II, 29 U.S.C. § 152(2), "employer," see supra note 33, and "employee," 29 U.S.C. § 152(3), see supra note 1, are defined. Political subdivisions of states are expressly excluded from the definition of employer. See supra note 33, and accompanying text. The remainder of the LMRA was enacted in 1947 (the Taft-Hartley Act) and it adopted by reference the definitional provisions of the 1935 Act. Thus, section 501, 29 U.S.C. § 142, states in part: "(3) The terms 'commerce,' 'labor disputes,' 'employer,' 'employee,' 'labor organization,' . . . shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter."

\textsuperscript{41} See supra note 1 and accompanying text.

\textsuperscript{42} \textit{Id.}
Avila,\(^43\) decided that when union workers are brought onto a construction worksite to perform subcontracts, the union employees are entitled to the rights and protections of the Act.\(^44\) In Villa Avila, nonunion general contractors refused union representatives permission to enter the construction sites to visit union workers who had been brought on the premises to perform subcontracts.\(^45\) The court held that the union workers were entitled to the protections of the Act, and that the rights and protections of the Act attach even if the general contractor in charge of the worksite is nonunion and is not the primary employer of the union employees.\(^46\)

In addition to the express provisions of the Act, various tests have developed to determine whether a person is an employee within the meaning of section 2(3) of the Act.\(^47\) In determining whether a person is an independent contractor or has achieved employee status, the standard followed by the Ninth Circuit is the "common law agency test."\(^48\) This test focuses on the degree of control to which the employee is subject.\(^49\)

In General Teamsters Local 162 v. Mitchell Brothers Truck Lines,\(^50\) the Ninth Circuit reviewed the standard applied by an arbitrator in determining whether workers who owned and operated their own trucking equipment were independent contractors or employees.\(^51\) In Mitchell Brothers, the employer trucking company transported goods in intra and interstate commerce, employing a substantial number of tractors leased from owner-operators to carry its freight. In addition, the employer maintained its own fleet of tractors driven by company employees.\(^52\) A dispute arose when the employer announced that the owner-operators would not be required to maintain union membership,
and thus, the employer would not withhold contributions for health, welfare and pension benefits from their pay.\textsuperscript{53} The arbitrator determined that the owner-operators were employees and thus subject to the provisions of the Act.\textsuperscript{54}

The Ninth Circuit held that the arbitrator's finding of employee status was proper, even though it did not expressly rely on the common law agency test and was allegedly based upon an erroneous standard.\textsuperscript{55} The Ninth Circuit found that the common law agency test had indeed been met, since the result reached by the arbitrator was the same as if the common law agency test had been used.\textsuperscript{56} Thus, the arbitrator's reliance on the outdated standard was of no consequence and was simply an instance "of nothing more than doing the right thing for the wrong reason."\textsuperscript{57}

In addition to determining employee status, the courts have developed tests to determine employer status within the meaning of section 2(2) of the Act. To determine whether two businesses are alter egos, and thus a single employer for the purposes of the Act, the Ninth Circuit follows the test promulgated by the United States Supreme Court in \textit{Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc.},\textsuperscript{58} which requires (1) centralized control of labor relations; (2) common management; (3) interrelation of operations; and (4) common ownership and financial control.\textsuperscript{59} The Ninth Circuit had repeatedly held, and affirmed in \textit{J.M. Tanaka Construction, Inc. v. NLRB},\textsuperscript{60} that none of these factors is controlling and all need not be present,\textsuperscript{61} but that the single most important factor is centralized control of labor relations.\textsuperscript{62}

In \textit{Tanaka}, a family owned construction company, J.M. Tanaka, closed down operations and discharged its workers as a result of heavy

\textsuperscript{53} Id. at 765.
\textsuperscript{54} Id.
\textsuperscript{55} The arbitrator based his determination of employee status on the outdated standard of \textit{NLRB v. Hearst Publications}, 322 U.S. 111 (1944). The arbitrator made the following statement concerning the classification of the employees: "The degree of control which a Carrier has a right to exercise will determine the outcome." 682 F.2d at 766.
\textsuperscript{56} 682 F.2d at 766.
\textsuperscript{57} Id.
\textsuperscript{58} 380 U.S. 255, 256 (1965) (per curiam). \textit{See also} \textit{NLRB v. Lantz}, 607 F.2d 290, 295 (9th Cir. 1979); \textit{Los Angeles Marine Hardware Co. v. NLRB}, 602 F.2d 1302, 1305 (9th Cir. 1979); \textit{NLRB v. Don Burgess Constr. Corp.}, 596 F.2d 378, 384 (9th Cir. 1979).
\textsuperscript{59} 380 U.S. at 256.
\textsuperscript{60} 675 F.2d 1029 (9th Cir. 1982).
\textsuperscript{61} Id. at 1033; \textit{accord} \textit{Los Angeles Marine Hardware Co. v. NLRB}, 602 F.2d at 1305.
\textsuperscript{62} 675 F.2d at 1034; \textit{accord} \textit{NLRB v. Lantz}, 607 F.2d at 295; \textit{NLRB v. Don Burgess Constr. Corp.}, 596 F.2d at 384.
financial losses.\textsuperscript{63} One month prior to the closure, the president of J.M. Tanaka incorporated another construction company, R.M. Tanaka, and subsequently acquired the bulk of J.M. Tanaka's equipment and hired many former J.M. Tanaka employees including all of J.M. Tanaka's engineers.\textsuperscript{64} R.M. Tanaka, however, refused to honor an existing collective bargaining agreement between J.M. Tanaka and the engineer's union, an agreement which had two years remaining.\textsuperscript{65}

To determine whether R.M. Tanaka was required to recognize the union and honor its agreement depended on whether the two companies were alter egos.\textsuperscript{66} The Ninth Circuit upheld the Board's finding that the two construction companies were alter egos, and thus constituted a single employer within the meaning of the Act.\textsuperscript{67} The court found that substantial evidence supported findings that a single person controlled labor relations,\textsuperscript{68} that the two companies shared common management,\textsuperscript{69} and that a close interrelation between the operations of the two companies existed.\textsuperscript{70} The element of common ownership was questionable in that R.M. Tanaka was solely owned, whereas J.M. Tanaka was owned by approximately twenty-two individuals.\textsuperscript{71} However, the court held that, although important, common ownership is but one of a number of factors and not a necessary prerequisite to an alter ego finding.\textsuperscript{72} The court indicated that, in this case, since both companies were still family owned and dominated, the common ownership factor should not be the turning point in a finding of alter ego status.\textsuperscript{73}

\textsuperscript{63} 675 F.2d at 1032.
\textsuperscript{64} \textit{Id}. at 1032-33.
\textsuperscript{65} \textit{Id}.
\textsuperscript{66} \textit{Id}. at 1033.
\textsuperscript{67} \textit{Id}. at 1035.
\textsuperscript{68} \textit{Id}. at 1034. Testimony at the hearing indicated that Takeo Wakida, the former general manager of J.M. Tanaka and the vice-president of R.M. Tanaka, and Raymond Tanaka, president of both companies and sole owner of R.M. Tanaka, were jointly responsible for labor relations at both companies. \textit{Id}.
\textsuperscript{69} \textit{Id}. Despite the fact that J.M. Tanaka was a statewide operation and R.M. Tanaka's activities were local in nature, the court found that the two corporations shared common management in that Wakida and Tanaka were also in charge of management of both companies. \textit{Id}.
\textsuperscript{70} \textit{Id}. R.M. Tanaka took over J.M. Tanaka's complete "office and staff, shop, asphalt plant, quarry, supervisors . . . engineers and virtually all of its other employees." In addition, R.M. Tanaka acquired almost 100 per cent of J.M. Tanaka's equipment and succeeded J.M. Tanaka on two unfinished projects. \textit{Id}.
\textsuperscript{71} \textit{Id}. at 1034-35.
\textsuperscript{72} \textit{Id}. at 1035.
\textsuperscript{73} \textit{Id}.
2. Concurrent jurisdiction

Generally, suits involving unfair labor practice charges come under the exclusive jurisdiction of the NLRB, whereas the federal district courts have primary jurisdiction for claims of breach of collective bargaining agreements. Jurisdictional conflicts arise when the NLRB and the district courts share concurrent jurisdiction in cases legitimately involving both types of disputes.

In *Northern California District Council of Hod Carriers v. Opinski,* a union filed suit in district court claiming a violation of a collective bargaining agreement which was closely related to an unfair labor practice charge that the employer had already presented to the NLRB. In such circumstances, the Ninth Circuit has indicated that the district court must exercise its discretion to determine whether judicial proceedings should be stayed until final disposition of the action before the Board. Often, appropriate deference to the Board's expertise requires a stay of the district court's proceedings. In *Opinski,* however, the district court dismissed the union's claim without prejudice. The Ninth Circuit held that no abuse of discretion would have occurred had the district court stayed the action until resolution of the NLRB litigation. But, by relinquishing its jurisdiction, the district court had abused its discretion and had exceeded its authority. Thus, a stay of

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74. 29 U.S.C. § 160(a) (1976) provides in part: "[t]he Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

75. Suits for violation of contracts between an employer and a labor organization


78. 673 F.2d 1074 (9th Cir. 1982).

79. 673 F.2d at 1075 (citing *Orange Belt Dist. Council of Painters No. 48 v. Maloney Specialties, Inc.,* 639 F.2d 487, 489-90 (9th Cir. 1980)).

80. 673 F.2d at 1076; see, e.g., *Santa Fe Land Improvement Co. v. Chula Vista,* 596 F.2d
proceeding is the proper action to be taken when a court suspends proceedings to give preliminary deference to an independent adjudicating body and further judicial proceedings are contemplated.\textsuperscript{81}

3. Non-profit organizations

Section 10(a) of the National Labor Relations Act empowers the Board to prevent the commission of unfair labor practices by “any person . . . affecting commerce.”\textsuperscript{82} Subject to specific exemptions, this gives the Board the broadest jurisdiction permitted under the commerce clause.\textsuperscript{83} Since the Act does not specifically exempt non-profit organizations, the Board, with court approval, has asserted jurisdiction over non-profit charitable and religious organizations engaged in commerce.\textsuperscript{84} However, in \textit{NLRB v. Catholic Bishop of Chicago},\textsuperscript{85} the United States Supreme Court held that the Board had no jurisdiction over teachers in church-operated schools because of the delicacy of first amendment issues involved in religious expression.\textsuperscript{86}

In \textit{NLRB v. Southeast Association for Retarded Citizens, Inc.},\textsuperscript{87} and \textit{NLRB v. World Evangelism, Inc.},\textsuperscript{88} the Ninth Circuit explored the Board’s jurisdictional power over non-profit organizations in light of \textit{Catholic Bishop}. In \textit{Southeast}, an incorporated non-profit association established to train handicapped citizens, was charged with unfair labor practices. The association challenged the Board’s jurisdiction contending that Congress did not intend for the Board to exercise jurisdiction over non-profit organizations except in “extraordinary circumstances.”\textsuperscript{89} The court recognized \textit{Catholic Bishop} as a limit on the Board’s discretion in exercising its statutory jurisdiction, but found that the first amendment was not in issue in \textit{Southeast}.\textsuperscript{90} Thus, \textit{Catholic Bishop} did not interfere with the Board’s longstanding policy of assert-
ing jurisdiction over non-profit organizations.\textsuperscript{91}

The court recognized that although the Board's policy had once been to decline jurisdiction over non-profit organizations unless such organizations had a "massive impact" on commerce, the Board had re-evaluated its policy when Congress deleted the non-profit hospital exemption from the Act.\textsuperscript{92} By doing so, "Congress appear[ed to agree] that non-profit institutions 'affect commerce'. . . ."\textsuperscript{93} Thus, the Ninth Circuit found that the Board and the courts have consistently held that the Board has jurisdiction over any enterprise with more than a "de minimus impact on the flow of interstate commerce."\textsuperscript{94} In fact, the Board has established jurisdictional guidelines expressed as a dollar amount of business volume for use in determining whether it will assert jurisdiction over an enterprise: the guideline for non-retail enterprises such as Southeast is purchases or sales of, at least, $50,000 annually.\textsuperscript{95} Relying on the Supreme Court's decision in \textit{NLRB v. Reliance Fuel Oil Corp.},\textsuperscript{96} the Ninth Circuit explicitly rejected Southeast's argument that the Board could only assert jurisdiction over an enterprise directly selling or purchasing goods out of state,\textsuperscript{97} and held that Southeast's interstate sales in excess of $50,000 were sufficient to establish the Board's jurisdiction.\textsuperscript{98}

In \textit{World Evangelism}, the Ninth Circuit specifically addressed the issue of the Board's jurisdiction infringing first amendment rights. The NLRB sought enforcement of its order against World Evangelism, Inc.
(WEI), a non-profit organization which, after acquiring a building complex occupying a city block,\textsuperscript{99} unilaterally altered the terms of a pre-existing employees' contract and refused to bargain with the employees' union.\textsuperscript{100}

The Ninth Circuit held that a finding of Board jurisdiction would not conflict with the Court's holding in \textit{Catholic Bishop} in that the Board had long asserted jurisdiction over non-profit religious organizations engaged in commerce,\textsuperscript{101} whereas in \textit{Catholic Bishop}, the Board had only recently reversed itself and asserted jurisdiction over private schools and Congress had not had a chance to pass upon the Board's action.\textsuperscript{102} Additionally, the court found that the Act's role of promoting labor peace clearly outweighed the minimal infringement on WEI's freedom of operation in that WEI had failed to show that recognizing a union would "significantly impede WEI's ability to propagate its beliefs."\textsuperscript{103}

Finally, using a method of computation similar to that in \textit{South-east},\textsuperscript{104} WEI was found to engage in sufficient commercial activities to qualify it within the Board's jurisdictional guidelines.\textsuperscript{105}

\textsuperscript{99} WEI acquired the El Cortez Center consisting of three motels, a swimming pool, a convention center and a tower containing offices, hotel rooms and restaurants. In addition, WEI adopted the previous owner's contracts with two interstate airlines to provide hotel rooms on a priority basis for flight crews and leased out 25,000 square feet to eighteen commercial tenants. 656 F.2d at 1351.

\textsuperscript{100} Id. at 1351-52. Before acquiring the center, WEI decided to retain between five and nine operating engineers whose contracts with the previous owner were still in effect. WEI refused to bargain with the engineers' union, paid the engineers lower than contract wages and failed to contribute to fringe benefit trusts. \textit{Id.} at 1351-53.

\textsuperscript{101} 656 F.2d at 1353 (citing Christian Bd. of Publications, 13 N.L.R.B. 534, 537 (1939), \textit{enforced}, 113 F.2d 687 (8th Cir. 1940)).

\textsuperscript{102} 440 U.S. at 497-98, 505-06.

\textsuperscript{103} 656 F.2d at 1354. "Requiring WEI to recognize a union would not contravene its religious tenets. Nor would WEI's religious tenets compel it to commit an unfair labor practice." \textit{Id.} See St. Elizabeth Community Hosp. v. NLRB, 626 F.2d 123, 128-29 (9th Cir. 1980) (Sneed, J., dissenting). \textit{See also} Yott v. North American Rockwell Corp., 501 F.2d 398, 403-04 (9th Cir. 1974) (clause requiring union membership of Seventh Day Adventist not unconstitutional); Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883, 890 (D.C. Cir. 1970) (applying Act to employer with religious objections to collective bargaining not unconstitutional). \textit{But cf} Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1123-25 (7th Cir. 1977) \textit{aff'd on other grounds}, 440 U.S. 490 (1979) (unconstitutional to apply Act where unionization would inhibit a religious group's ability to propagate its beliefs).

\textsuperscript{104} \textit{See supra} note 9 and accompanying text. The jurisdictional guideline for motel operations is $500,000 annual gross revenue. NLRB v. Cofer, 627 F.2d 1309, 1312 (9th Cir. 1981); Floridian Hotel of Tampa, Inc., 124 N.L.R.B. 261, 264 (1959). WEI stipulated that its motel receipts would exceed $500,000 annually. 656 F.2d at 1353.

\textsuperscript{105} 656 F.2d at 1353. Additionally, WEI concluded that while its long-range plan was to use the center exclusively for religious purposes, at the present time, such use was not feasible.
B. Procedure Under the Act

1. Quorums

Section 3(b) of the Act authorizes the Board to delegate any and all of its powers to any group of three or more members, and that “two members shall constitute a quorum” for any group so designated. In *Photo-Sonics, Inc. v. NLRB*, the Ninth Circuit rejected the contention that the three-member panel’s decision was unenforceable because one member’s resignation became effective on the same day the decision was issued. The court, by analogy to the practices of federal courts of appeals, interpreted “quorum” to mean the “number of members of the court as may legally transact judicial business.” Thus, the panel’s decision was enforceable because a quorum of two panel members supported the decision.

2. Due Process

a. complaints

Section 10(b) of the Act provides that an action must be brought within six months of the events which are the subject of the complaint. However, an ALJ has the discretion to allow amendment of a complaint during the proceedings. Amendments closely related to the original charges are deemed filed at the time the original complaint was filed.
is issued.\textsuperscript{113}

In \textit{J.M. Tanaka Construction, Inc. v. NLRB},\textsuperscript{114} the Ninth Circuit upheld an ALJ's decision to allow an amendment to the complaint which, if denied, would have been time-barred by section 10(b).\textsuperscript{115} The amendment charged the employer with unlawfully coercing employees to sign an agreement that the company was nonunion. The court found that the amendment was sufficiently related to the unfair labor practices charges in the underlying complaint. Thus the ALJ had not abused his discretion nor had the employer's procedural due process rights been violated.\textsuperscript{116}

It is well settled in the Ninth Circuit that the Board may find an unfair labor practice not specifically pleaded in the original complaint, where the issue has been fully and fairly litigated at the administrative hearing.\textsuperscript{117} Actions before the Board are not subject to the technical pleading requirements of private lawsuits and need not be technically precise if they generally inform the party charged of the nature of the alleged violations.\textsuperscript{118}

Following this firmly established principle, the Ninth Circuit in \textit{Industrial, Technical & Professional Employees Division v. NLRB},\textsuperscript{119} rejected an employer's claim that it was denied due process by the litigation of matters outside the scope of the complaint. The court found that the complaint sufficiently informed Monfort of the charges against it, despite Monfort's allegations of surprise.\textsuperscript{120} Moreover, Monfort's failure to object to the evidence presented and its "extensive cross-ex-

\textsuperscript{113} See NLRB v. Fant Milling Co., 360 U.S. 301 (1959); NLRB v. Jack La Lanne Management Corp., 539 F.2d 292, 295 & n.1 (2d Cir. 1976).

\textsuperscript{114} 675 F.2d 1029 (9th Cir. 1982).

\textsuperscript{115} The alleged unfair labor practices occurred in October, 1978. The original complaint was filed February 5, 1979, and the proposed amendment was offered at the second day of the hearing—beyond the six-month time limit allowable under section 10(b). 675 F.2d at 1036.

\textsuperscript{116} Id. The employer in the original complaint was charged with violation of section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), i.e., unilateral withdrawal of recognition from the union and repudiation of an existing collective bargaining agreement, failure to make fringe benefit payments to the union, and interrogation of employees regarding union activities and sympathies. 675 F.2d 1032-33.

\textsuperscript{117} Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721, 728 (9th Cir. 1980), \textit{cert. denied}, 451 U.S. 984 (1981); Olympic Medical Corp., 608 F.2d 762, 763 (9th Cir. 1979); e.g., NLRB v. International Ass'n of Bridge Workers Local 433, 600 F.2d 770, 775-76 (9th Cir. 1979), \textit{cert. denied}, 445 U.S. 915 (1980); Alexander Dawson, Inc. v. NLRB, 586 F.2d 1300, 1304 (9th Cir. 1978) (per curiam); NLRB v. Klaue, 523 F.2d 410, 414-15 (9th Cir. 1975); Frito Co. v. NLRB, 330 F.2d 458, 465 (9th Cir. 1964).

\textsuperscript{118} NLRB v. Carilli, 648 F.2d 1206, 1210 (9th Cir. 1981).

\textsuperscript{119} 683 F.2d 305 (9th Cir. 1982).

\textsuperscript{120} Id. at 307-08.
amination" of witnesses concerning the alleged "surprise" facts negated its claim of prejudicial surprise and demonstrated that the issues had been fully and fairly litigated at the hearing.121

b. continuances

The grant or denial of a continuance is clearly within the discretion of the ALJ and will not be overturned absent a clear showing of abuse.122 Such abuse is found only where the exercise of discretion "is demonstrated to clearly prejudice the appealing party."123

In J.M. Tanaka Construction Co. v. NLRB,124 the Ninth Circuit found no abuse of discretion upon the ALJ's refusal to grant a continuance to an alter-ego corporation after counsel for the corporation withdrew.125 The court reasoned that since the corporations were alter-egos, the relevant facts should be known to each and original counsel should have foreseen that the parties' failure to settle before trial would necessitate his withdrawal.126 Thus, the appellant was not "clearly prejudiced" and the refusal to continue the proceedings was proper.127

c. exclusion of evidence

Pursuant to section 10(b) of the Act, the Board shall conduct unfair labor practice hearings "so far as practicable . . . in accordance with the rules of evidence applicable in the district courts of the United States."128 Thus, the Board is not absolutely bound by the Federal Rules of Evidence.129

121. Id. at 308.
123. NLRB v. Pan Scape Corp., 607 F.2d at 201; Electromec Design and Development Co. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969); see, e.g., NLRB v. Safway Steel Scaffolds Co., 383 F.2d 273, 277 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968); NLRB v. Wichita Television, 277 F.2d 579, 585 (10th Cir. 1960); NLRB v. Gala-Mo Arts, Inc., 232 F.2d 102, 106 (8th Cir. 1956); NLRB v. Globe Wireless, Ltd., 193 F.2d 748, 751 (9th Cir. 1951).
124. 675 F.2d 1029 (9th Cir. 1982).
125. Id. at 1035. The two corporations, J.M. Tanaka and R.M. Tanaka, were originally represented by the same attorney, Kinji Kanazawa. The case failed to settle prior to the hearing to determine alter-ego status, and Kanazawa withdrew as counsel for R.M. Tanaka which substituted new counsel and requested a continuance to prepare for trial.
126. Id. at 1036.
127. Id.
During the survey period, in *NLRB v. Maywood Do-Nut Co.*,\(^{130}\) the Ninth Circuit, in a per curiam opinion, held that it was within the Board's discretion under section 10(b) to exclude from evidence a secretly made tape recording of a bargaining session. The court agreed that the Board had properly relied on the rule of *Carpenter Sprinkler Corp.*,\(^{131}\) which excludes "surreptitiously prepared tape recordings of negotiations" because of the chilling effect they have on the bargaining process.\(^{132}\)

Moreover, the court distinguished *Maywood Do-Nut* from its previous decision in *General Engineering, Inc. v. NLRB*,\(^{133}\) in which the Ninth Circuit held that section 10(b) does not "justify the exclusion of evidence . . . which it would be error to exclude . . . in a federal district court . . . ."\(^{134}\) The court found that unlike *General Engineering*, in *Maywood Do-Nut* the Board had not attempted to suppress admissible evidence,\(^{135}\) but had properly exercised its discretion and excluded evidence that interfered with the collective bargaining process.\(^{136}\)

**d. right to cross-examination**

In *Ra-Rich Manufacturing Corp.*,\(^{137}\) the NLRB adopted the rationale of *Jencks v. United States*\(^{138}\) and held that the right of counsel in a criminal trial to examine pretrial statements of witnesses called by the government was applicable to Board proceedings. Thus, the Board "affords parties . . ., upon proper demand, the right to production for purposes of cross-examination of pretrial statements made by witnesses who have already testified in such proceedings."\(^{139}\)

130. 659 F.2d 108 (9th Cir. 1981) (per curiam).
131. 238 N.L.R.B. 974 (1978), enforced, 605 F.2d 60 (2d Cir. 1979).
132. 659 F.2d at 110. In *Carpenter Sprinkler*, the Board stated:
We are convinced that a rule permitting the introduction into evidence of surreptitiously prepared tape recordings of negotiations would inhibit severely the willingness of the parties to express themselves freely and would seriously impair the smooth functioning of the collective bargaining process. Accordingly, we hold that recordings of conversations which are part of negotiations and which are made without notice to a party to the conversations should be excluded from evidence in Board proceedings.

133. 341 F.2d 367 (9th Cir. 1965).
134. *Id.* at 374 (citing NLRB v. Capitol Fish Co., 294 F.2d 868, 872 (5th Cir. 1961)); see also NLRB v. Jacob E. Decker & Sons, 569 F.2d 357, 363 (5th Cir. 1978).
135. In *General Engineering*, the Board had attempted to use § 10(b) to shield Board employees from subpoenas for evidence possessed by Board employees. 341 F.2d at 370.
136. 659 F.2d at 110.
137. 121 N.L.R.B. 700 (1958).
The Board elaborated on Ra-Rich in Tidelands Marine Service Corp. by rejecting the argument that the purpose of Jencks is merely to point out discrepancies between a witness' direct testimony and his pretrial statement and that absent such discrepancies, the failure to cross-examine a witness in light of his pretrial statement is not prejudicial.

The Ninth Circuit in NLRB v. Doral Building Services, Inc. reiterated its approval of the Tidelands holding by tersely rejecting the argument that an Administrative Law Judge's refusal to permit cross-examination of witnesses as to prehearing statements did not constitute prejudicial error absent a showing of inconsistency between the affidavits and live testimony.

In Doral, prehearing affidavits of General Counsel witnesses were prepared in Spanish, the native tongue of the witnesses, and unofficially translated into English by a Board employee. The ALJ refused to permit cross-examination of the witnesses from the unofficial English versions, and, since no one at the hearing understood Spanish, all cross-examination of the witnesses on their prehearing affidavits was precluded. The court, while recognizing that every procedural defect is not "per se" prejudicial, held that the denial of full, complete and proper cross-examination amounted to prejudicial error. The court noted that the better procedure would have been to continue the hearing until official translations were prepared and then allow full cross-examination of the witnesses as to their prehearing affidavits.

The court distinguished Doral from its previous holdings where limitations of cross-examinations were found not to be prejudicial. In

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140. 126 N.L.R.B. 261 (1960).
141. Tidelands Marine Serv. Corp., 126 N.L.R.B. at 263. Tidelands relied specifically upon Jencks for the proposition that

[f]lat contradiction[s] [are] not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in the emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing [a witness'] credibility . . . . A requirement of a showing of conflict would be clearly incompatible with our standards . . . and must be rejected.

142. 666 F.2d 432 (9th Cir. 1982).
143. Id. at 433-35.
144. Id. at 433.
145. Id. at 433-34.
146. Id. at 435; see also NLRB v. Health Tec Div./San Francisco, 566 F.2d 1367, 1371 (9th Cir.), cert. denied, 439 U.S. 832 (1978).
147. 666 F.2d at 435.
148. Id.
NLRB v. Seine & Line Fishermen's Union,\(^{149}\) a trial examiner impermissibly limited the scope of the cross-examination so that no prejudicial effect flowed from the _Jencks_ violation. Similarly, in _Dwight-Eubank Rambler, Inc. v. NLRB_,\(^{150}\) the prejudicial effect flowing from a _Jencks_ violation was held waived by failure to request a rehearing when “lost” prehearing statements were made available after the hearing. Unlike _Seine_ and _Dwight-Eubank_, in _Doral_, no opportunity to cross-examine was afforded and all objections to the ALJ's determination had been pursued.\(^{151}\) Accordingly, the Ninth Circuit remanded _Doral_ to the NLRB to reopen the hearing and allow cross-examination of the witnesses regarding their pretrial affidavits.\(^{152}\)

C. NLRB Orders and Remedies

1. Reimbursement

Section 10(c) of the Act\(^{153}\) gives the Board broad discretion to fashion remedies that effectuate the policies of the Act.\(^{154}\) In cases involving unauthorized collection of union initiation fees, dues, and fines, the Board should order a refund to nonunion employees absent some rational ground for refusing to do so.\(^{155}\)

In the 1981 case of _Joint Council of Teamsters, No. 42 v. NLRB_,\(^{156}\) the Ninth Circuit found that the Board had failed to offer a rational ground for refusing to grant a make whole remedy requiring labor unions to reimburse nonunion dump truck owner-operators for initiation fees and dues paid under an invalid provision of a bargaining agreement.\(^{157}\) In _Joint Council_, the Board had denied the dump truck owner-operators' claim for reimbursement, reasoning that only a violation of section 8(b)(4)\(^{158}\) of the Act would warrant such a remedy.\(^{159}\)

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150. 380 F.2d 141 (9th Cir. 1967).
151. 666 F.2d at 433-35.
152. _Id._ at 435.
153. Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), provides that “the Board shall . . . take such affirmative action . . . as will effectuate the policies of this subchapter.”
155. 511 F.2d at 852.
156. 671 F.2d 305 (9th Cir. 1981), vacated and remanded, 103 S. Ct. 1172 (1983).
157. _Id._ at 310. The Board declared a provision of the master labor agreement between unions and contractor-employers in the Southern California construction industry to be an unfair labor practice under § 8(e) of the Act, 29 U.S.C. § 158(e) (1976), because it prohibited general contractors from hiring nonunion dumptruck owner-operators. 671 F.2d at 308.
159. 671 F.2d at 310. The Board stated, “no evidence has been introduced with respect to
While recognizing that reimbursement is an inappropriate remedy in the absence of coercion, the court rejected the Board's requirement of a strict section 8(b)(4) violation. Instead, the court held that there was "no logical reason for denying reimbursement because of the absence of a technical [section] 8(b)(4) violation" when an unlawful provision of a collective bargaining agreement would have a coercive effect. Because the provision in the collective bargaining agreement would have had the effect of coercing otherwise reluctant dump truck owner-operators to join the union, the court found that reimbursement of money paid by the truck owners to support a union they did not freely choose to join would effectuate the policies of the Act and impose a remedy consistent with prior Board decisions in similar situations. In remanding the case to the Board to fashion a make whole remedy or to show good cause why one would not effectuate the policies of the Act, the court rejected the argument that an alternative remedy under section 303 of the Labor Management Relations Act barred the NLRB from ordering reimbursement.

In Industrial, Technical & Professional Employees Division v. NLRB, the Ninth Circuit affirmed its holding in Joint Council enforcing the Board's award of dues reimbursement to employees who had been coerced into joining a union through the unfair labor practices of their employer and a union. The court found that substantial alleged losses directly attributable to actual coercion by [the] Unions . . . . Furthermore, we find a reimbursement order, typically used to 'make whole' employees for violations of the Act, to be generally overly broad and inappropriate in the context of 8(e) violations." Joint Council of Teamsters, No. 42, 248 N.L.R.B. 808, 817 n.34 (1980) (emphasis in original).

60. 671 F.2d at 311 (citing Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 655-56 (1961)).

161. Id. at 311-12.


163. Id. at 311 n.10 ("The Board cannot arbitrarily impose different remedies in similar situations."). See Santini Brothers, 208 N.L.R.B. at 184; Sheraton-Kauai, 177 N.L.R.B. at 25.

164. 671 F.2d at 312-13.


166. 683 F.2d 305 (9th Cir. 1982).

167. Id. at 308. In this case the employer committed unfair labor practices by giving
evidence supported the Board’s finding of coercion, in that the employees involved were temporary construction workers hoping to secure permanent employment with the employer. The union organizers had guaranteed the employees permanent jobs if they signed the union authorization cards, but had warned that no promise of future employment existed if the employees failed to select the union as their collective bargaining agent. The Board found that the employees’ awareness of the employer’s support of the union justified the employees’ fear that the union possessed the ability to carry out threats of job loss. Thus, the Board found that coercion existed in that the employees joined the union only after being informed that their chances for selection for a permanent position depended upon whether they joined the union.

Under these circumstances, the court found that reimbursement was not only appropriate but necessary because it promoted the policies of the Act and played a “vital role in remedying coercive union organizing.”

2. Punitive remedies

While the NLRB’s broad remedial power includes the discretion to order back pay or make whole remedies, the Board has no power to order punitive remedies.

Cautioning that it is not merely a “rubber stamp” for the Board’s remedial decisions, the Ninth Circuit in Rayner v. NLRB, reiterated its position that remedies which are in fact punitive rather than unlawful assistance and support to a union and by recognizing, and entering into a collective bargaining agreement with, the union at a time when the union did not represent an uncoerced majority of employees. Id. at 306.

170. Id. at 308.
171. Id.
172. Id. at 308-09 (quoting NLRB v. Forest City/Dillon-Tecon Pacific, 522 F.2d 1107, 1109 (9th Cir. 1975)). In Forest City/Dillon-Tecon, the Ninth Circuit reasoned that:

Reimbursement of union initiation fees and dues plays a vital role in remedying coercive union organizing. It promotes the policies of the Act by assisting in completely disestablishing the illegally constituted union, severing its connection with the employer, restoring freedom of choice and encouraging the employee to exercise his rights under the Act.

522 F.2d at 1109.

175. NLRB v. Chatfield-Anderson Co., 606 F.2d 266, 268 (9th Cir. 1979).
176. 665 F.2d 970 (9th Cir. 1982).
compensatory will not be judicially enforced.\textsuperscript{177}

In *Rayner*, an employer notified the representative union of its intent to terminate an existing contract and offered to negotiate a new agreement.\textsuperscript{178} The Board condoned the union’s refusal to respond by concluding that, given the employer’s long-standing noncompliance with the terminated contract,\textsuperscript{179} any offer by the union to negotiate would have been “‘an exercise in futility.’”\textsuperscript{180}

The court enforced the Board’s remedial order requiring the employer to make whole employees for losses incurred during the term of the collective bargaining agreement, but rejected the Board’s order that the make whole remedies continue beyond the termination of the agreement until the employer complied with its terms.\textsuperscript{181} The court indicated that the Board had ignored its own statement of the law which provides that an “employer’s continuing obligations expire once the employer ‘gives timely notice of its intention to modify a condition of employment and the union fails to timely request bargaining.’”\textsuperscript{182}

The court held that since there was nothing in the record which indicated that the employer would not negotiate the new contract in good faith, the continuing make whole remedy served “only to punish the [employer] for past conduct,” and, as such, was beyond the Board’s remedial powers.\textsuperscript{183} The court indicated, however, that the decision in *Rayner* was in response to its factual setting, and had there been a refusal on the part of the employer to bargain for a new contract, continuing liability would clearly be proper.\textsuperscript{184}

3. Calculation of backpay

Subject only to limited judicial review, the NLRB is empowered

\begin{itemize}
\item \textsuperscript{177} *Id.* at 976.
\item \textsuperscript{178} *Id.* at 973.
\item \textsuperscript{179} *Id.* at 977.
\item \textsuperscript{180} *Id.* (quoting *Rayner*, 251 N.L.R.B. 89, 90 n.5 (1980).
\item \textsuperscript{181} 665 F.2d at 976.
\item \textsuperscript{182} *Id.* at 977 (quoting *Rayner*, 251 N.L.R.B. at 90). As a general rule, an “employer is required by section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1976), to maintain the status quo as to wages and working conditions even following the expiration date of the agreement,” if the parties continue negotiations. 665 F.2d at 977 (citing Peerless Roofing Co. v. NLRB, 641 F.2d 734, 736 (9th Cir. 1981); Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721, 729 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981)). However, such continuing liability continues “until and unless [the employer] affords the Union an opportunity to bargain.” 665 F.2d at 977 (quoting Hinson v. NLRB, 428 F.2d 133, 139 (8th Cir. 1970)).
\item \textsuperscript{183} 665 F.2d at 977.
\item \textsuperscript{184} *Id.* at 978.
\end{itemize}
with broad discretion in determining the amount of backpay awards.\textsuperscript{185} Once the General Counsel establishes the amount of backpay due a discharged employee, the burden shifts to the employer to provide evidence to mitigate its liability.\textsuperscript{186}

In \textit{Alfred M. Lewis, Inc. v. NLRB},\textsuperscript{187} the Ninth Circuit enforced an NLRB decision requiring an employer to reinstate all employees who were discharged "solely as a result of" a production quota system.\textsuperscript{188} The employer reinstated and made whole all employees, except McCown.\textsuperscript{189} Subsequently, the Ninth Circuit in \textit{Alfred M. Lewis, Inc. v. NLRB (Lewis II)},\textsuperscript{190} enforced the Board's supplemental order to reinstate McCown with backpay, subject to certain reductions.\textsuperscript{191}

In \textit{Lewis II}, the employer sought to reduce the amount of backpay due McCown on the grounds that McCown had failed to make reasonable efforts to find equivalent employment, had refused offers of employment, and would have participated in a strike against the employer during the period of unemployment following his discharge.\textsuperscript{192}

The Ninth Circuit rejected the employer's contention that McCown had not made a "diligent search" for employment since McCown's period of unemployment coincided with a period of substantial unemployment and there was no evidence that McCown's efforts to secure other employment had been "insincere" or pursued with "disinterest."\textsuperscript{193} The court also found that McCown's rejection of a job offered three months after his discharge which paid less than one-half the sal-

\begin{footnotes}
\item[185] NLRB v. Dodson's Market, Inc., 553 F.2d 617, 619 (9th Cir. 1977); see also Golden Day Schools, Inc. v. NLRB, 644 F.2d 834, 840 (9th Cir. 1981).
\item[186] NLRB v. Mercy Peninsula Ambulance Serv., 589 F.2d 1014, 1017 (9th Cir. 1979); NLRB v. Superior Roofing Co., 460 F.2d 1240, 1241 (9th Cir. 1972).
\item[187] 587 F.2d 403 (9th Cir. 1978).
\item[188] Id. at 412.
\item[189] Alfred M. Lewis, Inc. v. NLRB, 681 F.2d 1154, 1155 (9th Cir. 1982) (\textit{Lewis II}). In compliance proceedings, the ALJ determined that McCown had not been fired solely because of the quota system but also due to his "poor attitude" toward his supervisor. \textit{Id.} at 1155.
\item[190] 681 F.2d 1154 (9th Cir. 1982).
\item[191] \textit{Id.} at 1156. In \textit{Lewis II}, the Ninth Circuit revised its earlier judgment to include reinstatement and backpay for employees, such as McCown, who reacted negatively to the quota system and developed a poor attitude as a result. \textit{Id.}
\item[192] \textit{Id.} The employer also argued that the backpay award should be reduced by the amount of unemployment compensation McCown received. The court dismissed this argument as "specious." \textit{Id.} at 1156 n.1 (citing NLRB v. Gullett Gin Co., 340 U.S. 361, 364-65 (1951); Kauffman v. Sidereal Corp., 677 F.2d 767, 769-71 (9th Cir. 1982)).
\item[193] 681 F.2d at 1156. The court rejected the employer's reliance on NLRB v. Mercy Peninsula Ambulance Serv., 589 F.2d at 1018, because the employee in \textit{Mercy Peninsula}, unlike McCown, admitted that he could have easily found employment had he seriously pursued it. 681 F.2d at 1156.
\end{footnotes}
ary he had previously received was not “willful refusal of equivalent employment.” Thus, no reduction of backpay was warranted.

The court did, however, agree with the employer that McCown’s award should be reduced by the amount of backpay accruing during the period of the strike. While recognizing the Board’s rule that “employees wrongfully discharged before an economic strike are entitled to backpay accruing during the strike,” the court held that because McCown had testified unequivocally that he would have participated in the strike had he been employed at that time, there was no uncertainty McCown would have taken part in the strike, and thus, there was no reason to award backpay for the strike period.

4. Retroactive bargaining orders

While the National Labor Relations Board is vested with broad remedial powers, the Board cannot prescribe the substantive terms of a collective bargaining agreement, either directly or indirectly. To allow the Board to do so would “violate the fundamental premise on which the Act is based—freedom to contract.”

In *East Bay Chevrolet v. NLRB*, the Ninth Circuit rejected a

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194. McCown was offered employment at $2.35 per hour, whereas he had received $6.40 an hour before his discharge. 681 F.2d at 1156.
195. 681 F.2d at 1156.
196. *Id.* (citing NLRB v. Alaska S.S. Co., 211 F.2d 357, 360 (9th Cir. 1954); NLRB v. J.G. Boswell Co., 136 F.2d 585, 597 (9th Cir. 1943)). The court indicated that if McCown had accepted such a drastic cut in pay so soon after his discharge, he could have been held to have willfully incurred the loss and thus be subject to a corresponding reduction in backpay. 681 F.2d at 1156.
197. 681 F.2d at 1157.
198. *Id.* The reason for the rule is that it is often impossible to determine whether the employer’s discrimination caused the employee to participate in the strike and the employer should not benefit from such uncertainty. See NLRB v. Rogers Mfg. Co., 406 F.2d 1106, 1109 (6th Cir. 1969); Winn-Dixie Stores, Inc., 206 N.L.R.B. 777 (1973), enforced, 502 F.2d 1151 (4th Cir. 1974).
199. 681 F.2d at 1157.
201. H.K. Porter Co. v. NLRB, 397 U.S. at 108.
202. *Id.* at 107. The Court stated:

> While the parties' freedom of contract is not absolute . . . allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

*Id.* at 108.
203. 659 F.2d 1006 (9th Cir. 1981).
Board order directing an employer to recognize and bargain with a union and to embody any agreement in a contract retroactive to a specific date. The court found that the effective date of the collective bargaining agreement was a substantive provision. Thus the Board had exceeded its authority and had ignored firmly established principles by attempting to establish a substantive contract term.

The court distinguished *East Bay Chevrolet* from cases in which Board orders according retroactive effect to collective bargaining agreements have been upheld. In those cases, collective bargaining agreements had already been negotiated and agreed upon; thus the retroactive orders merely gave the employees "the full benefit of the bargain" already agreed upon and did not prescribe substantive terms of the agreement.

The court also rejected the General Counsel's urging to adopt the decision of *I. U. E. v. NLRB* (*Tiidee Products*), whereby the Board would be allowed to fashion a remedy "based upon what the parties would have agreed upon but for the unfair labor practices." The court declined to adopt or reject the *Tiidee Products* decision as there was no indication that the Board had based its order upon *Tiidee Products* and General Counsel's "'post hoc rationalizations'" for the Board's actions were "incompatible with the orderly function of the

204. 659 F.2d at 1008. In *East Bay Chevrolet*, the employer refused to bargain with a four-craft union (representing auto mechanics, painters, car jockeys, and new and used car salespeople) and the union filed unfair labor practice charges. On July 26, 1977, three of the four crafts entered into a collective bargaining agreement, while the fourth was engaged in a dispute concerning its representative status. In the subsequent unfair labor practice proceedings, the Board ordered that the employer recognize and bargain with the four-craft union and that any contract agreed upon by the parties be made retroactive to July 26, 1977. The employer's sole objection concerned the retroactive order. *Id.* at 1008-09.

205. *Id.* at 1009.

206. *Id.* (citing Trustees of Boston Univ., 228 N.L.R.B. 1008 (1977), enforced, 575 F.2d (1st Cir. 1978), vacated on other grounds, 445 U.S. 912 (1980)). In *Trustees* the Board stated:

By its request for retroactivity of certain contract provisions, the Union in effect is asking the Board to establish the effective date of the contract with respect to these terms. Since the Board is without power to compel parties to agree to any such substantive provision of a collective bargaining agreement, we shall deny this request.

228 N.L.R.B. at 1010 (citing H.K. Porter v. NLRB, 397 U.S. 99 (1970)).

207. 659 F.2d at 1010.

208. *Id.*


210. 659 F.2d at 1010.

211. *Id.* See also Culinary Alliance & Bartenders Union, Local 703 v. NLRB, 488 F.2d 664, 666 (9th Cir. 1973), cert. denied, 417 U.S. 946 (1974).

212. 659 F.2d at 1010.
Finally, the court distinguished *East Bay Chevrolet* from circumstances in which the Board's order makes only the obligation to bargain retroactive. Unlike *East Bay Chevrolet*, the retroactive bargaining order in *Trading Port, Inc.* sought to remedy the employer's unilateral changes in working conditions made after a union had achieved majority status. Thus, the retroactive order in *Trading Port* was necessary to restore the union to a bargaining position equal to that which had existed before the employer's unfair labor practices and did not compel the parties to agree to substantive contract terms.

5. Costs and attorneys' fees

The Board has adopted a policy of awarding costs and attorneys' fees only in instances where the defenses asserted by the employer in refusing to bargain are frivolous or totally devoid of merit. Recently, the Ninth Circuit twice rejected arguments that costs and attorneys' fees were warranted. In *East Bay Chevrolet v. NLRB*, the court deferred to the Board's discretionary determination that the employer had not engaged in litigation "totally without merit," and that a defense resting upon a credibility determination was not frivolous.

In *NLRB v. East Wind Enterprises*, an employer appealed a Board determination that an employee had been discharged solely for participating in union activities. In opposition, the Board requested that attorneys' fees be awarded against the employer for bringing a frivolous appeal to delay enforcement of the Board's order. The Ninth Circuit, in a per curiam opinion, acknowledged that the employer's defense virtually lacked all merit, yet refused to award attorneys' fees. The court reasoned that it was not the practice of the

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213. *Id.* (quoting *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-44 (1965)).
214. 659 F.2d at 1010-11.
216. *Id.* at 301.
217. *Id.*
218. 659 F.2d at 1011.
220. 659 F.2d 1006 (9th Cir. 1981).
221. *Id.* at 1011.
222. *Id.*
223. 664 F.2d 754 (9th Cir. 1981) (per curiam).
224. *Id.* Solid and substantial evidence existed supporting the Board's finding that the employee had been discharged for union activities. On the other hand, the employer was unable to assert any plausible argument to the contrary. *Id.*
225. *Id.*
226. *Id.*
Ninth Circuit to award attorneys' fees, but cautioned that "henceforth [the Ninth Circuit] will be more favorably disposed to such requests [for attorneys' fees] . . . to preserve the rights of all parties under the . . . Act and to protect our own docket."227

II. UNFAIR LABOR PRACTICES

A. Interference with Employees' Section 7 Rights

Section 8(a)(1) of the National Labor Relations Act228 defines an unfair labor practice as one in which an employer attempts to restrain, interfere, or coerce employees in the exercise of section 7 rights.229 The Ninth Circuit test for a violation of section 8(a)(1) is whether the employers' actions reasonably tend to coerce or restrain employees.230 Intent to coerce is not required in order to establish a violation of the Act.231

1. Interrogation

An employer's interrogation of an employee violates section 8(a)(1) if, under all the circumstances, "the interrogation reasonably tends to restrain or interfere with the employees in the exercise of their protected § 7 rights."232 The Ninth Circuit has held that an employer's interrogation of employees regarding union activity is not unlawful per se,233 but is coercive and inherently suspect as an unfair labor practice unless the employer gives express assurances against reprisal.234

In J.M. Tanaka Construction, Inc. v. NLRB,235 the employer questioned several employees after receiving complaints that the union was coercing employees to sign authorization cards. The employer gave no explanation for his questioning and failed to make assurances that there would be no forthcoming reprisals. The court held that consider-

227. Id.
229. 29 U.S.C. § 157 (1976) provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."
231. 324 U.S. at 795-803.
232. 632 F.2d at 725.
233. NLRB v. Super Toys, Inc., 458 F.2d 180, 182 (9th Cir. 1971); Amalgamated Meat Cutters, Local 364 v. NLRB, 435 F.2d 668 (9th Cir. 1970).
234. 458 F.2d at 183.
235. 675 F.2d 1029 (9th Cir. 1982).
ing the company's hostile attitude toward the union, the employees
who were interrogated could reasonably conclude that the questioning
was intended to be coercive.\(^{236}\)

An employer who interrogates an employee regarding union activ-
ity must give express assurances against reprisals or else an employee
can reasonably conclude that the interrogation was intended to be coer-
cive. The Ninth Circuit will look to surrounding circumstances to de-
termine whether an unfair labor practice has been committed.

2. Employer no-solicitation rules

Employers establish no-solicitation rules to prevent union and
other activities from occurring at specified times and locations.\(^{237}\) The
rules may be considered valid or invalid depending on their wording
and the circumstances under which they are enforced.\(^{238}\) A rule that
prohibits only union activity will be considered discriminatory and pre-
sumptively invalid.\(^{239}\) In addition, an employer cannot ban solicitation
in non-working areas during non-working hours.\(^{240}\) A rule barring sol-
licitation during working hours may also be invalid if there is no sub-
nontial business justification,\(^ {241}\) but such a rule is presumptively valid
if it simply prohibits solicitation during the employee's working hours
and not during breaks or lunch hours.\(^ {242}\)

In \textit{NLRB v. Rooney},\(^ {243}\) an employee allegedly caused work disrup-
tions by distributing union literature to co-workers. One of her em-
ployers ordered her not to solicit "on my time."\(^ {244}\) The court referred
to earlier Board decisions in which the Board distinguished rules bar-
ing solicitation during "working time," which are presumptively valid,
and those barring solicitation during "working hours," which are pre-
sumptively invalid.\(^ {245}\) The phrase "working hours," subject to broad

\(^{236}\) \textit{Id.} at 1037.
\(^{237}\) ABA, \textit{THE DEVELOPING LABOR LAW} 84-86 (C. Morris ed. 1971).
\(^{238}\) \textit{Id.}
\(^{239}\) \textit{Id.}
\(^{240}\) \textit{Id.} at 84. There is, however, an exception to this rule for retail department stores
which may prohibit solicitation on the selling floor even during non-working time due to the
nature of the business. \textit{Id.} at 85.
\(^{241}\) \textit{See} Daylin, Inc., 198 N.L.R.B. 281 (1972); \textit{see also} Wayne Home Equip. Co., 229
\(^{242}\) \textit{Id.}
\(^{243}\) 677 F.2d 44 (9th Cir. 1982).
\(^{244}\) \textit{Id.} at 45. The next day the employee was seen distributing union literature to a co-
worker in the work area. She received a written reprimand which included a facially valid
statement concerning her rights under the no-solicitation rule.
interpretation, has been found by the Board to mean the period from
the time employees begin their work shift, or "clock in," to the time
their shift ends when they "clock out." This period of time includes
lunch and rest periods.246

The Ninth Circuit looks beyond purely semantic distinctions and
focuses on how the employee interpreted a phrase used by the em-
ployer.247 In *Rooney*, the court found that the employee understood
the employer's use of the phrase "my time" to refer to periods when
either she or the other employees were actually on duty.248 Since the
employee did not understand the admonition to refer to periods when
the employees were not on duty, the court found that the employer did
not commit an unfair labor practice by enforcing the no-solicitation
rule.249

The coincidence of the promulgation of a no-solicitation rule and
a union campaign, although not invalid per se, is evidence of discrimi-
natory intent.250 This evidence may be rebutted if the employer can
prove that the union campaign caused substantial work disruption for
the first time.251 In *Rooney*, the employer testified that the employee's
activities created a disturbance and that she was the first employee to
attempt solicitation. The court held that this evidence, in light of other
factors, showed that the employer did not commit an unfair labor prac-
tice.252 The court's holding overturned the Board's ruling that the writ-
ten reprimand to the employee was improperly motivated and issued
with discriminatory intent. Thus, the court found the no-solicitation
rule to be valid.253

3. Yellow-dog contracts

An agreement whereby an employee is obliged to refrain from
union membership is rendered unenforceable by the National Labor
Relations Act.254 Specifically, section 8(a)(3) outlaws yellow-dog con-

246. *Id.* at 750. The parties in *Rooney* disputed whether the employer's use of the phrase
"my time" was analogous to "work time" and was therefore presumptively valid, or to
"company time" and thus presumptively invalid. The court found that the parties were
overly concerned with semantics and that they failed to address whether the employer's
action interfered with the employees' organizational rights. 677 F.2d at 45-46.
247. 677 F.2d at 46.
248. *Id.*
249. *Id.* at 45.
250. NLRB v. Roney Plaza Apartments, 597 F.2d 1046, 1049 (5th Cir. 1979).
251. *Id.*
252. 677 F.2d at 46.
253. *Id.*
tracts by making it an unfair labor practice to "encourage or discourage membership in any labor organization."^{255}

In *J.M. Tanaka Construction, Inc. v. NLRB*,^{256} the owners of a construction company shut down operations of an old company and transferred operations to an alter ego to avoid the burden of a union contract. All of the engineers hired by the new company had been employees of the old company. When rehired, the engineers were required to sign an agreement acknowledging the new company as a non-union employer.^{257} The court held that the agreement violated section 8(a)(1) because an employee might reasonably conclude that he or she had executed a binding agreement to remain non-union.^{258} The company maintained that the agreement did nothing more than advise the employees of non-union status. However, the court rejected this claim^{259} as it had earlier in *Kallman v. NLRB*.^{260}

In *Kallman*, the employer told his predecessor's former employee that he would be rehired under the same conditions, but that the new company would be non-union. The employer alleged, as did the employer in *J.M. Tanaka*, that he was merely expressing his view of the company's status. The court held that the statement implied that the company would remain non-union and therefore violated section 8(a)(1).^{261}

4. Employer interference

An employer's assistance to a union and a union's acceptance of such assistance may serve to coerce employees in selection of a bargaining agent and violate section 8(a)(1) of the Act.^{262} In *Industrial, Technical and Professional Employees Division, National Maritime Union of America v. NLRB*,^{263} the union began to solicit authorization cards from employees at the employer's plant. The union was given unlimited access to the employer's facilities and was allowed to conduct organizing campaigns during working hours with the cooperation of the

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256. 675 F.2d 1029 (9th Cir. 1982).
257. *Id.* at 1033. The agreement also provided that all fringe benefit payments on government contracts were to be paid directly to the employees, but in case of dispute the employee promised to reimburse the union for such payments. *Id.*
258. *Id.* at 1037.
259. *Id.*
260. 640 F.2d 1094 (9th Cir. 1981).
261. *Id.* at 1097-98.
262. Industrial, Tech. and Prof. Emp. Div. v. NLRB, 683 F.2d 305 (9th Cir. 1982); see also ABA, *THE DEVELOPING LABOR LAW* 139 (C. Morris ed. 1971).
263. 683 F.2d 305 (9th Cir. 1982).
employer's supervisors. The union presented the employer with authorization cards of a majority of the employees, and the employer immediately recognized the union as the sole bargaining agent without verifying the cards. The court held that the employer's activities constituted illegal assistance sufficient to coerce employees in the exercise of their section 7 rights.

The employees were temporary construction workers who desired permanent positions with the employer. Union organizers made promises that those employees who signed authorization cards would be guaranteed permanent employment. The court upheld the Board ruling that the references to job status were material because the employees were well aware of the employer's support for the union. This awareness could reasonably have led the employees to believe the union could carry out threats of job loss. Thus, the employees were coerced into union membership, it being apparent that future employment depended on union membership.

In NLRB v. Catalina Yachts, the Ninth Circuit held that the employer violated sections 8(a)(1) and 8(a)(3) of the Act by engaging in certain activities during an employee organizational campaign. Catalina Yachts attempted to discourage union support by promising and granting benefits to certain employees, by soliciting employee grievances, and by discharging one employee for involvement in union activities. The employer also interrogated employees about union activities. The court held that the employer committed an unfair labor practice based on the record as a whole, and stated that the findings of the administrative law judge would be overturned “‘only if a clear preponderance of the evidence’” convinced the court that they were incorrect. The employer did not meet the burden so as to overturn the Board's ruling in this case.

264. Id. at 307. The union and employer subsequently entered into a bargaining agreement. Id.
265. 683 F.2d at 308.
266. Id. at 307-08.
267. Id. at 308.
268. Id.
269. 679 F.2d 180 (9th Cir. 1982).
270. Id. at 181.
271. Id.
272. Id. (citations omitted).
273. 679 F.2d at 181.
5. Weingarten rights

The Supreme Court in *NLRB v. Weingarten, Inc.* held that an employer commits an unfair labor practice by denying an employee's request for union representation at an investigatory interview conducted by the employer. The employee must have a reasonable belief that the interview may result in disciplinary action. The Court stated that such a request fell within the literal language of section 7 of the Act allowing "concerted activities for the purpose of . . . mutual aid or protection."277

The Board in *Pacific Telephone and Telegraph Co.* reaffirmed an earlier extension of Weingarten rights that permits an employee to confer with a union representative before any confrontation with the employer. In *Pacific Telephone*, two telephone company installers were ordered to meet with a phone company manager. The employees asked the reason for the summons but received no answer. The manager asked if they desired union representation and both employees responded in the affirmative. When the union steward arrived, he was denied a request to meet with the installers before the investigatory interview, and was informed only that there was a "problem" in response to his query as to what was going on. The employees were discharged one week after the meeting for unauthorized installation of phone equipment. The Board held that employees have a section 7 right to confer with their union representative prior to an employer confrontation. The employee and representative also have a right to "a general statement" as to the subject matter of the interview.

In *Climax Molybdenum Co.*, the Board stated that prior consultation permits the representative to assist the employer by "eliciting favorable facts," thereby saving the employer time in investigation. The counseling also assists the fearful employee, or one who may have

275. *Id.* at 267. The employee had been suspected of stealing food from the employer. The employer conducted an interview concerning the matter, at which time the employee's request to have a union representative accompany him to the meeting was denied.
276. *Id.*
277. *Id.* at 260 (quoting Mobil Oil Corp. v. NLRB, 482 F.2d 842, 847 (7th Cir. 1973)).
278. 262 N.L.R.B. 1048 (1982), *enforced in part, denied in part,* 711 F.2d 134 (9th Cir. 1983).
279. *Id.* at 1048. *See infra* note 299.
280. *Id.* at 1050. The reason for discharge also included falsification of time sheets. *Id.*
281. *Id.* at 1048.
282. *Id.* at 1049 (emphasis in original).
284. 262 N.L.R.B. at 1048 (quoting *Weingarten*, 420 U.S. at 263).
difficulty articulating the facts of the incident being investigated.\textsuperscript{285} The \textit{Weingarten} rule attempts to strike a balance between employer prerogatives in investigating misconduct and employee rights to join collectively for mutual aid and protection when employment is threatened.\textsuperscript{286} The Board in \textit{Pacific Telephone} ruled that access to union counseling before an investigatory proceeding restores a proper balance since, "[t]he weight of an employer's investigatory machinery against the isolated employee is an imbalance which Section 7 was designed to eliminate."\textsuperscript{287}

The Ninth Circuit recently considered \textit{Weingarten} rights in \textit{NLRB v. Texaco, Inc.},\textsuperscript{288} and held that the employee's right to have a union representative present when confronted by the employer also includes the right to have the union representative speak during the interview.\textsuperscript{289} In \textit{Texaco}, a foreman asked an employee to report to his office after discovering that the employee had not activated his safety device. As requested by the employee, a union representative was present at the meeting, but the representative was advised by the foreman that he would not be permitted to speak. The employee admitted to violating company regulations during the interview and subsequently received a written reprimand.

\textit{Texaco} argued that although \textit{Weingarten} permits the presence of a union representative at an investigatory proceeding, the employer can prohibit that representative from speaking. The employer cited a passage from \textit{Weingarten} which states, "[t]he employer . . . is free to insist that he is only interested . . . in hearing the employee's own

\footnotesize{\textsuperscript{285} 262 N.L.R.B. at 1048.  \textsuperscript{286} Id. at 1049.  \textsuperscript{287} Id. The dissent argued that the Board's rulings in \textit{Climax} and \textit{Pacific Telephone} were an unreasonable extension of \textit{Weingarten}. \textit{Id.} at 1050 (Hunter, J., dissenting). The dissent further stated that the Board's definition of "knowledgeable representative" differed from the Supreme Court's definition in \textit{Weingarten}. \textit{Id.} at 1051. The dissent argued that this phrase referred to knowledge about grievance procedures and not knowledge about the particular facts of the incident at hand. The majority in \textit{Pacific Telephone}, pointed out that although the Board in \textit{Climax} declined to extend \textit{Weingarten} to a pre-interview conference in that case, the employees in \textit{Climax} made no request for representation, although seventeen hours elapsed between summons and the meeting. \textit{Id.}.  \textsuperscript{288} 659 F.2d 124 (9th Cir. 1981).  \textsuperscript{289} Id. at 126-27.}
account of the matter under investigation.'"

The court agreed with the Board that this language was directed at avoiding a bargaining session or adversarial hearing. The language also refers to the employer's right to hear the employee's account of the incident. Furthermore, other language in *Weingarten* indicated that the union representative should take an active role in such a situation to help the employer get to the bottom of the incident more quickly. Texaco therefore violated section 8(a)(1) of the Act by denying the union steward the opportunity to speak at the investigatory proceeding.

The Board extended *Weingarten* rights to unrepresented employees in *Materials Research Corp.* Employees in the precious metals department (PMD) were annoyed at an abrupt change in the work schedule announced by management. One employee organized a group meeting of employees to discuss the new schedule. This employee and two others confronted a PMD supervisor and requested a group meeting to discuss the problem. The supervisor denied the request but said he would be available to discuss individual problems. The supervisor then asked to see the employee who organized the group meeting in his office. The employee informed the supervisor that he had a right to have another employee present at the meeting. The supervisor replied that he had no such right in Materials' plant. The employee was informed that the meeting was disciplinary in nature, and he received a verbal warning for organizing a group meeting and failing to follow a grievance procedure established by the company.

The Board pointed out that although *Weingarten* spoke in terms of a right to a "union representative" at an investigatory interview, the reference to "union" was a result of the specific fact pattern before the Court. "[W]ith only very limited exceptions," the considerations of protection of section 7 rights, as discussed in *Weingarten*, are present whether or not the employee is represented by a union. As the Board pointed out in *Glomac Plastics, Inc.*, the unrepresented employee's need for support is probably greater than that of a represented

290. Id. at 126 (quoting 420 U.S. at 260).
291. 659 F.2d at 126.
292. Id.
293. Id. (quoting 420 U.S. at 262-63).
294. 659 F.2d at 126-27.
295. 262 N.L.R.B. 1010 (1982).
296. Id. at 1012.
298. Id.
employee being investigated by an employer. Moreover, correcting the imbalance between the employer and the unrepresented employee "is not achieved by forcing an employee to attend a disciplinary interview alone." If a co-worker is present to witness the interview, the employer is less likely to overpower the employee. The purpose is fulfilled whether or not the co-worker is a union representative. The court also stated that Weingarten provided for limited assistance which can be equally satisfied whether or not the other employee present is a union representative. Even if the employee is not a union representative, he may be able to assist another employee who is too "fearful or inarticulate" to give an accurate description of the incident.

**B. Employer Discrimination**

Section 8(a)(3) of the NLRA provides that an employer who discriminates in hiring or establishes any term or condition of employment which is intended to discourage or encourage membership in any labor organization commits an unfair labor practice. Section 8(a)(3) protection extends to job applicants as well as persons already employed. Temporary employees, paid professional union organizers who obtain employment in order to organize the employer's work force, and union members are all afforded protection by this section of the Act. In contrast, supervisors are not protected under section 8(a)(3). Courts have held that employment discrimination alone does not violate section 8(a)(3), which requires that the purpose of the discrimination be actually proscribed.

The Supreme Court in *NLRB v. Great Dane Trailers, Inc.* held that the Board could find an unfair labor practice without proof of anti-union motivation if the employer's conduct was "inherently destruc-

300. *Id.* at 1311.
301. 262 N.L.R.B. at 1014.
302. *Id.* at 1015.
303. *Id.*
304. *Id.* An employer still has alternatives when an employee requests assistance at an investigative proceeding. He or she may refuse such a request by carrying on the investigation without interviewing the employee. *Id.* at 1015-16.
306. ABA, *The Developing Labor Law 51* (Morris Supp. 1971-75) [hereinafter cited as *DEVELOPING LABOR LAW*].
307. *Id.*
308. *Id.*
309. *Id.* at 52.
tive’ of important employee rights.” This is true even if the employer advances a legitimate business consideration as justification for the conduct. The Ninth Circuit in *Ad Art, Inc. v. NLRB*, stated that when a discharge appears to be motivated by both legitimate business concerns and protected union activity, the test is whether the union activity or the business reason actually motivated the discharge.

The Board developed a bifurcated approach to determine whether an employee discharge violated the Act in *Wright Line, a Division of Wright Line, Inc.*

The General Counsel has the burden of first establishing that the employee’s protected activity was a motivating factor in the employer’s decision. After the General Counsel has made a prima facie case, the employer has the burden of proving that the employee would have been discharged regardless of antiunion motivations.

The Ninth Circuit recently adopted the *Wright-Line* test in *Zurn Industries, Inc. v. NLRB*. In *Zurn*, the employer, a contractor, was constructing concrete cooling towers for a nuclear power plant. Several employees complained to the employer about safety deficiencies on the jobsite. The field superintendent expressed his annoyance with the safety complaints. Subsequently, a number of employees who had complained about serious flaws in a concrete structure which created safety hazards received termination notices. The employees admitted the poor quality of the work, but attributed this to machine deficiencies and breakdowns. The Board concluded that the field superintendent’s remarks threatened the employees for expressing safety concerns and that the employer’s asserted reason for the discharge was a mere pretext.

The court, in adopting the *Wright-Line* test, stated that the con-

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311. Id. at 34.
312. Id.
313. 645 F.2d 669 (9th Cir. 1981).
314. Id. at 678 (citing Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977)).
315. 251 N.L.R.B. 1083 (1980).
316. Id. at 1089.
317. Id.
318. 680 F.2d 683 (9th Cir. 1982), cert. denied, 105 S. Ct. 3110 (1983); see also NLRB v. Nevis Indus., Inc., 647 F.2d 905 (9th Cir. 1981).
319. 680 F.2d at 685. The superintendent told the employees in a meeting that he was “tired of hearing all this commotion about safety” and that dissatisfied employees should talk to the shop steward or “pick up their checks.” Id.
320. Id. at 686.
gressional intent did “not foreclose a legislative purpose to place on the employer the burden of proving the presence of a legitimate cause.” The court accepted the Board’s conclusion that the employer had not met this burden. The employer had sole responsibility for the inoperable equipment and failed to discharge the foreman who was responsible for the project when the other employees were terminated. The work of the discharged crew was generally satisfactory. These factors supported the inference that the employer’s asserted reason for the discharge, poor quality work, was a mere pretext.323

In Lippincott Industries, Inc. v. NLRB,324 the Ninth Circuit held that the test for a violation in discharge cases should focus on whether “antiunion animus was the moving cause, or but for cause, behind the decision to discharge an employee.”325 The Wright-Line decision was rendered after the Board decision in Lippincott and was therefore not applied by the appellate court. The opinion is, however, consistent with the Wright-Line test.326

In Lippincott, an employer discharged an employee three hours before a union representation election because of her pro-union stance. The Board characterized the case as a “pretext case,” one in which the employer’s business reasons are rejected leaving only the unjustifiable, improperly motivated reason.327 Lippincott claimed that the case was a “mixed motive” case and that the relative force of the employer’s business reason should have been compared to the impermissible reason to determine which motivated the discharge.328 The court considered this distinction to be artificial and eroded by Ad Art.329 Many recent Ninth

321. Id. at 689. Other circuits have not been so quick to adopt the test. The First and Third Circuits have questioned whether the test is entirely consistent with the Act. These circuits agree with the adoption of a “but for” test, but claim that shifting the burden to the employer is unwarranted and violates § 10 of the National Labor Relations Act. The First and Third Circuits have concluded that § 10 is violated because the Board will prevail should the employer fail to prove its affirmative defense. As a consequence, these circuits have adopted a procedure whereby the burden shifts back to the plaintiff, after the defendant provides a legitimate reason for its conduct, to prove that the defendant’s reason was not the true reason for the discharge. Id. at 688-89. See NLRB v. Wright Line, a Division of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); Behring Int'l, Inc. v. NLRB, 675 F.2d 83 (3d Cir. 1982); but see NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550 n.4 (8th Cir. 1982) (disagreeing with the First Circuit’s criticisms).

322. 680 F.2d at 694.
323. Id.
324. 661 F.2d 112 (9th Cir. 1981).
325. Id. at 115.
326. Id.
327. Id. at 114.
328. Id.
329. Id. at 115.
Circuit decisions have been decided without considering the employer's alleged business motivations for dismissal.\textsuperscript{330} The test promulgated by the court in \textit{Lippincott} is in accord with the maxim that "'[a]n employer may discharge an employee for good cause, bad cause, or no cause at all, without violating § 8(a)(3), as long as his motivation is not antiunion discrimination . . . .'"\textsuperscript{331} The court concluded that the Board applied the law in conformity with the test.\textsuperscript{332} The discharge of the employee for her union sentiments and the "chilling" effect it would have on other employees supported a violation of section 8(a)(3) of the Act.\textsuperscript{333} The employer's explanations were found to be "implausible" and "contrived."\textsuperscript{334}

While many recent Ninth Circuit cases have considered violations without respect to the employer's legitimate business concerns, some have not. For example, in \textit{Fun Striders, Inc. v. NLRB},\textsuperscript{335} the court held that a violation of the Act is established by showing that the employees engaged in activities protected by the Act, that the employer's conduct interfered with, restrained or coerced the employees in the exercise of those activities, and that the employer's conduct was not justified by a legitimate business consideration.\textsuperscript{336} In \textit{Fun Striders}, the court reversed a Board finding that an employer had committed an unfair labor practice by dismissing and refusing to reinstate four workers after they distributed literature during an unannounced work stoppage. The employees picketed the employer in protest of new piece-rates and distributed literature which advocated violent revolution and the annihilation of all management personnel.

The plant manager refused to reinstate the employees because they

\textsuperscript{330} See, e.g., Stephenson v. NLRB, 614 F.2d 1210 (9th Cir. 1980), where an employee was discharged for smoking near a container of flammable solvents after a warning by the employer. The court stated that the proper test for determining whether the discharge of an employee constitutes an unfair labor practice is whether "antiunion animus" is the motivating reason. \textit{Id.} at 1213. No mention of an employer's business motivations is made in the test.

\textsuperscript{331} 661 F.2d at 115 (quoting L'Eggs Products, Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980)).

\textsuperscript{332} \textit{Id.}

\textsuperscript{333} \textit{Id.}

\textsuperscript{334} \textit{Id.} The employer claimed that the Board applied an "in part" test which states that a "discharge motivated in part by an employee's exercise of section 7 rights is a violation even though another valid cause may also be present." \textit{Id.} (emphasis in original). The court agreed that this formulation of the test was incorrect but pointed out that the Board stated no test in its decision and that the Board's conclusion conformed to the Ninth Circuit test. \textit{Id.}

\textsuperscript{335} 686 F.2d 659 (9th Cir. 1981).

\textsuperscript{336} \textit{Id.} at 661-62 (emphasis added).
advocated the overthrow of plant supervision and because he believed they were associated with the Communist Party. The court determined that the distribution of leaflets was a protected activity.\textsuperscript{337} Although distribution of purely political literature is not a protected activity,\textsuperscript{338} distribution of literature containing nonpolitical matter and political matter related to the employee's working conditions is a protected activity.\textsuperscript{339}

Antiunion animus is an essential element of section 8(a)(3) violations.\textsuperscript{340} Since the Board found no such animus on the part of the employer, the court made no finding regarding a possible section 8(a)(3) violation.\textsuperscript{341} Instead, the case proceeded under alleged violations of section 8(a)(1).\textsuperscript{342} In a section 8(a)(1) discharge case, if the employer has demonstrated justification for the dismissal with legitimate and substantial business concerns, the Board has the burden of proving that the employer's motivation for the discharge was to penalize the employee for engaging in a protected activity.\textsuperscript{343} The court in \textit{Fun Striders} concluded that the employer could reasonably believe that the employees threatened to initiate a violent confrontation in its plant.\textsuperscript{344} Refusal to reinstate the employees was an effort to avoid such a confrontation which represented a legitimate and substantial business concern.\textsuperscript{345}

Evidence that an employee was engaged in protected activity and that the employer had knowledge of that activity at the time of discharge is necessary to establish a prima facie case of wrongful discharge.\textsuperscript{346} In \textit{Anja Engineering Corp. v. NLRB},\textsuperscript{347} an employee, active in an unsuccessful union representation campaign, was terminated for failing to notify the company of her intent to return to work after receiving permission for a leave of absence. This failure to notify violated the company's automatic termination policy. The Administrative Law Judge found that Anja had no knowledge of the employee's activi-

\begin{footnotes}
\footnotemark[337]\textit{Id.} at 662.
\footnotemark[338]\textit{Id.} (citing Firestone Steel Products Co., 244 N.L.R.B. 826 (1979); Ford Motor Co., 221 N.L.R.B. 663 (1975), \textit{enforced mem.}, 540 F.2d 418 (3d Cir. 1976)).
\footnotemark[339]686 F.2d at 662 (citing Eastex, Inc. v. NLRB, 437 U.S. 556, 563-70 (1978)).
\footnotemark[340]686 F.2d at 662.
\footnotemark[341]\textit{Id.}
\footnotemark[342]\textit{Id.} This case is distinguished from \textit{Ad Art} and \textit{Stephenson}; see supra notes 312 and 317, where the courts found violations of sections 8(a)(1) and (3).
\footnotemark[343]686 F.2d at 662 (citations omitted).
\footnotemark[344]\textit{Id.}
\footnotemark[345]\textit{Id.} at 663.
\footnotemark[346]\textit{Anja Eng'g Corp. v. NLRB}, 685 F.2d 292, 294-95 n.4 (9th Cir. 1982) (citing NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964)); \textit{see also} NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973).
\footnotemark[347]685 F.2d 292 (9th Cir. 1982).
\end{footnotes}
ties in the union's organizational campaign. The Board held, however, that the employer had "continuing knowledge" of the employee's union activity. The Board found that Anja had knowledge of the employee's union activities based on other testimony. In addition, the Board noted that Anja had vigorously resisted organizational efforts and harbored antiunion animus with respect to other discharges. The Board also considered the firing of the employee one day before the union election to be highly "suspicious." The court in Anja found the Board's conclusion to be speculative and in direct conflict with testimony credited by the ALJ. The company's resistance to union organization and antiunion animus regarding the discharge of other employees on prior occasions did not render support to the Board's "continuing knowledge" theory. Although the timing of an employee's termination can lead to an inference of company knowledge regarding union activity, the court found the timing in this case to be of little significance. The court based its refusal to enforce the Board's order on the ALJ's finding that the discharge was the result of a strict application of company policy which was not discriminatorily applied to the terminated employee.

C. Withdrawal of Recognition

Congress granted the NLRB primary responsibility to formulate rules to govern multiemployer bargaining units in order to balance the conflicting interests of unions and employer association members. Several Ninth Circuit decisions have concluded that the Board's rules do not reasonably balance these conflicting interests. The courts and the Board previously held that an employer could withdraw from the unit once there was impasse in bargaining. Prior to negotiations, either the union or an employer in a multiemployer bargaining unit may unilaterally withdraw upon adequate written notice. The intent

348. Id. at 294. The ALJ's finding was based on the testimony of a company vice president. Id.
349. 685 F.2d at 295.
350. Id.
351. Id.
352. Id. at 296.
353. The court went so far as to say that the Board's opinion was "conjecture bordering on cynicism." Id.
354. 685 F.2d at 296.
355. Id.
to withdraw must be unequivocal and exercised in good faith. During negotiations any party may withdraw upon mutual consent. The Supreme Court in *NLRB v. Charles D. Bonanno Linen Service*, overruled earlier decisions by stating that an impasse in bargaining would no longer qualify as a justification for an employer's withdrawal from a bargaining unit.

In *Seattle Auto Glass v. NLRB*, the Ninth Circuit applied the *Bonnano* rule to employers who withdrew from a multiemployer bargaining unit. The court in *Seattle Auto Glass* ruled that neither an impasse in bargaining nor the signing of an interim agreement that will not survive the final master agreement, constitutes an "unusual circumstance" to justify an employer's withdrawal. The multiemployer bargaining unit and union had already signed a master agreement when a dispute over terms regarding a segment of the unit arose. The union struck, but shortly thereafter agreed to stop picketing association members who signed the master agreement and agreed to sign an interim agreement concerning segment terms. Seattle Auto Glass did not sign the interim agreement and attempted to withdraw from the bargaining unit in objection to the other employers' signing of the interim agreement. The union refused to recognize Seattle's withdrawal. The court concluded that the employer's withdrawal constituted an unfair labor practice based on the rule in *Bonnano*. Only interim agreements were signed in *Seattle*, as opposed to separate agreements that would survive unit negotiations and might justify withdrawal.

In *Western Pacific Roofing v. NLRB*, the court held that an employer who is a member of a multiemployer bargaining unit may demand special treatment if it informs all parties of a problem, such as financial difficulties, at the start of negotiations. In *Western Pacific* a union struck all members of a multiemployer bargaining unit when an

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359. Id.
360. Id.
361. 454 U.S. 404 (1982). In *Bonanno*, the employer was a member of a multiemployer bargaining unit and was struck by a union after an impasse in bargaining was reached. The company hired permanent replacements for the striking union members and notified the bargaining unit of an intent to withdraw. The union filed an unfair labor practice against the company as a result of its withdrawal.
362. Id. at 412.
363. 669 F.2d 1332 (9th Cir. 1982).
364. Id. at 1335.
365. Id.
366. Id.
367. Id.
368. Id. at 1336 (citing Genesco, Inc. v. Joint Council 13, United Shoe Workers of America, 341 F.2d 482, 489 (2d Cir. 1965)).
agreement was not reached. Negotiations continued in spite of the strike. Western's president decided to withdraw from the unit when it appeared imminent that a contract to which he did not wish to be bound would be approved. Western argued that extreme financial distress justified the withdrawal.369

The Board has ruled that financial distress may qualify as an "unusual circumstance" and justify withdrawal.370 The court concluded, however, that since Western did not initially demand special treatment and make other members of the multiemployer unit aware of its financial problems, it could not later choose to use these problems as an excuse to withdraw from the bargaining unit to avoid an unfavorable contract.371

In NLRB v. Birkenwald, Inc.,372 the court ruled that when the largest member of a bargaining unit enters into a separate agreement with a union that "effectively fragment[s] and destroy[s] the integrity of the bargaining unit,"373 this constitutes an unusual circumstance that will justify employer withdrawal.374 In Birkenwald, the union voted to go on strike after rejecting a proposal from the employers. The largest employer member of the unit signed a separate permanent agreement with the union shortly thereafter. Birkenwald became aware of this agreement and notified all unit members that it was withdrawing. The union refused to consent to the withdrawal. Several days later, the bargaining unit and the union ratified a new contract and Birkenwald refused to be bound by the terms of the new agreement. The court, relying on Bonanno, found that the separate agreement was an unusual circumstance which justified Birkenwald's withdrawal and that the remaining members of the multiemployer unit would also be permitted to withdraw.375

A party may withdraw from a bargaining unit if all members were notified of its intent to withdraw before commencement of negotiations.376 In NLRB v. Teamsters Union, Local No. 378,377 the Teamsters

369. 669 F.2d at 1336.
370. Id. (citing Spun-Jee Corp., 171 N.L.R.B. 557 (1968); United States Lingerie Corp., 170 N.L.R.B. 750 (1968)).
371. 669 F.2d at 1336.
372. Id.
373. Id. at 1337 (quoting Charles D. Bonanno Linen Service, 243 N.L.R.B. 1093, 1096 (1979)).
374. Id. at 1336-37.
375. Id. at 1337.
376. Bonanno, 454 U.S. at 410-11. See Retail Associates, Inc., 120 N.L.R.B. 388, 393-95 (1958). In Retail Associates, an association consisting of department stores and a union commenced labor negotiations. The union joined with other labor organizations with whom the
threatened to strike a multiemployer bargaining unit because the negotiations were at a standstill. One employer, Capitol Chevrolet, objected to the tactics and proposals of the other employers. For example, the association refused to incorporate a cost-of-living proposal made by Capitol. As a result, Capitol announced its withdrawal from the bargaining unit after its proposal was rejected. Further negotiations proved unfruitful and the Teamsters struck all association members except Capitol because it had initiated separate negotiations and executed a separate written agreement with the Teamsters.

The association filed unfair labor practice charges, and the Board held that withdrawal by an employer after commencement of negotiations requires "mutual consent." The Teamsters contended that mutual consent only required the "union's consent for unilateral withdrawal by an employer." The Board held, however, that the multiemployer association must also consent to the withdrawal. Thus, the union, by negotiating with an improperly withdrawn employer, had committed an unfair labor practice.

The Board's position, if accepted, would allow the multiemployer bargaining unit to have absolute authority over its members regardless of the authority actually granted to it by its members during formation. The Teamster's position, at the other extreme, would give the multiemployer unit no control over its members because they could unilaterally withdraw at any time. The court relied on Bonanno in stating that there should be limitations on the ability to withdraw because employers who have delegated the authority to negotiate to a multiemployer bargaining unit have the right to have the agreement respected by other signatories. This decision was not inconsistent with Seattle Auto Glass, because unit members should only be held

377. 672 F.2d 741 (9th Cir. 1982).
378. Id. at 743.
380. 672 F.2d at 743.
381. Id. at 744.
382. Id.
383. Id.
384. See supra note 360 and accompanying text.
to the terms of an agreement so long as its terms are satisfied.\textsuperscript{385} An employer bargains for a guarantee that other employer members will jointly negotiate when it joins a multiemployer bargaining unit. If a large member of the unit drops out, the bargain is changed and the terms are no longer satisfied.\textsuperscript{386}

The court in \textit{Teamsters Union, Local No. 378}, also rejected the Board's conclusion that when an association agrees to restrict employer withdrawals, it creates liability for a union which may be unaware of the agreement and which subsequently reaches an agreement with an improperly withdrawn employer.\textsuperscript{387} In \textit{Retail Associates},\textsuperscript{388} the Board held that a party who desires to withdraw from a bargaining unit must notify all other parties of its intent.\textsuperscript{389} This notice should make all parties aware of the "interests at stake" in the negotiations.\textsuperscript{390} Notice would also eliminate the possibility that a union would be unaware that it was negotiating with an improperly withdrawn employer.\textsuperscript{391}

\section*{D. Union Discrimination}

Section 8(b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their self-organization and collective bargaining rights.\textsuperscript{392} Section 8(b)(1)(B) makes it an unfair labor practice for a union to restrain or coerce an employer in the selection of representatives for grievance adjustment or collective bargaining.\textsuperscript{393}

In \textit{Northwest Publications, Inc. v. NLRB},\textsuperscript{394} the court held that the union's fining of a warehouse supervisor for performing "off the clock" activities prior to the start of the shift violated section 8(b)(1)(B) of the National Labor Relations Act.\textsuperscript{395} The supervisor in \textit{Northwest} usually arrived at work thirty minutes prior to the start of the shift to perform "prestart activities" to ensure that the shift started smoothly.\textsuperscript{396} The union notified this supervisor to appear at a hearing regarding observa-

\begin{thebibliography}{999}
\bibitem{385} Teamsters, Local No. 378, 672 F.2d at 744.
\bibitem{386} Id. at 744-45.
\bibitem{387} Id. at 745.
\bibitem{388} See supra note 376.
\bibitem{389} Id at 745-46.
\bibitem{390} 120 N.L.R.B. at 393-95.
\bibitem{391} 672 F.2d at 745.
\bibitem{393} 29 U.S.C. \textsection 158(b)(1)(B) (1976).
\bibitem{394} 656 F.2d 461 (9th Cir. 1981).
\bibitem{395} Id. at 465-66.
\bibitem{396} Id. at 462. These activities included such things as turning on the warehouse conveyor, starting a forklift to warm it up, and unlocking warehouse doors. Id.
\end{thebibliography}
tions that he had been working “off the clock” before the shift began. The employer advised the supervisor not to appear at the union hearing. The union fined him $100.00 for failure to appear, which was paid by the supervisor under protest. Northwest then filed an unfair labor practice charge against the union. 397

Situations in which supervisors are also union members create unique problems with respect to union discipline. 398 In Florida Power and Light Co. v. International Brotherhood of Electric Workers, 399 the Supreme Court established a standard for ascertaining whether union discipline of supervisors has violated the Act. 400 A violation of section 8(b)(1)(B) occurs only when disciplinary action taken by the union “adversely affect[s] the supervisor’s conduct in performing the duties of and acting in his capacity as grievance adjustor or collective bargainer on behalf of the employer.” 401

The types of union activity that adversely affect a supervisor’s conduct in this capacity have expanded significantly since the 1947 passage of the Act. 402 The Board extended the auspices of section 8(b)(1) in San Francisco-Oakland Mailers Union No. 18. 403 In Oakland Mailers, 404 three foremen were assigned bargaining unit work in violation of a collective bargaining agreement and were expelled from the union as a result. Although there was no union pressure or coercion aimed at replacing the foremen, the Board held that the union violated section 8(b)(1)(B) by attempting to influence interpretation of the collective bargaining agreement by the foremen. 405 Any foreman interpreting the contract in the future would predictably be reluctant to take a stance adverse to that of the union. 406

The Supreme Court has discussed a possible “carryover” effect of union discipline that might influence a supervisor’s conduct and deprive an employer of the full services of his supervisor, “thereby re-

397. The employer alleged violations of § 8(b)(1)(B). 656 F.2d at 462.
398. 656 F.2d at 463.
400. Id. at 805. The Court determined that a union did not commit an unfair labor practice when it disciplined supervisors who were also union members for crossing a picket line during a strike and performing work normally done by the nonsupervisory employees on strike. Id. at 813.
401. Id. at 805.
402. 656 F.2d at 463.
404. The case involved the same employer as in Northwest Publications, see supra note 394.
405. 172 N.L.R.B. at 2183.
406. 417 U.S. at 801.
strained and coercing the employer in his selection of representatives." The Board elucidated circumstances in which union discipline may have a carryover effect and interfere with a supervisor's functions in Teamsters Local No. 524 (Yakima). In Yakima, the union filed charges against several supervisors for performing off the clock bargaining unit work at the request of customers. The union claimed that the supervisors breached a provision in the collective bargaining agreement by performing off the clock work without prior union consent. The union admitted that the disciplinary action of fining the supervisors was directed at forcing the supervisors to adhere to the terms of the collective bargaining agreement. As a result, the Board found violations of 8(b)(1)(B) in that the union action imposed the union's interpretation of the collective bargaining agreement on the employer without initiating a grievance proceeding. The underlying purpose of the Act is undercut when a union uses disciplinary action instead of the proper mechanisms set up by the Act to force its interpretation of an agreement on an employer.

In Northwest, the company claimed that prestart activities had been performed off the clock by previous supervisors without union protest. The Board concluded that the prestart activities did not constitute a supervisory function, but this was inconsistent with the Board's decision in Yakima which found similar activities to be supervisory. The court determined that the proper classification of work should be determined by an "overall analysis" of the supervisor's activity during the period of time for which the supervisor is being reprimanded. The court stated that the union had unilaterally interpreted what should be considered supervisory under the collective bargaining agreement instead of properly instituting a grievance proceeding. The union's action would have a "carryover" effect on future supervisory decisions.

409. Id. at 909.
410. Id. at 910.
411. Id.
412. 656 F.2d at 465.
413. Id.
414. Id.
415. Id. at 465-66.
416. Id. at 466.
E. Subcontracting Clauses

In *Joint Council of Teamsters, No. 42 v. NLRB*, the Ninth Circuit considered whether a subcontracting clause between a union and an employer which mandated union membership for any person wishing to work for the employer constituted an unfair labor practice. Section 8(e) of the Act prohibits agreements, known as hot cargo agreements, between unions and employers where the employer agrees to "'cease doing business with any other person.'" In effect, the subcontracting clause under consideration would require that any self-employed person who wished to work at the jobsite would first have to join the union. The construction industry proviso to section 8(e), however, permits such agreements with respect to "'work to be done at the site of the construction.'" In *Joint Council*, independent dump truck owner-operators hauled material from the construction site to remote dump pits. The court upheld the Board's conclusion that the owner operators did not come under the auspices of the special construction industry proviso because they spent "most of their time on public roads away from the construction site." The court found that although the union did not directly use coercive tactics, the inclusion of the agreement to require mandatory union membership would have the indirect effect of coercing reluctant truck owners to join the union if they wished to work for the employer.

The Supreme Court in *Woelke & Romero Framing, Inc. v. NLRB*, held that subcontracting clauses are protected by the construction industry proviso and are not restricted in application to jobsites where both nonunion and union employees are working. The Court considered two consolidated cases where both employers argued that the subcontracting clauses which prohibited the employers from subcontracting work at the jobsite to anyone who was not a member of the union violated section 8(e).

417. 671 F.2d 305 (9th Cir. 1981), vacated, 103 S. Ct. 1172 (1983).
418. *Id.* at 309 (quoting 29 U.S.C. § 158(e) (1976)).
419. *Id.* at 311.
420. *Id.* at 309.
421. *Id.* The only time the truck operator was on the site was when the truck was being loaded or unloaded during which time he generally remained in the vehicle. *Id.*
422. *Id.* at 311.
424. *Id.* at 666.
425. *Id.* at 647-48. Section 8(e) generally prohibits secondary agreements that "require an employer to cease doing business with another party, in order to influence the labor relations of that party." 456 U.S. at 649.
The first case involved Woelke & Romero Framing, Inc., a framing subcontractor in the construction industry. Woelke had been engaged in collective bargaining with the United Brotherhood of Carpenters and Joiners of America for a three year period. Negotiations for a successive agreement reached an impasse because the union demanded a union signatory subcontracting clause. Two union locals picketed Woelke's jobsite which resulted in work stoppages. Woelke filed an unfair labor practice charge with the Board alleging section 8(e) violations. Woelke alleged that the construction industry proviso protected only subcontracting clauses that covered jobsites where union and non-union personnel were employed. The Board rejected this argument and ruled that such clauses are protected by the proviso so long as they are negotiated under a collective bargaining arrangement. In upholding the clause's validity, the Board also found that the union committed no unfair labor practice by picketing to enforce the clause.

The second case involved the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. and Local 701 of the International Union of Operating Engineers. Oregon AGC, an association comprised of approximately two hundred employers in the construction industry, entered into a contract containing a subcontracting clause with Local 701 in 1960. In 1977, the association filed unfair labor practice charges against the union alleging section 8(e) violations. The Board, adopting the rationale applied in *Carpenters Local No. 944 (Woelke)*, found that the clause was protected by the proviso. In an en banc hearing, the Ninth Circuit enforced the Board's order in its entirety and added that, although economic pressure may not be used to enforce a subcontracting clause, it may be used in an effort to obtain such an agreement. In reviewing these decisions, the Supreme Court looked to the plain language and legislative history of section 8(e) and determined that Congress did not intend to limit the

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426. *Id.* at 649. Woelke also argued that union picketing in support of the allegedly invalid clause violated section 8(b)(4). That section prohibits coercing "any employer . . . to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) . . . ." 29 U.S.C. § 158(b)(4) (1976).

427. 456 U.S. at 649.

428. *Id.* at 649-50 (quoting *Carpenters Local No. 944 (Woelke)*, 239 N.L.R.B. 241, 250 (1978) (citations omitted)).

429. 456 U.S. at 650 (citing *Carpenters*, 239 N.L.R.B. at 251).

430. 456 U.S. at 650-51.

431. *Id.* at 651 (citing International Union of Operating Eng'rs, 239 N.L.R.B. 274, 277 (1978)).

validity of subcontracting clauses to situations where union and non-union employees were working side-by-side.\textsuperscript{433}

The petitioners also alleged that subcontracting clauses cause "top-down" pressure for unionization.\textsuperscript{434} Such clauses have the effect of forcing subcontractors to require that all employees join the union to obtain work, thereby "[taking] the representation decision out of the hands of the employees and [placing] it in the hands of the employers."\textsuperscript{435} The Court found that this pressure was inherent in the proviso to section 8(e) and that Congress decided that the ill effects of such pressure were outweighed by the benefits of the proviso.\textsuperscript{436}

Furthermore, the pressure is limited by other provisions of the Act.\textsuperscript{437} Section 8(f) permits collective bargaining in the construction industry even if the employees have not selected the union as their bargaining representative.\textsuperscript{438} This section also provides that employees may file an election petition with the Board to challenge the union's status as exclusive representative.\textsuperscript{439} As an additional safeguard, the subcontractor may repudiate the clause if the union does not demonstrate majority status.\textsuperscript{440} Even if the subcontractor must obtain labor from union hiring halls, nonunion members are not "frozen out" because the union must refer union and nonunion members to available jobs on a non-discriminatory basis.\textsuperscript{441} Based on the plain language and legislative history of section 8(e) and the additional safeguards, the Court affirmed the lower court rulings that the clauses were protected by the proviso.\textsuperscript{442}

### F. Union Coercion of Employers

In \textit{NLRB v. Driver Salesmen},\textsuperscript{443} the court found that the Board

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\textsuperscript{433} 456 U.S. at 653-54.
\textsuperscript{434} Id. at 662-63.
\textsuperscript{435} Id. at 663.
\textsuperscript{436} Id. "Congress concluded that the community of interests on the construction jobsite justified the top down organizational consequences that might attend the protection of legitimate collective bargaining objectives." Id. It is interesting to note that 7 years earlier in Connell Constr. Co. v. Plumbers and Steamfitters, 421 U.S. 616 (1975), the Court stated that one of the major aims of the 1959 Act was to limit top-down organizing. 456 U.S. at 632.
\textsuperscript{437} 456 U.S. at 663-64.
\textsuperscript{439} Id.
\textsuperscript{440} See, NLRB v. Local 103, Ironworkers, 434 U.S. 335 (1978).
\textsuperscript{441} 456 U.S. at 664-65 (citing 29 U.S.C. § 158(a)(3)).
\textsuperscript{442} 456 U.S. at 666. The Court also held that the court of appeals was without jurisdiction to decide whether a union violates § 8(b)(4)(A) when it pickets to obtain a lawful subcontracting clause. Id. at 665-66.
\textsuperscript{443} 670 F.2d 855 (9th Cir. 1982).
failed to establish that the union controlled a trust when the trustees voted to implement vision care benefits.\textsuperscript{444} Without a showing that the trust was an agent of the union there could be no violation of section 8(b)(3) of the Act.\textsuperscript{445} A trust was created in 1966 by Driver Salesmen, a union, and three employers in a multiemployer bargaining unit. In 1976, the union suggested to the Board of Trustees that the trust establish a vision care package by using $100,000 from the trust reserve fund. The Board of Trustees was composed of three union and three employer members. The vision care proposal received unanimous support from the union trustees and majority support from the employer trustees.\textsuperscript{446} The court concluded that there was no evidence that the employers were coerced when the decision was made to extend the benefits.\textsuperscript{447} The employers would not be obligated to pay for any benefits beyond the termination date of the existing collective bargaining agreement.\textsuperscript{448} Because the trust was not considered an agent of the union, and the employers had not been coerced in the vote, there was no violation of section 8(b)(3) of the Act.\textsuperscript{449}

In \textit{NLRB v. Local No. 12},\textsuperscript{450} the court held that the union committed an unfair labor practice by threatening to strike in order to force an employer to pay contributions to a union fringe benefit fund.\textsuperscript{451} The union claimed that contributions were due on behalf of the president and vice-president of the company.\textsuperscript{452} In an earlier decision,\textsuperscript{453} the court ruled that the union strike was illegal, and required the union and trust fund trustees to repay to the company all monies that had been paid to the trust under protest.\textsuperscript{454} Relying on this earlier ruling, the court found that the record clearly established that the union committed an unfair labor practice in the instant case.\textsuperscript{455} Thus, the decision was based on the earlier ruling that the strike was illegal and that the Board's remedy requiring repayment of the funds was appropriate.\textsuperscript{456}

\textsuperscript{444}. \textit{Id.} at 858.
\textsuperscript{445}. \textit{Id.} at 859.
\textsuperscript{446}. \textit{Id.} at 857.
\textsuperscript{447}. \textit{Id.} at 858.
\textsuperscript{448}. \textit{Id.} at 859.
\textsuperscript{449}. \textit{Id.} at 859-60.
\textsuperscript{450}. 673 F.2d 1094 (9th Cir. 1982).
\textsuperscript{451}. \textit{Id.} at 1096.
\textsuperscript{452}. \textit{Id.}
\textsuperscript{453}. Maas & Feduska, Inc. v. NLRB, 632 F.2d 714 (9th Cir. 1979).
\textsuperscript{454}. \textit{Id.} at 720-21. The court relied on the terms of the labor agreement which provided the company president and vice-president with optional coverage. \textit{Id.}
\textsuperscript{455}. \textit{Id.} at 1097. The court, in a rather cursory opinion, relied heavily on the Board's findings.
\textsuperscript{456}. \textit{Id.}
G. Duty of Fair Representation

The duty of fair representation has a statutory basis in both the Railway Labor Act and the National Labor Relations Act. The failure to exhaust internal union remedies will generally preclude a union member from bringing an action against the union. A union member may sue if the union acted in bad faith or engaged in discriminatory or arbitrary conduct.

The Ninth Circuit considered a union's duty of fair representation in Weitzel v. Oil Chemical and Atomic Workers Union, Local 1-5. The court in Weitzel held that where the union made a good faith effort to have a former employee adequately represented, the union did not breach its duty of fair representation. The employee had been fired by Shell Oil Company during a strike. The union referred him to a law firm and the firm subsequently filed an unfair labor practice charge with the Board. The employee became critical of the law firm's services, and appealed a $10,000 judgment against the advice of the firm. On appeal, no counsel from the firm appeared and the employee was represented by an NLRB attorney. The Board overruled its earlier decision and reversed the $10,000 judgment. The court of appeals found that the employee produced no evidence to prove that the union acted in "an arbitrary, discriminatory, or bad faith fashion, and therefore [the employee] failed to state a claim for breach of duty of fair representation."

The employee also claimed that the NLRB attorney was uninterested, inexperienced, and incompetent. The court stated that the standard in a malpractice suit should be whether the combined skill and care of the NLRB attorney and private counsel would have rendered a different decision, and not whether the NLRB attorney exercised ordinary skill and care. The case was remanded to consider this issue.

The court in Tenorio v. NLRB held that a union breaches its duty of fair representation by processing a member's grievance in a perfunctory or arbitrary manner. In Tenorio, two union members became involved in a barroom altercation. They refused to appear for

458. Id. at 187 (Supp. 1978).
459. Id. at 191.
460. 667 F.2d 785 (9th Cir. 1982).
461. Id. at 786-87.
463. 667 F.2d at 787.
464. 680 F.2d 598 (9th Cir. 1982).
465. Id. at 601 (citing Vaca v. Sipes, 386 U.S. at 190-91).
questioning before a union board because they considered the fight to be a private matter. They met with an executive board member to inform him of their position. The board member reported to a foreman that he felt "threatened" at the meeting, and the two union members were discharged the next day. The union filed a grievance on their behalf. The union had a policy of interviewing discharged workers to get their version of any incidents regarding dismissals, but failed to do so in this case, alleging that it did not have the addresses or phone numbers of the discharged workers. Testimony of one union official disputed this fact. The joint standing committee met to review the merits of the grievance. The union acquiesced in the dismissal and decided not to pursue the grievance to arbitration.

The court noted that unions are afforded a reasonable range of discretion in handling grievances, but that an "egregious disregard for the rights of union members constitutes a breach of the duty of fair representation." The court found that the union departed from its policy of interviewing all employees after dismissal and that the union had no legitimate basis for doing so. The totality of the circumstances indicated an inadequate handling of the union members' grievance.

III. COLLECTIVE BARGAINING

A. Duty to Bargain in Good Faith

Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act (NLRA) impose a mutual duty on an employer and a union to "bargain collectively". Section 8(d) requires the employer and the union to meet at reasonable times and to confer in good faith. Together, these sections make it an unfair labor practice to refuse to bargain in

466. 680 F.2d at 609 (citing Ness v. Safeway Stores, Inc., 598 F.2d 558, 560 (9th Cir. 1979) (per curiam); Robesky v. Quantas Airways Ltd., 573 F.2d 1082, 1086 (9th Cir. 1978)).
467. 680 F.2d at 602.
468. Id.
469. 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(5) states in pertinent part: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . ." Similarly, 29 U.S.C. § 158(b)(3) (1976) states in pertinent part: "It shall be an unfair labor practice for a labor organization or its agent to refuse to bargain collectively with an employer, provided it is the representative of his employees . . . ."
470. 29 U.S.C. § 158(d) (1976). Section 8(d) states in pertinent part: "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and concur in good faith . . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." See, e.g., NLRB v. Tomco Communications, Inc., 567 F.2d 871, 884 (9th Cir. 1978).
good faith. However, there is no universal definition of good faith.\textsuperscript{471} Thus, the Board and the courts determine the meaning of good faith on a case-by-case basis.\textsuperscript{472}

1. Indicia of good/bad faith

Surface bargaining and dilatory tactics during negotiations have been recognized as evidence of bad faith.\textsuperscript{473} Surface bargaining exists when a party bargains without an intent to reach an agreement.\textsuperscript{474} Similarly, dilatory tactics exist when a party initiates unreasonable delays or tactics to frustrate the process of negotiation.\textsuperscript{475}

The Ninth Circuit recently dealt with the issue of good faith bar-

\begin{footnotesize}
\begin{enumerate}
\item ABA, \textit{THE DEVELOPING LABOR LAW}, 83-97 (Supp. 1976). In its first Annual Report, the Board discussed some guidelines of good faith:

Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground . . . .

The Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining.

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

472. The courts have tried to define “good faith.” For example, the Ninth Circuit in NLRB v. Montgomery Ward Co., 133 F.2d 676, 686 (9th Cir. 1943), stated that the parties must meet with a present intention to find a basis for agreement. See also NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956) (“While Congress did not compel agreement . . . . it did require collective bargaining in the hope that agreements would result.”); NLRB v. Southwestern Porcelain Steel Corp., 317 F.2d 527, 528 (10th Cir. 1963) (parties may not come to the bargaining table with a “predetermined position not to bargain”); NLRB v. Herman Sausage Co., 275 F.2d 229, 232 (5th Cir. 1960) (tactics employed while bargaining made collective bargaining futile; there must be an attempt to reach an agreement); NLRB v. Highland Park Mfg., 110 F.2d 632, 637 (4th Cir. 1940) (parties “negotiate in good faith with the view of reaching an agreement if possible”). See generally ABA, \textit{THE DEVELOPING LABOR LAW}, 83-88 (Supp. 1976).

473. ABA, \textit{THE DEVELOPING LABOR LAW}, at 84-85.

474. See, e.g., NLRB v. West Coast Casket Co., 469 F.2d 871, 874-75 (9th Cir. 1972) (cancellation of meetings, refusal to return phone calls, and failure to provide counterproposals on time constituted a section 8(a)(5) violation); NLRB v. Holmes Tuttle Broadway Ford, Inc., 465 F.2d 717, 718-19 (9th Cir. 1972) (employer’s actions during ten bargaining sessions—refusal to sign union acceptance of employer’s proposal, insistence on the right to withdraw his proposal at any time, objections to typographical errors, commencement of decertification proceeding against union—constituted surface bargaining).

475. See, e.g., General Motors Acceptance Corp. v. NLRB, 476 F.2d 850, 855 (1st Cir. 1973) (employer’s limited schedule of meetings, insistence that union representatives travel long distances to meetings and requirement that union withdraw unfair labor practice charge before any further meetings constituted bad faith bargaining); NLRB v. Vander Wal, 316 F.2d 630, 633 (9th Cir. 1963) (procrastination in execution of written agreement held to be a dilatory tactic); NLRB v. Southwestern Porcelain Steel Corp., 317 F.2d 527, 530 (10th Cir. 1963) (request for contract review on matters agreed to in principle and failure to make positive and constructive suggestions concerning the wording of the contract indicative of deliberate stalling).
\end{enumerate}
\end{footnotesize}
gaining in *Pittsburgh-Des Moines Corp. v. NLRB*, the employer withdrew its proposed contract after the union had rejected specific portions of it. When the employer tried to revive the negotiations, the union refused, contending that the employer did not intend to reach an agreement. The court, however, concluded that the company did wish to reach an agreement. An employer is not committed to those portions of a proposal on which there has been tentative agreement. The Ninth Circuit reasoned that a proposal should be viewed as a package. Concessions may be made in some portions of the proposal to gain concessions in other portions. Thus, the fact that Pittsburgh-Des Moines retracted its entire proposal when it could not win concessions from the union on specific proposals did not justify a conclusion that it had engaged in surface bargaining.

Sections 8(a)(5) and 8(d) do not require a party to make concessions or to give up a reasonable position. If a party, however, does not "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement," the party may be violating its duty to bargain in good faith. To determine whether a party genuinely desires to reach an agreement, the Board and the courts must consider the "totality of the circumstances" which are indicative of mental state. The Ninth Circuit has held that the content of the bargaining

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476. 663 F.2d 956 (9th Cir. 1981).
477. *Id.* at 958. The union rejected new proposal sections dealing with strikes and employee retirement plans. *Id.* at 957. Tentative agreement had been reached on other portions of the contract. *Id.*
478. *Id.* at 958-59.
479. *Id.* at 959.
480. *Id.* The court stated that "'[t]o bargain collectively does not impose an inexorable ratchet, whereby a party is bound by all it has ever said.'" *Id.* at 960 (quoting NLRB v. Tomco Communications, Inc., 567 F.2d 871, 883 (9th Cir. 1978)).
481. 663 F.2d at 960. "We must assume that the proposal, advanced in the course of the strike, was the result of compromise and the concessions may well have been tendered in some areas with the hope of securing agreement on those portions which the Union chose to reject." *Id.*
482. *Id.*
484. NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960). See also NLRB v. Insurance Agent's Int'l Union, 361 U.S. 477, 485 (1960); NLRB v. Mrs. Fay's Pies, 341 F.2d 489, 492 (9th Cir. 1965); NLRB v. Stanislaus Implement & Hardware Co., 226 F.2d 377, 380 (9th Cir. 1955).
485. Seattle-First Nat'l Bank v. NLRB, 638 F.2d 1221, 1227 (9th Cir. 1981). A court cannot rely solely upon the terms of the contract proposals. *Id.* For example, in NLRB v. Pacific Grinding Wheel Co., 572 F.2d 1343, 1348 (9th Cir. 1978), the Ninth Circuit stated: This circuit has specifically held that the Board can look at the content of the bargaining proposals as part of its review of all the circumstances. NLRB v. Holmes Tuttle Broadway Ford, Inc., 465 F.2d 717, 719 (9th Cir. 1972). In addition, how-
proposal is relevant in determining bad faith.\textsuperscript{486}

For example, in \textit{NLRB v. Mar-Len Cabinets, Inc.},\textsuperscript{487} the employer proposed an extremely strong "management rights" package that would have required the union effectively to abrogate its representation of the employees.\textsuperscript{488} While the court urged caution when inferring motivation from a proposal's content, it concluded that Mar-Len intended to frustrate any possibility of agreement and consequently failed to bargain in good faith.\textsuperscript{489} The proposals were so "consistently and predictably unpalatable" to the union that Mar-Len should have known an agreement was impossible.\textsuperscript{490} Furthermore, though the employer professed economic justifications in support of its proposal, the court stated that "patently improbable justifications for a bargaining position will support an inference that the position is not maintained in good faith."\textsuperscript{491}

2. Unilateral changes

An employer's unilateral changes in conditions of employment which are a mandatory subject of bargaining have been regarded as a per se violation of section 8(a)(5).\textsuperscript{492} Accordingly, in \textit{N.T. Enloe Memo-}

\begin{itemize}
\item \textsuperscript{486}638 F.2d at 1227.
\item \textsuperscript{487}659 F.2d 995 (9th Cir. 1981).
\item \textsuperscript{488}Id. at 999. The employer proposed:
\begin{itemize}
\item to establish a no-strike/no-picket policy;
\item to abolish union security, the right of union representatives to visit the plant, and super-seniority for shop stewards;
\item to deny the employees' rights to arbitration of grievances and to respect picket lines;
\item and to relieve [employer] of its duties to notify the union of new hiring, to hire first through the union hiring hall, and to contribute to the union pension fund.
\end{itemize}
\item \textsuperscript{489}Id. The court recognized that caution is required because "there are too many reasons why an employer who is willing to contract with a union might wish to . . . maintain an open shop." \textit{Id.} (quoting K-Mart Corp. v. NLRB, 626 F.2d 704, 706 (9th Cir. 1980)).
\item \textsuperscript{490}659 F.2d at 999.
\item \textsuperscript{491}Id. at 999-1000. Mar-Len, for example, argued that the union was applying union security clauses in an unlawful manner and consequently subjecting the company to litigation costs. The Board concluded that such an argument was "grasping at straws." \textit{Id.} The court agreed with the Board that the employer's economic justifications "were so theoretical and marginal as to be pretextual." \textit{Id.} (quoting Queen Mary Restaurant Corp. v. NLRB, 560 F.2d 403, 409 (9th Cir. 1977)).
\item \textsuperscript{492}NLRB v. Tom Joyce Floors, Inc., 353 F.2d 768, 772 (9th Cir. 1965) (unilaterally implemented wage program constituted a failure to bargain in good faith without reference to employer's subjective motive). \textit{See also} NLRB v. Sky Wolf Sales, 470 F.2d 827, 830 (9th Cir. 1972).
\end{itemize}
ria Hospital & California Nurses' Association, the Board found the hospital's unilateral wage and benefit changes to be a per se violation of section 8(a)(5).494

Similarly, a successor employer who plans to carry on the same business with a substantial number of the predecessor's employees must consult with the union before altering terms and conditions of employment.495 Thus, in NLRB v. World Evangelism, Inc.,496 the Ninth Circuit held that a successor employer violated section 8(a)(5) when it unilaterally changed the terms and conditions of employment.497 In World Evangelism, the successor employer retained all of the predecessor's employees while carrying on the same business at the same location.498 The successor employer, however, lowered wages and discontinued employee benefits which the employees had enjoyed under the contract with the predecessor employer.499 The Ninth Circuit concluded that the successor employer's changes made without consultation with the representative union, constituted a violation of section 8(a)(5).500

A union's unilateral change of an agreement is a per se violation of section 8(b)(3).501 In NLRB v. Driver Salesmen Local No. 582,502 an independently-operated union trust fund implemented a change in the employees' vision care benefits.503 Because the trustee was not found to be the union's agent, the Ninth Circuit concluded that the union had not unilaterally changed the benefits, and therefore, was not in violation of section 8(b)(3).504

493. 250 N.L.R.B. 583 (1980), enforced, 682 F.2d 790 (9th Cir. 1982).
494. 250 N.L.R.B. at 588. The Ninth Circuit did not address the issue on appeal because the hospital did not specifically challenge the Board's determination. 682 F.2d at 793 n.1.
495. See, e.g., Burns Int'l Security Servs., Inc. v. NLRB, 406 U.S. 272, 294-95 (1972) (successor employer is free to establish initial terms and conditions upon which it will hire the predecessor's employees, unless "it is perfectly clear that the new employer plans to retain all the employees in the unit"); Kallmann v. NLRB, 640 F.2d 1094, 1102 (9th Cir. 1981).
496. 656 F.2d 1349 (9th Cir. 1981).
497. Id. at 1355.
498. Id. at 1354. See Kallmann v. NLRB, 640 F.2d 1094, 1100 (9th Cir. 1981) (a successor employer is one who carries on essentially the same business as the predecessor with a majority of the same employees).
499. 656 F.2d at 1355.
500. Id.
501. See, e.g., NLRB v. Communications Workers Local 1170, 474 F.2d 778, 780 (2d Cir. 1972).
502. 670 F.2d 855 (9th Cir. 1982).
503. Id. at 857.
504. Id. at 859. In order for the trustee to have been an agent of the union, the union must have been in control of the trust at the time of the vision care change. Id. at 858. For
3. Recognition of employees' representatives

Section 8(a)(5) imposes a duty on an employer to bargain collectively with the representatives of his employees. This duty exists even when an employer conducts his own poll and finds that a majority of his employees support a union. In *NLRB v. English Brothers Pattern & Foundry*, the Ninth Circuit held that if an employer conducts a poll and the poll shows that a majority of the employees support a union, the employer is bound to bargain with the union. Here, the court found that the employer's personal poll proved the employer's knowledge of the union's majority support. Therefore, the employer's refusal to bargain with the union constituted a section 8(a)(5) violation.

4. Employer withdrawal of recognition

Section 8(a)(5) requires an employer to bargain with the representative selected by a majority of its employees. After certification or voluntary recognition of a union, majority support is irrebuttable presumed for a reasonable period of time, usually one year. After one year, the presumption becomes rebuttable. To rebut the presumption, an employer must show that it had a good faith reasonable doubt of the union's majority support at the time of withdrawal of recognition, or that it had clear and convincing evidence of the union's minority status.

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\text{Id. at 788.}
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\text{International Ass'n of Machinists & Aerospace Workers v. NLRB, 498 F.2d 680, 682 (D.C. Cir. 1974).}
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\text{NLRB v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir.), cert. denied, 442 U.S. 921 (1979). Absent unusual circumstances, the reasonable period of time is usually one year. Id. at 297. An example of an unusual circumstance is a radical change in the size of the employee unit. Brooks v. NLRB, 348 U.S. 96 (1954).}
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\text{513. 584 F.2d at 297.}
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\text{514. NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980). If the presumption is rebutted, then the union must produce evidence to show the union's majority status. National Cash Register Co. v. NLRB, 494 F.2d 189 (8th Cir. 1974).}
\]
In *NLRB v. Mar-Len Cabinets, Inc.*, the Ninth Circuit held that the employer did not meet its burden of proof to rebut the presumption of the union's majority support at the time it withdrew union recognition. In *Mar-Len*, the employer withdrew recognition from the union after negotiations for a new agreement had broken down. Although the employer showed that none of its employees joined in the picket line and that four out of six employees resigned from the union and returned to work, the court held that the Board had sufficient evidence to find that the employees resigned from the union out of economic necessity. In addition, the court agreed with the Board that the employer's doubt of the union's majority status was not asserted in good faith.

Similarly, in *N. T. Enloe Memorial Hospital v. NLRB*, the Ninth Circuit held that the hospital violated section 8(a)(5) when it failed to rebut the presumption of the union's majority status. In *Enloe*, the court stated that "'the evidence presented to establish [a] reasonable good faith doubt, individually or cumulatively, must unequivocally indicate that union support had declined to a minority.'" Enloe contended that it had presented the Board "overwhelming evidence" to demonstrate its good faith doubt. The court, however, found that *Enloe* relied on its supervisors' testimony of comments made by employees in the past. Even assuming the reliability of the testimony, the court held that *Enloe*'s evidence did not unequivocally show that a

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515. 659 F.2d 995 (9th Cir. 1981).
516. *Id.* at 998.
517. *Id.* at 996.
518. *Id.* at 999. *See NLRB v. Top Mfg. Co.*, 594 F.2d 223, 224-25 (9th Cir. 1979). The court also found that the Board was justified in finding that the employees' dissatisfaction with the union focussed on its handling of the negotiations, not its representation in general. 659 F.2d at 999.
519. 659 F.2d at 999. "'Reasonable doubt as to majority status must only be asserted in good faith and may not be raised in the context of an employer's activities aimed at causing disaffection from the Union.'" *Id.* (quoting Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721, 730 (9th Cir. 1980)). The court affirmed the Board conclusion that the employees' resignations were a direct result of the employer's failure to bargain in good faith. 659 F.2d at 999.
520. 682 F.2d 790 (9th Cir. 1982).
521. *Id.* at 795.
522. *Id.* at 794 (quoting NLRB v. Silver Spur Casino, 623 F.2d 571, 579 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981)). Thus, evidence presenting only an ambiguous inference of the union's minority status is not enough. 682 F.2d at 795.
523. 682 F.2d at 795.
524. *Id.* *Enloe* relied on comments made by nurses from the time of a strike in 1976 until an unfair practice hearing in 1978 and on comments made by prospective employees. *Id.* The court found that these remarks were remote in time and had little probative value. *Id.*
majority of the employee unit did not want the union's representation.\textsuperscript{525} Thus, the court affirmed the Board's finding that Enloe had violated section 8(a)(5) by refusing to bargain with the union.\textsuperscript{526}

The Ninth Circuit extended the basic rule restricting an employer's ability to withdraw recognition in \textit{Mammoth of California, Inc. v. NLRB}.\textsuperscript{527} In \textit{Mammoth}, the employer and the union entered into a settlement agreement in which the employer agreed to post a notice of its intent to bargain with the union upon request in the future.\textsuperscript{528} Thereafter, Mammoth informed the union of its withdrawal of recognition since it believed that the union had lost its majority support.\textsuperscript{529} The Ninth Circuit reiterated that an employer must engage in good faith bargaining with a union following its certification for a reasonable period of time, usually one year.\textsuperscript{530} Although Mammoth withdrew recognition one month after the certification year had ended, the court held that the settlement agreement extended the certification year and the union's irrebuttable presumption of majority status.\textsuperscript{531} Therefore, Mammoth had committed itself to bargain with the union for a reasonable period of time without regard to the certification year or to any change in the union's majority status.\textsuperscript{532} The Ninth Circuit has thereby limited the ability of an employer to withdraw its recognition of the

\textsuperscript{525} Id.
\textsuperscript{526} Id. at 792.
\textsuperscript{527} 673 F.2d 1091 (9th Cir. 1982).
\textsuperscript{528} Id. at 1092. The agreement to post notice of the employer's future intent to bargain with the union was in consideration of the union's withdrawal of unfair labor practice charges against Mammoth. \textit{Id}. The settlement agreement was approved by the Regional Director. \textit{Id}.
\textsuperscript{529} Id.
\textsuperscript{530} \textit{Id}. \textit{See} Brooks \textit{v. NLRB}, 348 U.S. 96, 98 (1954); Pioneer Inn Assoc. \textit{v. NLRB}, 578 F.2d 835, 838 (9th Cir. 1978); \textit{cf}. 29 U.S.C. § 159(c)(3) (Board shall not order an election in any bargaining unit within which a valid election was conducted in the preceding twelve months).
\textsuperscript{531} 673 F.2d at 1092-93. The court relied on Poole Foundry & Machry. Co. \textit{v. NLRB}, 192 F.2d 740, 743 (4th Cir. 1951), \textit{cert. denied}, 342 U.S. 954 (1952), where it was stated that "by entering into a settlement agreement [the employer] is bound to bargain in good faith with the Union for a reasonable period of time after such agreement, without questioning the Union's lack of a majority." In \textit{Poole}, the employer was not permitted to withdraw its recognition three and one-half months after following the settlement agreement. 192 F.2d at 743. Mammoth contended, however, that the settlement agreement did not extend the certification year, relying on NLRB \textit{v. Vantran Elec. Corp.}, 580 F.2d 921 (7th Cir. 1978), 673 F.2d at 1093. The court found \textit{Vantran} distinguishable because the settlement in \textit{Vantran} was a "non-board settlement" which did not require the Board's approval. 673 F.2d at 1093 n.3.
\textsuperscript{532} The court agreed with the Board that four months was not a "reasonable period of time." \textit{See supra} notes 512, 531 and accompanying text.
union when the employer voluntarily enters into a settlement agreement with the union.

Similarly, a successor employer commits a section 8(a)(5) violation when it refuses to bargain with the previously recognized union unless the successor employer shows that the union no longer represents a majority of the employees, or that there is a good faith doubt as to the union's majority status. In *NLRB v. World Evangelism, Inc.*, the Ninth Circuit found that the new owner's refusal to bargain with the union constituted a section 8(a)(5) violation because the new owner intended to carry on the same business with the same union employees. As a successor employer, World Evangelism was obligated to recognize and bargain with the employees' union.

5. Withdrawal from a multiemployer bargaining unit

With adequate advance notice, a party is free to withdraw from a multiemployer unit prior to the commencement of negotiations. Once negotiations have begun, however, a party may only withdraw if "unusual circumstances" exist or if "mutual consent" is obtained.

  a. unusual circumstances

The Board has ruled that a bargaining impasse is not an unusual circumstance so as to justify a party's withdrawal from a multiemp-

533. A successor employer is one who conducts essentially the same business as the former employer, and a majority of whose work force are former employees. Kallmann v. NLRB, 640 F.2d 1094, 1100 (9th Cir. 1981).
534. NLRB v. Edjo, Inc., 631 F.2d 604, 607 (9th Cir. 1980).
535. 656 F.2d 1349 (9th Cir. 1981).
536. *Id.* at 1354-55. If a successor employer plans to retain substantially all the predecessor's employees, the successor employer must consult with the union before altering terms and conditions of employment. *Id.* at 1355 (citing Burns Int'l Security Servs., Inc. v. NLRB, 406 U.S. 272, 294-95 (1972)).
537. 656 F.2d at 1354.
539. 454 U.S. at 411. Although this rule was dictum in *Retail Associates*, the Board's approach has been accepted by the courts. See, e.g., NLRB v. Custom Wood Specialties, Inc., 622 F.2d 381 (8th Cir. 1980); Carvel Co. v. NLRB, 560 F.2d 1030 (1st Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); NLRB v. Central Plumbing Co., 492 F.2d 1252 (6th Cir. 1974); NLRB v. Brotherhood of Teamsters, Local No. 70, 470 F.2d 509 (9th Cir. 1972), *cert. denied*, 414 U.S. 821 (1973); NLRB v. Johnson Sheet Metal, Inc., 442 F.2d 1056 (10th Cir. 1971); NLRB v. Dover Tavern Owner's Ass'n, 412 F.2d 723 (3d Cir. 1969); NLRB v. John J. Corbett Press, Inc., 401 F.2d 673 (2d Cir. 1968).
540. A widely accepted definition of impasse is "a state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1969).
In contrast, the Ninth Circuit, along with two other circuits, has held that an impasse in negotiations constitutes an unusual circumstance which justifies an employer's unilateral withdrawal from the multiemployer bargaining unit.\(^\text{542}\)

To resolve these differences, the Supreme Court, in *Charles D. Bonanno Linen Service, Inc. v. NLRB*,\(^\text{543}\) held that an impasse in bargaining *did not* justify a party's withdrawal from the bargaining unit.\(^\text{544}\) In *Bonanno*, the union and the employer association reached an impasse over the method of compensation for truck drivers.\(^\text{545}\) Unable to break the impasse, the union initiated a selective strike against Bonanno.\(^\text{546}\) Thereafter, Bonanno notified the union and the employer association of its withdrawal from the association. After Bonanno's withdrawal, negotiations between the union and remaining employers resumed, resulting in a collective bargaining agreement.\(^\text{547}\) Bonanno, however, denied that it was bound by the agreement. As a result, the union filed a charge alleging that Bonanno's attempt to withdraw from the unit constituted an unfair labor practice under section 8(a)(5).\(^\text{548}\) The Board concluded that Bonanno's withdrawal violated this section.

\(^{541}\) Hi-Way Billboards, Inc., 206 N.L.R.B. 22 (1973), enforcement denied, 500 F.2d 181 (5th Cir. 1974). In *Hi-Way Billboards*, the Board reasoned that an impasse was a foreseeable stage in the bargaining process, rather than the end of collective bargaining. *Id.* at 23. The Board added that a rule permitting unilateral withdrawal upon impasse would "herald the demise of multiemployer bargaining," since a member could avoid its bargaining obligation by purposefully creating an impasse whenever "it was dissatisfied with the impending agreement." *Id.* at 23-24. The Board has adhered to this policy ever since. *See, e.g.*, Seattle Auto Glass, 246 N.L.R.B. 94, 96 (1979); Golden Bear Motor, Inc., 245 N.L.R.B. 300, 308 (1979); Marine Mach. Works, Inc., 243 N.L.R.B. 1098, 1099 (1979); Florida Fire Sprinklers, Inc., 237 N.L.R.B. 1034, 1035 (1978); Bill Cook Buick, Inc., 224 N.L.R.B. 1094, 1096 (1976).

\(^{542}\) NLRB v. Associated Shower Door Co., 512 F.2d 230, 232 (9th Cir.), cert. denied, 423 U.S. 898 (1975); NLRB v. Independent Ass'n of Steel Fabricators, 582 F.2d 135, 146 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); NLRB v. Beck Engraving Co., 522 F.2d 475, 485 (3d Cir. 1975). In *Associated Shower Door*, the Ninth Circuit reasoned that it was "only fair" that when an impasse was reached and the union engaged in selective picketing and entered into an individual agreement with some members of the unit, the other members should be permitted to withdraw. 512 F.2d at 232. If "the rule [were] otherwise, a union could reach an agreement with one or more employers and then whipsaw the remaining members . . . of the weakened multiemployer unit." *Id.* *See Hi-Way Billboards, Inc.*, 500 F.2d at 183.

\(^{543}\) 454 U.S. 404 (1982).

\(^{544}\) *Id.* at 412.

\(^{545}\) *Id.* at 407. The impasse was reached around May 15, 1975, two and one-half months after the commencement of the negotiations. *Id.*

\(^{546}\) *Id.* In response to the union's strike against Bonanno on June 23, most of the association's members locked out their drivers.

\(^{547}\) *Id.* at 408. The collective bargaining agreement was reached on April 23, 1976.

\(^{548}\) *Id.* The union stated that since it had not consented to the withdrawal, Bonanno was bound by the settlement. *Id.*
and the First Circuit enforced the Board's order.\textsuperscript{549}

The Court reiterated the Board's position that an impasse in negotiations is not "sufficiently destructive" of multiemployer bargaining to justify a party's unilateral withdrawal.\textsuperscript{550} The Court reasoned that an impasse is only a "temporary deadlock" which is broken "through either a change of mind or the application of economic force."\textsuperscript{551} Therefore, to permit withdrawal at an impasse would undermine the utility of multiemployer bargaining.\textsuperscript{552} In affirming the Board's decision, the Court recognized that the function of striking a balance effectuating national labor policy should be left to the Board and not to the courts.\textsuperscript{553}

In addition, the Court affirmed the Board's position that individual employers could execute interim or temporary agreements with the union without that being destructive to a multiemployer unit.\textsuperscript{554} Therefore, interim agreements \textit{do not} justify a party's unilateral withdrawal.\textsuperscript{555}

On the other hand, in \textit{Seattle Auto Glass v. NLRB},\textsuperscript{556} the Ninth Circuit held that when a union enters into a "permanent separate agreement" with a substantial member of the unit, the remaining members of the unit are free to withdraw.\textsuperscript{557} In \textit{Seattle Auto Glass},

\begin{itemize}
\item \textsuperscript{549} NLRB v. Charles D. Bonanno Linen Serv., Inc., 630 F.2d 25 (1st Cir. 1980).
\item \textsuperscript{550} 454 U.S. at 412 (citing Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973)).
\item \textsuperscript{552} 454 U.S. at 412. The Court stated that the Board "developed a rule which, although it may deny an employer a particular economic weapon, does so in the interest of . . . maintaining the stability of the multiemployer unit." \textit{Id.} at 419. \textit{See supra} note 541.
\item \textsuperscript{553} 454 U.S. at 413. \textit{See} NLRB v. Truck Drivers Union, 353 U.S. 87 (1957) (\textit{Buffalo Linen}). In \textit{Buffalo Linen}, the Court stated that "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." 353 U.S. at 96 (citations omitted). Thus, in \textit{Bonanno}, the Court concluded that since the Board's decision was not arbitrary or contrary to law, the courts should defer to its judgment. 454 U.S. at 413.
\item \textsuperscript{554} 454 U.S. at 416-17.
\item \textsuperscript{555} \textit{Id.} Although interim agreements establish terms and conditions of employment pending the negotiations, all employers, including those with interim agreements, have a vested stake in the final agreement. \textit{Id.} at 415. \textit{See}, e.g., Sangamo Constr. Co., 188 N.L.R.B. 159 (1971); Plumbers and Steamfitters Union No. 323, 191 N.L.R.B. 592 (1971). However, when one or more group members reach a "separate" agreement, entirely divorced from the multiemployer process, the Board has permitted the remaining members to withdraw. 454 U.S. at 414-15. \textit{See}, e.g., Typographic Serv. Co., 238 N.L.R.B. 1565, 1573-74 (1978); Cornell Typesetting Co., 212 N.L.R.B. 918, 921 (1974).
\item \textsuperscript{556} 669 F.2d 1332 (9th Cir. 1982).
\item \textsuperscript{557} \textit{Id.} at 1337. \textit{See supra} note 555.
\end{itemize}
Birkenwald, a beer and wine distributor, was a member of a multiemployer bargaining unit. Upon learning that Premium, the largest member of the unit, had signed a separate agreement with the union after the negotiations had reached an impasse, Birkenwald gave notice and withdrew from the unit. The Ninth Circuit reasoned that Premium's signing of a permanent separate agreement had "effectively fragmented and destroyed the integrity of the bargaining unit." Therefore, the remaining members, including Birkenwald, were justified in withdrawing from the unit.

The Court's holding in Bonanno arguably sweeps too broadly. A majority of the Court agreed with the Board that an impasse is only a "temporary deadlock" which will eventually be broken "either through a change in mind or the application of economic force." However, not all impasses are temporary. In fact, the deadlock in Bonanno lasted for over six months, and there were no signs that the parties would return to the bargaining table. Thus, the facts in Bonanno suggested not just a temporary deadlock, but a complete breakdown in negotiations. Since negotiations recommenced after Bonanno's withdrawal, Bonanno's withdrawal actually helped rather than hindered the collective bargaining process.

Furthermore, the majority's holding in Bonanno that interim or temporary agreements do not justify a party's withdrawal also may sweep too broadly. An employer who enters into an interim agreement is less likely to seek a final agreement, especially if his competitors are hampered by a strike or a defensive lockout. In such a situation, all employers do not have an equal stake in promptly securing a final agreement. By giving blanket approval to interim and temporary agreements, the Court actually promoted fragmentation of the bargaining unit.

A better rule would be to require the Board to analyze the specific facts on a case-by-case basis. If a complete breakdown occurred in negotiations, or if an interim agreement resulted in unit fragmentation,

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558. 669 F.2d at 1336.
559. Id. at 1337 (quoting Charles D. Bonanno Linen Serv., 243 N.L.R.B. 1093, 1096 (1979), aff'd, 454 U.S. 404 (1982)).
560. 669 F.2d at 1337.
561. 454 U.S. at 412.
562. Id. at 422 (Burger, C.J., dissenting).
563. Id. at 408.
564. An employer who reaches an interim agreement remains in the multiemployer unit to negotiate for a final agreement, which would terminate the interim agreement.
The Board could permit a party to withdraw. The Court, however, was reluctant to step into the Board's area of expertise.

The Board has held that financial distress may be an unusual circumstance justifying a party's withdrawal. In *Seattle Auto Glass v. NLRB*, a roofing contractor withdrew from the multiemployer unit after an impasse in negotiations was reached. In addition to arguing that an impasse justified withdrawal, Western, the contractor, contended that extreme financial distress warranted its withdrawal. The Ninth Circuit held that this was not an unusual circumstance. The court stated that a member of a multiemployer unit may demand special treatment if it clearly notifies the other parties at the beginning of negotiations of its special problems. Since Western entered into the negotiations without disclosing its financial problems, it was not permitted to withdraw from the unit at the last minute claiming financial distress.

Additionally, the Ninth Circuit, in *H & D, Inc. v. NLRB*, held that the mass resignation of H & D's employees from the union was not an unusual circumstance to justify the employer's withdrawal from the multiemployer unit. The court stated that the proper test was not whether the majority of H & D's employees had resigned from the union, but rather, whether the majority of all of the employees in the multiemployer unit had resigned. H & D was not justified in its

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566. *Id.* at 431 (O'Connor, J., dissenting).

567. The majority opinion stated in *Bonanno* that some or all of the Justices may prefer that the Board reach a different balance in assessing the significance of impasse in collective bargaining. 454 U.S. at 413. The Court reasoned that if it had substituted its judgment for that of the Board, "the role of the judiciary in administering regulatory statutes will be enormously expanded and its work will become more complex and time consuming." *Id.* at 418. The dissenting Justices, however, noted that although judicial review should be limited, it should not be absent altogether. *Id.* at 421 (Burger, C.J., dissenting).


569. 669 F.2d 1332 (9th Cir. 1982).

570. *Id.* at 1336.

571. *Id.*

572. *Id.*

573. *Id.* Even if an employer does not state its special problems at the beginning of negotiations, the employer would be able to withdraw if the union or the other members of the association had notice of the special problems. *See, e.g.*, *U.S. Lingerie Corp.*, 170 N.L.R.B. 750, 752 (1968) (union waived its right to prohibit withdrawal where it had notice of the employer's financial difficulties).

574. 670 F.2d 120 (9th Cir. 1982).

575. *Id.* at 123.

576. *Id.* (citing NLRB v. Sheridan Creations, Inc., 357 F.2d 245, 248 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967)).
withdrawal from the multiemployer unit because H & D's employees amounted to substantially less than a majority of the entire unit.

b. mutual consent

In NLRB v. Teamsters Union Local No. 378, the Ninth Circuit rejected the Board's determination that the union had committed an unfair labor practice by negotiating a separate contract with an employer who had withdrawn from a multiemployer unit without the unit's consent. Capitol Chevrolet withdrew from the multiemployer unit after it objected to the unit's bargaining tactics. Capitol Chevrolet sent notice of its withdrawal to the employer association and the Teamsters. The association, however, refused to accept Capitol Chevrolet's withdrawal, and it sent notice of its refusal to Capitol Chevrolet and the Teamsters. Nonetheless, Capitol Chevrolet and the Teamsters initiated separate bargaining which led to the execution of a permanent separate agreement. The Teamsters contended that the mutual consent requirement should be interpreted as requiring only the union's consent. The Board, however, concluded that mutual consent requires both the union's consent and the employer unit's consent. Therefore, the Board determined that the Teamsters were guilty of an unfair labor practice because the employer unit did not consent to Capitol Chevrolet's withdrawal.

The Ninth Circuit rejected both the Board's and the Teamsters' positions as too extreme. Instead, the court reasoned that the mutual consent requirement depended on the employer's agreement with the unit prior to negotiations. This agreement indicates the degree to

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577. 672 F.2d 741 (9th Cir. 1982).
578. Id. at 745.
579. Id. at 743. The unit decided to maintain a "hard money" position against the union's proposed cost-of-living increase clause. Id.
580. Id.
581. Id.
582. Id.
584. 672 F.2d at 743.
585. Id. at 744. The court stated that either extreme imposed unnecessary rigidity on the bargaining process. Id.
586. Id. The court relied on dicta from the Supreme Court in Bonanno where the Court stated:

[The Board has held that the execution of separate agreements that would permit either the union or the employer to escape the binding effect of an agreement re-
which an employer is bound to the unit and also indicates the other employers’ interests in maintaining the “stability, solidarity, and integrity of the unit.” Accordingly, the Ninth Circuit held that a union should not be liable unless the union was given notice prior to negotiations of an agreement which bound each of the employers. Because the facts here did not show whether there was such an agreement or whether the Teamsters were given pre-negotiation notice of such an agreement, the case was remanded to the Board for a factual determination.

6. Construction industry proviso

a. “hot cargo” agreements

Under section 8(e) of the Act, it is an unfair labor practice for the employer or the union to enter into any agreement which requires the employer to refrain from doing business with another party. However, section 8(e) contains a proviso which permits these “hot cargo” agreements between the union and an employer in the construction industry, concerning the contracting or subcontracting of work to be performed at a construction jobsite.

In Woelke & Romero Framing, Inc. v. NLRB, the Supreme Court held that the construction industry proviso shelters union signatory subcontracting clauses sought or negotiated during collective bargaining, even when the clauses extend beyond a particular jobsite where both union and nonunion workers are employed. In Woelke,
the petitioner and the union reached a bargaining impasse over the union's demand for a clause which would prohibit Woelke from subcontracting work at any jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this agreement." When Woelke's jobsites were picketed in support of the union's subcontracting clause, Woelke filed an unfair labor practice charge with the Board.

Woelke asserted that the construction industry proviso shelters subcontracting clauses only if they are limited in application to particular jobsites at which both union and nonunion workers are employed. The Board, however, rejected Woelke's argument and held that "such clauses are lawful whenever they are sought or negotiated 'in the context of collective bargaining relationships.'" In addition, even though the issue was not raised before the Board, the Board indicated that since the subcontracting clause was lawful, the picketing in support of the proposal was permitted under section 8(b)(4)(A).

On appeal, the Ninth Circuit at first refused enforcement. The court adopted Woelke's contention, reasoning that the proviso was designed solely to minimize friction between union members and nonunion workers employed at the same jobsite. Therefore, the court would shelter a subcontracting clause only when a collective bargaining relationship exists and the employer wishes to engage a nonunion subcontractor at a jobsite where the employer or his subcontractor employs union employees. On rehearing en banc, however, the Ninth Circuit enforced the Board's decision. Consequently, the Ninth Circuit agreed with the Board that "union signatory subcontracting clauses are protected so long as they are sought or negotiated in the context of a collective bargaining relationship." In addition, the Ninth Circuit held that section 8(b)(4)(A) was not violated when the union picketed

594. Id. at 648-49.
595. Id. at 649.
596. Id.
597. Id. at 650 (citing Carpenters Local No. 944, 239 N.L.R.B. 241, 250 (1978)).
598. 456 U.S. at 650 (citing Carpenters Local No. 944, 239 N.L.R.B. 241, 251 (1978)). Section 158(b)(4)(A) provides in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents to force or require any employer . . . to enter into any agreement which is prohibited by subsection (e) of this section."
599. 456 U.S. at 651 (citing Pacific Northwest Chapter of the Assoc. Gen. Contractors, Inc. v. NLRB, 609 F.2d 1341, 1347 (1979)).
600. 456 U.S. at 652 (citing Pacific Northwest Chapter of the Assoc. Gen. Contractors, Inc. v. NLRB, 654 F.2d 1301 (9th Cir. 1980) (en banc)).
to obtain a lawful subcontracting clause.\footnote{602}{Id. at 651.}

The Supreme Court unanimously affirmed the Ninth Circuit’s holding that the subcontracting clause was permitted under the construction industry proviso.\footnote{603}{Id. at 666.} The Court reasoned that the legislative history of section 8(e) and the construction industry proviso clearly indicated that Congress did not intend to limit the proviso’s application to situations where union and nonunion workers are employed at the same jobsite.\footnote{604}{Id at 655. See H.R. REP. No. 1147, 86th Cong., 1st Sess. 39 (1959). Senator John F. Kennedy stated that the proviso was “necessary to avoid serious damage to the pattern of collective bargaining in [the construction industry].” 456 U.S. at 656 (quoting 105 CONG. REC. 17,889 (1959)). Senator Kennedy clearly indicated that broad subcontracting agreements were legal: Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. 456 U.S. at 657 (quoting 105 CONG. REC. 17,900 (1959)).}

In contrast, Woelke argued that Congress adopted the construction industry proviso primarily to overrule the Court’s decision in \textit{NLRB v. Denver Building \\& Construction Trades Council}.\footnote{606}{456 U.S. at 657 (quoting 105 CONG. REC. 17,900 (1959)).} In \textit{Denver Building}, the Court held that picketing a general contractor’s job in order to protest the presence of a nonunion subcontractor is an illegal secondary boycott.\footnote{607}{456 U.S. at 660. See \textit{NLRB v. Denver Bldg. \\& Constr. Trades Council}, 341 U.S. 675 (1951).} The Court, however, discounted Woelke’s reliance on \textit{Denver Building} by finding that Congress was concerned about more than the possibility of jobsite friction.\footnote{608}{Id. See supra note 604. The Court noted that the problem of jobsite friction received relatively little emphasis. 456 U.S. at 662. Congress was more concerned that the \textit{Denver Building} case would deny construction workers the right to engage in economic picketing at their place of employment. Congress was also concerned that since the employers of various contractors have a close community of interest, the wages and working conditions of one set of employers may affect the others. Id. at 661-62 (citations omitted).}

Woelke also contended that if these types of clauses were ap-
proved, the unions would have a powerful organizing tool.\textsuperscript{609} Essentially, the subcontracting clauses would create "top-down" pressure for unionization because the employers would decide the employees' representation. Admitting the presence of top-down organization pressure, the Court reasoned that such pressure is implicit in the construction industry proviso.\textsuperscript{610} In addition, the Court stated that Congress decided to accept this degree of top-down pressure when it endorsed subcontracting agreements obtained in the context of a collective bargaining relationship.\textsuperscript{611} Top-down organizing pressure, however, is limited by other provisions of the NLRA.\textsuperscript{612}

Woelke also argued that the union's picketing to obtain the subcontracting clause violated section 8(b)(4)(A).\textsuperscript{613} The Court refused to review the validity of the picketing because it concluded that the Ninth Circuit was without jurisdiction to consider the issue.\textsuperscript{614}

The Court has affirmed a broad interpretation of the construction industry proviso. As a result, a construction industry employer who has union employees will be unable to employ a nonunion subcontractor at a jobsite if the employees' union successfully negotiates a subcontractor clause in the context of collective bargaining. This seems to be consistent with the purpose of the proviso because if the proviso did not shelter a subcontractor clause like the one in Woelke, the employer would be free to carry on separate nonunion construction projects. Besides causing friction between the employer's union and nonunion employees with regard to pay and working conditions, the position of union members would be endangered because an employer could pay less and give fewer benefits to a nonunion employee who is in a weaker bargaining position. Thus, an employer would be more inclined to have nonunion construction projects and, therefore, freeze out union employees. In contrast, nonunion employees are not frozen out with the presence of a subcontractor clause because sections 8(a)(3) and

\begin{thebibliography}{9}
\bibitem{609} 456 U.S. at 662.
\bibitem{610} \textit{Id.} at 663.
\bibitem{611} \textit{Id.}
\bibitem{612} \textit{Id.} at 663-64. A subcontractor cannot be subjected to unlimited picketing to force it into a union agreement. \textit{See} 29 U.S.C. § 158(b)(7)(C) (1976). Also, an employer can enter into a prehire agreement with the union even though the employees have not designated the union as their representative. \textit{See} 29 U.S.C. § 158(f) (1976).
\bibitem{613} 456 U.S. at 665. \textit{See supra} note 598.
\bibitem{614} 456 U.S. at 665. The picketing issue was not raised during the proceedings before the Board. Thus, judicial review was barred by § 10(e) which states in pertinent part: "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e) (1976).
\end{thebibliography}
8(b)(2) of the Act require the union to refer both members and non-members to available jobs.

The Ninth Circuit applied the Court's holding in Woelke to Brogan v. Swanson Painting Co. In Brogan, the defendant, a signatory to an industrial collective bargaining agreement, subcontracted work to a nonsignatory contractor in violation of a subcontractor clause. The nonsignatory contractor refused to contribute to the signatory union trust fund. The collective bargaining agreement specified that the defendant was obligated to make the contribution upon refusal of a nonsignatory subcontractor. When the trustees of the employee trust fund filed suit to enforce payment, the defendant argued that the subcontracting clause was "outside the ambit" of the construction industry proviso. Relying on the holding in Woelke, the Ninth Circuit held that since the subcontracting clause was sought and negotiated in the context of a collective bargaining relationship, it was sheltered by the construction industry proviso.

Although the construction industry proviso exempts the industry from the prohibition against secondary boycott agreements, the proviso does not exempt the industry from section 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. In Griffith Co. v. NLRB, the Ninth Circuit held that agreements entered into pursuant to section 8(e) are to be enforced judicially rather than by self-help. In Griffith, the collective bargaining agreement gave the union the right to strike to enforce its boycott against subcontractors who were delinquent in their trust fund payments. The court, however, held that this provision violated section 8(b)(4)(ii)(B). Although the enforcement provision was held to be invalid, the construction industry

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615. 682 F.2d 807 (9th Cir. 1982).
616. Id. at 808.
617. Id. at 809.
618. Id.
619. Id. at 809-10.
620. Id. at 811.
623. Id. at 410. See supra note 621 and accompanying text.
624. 660 F.2d at 408.
625. Id. at 410.
proviso still sheltered the rest of the boycott agreement.\textsuperscript{626}

In addition, the construction industry proviso is limited to activity on the jobsite. In \textit{Joint Council of Teamsters, No. 42 v. NLRB},\textsuperscript{627} the Ninth Circuit held that the operation of owner-operated dump trucks was not "on-site work" within the meaning of the construction industry proviso.\textsuperscript{628} In \textit{Joint Council}, the dump truck operators hauled materials from construction sites to remote dump sites, from "borrow" pits to construction sites, and from one construction site to another.\textsuperscript{629} Since the truck owners spent most of their time away from the construction site, the court held that the truck owner-operators were delivery persons; therefore, their work was not covered by the on-site construction industry proviso.\textsuperscript{630}

\textbf{b. prehire agreements}

Generally, it is an unfair labor practice for an employer and a union to sign a collective bargaining agreement recognizing a minority union as the exclusive bargaining representative.\textsuperscript{631} An employer in the construction industry, however, will not be found to have committed an unfair labor practice if it enters into a prehire agreement with a minority union.\textsuperscript{632} A prehire agreement does not entitle a union to full rights until it can show that it has attained majority status in the bargaining unit.\textsuperscript{633} An employer, therefore, is free to repudiate a prehire

\textsuperscript{626} \textit{Id.} Only the portion of the agreement which exceeds the limits of the construction industry proviso is negated. \textit{Id.} See, e.g., NLRB \textit{v. International Bhd. of Elec. Workers}, 405 F.2d 159, 162 (9th Cir. 1968).

\textsuperscript{627} 671 F.2d 305 (9th Cir. 1981), cert. denied, 104 S. Ct. 100 (1983).

\textsuperscript{628} \textit{Id.} at 309.

\textsuperscript{629} \textit{Id.}

\textsuperscript{630} \textit{Id.} The court affirmed the Board's holding which was consistent with other holdings involving the delivery of goods to a construction site. See, e.g., Drivers Local 695 \textit{v. NLRB}, 361 F.2d 547, 552 n.19 (D.C. Cir. 1966).


\textsuperscript{632} 29 U.S.C. § 158(f) (1976). Section 158(f) states in pertinent part: "It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement . . . with a labor organization . . . because . . . the majority status of such labor organization has not been established . . .." Section 158(f) was added to the NLRRA in a 1959 amendment under the Labor-Management Reporting and Disclosure Act. Pub. L. No. 86-257, § 705(a), 73 Stat. 545. Section 158(f) recognizes the frequent movement of employees in the construction industry which makes it impossible for the NLRB to conduct union elections at each jobsite. In addition, the use of prehire agreements allow contractors to compute labor costs which are necessary to bid jobs. See NLRB \textit{v. Local Union No. 103}, 434 U.S. 335, 348 (1978).

\textsuperscript{633} 434 U.S. at 345.
agreement and call for an election at any time. Once a union achieves majority support, however, "the prehire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." Accordingly, the employer must recognize the union as the bargaining representative for the duration of the contract.

In *Construction Erectors, Inc. v. NLRB*, the employer entered into a prehire agreement with the union. Subsequently, the employer repudiated the agreement, asserting that it no longer employed any union members. The union filed suit, claiming that the employer's refusal to recognize the union was an unfair labor practice. The Board held that at the time of the agreement the company's employees were a stable unit and that the union had the majority support of the unit. The agreement, therefore, was binding under section 9(a) of the NLRA and the union was entitled to be recognized as the exclusive representative.

On appeal, the Ninth Circuit vacated and remanded the Board's decision because the court decided that there was insufficient evidence to support the Board's finding that there was a permanent and stable work force on the job at the time of the agreement. In fact, only two of thirteen workers employed at the time of the agreement were on the job one year later. The Ninth Circuit distinguished this case from those relied on by the union which were found to have permanent and stable work forces. Consequently, the

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634. *Id.*
635. *Id.* at 350.
637. 661 F.2d 801 (9th Cir. 1981).
638. *Id.* at 802.
639. *Id.*
640. *Id.* at 802-03.
641. *Id.* One method used by the Board to determine whether the agreement is voidable under § 8(f) or binding under § 9(a) is to determine whether the agreement covers a permanent and stable unit of employees. *See, e.g.*, Precision Striping, Inc., 245 N.L.R.B. 169 (1979), enforcement denied, 642 F.2d 1144 (9th Cir. 1981). If the union represents a majority of employees in a stable unit when the contract is executed, the contract is binding under § 9(a). Similarly, if the union does not represent a majority at the time the contract was executed, but later attains a majority in the stable unit, the Board deems the contract to be initially a voidable § 8(f) agreement that is later converted to a binding § 9(a) agreement. When an employer does not have a stable employee unit and hires on a job basis, the union must demonstrate its majority status in order to invoke § 8(a)(5) of the NLRA. *See, e.g.*, Hageman Underground Constr., 253 N.L.R.B. 60 (1980).
642. 661 F.2d at 803.
643. *Id.* at 804-05.
644. *Id.* at 804.
645. *Id.* *See, e.g.*, Precision Striping, Inc., 245 N.L.R.B. 169 (1979), enforcement denied,
case was remanded to the Board to determine whether the union had attained majority support at any other time prior to the repudiation of the agreement.646

Similarly, in *Todd v. Jim McNeff, Inc.*,647 the Ninth Circuit held that a section 8(f) prehire contract is voidable by the employer until the union attains majority support.648 In *Todd*, McNeff signed a prehire agreement with the union.649 According to the terms of the agreement, McNeff was to make contributions to the union trust fund for each covered employee.650 When McNeff refused to make these contributions, the union filed an unfair labor practice charge with the Board.651 McNeff claimed that the agreement was unenforceable.652 Disagreeing, the Ninth Circuit held that an agreement is enforceable unless the employer repudiates the agreement before the union attains majority status.653 Here, McNeff never repudiated the contract. The court found that McNeff's failure to perform its contractual obligations fell short of the behavior needed to put the union on notice of the em-

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646 F.2d 1144 (9th Cir. 1981) (same five persons employed from execution of contract to repudiation); Hageman Underground Constr., 253 N.L.R.B. 60 (1980) (three of four backhoe operators were transferred by employer from job to job).


648. Id. at 802. See, e.g., NLRB v. Local Union No. 103, 434 U.S. 335, 345 (1978) (*Higdon Construction Co.*); Ruttman Constr. Co., 191 N.L.R.B. 701, 702 (1971). In *Higdon*, the Supreme Court held that a prehire agreement only matures when the union achieves majority status. 434 U.S. at 341. Since the *Higdon* decision, the lower federal courts have split into three groups on the issue of the correct interpretation of the Supreme Court's statement that prehire contracts are voidable. The most restrictive reading limits *Higdon* to only unfair labor practice cases and to suits brought by trustees of fringe benefit funds for back payment. See, e.g., Contractors, Laborers, Teamsters, and Engineers Health & Welfare Plan v. Associated Wrecking Co., 638 F.2d 1128 (8th Cir. 1981); New Mexico Dist. Council of Carpenters v. The Mayhew Co., 664 F.2d 215 (10th Cir. 1981). At the other end of the spectrum, some courts have held that no contract is created until the union affirmatively demonstrates majority status. See, e.g., Washington Area Carpenters Welfare Fund v. Overhead Door Co., 488 F. Supp. 816 (D.C. Cir. 1980); Baton Rouge Bldg. & Constr. Trades Council v. E.C. Shafer Constr. Co., 657 F.2d 806 (5th Cir. 1981). The middle ground, which requires the employer to repudiate the prehire agreement, is the best interpretation of the *Higdon* decision. The Supreme Court did use the word "voidable," not "void" in *Higdon*. 434 U.S. at 341. To hold that no contract has been created allows the employer to enjoy the benefits of a prehire agreement, while retaining the ability to avoid its contractual obligations. Further, there is no reason to restrict *Higdon* to unfair labor cases since the construction industry proviso has continually been broadly interpreted. As shown in *Todd*, the Ninth Circuit has adopted the middle ground.

649. 667 F.2d at 801.

650. Id.

651. Id.

652. Id. at 803.

653. Id. at 804.
ployer's intent to repudiate.654

Prehire agreements are an invaluable tool in the construction industry. Employees are given some of the wage and benefit advantages of union representation. Employers are assured a qualified pool of workers to choose from when needed, protection against labor unrest during the period of contract, and, most importantly, predictable labor costs. To allow an employer to enjoy the benefits of a prehire agreement without any intention to perform its obligations would be an injustice. The Ninth Circuit's holding that a prehire agreement is enforceable under section 301 of the Act until the employer expressly repudiates the agreement prior to the union's achievement of majority status strikes a good balance between the interests of the employer and the employee.

B. Grievance Arbitration

1. Judicial review of arbitration awards

The legislative policy expressed in section 203(d) of the Labor Management Relations Act,655 encouraging the final settlement of labor disputes by arbitration, has resulted in a rule limiting judicial review of arbitration awards.656 A court may not rule on the merits of an arbitrable grievance,657 since such a decision denies the parties the bargained-for judgment of the arbitrator.658 Judicial inquiry will therefore normally be limited to whether the parties intended to arbitrate the

654. Id.
655. 29 U.S.C. § 173(d) (1976) provides in part: “Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”
656. The rule was originally propounded and developed in the Steelworkers Trilogy, three Supreme Court cases decided the same day. In United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), the first case in the Trilogy, the Supreme Court reversed a court of appeals decision which denied a union's demand to arbitrate on the ground that the grievance, though concededly arbitrable, was "frivolous." United Steelworkers v. American Mfg. Co., 264 F.2d 624, 628 (6th Cir. 1959), rev'd, 363 U.S. 564 (1960). The Court held that all grievances were arbitrable under the agreement, not just those the court deemed "meritorious." 363 U.S. at 567.
In the second case, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Court held that although the question of arbitrability is normally one for the court, an order to compel arbitration should only be denied if it is clear that the arbitration clause does not cover the parties' dispute. 363 U.S. at 582.
Finally, in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), it was held that an arbitration award may not be overturned if it "draws its essence" from the contract. 363 U.S. at 597-98.
658. Id.
When he makes a decision and formulates a remedy, the arbitrator is not strictly limited to the provisions of the collective bargaining agreement, but may also rely on "industrial common law," or industry and shop practices. An arbitrator's award, however, must "draw its essence" from the contract, and may be overturned if not premised on an interpretation of the contract. The award will also be overturned if the arbitrator exceeds his jurisdiction, formulates a remedy which is not within his contractually-derived authority, or if the dispute itself is not one the parties intended to arbitrate.

The Ninth Circuit requires that an award be affirmed if on its face it is a plausible interpretation of the contract. This standard is consistent with the rule of limited judicial review of arbitration awards. In *Local 1020 v. FMC Corp.*, the Carpenters Union appealed from the dismissal of a section 301(a) suit against an employer. The union sought to compel arbitration of the question whether certain work should be assigned to Carpenters Union members rather than members of two other unions working on the same job. The union argued that an earlier arbitrator's decision that the Carpenters Union was not entitled to be assigned the work was not dispositive of the instant dispute because the decision did not "draw its essence" from the collective bargaining agreement. The union asserted that because the work had
initially been assigned to the Carpenters Union, reassignment to another union was precluded. The Ninth Circuit pointed out that the Carpenters Union was not arguing that the award failed to draw its essence from the agreement, but rather that the award was erroneous. The court upheld the award, noting that it effectively avoided a work stoppage over the dispute while not precluding additional negotiation between the unions.

A logical corollary to the rule that an arbitrator's decision must be based on some rational construction of the contract is the premise that the legal effect of an arbitrator's decision is limited to the parties to the proceeding. The Ninth Circuit applied this corollary in *Joint Council of Teamsters v. NLRB*.

Section 8(e) prohibits employer-union agreements requiring self-employed persons to join the union in order to work on a job, but excepts from this prohibition on-site work in the construction industry. The NLRB found that transportation between sites is not "on-site work" for purposes of section 8(e), and that the agreement requiring owner-operators transporting supplies between sites to join the union was therefore

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667. 658 F.2d at 1294.
668. *Id.* The court applied the test that the decision must be derived in some "rational" manner from the collective bargaining agreement. *Id.* (citing *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union Local 781*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981)).
669. 658 F.2d at 1293. The court treated the action to compel arbitration as an action to vacate the earlier arbitration award. However, even if the suit had not been treated as one seeking to vacate the earlier award, but rather as a completely separate claim, the employer probably would have been able to assert the earlier award as a bar. This is because the collective bargaining agreement between the Carpenters union and the employer provided that the unions would settle jurisdictional disputes by arbitration among themselves. *Id.* at 1287. Therefore, the employer did not have to be a party to the earlier proceeding in order to invoke its effect.
671. *Id.* at 308.
672. 29 U.S.C. § 158(e) (1976) provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract . . . whereby such employer . . . agrees to . . . cease doing business with any other person . . . 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 . . . .
unenforceable.\textsuperscript{673} On appeal, the union relied on a prior Ninth Circuit case affirming an arbitrator's award\textsuperscript{674} which was based on a finding that transportation between sites was "on-site work" for purposes of section 8(e).\textsuperscript{675} The Ninth Circuit concluded that the union's reliance on the earlier case was misplaced, stating that the affirmance merely meant that the arbitrator's award was premised on a logical construction of the contract, and not that transportation between construction sites is "on-site work" as a matter of law.\textsuperscript{676} The decision in Joint Council accords with the theory that, because an arbitrator's authority to settle disputes is contractually derived,\textsuperscript{677} the legal effect of his decisions will not extend beyond the parties to the contract.

In addition to vacating awards which exceed the scope of the arbitrator's jurisdiction, courts will sometimes set aside awards procured through corruption or fraud, or rendered by a biased arbitrator.\textsuperscript{678} The Ninth Circuit has held, however, that failure to object to an arbitrator's bias at the arbitration proceeding waives the objection on appeal.\textsuperscript{679} In United Steelworkers v. Smoke-Craft, Inc.,\textsuperscript{680} the Ninth Circuit applied this waiver doctrine to procedural objections to a party's standing to arbitrate and to an arbitrator's right to proceed. In Smoke-Craft, the employer appealed from a district court's summary confirmation of an arbitration award,\textsuperscript{681} arguing that there were triable issues of fact regarding whether the dispute was settled before arbitration and whether

\textsuperscript{673} 671 F.2d at 309. See Joint Council of Teamsters No. 42, 248 N.L.R.B. 808, 816-17 (1980).
\textsuperscript{674} 671 F.2d at 310. The union relied on La Mirada Trucking, Inc. v. Teamsters Local Union 166, 538 F.2d 286 (9th Cir. 1976), cert. denied, 429 U.S. 1062 (1977). The court in La Mirada upheld the arbitrator's decision on two grounds: (1) he did not exceed the scope of his submission; and (2) the case was factually distinguishable from Board cases holding that transportation between sites was not on-site work. 538 F.2d at 289.
\textsuperscript{675} La Mirada, 538 F.2d at 288.
\textsuperscript{676} Joint Council, 671 F.2d at 310.
\textsuperscript{678} See, e.g., Bieski v. Eastern Auto. Forwarding Co., 396 F.2d 32, 37 (3d Cir. 1968) (award vacated when arbitration panel included union members and union represented both groups of conflicting employees).
\textsuperscript{679} See Kodiak Oil Field Haulers, Inc. v. Teamsters Union Local 959, 611 F.2d 1286, 1290 (9th Cir. 1980) (claim that arbitrator bias waived where not raised at time arbitration board convened). In order for a waiver to occur, there must be knowledge of possible bias or of the grounds for objection. See Cook Indus. Inc. v. C. Itoh & Co., 449 F.2d 106, 108 (2d Cir. 1971) (waiver occurs when a party with knowledge of facts showing bias fails to raise objection), cert. denied, 405 U.S. 921 (1972).
\textsuperscript{680} 652 F.2d 1356 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).
\textsuperscript{681} Id. at 1358.
the union had standing to proceed with the arbitration.\textsuperscript{682}

The arbitration proceedings had originally been instituted by two unions which jointly represented the employees.\textsuperscript{683} The parties requested a stay since settlement appeared imminent, and after three weeks without further communication, the arbitrator, assuming a settlement had been reached, sent a bill for his services.\textsuperscript{684} One of the unions then filed a brief. The employer was notified but failed to respond, and the arbitrator rendered a decision.\textsuperscript{685} On the issue of whether the dispute had been settled, the court noted that the arbitrator acted reasonably in resuming the proceedings,\textsuperscript{686} and held that in any event the employer waived its argument by failing to raise it before the arbitrator.\textsuperscript{687} On the issue of standing, the court observed that the arbitration had been properly commenced by both unions in their joint capacity as employee representatives\textsuperscript{688} and held that the employer had waived that objection as well by its failure to raise it at arbitration.\textsuperscript{689} The court reasoned that allowing the objection on appeal would discourage the national labor policy encouraging dispute settlement by arbitration.\textsuperscript{690} Because the court characterized standing as a "procedural" issue to be decided by the arbitrator,\textsuperscript{691} the employer would probably have been unable to raise that issue on appeal even had it not waived its objection.

2. Arbitration and the NLRB

A breach of contract which is arbitrable pursuant to the contract may also be an unfair labor practice within the jurisdiction of the NLRB.\textsuperscript{692} In \textit{Carey v. Westinghouse Electric Corp.},\textsuperscript{693} the Supreme

\textsuperscript{682} Id. at 1359.
\textsuperscript{683} Id. at 1358. Neither union had succeeded in becoming the exclusive employee bargaining representative; both were eventually elected and certified jointly. Id.
\textsuperscript{684} Id.
\textsuperscript{685} Id. at 1359.
\textsuperscript{686} Id. at 1360. Once the union resumed the proceedings by filing a brief, the arbitrator received no indication from any party that the dispute was settled. Id.
\textsuperscript{687} Id.
\textsuperscript{688} Id. at 1359.
\textsuperscript{689} Id. at 1360.
\textsuperscript{690} Id.
\textsuperscript{691} Id. See also John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964) (arbitrator is to decide procedural questions, i.e. questions whether proper grievance procedures have been followed or excused, or whether failure to follow procedures avoids duty of arbitration).
\textsuperscript{692} For example, although discharging an employee for union activity is an unfair labor practice under § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976), the discharge may also be forbidden under a collective bargaining agreement which allows discharge only for cause.
Court held that when a dispute can be characterized either as a representational dispute, and thus within Board jurisdiction, or as an arbitrable contract interpretation dispute, the Board's jurisdiction is not exclusive and a party may compel arbitration. The Court further held that should the Board choose to render a decision, its judgment will prevail over a conflicting arbitration decision.

Although under Carey the Board retains jurisdiction to decide arbitrable breaches of contract that are also unfair labor practices or are otherwise within its expertise, the Board will normally defer to an arbitrator's decision. If, however, the award is in some way "repugnant" to the letter or the policies of the National Labor Relations Act (NLRA), the Board will assume jurisdiction and overturn the award. An award that contravenes the NLRA will also be overturned in federal court.

In Pagel v. Teamsters Local Union 595, an employer brought a section 301(a) action to vacate an arbitration award in favor of a union. The employer argued that the NLRB's prior refusal to enter a complaint on the same issue precluded any arbitration. The Ninth Circuit held that, because the Board's issuance or refusal to issue a complaint is a decision made in a non-adversarial context without a hearing on the merits, refusal to issue a complaint does not bar arbitra-

694. Id. at 272. The Court based its holding on the policy goal of encouraging conciliatory measures such as arbitration in furtherance of industrial peace. Id. See also supra note 655.
695. 375 U.S. at 272. The holding that a Board decision will control over an inconsistent arbitration award is consistent with the congressional grant of power to the Board as expressed in § 10(a) of the Act, 29 U.S.C. § 160(a) (1976), which provides in part: "This power [to prevent unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ."

The Carney decision is also consistent with the different functions of an arbitrator and the NLRB: the arbitrator's function is essentially to make factual findings in light of the parties' conduct and their contract; the Board's purpose is to establish, through its decisions, a national labor policy.

697. See Monsanto Chem. Co., 97 N.L.R.B. 517, 520 (1951) (arbitration award allowing discharge of employee for nonpayment of union dues overturned because union not certified and discharge would be an unfair labor practice), enforced sub nom. NLRB v. Monsanto Chem. Co., 205 F.2d 763 (8th Cir. 1953).
699. 667 F.2d 1275 (9th Cir. 1982).
700. Id. at 1279. The employer also argued unsuccessfully that the arbitrator's decision did not "draw its essence" from the contract. Id. at 1278.
tion of the dispute. 701 The court suggested that if the failure to issue a complaint turns solely on a legal issue, subsequent arbitration will be precluded. 702 The court noted that had the Board actually decided the case, arbitration of the issue would have been precluded. 703

In General Teamsters Local 162 v. Mitchell Bros. Truck Lines, 704 the Ninth Circuit affirmed an arbitration award that the employer argued would require independent contractors to join the union in violation of section 8(e) of the NLRA. 705 The court reviewed the legal basis for the arbitrator's decision, holding that although the arbitrator had cited an outdated precedent in rendering the award, he had applied the correct legal test for determining employee status of the owner-operators. 706 The court rejected the employer's contention that the owner-operators were independent contractors as a matter of law and thus were not covered by the collective bargaining agreement. The Ninth Circuit stated that accepting such an argument would require an impermissible review of the merits. 707

3. Arbitrability of a dispute

Although judicial review of arbitration awards is necessarily limited due to the legislative policy favoring arbitration, the preliminary question of whether a dispute is arbitrable is normally decided by a court. 708 When a court determines whether a dispute is arbitrable, it will resolve doubts in favor of arbitrability. 709 The parties to a collective bargaining contract may even agree to submit the issue of arbitrability itself to arbitration. 710 However, in order for the issue of arbitrability to be decided by an arbitrator, courts will require a clear

701. Id. at 1280.
702. Id. at n.10. The court's suggestion is consonant with the rule that an arbitrator may not render an award which has the effect of sanctioning an unfair labor practice. Nevertheless, it is difficult to imagine a case where both the arbitrator and the Board would be required to decide a pure legal issue, since the arbitrator's authority is normally limited to the resolution of factual issues.
703. Id. at 1279.
704. 682 F.2d 763 (9th Cir. 1982).
705. Id. at 767, 769.
706. Id. at 766.
707. Id. at 766-67.
708. John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964) (whether a party is bound to arbitrate, as well as what issues it must arbitrate, is matter to be decided by court on the basis of the contract); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").
710. Id. at 583 n.7.
showing that the parties intended it to be arbitrated.\textsuperscript{711}

In \textit{California Trucking Association v. Teamsters Local 70},\textsuperscript{712} the Ninth Circuit rejected a union's argument that the employer's section 301(a) suit for damages for an illegal strike was precluded because the employer was required to arbitrate its claim under either the master agreement or a supplemental agreement.\textsuperscript{713} The master agreement provided that an employer could institute legal proceedings for a strike which violated the contract.\textsuperscript{714} The union first argued that the meaning of the terms "strike" and "contract violation" had to be determined by an arbitrator,\textsuperscript{715} and second, that the mandatory arbitration provision of the supplemental agreement included violations covered by the master agreement.\textsuperscript{716} The Ninth Circuit reasoned: (1) that the real issue was whether the dispute was arbitrable; (2) that the district court had jurisdiction to decide whether the dispute was arbitrable because there was no clear indication that the parties intended to have the arbitrator decide the issue; and (3) that the district court's decision that the dispute was not arbitrable was reasonable, because the union had repudiated its right to arbitrate.\textsuperscript{717} The difficulty with the first two steps of the court's reasoning is that, as the court admitted, the union was not contending that the arbitrator must rule on his jurisdiction, but was rather arguing that the actual dispute was arbitrable. Under the principles enunciated in \textit{Steelworkers Trilogy}, any doubts as to the arbitrability of a suit must be decided in favor of arbitration.\textsuperscript{718} Therefore, since the union's construction of the arbitration clause was not implausible, or at least left doubts as to the parties' intent, the dispute should have been arbitrated except for the issue of the union's repudiation.\textsuperscript{719}

With respect to the issue of whether the union had repudiated the collective bargaining agreement in proceedings before the district court and therefore waived its right to arbitration,\textsuperscript{720} the \textit{California Trucking} court held that, although the question of agreement repudiation is presumptively arbitrable where the agreement provides for arbitration, a

\begin{itemize}
\item \textsuperscript{711} \textit{Id.}
\item \textsuperscript{712} 679 F.2d 1275 (9th Cir. 1981), \textit{cert. denied}, 103 S. Ct. 299 (1982).
\item \textsuperscript{713} \textit{Id.} at 1278.
\item \textsuperscript{714} \textit{Id.} at 1280.
\item \textsuperscript{715} \textit{Id.}
\item \textsuperscript{716} \textit{Id.}
\item \textsuperscript{717} \textit{Id.} at 1280-81.
\item \textsuperscript{718} \textit{Warrior & Gulf Navigation Co.}, 363 U.S. at 582.
\item \textsuperscript{719} If the dispute was not properly brought before the district court in the first place, however, the subsequent repudiation would arguably be immaterial, meaning that the union never lost its right to arbitrate.
\item \textsuperscript{720} 679 F.2d at 1282.
\end{itemize}
court may rule on repudiation when the asserted rejection occurs before the court, as opposed to repudiations allegedly occurring before the arbitrator. The court reasoned that the inherent right of a court to supervise its own proceedings gives it jurisdiction to decide equitable defenses, including repudiation claims, that arise out of conduct before it.

The Ninth Circuit went on to hold that the district court had correctly decided that repudiation had in fact occurred. It noted that mere nonperformance will not amount to a repudiation, but held that in this case the union had repudiated by actively participating in the legal proceedings without invoking arbitration, by asserting that it was not bound by the agreement, and by delaying its request for a stay of arbitration for over four years.

In Francesco's B., Inc. v. Hotel and Restaurant Employees Local 28, the Ninth Circuit dealt again with the question of when the duty to arbitrate arises. In Francesco's B., one clause of a collective bargaining agreement provided for resolution of employee discharge grievances by an adjustment board. The clause did not provide for arbitration, but did require that the complaint be filed for adjustment “as provided in” a second clause. The second clause included a “no-strike” provision and provided for arbitration of all grievances between the union and employers who were members of the multiemployer association. The employer, who was no longer an association member, fired an employee. The union struck without seeking arbitration, claiming that the second clause, with its no-strike and arbitration provisions, protected only association members. The employer filed suit in district court for injunctive relief and damages. The district court ordered an arbitration on the issue of whether the second clause applied in its entirety to the first clause. After the arbitrator decided that the second clause was incorporated by reference in the

721. Id. at 1283.
722. Id.
723. Id.
724. Id. at 1284.
725. 659 F.2d 1383 (9th Cir. 1981).
726. Id. at 1384-85.
727. Id. at 1385.
728. Id.
729. Id.
730. Id.
731. Id. at 1385-86. Because the arbitrability of the dispute turned on how the arbitrator construed the two clauses, the order in effect required the arbitrator to decide his own jurisdiction.
first clause, the district court ordered an arbitration on the issue of whether the union had breached the no-strike provision.\textsuperscript{732} The union appealed from the district court’s confirmation of the arbitrator’s award in favor of the employer, arguing that the arbitrator exceeded his contractual authority.\textsuperscript{733}

The Ninth Circuit acknowledged that the district court, rather than deciding the arbitrability of the dispute, had ordered that the arbitrator decide his own jurisdiction.\textsuperscript{734} The court noted that, had the district court decided that the dispute was arbitrable, it would necessarily have decided the merits, since the arbitration clause included a no-strike clause.\textsuperscript{735} The court then confirmed the award, noting that since the contract was ambiguous,\textsuperscript{736} the incorporation by reference of the entire second clause within the first clause was not an implausible reading of the agreement.

The court’s reasoning is flawed because, although arbitrability of disputes is favored,\textsuperscript{737} the right of an arbitrator to decide his own jurisdiction is not.\textsuperscript{738} Therefore, since it was not at all clear in this case that the parties intended for the arbitrator to decide the arbitrability of the employee discharge grievance, the court should have made that decision, even if its decision would determine the outcome of the dispute.

In \textit{Alpha Beta v. Retail Store Employees Union Local 428},\textsuperscript{739} an employer unsuccessfully appealed a district court’s denial of its petition to compel arbitration. The employer had fired several employees who struck in sympathy with another union.\textsuperscript{740} The union filed a grievance over the discharges, which was settled without resort to the arbitration clause of the collective bargaining agreement.\textsuperscript{741} Pursuant to the settlement agreement, which was to be final, the employees were reinstated without back pay.\textsuperscript{742} The reinstated employees filed independent suits for back pay with the NLRB.\textsuperscript{743} The employer sought to compel the union arbitrate, arguing that a dispute existed because the union’s alleged intent to support the employees’ suits would have breached the

\begin{footnotes}
\item 732. \textit{Id.} at 1386.
\item 733. \textit{Id.}
\item 734. \textit{Id.} at 1387.
\item 735. \textit{Id.} at 1388.
\item 736. \textit{Id.} at 1388-89.
\item 737. \textit{Warrior & Gulf Navigation Co.}, 363 U.S. at 583.
\item 738. \textit{Id.} at n.7.
\item 739. 671 F.2d 1247 (9th Cir. 1982).
\item 740. \textit{Id.} at 1248.
\item 741. \textit{Id.}
\item 742. \textit{Id.}
\item 743. \textit{Id.}
\end{footnotes}
settlement agreement. The court held that because the union was not a party to the employee actions and the settlement agreements did not provide for arbitration, the employer could not compel arbitration. The court also held that no dispute had arisen under a new collective bargaining agreement, which did provide for arbitration. The holding in Alpha Beta is consistent with the rule that parties may not be compelled to arbitrate disputes that they have not agreed to arbitrate. Because the most the employer had alleged was a breach of the settlement agreement, which had no arbitration clause, the employer's remedy lay in an action in federal court.

C. Enforcement of Agreements Under Section 301(a)

1. Subject matter jurisdiction under section 301(a)

In Textile Workers Union v. Lincoln Mills, the United States Supreme Court rejected the view that section 301(a) of the National Labor Relations Act is merely a jurisdictional statute providing a federal forum for labor disputes. The Court instead held that section 301(a) authorizes courts to fashion substantive federal remedies to enforce collective bargaining agreements. The Court reasoned that the second construction was necessary in order to effect the congressional policy that labor agreements be enforceable in federal courts. The Court further held that the law to be applied in section 301(a) suits is federal law, developed “from the policy of our national labor laws.

After the Lincoln Mills decision, the question became how to accommodate the role of federal courts acting under section 301(a) with that of other federal tribunals such as the NLRB. In San Diego Building Trades Council v. Garmon, the Supreme Court held that federal

744. Id. at 1248-49.
745. Id. at 1249.
746. Id.
747. Id. at 1250.
748. 353 U.S. 448 (1957).
749. 29 U.S.C. § 185(a) (1976). Section 301(a) provides:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.
750. 353 U.S. at 450-51.
751. Id. at 451.
752. Id. at 455.
753. Id. at 456. The Court noted that state law could be applied if it would best effect a federal policy, but that state law could not be an independent source of rights. Id. at 457.
and state courts must defer to the exclusive jurisdiction of the NLRB in suits dealing with activity that is arguably subject to sections 7 or 8 of the NLRA. The Court reasoned that a contrary holding would frustrate the congressional intent of a uniform national labor policy promulgated by a single tribunal.

The Garmon preemption doctrine was limited in *Teamsters Local 174 v. Lucas Flour Co.*, where the Supreme Court held that a suit for violation of a collective bargaining agreement could be brought in federal court under section 301(a), even if the conduct complained of was also arguably an unfair labor practice. In *Smith v. Evening News Association*, the Court held that even if the alleged conduct is clearly an unfair labor practice, federal courts have jurisdiction under section 301(a) if the suit also alleges that the same conduct breaches the collective bargaining agreement. The *Smith* Court also ruled that jurisdiction under section 301(a) extends to claims by parties who seek to vindicate individual rights conferred under the collective bargaining agreement. The Court reasoned that denying jurisdiction to hear individual claims would stultify the congressional policy of maintaining a uniform body of labor law, since individual suits would be decided under state law and union suits for the same breach would be decided under federal law.

In *Kaiser Steel Corp. v. Mullins*, the United States Supreme Court held that the jurisdiction of a federal court in a section 301(a) contract enforcement action extends to the merits of a defense alleging contract illegality, even if the subject matter of the defense is arguably

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755. *Id.* at 245.

756. *Id.* at 244-45 (citing Garner v. Teamsters Union, 346 U.S. 485, 489-91 (1953)).

757. 369 U.S. 95 (1962).

758. *Id.* at 102.


760. *Id.* at 197.

761. *Id.* at 200. The Court did not decide whether an individual has standing to bring a claim to enforce individual rights. *Id.* However, later decisions read *Smith* as conferring standing to individuals to sue under § 301(a) to enforce collective bargaining agreement provisions which grant personal rights. See *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 298-99 (1971). Individuals may not bring a § 301(a) suit without having exhausted their collective bargaining agreement's grievance procedures unless they allege not only an employer's breach of contract, but also the union's breach of its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). See also *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976) (union's breach of duty of fair representation allows employee to seek vacation of arbitration award even though the labor agreement provides that arbitrator's decision is final).

762. 371 U.S. at 200.

763. 455 U.S. 72 (1982).
within the exclusive jurisdiction of the NLRB. In *Kaiser*, a union sued under section 301(a) to enforce a clause in a collective bargaining agreement which required contributions to employee health and retirement funds for coal purchased from producers who did not have contracts with the union. The employer admitted its noncompliance with the clause, but argued that the clause was illegal under either sections 1 or 2 of the Sherman Act, 15 U.S.C. sections 1 and 2, or section 8(e) of the NLRA, 29 U.S.C. section 158(e). Both the district court and the court of appeals rejected the employer's defense without considering the merits. The Supreme Court reasoned that federal contract law prohibits the enforcement of illegal contracts and that a court must therefore reach the merits of a defense of illegality before it can decide whether to give effect to the clause in question. The Court reached this conclusion even though the act of contributing was concededly proper. The Court noted that the obligation to contribute, if enforced, would amount to an unlawful financial burden on coal purchased from nonunion producers.

*Kaiser* effectively overruled *Waggoner v. R. McGray, Inc.*, a Ninth Circuit case which held that federal courts may not entertain an unfair labor practice defense to a section 301(a) action. *Waggoner* relied on *Amalgamated Association of Street Employees v. Lockridge*, a Supreme Court case limiting jurisdiction under section 301(a) to disputes arising out of the contract itself and precluding the exercise of jurisdiction where the dispute is based on an implied-in-law promise rather than on a contract provision.

During the survey period, several Ninth Circuit decisions permit-
ted federal courts to entertain section 301(a) suits interpreting collective bargaining agreements even though the resolution of the suits required decisions upon matters subject to NLRB jurisdiction. In *Cappa v. Wiseman*, the Ninth Circuit upheld a district court's decision that an employer's oral agreement with a union modified a written collective bargaining agreement to exclude an employee's job category. The decision necessarily involved a determination that the modified agreement, which changed the composition of the bargaining unit, did not violate national labor policy. The court held that even though the NLRB has primary jurisdiction to determine whether the composition of a bargaining unit comports with national labor policy, the main issue—the admissibility of evidence showing an oral agreement—was one of contract law within the expertise of the federal courts. The court noted that the NLRB is bound by union-employer agreements regarding the composition of a bargaining unit, unless such agreements violate statutes or federal labor policy.

Judge Fletcher dissented, arguing that the district court overstepped its bounds in making the determination that the bargaining unit created under the modified agreement was appropriate. Fletcher would have allowed the district court to make the decision that the contract was modified by the oral agreement, but would leave to the Board the decision whether the agreement as modified created an appropriate bargaining unit. Fletcher's approach may be valid even in light of *Kaiser*. In *Kaiser*, resolution of the contract issue turned on the disposition of the unfair labor practice issue. Arguably, where the contract issue (e.g., the existence of a modified agreement) can be decided without reaching the issue within Board jurisdiction, the court should decide the contract issue and remand the case to the Board for a final disposition. Although this approach hardly produces judicial economy, the deference mandated in *Garmon* is effected.

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775. 659 F.2d 957 (9th Cir. 1981).
776. *Id.* at 958.
777. *Id.*
778. *Id.* at 959. The Board's jurisdiction is established under 29 U.S.C. § 159(b) (1976), which provides: "The Board shall decide in each case whether... the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof... ."
779. 659 F.2d at 959-60.
780. *Id.* at 960 (citing NLRB v. Mercy Hosp., 589 F.2d 968, 972 (9th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979)).
781. 659 F.2d at 960 (Fletcher, J., dissenting).
782. *Id.* (Fletcher, J., dissenting).
In *Todd v. Jim McNeff, Inc.*, the Ninth Circuit held that prehire agreements under section 8(f) are enforceable until repudiated by the employer, absent a showing by the union that it enjoyed majority support before repudiation. The court held that it had jurisdiction under section 301(a) to determine whether a union enjoyed majority support sometime before a repudiation even though the NLRB has exclusive jurisdiction to determine a union's current majority status. The court noted that a determination of a union's former majority status involves recreation of past relationships, which is a factual question within the expertise of federal trial courts.

Absent an explicit agreement to the contrary, the existence and scope of an agreement to arbitrate is a question to be decided by the courts. In *California Trucking Association v. Brotherhood of Teamsters Local 70*, an employer sued a union local under section 301(a) for damages resulting from an allegedly illegal strike. The union argued unsuccessfully that the employer's right to sue was conditioned on preliminary resort to arbitration. The Ninth Circuit held that the district court had jurisdiction to determine whether the agreement permitted a damages action in lieu of arbitration. The court based its holding on the absence of a clear indication that the parties intended that the arbitrator decide his own jurisdiction.

The court further upheld the district court's decision that the union had repudiated its rights and obligations under the collective bargaining agreement during trial, thereby waiving its right to compel arbitration. In so holding, the court created an exception to the general rule that the issue of whether repudiation has occurred must itself be arbitrated if the agreement calls for arbitration. The court limited

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783. 667 F.2d 800 (9th Cir. 1982), *affd*, 103 S. Ct. 1753 (1983).
784. *Id.* at 804.
785. *Id.*
786. *Id.* By its reasoning the court in *Todd* determined that there was no issue subject to NLRB jurisdiction. *Todd* is therefore distinguishable from *Kaiser* and *Cappa*, which permitted adjudication of issues admittedly within the Board's expertise.
789. *Id.* at 1278.
790. *Id.* The union's arguments are discussed supra under Arbitrability of a dispute.
791. *Id.* at 1281.
792. *Id.* at 1280-81.
793. *Id.* at 1284.
794. *Id.* at 1284-85. The court adopted the holding in Reid, Burton Constr., Inc. v.
this exception to instances where the repudiation occurs in proceedings directly before the court, rather than before the arbitrator or during the parties’ contractual relationship. Whether repudiation has occurred will depend not merely on a refusal to perform, but on whether the repudiating party manifests any intent to preserve his contractual right to arbitration.

2. Standing to sue and remedies available under section 301(a)

In *Seattle Times Co. v. Seattle Mailer’s Union No. 32,* an employer successfully sued a union under section 301(a) for damages resulting from a work slowdown in breach of a collective bargaining agreement. The Ninth Circuit overturned the district court’s award of attorney fees. The Ninth Circuit rejected the employer’s argument that the legal fees were incurred in an effort to mitigate damages by seeking injunctive relief, holding that legal fees are recoverable only in exceptional circumstances, or where authorized by contract or statute.

In *United Association of Journeymen v. Local 334,* the United States Supreme Court held that a union constitution is a contract within the meaning of section 301(a), and therefore, federal courts have jurisdiction to hear suits between parent and local unions for damages caused by violations of union constitutions. The Court rea-
soned that the congressional purpose of labor stability would be furthered by construing the word "contract" in section 301(a) to include union constitutions.\textsuperscript{804} The Court bolstered its holding by noting that Congress was certainly aware that union constitutions are the typical form of contract between labor organizations and therefore must have intended to include those types of contracts under section 301(a).\textsuperscript{805}

The Ninth Circuit had formerly held that jurisdiction under section 301(a) in intraunion disputes is limited to those suits which allege that the dispute significantly affects external labor relations.\textsuperscript{806} In \textit{Kinney v. IBEW},\textsuperscript{807} the court followed the Supreme Court's holding in \textit{Local 334}, concluding that a union member need not allege that a breach of a constitution significantly affects external labor relations in order to maintain a section 301(a) suit against a union for breach of a union constitution, so long as the member can allege a connection between the action challenged and some legally protected interest.\textsuperscript{808} The court actually extended the rule of \textit{Local 334} by allowing suits on union constitutions to be brought by individual members as well as union locals.

An employee's action against a union for breach of its duty of fair representation is generally within the subject matter jurisdiction of the federal courts,\textsuperscript{809} although such a breach also gives rise to an unfair labor practice.\textsuperscript{810} In \textit{Ayres v. IBEW},\textsuperscript{811} the Ninth Circuit dismissed an employee's section 301(a) suit against both his union for breach of the

\textsuperscript{804} 452 U.S. at 624.
\textsuperscript{805} Id.
\textsuperscript{806} See Stelling v. International Bhd. of Elec. Workers, 587 F.2d 1379, 1384 (9th Cir. 1978) ("courts have been uniformly reluctant to permit judicial intervention in ongoing internal union affairs"), cert. denied, 442 U.S. 944 (1979); Hotel & Restaurant Employees Local 400 v. Svacek, 431 F.2d 705, 706 (9th Cir. 1970) (it is not the intent of Congress for courts to use § 301(a) to police intra-union relations).
\textsuperscript{807} 669 F.2d 1222 (9th Cir. 1982).
\textsuperscript{808} Id. at 1229. The union member in \textit{Kinney} was complaining of wrongful discharge from union office. He met the standing requirement because he alleged that his right to office was protected under the union constitution and that he was discharged in violation of that constitution. \textit{Id.} at 1230.
\textsuperscript{809} Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 301 (1971).
\textsuperscript{810} Vaca v. Sipes, 386 U.S. 171, 179 (1967). The major rationales for this rule are that decisions on a breach of the duty of fair representation are likely to be consistent whether rendered by the Board or federal courts and will not give rise to conflicts in national labor policy, and that the duty itself was a judicially evolved principle applied by the Board in the same manner as the courts. \textit{Id.} at 181.
\textsuperscript{811} 666 F.2d 441 (9th Cir. 1982).
duty of fair representation and his employer, a public entity, for violation of a collective bargaining agreement. The court held that it lacked jurisdiction because section 2 of subchapter II of the NLRA, 29 U.S.C. section 152, excludes political subdivisions of states from the definition of employer. The court had earlier held in Dente v. International Organization of Masters Local 90 that the legislative policy protecting employees warranted the extension of section 301(a) jurisdiction to claims brought by supervisory employees, even though supervisors were expressly excluded from the statutory definition of employees. The court refused to extend the holding in Dente to include state employees because such an extension would contravene the congressional intent to exclude the states from the reach of federal labor laws. The court's holding is reasonable because an expansion of section 301(a) jurisdiction to state political subdivisions would have a tremendous impact on state government and is therefore best left to Congress.

Section 4(a) of the Norris-LaGuardia Act, 29 U.S.C. section 104(a), prohibits federal courts from issuing injunctions restraining persons interested in or participating in a labor dispute from "ceasing or refusing to perform any work or to remain in any relation of employment." The purpose of section 4(a) was to forbid blanket injunctions against labor unions, thereby protecting the freedom of union members to organize and to strike. In Lumber & Sawmill Workers Local 2750 v. Cole, the Ninth Circuit held that section 4(a) does not bar a federal court's order reinstating a wrongfully discharged employee as a remedy in a section 301(a) suit. The court reasoned that affording an employee an equitable make-whole remedy would not damage the labor movement or defeat efforts to organize, but would in fact vindicate the collective bargaining process.

In Boys Markets, Inc. v. Retail Clerks Union Local 770, the

812. Id. at 442.
813. Id. at 441-42.
815. Id. at 12.
816. 666 F.2d at 444.
819. 663 F.2d 983 (9th Cir. 1981).
820. Id. at 986-87.
821. Id. The court noted that this holding would also ensure a uniform national labor policy, since state courts are not subject to the Norris-LaGuardia Act and would not be precluded under that act from issuing reinstatement orders. Id.
United States Supreme Court held that federal courts may enjoin a strike in violation of a collective bargaining agreement where the dispute underlying the strike is clearly arbitrable. The Court reasoned that, because a no-strike clause is normally the quid pro quo of an arbitration clause, denial of specific enforcement of a no-strike clause would discourage agreements to arbitrate. The Court limited its holding, stating that an injunction may not issue unless the court determines that the grievance is arbitrable and that ordinary requirements for equitable relief are met. In addition, the court must condition issuance of an injunction on the employer's agreement to arbitrate.

In Northern Stevedoring & Handling Corp. v. International Longshoremen's Union Local No. 60, the Ninth Circuit held that a temporary restraining order issued to enforce an arbitration award was invalid because the order was not issued in compliance with the procedures set out in section 7 of the Norris-LaGuardia Act. The collective bargaining agreement had an arbitration clause, a no-strike clause, and a clause allowing the union to refuse to cross a bona fide picket line of another union. The union refused to cross a picket line; an arbitrator determined that the line was not bona fide under the collective bargaining agreement, and the district court issued a temporary restraining order to enforce the award. After disposing of an argument that the case was moot because the picket line itself had been enjoined pursuant to NLRB proceedings, the Ninth Circuit held that the lower court had erred because, although it heard arguments, it adopted the employer's proffered conclusions of fact and law without...

823. *Id.* at 253 & n.22.
824. *Id.* at 248.
825. *Id.* at 253-54 (quoting dissenting opinion in Sinclair v. Atkinson Refining Co., 370 U.S. 195, 228 (1957) (Brennan, J., dissenting)).
826. 398 U.S. at 254.
827. 685 F.2d 344 (9th Cir. 1982).
828. *Id.* at 348. Section 7 of the Act provides that a temporary or permanent injunction may not issue in a labor dispute except after testimony is heard with the opportunity for cross-examination, and after the court makes findings of fact. 29 U.S.C. § 107 (1976).
829. 685 F.2d at 346.
830. *Id.* The Ninth Circuit had earlier stayed the restraining order pending the district court's compliance with the Act; the case at bar was based on a complaint that the district court had not complied with the order.
831. *Id.* at 346-47. The court decided that the case was not moot because if the Board found that the picket line was not an unfair labor practice, the line could go up again and the dispute could recur. Further, the employer had sought damages along with the restraining order, a claim which would depend on the validity of the order. The court's first reason is not persuasive: a new picket line might have been "bona fide" under the agreement.
an evidentiary hearing or testimony. The court rejected the employer's argument that the Norris-LaGuardia Act was inapplicable because the underlying dispute was not a "labor dispute" under section 13(c) of the Act, 29 U.S.C. section 113(c). The employer relied on New Orleans Steamship Association v. General Longshore Workers Local No. 1418, a Fifth Circuit case that held that the enforcement of an arbitration award is not a labor dispute under the Act. The Ninth Circuit refused to follow New Orleans Steamship, noting that it was decided before Boys Markets and was part of an ongoing erosion of an earlier Supreme Court decision which was overruled in Boys Markets. The court went on to apply the test approved by the Supreme Court in Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association. In Jacksonville, the Court ruled that the applicability of the Norris-LaGuardia Act turns on whether the "employer-employee relationship [is] the matrix of the controversy." The Ninth Circuit held that the Jacksonville test was satisfied here because the dispute was between the employer and a union over the interpretation of a bargaining agreement.

### 3. Time limitations in section 301(a) suits

In United Parcel Service, Inc. v. Mitchell, the United States Supreme Court held that the timeliness of a section 301(a) suit may be determined by reference to the appropriate state statute of limitations. In Mitchell, a discharged employee brought a section 301(a) suit against the employer and a union seventeen months after an arbitrator upheld his dismissal. The suit alleged the union's breach of duty of fair representation and the employer's wrongful discharge in violation of the labor agreement. The Court, noting that Congress has not enacted a statute of limitations for section 301(a) suits, held that the suit was barred by the 90-day state statute of limitations for actions

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832. Id. at 350.
833. Id. at 349.
834. 389 F.2d 369 (5th Cir.), cert. denied, 393 U.S. 828 (1968).
835. Id. at 372.
836. 685 F.2d at 349. The earlier decision was Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1957), which held that federal courts may not enjoin a strike.
838. Id. at 712-13 (quoting Columbia River Co. v. Hinton, 315 U.S. 143, 147 (1942)).
839. 685 F.2d at 350.
841. Id. at 60.
842. Id. at 58-59.
843. Id. at 59.
challenging arbitration decisions.\textsuperscript{844}

In \textit{United Brotherhood of Carpenters Local 1020 v. FMC Corp.},\textsuperscript{845} the Ninth Circuit reviewed a claim that a union's section 301(a) suit to have certain work reassigned to its members was barred by a state or federal statute of limitations.\textsuperscript{846} The question as to whether the union was entitled to have the work assigned to its members had been decided against the union in an arbitration proceeding between three unions several months earlier.\textsuperscript{847} Relying on \textit{Mitchell}, the court treated the suit as one to vacate an arbitration award.\textsuperscript{848} The court disposed of the case on the merits,\textsuperscript{849} but discussed at length the possible application of a statute of limitations. The court suggested that it would adopt the twenty-day state statute of limitations for actions challenging commercial arbitration proceedings, even though that statute excluded "terms or conditions of employment under collective contracts between employers and employees."\textsuperscript{850} The court noted that the only other period available under state law was a six-year statute of limitations for actions on a contract or on a statutory liability, a period disapproved in \textit{Mitchell} because it discouraged speedy settlement of labor disputes.\textsuperscript{851} Finally, the court suggested that it would not adopt the three-month period of the Federal Arbitration Act\textsuperscript{852} because the Supreme Court was reluctant to apply that Act to labor disputes.\textsuperscript{853}

In \textit{San Diego County District Council v. Cory},\textsuperscript{854} the Ninth Circuit relied on \textit{Local 1020} to hold that a 100-day state statute of limitations for the vacation, correction or confirmation of an arbitration award applied rather than the period under the Federal Arbitration Act.\textsuperscript{855} The court qualified its ruling, noting that a state limitations period would apply only if it did not defeat the national labor policy favoring quick

\textsuperscript{844} Id. at 60.
\textsuperscript{845} 658 F.2d 1285 (9th Cir. 1981).
\textsuperscript{846} Id. at 1288.
\textsuperscript{847} Id. at 1286.
\textsuperscript{848} Id. at 1290. \textit{Local 1020} is distinguishable from \textit{Mitchell} because in \textit{Local 1020} the suit was against the employer, who was not a party to the arbitration proceedings, while in \textit{Mitchell} the defendants had been parties to the arbitration. Nevertheless, the court was correct in relying on \textit{Mitchell} because the effect of the union's suit, if successful, would have been to nullify the arbitration award.
\textsuperscript{849} See supra discussion under Judicial review of arbitration awards.
\textsuperscript{850} 658 F.2d at 1289-90 & n.7.
\textsuperscript{851} Id. at 1290.
\textsuperscript{853} 658 F.2d at 1290.
\textsuperscript{854} 685 F.2d 1137 (9th Cir. 1982).
\textsuperscript{855} Id. at 1142.
The court noted that a single federal standard would be helpful to insure uniformity and confidence in the arbitration system. Nevertheless, the court reasoned that Congress' failure to adopt a statute of limitations under section 301(a) was a tacit acceptance of the state statutes, and thus refused to create a limitations period in the absence of legislative action.

IV. CONCERTED ACTIONS

A. Secondary Activity

1. Product picketing and boycotts

Section 8(b)(4)(B) of the National Labor Relations Act states that a union commits an unfair labor practice if it refuses to handle goods or perform services, or coerces or threatens a person engaged in commerce with the object of forcing that person to cease doing business with another. Concerted activities excepted from this section include primary strikes and picketing, that is, concerted activities directed against the employer with whom the union has a dispute.

Further excluded from the section 8(b)(4)(B) prohibition is "publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product . . . [is] produced by an employer with whom the [union] has a primary dispute" which is distributed by a neutral employer, so long as the publicity does not induce neutral employees to refuse to perform services at the neutral employer's premises. Courts have had difficulty determining when a concerted activity such as picketing or boycotting constitutes protected primary activity, and when the activity amounts to illegal secondary activity seeking to embroil a neutral employer in a primary dispute.

856. Id.
857. Id. at 1140-42.
858. Id. at 1141.
860. Such a violation is actionable before the NLRB as an unfair labor practice under § 8(b)(4) of the NLRA, or in federal court as a damages suit under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976).
863. See, e.g., § 7 of the NLRA, 29 U.S.C. § 157 (1976), which provides in part that "employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."
864. Congress, in forbidding secondary boycotts, sought to secure a union's right to pressure primary employers and shield neutral employers and employees from disputes that were not of their own making. NLRB v. Denver Bldg. Trades Council, 341 U.S. 675, 692 (1951).
In *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, the United States Supreme Court held that it is not an unfair labor practice under section 8(b)(4)(B) for a union to refuse to handle a product that is one of many sold by the secondary employer, where the union conducted peaceful picketing at the secondary establishment and requested that customers boycott the primary employer's product. The Court refused to construe section 8(b)(4)(B) to prohibit all secondary consumer picketing, noting that the congressional intent in enacting the law was to avoid a broad ban on peaceful picketing because it could conflict with the first amendment. The Court held that Congress only intended to prohibit picketing which was designed to cause the neutral party a general loss of patronage.

The *Tree Fruits* decision was distinguished and limited in *NLRB v. Retail Store Employees Union, Local 1001 (Retail Employees)*. In *Retail Employees*, the Supreme Court held that secondary product picketing is an unfair labor practice under section 8(b)(4)(ii)(B) of the NLRA when the product involved constitutes virtually all of the neutral employer's trade. The Court reasoned that consumer picketing of a single-product secondary employer leaves responsive customers with no practical option but to boycott the neutral employer altogether, and therefore amounts to coercion with the object of causing the neutral employer to stop dealing with the primary employer. The Court noted that its holding was necessary to further the related legislative goals of protecting neutral parties and discouraging labor discord. The Court held that the appropriate test to determine whether product

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866. *Id.* at 71. In *Tree Fruits*, union members picketed the consumer entrances of neutral grocery stores. They carried placards and distributed handbills asking store customers to refrain from buying apples packed by the struck primary employer. *Id.* at 60.
867. *Id.* at 63.
868. *Id.* Because picketing includes patrolling, conduct not directly protected by the first amendment, as well as a speech element in the placard statements, it is "something more [than] and different from simple communication" and as such is not beyond legislative control. *Id.* at 93 (Harlan, J., dissenting) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 464 (1950)).
869. 377 U.S. at 63.
871. *Id.* at 614-15. In *Retail Employees*, the union picketed neutral title companies, carrying signs which asked customers to cancel their insurance policies with the primary employer. *Id.* at 609. Approximately ninety percent of the title companies' business was from the sale or servicing of the employer's policies. *Id.*
872. *Id.* at 613.
873. *Id.* at 615.
874. *Id.* at 614.
875. *Id.* at 613-14. Justice Brennan, dissenting, argued that a single-product neutral em-
picketing is coercive secondary activity is whether the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss (economic impact test).\textsuperscript{a}

In \textit{International Longshoremen's Association v. Allied International, Inc.},\textsuperscript{b} the Supreme Court applied the economic impact test to a union's boycott, based on political grounds, of ships carrying cargo from the U.S.S.R.\textsuperscript{c} The cargo was owned by an American importer who had contracted with an American shipper to bring the goods from the Soviet Union.\textsuperscript{d} The importer, the shipper, and the stevedoring company which agreed to unload the ships brought suit against the union under section 303(a) of the Labor Management Relations Act for damages resulting from the boycott.\textsuperscript{e}

The Court first dealt with the question of whether the boycott affected "commerce" within the meaning of the NLRA\textsuperscript{f} so as to be subject to its secondary boycott provisions. The union relied on a line of cases beginning with \textit{Benz v. Compania Naviera Hidalgo},\textsuperscript{g} where the Supreme Court held that picketing by an American union in support of strikes conducted by foreign crews against foreign shipowners was not "commerce" under the NLRA.\textsuperscript{h} The rationale behind that line of cases was that applying the Act to such situations would necessitate inquiry into the "internal discipline and order" of foreign vessels, which could cause disruption in maritime law and international

\textsuperscript{a} Id. at 621 (Brennan, J., dissenting).

\textsuperscript{b} 456 U.S. 212 (1982).

\textsuperscript{c} Id. at 223.

\textsuperscript{d} Id. at 215.

\textsuperscript{e} Id. at 216.

\textsuperscript{f} 29 U.S.C. § 152(6) (1976) defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States . . . or between any foreign country and any State . . . ."

\textsuperscript{g} 29 U.S.C § 152(7) (1976) defines "affecting commerce" as "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."

\textsuperscript{h} 353 U.S. 138 (1957).

\textsuperscript{i} Id. at 142. \textit{See also} In Cres S.S. Co. v. International Maritime Workers Union, 372 U.S. 24, 26-27 (1963) (operations of foreign owned ships employing foreign seamen not "in commerce" under Act); Windward Shipping, Ltd. v. American Radio Ass'n, 415 U.S. 104, 114-15 (1974) (picketing of foreign flagships by American unions protesting wages paid to foreign crew not within Act, even though motivated by a desire to publicize competitive advantage of foreign shippers over shippers employing American union members); American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 222 (1974) (factually similar to \textit{Windward} except plaintiffs in state court were unions seeking to unload foreign flag ships; state court jurisdiction held not preempted).
The union maintained that its boycott was a primary boycott of Russian goods which incidentally affected American employers dealing in those goods. The union pointed out that its motivation was not to force the plaintiffs to stop dealing with each other, but to express disapproval of the Russian invasion of Afghanistan.  

The Supreme Court, affirming the First Circuit, held that Benz and subsequent cases were irrelevant, since the instant boycott "did not seek to extend the bill of rights developed for American workers . . . to foreign seamen." The Court noted that the employers subject to the boycott were American companies "engaged in commerce," and that the boycott allegedly affected "commerce up and down the east and gulf coasts."  

Having decided that the union's boycott was "in commerce," the Court went on to hold that the plaintiffs had alleged a violation of section 8(b)(4)(B) because primary dispute was with the Soviet Union rather than the plaintiffs, and because "the certain effect of [the union's] action is to impose a heavy burden on neutral employers." It is apparent from this case and Retail Employees that the question of whether product picketing is protected primary activity or prohibited secondary activity turns not on the admitted object of the picketing, but on its possible effects. Such a test reflects a policy of protecting neutral employers while limiting the right of unions to publicize labor disputes through picketing or boycotting.

Finally, the union argued that to hold that the boycott fell within the purview of section 8(b)(4) would violate the first amendment. The Court dismissed this argument by holding that the union's conduct was not designed to communicate, but to coerce, and was therefore not protected under the first amendment.  

In Allied International, the union conceded that its dispute was with the U.S.S.R., and that it had no complaints against the plaintiffs. The union might have sought to characterize the plaintiffs as primary employers by arguing that its dispute was with American com-

885. 456 U.S. at 224.  
886. 640 F.2d 1368 (1st Cir. 1981).  
887. 456 U.S. at 221.  
888. Id. at 219.  
889. Id. at 223-24.  
890. Id. at 226.  
891. Id.  
892. 640 F.2d at 1377.
panies "disloyal" enough to trade with Russia. However, it is likely that the Supreme Court would have reached the same result, either by refusing to accept the union's characterization of the dispute and holding that the primary dispute was with the U.S.S.R., or by concluding that the boycott was unprotected because it was not related to working conditions. The First Circuit disapproved of the union's political motivations, apparently because it considered non-labor related political action to be outside the ambit of proper union activity. The Supreme Court approved and quoted at length from the First Circuit's opinion, and would probably follow its reasoning in this area as well. It does appear, however, that unions will be permitted to speak for their members in political areas unrelated to labor as long as their actions are in the form of communication, which is protected by the first amendment, rather than conduct.

2. Common-situs picketing

A second type of concerted activity which has generated considerable litigation under section 8(b)(4) is common-situs picketing, or picketing at a site where two or more employers are engaged in separate tasks. The Moore Dry Dock rule, a Board test for determining whether common-situs picketing is protected primary activity or illegal secondary activity, was approved by the United States Supreme Court in Local 761, International Union of Electrical Workers v. NLRB (General Electric). In General Electric, a union picketed all the gates of a common-situs, including a gate reserved for the exclusive use of employees of independent contractors who did work unrelated to the everyday operations of the struck employer's plant. The Court held that picketing the reserve gate was an unfair labor practice because the picketing would embroil neutral employees in a labor dispute and com-

894. 640 F.2d at 1378. But see NLRB v. International Longshoremen's Ass'n, 332 F.2d 992, 997 (4th Cir. 1964) (union's refusal to handle cargo bound to or coming from Cuba not illegal secondary activity).
895. 456 U.S. at 226.
896. In re Sailors' Union of the Pacific (Moore Dry Dock), 92 N.L.R.B. 547 (1950). The test for determining the legality of common-situs picketing is as follows: (1) the picketing is strictly limited to times when the dispute is located on the secondary employer's premises; (2) the primary employer is engaged in its normal business at the site at the time of picketing; (3) the picketing is limited to places near the location of the dispute; and (4) the picketing clearly discloses that the dispute is with the primary employer. Id. at 549.
898. Id. at 669-70.
pel a neutral employer to stop dealing with the struck employer. The Court emphasized that its ruling should not be interpreted to proscribe picketing at gates used by the struck employer's suppliers, customers, or employees. The Court further held that appealing to neutral employees whose tasks are necessary to the employer's everyday operations is protected primary activity.

In *Huber & Antilla Construction v. Carpenters Union Local 470*, the Ninth Circuit applied the reserve gate doctrine developed in *General Electric* to uphold a union's argument that the struck employer's effort to establish a reserve gate as a common site was legally insufficient. The employer had put up signs restricting union deliverymen and subcontractors to one gate and non-union employees, deliverymen and subcontractors to another. The court held that the employer's attempt to limit picketing to the non-union gate infringed on the union's right to "carry its message" to the struck employer's materialmen and suppliers, whether they were affiliated with a union or not.

The Ninth Circuit further held that the union did not violate section 8(b)(4)(A) by picketing at both gates because the picketing was necessary to preserve the union's right to picket gates used by the primary employer's materialmen. The court's holding on this point is consistent with the Supreme Court's ruling in *General Electric* that mingled-use gates may be picketed without violating section 8(b)(4)(A).

### B. Strikes

The right to strike, though not constitutionally guaranteed, enjoys statutory protection under section 7 of the National Labor Relations Act. An employer who interferes with employees who are lawfully exercising their section 7 rights or who discriminates in terms

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899. Id. at 680.
900. Id. There was some evidence that the gate had been used by employees of independent contractors doing work necessary to daily plant operations. Therefore, the case was remanded for a Board determination on the issue of whether the mixed use was substantial enough to take the reserve gate out of the § 8(b)(4) limitation. Id. at 682.
901. Id. at 681.
903. Id. at 1018.
904. Id. at 1015.
905. Id. at 1018.
906. Id.
907. 366 U.S. at 682.
or tenure of employment commits an unfair labor practice under sections 8(a)(1) and (3) of the NLRA.\textsuperscript{910}

In \textit{Bill Johnson's Restaurants, Inc. v. NLRB},\textsuperscript{911} the Ninth Circuit enforced a Board decision holding that an employer had violated sections 8(a)(1) and 8(a)(3) by firing three waitress employees who struck to protest working conditions and the discharge of another waitress.\textsuperscript{912} The waitresses were not represented by a union, but were discussing the possibility of unionizing. The employer argued unsuccessfully that the waitresses did not strike, but instead quit their jobs.\textsuperscript{913} Conflicting inferences could be drawn from the facts, but the court upheld the NLRB's determination as "reasonable and supported by substantial evidence."\textsuperscript{914} The employer relied on leaflets distributed by the picketing waitresses which stated that they had quit their jobs.\textsuperscript{915} The court also upheld that Board's decision that the waitresses' walkout was a valid strike even though they had not made specific demands at the time of their walkout.\textsuperscript{916} Furthermore, the striking waitresses were reinstated with back pay because they were victims of their employer's unfair labor practice.\textsuperscript{917}

It is clear from \textit{Bill Johnson's Restaurants, Inc.} that the NLRA protects legal concerted activity whether carried on by a union and its members or by unrepresented employees who act together. This is an appropriate interpretation of the Act, which was intended to benefit all employees, whether unionized or not.

V. Occupational Safety and Health Act

A. Inspection

Congress enacted the Occupational Safety and Health Act of

\footnotesize{\textsuperscript{910} 29 U.S.C. § 158(a) (1976) provides in pertinent part:
(a) It shall be an unfair labor practice for an employer—
\begin{enumerate}
\item to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
\item 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 . . . .
\end{enumerate}
\textsuperscript{911} 660 F.2d 1335 (9th Cir. 1982), \textit{vacated on other grounds}, 103 S. Ct. 2161 (1983).
\textsuperscript{912} 660 F.2d at 1341.
\textsuperscript{913} Id.
\textsuperscript{914} Id.
\textsuperscript{915} Id.
\textsuperscript{916} Id. The court relied on NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-15 (1962) (concerted activities by employees seeking to improve working conditions are protected whether they take place before, after, or at the same time a demand is made).
\textsuperscript{917} 660 F.2d at 1341.}
1970 (OSHA) “to assure so far as possible” every worker a safe and healthful work environment. To ensure compliance with its provisions, the Act grants the Secretary of Labor (Secretary) and his/her representatives the authority, upon presenting proper credentials, to enter, inspect, and investigate any workplace in a reasonable manner. An employee who believes that there is an imminent danger or a violation of an OSHA standard on the worksite may request such an inspection. If the Secretary determines that the employee’s belief is based on reasonable ground, the Secretary or his/her representatives may conduct a “special inspection . . . as soon as practicable.”

B. Warrant

1. Probable cause

If an employer denies an OSHA officer admittance for the purpose of conducting an inspection, the officer must secure a warrant. Warrants for OSHA inspections must be based on probable cause. In Marshall v. Barlow’s, Inc., the Supreme Court held that the requisite probable cause for an OSHA warrant is not the same as that for a criminal proceeding warrant. The OSHA officer’s right to inspect does not depend on his or her demonstrating probable cause to believe that conditions on the premises violate OSHA. Rather, the officer need only show that “‘reasonable legislative or administrative standards for conducting . . . an inspection are satisfied with respect to a particular [establishment].’” Thus, probable cause for an administrative search requires that the search be “reasonable” such that the public interest in the inspection outweighs the invasion of privacy which the

919. Id. § 651(b).
920. Id. § 657(a) (1976) provides:
   (a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
   (1) to enter without delay and at reasonable times any . . . workplace or environment where work is performed by an employee of an employer; and
   (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment . . . and to question privately any such employer, owner, operator, agent or employee.
922. Id.
924. Id. at 320.
925. Id. (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)).
inspection entails.\footnote{Camara v. Municipal Court, 387 U.S. 523, 539 (1967).} Since the \textit{Barlow's} decision, federal courts have uniformly applied a less stringent standard of probable cause for an OSHA inspection based on employee complaints than for a criminal proceeding.\footnote{Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1318 n.6 (7th Cir. 1980). \textit{See also} Marshall v. W & W Steel Co., 604 F.2d 1322, 1326 (10th Cir. 1979); Weyerhauser Co. v Marshall, 592 F.2d 373, 377 (7th Cir. 1979); Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283, 1287 (9th Cir. 1979); Marshall v. North American Car Co., 476 F. Supp. 698, 703 (M.D. Pa. 1979).}

The Ninth Circuit applied this relaxed standard of probable cause in the case of \textit{Hern Iron Works, Inc. v. Donovan},\footnote{670 F.2d 838 (9th Cir.), \textit{cert. denied}, 103 S. Ct. 69 (1982).} and concluded that an inspection warrant issued fifteen months after receipt of an employee complaint was not based on stale probable cause.\footnote{Id. at 840.} The Ninth Circuit rested its decision on the circumstances surrounding the delay. Upon service of a full scope inspection warrant, Hern refused entry to an OSHA officer. The district court then denied the Department of Labor's application for an enforcement order because the warrant had been improperly drafted. Hern refused to honor a newly drafted warrant, but the district court declined to find contempt because the warrant was improperly served. Finally, Hern contested the third warrant on the ground that it was based on stale probable cause. The Ninth Circuit ruled that, unlike a criminal proceeding warrant, issuance of a warrant for an OSHA search need not immediately follow an employee complaint.\footnote{Id. at 839-40.} Perhaps more important, the court declined to conclude that the warrant was based on stale probable cause because Hern was chiefly responsible for the delay in its issuance through its "occlusive tactics."\footnote{29 U.S.C. § 657(a) (1976). \textit{See supra} note 920 and accompanying text.}

2. Scope

Section 8(a) of the Act\footnote{29 U.S.C. § 657(0(1) (1976) provides in pertinent part:} permits "wall to wall" inspection of the workplace even if there is no reason to suspect violations of the Act. Circuits differ, however, on the scope of a section 8(f)\footnote{29 U.S.C. § 657(0(1) (1976) provides in pertinent part:} special in-
“special inspection” prompted by an employee complaint. The Third Circuit concluded that as a “special inspection” the scope of a section 8(f) inspection was limited to that which bore some relationship to the violations alleged in the employee complaint. In contrast, the Seventh Circuit held that a special inspection need not be limited in scope to the substance of the employee complaint.

The Ninth Circuit upheld a full-scale section 8(f) inspection in *J.R. Simplot Co. v. OSHA*, but declined to formulate a general rule for the proper scope of a special inspection. The court based its decision on the information presented to the district court in the warrant application. The district court mistakenly inferred from the warrant application that the Simplot plant was located in a single facility and, thus, it authorized an inspection of the entire Simplot plant. The Ninth Circuit ruled that since the district court’s conclusion was neither unreasonable nor made in bad faith, the warrant was not overbroad.

The Ninth Circuit applied the Simplot analysis in *Hem Iron Works, Inc. v. Donovan*, where it upheld an inspection of the entire worksite after receipt of an employee complaint. The complaint alleged that there existed safety hazards in the metal pouring area of the plant and ventilation defects in the foundry. The Ninth Circuit held that the magistrate who issued the warrant could have reasonably inferred from the complaint that a full-scale inspection of the entire plant was necessary to detect the hazards.

The *Hem* court concluded that the warrant authorizing the full-

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(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing [and] shall set forth with reasonable particularity the grounds for the notice . . . . If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection . . . as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

935. Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1322-26 (7th Cir. 1980). The Seventh Circuit pointed out the anomaly which would result if a wall to wall inspection were permitted where there was no specific reason to suspect an OSHA violation, but were proscribed where there was specific probable cause to suspect that violations of OSHA would be found on the work premises. 625 F.2d at 1325.
936. 640 F.2d 1134, 1138 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982).
937. *Id.*
938. 670 F.2d 838 (9th Cir.), cert. denied, 103 S. Ct. 69 (1982).
939. *Id.* at 841.
940. *Id.*
scale inspection was reasonable in light of OSHA's purpose of promoting employee safety. The Ninth Circuit expressly adopted the Seventh Circuit rule that "[t]he better view is that which permits, absent extraordinary circumstances, general inspections in response to employee complaints."

C. The Multi-Employer Construction Site

1. Anning-Johnson/Grossman rule

Section 5(a)(2) of the Act requires an employer to comply with the Act's health and safety standards. Typically, the employer cited for violation of section 5(a)(2) created or controlled the hazard. There are no OSHA regulations, however, which define the duties of a subcontractor toward its employees where it neither created nor controlled the hazard. At a multiemployer construction site, the hazard created by one employer can foreseeably injure employees of another employer. In recognition of the circumstances peculiar to the construction industry, the Occupational and Safety Health Review Commission (Commission) has imposed a duty under section 5(a)(2) on a subcontractor regarding safety violations which it neither created nor fully controlled. The Commission left the scope of the duty for case-by-case determination.

In Secretary of Labor v. Anning-Johnson Co., the Commission ruled that the noncreating and noncontrolling subcontractor having actual knowledge of the OSHA violations may defend against liability by showing it took "realistic" steps to protect its employees from hazardous conditions. In Grossman Steel & Aluminum Corp., the Commission ruled that the subcontractor may defend against liability by showing it acted as a reasonable person to assure that its own conduct did not create a hazard to any employee at the site. These decisions

941. Id.
942. Id. (quoting Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1324 (7th Cir. 1980)).
944. BNA 4 OSHC 1193 (1976).
945. Id. at 1199.
946. BNA 4 OSHC 1185 (1976).
947. Id. at 1188. The Commission stated:

Simply because a subcontractor cannot himself abate a violative condition does not mean it is powerless to protect its employees. It can for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, instruct its employees to avoid the area where the hazard exists if this alternative is practical, or in some instances provide an alternative means of protection against the hazard.
are referred to collectively as the Anning-Johnson/Grossman rule.

2. Reasonable and realistic measures

The Ninth Circuit followed the Second and Eighth Circuits by applying the Anning-Johnson/Grossman rule in the survey case of Electric Smith, Inc. v. Secretary of Labor. The Ninth Circuit treated the Anning-Johnson/Grossman standard as an affirmative defense, thereby placing the burden of persuasion on the employer. The court ruled that the subcontractor met this burden, and was relieved of liability for OSHA violations, by proving that it took reasonable and realistic steps to protect its employees from the hazards it neither created nor controlled. By agreement, the general contractor in Electric Smith had assumed full responsibility for providing safeguards for the protection of all employers at the worksite. When the general contractor failed to provide the necessary safeguards, the subcontractor repeatedly complained to the general contractor's superintendent, directed its employees away from the hazardous area, and installed a makeshift railing near the hazardous area.

The Ninth Circuit predicated its decision on the good faith efforts made by the subcontractor; it implied that it would be unfair to hold the subcontractor liable for a hazard he diligently sought to remedy. Also playing a key role in the Ninth Circuit decision was the Commission's pragmatic emphasis in enforcing OSHA standards only when interest in enforcement outweighs interests of equity, economy, and efficiency. In this case, the scale tipped toward relieving the subcontractor of any liability.

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948. 666 F.2d 1267, 1270 (9th Cir. 1982) (citing DeTrae Enters. Inc. v. Secretary of Labor, 665 F.2d 103 (2d Cir. 1980) (per curiam) (noncontrolling and noncreating subcontractor liable for OSHA violations for failure to warn employees of hazards, to provide alternative means of protection, and to prevent employees from using hazardous areas); Bratton Corp. v. OSHRC, 590 F.2d 273 (8th Cir. 1979) (noncontrolling and noncreating subcontractor lacking authority to abate hazards liable in absence of showing that it took realistic measures to protect its employees from known hazards)).

949. 666 F.2d at 1270. The court allocated the burden based on its finding that the employer's conduct with respect to protection of its employees is a matter particularly within its knowledge. Id. (citing Grossman Steel & Aluminum Corp., BNA 4 OSHC at 1188).

950. 666 F.2d at 1274.

951. Id. at 1270-72.

952. Id. at 1273. The court cited Brennan v. OSHRC, 511 F.2d 1139, 1145 (9th Cir. 1975), for the proposition that fairness requires that one held liable for a violation be shown to have at least "knowingly acquiesced in" the violation.

953. Id.
VI. Sex Discrimination Under Title VII

A. Proof of Disparate Treatment

Title VII of the Civil Rights Act of 1964954 makes it unlawful for an employer to discriminate against any individual on account of sex.955 Congress created the Equal Employment Opportunity Commission956 to enforce the Act, and granted individuals the right to initiate private causes of action against employers they believe violated Title VII.957 A plaintiff may establish a Title VII violation by showing that the challenged employment practice resulted in either disparate impact or disparate treatment. Under the disparate impact theory, employment practices are discriminatory where, though facially neutral in their treatment of different groups, they in fact fall more harshly on certain groups and cannot be justified by business necessity.958 Disparate treatment, "the most easily understood type of discrimination,"959 results where the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. The presence of discriminatory intent, though irrelevant under the disparate impact theory, is critical to establishing the disparate treatment

   (a) It shall be an unlawful employment practice for an employer—
      (1) to fail or refuse to hire or to discharge any individual, or otherwise to
discriminate against any individual with respect to his compensation, terms,
   conditions, or privileges of employment, because of such individual's race,
   color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employ-
      ment in any way which would deprive . . . any individual of employment
   opportunities or otherwise adversely affect his status as an employee, because
   of such individual's race, color, religion, sex, or national origin.
956. 42 U.S.C. § 2000e-5. The EEOC, however, has little power. The Commission may investigate discrimination charges and bring civil actions against employers if it determines after investigation that there is reasonable ground to believe that the charges are true. While courts frequently defer to the Commission's views on the lawfulness of certain employment practices, occasionally courts accord little weight to the agency's guidelines. Compare Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (EEOC guidelines constitute "'[t]he administrative interpretation of the Act by the enforcing agency,'" and consequently are to be accorded great deference) (citations omitted) with General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) ("courts properly may accord less weight to EEOC guidelines than to administrative regulations which Congress has declared shall have the force of law").
type of discrimination. To sharpen the inquiry into “the elusive factual question” of discriminatory intent, the Supreme Court has allocated the burdens of establishing discrimination.

1. Allocation of burdens

In *McDonnell Douglas Corp. v. Green*, the Supreme Court announced the procedures to govern the litigation of disparate treatment claims. The plaintiff carries the initial burden of producing evidence which establishes a prima facie case of discrimination. The defendant then carries the intermediate burden of articulating a legitimate non-discriminatory reason for the challenged action, thereby rebutting the prima facie case. Finally, if the defendant meets this burden, the plaintiff is afforded a full opportunity to prove by a preponderance of the evidence that the defendant’s proffered reason was a pretext for discriminatory intent. Though the burden of coming forth with evidence shifts throughout the trial, the ultimate burden of persuading by a preponderance of the evidence never leaves the plaintiff. The allocation of burdens serves to clarify the factual issues and, hence, to expeditiously and fairly focus the litigants and the court onto the question of discrimination.

2. Order and nature of proof

a. *prima facie case*

The plaintiff has the initial burden of presenting evidence to create a rebuttable presumption that the employment act or decision was premised on a criterion prohibited by Title VII. The plaintiff meets this burden by showing that, in the absence of any explanation, the employer’s act or decision “more likely than not” was based on unlawful considerations. The plaintiff’s initial burden is not “onerous.”

960. *Id.*
963. *Id.* at 805.
965. *Id.*
967. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978). In *Furnco*, the Supreme Court explained how a prima facie case raises an inference of discriminatory animus: “when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration . . . .” 438 U.S. at 577 (emphasis in original). *Accord* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).
During this survey period, the Ninth Circuit uniformly held that plaintiffs in Title VII sex discrimination actions produced enough evidence to establish a prima facie case of employment discrimination.

The Ninth Circuit demonstrated the ease with which the plaintiff may establish a prima facie case of sex discrimination in *Meyer v. California & Hawaiian Sugar Co.* At the time of her discharge, the plaintiff played a significant role in the administration of the defendant's affirmative action program. She was dismissed after writing a memorandum which reflected personal sentiments unfavorable to minority employees. The Ninth Circuit concluded that, to create the rebuttable presumption of discrimination, the plaintiff need only eliminate the most common reasons for her discharge. The court ruled that the plaintiff created this inference of discrimination by presenting evidence that she was discharged in spite of eighteen years of performance satisfactory to her employer, and that the employer did not seek to eliminate her position.

The Ninth Circuit applied a remarkably lenient standard for establishing a prima facie case in *Ostroff v. Employment Exchange, Inc.* According to the district court findings, the plaintiff telephoned an employment agency to inquire about an advertised position. Without asking about her qualifications, an agency employee curtly informed the plaintiff that the job was already filled. In fact, the plaintiff was not qualified. Later that day the plaintiff's husband called and was invited to apply for the same position. The district court held that, despite this disparate treatment, the plaintiff's lack of qualifications

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968. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In *McDonnell Douglas*, the Court suggested that the complainant in a Title VII action state a prima facie case by showing:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. The Court considered this standard a flexible one which may vary with different factual situations. *Id.* at 802 n.13. In *Burdine*, the Court refined the *McDonnell Douglas* model: the plaintiff need only prove by a preponderance of the evidence that she applied for a vacant position for which she was qualified, but was rejected under circumstances which create an inference of unlawful discrimination. 450 U.S. at 253.

969. 662 F.2d 637 (9th Cir. 1981).
970. 662 F.2d at 639 (citing *Burdine*, 450 U.S. at 253-54).
971. 662 F.2d at 639.
972. 683 F.2d 302 (9th Cir. 1982) (per curiam).
973. 683 F.2d at 304. The advertisement specified that applicants were to possess a college degree. The plaintiff did not have a college degree and lacked significant managerial experience.
precluded her from establishing a prima facie case of discrimination.\footnote{974}

The Ninth Circuit reversed the decision and ruled that a showing of qualification is not essential to create the inference that "more likely than not" the employment agency denied the plaintiff an opportunity to apply for the position because of her sex. The court followed the earlier Ninth Circuit decision in \textit{Nanty v. Barrows Co.},\footnote{975} observing that, where the applicant is summarily rejected without knowledge of her qualifications, the reason for her rejection cannot be lack of qualification. Hence, those qualifications are irrelevant to whether the plaintiff has established a prima facie case of discrimination.\footnote{976} The Ninth Circuit concluded that the plaintiff established a prima facie case of disparate treatment and that, since the defendants failed to rebut the presumption, the plaintiff was entitled to judgment.\footnote{977}

Though the Supreme Court has stated that the plaintiff's initial burden, if carried successfully, creates a rebuttable presumption, the Ninth Circuit has held that the evidence presented to establish a prima facie case may be so conclusive as to compel the court to rule that the employer discriminated against the plaintiff. For example, in \textit{Muntin v. California Parks and Recreation Department},\footnote{978} the Ninth Circuit held that the defendant's testimony together with the plaintiff's evidence established, as a matter of law, the defendant's discriminatory intent.\footnote{979}

The plaintiff, an experienced deckhand, placed third out of sixty applicants in the defendant's job application process.\footnote{974} \textit{Id.} at 304. In \textit{Nanty}, the defendant placed an order with a state employment agency for a truck driver. The agency determined that the plaintiff, a Native American, was qualified and referred him to the defendant. Without inquiring of his qualifications, the defendant told the plaintiff the job had been filled; two days later the defendant hired two Caucasian truck drivers. Though the Ninth Circuit believed that the plaintiff met the \textit{McDonnell Douglas} model for establishing a prima facie case, it ruled that the plaintiff met the more flexible approach outlined in \textit{Burdine}. \footnote{660 F.2d at 304 (citing EEOC v. Ford Motor Co., 645 F.2d 183, 188 n.3, 198-99 (4th Cir. 1981) (employer cannot defend itself by stating men were more qualified for the positions where it never evaluated the qualifications of women))).} The Ninth and Third Circuits invoke the rule that qualifications are irrelevant where the defendant never initially considered them. Whereas the \textit{Ford Motor Co.} court ruled that the qualifications defense did not rebut the plaintiff's prima facie case, the \textit{Ostroff} court stated that the lack of qualifications was not material in establishing the prima facie case itself.\footnote{976} \textit{Id.} at 304. The plaintiff's lack of qualifications for the position is nonetheless a crucial factor in the award of lost wages. If the defendant can show by clear and convincing evidence that the plaintiff would not have been hired in the absence of discrimination, she is not entitled to lost wages. The Ninth Circuit remanded the case for such a determination. \textit{Id.} at 305.

\footnote{978} 671 F.2d 360 (9th Cir. 1982).
\footnote{979} \textit{Id.} at 362-63.
cants on the qualifying exam for a position as a deckhand. The defendant refused to interview the plaintiff for the position, thus departing from a longstanding practice of interviewing the top three applicants on the exam. The testimony and deposition of the hiring officer manifested a great reluctance to hire women as deckhands regardless of their ability to perform the job.\textsuperscript{980} The Ninth Circuit reasoned that no explanation offered by the defendant could rebut the inference of sex discrimination.\textsuperscript{981}

In most Title VII cases, however, it is difficult to present direct evidence that an employer acted or made a decision on the basis of the plaintiff’s sex. The Ninth Circuit has recognized this difficulty by enthusiastically admitting the plaintiff’s statistical data into evidence to help establish a prima facie case. For example, in \textit{Lynn v. Regents of the University of California},\textsuperscript{982} the court found some of the plaintiff’s statistical data “highly persuasive” in creating a rebuttable presump-

\begin{footnotesize}
\begin{enumerate}
\item The trial and deposition testimony included the following:
\begin{enumerate}
\item Q. Do you think women should be standing night watch in San Francisco?
A. No.
\item \textsc{R.T. 115}
Q. Do you think the appointment of women deckhands at the park would cause problems?
A. Not particularly other than a — particularly the night watch business, that sort of thing.
Q. But that’s a problem that you see, a woman standing—
A. I see it as a very serious problem, yes.
Q. That women shouldn’t be standing night watch in San Francisco?
A. Right.
Q. So, it would be practically impossible, then, for you to give consideration to a woman for a deckhand position; is that correct?
A. Well, it would certainly be limiting.
\item \textsc{R.T. 124.}
Q. Have you ever worked with women deckhands?
A. At sea?
Q. Yes.
A. No.
Q. Would you want to?
A. No.
Q. Why not?
A. It’s a lot of problems. I’m talking about merchant ships, now, with women in the ship.
Q. What kind of problems?
A. Sexual problems.
Q. Such as?
A. Fights.
Q. What kinds of other problems do you foresee?
A. Other kinds of problems? Mostly those between the two sexes. As far as abilities go, I’m sure they’re every bit as capable as most of the guys going to sea today. But off watch, trouble.
\item \textsc{R.T. 194-95.}
\item \textsuperscript{981} 671 F.2d at 363.
\item \textsuperscript{982} 656 F.2d 1337 (9th Cir. 1981), \textit{cert. denied}, 103 S. Ct. 53 (1982).
\end{enumerate}
\end{enumerate}
\end{footnotesize}
tion of sex discrimination. The plaintiff's data tended to show that she was objectively qualified for the tenure the university denied her and that the university exhibited a general pattern of discrimination against women. The plaintiff augmented the statistics with testimony which indicated that the evaluation of the plaintiff's scholarship reflected, in part, the university's disdain for women's studies as a topic of scholarly work. The Ninth Circuit ruled that the plaintiff successfully carried her initial burden, since the statistics and testimony each implied that it was "more likely than not" that the university's decision to deny tenure was based on a criterion proscribed by Title VII.

Statistical data also played an important role in the Ninth Circuit's determination that the plaintiffs established a prima facie case in *O'Brien v. Sky Chefs, Inc.* To substantiate their claims that their employer discriminated against women in its promotion practices, the plaintiffs submitted statistical evidence which demonstrated the disparity of representation between women in the lower paying positions and the higher paying positions. The plaintiffs also produced evidence that the employer failed to establish promotion criteria and relied entirely upon subjective criteria for its high-level positions. The Ninth Circuit rejected the view that the plaintiffs were required to show that they were qualified for promotion since, given the fact that the criteria for qualifications were unknown, such a showing would be an onerous burden to carry. Furthermore, the positions at issue involved supervision of airline meal preparations, which may have required skills that many persons may easily learn. Relying primarily on the plaintiffs' statistical data, the Ninth Circuit ruled that the plaintiffs established a

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983. 656 F.2d at 1342. The court emphasizes the utility of statistics, particularly in the academic context, where the tenure decision is highly subjective. See also International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (statistical analyses serve an important role in proving employment discrimination).

984. 656 F.2d at 1344. The Ninth Circuit thus ruled that the district court's finding that Lynn failed to satisfy the initial burden was clearly erroneous and, accordingly, reversed the decision. *Id.*

985. 670 F.2d 864 (9th Cir. 1982).

986. 670 F.2d at 867 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

987. On this basis the court distinguished *Pack v. Energy Research & Dev. Admin.,* 566 F.2d 1111 (9th Cir. 1977) (per curiam), which required a showing that plaintiffs were qualified for the positions. In *Pack,* the positions at issue were those of highly specialized geologic engineers. The Ninth Circuit ruled in *O'Brien* that when a position involves skills which many persons may easily acquire, statistical comparisons with the general labor pools are more probative than when the job requires special training. 670 F.2d at 867 (citing *Piva v. Xerox Corp.,* 654 F.2d 591, 594 (9th Cir. 1981) (where employment position involves easily attainable skills statistical comparisons between composition of defendant's employees in the position and composition of general work force can be highly probative).
rebuttable presumption of sex discrimination in promotion policies.\textsuperscript{988}

The Ninth Circuit does not, however, categorically accept the validity of plaintiffs' statistics. In \textit{Williams v. Owens-Illinois, Inc.},\textsuperscript{989} the court ruled that the probative value of statistics with respect to assessment of a prima facie case depended on the relevant labor market. The plaintiffs urged that the market definition was either the city population or its labor force while the defendant claimed it encompassed the labor force of the entire county. The county had a lower percentage of female managers and professionals than the city.\textsuperscript{990} The plaintiffs' statistical studies thus conflicted with those of the defendant. The plaintiffs' figures showed that at the defendant's glass bottling plant, women were systematically excluded from certain job categories, earned significantly less than men, and comprised a disproportionate number of clerical and other nonmanagerial workers.\textsuperscript{991} Relying upon the zip code data submitted by the defendant showing that its employees resided throughout the county, the trial court adopted the defendant's definition of the relevant labor market. It therefore held that the plaintiffs failed to establish a prima facie case of discrimination in earnings and nonsupervisory and management promotions.\textsuperscript{992}

The Ninth Circuit ruled that the zip code data relied upon by the district court did not prove that the defendant's employment practices were nondiscriminatory.\textsuperscript{993} Because the district court premised its conclusion that the defendant did not engage in sex discrimination on this market definition, the Ninth Circuit remanded the claims for a redetermination of the relevant labor market and an assessment, based on the proper market definition, of the prima facie case.\textsuperscript{994}

A prima facie case was established in part through the use of statistical evidence in \textit{Laborde v. Regents of the University of California}.\textsuperscript{995} The university considered the plaintiff, an associate professor, for promotion to full professor several times and each time decided against it. The plaintiff's statistical evidence tended to show that the university hired fewer women, paid them less, and granted tenure to fewer women.

\textsuperscript{988} 670 F.2d at 867.
\textsuperscript{989} 665 F.2d 918 (9th Cir.), \textit{cert. denied}, 103 S. Ct. 302 (1982).
\textsuperscript{990} 665 F.2d at 929-30.
\textsuperscript{991} \textit{Id.}
\textsuperscript{992} \textit{Id.} at 930.
\textsuperscript{993} \textit{Id.} at 927, 930.
\textsuperscript{994} \textit{Id.} at 930. The court did not automatically accept, however, the plaintiffs' market definition which was the definition the defendant had adopted to qualify for a government contract. The Ninth Circuit suggested that a more accurate indicator of the relevant market would be actual applicant flow instead of hired worker flow. \textit{Id.} at 927 (citations omitted).
\textsuperscript{995} 686 F.2d 715 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 820 (1983).
than men. The Ninth Circuit ruled that the plaintiff was also required to show that she was objectively qualified for the promotion to establish a prima facie case. The court held that the fact that the university considered the plaintiff for promotion was sufficient proof that she met the minimum objective qualifications.

In *Gifford v. Atchison, Topeka and Santa Fe Railway*, the plaintiff alleged that her employer continually refused to promote her to the position of wire chief, a position for which she was eligible until the time of her termination. Although the plaintiff worked for the defendant for over twenty-three years, she had never applied for the wire chief position. The Ninth Circuit ruled that to establish a prima facie case, the plaintiff did not have to allege that she applied for the promotion if the employer's promotional policies made application futile, or if the employer normally initiated the promotion. Accordingly, the court held that the plaintiff's allegation that an application would have been futile because of the defendant's prior refusal to hire women for the wire chief position was sufficient to make out a prima facie case.

Without reference to the allocation of burdens which characterize Title VII cases, the Ninth Circuit reversed the summary judgment for the defendants in *Padway v. Palches*, and held that the plaintiff's depositions and affidavits raised an inference of sex discrimination. Pursuant to the school superintendent's recommendation, the school district's Board of Trustees voted to reassign the plaintiff from her position as elementary school principal to a teaching position. Three weeks later the superintendent recommended that the plaintiff be discharged, and the Board voted in agreement. The plaintiff charged that the superintendent's recommendations stemmed from his prejudice against women.

The plaintiff's declarations and depositions reflected the superin-

\[996. 686 F.2d at 717-18 \& n.4.\]
\[997. Id. at 718. The Ninth Circuit applied the *McDonnell Douglas* elements of a prima facie case and ruled that the plaintiff met this burden of showing that: (1) she was a member of a class protected by Title VII; (2) she met the minimum qualifications to be considered for promotion to full professor; (3) she was denied promotion; and (4) men with similar qualifications had been promoted to full professor. *Id.* at 717.\]
\[998. 685 F.2d 1149 (9th Cir. 1982).\]
\[999. *Id.* at 1154 (citing *Reed v. Lockheed Aircraft Corp.*., 613 F.2d 757, 761 (9th Cir. 1980) (where employer sought out male employees for training or promotion and women found it futile to apply for such training or promotion, it is immaterial that plaintiff never was denied promotion or training)).\]
\[1000. *Id.* at 1154.\]
\[1001. 665 F.2d 965 (9th Cir. 1982).\]
\[1002. 665 F.2d at 966-68.\]
tendent's alleged difficulties in dealing with female employees. The defendant trustees filed affidavits giving the reasons for their vote to reassign the plaintiff.\textsuperscript{1003} Relying heavily on these affidavits, the trial court granted summary judgment. The Ninth Circuit ruled that summary judgment was improper because the affidavits raised conflicts of material facts.\textsuperscript{1004}

In Sumner v. San Diego Urban League, Inc.,\textsuperscript{1005} the Ninth Circuit remanded the case for further findings because of the trial court's failure to frame its findings against the allocation of burdens.\textsuperscript{1006} The trial court made a single conclusionary finding that the plaintiff "failed to prove by a preponderance of the evidence" that she was terminated from her position because of her sex. The Ninth Circuit stated that while McDonnell Douglas did not mandate that the order of proof be "rigidly 'compartmentalized,'" it is essential for appellate review that the trial court findings be clear and explicit.\textsuperscript{1007} Since the district court addressed only the ultimate issue of discrimination, the Ninth Circuit could not review the district court decision in light of the applicable legal principles. Nevertheless, the court observed ample evidence in the record which would support a finding of a prima facie case.\textsuperscript{1008}

\textit{b. rebuttal of the presumption}

In Furnco Construction Corp. v. Waters,\textsuperscript{1009} the Supreme Court emphasized that once a prima facie showing is made, the court must afford the employer an opportunity to introduce evidence to explain his or her motive for the action or decision. The burden shifts to the em-

\textsuperscript{1003} 665 F.2d at 967. Each trustee stated that the plaintiff showed lack of discretion and tact by sending each of them a mailgram protesting the assignment of a particular teacher to her school. The Ninth Circuit ruled that sending the mailgram may have been an activity protected by the first amendment and, if so, it could not have formed the basis of the plaintiff's reassignment. The court concluded that this issue could not be settled by summary judgment. \textit{Id.} at 967-68 (citing Pickering v. Board of Educ., 391 U.S. 563 (1968) (absent proof of false statement knowingly or recklessly made, teacher's exercise of his right to speak on issues of public importance could not furnish the basis of his dismissal from public employment)).

\textsuperscript{1004} 665 F.2d at 968.

\textsuperscript{1005} 681 F.2d 1140 (9th Cir. 1982).

\textsuperscript{1006} 681 F.2d at 1142.

\textsuperscript{1007} \textit{Id.} (citing Worthy v. United States Steel Corp., 616 F.2d 698, 701 (3d Cir. 1980) (it is necessary that the trial court make clear findings of fact as to each of the three states of proof so that they may be examined in light of the evidence and applicable legal principles)).

\textsuperscript{1008} 681 F.2d at 1143. The record contained evidence of the plaintiff's qualifications for the job and of discriminatory animus in the remarks of the plaintiff's superior that women should be at home rather than at work. The record also included an EEOC determination of reasonable cause to believe that the plaintiff was discriminated against.

\textsuperscript{1009} 438 U.S. 567, 580 (1978).
ployer to “articulate” a legitimate nondiscriminatory reason for the action or decision.\textsuperscript{1010} Such an articulation rebuts the presumption of sex discrimination.

If the trier of fact believes the plaintiff’s evidence and the employer offers no reason which would rebut the presumption, the court must enter judgment for the plaintiff because there is no issue of fact in the case.\textsuperscript{1011} In \textit{Ostroff v. Employment Exchange, Inc.},\textsuperscript{1012} the plaintiff claimed that the defendant employment agency refused to refer her to a potential employer because of her sex. The plaintiff telephoned the agency to inquire about an advertised position. An agency employee told her the job was filled. Later that day the plaintiff’s husband telephoned the agency about the same job and was invited to apply. The Ninth Circuit held that the plaintiff had to establish a prima facie case, so that the burden shifted to the agency to rebut the presumption.\textsuperscript{1013} The defendants offered no explanation for their refusal to refer the plaintiff. Accordingly, the Ninth Circuit ruled that the plaintiff was entitled to judgment.\textsuperscript{1014}

The Ninth Circuit recognized that the burden of articulating a sufficient reason is significantly less than proving the absence of discriminatory motive.\textsuperscript{1015} In \textit{Lynn v. Regents of the University of California},\textsuperscript{1016} the plaintiff established prima facie that the university denied her merit salary increases and tenure because of her sex. The Ninth Circuit ruled that the university successfully articulated reasons justifying its denial of tenure and salary increases by offering evidence of the plaintiff’s deficient scholarship and research.\textsuperscript{1017} The court reasoned that an employer successfully rebuts a presumption of discriminatory intent if it presents evidence that raises a genuine issue of fact as to whether it

\begin{footnotes}
\item 1010. \textit{Id.} at 578 (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)).
\item 1012. 683 F.2d 302 (9th Cir. 1982) (per curiam).
\item 1013. \textit{Id.} at 304. \textit{See supra} notes 972-977 and accompanying text.
\item 1014. 683 F.2d at 304 (citing \textit{Texas Dep't of Community Affairs v. Burdine}, 450 U.S. 248, 258 (1981)).
\item 1015. 683 F.2d at 304. The employee’s burden is satisfied when it explains or offers evidence showing some legitimate nondiscriminatory reason for the action which would allow the trier of fact to conclude that the action was not motivated by discriminatory animus. \textit{Texas Dep't of Community Affairs v. Burdine}, 450 U.S. 248, 257 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978) (per curiam).
\item 1016. 656 F.2d 1337 (9th Cir. 1981), \textit{cert. denied}, 103 S. Ct. 53 (1982).
\item 1017. \textit{Id.} at 1344. The university offered evidence to show that the plaintiff was warned several times during her career that her scholarship was deficient. The plaintiff was encouraged to discuss her scholarship deficiency with members of her department and was granted sabbatical for the purpose of improving her research and writing skills. \textit{Id.}
\end{footnotes}
Another survey case remarkably similar to Lynn demonstrates the ease with which a defendant may rebut a presumption of discrimination. In Laborde v. Regents of the University of California,1019 the plaintiff, an associate professor, charged that the university repeatedly denied her promotion to full professor because of her sex. The Ninth Circuit ruled that the university carried its intermediate burden simply by offering evidence of the plaintiff's failure to meet the university standards for scholarship and research.1020

In Meyer v. California & Hawaiian Sugar Co.,1021 the plaintiff was discharged after writing a memorandum which reflected personal sentiments unfavorable to minority employees. At the time of her discharge, the plaintiff had significant responsibility for the administration of the defendant's affirmative action program. The Ninth Circuit ruled that the employer tendered a sufficient nondiscriminatory basis for its discharge of the plaintiff. The employer reasoned that the plaintiff's sentiments concerning affirmative action rendered her ineffective in administering its affirmative action program. Furthermore, the employer feared that the plaintiff's conduct would expose it to liability to the EEOC unless it indicated that such conduct did not reflect the employer's sentiments.1022

Not all the reasons proffered by employers during the survey period were deemed sufficient to rebut the inference of discrimination. In Williams v. Owens-Illinois, Inc.1023 the plaintiff attempted to make out a prima facie case of discrimination by showing that women were concentrated in nonmanagerial and nonprofessional positions, and earned significantly less than men at the defendant's glass bottling plant. The employer attempted to rebut the sex discrimination claim by attacking the validity of the plaintiff's statistical studies and introducing other studies to support its view. The employer also attempted to shift the blame to the unions for any discriminatory practices by showing that many of the policies concerning hiring, firing, promoting, and wages

1018. Id. (citing Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981)). See also Smith v. University of North Carolina, 632 F.2d 316, 342 (4th Cir. 1980) (scholarly deficiency and inability to relate specialized field of study to issues of general importance were legitimate, nondiscriminatory reasons for not reappointing plaintiff to faculty).
1019. 686 F.2d 715 (9th Cir. 1982), cert. denied, 103 S. Ct. 820 (1983).
1020. Id. at 718.
1021. 662 F.2d 637 (9th Cir. 1981).
1022. Id. at 639.
1023. 665 F.2d 918 (9th Cir.), cert. denied, 103 S. Ct. 302 (1982).
were governed by provisions of collective bargaining contracts that the employer had entered into with various unions. The Ninth Circuit held that the company's alternative studies did not negate the probative value of the plaintiff's statistics.\footnote{1024} The court also ruled that union pressure on the employer does not affect the employer's obligation to honor an employee's Title VII rights.\footnote{1025} Consequently, the Ninth Circuit found that the employer's evidence did not rebut the plaintiff's statistical case.\footnote{1026}

In O'Brien v. Sky Chefs, Inc.,\footnote{1027} the plaintiffs, both for the individual and class claims, made a prima facie showing of the employer's discrimination in promotions by offering statistical evidence of disparity between the representation of women in the lower paying positions and the higher paying positions. The district court found that the employer's presentation of a "cohort group" study rebutted any inference of discrimination from the plaintiffs' statistics and, consequently, granted summary judgment in favor of the defendant.\footnote{1028} The "cohort group" study covered advancements primarily in the years after the individual plaintiffs left the defendant's employ. The Ninth Circuit reversed summary judgment, ruling that the "cohort group" study had little probative value for sex discrimination before the plaintiffs' departure.\footnote{1029} The Ninth Circuit did not make it clear, however, whether the defendant had successfully rebutted the presumption of discrimination, but remanded the case for resolution of the factual issues.

The employer also proffered legitimate reasons for not promoting the named plaintiffs. Consequently, the district court held that the defendant had rebutted the prima facie showing and that, because the plaintiffs did not controvert these reasons, no factual issues relevant to

\footnote{1024}{Id. at 926, 930.}
\footnote{1025}{Id. (citing Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1016 (2d Cir. 1980) (union pressure on employer does not relieve the employer of its duty to respect applicant's Title VII rights), cert. denied, 452 U.S. 940 (1981); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 447 (D.C. Cir. 1976) (Title VII rights cannot be bargained away by union, employer, or both acting in concert), cert. denied, 434 U.S. 1086 (1978)).}
\footnote{1026}665 F.2d at 930. The court remanded the case for a redetermination of the relevant labor market so that the district court could assign a probative value to the parties' statistical data. See supra notes 989-994 and accompanying text.
\footnote{1027}670 F.2d 864 (9th Cir. 1982).
\footnote{1028}Id. at 867. The "cohort group" study demonstrated that the disparity between male and female promotion was less than the standard deviation required to create an inference of discrimination. See Hazelwood School Dist. v. United States, 433 U.S. 299, 308-09 n.14 (1977) (as a general rule, if difference between expected value and observed number is greater than two or three standard deviations, then claim that teachers were fired without regard to race is suspect).
\footnote{1029}670 F.2d at 867.
The McDonnell Douglas theory remained.\textsuperscript{1030} The Ninth Circuit ruled that a summary judgment was improper because there remained a factual issue of whether the defendant had a regular practice of keeping women from advancing by not announcing job openings and by seeking men to fill the positions.\textsuperscript{1031} The court premised its holding on the fact that the named plaintiffs based part of their prima facie showing upon proof that there was a pattern or practice of discrimination. The Ninth Circuit opined that a pattern or practice of discrimination can take subtle forms so that it is less clear what the defendant must prove to rebut the presumption. The Ninth Circuit thus ruled that the defendant’s proffered reasons were insufficient for purposes of summary judgment.\textsuperscript{1032} Again, the court did not clearly indicate whether the defendant met its intermediate burden.

c. pretext

Once the employer rebuts the presumption of discrimination, the issue of discriminatory animus becomes crucial. The court must afford the plaintiff a full and fair opportunity to show by competent evidence that the presumptively valid reasons for the employment decision were a cover for a discriminatory reason.\textsuperscript{1033} The plaintiff may meet the burden by persuading the court that a discriminatory reason more likely motivated the employer. Alternatively, he or she may prove that the employer’s proffered reason is pretext.\textsuperscript{1034} The burden the plaintiff carries at this point merges with the ultimate burden of proving by a preponderance of the evidence that he or she has been the victim of intentional discrimination.\textsuperscript{1035}

The Ninth Circuit reached the issue of whether the reason “articulated” by the employer was a pretext in only two cases during the survey period. In Laborde v. Regents of the University of California,\textsuperscript{1036} the

\begin{itemize}
  \item \textsuperscript{1030} Id. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).
  \item \textsuperscript{1031} Id. at 868.
  \item \textsuperscript{1032} Id. The Ninth Circuit stated: “We do not say that summary judgment is never proper against individual plaintiffs in a pattern or practice case, but in this case we think that the defendant has not made a sufficient showing.” Id. It is difficult to conceive, however, when summary judgment would be proper because the court must afford the plaintiff a full and fair opportunity to demonstrate that the employer’s proffered reason for the decision is pretext. See McDonnell Douglas v. Green, 411 U.S. 792, 805 (1973). See also Haydon v. Rand Corp., 605 F.2d 453, 455 & n.2 (9th Cir. 1979) (per curiam) (summary judgment generally not proper when intent of the party is placed in issue).
  \item \textsuperscript{1033} Id. at 256.
  \item \textsuperscript{1034} Id. at 256.
  \item \textsuperscript{1035} Id. at 256.
  \item \textsuperscript{1036} 686 F.2d 715 (9th Cir. 1982), cert. denied, 103 S. Ct. 820 (1983).
\end{itemize}
plaintiff made a prima facie showing that the university refused to promote her from associate professor to full professor because of her sex. The university rebutted the presumption by offering evidence that it repeatedly denied her promotion because she failed to meet the requisite standards for scholarship and research. The burden then shifted to the plaintiff to prove that the university's articulated reason was "'a pretext or discriminatory in its application.' " The plaintiff submitted evidence of her academic achievements. By 1979 she had published four books which critiqued eighteenth century French literature, two poetry books, and numerous articles and book reviews. She had also read several papers at academic conventions. In addition, the plaintiff presented evidence indicating that the majority of evaluations submitted by outside scholars to the university supported the plaintiff's promotion.

The district court found, nevertheless, that the evaluations "'provide[d] a mixed picture of plaintiff's scholarship.' " Accordingly, the district court held that the plaintiff failed to prove by a preponderance of the evidence that she was the victim of invidious discrimination. Although it characterized the plaintiff's academic file as containing numerous favorable comments, the Ninth Circuit upheld the district court findings as not clearly erroneous.

1037. Id. at 718 (quoting McDonnell Douglas v. Green, 411 U.S. 792, 807 (1973)).
1038. 686 F.2d at 718. The plaintiff was considered for promotion to full professor during the academic years 1973-74, 1975-76, 1976-77, 1977-78, and 1979. Id. Each time the university decided against promotion; instead, it granted her merit salary increases to her present rank of Tenured Associate Professor Step V, which was just one step short of full professor. Id. at 718-19.
1039. Id. at 719. The decision to promote a teacher to full professor was based on several factors, including letters of recommendation solicited from outside scholars. As permitted by university procedures, the plaintiff herself solicited several of these letters. Id. at 719 & n.6.
1040. Id. at 719. The university characterized these letters as "damnably faint in their praise." Id.
1041. Id. The Ninth Circuit stated: "We do not discredit Laborde's academic qualifications by adopting the University's description of her work as 'inadequate' or 'deficient'. . . . we recognize that her scholarship has already been considered worthy of several promotions. . . ." Id.
1042. Id. The clearly erroneous standard is set forth in Fed. R. Civ. P. 52(a).

The full court voted against a suggestion for rehearing en banc. 686 F.2d at 719. Judge Ferguson, dissenting from the en banc vote, succinctly outlined the effect of the majority's analysis:
In *Meyer v. California & Hawaiian Sugar Co.*, the plaintiff established a prima facie case of discrimination by showing that she was discharged from her position because of her sex. At the time of her discharge, the plaintiff played a significant role in administering the defendant’s affirmative action program. The employer rebutted the presumption by explaining that she was discharged for preparing a memorandum which disclosed personal sentiments unfavorable to minorities. To prove that the memorandum and the employees’ reactions to it were not the true reason for discharging the plaintiff, the plaintiff cited numerous incidents in which male employees made racist remarks which evoked little or no reprimand from management.

The Ninth Circuit ruled that these allegations did not raise a triable issue of fact as to whether the proffered reason for the discharge was pretext. The Ninth Circuit based its reason on the fact that the plaintiff was not discharged for making derogatory comments about minorities. Rather, she was discharged because her derogatory comments provoked reactions which impaired her effectiveness in administering the employer’s affirmative action program. None of the comments of the male employees provoked such a reaction. Furthermore, coming from her, the comments appeared to reflect the employer’s policies toward its minority employees. Thus, the court found

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The panel opinion presents the strongest case possible that Alice Laborde is the victim of invidious sex discrimination.

The opinion states in clear language that men with qualifications similar to hers have been promoted to full professor positions. Yet the opinion concludes that she is not entitled to promotion because she failed to meet the University’s standards for scholarship and research.

The logical conclusion of that analysis is that men who do not meet the standards of scholarship and research will be promoted but women will not unless they meet the standards. Title VII prohibits that type of discrimination.

*Id.* at 720 (Ferguson, J., dissenting from en banc vote).

1043. 662 F.2d 637 (9th Cir. 1981).

1044. The plaintiff placed the memorandum on her superior’s desk. A minority employee found two draft memoranda and discussed the contents thereof with other minority employees. The employees expressed their displeasure with C & H’s president. Several top C & H meetings followed. The plaintiff confirmed that she had written the memorandum and was asked for her resignation. *Id.* at 638-39.

1045. *Id.* at 639-40. One employee purportedly shouted at his secretary that she “thinks like a God damn Japanese.” Another allegedly refused to hire a Chinese woman, stating that “Chinese can’t learn anything.” A third employee refused to accept a black employee in his department, commenting that “when there was more than one black they indulged in a great deal of black humor.” Finally, the past president of C & H purportedly refused to hire a minority chauffeur because he thought his wife would be afraid of him. According to the plaintiff, none of these employees received more than a mild reprimand. *Id.*

1046. *Id.* at 640.

1047. *Id.*
that the incidents cited by the plaintiff were distinguishable. Since no triable issues of fact remained, the Ninth Circuit held that summary judgment was proper.

3. Retaliation

Title VII makes it unlawful for an employer to discriminate against an employee because the employee has filed a discrimination complaint against the employer. The allocation of burdens and order of proof set forth in McDonnell Douglas apply to litigating a retaliation claim.

In Kauffman v. Sidereal Corp., the Ninth Circuit affirmed the trial court's findings that the plaintiff was discharged unlawfully in retaliation for having filed a sex discrimination complaint. During her first year of employment, the plaintiff received favorable performance reviews and periodic pay increases. Shortly after the plaintiff complained to management of discriminatory treatment by her direct supervisor, the supervisor noted in her file that her attitude needed improvement. After the employer learned that the plaintiff filed a discrimination complaint with the EEOC, several unfavorable notations were entered in her file. She was subsequently discharged.

The Ninth Circuit ruled that the plaintiff clearly established a prima facie case, and that the employer successfully rebutted the presumption of discrimination. The heart of the case was determining

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1048. Id.
1049. Id.
1050. 42 U.S.C. § 2000e-3(a) (1976) provides:

   It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

1051. 411 U.S. 792, 802-04 (1973).
1052. To establish a prima facie case of retaliation, the plaintiff must show that the challenged employment decision followed the plaintiff's protected activities of which the employer was aware. The employer then carries the burden of articulating a legitimate nondiscriminatory reason for the decision. Finally, the plaintiff must be granted a full and fair opportunity to show that the proffered reason is pretext. See Aguirre v. Chula Vista Sanitary Serv., 542 F.2d 779 (9th Cir. 1976) (per curiam).
1053. 695 F.2d 343 (9th Cir. 1982) (per curiam).
1054. Id. at 346.
1055. Id. at 344. Several notations reflected dissatisfaction with the plaintiff's actions in connection with a medical leave of absence. She was dismissed for failure to contact management during her five-week absence.
1056. Id. at 345. The Ninth Circuit did not specify the evidence which constituted the prima facie case or rebuttal. For guidelines to establish a prima facie case and its rebuttal, see supra note 1052.
whether the plaintiff proved by a preponderance of the evidence that the proffered reasons were pretext and that she was discharged because she engaged in protected activities. The Ninth Circuit applied the “but for” test\(^\text{1057}\) and concluded that there was sufficient evidence in the record to support a finding that but for the employer's retaliatory conduct, the plaintiff would not have lost her job.\(^\text{1058}\) The supervisor testified, both in his deposition and at trial, that the plaintiff's filing of a discrimination complaint was one of the reasons for her discharge. Another officer of the company testified, as the abrupt shift in the tenor of the notations indicated, that the company's attitude toward the plaintiff changed after she filed the discrimination charge.\(^\text{1059}\) The Ninth Circuit accordingly ruled that the finding of retaliation was not clearly erroneous.\(^\text{1060}\)

In \textit{Gifford v. Atchison, Topeka and Santa Fe Railway},\(^\text{1061}\) the plaintiff contended that she was wrongfully fired and not rehired because she threatened to file a discrimination complaint with the EEOC. The Ninth Circuit found that the plaintiff clearly established a prima facie case of retaliation when she offered into evidence a letter she wrote to Santa Fe and the union prior to her firing, in which she threatened to file a charge with the EEOC.\(^\text{1062}\) The court also found that the defendants rebutted the presumption of retaliation by articulating that the plaintiff was discharged for failure to pay her union dues.\(^\text{1063}\)

The Ninth Circuit reversed summary judgment for the defendants and held that the plaintiff offered sufficient evidence to raise an issue of fact as to whether the proffered reason was pretext.\(^\text{1064}\) To show that

\(^{1057}\) Under this test, the plaintiff must show by a preponderance of the evidence that her involvement in the protected activity was one of the motivating factors for the firing and that but for such activity she would not have been fired. \textit{Id.} (citing \textit{McDonald v. Santa Fe Trail Transp. Co.}, 427 U.S. 273, 282 n.10 (1976) (plaintiff need only show that race was a “but for” cause for the employer’s decision); \textit{De Anda v. St. Joseph Hosp.}, 671 F.2d 850, 857 n.12 (to show pretext plaintiff need not prove that her activity was sole basis for employer’s action but must prove that “but for” the activity she would not have been fired)).

\(^{1058}\) 695 F.2d at 345.

\(^{1059}\) \textit{Id.}

\(^{1060}\) \textit{Id.} at 346.

\(^{1061}\) 685 F.2d 1149 (9th Cir. 1982).

\(^{1062}\) \textit{Id.} at 1155-56. The court declined to draw a distinction between the filing of a charge which is clearly protected and threatening to file a charge. \textit{Id.} at 1156 n.3 (citing \textit{Sias v. City Demonstration Agency}, 588 F.2d 692, 694-95 (9th Cir. 1978)).

\(^{1063}\) 685 F.2d at 1156.

\(^{1064}\) \textit{Id.} The Ninth Circuit ruled that a question of pretext involves a determination of the employer’s intent in discharging an employee and, therefore, summary judgment was not proper. \textit{Id.} (citing \textit{Haydon v. Rand Corp.}, 605 F.2d 453, 455 & n.2 (9th Cir. 1979) (per curiam) (summary judgment generally disfavored where motivation of a party is in issue)).
she was the victim of intentional discrimination, the plaintiff offered into evidence an EEOC report which concluded that there was reasonable cause to believe that the plaintiff was treated differently than similarily situated male employees.\textsuperscript{1065}

The Ninth Circuit also found that the plaintiff came forward with enough evidence to create an issue of fact as to whether she was not rehired because of retaliation. Although the plaintiff did not apply for rehire, she presented evidence showing that it would have been futile to do so. The court ruled that the evidence of futility was sufficient to render summary judgment improper.\textsuperscript{1066}

The plaintiff also claimed that she was discharged for her opposition to the collective bargaining agreement entered into by Santa Fe and the union. Title VII makes it unlawful for employers and unions to retaliate against employees who oppose unlawful employment practices.\textsuperscript{1067} The agreement required extra board printer clerks to accept assignments at all locations in their district. Prior to this agreement, the clerks could opt to reject assignments away from their home points without loss of seniority. The plaintiff argued that the agreement had a harsher impact on some of the female employees than it had on the male employees. The EEOC determined that there was reasonable cause to believe that the agreement was discriminatory. The Ninth Circuit thus ruled that the plaintiff's allegations, coupled with the EEOC finding, were sufficient to survive summary judgment and to make the plaintiff's opposition an activity protected by Title VII.\textsuperscript{1068}

\textbf{B. Employee Insurance Plans}

As a group, women live longer than men. Consequently, many insurance companies offer life insurance plans which make distinctions, either in contributions or in benefits, on the basis of sex. \textit{In Los Angeles}

\begin{itemize}
\item \textsuperscript{1065} 685 F.2d at 1156. The EEOC "reasonable cause" determination was made following an impartial investigation.
\item \textsuperscript{1066} \textit{Id.} The plaintiff submitted an affidavit in which she stated that a fellow employee told her that she would never have the chance to work for Santa Fe again. She also submitted a copy of her employment form which bore the notation "DO NOT REHIRE." Finally, the parties stipulated that on prior occasions when the plaintiff resigned and had been rehired, Santa Fe initiated the rehire.
\item \textsuperscript{1067} 42 U.S.C. § 2000e-3(a) (1976). \textit{See supra} note 1045.
\item \textsuperscript{1068} 685 F.2d at 1157 (citing Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) (opposition clause shields an employee from retaliation when employee reasonably believes discrimination exists); Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1004-07 (5th Cir. 1969) (filing a valid charge with EEOC is protected activity regardless of the merits)).
\end{itemize}
the Supreme Court ruled that an employee-funded insurance group plan which requires greater contributions from one sex is discriminatory on the basis of sex and, hence, violates Title VII.1070

The Supreme Court emphasized that Title VII focuses on fairness to the individual rather than fairness to the class.1071 The Court therefore found it significant that many women do not live as long as the average man. Under insurance plans which made distinctions in contributions or benefits on the basis of sex, these “short-lived” women were required to contribute more money to the fund and would have received no compensating advantage upon retirement.1072

The Supreme Court also illustrated the flaw in classifying insurance risks on the basis of sex: the preoccupation with traditional assumptions about men and women is preserved at the expense of other, perhaps more important, individual characteristics which account for differences in health and longevity. For example, while sex-segregated mortality tables seem to reflect innate differences between the sexes, a better explanation for longevity may be that women are lighter smokers than men.1073

The Court concluded that requiring women employees to pay more into a pension fund directly contravened the language and policy of Title VII.1074 The Court limited its holding to the employment practice of requiring unequal contributions from the sexes.1075 It thus created the open market exception, which permits an employer to set aside

1070. 435 U.S. at 711. In Manhart, the employer determined that the average female employee would live longer than the average male employee and that, as a class, the retired female employees would receive more monthly payments than their male counterparts. Consequently, the employer required its female employees to make higher monthly contributions to its pension fund. Since the contributions were withheld from the paychecks, a female employee took home less money than a male employee earning the same salary. Id. at 705.
1071. Id. at 708. Section 703(a)(1) of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (1976), makes it unlawful “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .” (emphasis added).
1072. 435 U.S. at 708.
1073. Id. at 709-10. The Manhart Court illuminated the absurdity of the practice of combining different classes of risks for purposes of group insurance: the flabby and the fit, the healthy and the unhealthy, and the smokers and the nonsmokers are all treated as equivalent risks. The Court suggested that “nothing more than habit” makes one classification seem less fair than another. Id. at 710.
1074. Id. at 711.
1075. Id. at 717. The Court cautioned: “[W]e do not suggest that [Title VII] was intended to revolutionize the insurance and pension industries.” Id. at 717.
equal retirement contributions for each employee and let the retiree purchase the benefits on the open market.\textsuperscript{1076}

During the survey period, the Ninth Circuit extended \textit{Manhart} to employee group insurance plans which require the same contributions from individuals but allocate benefits on the basis of sex. In \textit{Norris v. Arizona Governing Committee For Tax Deferred Annuity},\textsuperscript{1077} retiring employees were offered one of three options in the life insurance plan: to receive the benefit in one lump sum, to receive a fixed sum for a fixed period of time, or to receive a certain amount of money each month for life. A female employee instituted a class action challenging the third option. All the insurance companies which were selected by the employer to carry out the third option used sex-segregated mortality tables to compute the monthly payments due the employee. Because women, as a class, live longer, their monthly payments were smaller than those of their male counterparts.\textsuperscript{1078}

The Ninth Circuit found that the third option was a fringe benefit and, thus, fell within the scope of Title VII. Since the option treated female employees differently from male employees, the court held that the plan violated Title VII.\textsuperscript{1079}

The court applied \textit{Manhart} even though the employer in \textit{Norris} did not operate the pension funds. The Ninth Circuit reasoned that Title VII extends to agents of covered employers and that the challenged program could not operate without the affirmative adoption of the employer.\textsuperscript{1080}

The defendant contended that the third option fell within \textit{Manhart}'s open market exception because the defendant offered other non-discriminatory plans. The Ninth Circuit summarily dispensed with this argument and held that offering nondiscriminatory options does not

\textsuperscript{1076} \textit{Id.} at 717-18.

\textsuperscript{1077} 671 F.2d 330 (9th Cir. 1982), \textit{aff'd in part, rev'd in part per curiam}, 103 S. Ct. 3492 (1983) (plurality). A majority of the Supreme Court affirmed the Ninth Circuit, holding that the insurance plan violated Title VII, \textit{id.} at 3499, but reversed the circuit court award of retroactive relief, \textit{id.} at 3503-04. The Ninth Circuit had enjoined the employer to assure that future annuity payments to similarly situated male and female employees would be equal. The Supreme Court remanded the case for a redetermination of the relief to be awarded. \textit{Id.}

\textsuperscript{1078} 671 F.2d at 332 & n.1.

\textsuperscript{1079} \textit{Id.} at 332. The Supreme Court affirmed this portion of the opinion in 103 S. Ct. at 3499. \textit{See supra} note 1075.

\textsuperscript{1080} \textit{Id.} at 333-34 (citing Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. at 718 n.33; EEOC v. Colby College, 589 F.2d 1139, 1141 (1st Cir. 1978)). The Ninth Circuit rejected the employer's defense that it did not intend to discriminate against women, noting that \textit{Manhart} required no affirmative showing of intent. 671 F.2d at 333.
validate a discriminatory option. The defendant also argued that the open market exception applied because the plan merely reflected limits in the marketplace and was not a restriction of its own making. The Ninth Circuit ruled that discriminatory practices under Title VII do not become lawful by the mere fact that the challenged practices flourish outside the employment context.

In *Retired Public Employees' Association of California v. California*, the Ninth Circuit again held that an employee group insurance plan which resulted in different benefits for similarly situated male and female employees violated Title VII. The men and women employees made equal contributions to the pension plan but, as the result of the use of sex-segregated tables, benefits differed according to both sex and age. A woman retiring before age sixty would receive more benefits than a similarly situated male retiring before sixty. Retirement after reaching sixty would result in more favorable benefits to the male employee.

The State argued that the retirement plan was not discriminatory because the different benefit levels did not favor any particular class. The Ninth Circuit refused to interpret *Manhart* as allowing the employer to discriminate against one sex so long as it discriminated in another manner against the other sex. The Ninth Circuit also refuted the employer's argument that the plan did not violate Title VII since it presented no barrier to employment, holding that the language

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1081. 671 F.2d at 335. The defendant specifically argued that the employees were given an option of taking their deferred compensation in a lump sum and buying the largest annuity they could find on the open market. The Ninth Circuit stated that not only did the defendant offer a benefit which would purchase different amounts of goods from a third party, it offered a benefit which favored men. *Id.*

1082. *Id.* The Ninth Circuit emphasized that the defendant “affirmatively offered a plan, better than that available for purchase by an individual, which discriminated against women.” *Id.*

1083. 677 F.2d 733 (9th Cir. 1982), vacated, 103 S. Ct. 3565 (1983). The Supreme Court remanded the case for further consideration in light of its decision in *Norris*, 103 S. Ct. 3492. Presumably, the Court remanded the case only for a redetermination of the relief to be awarded. See supra note 1077.

1084. 677 F.2d at 735.

1085. *Id.* at 735 & n.2. Similarly situated men and women who retired at the retirement target age of sixty received equal pension benefits. If an employee retired either before or after sixty years of age, the monthly payment he or she received were computed from sex-segregated mortality tables. Since these tables incorporate assumptions that women live longer than men, female retirees received smaller pension checks than their male counterparts.

1086. *Id.*

1087. *Id.* at 735.

1088. *Id.*
of Title VII does not require a showing that the challenged practice created such an obstacle. Finally, the State contended its plan was valid under the holding in General Electric Co. v. Gilbert. The court distinguished General Electric, finding that the plan there discriminated on the basis of a physical disability, pregnancy, and not on the basis of sex.

C. Affirmative Action

Section 703(a) of the Civil Rights Act makes it unlawful for an employer to limit, segregate, or classify its employees in a way which would harm an individual's employment status because of the individual's race, color, religion, sex, or national origin. Section 703(d) prohibits an employer from discriminating on such bases in the selection of employees for training programs.

In United Steelworkers of America v. Weber, the Supreme Court considered whether sections 703(a) and (d) proscribed a voluntary affirmative action program designed to propel black employees into an exclusively white craftwork force. There, a union and an employer bargained for an affirmative action plan that reserved for black employees fifty percent of the openings in a craft training program until the percentage of the black workforce was commensurate with the percentage of blacks in the labor force. The plaintiffs argued that

1089. Id.
1091. 677 F.2d at 736. In General Electric, the Supreme Court found that the exclusion of pregnancy benefits from a disability insurance plan did not discriminate against women as a class. Rather the plan classified two groups—pregnant persons and non-pregnant persons—and, therefore, did not violate Title VII. 435 U.S. at 715.
1092. 42 U.S.C. § 2000e-2(a) (1976) provides:
(a). . . . It shall be an unlawful employment practice for an employer—

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.
1093. 42 U.S.C. § 2000e-2(d) (1976) provides:
It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.
1095. Id. at 198. The Court took judicial notice of the fact that blacks had long been excluded from crafts on racial grounds. Id. at 198 n.1 (citations omitted).

Prior to 1974, the employer, Kaiser Aluminum & Chemical Corp., hired as craftworkers
since the plan discriminated against white employees solely because they were white, the plan violated Title VII. The Supreme Court rejected this interpretation of Title VII, holding that sections 703(a) and (d) do not proscribe all race-conscious affirmative action.\textsuperscript{1096}

The Court premised its holding on the intent of Congress in enacting the Civil Rights Act ʺto open employment opportunities for Negroes in occupations which have been traditionally closed to them.ʺ\textsuperscript{1097} The Court also inferred that Congress envisioned private, voluntary resolution of discrimination which would supplement the curative mandates of the Act.\textsuperscript{1098} While the Court did not establish a test to determine the legality of an affirmative action plan, it held that the challenged plan fell ʺon the permissible side of the line.ʺ\textsuperscript{1099}

Against the background of Weber, the Ninth Circuit examined the legality of an affirmative action program which discriminated on the basis of sex rather than race and which was implemented by a state agency rather than an employer in the private sector. In La Riviere v. Equal Employment Opportunity Commission,\textsuperscript{1100} the California Highway Patrol (CHP) conducted a two-year pilot study to determine the feasibility of employing women as CHP traffic officers.\textsuperscript{1101} To select the female participants of the study, the CHP conducted an examina-
tion limited to female applicants. The male plaintiff was denied admission to this examination. The CHP hired forty women who scored highest on the examination and forty men chosen from a pre-existing list of eligible males. The plaintiff was not on this list.

The plaintiff argued that the CHP violated Title VII when it failed to allow him to take the women-only examination and to participate in the feasibility study. The Ninth Circuit held that Title VII does not proscribe all gender conscious affirmative action, and that the challenged feasibility study fell "on the permissible side of the line." ¹¹⁰²

The Ninth Circuit identified the purposes of Title VII's gender component as identical to those underlying Title VII's race component: to protect the group in the marketplace and to open employment opportunities in occupations previously closed to the group. ¹¹⁰³ Applying Weber, the Ninth Circuit found that, in light of these purposes, Congress contemplated the existence of lawful voluntary affirmative action programs designed to eradicate sex discrimination. ¹¹⁰⁴

The court discerned no basis for differentiating affirmative action programs implemented by state agencies from those implemented by employers in the private sector. The Ninth Circuit reasoned that states and their official agencies are not immune from Title VII. ¹¹⁰⁵

To determine whether the challenged feasibility study fell "on the permissible side of the line," the Ninth Circuit examined the factors the Supreme Court considered in Weber. As in Weber, the challenged program (1) was designed to break down traditional patterns of segregation; (2) did not unnecessarily trammel the interests of the majority group; (3) did not create an absolute bar to the majority group; and (4) was a temporary measure. Thus, the Ninth Circuit ruled that the challenged feasibility study was permissible. ¹¹⁰⁶

D. Relief

One of the chief objectives of Title VII is to achieve equality of

¹¹⁰². 682 F.2d at 1279-80 (citing United Steelworkers of Am. v. Kaiser, 443 U.S. 193, 208 (1979)).
¹¹⁰³. 682 F.2d at 1278-79. See, e.g., Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (employment decisions cannot be predicated on mere sex stereotypes); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (1971) (premise of Title VII is that women are on an equal footing with men).
¹¹⁰⁴. 682 F.2d at 1279.
¹¹⁰⁵. Id.
¹¹⁰⁶. Id. at 1279-80. The Weber Court did not enumerate the criteria for the legality of a particular affirmative action plan. Nonetheless, it underscored these four factors in support of its decision. See United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979).
employment opportunities by proscribing practices which have operated to favor certain employees on the basis of race, religion, sex, or national origin.\textsuperscript{1107} Another primary objective is to make persons whole for injuries resulting from unlawful employment discrimination.\textsuperscript{1108} To accomplish the "make whole" objective, Congress in section 706(g)\textsuperscript{1109} granted the federal courts broad powers to award full equitable relief to victims of unlawful discrimination. Legislative history supports the view that Congress intended to give the courts wide discretion to fashion "the most complete relief possible" for the purpose of restoring the injured parties to the position where they would have been had the unlawful discrimination not occurred.\textsuperscript{1110}

In exercising their section 706(g) powers, courts have awarded successful plaintiffs back pay,\textsuperscript{1111} retroactive seniority,\textsuperscript{1112} attorneys' fees,\textsuperscript{1113} and injunctive relief.\textsuperscript{1114} They also have ordered reinstatement or hiring of employees.\textsuperscript{1115} Courts cannot, however, award compensatory or punitive damages for a Title VII violation.\textsuperscript{1116}

\textsuperscript{1108} Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
\textsuperscript{1109} 42 U.S.C. § 2000e-5(g) (1976) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . .

\textsuperscript{1110} Albemarle Paper Co. v. Moody, 422 U.S. at 420-21 (citing Section by Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972 - Conference Report, 118 CONG. REC. 7166, 7168 (1972)).
\textsuperscript{1111} Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975).
\textsuperscript{1116} Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982) (detailed provisions of § 2000e-5 almost compel conclusion that Congress intentionally omitted provisions for general or
The district court does not wield unfettered discretion but must exercise its judgment in view of "sound legal principles." Nevertheless, the appellate court is to apply a narrow standard of review by which it determines whether the district court's factual findings were clearly erroneous and whether it abused its discretion to fashion a "just result in light of the circumstances peculiar to the case."1118

1. Backpay

The Supreme Court has interpreted Title VII as creating a presumption in favor of backpay.1119 Indeed, district courts which exercise their power to award full backpay relief further the twin purposes of Title VII. First, the prospect of a backpay award provides incentive for employers to scrutinize their practices and eliminate discrimination. Second, backpay awards make persons whole for injuries resulting from past discrimination.1120

Backpay is to be paid only by the employer responsible for the unlawful discrimination.1121 Hence, agents and employees cannot be held liable for backpay.1122

a. tolling accrual

In Ford Motor Co. v. EEOC,1123 the Supreme Court considered whether an employer charged with discrimination in hiring may toll the continuing accrual of backpay liability simply by offering the complainant the position it previously denied her. The EEOC claimed that

1117. Albemarle Paper Co. v. Moody, 422 U.S. at 416 (quoting United States v. Burr, 25 F. Cas. 30, 35 (CC Va. 1807 (No. 14,692d)).
1118. 422 U.S. at 424-25 (quoting Langnes v. Green, 282 U.S. 531, 541 (1931)).

In Albemarle Paper Co., 422 U.S. at 421, the Supreme Court ruled that backpay must be awarded unless its denial would not frustrate the purposes of eradicating discrimination in the general employment sector and making persons whole for injuries resulting from past discrimination. The Court thus required that a district court which denies a backpay award must "carefully articulate its reason." Id. at 421 n.14.

1122. Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982) (individual school board members cannot be held liable for backpay).
backpay liability may be tolled only when, in addition to offering unconditionally the job previously denied, the employer awards the complainant seniority retroactive to the date of the alleged discrimination.

In July 1971, Judy Gaddis and Rebecca Starr applied for jobs as “picker-packers” at a Ford automotive parts warehouse. Each had experience as picker-packers and, thus, were qualified to work at Ford. At the time the women applied, Ford had never hired women to work at the warehouse. Ford refused to interview Gaddis and Starr, then hired male applicants to fill job openings. Gaddis filed a sex discrimination charge with the EEOC in September 1971. In January 1973, Gaddis and Starr were rehired by a nearby General Motors warehouse. The following July, Ford offered a job to Gaddis without seniority retroactive to her 1971 application. Gaddis, who was still working for General Motors, declined the offer because she neither wished to lose her accrued seniority at General Motors nor wanted to be the only women employed in the Ford warehouse. Ford then extended its offer to Starr, who turned it down for the same reasons.

The district court held that Ford discriminated against the women on the basis of their sex and awarded the women backpay in an amount equal to what they would have earned had they been hired by Ford in August 1971 minus the amount actually earned or reasonably earnable by them. The Fourth Circuit affirmed, holding that Ford did not toll the accrual of backpay liability when it offered to hire the women because its offer, without the promise of retroactive seniority, was “incomplete and unacceptable.” The Supreme Court reversed the Fourth Circuit judgment, holding that Ford’s unconditional job offer to Gaddis and Starr terminated the further accrual of backpay liability.

The Supreme Court concluded that its standard for tolling backpay liability better serves the objectives of Title VII. The Court stated that voluntary compliance rather than litigation is the preferred

1124. “Picker-packers” pick ordered parts from storage and pack them for shipment. Id. at 221.
1125. Id. at 221-22. Ford’s hiring policy was to fill job vacancies from the earliest filed applications first. The unit supervisor testified, however, that at least two of the male applicants were hired after Gaddis and Starr applied. Id. at 245 (Blackmun, J., dissenting).
1126. Both women had been laid off by General Motors prior to July 1971. Id. at 222.
1127. Id. at 224. According to the dissent, however, the circuit court held simply that there was no abuse of discretion in the district court’s decision not to cut off backpay awards in July 1973. The dissent asserted vigorously that the Fourth Circuit expressed no opinion on whether Ford would have tolled its backpay liability if it promised retroactive seniority. Id. at 248 (Blackmun, J., dissenting).
1128. Id. at 241.
means of achieving Title VII's primary purpose of ending discrimination. Accordingly, the Court found that the rule tolling backpay liability if the defendant offers the claimant the job originally sought provides the employer strong incentive to hire the Title VII claimant. In contrast, the rule requiring retroactive seniority to accompany the offer fails to provide the same motivation, because it makes hiring the Title VII claimant more expensive than hiring new applicants for the same position.

The Court similarly concluded that its standard better coincides with Title VII's "secondary, fallback" goal of compensating injured victims of discrimination. Applying the statutory duty to minimize damages, the Court ruled that the unemployed or underemployed Title VII claimant must accept the unconditional offer of the job sought, even without retroactive seniority. The Court emphasized that acceptance of this offer preserves the claimant's right to be made whole because a court may grant the claimant's retroactive seniority. In the case where a victim of discrimination lands a job substantially equal to or more attractive than the defendant's, the Court concluded that the victim no longer suffers the injury arising from the unlawful practice. The Court thus reasoned that a rule which requires for tolling that retroactive seniority be attached to the job offer would propel the victims into a better position than they would have enjoyed in the absence of discrimination. Accordingly, the Court inferred that Gaddis and Starr opted to remain at their GM jobs rather than accept Ford's offer because they thought that their GM jobs and the

1129. Id. at 228 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (cooperation and voluntary compliance are preferred means of assuring equality of employment opportunities)).
1130. 458 U.S. at 228-29. According to the Court, such a job offer would ensure that the employer would not be liable for further backpay damages. The employer's concern for minimizing potential liability would motivate the employer to extend its offer to the Title VII claimant before approaching other potential employees. Id.
1131. Id. The employer must offer the fringe benefits that accompany seniority. The Court also suggested that granting retroactive seniority to the Title VII claimant over other employees who "earned their places through their work on the job" may operate to deteriorate morale, reduce productivity, and create labor unrest. The Court concluded that requiring retroactive seniority would make the employer less willing to hire the claimant. Id.
1132. 42 U.S.C. § 2000e-5(g) (1976) provides: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."
1133. 458 U.S. at 234.
1134. Id. at 234-36.
1135. Id. The Court considered continuing accrual of backpay liability following the job offer to be tantamount to insurance against the risk of unemployment in a new job. Id. at 234.
amount of backpay accrued prior to the offer were more valuable than the Ford jobs and the right to seek full compensation from the courts.  

Finally, the Court considered the rights of innocent employees who work for the employer charged with discrimination. It found that requiring a promise of retroactive seniority to toll backpay liability would trample upon these employees’ seniority rights. Consequently, the Court ruled that the objectives of Title VII should not impose “such a heavy burden” on innocent employees.

The dissent sharply attacked the manner in which the Court framed the questions presented. It asserted vigorously that the question was simply whether the district court abused its discretion to award backpay relief in this particular case. The dissent objected to the Court decision as inconsistent with Albemarle’s mandate that backpay should be denied in cases of unlawful discrimination only for reasons which, if applied generally, would not undermine the twin statutory objectives of Title VII. The dissent interpreted the Court ruling as a spur for employers to make “cheap offers” to victims of their past discrimination, thus frustrating Title VII’s primary objective to eradicate discrimination. According to the dissent, Gaddis and Starr would not have been made whole by accepting Ford’s offer and, thus, the Court decision did not comport with the objective of

1136. Id. at 236-39. The Court appeared to contradict itself; nevertheless, when it stated: “We cannot infer [that Gaddis and Starr thought their jobs at GM superior to the Ford positions] solely from their rejection of Ford’s offer.” Id. at 235 n.24.

1137. Id. at 239-40. The Court acknowledged the central role seniority plays in many employment situations and, on this basis, criticized a rule which encourages job offers that would compel innocent workers to forfeit their seniority to a claimant with a yet unproven claim of discrimination. Furthermore, the displaced workers cannot seek relief from claimants who sued unsuccessfully upon their claims. Id. at 240.

1138. Id. at 242 (Blackmun, J., dissenting). The dissent further asserted that the Supreme Court rule unjustifiably limits the district court’s discretion to exercise full equitable powers in making victims of discrimination whole. Id. at 251-52 (Blackmun, J., dissenting).

1139. Id. at 244 (Blackmun, J., dissenting) (citing Albemarle, 422 U.S. at 421 (backpay should be denied only where it would not frustrate objectives of eliminating discrimination and compensating unlawful discrimination victims)).

1140. 458 U.S. at 249-50 (Blackmun, J., dissenting). The dissent contended that employers may now cut off all future backpay liability by making offers which their discrimination victims cannot reasonably accept. The applicant who declines such an offer to preserve current job security is thereby penalized. Id. (Blackmun, J., dissenting).

1141. Id. at 250-51 (Blackmun, J., dissenting). Gaddis and Starr would have been deprived of two years of seniority that they would have otherwise acquired if there were no discrimination. They would have enjoyed lower insurance benefits, lower wages, less vacation pay, and greater vulnerability to layoffs than persons hired after they were denied employment. Id.
making discrimination victims whole.\textsuperscript{1142}

The dissent was perplexed by the Court’s preoccupation with rights of innocent employees and with classes of claimants not before the Court.\textsuperscript{1143} Finally, the dissent characterized as “studied indifference” the Court’s attitude towards the concerns of the parties whose interests were directly affected, in contrast to the Court’s concern for parties not before the Court.\textsuperscript{1144}

\textit{b. offset of unemployment benefits}

In Kauffman v. Sidereal Corp.,\textsuperscript{1145} the district court granted the plaintiff backpay for retaliatory discharge. The district court refused to offset unemployment benefits from the plaintiff’s award, and the defendant appealed. The Ninth Circuit affirmed, holding that, in granting relief, the court need not consider collateral benefits which the employee may have received.\textsuperscript{1146}

The court concluded that unemployment compensation is collateral because payments to the employee are not made to discharge the employer’s liability for unlawful discrimination.\textsuperscript{1147} In addition, the Ninth Circuit found the trial judge’s reasoning persuasive. First, if Congress did not intend that an employee receive unemployment benefits plus backpay, the state employment agency logically should seek reimbursement. Second, because section 706(g)\textsuperscript{1148} requires a deduction of amounts reasonably earnable, refusal to offset does not discourage discharged employees from seeking another job.\textsuperscript{1149}

\textbf{2. Attorneys’ fees}

Section 706(k) of the Civil Rights Act\textsuperscript{1150} grants the court discre-
tion to award a prevailing party reasonable attorneys’ fees. Allowance of such fees is an important feature of Title VII because it encourages victims of discrimination to seek the court’s enforcement of Title VII provisions and, at the same time, makes them whole for injuries resulting from the discrimination.\textsuperscript{1151}

Courts have adopted either the \textit{lodestar}\textsuperscript{1152} or \textit{Johnson}\textsuperscript{1153} approach in determining the reasonable value of an attorney’s service in a Title VII action. A court reaches the \textit{lodestar} figure by multiplying the time spent on the case by a reasonable hourly rate.\textsuperscript{1154} The court may adjust the \textit{lodestar} figure after considering the contingent nature of success and the quality of the attorneys’ work.\textsuperscript{1155} The resultant figure is the amount of attorneys’ fees to be awarded.

The \textit{Johnson} approach involves the consideration of twelve factors in arriving at reasonable attorneys’ fees.\textsuperscript{1156} Many of these factors are incorporated in the \textit{lodestar} approach.

Although a successful \textit{plaintiff} in a Title VII action is ordinarily entitled to attorneys’ fees, courts are generally reluctant to award a suc-

\textsuperscript{1151} In Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968), the Supreme Court illustrated the importance of awarding the prevailing party reasonable attorney fees in a Title II action:

If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975), the Supreme Court applied the \textit{Piggie Park} rationale to a Title VII action.


\textsuperscript{1153} Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (award of attorneys’ fees in a Title VII class action).

\textsuperscript{1154} \textit{Lindy Bros.}, 487 F.2d at 167. The district court ascertains how many hours were spent and in what manner. The court then takes into account the attorney’s legal reputation, experience, and status (associate or partner) in setting a reasonable hourly rate. \textit{Id.}

\textsuperscript{1155} \textit{Id.} at 168. Where the fee is contingent, the court may wish to increase the attorney’s compensation to reflect the low chance of success. In evaluating the quality of an attorney’s work, the court may increase or decrease the award of fees only if the attorney exhibits an unusual degree of skill, be it unusually poor or unusually good.

\textsuperscript{1156} To wit, the trial court must weigh the following:

1. The time and labor required;
2. The novelty and difficulty of the questions;
3. The skill requisite to perform the legal service properly;
4. The preclusion of other employment by the attorney due to acceptance of the case;
successful defendant attorneys’ fees.\textsuperscript{1157} In Christiansburg Garment Co. v. EEOC,\textsuperscript{1158} the Supreme Court explained that a successful plaintiff is more likely to be awarded attorneys’ fees because Congress appointed the plaintiff as private attorney general of the Civil Rights Act and, moreover, awarding the plaintiff attorneys’ fees is an award against a violator of federal law.\textsuperscript{1159} In contrast, the Court inferred that Congress intended attorneys’ fees to be awarded to successful defendants only in face of frivolous or burdensome litigation having no legal or factual foundation.\textsuperscript{1160}

In National Organization for Women v. Bank of California, National Association,\textsuperscript{1161} the district court awarded attorneys’ fees to the defendant. The parties to this class action agreed to a partial audit of the defendant’s Spanish-surnamed employees. Prior to this agreement, the parties entered into a consent decree which provided that if the auditor or court found that the defendant supplied inaccurate or inadequate information, the defendant would bear the cost of the audit; otherwise the parties were to split the cost equally.\textsuperscript{1162}

After investigating a random sample of the defendant’s list of Spanish-surnamed employees, the auditor concluded that the list was inaccurate because it included individuals having origins in peninsular Spain. The auditor reasoned that these individuals were not discriminated against and, hence, were not the object of the consent decree.\textsuperscript{1163}

\begin{itemize}
\item \textit{(5)} The customary fee;
\item \textit{(6)} Whether the fee is fixed or contingent;
\item \textit{(7)} Time limitations imposed by the client or the circumstances;
\item \textit{(8)} The amount involved and the results obtained;
\item \textit{(9)} The experience, reputation, and ability of the attorneys;
\item \textit{(10)} The "undesirability" of the case;
\item \textit{(11)} The nature and length of the professional relationship with the client;
\item \textit{(12)} Awards in similar cases.
\end{itemize}

\textit{Johnson,} 488 F.2d at 717-19.

\textsuperscript{1157} Section 706(k), 42 U.S.C. § 2000e-5(k) (1976), does not indicate when either a plaintiff or a defendant is entitled to attorneys’ fees. See supra note 1150.

\textsuperscript{1158} 434 U.S. 412 (1978).

\textsuperscript{1159} Id. at 418.

\textsuperscript{1160} Id. at 420-21.

\textsuperscript{1161} 680 F.2d 1291 (9th Cir. 1982) (per curiam).

\textsuperscript{1162} Id. at 1292-93. The plaintiffs sued the defendant for its alleged discrimination against blacks, women, and Spanish-surnamed employees. The parties entered into a consent decree which defined the Spanish-surnamed class it protected as "‘persons with Spanish-surnames and others, those with Spanish-American background, including Mexican Americans, Cubans, Puerto Ricans and those from Central and South America. This category does not include those of Portuguese ancestry.’" Id. at 1292. This appeal arose out of the district court's administration of the consent decree. Id.

\textsuperscript{1163} Id. at 1293.
On the basis of these findings, the plaintiffs moved for a complete audit of Spanish-surnamed employees. The district court denied the motion without an opinion, but noted that the motion turned on the question of whether the auditor's report constituted a determination that the defendant's information was erroneous. The district court also denied the plaintiffs' subsequent motion seeking to have the defendant pay for the partial audit. In addition, the district court awarded the defendant full attorneys' fees attributed to the second motion, holding that since the second motion turned on precisely the same question as the first motion, the second motion met the Christiansburg standard of frivolous or unreasonable action.\textsuperscript{1164}

In a per curiam opinion, the Ninth Circuit concluded that the district court did not err in finding the second motion frivolous and upheld the award of attorneys' fees to the defendant.\textsuperscript{1165} The Ninth Circuit implied that the two motions turned on the same issue.

The dissent asserted that the motions addressed different legal issues and, hence, that the second motion was not frivolous. According to the dissent, the motion seeking a full audit required the court to determine whether the auditor's finding warranted a full audit. The second motion seeking full payment for the partial audit concerned whether the auditor's conclusion that the defendant's list was inaccurate required that the defendant pay for the partial audit.\textsuperscript{1166} In spite of the dissent's distinction between the two motions, the Ninth Circuit found that the defendant deserved protection, in the form of attorneys' fees, from the plaintiffs' frivolous action.

\textbf{E. Exemptions}

1. Bona fide occupational qualification

An employer may discriminate against employees on the basis of religion, sex, or national origin where religion, sex or national origin is a bona fide occupational qualification (BFOQ) "reasonably necessary" to carry on the particular business.\textsuperscript{1167} In \textit{Gifford v. Atchison, Topeka}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{1164} \textit{Id.} at 1293-94.
  \item \textsuperscript{1165} \textit{Id.}
  \item \textsuperscript{1166} \textit{Id.} at 1294-95 (Swygert, J., dissenting).
  \item \textsuperscript{1167} 42 U.S.C. § 2000e-2(e) (1976) provides that:
    \begin{itemize}
      \item [\textit{It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operations of that particular business . . . .}]
    \end{itemize}
\end{itemize}
\end{footnotesize}
and Santa Fe Railway, the plaintiff claimed that the defendant consistently failed to promote her to the wire chief position because of her sex. The defendant responded that this position required the lifting of at least twenty-five pounds and, at that time, state protective legislation did not permit the hiring of women in jobs requiring lifting. Consequently, the defendant pled good faith reliance on the statute.

The district court held that the plaintiff failed to produce evidence to support her claim that heavy lifting was not a BFOQ for the position and, therefore, it granted summary judgment in favor of the defendant. The Ninth Circuit reversed and ruled that BFOQ is an affirmative defense. As such, the defendant carried the burden of producing facts in support of the BFOQ claim. The Ninth Circuit directed the district court to examine whether heavy lifting was “reasonably necessary” to the position of wire chief. The court stated that if it was not reasonably necessary, the defendant could not plead good faith reliance on the statute.

2. Religious institutions

Religious institutions may discriminate in favor of employees who are members of their faith. In EEOC v. Pacific Press Publishing Association, the plaintiff charged her employer, a non-profit religious publishing house, with discrimination on the basis of sex. Until 1973, the defendant paid its employees according to marital status and sex. The defendant claimed that Title VII exempts religious employment practices from Title VII’s coverage. The Ninth Circuit ruled that the religious exemption is of limited scope and did not apply to this case.

1168. 685 F.2d 1149 (9th Cir. 1982).
1169. Id. at 1154. The plaintiff conceded that this legislation had not yet been declared invalid.
1170. Id. at 1155.
1171. Id. (citing Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980) (to justify exclusion of women employer has burden of proving that it had a factual basis for believing that substantially all women could not meet the BFOQ)).
1172. 685 F.2d at 1155. The Ninth Circuit further stated that the district court should consider the merits of the plaintiff's claim and if it found that heavy lifting was not a BFOQ, it could grant, in addition to damages, injunctive relief.
1173. 42 U.S.C. § 2000e-1 (1976) provides that Title VII does not apply to a religious institution “with respect to the employment of individuals of a particular religion to perform work connected with ‘the operation of the religious institution’s activities.’”
1174. 676 F.2d 1272 (9th Cir. 1982).
1175. Id. at 1275. Married men received a higher rental allowance than single men, who in turn received more than female employees.
1176. Id. at 1276-77.
The Ninth Circuit relied upon legislative history for its decision. It found that Congress rejected proposals that granted religious employees complete exemption from Title VII's regulation. The Ninth Circuit concluded, in accordance with all other courts that have considered this issue, that religious employers are not immune from liability for discrimination based on race, sex, or national origin. Accordingly, the court affirmed the district court holding that the defendant violated Title VII.

VII. Employee Retirement Income and Security Act

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to protect participants in employee benefit plans and their beneficiaries. Thus, the Act was designed "to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust."

A. Standard of Review of Fiduciary Decisions and Fiduciary Personal Liability

Section 1104 of ERISA sets forth the fiduciary duties of employee benefit plan trustees. Fiduciaries must administer pension plans solely in the interest of the participants and beneficiaries. Although

1177. Id. at 1276.
1178. See, e.g., EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284-85 (5th Cir. 1981) (seminary must comply with EEOC filing requirements for employees who were not working in capacity of minister); EEOC v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980) (employment relationship between a religious educational institution and its faculty not exempt from Title VII).
1179. 676 F.2d at 1276-77.
1180. Id. at 1283.
1182. 29 U.S.C. § 1001(b) (1976) states:
   It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.
1183. 120 Cong. Rec. 29,932 (1974).
1185. Id. Section 1104 provides in pertinent part that:
   [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-
   (A) for the exclusive purpose of:
      (i) providing benefits to participants and their beneficiaries; and
      (ii) defraying reasonable expenses of administering the plan;
trustees of pension plans have broad discretion in plan administration, the actions of trustees are subject to review. However, a federal court may not substitute its judgment for that of the trustees. In Rehmar v. Smith the Ninth Circuit adopted a standard of review for trustee decisions which provides that the court will only reverse fiduciary decisions that are "arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law." In three recently decided cases, the Ninth Circuit applied this standard to determine whether the trustee was liable for breach of fiduciary duties.

In Brug v. Pension Plan of Carpenters Pension Trust Fund, a union clerical employee bought suit against a trust fund claiming pension benefits for disability retirement. Effective June 1, 1975, trustees of the plan adopted an amendment and implemented regulations which designated clerical workers as beneficiaries of the plan. Shortly thereafter, a newly eligible employee became disabled and applied for disability retirement. In March 1976, however, the trustees of the plan rescinded the amendment and delayed action on the employee's application until after the amendment's rescission. As a result, the trustees denied the employee her benefits on the ground that she was no longer covered by the plan. The district court agreed with the trustees and rendered a verdict against the employee. On appeal, however, the Ninth Circuit reversed because it found that the trustees' action was

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like characters with like aims;

(D) in accordance with the documents and instruments, governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter . . . .


1186. Sailer v. Retirement Fund Trust, 599 F.2d 913, 914 (9th Cir. 1979); Giler v. Board of Trustees, 509 F.2d 848, 849 (9th Cir. 1978) (per curiam).

1187. 555 F.2d 1362 (9th Cir. 1977).

1188. Id. at 1371. The Ninth Circuit relied on a series of decisions by the District of Columbia Circuit involving claims under pension plans administered by the United Mine Workers Union. Id. See Danti v. Lewis, 312 F.2d 345, 349 (1962) (trustees' denial of plaintiff's application for benefits reversed because the decision was arbitrary and capricious); see also Miniard v. Lewis, 387 F.2d 864, 865 (D.C. Cir. 1967) (per curiam) (trustees' refusal of pension benefits upheld because based upon a reasonable interpretation of eligibility requirements), cert. denied, 393 U.S. 873 (1968); Kosti v. Lewis, 319 F.2d 744, 749 (D.C. Cir. 1963) (trustees' changes in eligibility requirements without notification to participants held arbitrary), cert. denied, 375 U.S. 964 (1964).

1189. 669 F.2d 570 (9th Cir.), cert. denied, 103 S. Ct. 135 (1982).

1190. Id. at 571.

1191. Id.
arbitrary and capricious.\textsuperscript{1192}

The \textit{Brug} court explained that the trustees could not retroactively deny the application due to the rescission of an amendment after the application was filed, and that the trustees were obliged to approve the pension since the employee met all the plan’s eligibility requirements at the time of application.\textsuperscript{1193} The court concluded that the trustees should have reviewed the application under the eligibility standards in effect at the time it was submitted.\textsuperscript{1194}

In \textit{Elser v. International Association of Machinists National Pension Fund},\textsuperscript{1195} the Ninth Circuit relied on the rational nexus test set forth in \textit{Central Tool Company v. International Association of Machinists National Pension Fund}\textsuperscript{1196} to reach its decision. In \textit{Central Tool}, the district court held that forfeiture provisions which provided, with some exceptions, for cancellation of past credits for employees whose employer withdrew from the plan, were arbitrary and capricious because less drastic means were available to achieve the goal of fund preservation.\textsuperscript{1197} The \textit{Central Tool} court stated that “the effects of the forfeiture provisions are unduly drastic given the poor fit between the provisions and goal they are designed to achieve, for far less punitive means than forfeiture of all past service credits are available to satisfy the legitimate objectives of fund preservation.”\textsuperscript{1198}

In \textit{Elser}, two employees brought suit challenging the cancellation provisions of a multiemployer pension plan. The plan provided that employees must have a minimum of ten years of credited service, which included both past\textsuperscript{1199} and future\textsuperscript{1200} service, in order to qualify for pension benefits. Waste King, the former employer of plaintiffs, contributed to the pension plan until its collective bargaining agreement with the union expired in 1975. Shortly thereafter, the union lost a decertification election. Both plaintiffs had been employees of Waste King for more than ten years. At the time of Waste King’s withdrawal

\begin{itemize}
\item \textsuperscript{1192} \textit{Id.}
\item \textsuperscript{1193} \textit{Id.} at 576.
\item \textsuperscript{1194} \textit{Id.} at 575.
\item \textsuperscript{1195} 684 F.2d 648 (9th Cir. 1982), \textit{cert. denied}, 104 S. Ct. 67 (1983).
\item \textsuperscript{1196} 523 F. Supp. 812 (D.D.C. 1981).
\item \textsuperscript{1197} \textit{Id.} at 818.
\item \textsuperscript{1198} \textit{Id.} at 817-18.
\item \textsuperscript{1199} 684 F.2d at 650. Past service credit is “credit for periods of eligible employment prior to an employer’s initial contribution.” \textit{Id.}
\item \textsuperscript{1200} \textit{Id.} at 650. Future service credit is “credit for periods of covered employment for which contributions were actually made.” \textit{Id.}
\end{itemize}
from the plan, however, the employees had only six years of future service credit.\(^{1201}\)

The plan had a cancellation provision which provided for cancellation of all past service credit if an employer stopped contributing to the fund and remained in business.\(^{1202}\) Exempt from this provision were employees already receiving pensions and employees who had left their employment more than twenty-four months before or within thirty days after their employer’s termination of participation.\(^{1203}\) Employees who earned at least five more years of future service credit within eight years of their employer’s termination of participation were entitled to reinstatement of their past service credit.\(^{1204}\)

After Waste King withdrew from the collective bargaining agreement, Waste King was notified that all past service credit had been cancelled. The plan participants, however, were not directly notified. Later, when the plaintiffs applied for pension benefits, their applications were denied because they did not have ten years credited service as a result of the cancellation of their past service credits.\(^{1205}\)

The plaintiffs contended that cancellation of the past service credit violated ERISA because the action was arbitrary and capricious insofar as it discriminated among the participants and was not actuarially justified.\(^{1206}\) In contrast, the trustees argued that the cancellation was necessary to encourage participation in the fund and to preserve the financial stability of the fund because the fund could not support a continuing liability for pension benefits when the employer’s contributions terminated.\(^{1207}\) The Ninth Circuit concluded that the cancellation provisions failed the *Central Tool* rational nexus test because the trustees submitted no actuarial evidence to support their contention that the provisions were necessary to protect the financial stability of the fund.\(^{1208}\) The court accordingly held that the cancellation of the past service credit was arbitrary and capricious.\(^{1209}\)

ERISA does not impose a per se rule of fiduciary liability on trustees who violate its provisions. In *Fentron Industries v. National*
Shopmen Pension Fund, the employer and its employees brought suit against the pension fund and its trustees, alleging that the trustees' cancellation of past service credits violated ERISA's minimum vesting standards. Plaintiffs further argued that the trustees' violation of the vesting standards was a per se violation of the fiduciary requirements set forth in section 1104(a)(1)(D).

Although the Fentron court found that the trustees' cancellation of the past service credits violated ERISA's minimum vesting standards, it did not summarily impose liability on the trustees. Instead, the court stated that a trustee is liable for breach of fiduciary duty "only when his or her action was 'made in bad faith, or upon lack of a factual foundations, or when unsupported by substantial evidence.'"

The court rejected the imposition of per se liability because Congress never intended it and because the court feared that "the potential burden of per se personal liability for any violation of this very complex statute might deter capable persons from serving as trustees for these plans." The court's conclusion therefore is consistent with the established standard of imposing liability only for arbitrary and capricious acts.

B. Attorneys' Fees

Section 1132 of ERISA creates a statutory cause of action against an employer for failure to make contributions in accordance with the terms and conditions of a plan. Prior to 1980, an award of attorney fees in such suits was discretionary. However, section 1132

1210. 674 F.2d 1300 (9th Cir. 1982).
1211. Id. at 1305. See 29 U.S.C. §§ 1053(c)(1)(B), (C)(1)(A), 1054(g) & 1082(c)(8) (1976).
1212. 674 F.2d at 1307. 29 U.S.C. § 1104(a)(1)(D) (1976) provides that a fiduciary shall discharge his duty "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter."
1213. 674 F.2d at 1306.
1214. Id. at 1307 (quoting Tomlin v. Board of Trustees, 586 F.2d 148, 150 (9th Cir. 1978)).
1215. 674 F.2d at 1307.
1216. 29 U.S.C. § 1132 (1976) provides in pertinent part:
   (a) A civil action may be brought —
   (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .
1217. San Pedro Fishermen's Welfare Trust Fund Local 33 v. Di Bernardo, 664 F.2d 1344, 1346 (9th Cir. 1982).
was amended in 1980 and currently provides that attorney's fees shall be awarded when a judgment is rendered in favor of a plan in suits brought by a participant, beneficiary of fiduciary to enforce contributions to a multiemployer plan.1218

In *Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co.*1219 a Michigan district court confronted the issue of retroactive application of the amendment. In *Central States*, a pension fund sought attorney's fees pursuant to section 1132 even though the amendment took effect during pendency of the proceedings. The court found the amendment applicable despite the statute's silence on the issue of retroactive application.1220 The court reasoned that the retroactive application would not result in an unanticipated burden because the court formerly had the discretion to order payment of attorney's fees.1221 The court bolstered its decision with the general proposition that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary."1222 In two recent decisions, *San Pedro Fisherman's Welfare v. Di Bernardo*1223 and *M&R Investment Co. v. Fitzsimmons*,1224 the Ninth Circuit addressed the retroactive application of the 1980 amendment.

In *San Pedro Fisherman's Welfare v. Di Bernardo*,1225 a union welfare trust fund brought suit to enforce an employer's payment of trust fund contributions pursuant to a multiemployer collective bargaining agreement. The district court granted the trust fund's motion for summary judgment and denied its motion for attorney's fees. The Ninth Circuit reversed the denial of attorney's fees, applying the 1980 amendment to section 1132.1226 The court concluded that the 1980 amendment is applicable to actions decided on or after its effective date and,

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1218. 29 U.S.C. § 1132(g) (Supp. V 1982). Section 1132(g) provides in part: "(C) In any action under this subchapter by a fiduciary . . . to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall . . . (D) reasonable attorney's fees and costs of the action, to be paid by the defendant . . . " 29 U.S.C. § 1132(g) (Supp. V 1982) (emphasis added). 29 U.S.C. § 1145 (Supp. V 1981) requires an employer participating in a multiemployer plan to make contributions in accordance with the terms and conditions of the plan.


1220. Id. at 925.

1221. Id. at 933.

1222. Id. at 924 (citing Bradley v. School Board, 416 U.S. 696, 715 n.21 (1973)).

1223. 664 F.2d 1344 (9th Cir. 1982).

1224. 685 F.2d 283 (9th Cir. 1982).

1225. 664 F.2d 1344 (9th Cir. 1982).

1226. Id. at 1346; see supra note 1218.
therefore, an award of attorney's fees was mandatory.\textsuperscript{1227}

In \textit{M&R Investment Co. v. Fitzsimmons},\textsuperscript{1228} an investment company brought suit against pension fund trustees for breach of contract. Judgment was entered against the investment company and the trustees' claim for attorney's fees was denied. The Ninth Circuit affirmed, reasoning that the amendment was inapplicable because the suit was initiated by the investment company and not by a "'participant, beneficiary or fiduciary.'"\textsuperscript{1229} Thus, to be awarded attorney's fees pursuant to the 1980 amendment, the underlying suit must have been initiated by an appropriate party.

\textbf{C. Section 515}

Under ERISA, delinquent contributions were enforced by an action founded either on state law, the collective bargaining agreement between the parties, or the trust agreement forming the foundation for the employee benefit plan. However, section 515, added as part of the 1980 amendments, created an unambiguous ERISA cause of action against a delinquent employer.\textsuperscript{1230} According to the Senate Committee on Labor and Human Resources, section 515 was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to simplify collection.\textsuperscript{1231}

In a recent Supreme Court case, \textit{Kaiser Steel Corp. v. Mullins},\textsuperscript{1232} interpretation of section 515 was at issue. In 1974, Kaiser Steel Corporation and the United Mine Workers (UMW) entered into a collective bargaining agreement. The agreement included a purchased-coal clause requiring Kaiser to contribute to employee health and retire-

\begin{footnotes}
\item[1227.] 664 F.2d at 1346.
\item[1228.] 685 F.2d 283 (9th Cir. 1982).
\item[1229.] \textit{Id.} at 288 (quoting § 1132(a)(3) (1976)); \textit{see supra} note 1216. The court further stated that "'[t]here is no ambiguity in the wording of the section . . . . Perhaps if Congress had considered the situation we are faced with, it might have written the statute differently. However, it did not, and it is not within our power to amend the clear language of the statute.' \textit{Id.} at 288.
\item[1230.] 29 U.S.C. § 1145 (Supp. V 1981) which provides:
Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.
\item[1231.] \textit{STAFF OF THE SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., REPORT ON THE MULTIEMPLOYER PLAN AMENDMENTS ACT OF 1980 44 (Comm. Print 1980)}.
\item[1232.] 455 U.S. 72 (1982).
\end{footnotes}
ment plan funds, based in part upon the amount of coal purchased by Kaiser from non-UMW mines. Kaiser complied with only part of the 1974 agreement. Although it contributed based on the coal it produced and the hours worked by its miners, it did not report the coal it acquired from others or make contributions under the purchased-coal clause. Upon the expiration of the 1974 agreement, the fund trustees sued Kaiser to enforce the purchased-coal clause.\(^{1233}\)

Kaiser conceded that it did not adhere to the purchased-coal clause but defended on the ground that the purchased-coal clause was void and unenforceable as violative of sections 1 and 2 of the Sherman Act,\(^{1234}\) and section 8(e) of the National Labor Relations Act.\(^{1235}\) Specifically, it was Kaiser's contention that making the payments would result in an illegal restraint of trade, or would allow the trustees to reap the benefits of an illegal "hot cargo" clause.\(^{1236}\) The trustees argued, however, that section 515 established "a special rule governing the availability of illegality defenses in actions for delinquent contributions brought by pension fund trustees,"\(^{1237}\) and that proper interpretation of section 515 therefore precludes illegality defenses.

The Supreme Court did not agree with the trustees' interpretation of section 515. The Court explained that although Congress enacted section 515 to simplify delinquency collection by discouraging "complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions,"\(^{1238}\) it did not intend to preclude the assertion of related, valid defenses.\(^{1239}\) Accordingly, the Court remanded the case for further proceedings.\(^{1240}\)

In a dissenting opinion joined by Justices Marshall and Blackmun, Justice Brennan argued that the Court ignored the legislative prescription by failing to interpret section 515 as a limitation on the viability of illegality defenses. The Court frustrated Congress' paramount concern in enacting section 515 which was to "expedite and simplify the collec-

\(^{1233}\) Id. at 73-76.
\(^{1234}\) 15 U.S.C. §§ 1, 2 (1976). “Sections 1 and 2 of the Sherman Act prohibit contracts, combinations, and conspiracies in restraint of trade, as well as monopolization and attempts to monopolize.” 455 U.S. at 78.
\(^{1235}\) 29 U.S.C. § 158(e) (1976). “Section 8(e) of the NLRA forbids contracts between a union and an employer whereby the employer agrees to cease doing business with or to handling the products of another employer.” 455 U.S. at 78.
\(^{1236}\) 455 U.S. at 78.
\(^{1237}\) Id. at 86.
\(^{1238}\) See supra note 1232.
\(^{1239}\) 455 U.S. at 86.
\(^{1240}\) Id. at 89.
tion of delinquent contributions by plan trustees.” The majority merely “impose[d] its own view of the wisdom of [section 515] upon Congress and upon respondents, in the guise of judicial restraint.” The dissent, relying on the legislative history, concluded that section 515 was specifically designed to cut off all illegality defenses except those falling within the prohibition of section 186 which involve a claim of illegality inherent in the payment itself.

**D. Regulation of Discretionary Acts of Trustees**

Absent violation of the National Labor Relations Act (NLRA), discretionary acts of trustees are subject to regulation under ERISA in the appropriate district court, and not by the National Labor Relations Board (NLRB). In *NLRB v. Driver Salesmen Local 582*, trustees voted to implement vision care benefits. The employer participants in the plan brought suit alleging that the trustees committed an unfair labor practice by adopting the vision care benefits. Specifically, the employers contended that the trustees violated section 8(b)(3) and 8(d) of the NLRA by making a unilateral decision on behalf of the union. The NLRB agreed that the trustees were acting as agents of the union and held that the extension of the benefits was an unfair labor practice.

1241. *Id.* at 94.
1242. *Id.* at 98.
1243. *Id.* at 95. 29 U.S.C. § 186(a) (1976) states in pertinent part:

(a) It shall be unlawful for an employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend or deliver, or agree to pay, lend or deliver, any money or other thing of value-

(1) to any representative of any of his employees. . . ; or (2) to any labor organization, or any officer or employer thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer. . . ; or (3) to any employee or group of committee of employees of such employer . . . in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization . . . with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

1244. *Id.* at 97.
1245. *Id.* at 95. 29 U.S.C. § 1104 (1976).
1246. 29 U.S.C. § 158(b) (1976) provides: “It shall be an unfair labor practice for a labor organization or its agents— . . . (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title.” 29 U.S.C. § 158(d) (1976) defines collective bargaining.
The NLRB petitioned this court to enforce its order. The trustees defended on the ground that the Board’s order was unenforceable because discretionary acts by trustees are outside the purview of the NLRB. Moreover, the trustees expressed concern that “the Board’s decision would make all internal decisions by trustees subject to collective bargaining.”

The Ninth Circuit denied the Board’s petition holding that there was insufficient evidence to find that the trust was an agent of the union, and therefore, there was no violation of 8(b)(3). Thus the trustee actions were subject to regulation only under section 302 and ERISA, neither of which is within the jurisdiction of the Board. Internal decisions by trustees, therefore, are subject to Board review only if an unfair labor practice is found.

E. Section 406

Section 406 of ERISA prohibits loans from a pension fund to a party in interest. A party in interest is an employer whose employees are covered by the plan, an owner of a majority of voting stock in a corporation, or any fiduciary of such employee benefit plan. Sec-

1248. Id. at 859.
1249. Id. at 858-59.
1250. Id. at 860.
1251. 29 U.S.C. § 1106(a)(1)(B) (1976) states in pertinent part:
(a) Except as provided in section 1108 of this title;
   (1) a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
   (B) lending of money or other extension of credit between the plan and a party in interest.
(14) The term “party in interest” means, as to an employee benefit plan—
   (A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel or employee of such employee benefit plan;
   (B) a person providing services to such plan;
   (C) an employer any of whose employees are covered by such plan;
   (D) any employer organization any of whose members are covered by such plan;
   (E) an owner, direct or indirect, of 50 percent or more of—
      (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.
      (ii) the capital interest or the profits interest partnership, or
      (iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);
   (F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);
   (G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—
      (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
tion 408, however, establishes an exemption procedure whereby if it is administratively feasible, and in the interests of and protective of the plan and its participants and beneficiaries, a loan from a fund to a party in interest may be exempt from the statutory prohibition.

In *M&R Investment Co. v. Fitzsimmons*, the Ninth Circuit addressed the issue of whether the ERISA loan prohibition applies when the party in interest problem was eliminated prior to the disbursal date in the loan agreement. In December 1974, M&R applied for a forty million dollar loan from a pension fund. After amending the terms, the trustees approved the loan. In June 1976, however, the trustees voted to rescind the loan agreement because of the section 406 prohibition. M&R consequently brought suit against the trustees for breach of contract relating to the loan agreement.

The trustees contended that the loan violated section 406 because at the time of the loan agreement M&R’s parent corporation also owned a third entity which was an employer contributing to the fund. Therefore, according to section 1002(14) M&R was a party in interest.

(ii) the capital interest or profits interest of such partnership, or
(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or (I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. . . .

1253. 29 U.S.C. § 1108(a) (1976) provides:
(a) The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by section 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,
(2) in the interests of the plan and of its participants and beneficiaries, and
(3) protective of the rights of participants and beneficiaries of such plan.

1254. 658 F.2d 283 (9th Cir. 1982).
1255. See supra note 1251.
M&R argued that the statutory prohibition did not apply because the parent company sold the employer subsidiary prior to the actual disbursement of any money. M&R's argument was based on the language of section 406 which prohibits a plan from lending money or extending credit to a party in interest. M&R argued that ERISA was not violated because a loan had never occurred and that the "loan contract is a separate part of the transaction not prohibited by ERISA." The Ninth Circuit rejected M&R's argument, holding that the sale of the subsidiary did not remove the ERISA impediment because the fact that the contract existed prior to the divestiture vitiated the effect of any change in the relationship between the companies. The court also held that a contractually created right is not severable from the contract that created it explaining that "[d]isbursement is meaningless without reference to the contract. The culpability arises with the contract's creation; it cannot be eliminated by merely dissolving the improper relationship prior to the contract's execution." Accordingly, the court concluded that the loan transaction was unenforceable as a matter of law because it violated section 406.

E. Preemption

Section 514(a) of ERISA preempts state participation in regulation of employee benefit plans by specifying that the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." An employee benefit plan is defined as a welfare plan or pension plan. The preemption provision, however, "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." Crucial to an inquiry into preemption, therefore, is the determination of when the cause of action arose and the judicial interpretation of whether a given state law "relates to" an employee benefit plan.

The Ninth Circuit, in Lafferty v. Solar Turbines International, set forth a test for determining when a cause of action arises under ERISA. Solar International began contributing to a pension plan in

1966. When the plan was amended in 1976, employees who were previously prohibited from contributing to the plan were allowed to begin contributing and receiving the same benefits as those employees contributing since 1966. Employees who had contributed since 1966 brought suit in state court claiming unfair discrimination in connection with the pension plan. The case, originally filed in state court, was removed to federal court by the employer. The employees sought and the district court denied a motion to remand the case to the state court. The Ninth Circuit affirmed on the ground that ERISA preempted plaintiff's alleged claim under state law.

The court explained that ERISA was applicable because the adoption of the 1976 plan was a substantial act contributing to the cause of action since it rendered the employee's previous agreements valueless and it occurred after the preemption date. The court noted that the agreement or the making of contributions in this case were not substantial acts because they were not, in themselves, actionable.

The Supreme Court, in Alessi v. Raybestos-Manhattan, Inc., adopted a broad interpretation of what "relates to" employee benefit plans pursuant to section 1144(a). In Alessi, the Court concluded that the New Jersey statute in question was preempted by federal law because it eliminated one method for calculating pension benefits permitted under ERISA. To the Alessi Court it did not matter that the statute intruded indirectly, "through a workers' compensation law, rather than directly, through a statute called 'pension regulation' [since] ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern."

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1264. The removal was pursuant to 28 U.S.C. § 1441 (1976).
1265. Id. at 410.
1266. Id. The Ninth Circuit has declined to apply ERISA if acts after the preemption date were mere formalities adjunct to actions more substantially related to the cause of action taken before the preemption date. Id. See Ponce v. Construction Laborers Pension Trust, 628 F.2d 537 (9th Cir. 1980) (the court declined to apply ERISA to plaintiffs formally denied benefits after the preemption date); Bacon v. Wong, 445 F. Supp. 1188 (N.D. Cal. 1978) (ERISA not applicable to a cause of action for mistaken payments to a pension fund made and discovered after the preemption date); see also Woodford v. Marine Cooks & Stewards Union, 642 F.2d 966 (5th Cir. 1981); Quinn v. Country Club Soda Co., 639 F.2d 838 (1st Cir. 1980); Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980); Martin v. Bankers Trust Co., 565 F.2d 1276 (4th Cir. 1977).
1268. Id. at 521-26.
1269. Id. at 524. The New Jersey statute was designed to ban pension benefit offsets based on workers' compensation benefits. ERISA, however, permits integration of pension funds with other public income maintenance moneys when calculating benefits.
1270. Id. at 525.
In Employee Benefits Committee v. Pascoe and Franchise Tax Board v. Construction Laborers, two simultaneously decided cases, the Ninth Circuit embraced and expanded the Alessi approach.

In Employee Benefits Committee v. Pascoe, the employees received both pension and Hawaii workers’ compensation benefits. The committee and the company brought an action to offset the employees’ workers’ compensation benefits against the benefits they would receive under the pension plan. The employees, however, contended that the Hawaiian compensation law prevented such an offset. The court stated that it was immaterial that the state compensation law may have prevented such an offset because ERISA preempted the state law. Following the Supreme Court’s holding in Alessi, the Ninth Circuit also rejected the argument that “since the state law did not directly regulate pension plans and had only a ‘collateral’ effect on them, it was not preempted.”

In Franchise Tax Board v. Construction Laborers, three union members owed the state unpaid personal income tax. The Franchise Tax Board, under statutory authority, levied against money held in trust for the members. The trustees of the fund, however, refused to pay and the state brought action for declaratory relief. The trustees contended that ERISA preempted the state's attempt to levy on the vacation trust for unpaid taxes. The state, on the other hand, argued that ERISA does not protect vacation funds from creditor's claims. It reasoned that there is a “difference between vacation benefits and retirement benefits, and . . . [that] Congress intended to protect only the latter.”

The Ninth Circuit held that ERISA preempts the levying statute.

1271. 679 F.2d 1319 (9th Cir. 1982).
1272. 679 F.2d 1307 (9th Cir. 1982).
1273. 679 F.2d 1319 (9th Cir. 1982).
1274. Unlike Lafferty v. Solar Turbines Int'l, 666 F.2d 408 (9th Cir. 1982), there was no question of ERISA applicability here because “the facts giving rise to any cause of action . . . did not occur at least until the award of worker's compensation benefits, an event which occurred several months after the effective date of the preemption provision.” 679 F.2d at 1323 n.5.
1275. 679 F.2d at 1322.
1276. Id. at 1323.
1277. 679 F.2d 1307 (9th Cir. 1982).
1278. CAL. REV. & TAX CODE § 18817 provides in pertinent part that the Franchise Tax Board may require an employer who has “possession . . . of things of value belonging to a taxpayer . . . to withhold the amount of any tax . . . due from the taxpayer.”
1279. 679 F.2d at 1308.
1280. Id.
1281. Id.
The court explained that although pension funds might differ from vacation funds in terms of other protections, ERISA clearly preempts state action relating to both pension and welfare benefit plans and the latter includes vacation benefits.

G. Minimum Vesting Standards

One of the primary purposes of ERISA is to insure that pension plan participants do not lose vested benefits because of "unduly restrictive" forfeiture provisions. Under section 1053 of ERISA, a pension fund must provide an employee with a nonforfeitable right to his normal retirement benefit when he reaches retirement age and a nonforfeitable right to a percentage of his accrued benefit; the percentage being related to length of employment. Such nonforfeitable rights are the employee's vested interest in his pension fund. An "accrued benefit" is defined in section 1002(23) to mean "in the case of a defined benefit plan, the individual's accrued benefit determined under the plan, and . . . expressed in the form of an annual benefit commencing at normal retirement age." "Normal retirement benefit" is defined as "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age."

"Normal retirement age" is defined as the "earlier of (a) the time a plan participant attains normal retirement under the plan, or (b) the later of - (i) the time a plan participant attains age 65, or (ii) the 10th anniversary of the time a plan participant commenced participation in the plan."

During the survey period, the Ninth Circuit interpreted ERISA's minimum vesting requirements under section 1053 in Hernandez v.

1282. Id. at 1309 (citing 29 U.S.C. § 1144 (1976)).
1283. Id. at 1309. Section 1002(1) defines a welfare benefit plan as a plan with "medical, surgical . . . accident, disability . . . or vacation benefits." 29 U.S.C. § 1002(1) (1976).
1286. Section 1053(a) requires that an employee's interest in his pension benefits be tied to his length of service. The plan may satisfy this requirement in three ways: 100% vesting after ten years of service (§ 1053(a)(2)(A)); 25% vesting after five years of service rising to 100% vesting after fifteen years of service (§ 1053(a)(2)(B)); or 50% vesting when age plus years of service equals forty-five rising to 100% vesting when age plus years of service equals fifty-five (§ 1053(a)(2)(C)).
Southern Nevada Culinary and Bartenders Pension. In Hernandez, the wife filed suit under ERISA seeking a declaration that she was entitled to her husband's pension benefits. Under the husband's plan, the wife was a joint beneficiary. The husband, who was sixty-one when he died, had a one hundred percent vested interest in his accrued benefits. The normal retirement age of his pension plan was sixty-two.

Mrs. Hernandez contended that under ERISA "accrued retirement benefits" differ from "normal retirement benefits" insofar as the former vest and become nonforfeitable upon satisfaction of the service requirement while the latter vest upon satisfaction of both the service requirement and the normal age requirement. She argued that since her husband had met the service requirement for "accrued retirement benefits," she, as his survivor, was entitled to receive benefits regardless of the fact that her husband died prior to reaching the normal retirement age under the plan.

The Ninth Circuit, however, determined that the proper interpretation of section 1053 is that in order to receive either "accrued benefits" or "normal benefits" the employee must satisfy both the length of service and age requirements of the plan. According to the court, Mrs. Hernandez misconceived the nature of the right which became vested because a right which is vested is not the same as the right to receive the vested pension benefits. Thus, although the husband's accrued benefits were one hundred percent vested at the time of his death, he was not entitled to receive the vested benefits because the age requirement was not met. The Ninth Circuit, therefore, distinguished between the right to receive vested benefits and the right to vested benefits.

The Ninth Circuit addressed ERISA's minimum vesting standards in another recent case, Fentron Industries v. National Shopmen Pension

1290. 662 F.2d 617 (9th Cir. 1981).
1291. Id. at 618.
1292. Id.
1293. Id. at 619.
1294. Id.
1296. 662 F.2d at 619.
1297. Id.
In Fentron, an employer and a class composed of employees who were members of the Shopmen's Union with vested credits under the plan, brought suit against the pension fund and its trustees. They alleged that the trustees violated section 1053 by adopting an amendment to the plan which cancelled employee past service credits. The amendment empowered the trustees to cancel plan obligations to employees whose employer withdrew from the plan. Fentron contributed to the fund according to the collective bargaining agreement until it expired. One year later, the trustees, pursuant to the amendment, cancelled the past service credits of the Fentron employees.

The Ninth Circuit held that the amendment violated section 1053 because under ERISA's minimum vesting requirements, the alteration of vested past service credits of employees is prohibited "unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after the adoption of such amendment, to have his unforfeitable percentage computed under the plan without regard to such amendment." The court noted that not all amendments which alter plan benefits are per se invalid under section 1053 because a pension plan may cancel benefits not required by ERISA's minimum vesting standards.

H. Standing Under Section 1132

The test for standing to sue for a violation of a federal statute set forth by the Supreme Court in Association of Data Processing Service Organizations, Inc. v. Camp and Barlow v. Collins requires: (1) that plaintiff suffer injury in fact (but it need not be economic), (2) that plaintiff is arguably within the zone of interests to be protected by the statute sought to be enforced; and (3) that the statute does not

1298. 674 F.2d 1300 (9th Cir. 1982). See supra note 1210.
1299. Id. at 1303.
1300. Article II, § 2.09 (part of the 1976 amendments to the shopmen's pension plan) provided:
   (a) If an Employer participation in the Fund with respect to a bargaining unit or group terminates, the trustees are empowered to cancel any obligation of the Trust Fund that is maintained under the Trust Agreement with respect to that part of any pension for which a person was made eligible on the basis of employment in such a bargaining unit or group prior to the contribution period with respect to that unit or group.
   Id. at 1303 n.3.
1301. Id. at 1306 (quoting 29 U.S.C. 1053(c)(1)(B) (1976)).
1302. Id. (citing Hummel v. S.E. Rycoff, 634 F.2d 445-50 (9th Cir. 1980); Freemont v. McGraw-Edison Co., 606 F.2d 752 (7th Cir. 1979), cert. denied, 45 U.S. 951 (1980).
preclude the suit. During the survey period, in *Fentron Industries v. National Shopmen Pension Fund*, the Ninth Circuit relied on the *Data Processing* and *Barlow* test to determine an employer's standing to sue under ERISA. In *Fentron*, an employer and a class of its employees brought suit against a pension fund and its trustees for violations of ERISA. Subsequently, the fund challenged the employer's standing to sue under section 1132. The Ninth Circuit found that the employer satisfied the requirements of *Data Processing* and *Barlow* and, therefore, had standing to sue under ERISA. Specifically, the court found that the employer suffered injury because the fund's failure to pay pension benefits would impair the employer's relationship with the union, and because the fund offered to restore benefits to those who quit Fentron and went to work for a contributing employer. Moreover, the alleged injuries fell within the zone of interests that Congress intended to protect when it enacted ERISA. The court stated that ERISA recognizes that pension plans "have become an important factor affecting the stability of employment and the successful development of industrial relations." Although section 1132 does not explicitly empower employers to bring civil actions to enforce ERISA, the Ninth Circuit did not find the omission preclusive. The court stated that "[t]here is nothing in the legislative history to suggest either that the list of parties empowered to sue under this section is exclusive or that Congress intentionally omitted employers." Accordingly, the employer was allowed to sue notwithstanding a literal reading of section 1132.

1307. 674 F.2d 1300 (9th Cir. 1982). See supra notes 1211 & 1291.
1308. Id. at 1304.
1309. Id. The court noted that "[t]hese are neither the general allegations of adverse impact condemned in Natural Resources Defense Council Inc. v. EPA, 507 F.2d 905, 908-11 (9th Cir. 1974) nor the assertion of third party rights condemned in Fisher v. Tucson School District, 625 F.2d 834, 837 (9th Cir. 1980)." Id.
1310. 674 F.2d at 1305 (quoting 29 U.S.C. § 1001(a) (1976)).
VIII. CIVIL SERVICE REFORM ACT

A. Introduction

Congress enacted the Civil Service Reform Act\(^\text{1312}\) (CSRA) of 1978 to regulate public employee labor relations. It is the purpose of this Act to prescribe certain rights and obligations of federal government employees and to establish procedures designed to meet the needs of government.\(^\text{1313}\) Simultaneously, the Federal Labor Relations Authority (FLRA)\(^\text{1314}\) was created to administer the Act by establishing policy, providing guidance, and resolving unfair labor practices.\(^\text{1315}\)

B. Exclusive Jurisdiction

Cases involving public employee labor relations are adjudicated before the FLRA because "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems and where court jurisdiction to make initial determinations would undermine the effectiveness of the statutory design, [those] procedures are to be exclusive."\(^\text{1316}\) To permit a district court to interfere would undercut the effectiveness of the statutory design.\(^\text{1317}\)

In a recent Ninth Circuit case, \textit{Columbia Power Trades Council v. United States Department of Energy},\(^\text{1318}\) the application of this principle was at issue. After the FLRA refused to issue a complaint against the Department of Energy for an alleged unfair labor practice, the union sought relief in district court. The district court entered judgment against the union and the union appealed. On appeal, the Ninth Circuit remanded the case to the district court with instructions to dismiss the suit because it lacked jurisdiction.\(^\text{1319}\)

The court, relying on an analysis of congressional intent and statutory interpretation, held that the FLRA is the "exclusive source of re-

\(^{1313}\) \textit{Id.} § 7101(b).
\(^{1314}\) \textit{Id.} § 7104.
\(^{1315}\) \textit{Id.} § 7105(a)(1).
\(^{1318}\) 671 F.2d 325 (9th Cir. 1982).
\(^{1319}\) \textit{Id.} at 329.
dress for a public union from unfair labor practices."\textsuperscript{1320} The court explained that Congress intended the Civil Service Reform Act to mirror the National Labor Relations Act (NLRA)\textsuperscript{1321} by filling "the identical role in the public sector that the NLRA performs in the private sector."\textsuperscript{1322} The scope of the FLRA's power, therefore, is as extensive as that of the National Labor Relations Board (NLRB).\textsuperscript{1323} Consequently, the Ninth Circuit concluded that the FLRA's jurisdiction, like that of the NLRB, is exclusive.\textsuperscript{1324} Nevertheless, the judicial role in the settlement of unfair labor practices is not entirely precluded because the Civil Service Reform Act, like the NLRA, provides for limited judicial appellate review.\textsuperscript{1325}

\textbf{C. Collective Bargaining}

1. Section 718(a)

Pursuant to section 7103(a)(12)\textsuperscript{1326} of the CSRA, collective bargaining is defined as the "mutual obligation . . . to meet at reasonable times and to . . . bargain in a good-faith effort to reach agreement with

\begin{footnotes}
\item[1320] Id. at 326-27.
\item[1321] Id. at 326.
\item[1322] Id. (citing H.R. REP. No. 1403, 95th Cong., 2d Sess. 41, reprinted in 1 HOUSE COMM. ON POST OFFICE & CIVIL SERVICE, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978, at 678-79 (1979)).
\item[1323] 671 F.2d at 326. Pursuant to 29 U.S.C. § 158 (1976), the NLRB's power to interpret what constitutes an unfair labor practice is broad. As a result, it is well settled that federal and state courts lack jurisdiction to remedy conduct covered by the NLRA because administration of labor policy must be centralized in one body. Id. at 327 (citing Vaca v. Sipes, 386 U.S. 171, 179 (1967); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959)). In short, the NLRB preempts both federal and state court jurisdiction. 671 F.2d at 327. As Justice Jackson stated in Garner v. Teamsters Union, 346 U.S. 485, 490-91 (1953):

\begin{quote}
Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.
\end{quote}

\item[1324] 671 F.2d at 327.

An aggrieved party may appeal the Authority's action to a court of appeals, the Authority may petition a court of appeals for enforcement of its orders, and the Authority may seek an injunction in a district court after it has issued a complaint.

At no point does the Act entitle a party to petition a district court for relief.

\end{footnotes}
respect to the conditions of employment.” 1327 A collective bargaining agreement is defined as “an agreement entered into as a result of collective bargaining.” 1328 In addition, employer and employee representatives are required to meet “as frequently as may be necessary” 1329 to fulfill the obligation to negotiate in good faith. Furthermore, pursuant to section 7131(a), 1330 representatives attending collective bargaining negotiations are entitled to reimbursement for official time.

In Bureau of Alcohol Tobacco and Firearms v. FLRA, 1331 the Ninth Circuit addressed the issue of whether reimbursement for official time, travel expenses, and per diem is authorized under section 7131(a) for employee representatives during midterm negotiations. 1332 In November 1978, the employer notified the union that it intended to move its office to another location. The union wanted to negotiate the move and, therefore, designated an employee representative. After the move was negotiated, the employee representative sought to have the meeting classified as official time in order to be reimbursed. The employer, however, denied the reimbursement request and informed the representative that he could take leave without pay or annual leave for the day. 1333

The Administrative Law Judge held that it was an unfair labor practice for the employer to refuse to reimburse the representative. 1334 The judge based his decision on an “Interpretation and Guidance” 1335 for section 7131(a) issued by the FLRA. The interpretive rule “mandated the authorization of official time for all collective bargaining ne-

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1327. Conditions of employment are defined as personnel policies affecting working conditions. 672 F.2d 736 n.1 (citing 5 U.S.C. § 7103(a)(14) (1980)).
1329. Id. § 7114(b)(3).
1330. Id. § 7131.
1331. 672 F.2d 732 (9th Cir. 1982).
1332. Id. at 736-37.
1333. Id. at 734.
1334. Id. at 735.
1335. Pursuant to § 7134, the FLRA has the authority to promulgate rules and regulations to carry out the provisions of the CSRA. 5 U.S.C. § 7134 (Supp. V 1981). Moreover, § 7105(a)(1) authorizes the FLRA to issue interpretations of the CSRA in order "to provide leadership in establishing policies and guidelines and to take responsibility for carrying out the purpose of Title VIII." 672 F.2d at 735.

An "Interpretation" pursuant to § 7105(a)(1) may be accorded less weight than a rule promulgated pursuant to § 7134. Id. (citing General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976)). Nevertheless, in the absence of a § 7134 rule, interpretive guidelines are given deference if reasoned and supportable. 672 F.2d at 735 (citing Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980); Magma Copper Co. v. Secretary of Labor, 645 F.2d 694, 696 (9th Cir.), cert. denied, 454 U.S. 940 (1981); Montana Power Co. v. EPA, 608 F.2d 334, 345 (9th Cir. 1979)).
grievations, and that if representatives were entitled to official time they were also entitled to travel and per diem reimbursements. Accordingly, the judge ordered the employer to pay the representative the appropriate sums owed to him.

On appeal, the employer argued that Congress intended to restrict the availability of official time for midterm negotiations because the statute did not explicitly provide for it. Therefore, the employer argued that only time spent negotiating basic collective bargaining agreements is compensable. The Ninth Circuit disagreed with the employer, upholding the FLRA "Interpretation and Guidance." The court held that official time is authorized for employee representatives during midterm negotiations as well as during negotiations of a basic collective bargaining agreement. The Ninth Circuit reasoned that the statute's silence with respect to the availability of official time for midterm negotiations does not imply that Congress intended to restrict reimbursement. The court noted that Congress specifically rejected language that would have limited official time to negotiations of basic collective bargaining agreements. The court further noted that since official time is granted for midterm negotiations, an employee representative is also entitled to recover travel expenses and a per diem.

2. Extent of the duty to bargain

Although section 7117 of the Civil Service Reform Act imposes an extensive duty on an employer to bargain over employment conditions with the employee representative, certain limitations on the collective bargaining duty exist. One such limitation provides that employer's authority to discipline employees and to assign work is non-negotiable. Section 7106(b)(2), however, provides that the proce-

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1337. 672 F.2d at 735.
1338. Id. at 737.
1339. Id.
1340. Id.
1341. Id. at 736-37 (citing S. REP. No. 969, 95th Cong., 2d Sess. 112, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2723, 2834).
1342. Id. at 737-38.
1344. 5 U.S.C. § 7106 (Supp. V 1981) provides in part:
(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official . . .
(b) in accordance with applicable laws-
(A) to hire, assign, direct, layoff, and retain employees in the agency, or
dures used in exercising this authority are subject to negotiation.\textsuperscript{1345}

In \textit{Navy Public Works Center v. FLRA},\textsuperscript{1346} the Ninth Circuit considered the negotiability of a union proposal giving employees the right to remain silent during disciplinary investigations and requiring the employer to inform employees of that right.\textsuperscript{1347} The FLRA found that the proposal was subject to negotiation because it fit within the "procedural pigeon-hole" of 7106(b)(2).\textsuperscript{1348}

The Ninth Circuit, however, disagreed with the FLRA’s determination. Instead, the court held that the proposal was nonnegotiable because it intruded on the managerial authority protected by section 7106(a)(2).\textsuperscript{1349} The court explained that the proposal would undermine the employees’ duty to account to their employer, resulting in a reduction of the employer’s power to discipline employees.\textsuperscript{1350}

\textbf{D. Standard of Review}

As previously stated, the FLRA has exclusive jurisdiction over unfair labor practice claims,\textsuperscript{1351} subject to review by the appropriate court. The reviewing court, however, is not free to set aside every FLRA finding with which it disagrees. Instead, the court must follow the standard of review set forth in section 706\textsuperscript{1352} of the Civil Service Act.

\begin{itemize}
\item to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
\item (B) to assign work . . . ;
\item (2) procedures which management officials of the agency will observe in exercising any authority under this section . . . .
\end{itemize}

\textsuperscript{1345}. \textit{Id.} § 7106(b)(2).

\textsuperscript{1346}. 678 F.2d 97 (9th Cir. 1982).

\textsuperscript{1347}. \textit{Id.} at 99. The proposal stated:

[D]iscussions that may lead to disciplinary actions will be held between a supervisor having authority to propose the action, the employee concerned, and his steward if requested. The employee has the right to speak or remain silent or refuse to give a written statement and shall be so informed by the employer at the outset of the inquiry or investigation.

\textit{Id.} at 99 n.2 (emphasis added).

\textsuperscript{1348}. \textit{Id.} at 100.

\textsuperscript{1349}. \textit{Id.} at 101.

\textsuperscript{1350}. \textit{Id.} The court stated that its decision was based upon one of Congress’ major reasons for enacting the 1978 Act: “[T]o make the government more efficient and accountable.” \textit{Id.} See Senate Report cited supra note 1341.

\textsuperscript{1351}. \textit{See supra} note 1316.

\textsuperscript{1352}. 5 U.S.C. § 706 (1976) provides in part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
Reform Act. Specifically, the reviewing court may set aside an FLRA finding only if it is deemed arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Furthermore, an FLRA finding based on an agency-issued statutory interpretation should be upheld by the reviewing court if it is reasonably defensible. "[A]n agency's construction . . . should not be rejected simply because a court might prefer another view . . ."\textsuperscript{1355}

In two recently decided cases, the Ninth Circuit applied the standard of review to determine whether it should enforce or deny an FLRA decision. In \textit{Navy Public Works Center v. FLRA},\textsuperscript{1356} the court refused to enforce an FLRA negotiability determination. The court, however, in \textit{Bureau of Alcohol Tobacco and Firearms v. FLRA},\textsuperscript{1357} upheld the FLRA's determination based on an "Interpretation and Guidance." In the former case, the court found that the FLRA's statutory analysis was arbitrary and capricious while in the latter case the FLRA's finding was deemed reasonably defensible.\textsuperscript{1358}

In \textit{Navy}, the court concluded that the FLRA's determination was arbitrary and capricious because it conflicted with the purpose of the Act. Congress intended "to make government more efficient and accountable"\textsuperscript{1360} and "to provide a 'balanced bill' that would 'allow civil servants to be able to be hired and fired more easily, but for right rea-
The second part of this proposal would give employees a contractual right to remain silent during disciplinary proceedings. According to the court, this right is substantive. Thus, the adoption of this proposal would infringe upon nonnegotiable employer powers, thereby defying congressional intent of retaining the balance of power between employers and employees.

In Bureau, the court found that the FLRA's "Interpretation and Guidance," which authorized official time for midterm negotiations, was reasonably defensible because both the statutory language and the legislative history supported its conclusion. First, the court found that the requirements of collective bargaining set forth in section 7131(a) do not merely refer to negotiation of basic agreements but encompass "all situations in which agency and union personnel meet." Second, the court noted that during debate, Congress rejected language which would have restricted the award of official time.

IX. URBAN MASS TRANSPORTATION ACT

The Urban Mass Transportation Act was designed to provide federal aid for local governments to acquire failing private transit companies, so that urban communities could continue to receive the benefits of mass transportation despite the collapse of private operations.

Congress feared that public ownership might threaten existing collective bargaining rights of unionized transit workers employed by private companies. Therefore, it included section 13(c) in the Urban Mass Transportation Act (UMTA).

Section 13(c) requires, as a condition of federal assistance under the UMTA, that the Secretary of Labor certify that "fair and equitable arrangements" be made "to protect the interests of employees affected by [the] assistance." Under the statute, several protective steps must be taken before a local government may receive federal aid. These steps include the preservation of benefits under existing collective bargaining agreements and the continuation of collective bargaining rights. Furthermore, the contract granting aid must specify protective

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1362. 672 F.2d at 736.
1363. Id. at 736-37.
arrangement.\footnote{1368}

Several circuits had decided that section 13(c) authorized federal suits for violations of section 13(c) agreements.\footnote{1369} However, during the survey period, the Supreme Court granted certiorari to a Sixth Circuit decision and held, in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union,*\footnote{1370} that violations of section 13(c) do not create a federal private right of action.\footnote{1371}

In *Jackson*, the union and district cooperated under a section 13(c) agreement from 1966 until 1975. By complying with UMTA requirements, the district received federal funding for a public transit authority. However, in 1975, the district unilaterally repudiated its current collective bargaining contract and reduced certain employee benefits.\footnote{1372}

The union filed an action in general court, and the action was dismissed on the ground that the court lacked jurisdiction because the complaint rested on state created contractual rights.\footnote{1373} The court of

\footnote{1368. Section 13(c), as incorporated into 49 U.S.C. § 1609 (1976), provides in full:

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.


1371. *Id.* at 29.

1372. *Id.* at 19.

appeals reversed, and the Supreme Court reversed and remanded. The Court found that while the language of section 13(c) supplies no definitive answers, the legislative history is conclusive that Congress intended such agreements be governed by state law applied in state courts. The Court therefore concluded that Congress did not intend to substitute section 13(c) for state labor law.

Prior to the Jackson case, the Ninth Circuit, in Division 587, Amalgamated Transit Union v. Municipality of Metropolitan Seattle, ruled on the precise question put before the Supreme Court in Jackson, namely whether violations of section 13(c) create federal subject matter jurisdiction and a federal cause of action. The Ninth Circuit held that suits brought for section 13(c) violations created a federal cause of action.

In Division 587, the city appealed from a preliminary injunction ordering it to submit to interest arbitration of a new collective bargaining agreement pursuant to the terms of a contract required by section 13(c). The Ninth Circuit upheld the injunction, adopting the position of the First Circuit in Local Division 714, Amalgamated Transit Union v. Greater Portland Transit District, that "Congress implicitly mandated both compliance with those arrangements and a federal remedy for their breach."

X. Railway Labor Act

The object of the Railway Labor Act (RLA) is to avoid interruption of commerce by promoting free association among employees for the purpose of settling disputes between them and the carriers. Although the RLA is designed to facilitate the peaceful and orderly adjustment of disputes, strikes are not outlawed. The RLA merely

1374. 650 F.2d 1379, 1388 (6th Cir. 1981).
1375. 457 U.S. at 29.
1376. Id. at 24.
1377. Id. at 24-28.
1378. Id. at 28.
1379. 663 F.2d 875 (9th Cir. 1981).
1380. Id. at 877-78.
1381. Id. at 878.
1382. 589 F.2d 1 (1st Cir. 1978).
1383. 663 F.2d at 878 (quoting Local Div. 714, Amalgamated Transit Union, 589 F.2d at 7).
provides the machinery to minimize crippling strikes in the nationally important transportation industry.

During the survey period, in United Transportation Union v. Long Island Rail Road, the Supreme Court held that the RLA applies to a state owned railroad where such application does not impair a state's ability to carry out its constitutionally preserved function under the tenth amendment.

In United Transportation, a privately owned railroad was acquired by New York State and operated in interstate commerce. Thirteen years after the acquisition, the union and the state failed to reach an agreement after conducting collective bargaining negotiations pursuant to the RLA. Mediation efforts also failed to produce an agreement. This triggered a thirty day cooling-off period under the RLA, at the expiration of which the RLA permits a union to resort to a strike.

Anticipating that New York would challenge the RLA's applicability to the railroad, the union sued in federal district court seeking a declaratory judgment that the labor dispute was covered by the RLA and not the Taylor Law.

The railroad then filed suit in a New York state court seeking to enjoin the impending strike under the Taylor Law. Before the state court acted, the federal district court held that the railroad was subject to the RLA rather than the Taylor Law. The district court rejected the railroad's argument that application of the RLA to a state owned railroad was inconsistent with National League of Cities v. Usery.

The Supreme Court agreed with the district court, holding that the railroad was subject to the RLA.

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1387. 455 U.S. 678 (1982).
1388. Id. at 686.
1389. Id. at 681.
1392. Id. at 1306 n.4. National League of Cities v. Usery, 426 U.S. 833 (1976), held the 1974 amendments to the Fair Labor Standards Act, which required states and their political subdivisions to pay state employee minimum wages and overtime, unconstitutional under the tenth amendment. Id. at 852. In Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), the Court set out a three-prong test for determining the validity of tenth amendment claims:

[In order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of [Usery] must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." 452 U.S. at 287-88 (quoting Usery, 426 U.S. at 854, 845, 852) (emphasis in original).]
operation of a railroad engaged in interstate commerce is clearly “not an integral part of traditional state activities generally immune from federal regulation.” Moreover, the Court concluded that federal regulation of state owned railroads does not impair a state’s ability to function as a state.

The Court reasoned that to allow individual states to circumvent the federal system of railroad regulation by acquiring railroads would destroy the comprehensive scheme of federal regulation of railroads and their labor regulations. The holding in this case was particularly justified because New York knew and accepted the federal scheme of regulation when it acquired the railroad, and had operated under the RLA for thirteen years without claiming an impairment to its sovereignty.

XI. Comprehensive Employment and Training Act

The Comprehensive Employment and Training Act (CETA) was enacted to provide job training and employment opportunities for economically disadvantaged, unemployed or underemployed persons which would result in an increase in their earned income.

Originally, grievants’ actions under CETA were limited to actions for discrimination on the basis of race, color, national origin or sex. In 1978, Congress created new rights and a new remedy by passing section 816(f). In 1979, the Secretary of Labor promulgated regula-

1393. 455 U.S. at 685.
1394. Id. at 686.
1395. Id. at 687.
1396. Id. at 690.
   If the Secretary determines that any recipient under this chapter has—
   (1) discharged or in any other manner discriminated against a participant or
   against any person in connection with the administration of the program involved
   or against any person because such person has filed any complaint or instituted or
   caused to be instituted any proceeding under or related to this chapter, or has testi-
   fied or is about to testify in any such proceeding or investigation under or related to
   this chapter, or otherwise unlawfully denied to any person a benefit to which that
   person is entitled under the provisions of this chapter or the Secretary’s regulations,
   or
   (2) discriminated against any person, failed to serve equitably significant
   segments of the eligible population, or failed to provide employment or training
   opportunities at levels of skill and remuneration that are commensurate with the
   participant’s capabilities or potential capabilities; the Secretary shall, within 30
tions which specifically allowed for back pay awards.

During the survey period, in *City of Great Falls v. United States Department of Labor*, the Ninth Circuit refused to apply section 816(f) retroactively and denied an award of back pay. In 1974, the plaintiff Parks was denied employment pursuant to an unwritten local anti-nepotism policy. During Parks' administrative appeal process, the law was changed to specifically allow for back pay awards. Ultimately, Parks was successful in his complaint and was awarded back pay. The City of Great Falls appealed, contending that the new law should not be retroactively applied.

The court found that, in the absence of manifest injustice, section 816(f) should be applied retroactively. The test used to determine if manifest injustice would occur was an examination of: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law on those rights." In discussing the first factor, the court found that this case did not involve issues of "great national concern" between the parties. Therefore, the application of the existing law to this case would not further an important congressionally expressed federal policy.

The court then found that Great Falls had no vested or unconditional right to CETA funds. The retroactive application of section 816(f) would not infringe upon or deprive the city of a right that had matured or become unconditional. Finally, the court determined that if the law was applied retroactively the City would be subject to far greater liability than it would have reasonably expected for a technical violation. Thus, retroactive application would effect a change in the substantive obligations of the parties. The court therefore concluded that although the case was close, it would be manifestly unjust in this case to apply the change in the law retroactively to award back pay.

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1401. 20 C.F.R. § 676.91(c) (1982).
1402. 673 F.2d 1065 (9th Cir. 1982) (per curiam).
1403. See supra notes 1400 & 1401 and accompanying text.
1404. Great Falls sought review solely to challenge the Secretary's authority to make a backpay award. 673 F.2d at 1067.
1405. Id. at 1068.
1406. Id. (quoting Bradley v. School Bd. of Richmond, 416 U.S. 696, 718 (1974)).
1407. 673 F.2d at 1069.
1408. Id.
1409. Id.
1410. Id. at 1070.
XII. Federal Mine Safety and Health Act

The Federal Mine Safety and Health Act (FMSHA) was enacted to protect the health and safety of miners by providing standards for their safety and health. In addition, the Act provides for enforcement procedures to ensure that the standards are met.

Prior to the 1977 amendments, the Act was entitled "Federal Coal Mine Health and Safety Act of 1969" and provided primarily for coal miners. Currently, however, FMSHA provides for the entire mining industry.

The definition of "mine" under FMSHA is derived from section 802(h)(1). In section 802(h)(1), the definition was extended from the original Act to include a broad spectrum of areas which may be considered within the purview of FMSHA. The Legislature clearly intended that the Act have the broadest possible interpretation.

The Ninth Circuit, in *Cyprus Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission*, further extended the definition of "mine." In *Cyprus*, a federal mine safety and health inspector cited Cyprus for a violation and issued a withdrawal order after a fatal accident. After an unsuccessful review petition before the Mine Safety and Health Administration, Cyprus sought review by the Ninth Circuit, contending that the operation where the accident oc-
curred was not a mine within the meaning of FMSHA.\textsuperscript{1420} Cyprus argued that the accident site was not a mine because the work under way consisted of driving exploratory drifts in search of a commercially exploitable deposit of talc, rather than the extraction of minerals.\textsuperscript{1421}

The court held that in view of the legislative intent to broadly construe section 802(h)(1), the exploratory drifts were "mines" and would therefore fall within the purview of FMSHA.\textsuperscript{1422} In reaching its decision, the court noted that cases in the Ninth Circuit and the Third Circuit have interpreted "mine" under section 802(h)(1) very broadly, to include a backyard rock quarry\textsuperscript{1423} and a sand and gravel preparation plant.\textsuperscript{1424}

\section*{XIII. Service Contract Act}

"[T]he Service Contract Act [(SCA)]\textsuperscript{1425} requires the inclusion of specific provisions establishing minimum wage and fringe benefit levels in every contract entered into by the United States in excess of \$2,500."\textsuperscript{1426} The SCA further prohibits a successor contractor or subcontractor, who will receive substantially the same services as those furnished under the original contract, from paying any service employee wages and fringe benefits in an amount less than that to which the service employee would have been entitled had he remained employed under the predecessor contract.\textsuperscript{1427} The SCA does not expressly provide for a private cause of action.

The Ninth Circuit considered whether violations under the SCA give rise to an implied private right of action in \textit{Miscellaneous Service Workers Local 427 v. Philco-Ford Corp.}\textsuperscript{1428} In \textit{Philco-Ford}, certain workers were employed by Lockheed under a United States Air Force contract. Although Aeronutronic Ford Corporation (AFC) was subsequently awarded the contract, most employees remained to complete the work. AFC entered into a collective bargaining agreement with which the employees altered entitlements to pension benefits formerly

\begin{footnotes}
\item[1420] 664 F.2d at 1117.
\item[1421] Id.
\item[1422] Id. at 1117-18.
\item[1423] Id. at 1118 (citing Marshall v. Wait, 628 F.2d 1255 (9th Cir. 1980)).
\item[1424] 664 F.2d at 1118 (citing Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), \textit{cert. denied, 444 U.S. 1015} (1980)).
\item[1427] 41 U.S.C. § 353(c) (1976).
\item[1428] 661 F.2d 777 (9th Cir. 1981).
\end{footnotes}
enjoyed under the Lockheed contract.\textsuperscript{1429}

The employees claimed that the contract violated the SCA because the contract failed to recognize fringe benefits under the Act.\textsuperscript{1430} Furthermore, they contended that the legislative history of the SCA provides a "private right of action" to enforce the Act.\textsuperscript{1431}

The Ninth Circuit held that the SCA does not specifically grant a private right of action, nor does the language or history of the Act imply such a right.\textsuperscript{1432} Therefore, the court concluded that the employees had no standing under the SCA to institute a private action for violations by AFC.\textsuperscript{1433}

The Court interpreted the Act to restrict employee remedies to administrative channels,\textsuperscript{1434} noting that the Secretary of Labor may compensate employees for violations under the Act by allowing the government contracting agency to withhold funds for such a purpose.\textsuperscript{1435} Moreover, the government may cancel a contract which violates the Act.\textsuperscript{1436}

XIV. \textbf{EQUAL PAY ACT}

Generally, the Equal Pay Act\textsuperscript{1437} requires that women receive equal pay for equal work.\textsuperscript{1438} Each suit brought under the Equal Pay Act, however, must be determined on a case-by-case basis because job duties vary widely.\textsuperscript{1439}

In \textit{Padway v. Patches},\textsuperscript{1440} the Ninth Circuit affirmed a summary judgment in favor of defendants with respect to an Equal Pay Act claim.\textsuperscript{1441} In \textit{Padway}, an elementary school teacher was dismissed along with eight other teachers. Padway claimed that her termination was the result of sex discrimination. She also claimed that she had

\begin{footnotes}{
\textsuperscript{1429} \textit{Id.} at 778. Plaintiffs contended that AFC modified certain pension benefits enjoyed under the Lockheed contract when it refused to recognize various seniority rights under the former contract. However, the court never reached this issue because it disposed of the case on jurisdictional grounds. \textit{Id.} at 778 n.5.


\textsuperscript{1431} \textit{Id.}

\textsuperscript{1432} \textit{Id.}

\textsuperscript{1433} \textit{Id.}

\textsuperscript{1434} \textit{Id.}

\textsuperscript{1435} \textit{Id.} See \textit{41 U.S.C. § 352(a)} (1976).

\textsuperscript{1436} \textit{661 F.2d} at 779. See \textit{41 U.S.C. § 352(c)} (1976).

\textsuperscript{1437} \textit{29 U.S.C. § 206(d)} (1976).


\textsuperscript{1439} Gunther v. County of Washington, 602 F.2d 882, 887 (9th Cir. 1979) (citations omitted).

\textsuperscript{1440} \textit{665 F.2d} 965 (9th Cir. 1982).

\textsuperscript{1441} \textit{Id.} at 970.
received a lower salary because she was a woman. She raised various statutory and common law grounds for her claims.\textsuperscript{1442} With respect to the Equal Pay Act, the court found that Padway failed to establish that the school district had denied females equal wages and retirement benefits in violation of the Act.\textsuperscript{1443} The court stated that the exhibits submitted showed conclusively that Padway had been paid and promoted in accordance with a bona fide salary plan.\textsuperscript{1444} Furthermore, the fact that two male employees were paid a higher salary than Padway was justified by other factors such as previous experience and doctorate degrees.\textsuperscript{1445}

XV. \textsc{Longshoremen's and Harbor Workers' Compensation Act}

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA)\textsuperscript{1446} is intended to afford relief to persons engaged in maritime employment who incur injuries in the course of that employment.\textsuperscript{1447} The 1972 amendments to the LHWCA\textsuperscript{1448} were intended to provide for “adequate, increased and sure compensation for injured longshoremen” and to encourage safe practices “within the industry by placing the duty of care on the [employer, who is] best able to prevent accidents.”\textsuperscript{1449} Intended as a humanitarian act, the LHWCA is to be construed liberally in order to effectuate its purpose.\textsuperscript{1450}

A. \textit{Statutory Presumption of Compensability}

Under section 920(a) of the LHWCA, an injured employee’s claim for compensation is presumed to be compensable absent substantial evidence to the contrary.\textsuperscript{1451} Section 903(a) provides that “[c]ompensation shall be payable . . . but only if the disability . . .

\begin{flushright}
1442. \textit{Id.} at 966.
1443. \textit{Id.} at 969-70.
1444. \textit{Id.} at 970.
1445. \textit{Id.}
1447. \textit{Id.}
1448. Amended in 1972 were §§ 902, 903, 905-910, 912-914, 917, 919, 921, 921(a), 923, 927, 928, 933, 935, 939, 940, 944, and 948(a).
1451. 33 U.S.C. § 920(a) (1976) provided that: “In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary — (a) [t]hat the claim comes within the provisions of this chapter.”
\end{flushright}
results from an injury occurring upon the navigable waters of the United States . . . .’" 1452 “Injury” is defined as an “accidental injury . . . arising out of and in the course of employment . . . .” 1453

In the recent case of United States Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers’ Compensation Programs, 1454 the Supreme Court denied an employee the benefit of the statutory presumption of compensability without requiring the employer to present substantial evidence refuting the existence of a causal relationship between the claimant’s injury and his employment. 1455

In Federal Sheet Metal, a claim for compensation was made under the LHWCA by a sheet metal worker who claimed that he had incurred an injury on November 19, 1975, as a result of lifting heavy ducts. He awoke early the next morning with severe pain in his neck, shoulders and arms. He was subsequently taken to the hospital where it was diagnosed that his discomfort was due to an exacerbated arthritic condition. 1456

The Administrative Law Judge found “that Claimant sustained no injury within the meaning of [section] 2(2) of the Act on November 19, 1975, as alleged . . . .’” 1457 A divided panel of the Benefits Review Board affirmed the denial of disability benefits. 1458 The court of appeals vacated and remanded the case, agreeing with the dissent filed by the Benefits Review Board: “‘The Act does not require that claimant prove an accident in order to establish a claim. To the contrary, compensation is payable under the Act if claimant is disabled because of injury which is causally related to his employment.’” 1459 The issue on remand was not whether the “injury” stemmed from a “work-related incident,” but whether the injury was “employment-bred.” 1460

The Supreme Court reversed the court of appeals because its opinion had ignored the statutory language relating section 20(a) to the employee’s claim, as well as the statutory definition of the term “injury.” 1461 The Court reasoned that the section 20(a) presumption only attaches to the “claim” made by the injured employee. Since the

1454. 455 U.S. 608 (1982).
1455. Id. at 614.
1456. Id. at 609.
1457. Id. at 610.
1460. Id. at 612.
1461. Id.
employee claimed that he was injured on November 19, 1975, and not
that his injury was generally "employment-bred," he was not entitled
to the benefit of a presumption to a claim that was never made.\footnote{1462}

In addition, the Supreme Court found error in the circuit court's
use of the term "injury."\footnote{1463} The Court held that a claimant must al-
lege both that the injury was caused by the employment and that it
arose during the employment.\footnote{1464} In contrast, the District of Columbia
Circuit had adopted a liberal standard, consistently holding that an in-
jury need not have occurred during working hours and need not be
traceable to any particular work-related incident in order to be
compensable.\footnote{1465}

Justice Brennan, joined by Justice Marshall, vigorously dissented.
He pointed out that the issue to be decided was a relatively simple one,
namely, whether the injuries suffered by the claimant \textit{may have been}
"employment-bred."\footnote{1466} "Absent a finding excluding this possibility,
[he argued] compensation could not be denied."\footnote{1467} Brennan stated
that the case should be remanded so that the necessary determination
could be made because the Administrative Law Judge failed to focus
on this crucial issue. Brennan further pointed out that all that is statu-
torily required to make a "claim" is a "simple request for payment,
carrying with it the implicit assertion of an entitlement to compensa-
tion."\footnote{1468} He noted that in \textit{Federal Sheet Metal} there was no indication
that the employer suffered any prejudice or lacked sufficient notice to
properly defend the claim.\footnote{1469}

The net effect of \textit{Federal Sheet Metal} is the insertion of needless
distinctions which constrict the statutory language of section 920(a) of
the LHWCA, originally enacted as a humanitarian act to be liberally
construed. Future claimants will have to be more careful to include in
their claims submissions legal theories setting forth a prima facie case
for compensation. The question to be asked after \textit{Federal Sheet Metal}

\footnotesize{1462. Id. at 614.}
\footnotesize{1463. Id. at 615.}
\footnotesize{1464. Id.}
\footnotesize{1465. See Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir.) (back injury mani-
factured a year after claimant's fall held compensable), \textit{cert. denied}, 429 U.S. 820 (1976); J.V.
Vozzolo, Inc. v. Briton, 377 F.2d 144 (D.C. Cir. 1967) (heart attack due to an employment-
related injury five years before held compensable); Butler v. District Parking Management
Co., 363 F.2d 682 (D.C. Cir. 1966) (compensating for a mental breakdown suffered as a
cumulative result of claimant's 20 years of employment).
1466. 455 U.S. at 619-20 (Brennan, J., dissenting).
1467. Id. at 620.
1468. Id. at 621.
1469. Id. at 622-23.
is whether the claimant’s disability was occasioned by an “accidental injury,” or whether the disability was generally “employment-bred,” or both.

B. Admiralty Jurisdiction

An injured employee cannot be compensated under the LHWCA without satisfying certain maritime situs and status requirements.\(^\text{1470}\) To satisfy the situs requirement, the injury must occur “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).”\(^\text{1471}\) To meet the status requirement, the employee must be “engaged in maritime employment.”\(^\text{1472}\)

Prior to 1977, some courts employed the “point of rest” theory to decide whether an employee was covered under the LHWCA.\(^\text{1473}\) Under that test, maritime employment would include only the portion of the unloading process that took place before the stevedore gang placed cargo onto the dock. Thus, a worker who carried cargo directly from a ship to a warehouse or truck would be engaged in maritime employment and therefore covered under the Act, but one who carried cargo from a warehouse to a truck would not. In loading operations, only those employed to the seaside of the last point of rest would be covered.\(^\text{1474}\)

In *Northeast Marine Terminal Co. v. Caputo*,\(^\text{1475}\) the Supreme Court explicitly rejected the “point of rest” theory. In *Caputo*, one of the claimants was injured while checking and marking goods as they were removed from a container which had been removed from a ship and trucked to a different pier before being emptied.\(^\text{1476}\) The other claimant was injured while rolling a loaded dolly into a consignee’s truck.\(^\text{1477}\) In holding that the claimants were covered by the Act, the Court noted that clear legislative history anticipated that some persons


\(^{1472}\) 33 U.S.C. § 902(3) (1976). Section 902(3) provides that “employee” includes persons “engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker . . . .”


\(^{1476}\) Id. at 253.

\(^{1477}\) Id. at 255.
who work only on land would receive benefits.\textsuperscript{1478}

The Ninth Circuit incorporated the \textit{Caputo} decision in \textit{Ramos v. Universal Dredging Corp.}.\textsuperscript{1479} Ramos was a deckhand who was injured on a dredge while performing his duties of cleaning the deck, checking the fuel, inspecting the pipes, and supplying general maintenance. The Administrative Law Judge determined that Ramos was entitled to compensation under the LHWCA because he was engaged in "maritime employment" and was not a crew member of a vessel, and because the dredge was in navigable waters.\textsuperscript{1480} The Board vacated the award, holding that subject matter jurisdiction was lacking because Ramos' work was not significantly related to commerce on navigable waters.\textsuperscript{1481} The Ninth Circuit reversed and remanded, concluding that the Board had confused jurisdiction with coverage under the Act.\textsuperscript{1482} The court noted that the touchstone in determining whether admiralty jurisdiction exists is whether the case "involves a significant relationship to traditional maritime activity."\textsuperscript{1483} The court concluded that subject matter jurisdiction existed because the operation of a dredge is clearly related to traditional maritime activity.\textsuperscript{1484}

In \textit{Perkins v. Marine Terminals Corp.},\textsuperscript{1485} the Ninth Circuit held that it had subject matter jurisdiction where the injured employee was engaged in maritime employment, which constituted a sufficient nexus to traditional maritime activity to create admiralty jurisdiction.\textsuperscript{1486} In \textit{Perkins}, a longshoreman was injured in his own automobile on his way home from work. He was being compensated, however, for the travel time to and from work.\textsuperscript{1487} The employee filed for compensation under the LHWCA. The Benefits Review Board vacated a compensation award by an Administrative Law Judge, and remanded to dismiss for lack of subject matter jurisdiction. The Board concluded, prior to \textit{Ramos}, that subject matter jurisdiction was lacking because the site of

\begin{itemize}
\item \textsuperscript{1478} \textit{Id.} at 273. \textit{See} P.C. Pfeiffer Co. v. Ford, 444 U.S. at 84 (injuries deemed compensable where worker injured while fastening vehicles delivered to port onto flatcars, and where another worker injured while unloading a bale of cotton from a dray wagon into a pier warehouse).
\item \textsuperscript{1479} 653 F.2d 1353 (9th Cir. 1981).
\item \textsuperscript{1480} \textit{Id.} at 1354.
\item \textsuperscript{1481} \textit{Id.} at 1355.
\item \textsuperscript{1482} \textit{Id.}
\item \textsuperscript{1483} \textit{Id.} at 1358 (citing \textit{Executive Jet Aviation, Inc. v. City of Cleveland}, 409 U.S. 249 (1972)).
\item \textsuperscript{1484} 653 F.2d at 1358.
\item \textsuperscript{1485} 673 F.2d 1097 (9th Cir. 1982).
\item \textsuperscript{1486} \textit{Id.} at 1101.
\item \textsuperscript{1487} \textit{Id.} at 1100.
\end{itemize}
the accident was not connected with maritime activity.\footnote{1488}

In order to be consistent with \textit{Ramos}, the Ninth Circuit reversed, reasoning that “\textit{It is undisputed that Perkins was engaged in maritime employment for purposes of the status test set forth in [section 2(3) of the LHWCA, and] this factor alone constitutes a sufficient nexus to traditional maritime activity to create admiralty jurisdiction.”\footnote{1489} The court pointed out that in some cases the connection with maritime activity may be so remote that a subject matter jurisdiction issue would be presented. The court, however, found that this was not such a case, noting that “\textit{[i]t is the existence of the special employer-employee relationship . . . that is significant for purposes of admiralty jurisdiction.’}”\footnote{1490}

The Ninth Circuit further expanded coverage under the LHWCA in \textit{Schwabenland v. Sanger Boats}.\footnote{1491} In that case, Schwabenland was injured while employed as the sales manager for Sanger Boats, a manufacturer and seller of custom-built, high performance recreational and racing boats. He spent approximately thirty percent of his working time inspecting boats in various states of production. In addition to his sales and inspection duties, Schwabenland was a primary test driver. When Schwabenland was injured, he was test driving a boat.\footnote{1492}

Schwabenland filed for compensation under the LHWCA and the Benefits Review Board refused his claim. The Board focused on Schwabenland’s overall employment and held that “a worker must spend a substantial amount of work time performing maritime duties in order to fall within the coverage of the Act.”\footnote{1493}

The Ninth Circuit reversed, holding that “Schwabenland’s regular performance of maritime operations, even though it constituted less than a ‘substantial portion’ of his overall working time, was sufficient to satisfy the status requirement of section 2(3).”\footnote{1494}

The court reiterated that for employment to be maritime, it “must have a realistically significant relationship to ‘traditional maritime activity involving navigation and commerce on navigable waters.’”\footnote{1495}

\begin{footnotes}
\item[1488] Id.
\item[1489] Id. at 1101.
\item[1490] Id. (quoting Sea-Land Serv., Inc. v. Director, Office of Workers’ Compensation Programs, 540 F.2d 629, 636 (3d Cir. 1976)).
\item[1491] 683 F.2d 309 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 814 (1983).
\item[1492] Id. at 310.
\item[1493] Id.
\item[1494] Id. at 312 (footnote omitted).
\item[1495] Id. at 311 (quoting Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir. 1975), \textit{cert. denied}, 429 U.S. 868 (1976)).
\end{footnotes}
Moreover, the court rejected the "substantial portion" test, stating that "[it departs] from the letter and the spirit of Caputo . . . and would be contrary to the Supreme Court's directive to take an expansive view of the coverage to give effect to the remedial purpose of the Act."  

The Ninth Circuit further solidified its expansive interpretation of "status" in Kelly v. Director, Office of Workers' Compensation Programs. In its abbreviated opinion, the court found the facts of Kelly indistinguishable from those in the Second Circuit case of Arbeeny v. McRoberts Protective Agency. In Kelly, the claimant's job involved protecting shipping containers from theft damage. In Arbeeny, the claimants were pier guards whose duty was to insure the protection of cargo on the pier, dock and adjacent areas of marine terminals against theft, pilferage, vandalism and fire. In both cases, the Board denied the claim for compensation under the LHWCA.

In Arbeeny, the Benefits Review Board held that the claimants could not be compensated because their duties "lacked the realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." The Second Circuit reversed, holding that the claimants' tasks were "clearly an integral part of the unloading process . . . ." The court reasoned that the guards could be likened to the checker in Caputo, and in the spirit of broad construction appropriate in remedial legislation, the claimants satisfied the status requirement of section 2(3) of the LHWCA.

In Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs, an employee who repaired and maintained tractors and trailers used to move cargo and containers was found to satisfy the "status" requirement of section 2(3) of the LHWCA. In Sea-
Land, the claimant was injured while installing a transmission and while removing air tanks from a truck. He applied for compensation under the LHWCA, and the Benefits Review Board affirmed the Administrative Law Judge’s conclusion that the claimant was covered. The employer appealed.

The Ninth Circuit affirmed. The court relied on what it perceived to be a growing recognition that “[t]he repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore ‘maritime employment’ covered by the Act.”

C. Statute of Limitations

The 1972 amendments to section 13(a) of the LHWCA expanded the period for filing a claim for compensation from one year after the injury to one year after the employee becomes aware of his or her injury. The Fifth Circuit has held that the 1972 amendment is procedural and therefore applies to claims pending at the time of its enactment.

In *Todd Shipyards Corp. v. Allan*, the Ninth Circuit upheld the Benefits Review Board’s application of the 1972 amended statute of limitations to an employee’s pending pre-1972 injury because he was not aware of the full character, extent and impact of the harm done to him within one year after his injury.

In *Todd*, employee Allan was injured when a piece of metal fell on his neck and shoulder. The injury was diagnosed as just a bruise, and Allan continued to work. The pain persisted and nearly two years later it was determined that the incident initiated a progressive ailment that rendered Allan permanently partially disabled.

The court adopted the reasoning of the Fifth Circuit that the claim was covered by the amended version of section 13(a) because the amendment was procedural and therefore applied to pending claims. Moreover, since the statute was remedial, the court read it

1505. Id.
1508. Cooper Stevedoring, Inc. v. Washington, 556 F.2d 268, 274 (5th Cir. 1977) (new wording applied where claimant's accident occurred a few months prior to the effective date of the 1972 amendment to section 13(a)).
1509. 666 F.2d 399 (9th Cir.), cert. denied, 103 S. Ct. 444 (1982).
1510. Id. at 401-02.
1511. Id. at 400-01.
1512. Id. at 401 (citing Cooper Stevedoring, 556 F.2d at 274).
liberally to "'best effectuate' the Congressional purpose." 1513

D. "Zone of Danger" Concept

In O'Leary v. Brown-Pacific-Maxon, Inc., 1514 the Supreme Court articulated the standard of coverage for the LHWCA:

The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. 1515

The Ninth Circuit recently applied the "zone of special danger" concept in Ford Aerospace and Communications Corp. v. Boling. 1516 In Ford, the employee began experiencing chest pains while quartered in barracks provided by his employer. An ambulance was called, but a stretcher could not be maneuvered to his room because of the narrow construction of the barrack passageway. As a result, the employee had to walk from his room to a larger room where a stretcher was waiting. He made this walk while suffering from a myocardial infarction. He was taken to the hospital, where he died. 1517

The Administrative Law Judge (ALJ) found the widow's claim compensable. 1518 The Benefits Review Board affirmed, and Ford appealed, arguing that the decision was unreasonable because it imposed "absolute liability on an employer for any injury as long as the job location is less than the best place imaginable to survive a heart attack." 1519 The Ford court disagreed, and upheld the ALJ's finding that the "zone of danger" was created by the construction of the barracks. 1520 Moreover, the court noted that Ford failed to show error in the finding that the construction of the building prevented the stretcher from being carried to the employee's room. 1521

1513. 666 F.2d at 401 (citing Cooper Stevedoring, 556 F.2d at 272).
1515. Id. at 506-07 (citations omitted).
1516. 684 F.2d 640 (9th Cir. 1982).
1517. Id. at 641.
1518. Id.
1519. Id. at 642.
1520. Id.
1521. Id.
E. Duty of Care Under the LHWCA

As a result of the 1972 amendments to the LHWCA, an injured longshoreworker can recover damages against a shipowner only by showing the shipowner's negligence.\textsuperscript{1522} Under this statutory authority, the Secretary of Labor has promulgated safety and health regulations for longshoring.\textsuperscript{1523} These regulations provide that work areas be kept clear of loose tripping or stumbled hazards.\textsuperscript{1524} In addition, the regulations impose a duty of care on stevedores, so that a negligent shipowner's liability may be reduced to the extent that an accident is due to a stevedore's negligence.\textsuperscript{1525}

In the Supreme Court case of \textit{Scindia Steam Navigation Co. v. De Los Santos},\textsuperscript{1526} a longshoreworker was injured by cargo that fell from an allegedly defective winch that was part of the ship's gear, but which was being operated by another longshoreworker.\textsuperscript{1527} The Supreme Court held that a "shipowner has no general duty . . . to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore."\textsuperscript{1528} The Court warned, however, that until a stevedore begins work, a shipowner does have a duty of care to warn of defects and make conditions safe.\textsuperscript{1529}

In \textit{Davis v. Partenreederei M.S. Normannia},\textsuperscript{1530} the Ninth Circuit adopted the distinction set forth in \textit{Scindia} and found a shipowner liable for failing to warn of defects and to make conditions safe.\textsuperscript{1531} In \textit{Davis}, a longshoreworker was injured when struck by cargo positioned dangerously close to a gangway.\textsuperscript{1532} The \textit{Davis} court held that even though the sole responsibility for safety in unloading cargo is vested in the stevedore, the shipowner could also be found liable for failure to warn of a dangerous condition.\textsuperscript{1533}

The Ninth Circuit in \textit{Subingsubing v. Reardon Smith Line, Ltd.},\textsuperscript{1534} applied the reasoning of \textit{Scindia} and \textit{Davis} to deny summary judgment

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\begin{enumerate}
\item[1524.] 29 C.F.R. § 1918.91(a) (1983).
\item[1525.] 29 C.F.R. § 1918-2(b) (1983).
\item[1526.] 451 U.S. 156 (1981).
\item[1527.] \textit{Id}. at 159-60.
\item[1528.] \textit{Id}. at 172.
\item[1529.] \textit{Id}. at 167.
\item[1530.] 657 F.2d 1048 (9th Cir. 1981).
\item[1531.] \textit{Id}. at 1049.
\item[1532.] \textit{Id}. at 1050.
\item[1533.] \textit{Id}. at 1050-51.
\item[1534.] 682 F.2d 779 (9th Cir. 1982).
\end{enumerate}
\end{footnotesize}
to a shipowner. In *Subingsubing*, a longshoreworker died from injuries sustained when he stepped on a "dead-eye," a small piece of wood used to stop the step of a rope ladder from moving. The plaintiff-widow brought forth evidence to show that the "dead-eye" came from a ladder used by the vessel's crew and that the accident took place ten minutes after the longshoring crew came on board.\footnote{Id. at 779-80.}

The district court granted summary judgment for the vessel owner, citing *Scindia*.\footnote{Id. at 780.} The Ninth Circuit reversed and remanded, holding that although the vessel owner may have owed the longshoreworker no duty to supervise stevedoring operations, it owed a duty of care to clear the deck of tripping hazards before longshoring operations began.\footnote{Id. at 782.}

The court further noted that:

> [perhaps] the crew acted negligently by failing to find the defect in the rope from which the "dead-eye" was lost. [Or perhaps] the "dead-eye" may have been on the deck for a period of time sufficient to make the vessel negligent for failing to remove it. Such questions are typically left to the jury.\footnote{Id. at 781.}

**XVI. Age Discrimination in Employment Act**

**A. Notice of Intent to Sue**

The Age Discrimination in Employment Act of 1967 (ADEA)\footnote{29 U.S.C. §§ 621-634 (1976 & Supp. V 1981).} prohibits discrimination against employees on the basis of age. Congress has declared that the purpose of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."\footnote{29 U.S.C. § 621(b) (1976).}

Under section 626(d)(1)-(2), the ADEA requires a grievant to file a "notice of intent to sue" with the Secretary of Labor.\footnote{29 U.S.C. § 626(d)(1), (2) (1976). In 1978, this section was amended so that only a charge alleging unlawful discrimination need be filed. See 29 U.S.C. § 626(d) (Supp. V 1981). The amendment also requires that charges be filed with the EEOC rather than the Department of Labor. See 29 U.S.C. § 625 (Supp. V 1981).} This notice provides the Department of Labor with sufficient information to notify prospective defendants and gives the Secretary an opportunity to elimi-
nate the alleged unlawful practice through informal conciliation.\textsuperscript{1542} The grievant must file the "notice of intent to sue" within 180 days of an alleged statutory violation, or in a deferral state (a state which provides an additional cause of action for age discrimination),\textsuperscript{1543} within 300 days.\textsuperscript{1544}

Confusion has developed in reconciling section 626 and 633(b) of the ADEA. Section 633(b) provides that in cases occurring in deferral states, no suit may be brought under section 626 until sixty days after proceedings have commenced before the state agency unless the state proceedings terminated earlier.\textsuperscript{1545}

In \textit{Oscar Mayer & Co. v. Evans},\textsuperscript{1546} the Supreme Court attempted to reconcile sections 626 and 633(b). In \textit{Oscar Mayer}, an employee was involuntarily retired after twenty-three years of employment. He filed a notice of intent to sue with the Secretary of Labor, charging that he had been forced to retire because of his age in violation of the ADEA. Upon Evans' inquiry, the Department informed him that the ADEA contained no requirement that he file a state complaint in order to preserve his federal rights. After federal conciliation efforts failed, Evans brought suit against the company in federal district court.

On these facts, the Supreme Court held that section 633(b) required grievants in deferral state actions to resort to state proceedings before bringing suit in federal court.\textsuperscript{1547} The Court also held, however, that such commencement of state proceedings for federal ADEA purposes need not be timely or effectual under state law.\textsuperscript{1548}

The Ninth Circuit distinguished \textit{Oscar Mayer} in \textit{Bean v. Crocker National Bank}.\textsuperscript{1549} In \textit{Bean}, the dispute arose after Crocker discharged more than 1,000 employees, including the claimant, in the spring and summer of 1974. On September 12, 1974, an attorney filed letters with the California Fair Employment Practices Commission and with the United States Department of Labor alleging that Crocker terminated several employees because of age. An investigation took place, and on February 13, 1975, a notice of intent to sue was filed under section 626(d). By May 7, 1975, the Department's attempts to conciliate the

\begin{itemize}
\item \textsuperscript{1543} 29 U.S.C. § 633(b) (1976).
\item \textsuperscript{1545} 29 U.S.C. § 633(b) (1976).
\item \textsuperscript{1546} 441 U.S. 750 (1979).
\item \textsuperscript{1547} \textit{Id.} at 758.
\item \textsuperscript{1548} \textit{Id.} at 764-65.
\item \textsuperscript{1549} 600 F.2d 754 (9th Cir. 1979).
\end{itemize}
dispute failed, and on July 3, 1975, the claimant filed an action in federal district court.

The *Bean* court held that in a deferral state the claimant must file with the Secretary of Labor within 300 days whether or not he or she has filed an action in state court. In so holding, the court indicated that the only plausible inference to be derived from *Oscar Mayer* is that "compliance with state time limitations in a deferral state must also be deemed irrelevant for purposes of determining whether a complainant has 180 or 300 days to file a notice of intent to sue with the Secretary."1550

The Ninth Circuit in *Aronsen v. Crown Zellerbach*,1551 was urged to reconsider its position, as enunciated in *Bean*, to conform with the approaches of the First and Sixth Circuits.1552 In *Aronsen*, the claim-

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1550. *Id.* at 759. Since the *Bean* decision, two other circuits have held that section 626(d) must be read to imply a requirement that proceedings be commenced within 180 days of an alleged violation in order to qualify for the 300-day federal filing period. In *Ewald v. Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183 (6th Cir.), *summarily vacated*, 449 U.S. 914 (1980), *cert. denied*, 451 U.S. 985 (1981), the Sixth Circuit held, on facts similar to those of *Bean*, that a grievant must file with either the state or federal agency within 180 days in order to qualify for the additional 120-day filing time. *Id.* at 1187. In *Ciccone v. Textron, Inc.*, 616 F.2d 1216 (1st Cir.), *summarily vacated*, 449 U.S. 914 (1980), *cert. denied*, 452 U.S. 917 (1981), the First Circuit held that a grievant must file with the state agency within 180 days in order to secure the 120-day filing extension with the Secretary of Labor. *Id.* at 1221. *Ciccone* relied upon an analogy to the similar filing provisions in Title VII, under which a complainant has 180 days to file with the EEOC in a non-deferral state and 300 days in a deferral state. See 42 U.S.C. § 2000e-5(e) (1978). When *Ciccone* was decided, at least one court interpreted section 2000e-5(e) to require a grievant to commence state proceedings within 180 days of an alleged violation in order to have the 300 days for filing the federal charge. See *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1233 (8th Cir. 1975) (en banc). *Ciccone* relied on the rationale of the *Olson* case and concluded that the ADEA filing periods should be construed as *Olson* construed the Title VII periods.

The *Olson* court's interpretation of the Title VII filing period, however, has not been accepted by other circuits. See *Doski v. Goldsicker Co.*, 539 F.2d 1326 (4th Cir. 1976); *Silver v. Mohasco Corp.*, 602 F.2d 1083 (2d Cir. 1979), rev'd on other grounds, 447 U.S. 807 (1980). Recently, the Ninth Circuit rejected *Olson* and found that 300 days was the proper time limit. See *Wiltshire v. Standard Oil Co.*, 652 F.2d 837 (9th Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982).


1552. With respect to the position that claimant Aronsen was barred by the 180-day limitation, it is noteworthy that the Supreme Court in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), summarily vacated the leading cases interpreting the ADEA as imposing the 180-day filing deadline with the state agency in order to qualify for the extended 120 days in which to file with the Secretary of Labor. *Mohasco* involved a similar ruling interpreting the filing provisions under Title VII. The Sixth Circuit in *Ewald v. Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183 (6th Cir. 1980), and on remand, the First Circuit in *Ciccone v. Textron, Inc.*, 651 F.2d 1 (1st Cir.), *cert. denied*, 452 U.S. 917 (1981), struck down the 180-day limitation in deferral states. *Accord Davis v. Calgon Corp.*, 627 F.2d 674 (3d Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981).
enant, Aronsen, worked as a research associate for Crown Zellerbach for twenty-eight years, virtually his entire working life since college graduation. Aronsen alleged in his complaint that Zellerbach terminated him solely on the basis of his age pursuant to its policy of replacing employees nearing retirement age. Furthermore, Aronsen asserted that Zellerbach terminated him on April 21, 1976, and that he gave the required notice of intent to sue to the Secretary of Labor on January 19, 1977, about 270 days later. This asserted day was within the 300-day time period of section 626(d)(2) but not within the 180-day period required in section 626(d)(1). There was evidence in the record that a Zellerbach vice president informally told Aronsen in the spring of 1975 that he would be terminated. 1553

Based on the evidence of the informal meeting in 1975, the district court concluded that Aronsen’s “notice of intent to sue” was untimely, thus failing to satisfy a prerequisite to sue under the ADEA. Therefore, the district court dismissed the action on Zellerbach’s motion for summary judgment. 1554 The Ninth Circuit reversed and remanded because triable issues of fact existed as to the date of Aronsen’s termination. 1555

The Aronsen court explicitly reaffirmed the Bean holding and determined that the standard to be used on remand was that ADEA grievants in deferral states have up to 300 days within which to file their notice or charge. 1556

B. ADEA “Determining Factor” Standard

The ADEA makes it unlawful for an employer to discharge any individual because of age. 1557 The Ninth Circuit, in Kelly v. American Standard, Inc., 1558 adopted the “determining factor” test. The determining factor test provides that age must make a difference between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged. 1559

In American Standard, Kelly was employed for over twenty years when he brought suit, alleging that his termination was a violation of

1553. 662 F.2d at 585-86.
1554. Id.
1555. Id. at 595.
1556. Id.
1558. 640 F.2d 974 (9th Cir. 1981).
1559. Id. at 984-85.
the ADEA and state law. The company argued that, under the ADEA, age must be the sole factor determining whether the employee is retained or discharged. The court disagreed, adopting the "determining factor" test as formulated by the Sixth Circuit in *Laugesen v. Anaconda Co.* and restated as a "but for" test by the First Circuit in *Loeb v. Textron, Inc.* The court in *American Standard* further stated that the jury should be instructed that the "plaintiff has the burden of proving that 'one of the reasons he was terminated was because of his age. . . .' and that he should prevail if this factor 'made a difference in determining whether or not [he] was retained or discharged.' A requirement that plaintiff prove that his age was the only factor in his termination would impose an intolerable burden on that plaintiff.

In *Cancellier v. Federated Department Stores,* the Ninth Circuit reaffirmed its commitment to the "determining factor" test as set forth in *American Standard.* In *Cancellier,* three employees were terminated after having been employed at I. Magnin for twenty-five, seventeen, and eighteen years, respectively. They argued that their terminations

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1560. WASH. REV. CODE ANN. § 49.60.180(2) (Supp. 1982) provides that "[i]t is an unfair practice for any employer: To discharge or bar any person from employment because of such person's age . . . ."

1561. 640 F.2d at 977.
1562. Id. at 984.
1563. 510 F.2d 307, 317 (6th Cir. 1975) (plaintiff entitled to recover if one factor is his age and if in fact it made a difference in determining whether he was retained or discharged).
1564. 600 F.2d 1003, 1019 (1st Cir. 1979) ("but for" employer's motive to discriminate on age, employee would not have been terminated).
1565. The Ninth Circuit opinion in *American Standard* summarized the jury instructions given by the judge at trial. Those jury instructions in full provided that:

The plaintiff has the burden of proving:

1. that one of the reasons he was terminated was because of his age; and
2. that as a result of the termination, he has suffered damage.

Title 29, Section 623(f), United States Code, provides that it shall not be unlawful for an employer to discharge any individual from his employment, or classify his employees in any way, for good cause or where the discharge or classification is based on reasonable factors other than age.

You are instructed that there may be more than one factor in defendant's decision to terminate the plaintiff's employment; but plaintiff is nevertheless entitled to recover if one such factor was his age and if, in fact, it made a difference in determining whether or not the plaintiff was retained or discharged . . . .


1566. 640 F.2d at 984 (quoting the trial judge).
1567. Id. at 984-85.
1568. 672 F.2d 1312 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982).
violated the ADEA.\textsuperscript{1569} After a $1.9 million award in favor of the employees, both sides appealed.\textsuperscript{1570}

I. Magnin based its appeal on the failure of the trial judge to give the American Standard jury instruction.\textsuperscript{1571} While the judge instructed the jury that "[a]ge must be a determining factor in an employer’s personnel policies or practices before violation of the Act occurs,"\textsuperscript{1572} he failed to explain the meaning of "determining factor" for lawsuits under the ADEA.\textsuperscript{1573}

The Ninth Circuit found that failure to give the American Standard jury instruction was error but, on the facts of this case, was not prejudicial.\textsuperscript{1574} While the court noted that it was extremely reluctant to affirm verdicts based on jury instructions different from those approved in American Standard, it added that the case was not decided by a "hairsbreadth" and that the error was therefore harmless.\textsuperscript{1575}

\textit{C. ADEA Exceptions}

Under the ADEA, where it is admitted that an employee was terminated solely because of age, the burden shifts to the employer to prove that the termination falls within one of the exceptions to the ADEA’s prohibitions.\textsuperscript{1576} The employer must show either that age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business, or that the termination

\begin{itemize}
  \item \textsuperscript{1570} 672 F.2d at 1315. The employees appealed for reinstatement and for injunctive relief. The court denied relief. Reinstatement and injunctive relief are both within the discretion of the trial court for ADEA claims. The Ninth Circuit concluded that, given the facts of the case, the trial court had not abused its discretion by limiting relief to monetary damages. Id. at 1319-20. The trial court noted that reinstatement would not be practicable because of animosity between plaintiffs and I. Magnin which would interfere with business relationships. Id. at 1319. Furthermore, the trial court concluded that the large damage award and attorney’s fees would deter I. Magnin from future age discrimination and therefore an injunction was not necessary. Id. at 1320.
  \item \textsuperscript{1571} Id. at 1315.
  \item \textsuperscript{1572} Id. at 1316.
  \item \textsuperscript{1573} Id.
  \item \textsuperscript{1574} Id. at 1316-17.
  \item \textsuperscript{1575} Id. at 1316. The court noted that there was ample evidence that consideration of age "made a difference" in I. Magnin’s decision to terminate the three plaintiffs.
  \item \textsuperscript{1576} 29 U.S.C. § 623(f) (1976); see also Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981); Sutton v. Atlantic Richfield Co., 646 F.2d 407, 411 (9th Cir. 1981).
\end{itemize}
was in compliance with terms of a bona fide seniority plan.\footnote{1577}

In \textit{Usery v. Tamiami Trail Tours, Inc.},\footnote{1578} the Fifth Circuit formulated a two-pronged test for the applicability of the BFOQ defense. In \textit{Tamiami}, a bus company refused to hire employees above a specific age asserting that the refusal was a BFOQ due to safety reasons inherent in its business. The court agreed, reasoning that there existed a "factual basis" for the bus company's discrimination based on age.\footnote{1579} The test the court used was that the employer must establish (1) that the qualification is reasonably necessary to the essence of its business; and (2) that there is a factual basis for believing that all or substantially all persons over a certain age would be unable to perform the duties of the job safely and efficiently, or that it is impossible or impracticable to ascertain the difference between older employees who can and cannot perform the job safely.\footnote{1580}

In \textit{E.E.O.C. v. County of Santa Barbara},\footnote{1581} the Ninth Circuit adopted the Fifth Circuit's two-pronged test for the applicability of the BFOQ defense.\footnote{1582} In \textit{Santa Barbara}, the county contended that its dismissal of two correctional officers was based on safety concerns and therefore fell within the BFOQ exception. The court denied the county's motion for summary judgment because of a lack of factual evidence to show that age impacted on an employee's ability to perform the tasks required of a correctional officer.\footnote{1583} Moreover, the court was reluctant to accept unsubstantiated assumptions that older people are unable to perform adequately the tasks of the job. The court concluded that such assumptions are condemned by the ADEA, which seeks to promote employment of older persons based on their abilities without reference to age.\footnote{1584}

Prior to the 1978 amendment to the ADEA, an employer was permitted to force an employee to retire involuntarily if the employee was covered by a bona fide retirement plan which stipulated a specific retirement age.\footnote{1585} In the Ninth Circuit, a bona fide plan is defined as a

\footnotesize

\begin{itemize}
\item 1578. 531 F.2d 224 (5th Cir. 1976).
\item 1579. \textit{Id.} at 238.
\item 1580. \textit{Id.} at 235.
\item 1581. 666 F.2d 373 (9th Cir. 1982).
\item 1582. \textit{Id.} at 376.
\item 1583. \textit{Id.} at 376-77.
\item 1584. \textit{Id.} at 376.
\item 1585. 29 U.S.C. § 623(f)(2). \textit{See} United Airlines, Inc. v. McMann, 434 U.S. 192 (1977) (airline pilot member of retirement plan with normal retirement age 60 years). In 1978, Congress amended section 623(f)(2) to preclude the retirement of any individual on the basis
\end{itemize}
genuine plan that pays substantial benefits.\textsuperscript{1586}

In \textit{E.E.O.C. v. County of Santa Barbara},\textsuperscript{1587} the court refused to apply the bona fide seniority plan exception because the employees were retired pursuant to the involuntary retirement terms of a Safety Member Plan in which they were unable to participate.\textsuperscript{1588}

I. \textsc{Administration of the Act}
   \textit{Melissa L. Garrity}

II. \textsc{Unfair Labor Practices}
   \textit{John J. Collins}

III. \textsc{Collective Bargaining}
    A. \textit{Scott A. Meyerhoff}
    B. \textit{Pollyann L. Brophy}
    C. \textit{Pollyann L. Brophy}

IV. \textsc{Concerted Actions}
    \textit{Pollyann L. Brophy}

V. \textsc{Occupational Safety and Health Act}
   \textit{Juliana Stamato}

VI. \textsc{Sex Discrimination Under Title VII}
    \textit{Juliana Stamato}

VII. \textsc{Employment Retirement Income and Security Act}
    \textit{Tracy B. McCulloch}

VIII. \textsc{Civil Service Reform Act}
     \textit{Tracy B. McCulloch}

IX. \textsc{Urban Mass Transportation Act}
    \textit{Barry P. Goldberg}

X. \textsc{Railway Labor Act}
    \textit{Barry P. Goldberg}

XI. \textsc{Comprehensive Employment and Training Act}
    \textit{Barry P. Goldberg}

XII. \textsc{Federal Mine Safety and Health Act}
     \textit{Barry P. Goldberg}

XIII. \textsc{Service Contract Act}

\textsuperscript{1586} 666 F.2d at 377 (citing Marshall v. Hawaiian Telephone Co., 575 F.2d 763, 766 (9th Cir. 1978)).
\textsuperscript{1587} 666 F.2d at 373 (9th Cir. 1982).
\textsuperscript{1588} \textit{Id.} at 377. The Safety Member Plan required retirement at age 60. Although the plaintiffs were classified as law enforcement personnel, they were excluded from the plan because they had been hired after they were age 35. \textit{Id.} at 374-75.
XIV. Equal Pay Act
   Barry P. Goldberg

XV. Longshoremen's and Harbor Workers' Compensation Act
   Barry P. Goldberg

XVI. Age Discrimination in Employment Act
   Barry P. Goldberg
I. INTRODUCTION

The National Labor Relations Act (hereinafter NLRA),1 protects both employers and employees from unfair labor practices. Accordingly, section 8(b)(4) of the NLRA prohibits secondary boycotts.2 Traditionally, a secondary boycott occurs when a labor organization exerts pressure on an employer with whom it is involved in a dispute (the primary employer) by coercing another employer, with whom the labor

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2. Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1976), is commonly known as the secondary boycott prohibition. However, the statute, by its terms, does not differentiate primary and secondary activity. In fact, the term “secondary boycott” does not appear in section 8(b)(4). Rather, section 8(b)(4) proscribes specified conduct if it is engaged in with specified objectives. Section 8(b)(4) provides in pertinent part:

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

   (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

   (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

Title 29 U.S.C. § 152 (1976) defines the terms “person,” “commerce,” and “affecting commerce,” and provides in relevant part that:

(1) The term “person” includes one or more individuals, labor organizations, partnerships, associations, [or] corporations.

(6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, or between any foreign country and any State.

(7) 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.
organization has no dispute (the neutral or secondary employer), to cease doing business with the primary employer. By causing a cessation of business between the primary and secondary employers, the labor organization attempts to further its goals in the dispute with the primary employer (the primary dispute). As a result, the labor organization entangles the secondary employer in the primary dispute.3

In *International Longshoremen’s Association v. Allied International, Inc.*,4 the United States Supreme Court declared that a labor organization’s politically-motivated boycott of Soviet goods constituted a secondary boycott prohibited by section 8(b)(4)(B) of the NLRA.5 To reach this conclusion, the Supreme Court addressed three major issues: (1) whether the union’s conduct was within the commerce jurisdiction of the NLRA;6 (2) whether the union’s conduct constituted a secondary boycott within the NLRA proscription;7 and (3) whether prohibiting the union’s conduct infringed upon the first amendment rights of the labor organization and/or its members.8

The purpose of this casenote is to analyze the Supreme Court’s resolution of each of these issues and the guidelines its reasoning provides for lower courts that will confront these issues in the future. This note suggests that the Court’s resolution of the commerce jurisdiction issue injected some confusion into the traditional test of commerce jurisdiction while establishing only that the effects of union conduct are relevant to determining whether secondary activity is “in commerce.” In addition, this note will show that the Court’s analysis of the secondary boycott issue simply reaffirmed the “ruin or substantial loss” test used to determine whether secondary union conduct violates section 8(b)(4)(B), yet contributed little to the definition of ruin or substantial loss. Finally, because the Court failed to consider the political motivation behind the International Longshoremen’s Association’s conduct

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3. The following hypothetical presents an example of a successful secondary boycott:

A union is involved in a dispute with employer A. A is, therefore, the “primary” employer and the dispute between A and the union is the “primary” dispute. A does business with B, another employer, whose employees are represented by the union; B is not involved in the primary dispute. Therefore, B is the neutral or “secondary” employer. The union induces B’s employees to refuse to work for B unless B ceases doing business with A. To avoid the costs of a work stoppage, B ceases doing business with A. As a result, A is forced to choose between losing further business as a result of further union action or capitulating to the union’s demands in the primary dispute. Thus, A is pressured into complying with the union’s demands in the primary dispute.

5. *Id.* at 218.
6. *Id.* at 220-22.
7. *Id.* at 222-26.
8. *Id.* at 226-27.
and based its resolution of the first amendment issue entirely on its determination that the union's conduct was an illegal secondary boycott, its reasoning and holding simply reaffirmed the general rule that unlawful conduct is not protected by the first amendment. Therefore, this note will conclude that the Court's reasoning established only very broad general guidelines for the resolution of these issues in future cases.⁹

II. FACTS OF THE CASE

In January, 1980, Thomas Gleason, President of the International Longshoremen's Association (hereinafter ILA), issued a directive ordering ILA members to cease handling cargo bound for or originating in the Soviet Union. The boycott was announced to be a political protest of the Soviet Union's invasion of Afghanistan. As a result of the directive, longshoremen refused to service ships carrying Soviet cargo.⁹

Allied International, Inc. (hereinafter Allied) is a Massachusetts corporation which imports Soviet wood products for resale in the United States. Allied contracted with Waterman Steamship Lines (hereinafter Waterman), a New York freight company operating ships of United States registry, to ship wood from the Soviet Union to six ports in the United States, including Boston. Waterman employed a Massachusetts stevedore company, John T. Clark & Son of Boston, Inc. (hereinafter Clark) to unload its ships in Boston.¹⁰ Clark employed ILA longshoremen pursuant to a collective bargaining agreement between the ILA, Local 799, and the Boston Shipping Association, of

⁹. Courts may confront these issues again in the context of a politically motivated secondary boycott because, in December of 1981, the ILA announced a boycott of Polish cargo to protest the imposition of martial law in Poland. N.Y. Times, Dec. 22, 1981, at 11, col. 4. The announcement stated in part:

Out of sympathy with our striking Polish brothers, the ILA is directing its members not to handle any cargo to and/or from Poland on any vessel until such time as martial law, the detention of trade union leaders and the denial of the civil rights of the Polish people come to an end.


¹¹. Walsh v. International Longshoremen's Ass'n, 488 F. Supp. 524, 525 (D. Mass. 1980). Allied Int'l, Inc. v. International Longshoremen's Ass'n, 492 F. Supp. 334 (D. Mass. 1980), was consolidated with Walsh. Therefore, some facts of Allied are found in Walsh. Walsh grew out of the same unfair labor practice charge filed by Allied against the ILA. NLRB Regional Director, Michael F. Walsh, petitioned the United States District Court for the District of Massachusetts for a section 10(e) injunction pending the NLRB's resolution of Allied's unfair labor practice charge.
which Clark is a member.\textsuperscript{12} As a result of the ILA boycott, Clark was unable to obtain longshoremen to unload Waterman's ships which were carrying Allied's imports.\textsuperscript{13} Consequently, Allied's shipments of Soviet wood products were completely disrupted.\textsuperscript{14}

Allied sued the ILA in the United States District Court for the District of Massachusetts, alleging that the ILA was engaging in a secondary boycott in violation of section 8(b)(4)(B) of the NLRA. Allied sought damages under section 303 of the Labor-Management Relations Act.\textsuperscript{15} The court dismissed the complaint,\textsuperscript{16} stating that it failed to allege a violation of section 8(b)(4)(B) because the ILA action was a political "primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods."\textsuperscript{17} As a primary boycott, the ILA action was not within the scope of section 8(b)(4)(B).\textsuperscript{18} The Court of Appeals for the First Circuit reversed and held that Allied had alleged a violation of section 8(b)(4)(B).\textsuperscript{19} The court found

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\textsuperscript{12} 456 U.S. at 215.
\textsuperscript{13} 488 F. Supp. at 526.
\textsuperscript{14} 456 U.S. at 215-16.

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) . . . may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

\textsuperscript{16} 492 F. Supp. at 339. Allied advanced three theories to justify injunctive and monetary relief from the ILA's action: (1) violation of the NLRA secondary boycott provision; (2) violation of the Sherman Antitrust Act prohibition on restraints of trade; and (3) international interference with contractual relations. \textit{Id.} at 335-36. The court held that Allied had failed to state a cause of action under any of the three theories asserted. \textit{Id.} at 339.

\textsuperscript{17} Walsh, 488 F. Supp. at 531 (emphasis added). \textit{See} 492 F. Supp. at 338 (ILA's boycott is "wholly politically oriented with no apparent economic benefit accruing to the union or its members.").

\textsuperscript{18} Title 29 U.S.C. § 158(b)(4)(B) (1976) contains a proviso which states "[t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The district court in \textit{Walsh} determined that the ILA action was a primary boycott of Soviet goods because

[l]he ILA has not induced a strike against Allied, Waterman, or Clark; nor does it seek to pressure those employers not to deal with one another. No picket lines have been established and no other employees have been prevented from work. Union members have simply declined to accept employment on certain ships, as a form of political protest.


\textsuperscript{19} Allied Int'l, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368, 1379 (1st Cir. 1981). The court determined that the district court had properly dismissed Allied's
that: (1) the ILA conduct was within the commerce jurisdiction of the NLRA,\(^\text{20}\) (2) the ILA action constituted prohibited secondary activity,\(^\text{21}\) and (3) prohibiting the ILA from ordering employees to cease handling Soviet goods would not infringe upon the first amendment guarantee of free speech.\(^\text{22}\) The United States Supreme Court granted the ILA's writ of certiorari,\(^\text{23}\) adopted the reasoning of the court of appeals and affirmed its ruling.\(^\text{24}\)

III. Historical Setting

A. Legislation

Prior to 1932, there were no federal statutes designed to govern labor relations. However, the Sherman Antitrust Act of 1890\(^\text{25}\) functioned as a significant curb on secondary union activity because federal courts used it as authority to issue injunctions against "virtually every collective activity of labor as an unlawful restraint of trade."\(^\text{26}\) Responding to union protests, Congress enacted the Clayton Act of 1914,\(^\text{27}\) which prohibited federal courts from issuing injunctions in controversies "involving, or growing out of, a dispute concerning terms or conditions of employment."\(^\text{28}\) Subsequent judicial interpretation of the Clayton Act revealed that it immunized primary, but not secondary, union activities from the antitrust laws.\(^\text{29}\) Thus, federal courts could still enjoin secondary union activities as unlawful restraints of trade.

The Norris-LaGuardia Act of 1932\(^\text{30}\) was the first legislation

\(^{20}\) Id. at 1371-74.
\(^{21}\) Id. at 1374-78.
\(^{22}\) Id. at 1378-79.
\(^{24}\) 456 U.S. at 218.
\(^{28}\) 386 U.S. at 621 (quoting § 20 of the Clayton Act).
\(^{29}\) Id. at 621-22. See also Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).
\(^{30}\) 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1976). The belief that industrial strife interfered with the public interest in the free flow of commerce led Congress to enact labor legislation pursuant to its power to regulate interstate commerce. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963). See H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. (1947), reprinted in 93 CONG. REC. 6369 (daily ed. June 4, 1947) ("experience has demonstrated that certain practices by some labor organizations have the effect of burdening commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce"). See also U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . to regulate Commerce with foreign Nations,
designed to regulate employer-employee relations. It prohibited federal courts from issuing injunctions “in any case involving or growing out of any labor dispute.”31 Because the term “labor dispute” was defined broadly, federal courts could enjoin neither primary nor secondary union activities.32 Therefore, the Norris-LaGuardia Act severely limited the use of injunctions to halt secondary boycotts. As a result, unions were free to engage in secondary boycotts without judicial interference.

Violence associated with disputes between newly formed unions and employers led Congress to enact the NLRA.33 The NLRA secured to employees the right to organize34 and bargain collectively with employers.35 It required employers to bargain in good faith and proscribed certain forms of employer conduct as unfair labor practices.36

and among the several States . . . ”). Consequently, the federal labor laws govern only labor controversies which are “in commerce” or are “affecting commerce.” See supra note 2 for statutory definitions of “commerce” and “affecting commerce.” Congress sought to put workers in a bargaining position equal to that of employers by ending easy access by employers to injunctions against workers attempting to organize for the purpose of improving working conditions. See S. Rep. No. 163, 72d Cong., 1st Sess. 9-10 (1932), reprinted in R. Koretz & B. Schwartz, Statutory History of the United States: Labor Organization 173-74 (1970) (primary object of Norris-LaGuardia Act to protect rights of employees to freedom of association, to organize, and to be represented by unions in negotiations with employers).

31. 29 U.S.C. § 101 (1976). Section 101 provides that “no court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter.”

32. 386 U.S. at 622-23. See also H.R. Rep. No. 669, 72d Cong., 1st Sess. 8 (1932). Section 13(c) of the Norris-LaGuardia Act provides:

When used in this Act, and for the purposes of this Act—

(c) The term “labor dispute” includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

33. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 141-87 (1976)). The NLRA is also known as the Wagner Act. Section 141(b) sets forth the intent and purpose of the NLRA and reads in part:

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.


35. Id. at § 159(a).

36. 29 U.S.C. § 158(a) (1976). Interference with the formation or administration of un-
However, the NLRA imposed no similar requirement on unions, nor did it prohibit abusive union conduct. Furthermore, because Congress did not repeal the Norris-LaGuardia Act, union abuses could not be enjoined. As a result, secondary boycotts became powerful weapons used by unions to gain recognition and economic benefits for their members. Thus, instead of equalizing bargaining power, the NLRA had the effect of tipping the balance in favor of the unions.37

To restrain union abuses which arose under the Norris-LaGuardia Act and the NLRA, Congress enacted the Labor-Management Relations Act of 1947.38 As an amendment to the NLRA, the statute proscribed union unfair labor practices, including secondary boycotts,39 and revived the use of the labor injunction to a limited extent by permitting the NLRB (but not private parties) to obtain injunctive relief from union unfair labor practices without the restrictions imposed by the Norris-LaGuardia Act.40 In addition, it gave employers a private right of action in federal court for damages caused by union unfair labor practices.41

The prohibition of secondary boycotts was originally incorporated into the NLRA as section 8(b)(4)(A).42 The secondary boycott prohibi-

37. See generally R. DERESHINSKY, THE NLRB AND SECONDARY BOYCOTTS 124-25 (1972). See also 93 CONG. REC. 3428 (daily ed. April 15, 1947) ("But times and conditions have changed and the unions are now strong and powerful—the employer—especially the one who gives a few jobs, is weak.") (statement of Rep. Hoffman).
39. 29 U.S.C. § 158(b) (1976). Other proscribed union labor practices included discrimination against employees who are not union members and the refusal to bargain collectively with an employer. Id.
40. 29 U.S.C. § 160(1) (1976). Section 160(1) provides that:
   If, after . . . investigation, the [NLRB] officer or regional attorney . . . has reasonable cause to believe such charge [of an unfair labor practice] is true . . . he shall, on behalf of the Board, petition any United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.
41. Id. at § 187(b). Section 187(b) provides that "[w]hoever shall be injured in his business or property by . . . any [unfair labor practice] violation . . . may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit." 29 U.S.C. § 187(b) (1976).
   This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. . . . Under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott . . . . All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.
tion was intended to preserve the right of unions to bring pressure to bear on offending employers in primary disputes and to protect neutral parties from pressures resulting from controversies in which they are not directly involved. It thus prohibited unions from inducing or encouraging “the employees of any employer to engage in, a strike or concerted refusal . . . to . . . handle . . . any goods” of a primary employer. In an effort to close major loopholes which had emerged from its language, Congress subsequently amended section 8(b)(4)(A) in the Labor-Management Reporting and Disclosure Act of 1959. However, these changes did not alter the basic thrust of the secondary boycott prohibition.

B. Pre-Allied Judicial Interpretations

1. Commerce jurisdiction

The ILA boycott of Russian goods generated several lawsuits in addition to Allied: Baldovin v. International Longshoremen’s Association, New Orleans S.S. Association v. General Longshore Workers,


43. The Senate Committee Report characterized the conduct prohibited by section 8(b)(4)(A):

Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute).

S. rep. no. 105, 80th cong., 1st sess. 22 (1947). See also Local 1976, United Bhd. of Carpenters and Joiners v. NLRB, 357 u.s. 93, 100 (1958) (Congress “aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers . . . .”); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951) (secondary boycott provisions serve the “dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.”).

44. Three major loopholes had emerged from the language of § 8(b)(4)(A). Because only inducement of “employees” was proscribed, direct inducement of a supervisor or the secondary employer was not prohibited. Because only a “strike or a concerted refusal” was proscribed, pressure upon a single employee was not unlawful. Finally, because railroads and municipalities were not “employees” within the NLRA, inducing or encouraging their employees was not forbidden. Subsequent to the Labor-Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin amendments), § 8(b)(4)(A) became § 8(b)(4)(B), 29 u.s.c. § 158(b)(4)(B) (1976). See NLRB v. Fruit & Vegetable Packers and Warehousemen, 377 U.S. 58, 64-66 (1964).

45. 626 F.2d 445 (5th Cir. 1980).

46. 626 F.2d 455 (5th Cir. 1980), aff’d sub nom., Jacksonville Bulk Term., Inc. v. International Longshoremen’s Ass’n, 457 u.s. 702 (1982).
SECONDARY BOYCOTTS

and *Walsh v. International Longshoremen's Association.* In *Baldovin,* the most significant of these cases for purposes of understanding the significance of the *Allied* decision, the Fifth Circuit held, contrary to the *Allied* Court, that the ILA boycott of Russian goods was not within the commerce jurisdiction of the NLRA. The *Baldovin* court was asked to determine whether the NLRB had jurisdiction over the ILA's action in accordance with section 10(a) of the NLRA which defines the powers of the NLRB with respect to unfair labor practices. Section 10(a) provides that "[t]he Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce." Because unfair labor practice charges had been filed against the ILA, the NLRB petitioned for injunctive relief pursuant to section 10(1) of the NLRA. Stating that "[t]he object of the dispute determines whether or not it is 'in commerce,'" and observing that the object of the ILA's boycott was Soviet military policy in Afghanistan, the court determined that the ILA's dispute was not remediable by domestic action. Therefore, the boycott was not "in commerce" within the meaning of the NLRA and the NLRB lacked jurisdiction.

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47. 630 F.2d 864 (1st Cir. 1980).
48. 626 F.2d 445 (5th Cir. 1980).
49. *See infra* notes 168-83 and accompanying text.
50. 626 F.2d at 449-50.
51. *Id.* at 449.
53. 626 F.2d at 448. The ILA was charged with violating section 8(b)(4)(B). *Id. See supra* note 2 for text of statute.
54. Section 10(1) of the NLRA requires the Regional Director of the NLRB to petition for a temporary injunction when an unfair labor practice charge has been filed and he has reason to believe that the charge is true. Section 10(1) provides in relevant part:

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [§ 8(b)(4)] . . ., [a] preliminary investigation of such charge shall be made forthwith . . . If, after such investigation, the officer . . . has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to [the unfair labor practice charge] . . . .

55. 626 F.2d at 453.
56. *Id.* at 453-54.
57. *Id.* at 449. Citing § 10(a) of the NLRA, 29 U.S.C. § 160(a) (1976), the court noted that "[t]he NLRB's jurisdiction over secondary boycotts is also confined to secondary activity 'affecting commerce.'" *Id.* Moreover, the court recognized the general limitation of the NLRA that activities governed thereby must be in or affect commerce. *Id.* Thus, the court also determined that the ILA boycott was not "in commerce" within the meaning of § 8(b)(4). *Id.* Furthermore, the court determined that the ILA refusal to handle Soviet cargo was a secondary boycott within the meaning of § 8(b)(4). *Id.* Analyzing the language and intent of the statute, the court stated:
power to enjoin the boycott.58

Prior to Allied, the Supreme Court had determined that primary labor disputes between American unions and foreign entities are not within the commerce jurisdiction of the NLRA when assertion of jurisdiction would inescapably interfere with foreign labor relations, foreign trade, and comity among nations. This principle derived from a series of decisions59 involving primary labor activity undertaken by American unions against foreign carriers. Those cases, however, raised no questions concerning injury to American neutrals.

In the leading case, Benz v. Compania Naviera Hidalgo, S.A.,60 the Supreme Court held that the NLRA was not applicable to primary la-

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The ILA's dispute is exclusively with the Soviet government which is the only authority capable of responding to its protest. The stevedoring, shipping, exporting or importing companies . . . are completely neutral with regard to the ILA's dispute with the Soviet Union. . . . [Therefore, the ILA boycott] violates the purpose of the secondary boycott ban: to compel the union to confront the employer with whom it has its real or primary dispute . . . .

Id.

Noting that § 8(b)(4) prohibits unions from pressuring neutral secondary employers when one of the union's objectives is to cause a cessation of business between neutrals, the Baldwin court cited NLRB v. Retail Store Employees Union, 447 U.S. 607 (1980), for the proposition that secondary picketing violates § 8(b)(4)(B) when it predictably encourages consumers to cease patronizing the neutral employer's business altogether. 626 F.2d at 449. See infra text accompanying notes 92-98. Thus, the court found, in accord with the Allied decision (see infra notes 140-153 and accompanying text), that the ILA boycott was a secondary boycott within the NLRA prohibition. Id. 58. Id. at 453. In Walsh, 630 F.2d 864 (1st Cir. 1980), the First Circuit concluded that Baldwin had preclusive effect over the NLRB's petition for a section 10(1) injunction. Id. at 867. Walsh resulted from the unfair labor practice charge filed with the NLRB by Allied against the ILA. NLRB Regional Director, Michael F. Walsh, petitioned the United States District Court for the District of Massachusetts for a § 10(1) injunction pending the NLRB's resolution of Allied's unfair labor practice charge. Id. at 866-67. The district court determined that it was not bound by the prior district court decision in Baldwin. 488 F. Supp. 524, 528 (D. Mass. 1980). The court held that the doctrines of issue preclusion, res judicata and collateral estoppel by judgment, were inapplicable to § 10(1) petitions. Thus, the court declined to follow Baldwin and concluded that the controversy was within the commerce jurisdiction of the NLRA. Id. However, because the court found that the ILA activity was a primary boycott exempted from § 8(b)(4), it denied the injunction. Id. at 530-31. On appeal, the First Circuit upheld the district court's denial of the § 10(1) injunction but on the ground that the action was barred by the decision of the district court in Baldwin, i.e., that the NLRB lacked jurisdiction because the controversy was not "in commerce." 630 F.2d at 875.


60. 353 U.S. 138 (1957).
bor disputes between foreign employers and their foreign employees. Benz involved picketing by three American unions against a foreign vessel in support of a strike by its foreign crew against their employer, a foreign shipowner. The foreign employer sought damages in federal court under the NLRA. The Court held that the controversy was outside the jurisdictional scope of the NLRA because the United States labor laws were not intended to govern labor disputes between foreign nationals arising under foreign laws. The Benz Court relied upon the legislative history of the NLRA to determine that Congress intended the NLRA to govern only labor strife between American employers and employees. In addition, the Benz Court recognized the strong likelihood that assertion of NLRB jurisdiction in this setting would promote international discord because it would directly interfere with the laws governing foreign-flag carriers and thus contravene principles of comity in international trade. Consequently, the Court held that the controversy was outside the jurisdictional scope of the NLRA and deferred to Congress the task of determining American policy in such a "delicate field of international relations."

61. Id. at 139-41.
62. Id. at 138-39.
63. Id. at 143. The foreign seamen were employed under a British form of articles of agreement setting forth employment terms. Id. at 139.
64. Id. at 142-44. The Court noted the statement of Representative Hartley, coauthor of the Labor-Management Relations Act, that "the bill herewith reported has been formulated as a bill of rights both for American workingmen and for their employers." Id. at 144 (emphasis added) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947)). Thus, the Court concluded that "Congress did not fashion . . . [the NLRA] to resolve labor disputes between [foreign] nationals . . . [T]he Act is concerned with industrial strife between American employers and employees." 353 U.S. at 143-44 (footnote omitted).
65. Id. at 146-47.
66. Id. at 147. The Court stated:

For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.

Id. The Allied Court noted that a similar analysis was followed six years later in McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963), and Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963). The Court stated:

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For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.
The Court's application of the Benz rationale in Windward Shipping (London) Limited v. American Radio Association and its companion case, American Radio Association v. Mobile Steamship Association, Inc., established that when assertion of jurisdiction over union conduct interferes in the realm of international affairs, it is immaterial to resolution of the commerce jurisdiction issue whether the union's conduct is characterized as "primary" or "secondary." In Windward, American unions picketed foreign vessels to protest low wages paid foreign seamen by foreign shipowners and to publicize the adverse impact of these low wages on American seamen. The Court found that because the unions' picketing sought to force the foreign shipowners to pay their foreign crews higher wages and thus raise the operating costs of the foreign vessels, it had a significant impact on the maritime operations of the foreign vessels. Therefore, the Court held that the unions' conduct was controlled by the Benz rationale and thus was not within the commerce jurisdiction of the NLRA.

The secondary effects of the conduct at issue in Windward came before the Court in Mobile. In Mobile, American stevedores and shippers employed to service the picketed foreign vessels in Windward sought injunctive relief from the unions' picketing. They contended that the Windward Court held only that maritime operations of foreign vessels were not "in commerce" and that a different result was required when picketing was viewed in the context of its effect on American employers clearly engaged "in commerce." The Mobile Court re-

68. 419 U.S. 215 (1974). International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970), is the only case in the Benz series in which the Court held that the controversy was within the commerce jurisdiction of the NLRA. Id. at 200. In Ariadne, an American union picketed a foreign-owned vessel to protest substandard wages paid American longshoremen by foreign shipowners. Id. at 196. Accordingly, the Court concluded that application of the NLRA to the controversy "threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law." Id. at 200. Consequently, the union's picketing was held to be within the commerce jurisdiction of the NLRA. Id.

69. 415 U.S. at 106-07. The difference between foreign and domestic seamen's wages gave foreign vessels a substantial competitive advantage over domestic vessels which resulted in a decline in the number of jobs available to union members. Id.

70. Id. at 114-15.
71. Id. at 115.
72. 419 U.S. at 220.
73. Id. at 221-22. The Court noted the fundamental inconsistency between the unions'
jected this argument and determined that the *Benz* line of cases did not allow a "bifurcated view of the effects of a single group of pickets . . . ."\(^{74}\) Accordingly, the Court held that the change in complainants did not alter the jurisdictional reach of the NLRA and therefore, as in *Windward*, the unions' picketing was not in commerce and thus not governed by the NLRA.\(^{75}\)

The determination in *Mobile* that the picketing was not "in commerce" rested upon the primary nature of the activity—the attempt to directly pressure foreign shipowners to raise the wages paid their seamen—and the necessary effect of this primary activity on foreign maritime operations. Therefore, the combined effect of the holdings in *Windward* and *Mobile* is that primary conduct which interferes with foreign maritime operations is not within the commerce jurisdiction of the NLRA, regardless of whether the complainant is a primary or secondary employer.

2. Secondary boycott

Due to the "chameleon-like qualities of the term 'secondary boycott,'"\(^{76}\) the Supreme Court has relied upon the legislative history and purpose of section 8(b)(4)(B) to determine whether union activity constitutes a prohibited secondary boycott.\(^{77}\) From its analysis of the legislative history of section 8(b)(4)(B), the Court has determined that Congress intended section 8(b)(4)(B) to shield neutral employers and others from pressures in controversies not their own\(^{78}\) by prohibiting union conduct "tactically calculated to satisfy union objectives elsewhere."\(^{79}\)

Because the term "secondary boycott" does not appear in section 8(b)(4)(B), the Court has recognized that its prohibitions do not recog-

\(^{74}\) *Id.* at 222.

\(^{75}\) *Id.* at 225. The Court stated that:

> The effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-ship owners or by persons seeking to service and deal with the ships. The fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into "commerce" activities which plainly were not such in *Windward*.


\(^{77}\) See supra notes 25-44 and accompanying text.


\(^{79}\) National Woodwork Mfrs. Ass'n, 386 U.S. at 644.
nize a distinction between primary and secondary activity. Instead, the Court has interpreted section 8(b)(4)(B) to proscribe specific union conduct engaged in with specific objectives which experience has shown to be undesirable.

The Supreme Court has described the elements of a prohibited secondary boycott as follows: "Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person." Furthermore, the Court has stated that it is not necessary to find that the sole object of a union's strike or boycott is to cause a cessation of business between neutral parties; the objective prohibited by section 8(b)(4)(B) need only be an object of union activity. Recognizing the difficulty of assessing the object of union conduct under section 8(b)(4), the Court has held that a union's intent or purpose may be shown by the nature of its conduct.

In *NLRB v. Fruit & Vegetable Packers Local 760* ("Tree Fruits"), the Court held that union secondary product picketing targeted at one of many products sold by a secondary employer does not violate section 8(b)(4)(B). In *Tree Fruits*, a union picketed Safeway stores to induce customers not to purchase Washington State apples because of a labor dispute between the union and fruit packers and warehousemen in Washington. The picketing was carefully limited to the struck product, Washington State apples, which was "only one of numerous food products sold in the [Safeway] stores." Noting that "the prohibition of § 8(b)(4) is keyed to the coercive nature of the [union's] conduct," the Court held that the union's picketing did not coerce neutral

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80. See supra note 2.
82. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 98 (1958).
84. Local 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 366 U.S. 657, 674 (1961) (to determine object of union conduct under § 8(b)(4)(B), the NLRB and the courts have "attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause.").
85. Id. See also NLRB v. Local 825, Int'l Union of Operating Eng'rs, 400 U.S. 297, 304-05 (1971) (union responsible for foreseeable consequences of its conduct).
86. 377 U.S. 58 (1964).
87. Id. at 72-73.
88. Id. at 59-60.
89. Id. at 60.
90. Id. at 68.
parties and therefore did not violate section 8(b)(4)(B).\footnote{Id. at 72-73.}

On the other hand, in \textit{NLRB v. Retail Store Employees Union Local 1001},\footnote{447 U.S. 607 (1980).} the Court held that the kind of union conduct which violates section 8(b)(4)(B) is conduct “that reasonably can be expected to threaten neutral parties with ruin or substantial loss . . . .”\footnote{Id. at 614-15.} The Court also provided a guideline to aid lower courts in determining what constitutes “ruin or substantial loss.” In \textit{Retail Store Employees}, a union which represented employees of Safeco Title Insurance Co., a title insurance underwriter, picketed five title companies, asking customers to cancel their Safeco policies because contract negotiations between the union and Safeco had reached an impasse.\footnote{Id. at 609-10.} The Court determined that, because the picketed title companies derived over ninety percent of their gross income from the sale of Safeco policies\footnote{Id. at 609.} and because the union’s picketing effectively asked customers to cease patronizing the title companies altogether, the title companies were forced to become involved in the primary dispute between the union and Safeco by the threat of financial ruin.\footnote{Id. at 613-14.} Therefore, the Court held that the union’s product picketing contravened the intent of section 8(b)(4)(B) “to protect secondary parties from pressures that might embroil them in the labor disputes of others”\footnote{Id. at 612.} and thus constituted a prohibited secondary boycott.\footnote{Id. at 615.}

At the time \textit{Allied} was decided by the Supreme Court, the lower courts were generally in agreement that the absence of a primary labor dispute does not preclude a finding that section 8(b)(4)(B) has been violated.\footnote{Title 29 U.S.C. § 152(9) (1976) defines the term “labor dispute” to include “any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.”} The courts, however, disagreed as to whether the NLRB

\textit{In Soft Drink Workers Union, Local 812 v. NLRB, 657 F.2d 1252 (D.C. Cir. 1980), the District of Columbia Circuit Court of Appeals held that § 8(b)(4)(B) is applicable even when there is no primary labor dispute to which the union conduct could be secondary. Id. at 1259. In \textit{Soft Drink Workers}, a union picketed a retail beverage store asking customers to purchase only locally manufactured soft drinks. Id. at 1255-56. Finding a violation of § 8(b)(4)(B), the NLRB issued a cease and desist order against the union. Id. at 1256-57. The court rejected the union’s argument that, because there was no conventional labor dis-}
may exercise jurisdiction absent a labor dispute as defined by section 2(9) of the NLRA. 100

3. First amendment

The first amendment 101 guarantee of free speech applies to unions as well as individuals. 102 However, the Supreme Court has held consistently that conduct made unlawful by legitimate legislation is not protected by the first amendment. 103 Therefore, in International Brotherhood of Electrical Workers v. NLRB, 104 the Supreme Court held that "[t]he [NLRA] prohibition of inducement or encouragement of secondary pressure . . . carries no unconstitutional abridgment of free speech." 105 Thus, before Allied, the Court had determined that because

100. NLRB v. International Longshoremen's Ass'n, 332 F.2d 992, 995 (4th Cir. 1964) (NLRB lacked jurisdiction to enjoin union boycott because "there can be no [NLRB] jurisdiction where the complaint presents a controversy unrelated to the resolution of a 'labor dispute' as defined [by § 2(9) of the NLRA]"). Accord United States Steel Corp. v. UMW, 519 F.2d 1236, 1247-48 (5th Cir. 1975) (union strike to protest importation of South African coal was an unarbitrable political dispute and therefore not exempt from Norris-LaGuardia Act), cert. denied, 428 U.S. 910 (1976); Danielson v. Fur Dressers, Local No. 2F, 411 F. Supp. 655, 657-59 (S.D.N.Y. 1975) (NLRB petition to enjoin union picketing of fur processor which, in compliance with requirements of foreign governments, imported only processed skins, denied because no labor dispute or because protected primary picketing); Douds v. Sheet Metal Workers Int'l Ass'n, Local Union No. 28, 101 F. Supp. 273, 278-79 (E.D.N.Y. 1951) (no secondary boycott in absence of primary labor dispute between union and heating company). Cf. Baldovin v. International Longshoremen's Ass'n, 626 F.2d 445, 450 (5th Cir. 1980) (union refusal to load grain bound for Soviet Union to protest Soviet invasion of Afghanistan was secondary boycott despite absence of primary labor dispute); National Maritime Union v. NLRB, 346 F.2d 411, 414-15 (D.C. Cir. 1965) (NLRB empowered to enjoin union's conduct in dispute with rival union despite the absence of conventional labor dispute), cert. denied, 382 U.S. 840 (1965); National Maritime Union v. NLRB, 342 F.2d 538, 541-42 (2d Cir. 1965) (union picketing to induce work stoppages among employees of secondary employers constituted a secondary boycott even though picketing was a retaliative measure against rival union rather than a conventional labor dispute), cert. denied, 382 U.S. 835 (1966).

101. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ").

102. See NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980).


105. Id. at 705.
SECONDARY BOYCOTTS

secondary boycotts are illegal under the NLRA, they are not protected by the first amendment.

IV. REASONING OF THE COURT

The threshold issue for the Allied Court was jurisdictional in nature: whether the ILA’s work stoppage was within the scope of the NLRA, i.e., whether it affected commerce. The Court began its analysis of the commerce jurisdiction issue by interpreting the language of section 8(b)(4). The Court reasoned that because Allied, Waterman and Clark were engaged “in commerce,” the ILA’s action “affected commerce” within the statutory definitions. Consequently, a literal interpretation of the statutory language invoked the commerce jurisdiction of the NLRA.

In addition, the Court rejected the ILA’s contention that its action was not “in commerce” as the Court had previously interpreted that term. The Court distinguished Benz and its progeny, determining that the ILA’s work stoppage did not affect the maritime operations of foreign vessels. The Court reasoned that, by refusing to handle Soviet goods, the ILA did not attempt to alter the terms of employment for foreign seamen aboard foreign ships and did not seek to extend to foreign seamen and shipowners rights given American employees and employers by the NLRA. Moreover, this “drama was ‘played out by an all-American cast’” and involved no dispute with a foreign employer. Consequently, the Court reasoned that the international trade policy considerations prevalent in the Benz cases were irrelevant in Allied. As a result, the Court held that the ILA conduct did not fall within the Benz limitation of NLRA commerce jurisdiction and therefore was governed by the NLRA.

By analyzing the language and legislative intent of section 8(b)(4)(B), the Allied Court held that the ILA’s refusal to handle Soviet cargo constituted a prohibited secondary boycott. Section 8(b)(4)(B) prohibits union conduct where “an object thereof” is forcing any person to cease doing business with another person. As a result, the Court’s method of analysis required it to find that one of the objects of

106. 456 U.S. at 221-22. See supra note 2 for text of statutes.
107. Id. at 221.
108. See supra notes 59-75 and accompanying text.
109. 456 U.S. at 221-22.
110. Id. at 222-26. “By its terms the statutory prohibition applies to the undisputed facts of this case.” Id. at 22. See supra note 2 for text of section 8(b)(4)(B). For a discussion of the relevant legislative history, see notes 25-44 and accompanying text.
the ILA's action was to disrupt business among Allied, Waterman and Clark. To make this determination, the Court focused on the foreseeable economic effects of the ILA's action and stated that "when a purely secondary boycott 'reasonably can be expected to threaten neutral parties with ruin or substantial loss' the pressure on secondary parties must be viewed as at least one of the objects of the boycott . . . ." However "understandable" and "commendable" the ILA's ultimate objective of protesting Soviet military aggression in Afghanistan might have been, the predictable result of the ILA's action was to threaten Allied, Waterman and Clark with financial ruin or substantial loss. Therefore, the Court held that the disruption of their business was "an object" of the ILA's action.

The Court rejected the ILA's argument that section 8(b)(4) was inapplicable because the ILA boycott involved a political dispute with a foreign nation rather than a labor dispute with a primary employer. The Court recognized that the ILA sought no labor objective from, nor had any labor dispute with, Allied, Waterman, or Clark and that the ILA refusal to unload Soviet cargo was entirely politically motivated. The Supreme Court, however, declined to limit the application of section 8(b)(4)(B) to secondary boycotts involving labor disputes, and instead held that Congress had purposefully given section 8(b)(4)(B) a broad scope to protect neutral parties from economic pressure resulting from the disputes of others.

112. 456 U.S. at 224.
113. Id. (citing NLRB v. Retail Store Employees Union, 447 U.S. 607, 614-15 (1980) ("Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B.")). The Court characterized the ILA's boycott as purely secondary activity because the boycott was directed against Allied's goods even though the ILA conceded it sought no labor objective from, nor had any dispute with Allied, Waterman or Clark. The boycott was designed to protest Soviet foreign policy and thus was clearly calculated to achieve union objectives elsewhere. 456 U.S. at 222 n.19.
114. Id. at 224.
115. Id. at 224-25.
116. Id. at 222-25. The Allied Court's reasoning parallels the Fifth Circuit's analysis of the labor dispute jurisdiction issue. In New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980), the Fifth Circuit determined that "a strike called to further the political goals of the union" does not involve a labor dispute. Id. at 465. Upholding two injunctions issued by district courts against the ILA, id. at 458, the court found that because the ILA boycott did not "involve or grow out of any labor dispute," the anti-injunction provisions of the Norris-LaGuardia Act were inapplicable. Id. at 464-65.
117. 456 U.S. at 224-25.
118. Id. (citing H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947) (secondary boycott prohibition designed to protect "helpless victims of quarrels that do not concern them at all.")). The Court also noted that Congress had refused to narrow the scope of section
In addition, the Court declined to exclude politically-motivated secondary boycotts from the scope of section 8(b)(4), noting that to do so would create a "far-reaching exemption" from a statute purposely drafted in broad terms. The Court further noted that section 8(b)(4) contains no exception for political disputes.

The Allied Court held that application of section 8(b)(4)(B) to the ILA's boycott of Soviet cargo would not violate the first amendment rights of either the ILA or its members. The Court reiterated its position that secondary picketing by labor unions in violation of section 8(b)(4) is not protected activity under the first amendment. Therefore, "[i]t would seem even clearer that conduct designed not to

8(b)(4)(B) in response to a claim that all secondary boycotts were not harmful. 456 U.S. at 225 n.23.

119. 456 U.S. at 226. Recognizing that the "distinction between labor and political objectives would be difficult to draw in many cases," the Court was apparently concerned that, if political disputes were exempted from section 8(b)(4), a union could engage in secondary activity and escape sanctions simply by proclaiming that its activity was a political protest. Id. See supra note 118 and accompanying text.

120. 456 U.S. at 226.

121. Id. The Fifth Circuit had reached the same conclusion in New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980). In New Orleans, the court recognized that, although first amendment guarantees extend to labor unions, union conduct made unlawful by legislation enacted for purposes other than to suppress free expression is not protected by the first amendment. 626 F.2d at 462-63. Therefore, because the ILA's boycott violated the arbitration provisions of the NLRA, it was not protected by the first amendment. Id. at 463.

122. 456 U.S. at 226 (citing NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 616 (1980); American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 229-31 (1974); International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 705 (1951)). The cases cited by the Court stand for the proposition that union conduct which violates section 8(b)(4)(B) is not protected by the first amendment. In Retail Store Employees, the Court held that section 8(b)(4)(B) does not abridge constitutionally-protected speech when applied to "picketing that predictably encourages consumers to boycott a secondary business . . . ." 447 U.S. at 616. See supra text accompanying notes 92-98.

The Mobile Court held that a state injunction of union picketing did not violate the first amendment because states are allowed wide discretion in "protecting various competing economic and social interests." 419 U.S. at 229. In Mobile, the state enjoined union picketing of foreign ships designed to protest substandard wages paid foreign seamen and to publicize the adverse impact of these wages on American seamen. Id. at 217. The Court found that the state's injunction was supported by a "valid public policy" in favor of preventing wrongful interference in business and consequently did not violate the first amendment. Id. at 230-32. However, because the Court held that the union's conduct was outside the commerce jurisdiction of the NLRA, it did not address the issue of whether the union's conduct was prohibited by section 8(b)(4)(B); nor did it decide whether prohibiting such conduct under section 8(b)(4)(B) would violate the first amendment. See supra notes 72-75 and accompanying text.

In Electrical Workers, the Court held that peaceful union picketing was not protected by the first amendment because its object was prohibited by section 8(b)(4)(A). 341 U.S. at 705. See supra note 104 and accompanying text.
communicate but to coerce merits still less consideration under the First Amendment." Moreover, noting that the labor laws reflect a balancing of interests, the Court concluded that the ILA and its members could express their political views regarding Soviet foreign policy in other ways which would not infringe upon the rights of others.

V. ANALYSIS: THE SIGNIFICANCE OF ALLIED

A. Commerce Jurisdiction: Object or Effect?

To determine that the ILA boycott was within the commerce jurisdiction of the NLRA, the Court focused on the domestic effects of the ILA's action—interference with contractual relationships—rather than its foreign objective—to protest Soviet foreign policy in Afghanistan. Thus, although the Allied Court claimed that it was "[a]pplying the principles developed in . . . [the Benz line of] cases," it actually departed from the Benz analysis, which emphasized the objective sought by the union to determine whether the union's conduct was within the commerce jurisdiction of the NLRA. Consequently, it is

123. 456 U.S. at 226 (citing NLRB v. Fruit & Vegetable Packers ("Tree Fruits"), 377 U.S. 58 (1964)). The Court apparently recognized that section 8(b)(4) does not prohibit all secondary activity by unions but only certain secondary activities designed to achieve specific prohibited objectives.

The Tree Fruits Court noted that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." 377 U.S. at 63. In Tree Fruits, a union involved in a labor dispute with employers of fruit packers and warehousemen in Washington picketed retail stores which sold Washington State apples packaged by the primary employers. The picketing was limited to asking customers of the retail stores not to buy Washington State apples. The Court held that the union's conduct did not violate section 8(b)(4) because it was directed only at the struck product and did not ask customers to cease dealing with the retail stores altogether. Id. at 71-72. Therefore, the union's conduct did not coerce neutral parties to become involved in the primary dispute. Id. at 68. The Court stated that "the prohibition of § 8(b)(4) is keyed to the coercive nature of the [union's] conduct, whether it be picketing or otherwise." Id. Consequently, non-coercive secondary activity is not prohibited by section 8(b)(4)(B) and is protected by the first amendment.

124. Id. (citing NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 617 (1980) (Blackmun, J., concurring)). Justice Blackmun concurred in the result in Retail Store Employees because he was reluctant "to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." 447 U.S. at 617-18.

125. 456 U.S. at 227.
126. Id. at 222-23.
127. Id. at 221.
128. See supra notes 59-75 and accompanying text.
129. Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) (object of union's picketing was representation of foreign seamen aboard foreign vessel); McCulloch v. Sociedad Na-
unclear whether the Allied Court (1) implicitly overruled the Benz "object" approach; (2) reaffirmed the object approach but limited its application to situations which involve the maritime operations of foreign vessels; or (3) adopted the bifurcated view rejected in Mobile, thus implicitly overruling that decision and permitting courts to focus on effects in unfair labor practice cases and objectives in all other situations.

Although the Allied decision created some uncertainty as to when the Court will focus on the objective rather than on the effects of union activity involving foreign entities to determine whether commerce jurisdiction exists, the Allied Court's focus on the effects of the ILA's action was nevertheless appropriate because Allied involved no primary dispute that affected the rights of foreign entities. In each of the Benz cases, with the exception of Mobile, foreign primary employers (the foreign shipowners) sought relief under the NLRA from primary union conduct. In Mobile, secondary domestic employers sought injunctive relief from primary union conduct directed against foreign entities. Assertion of jurisdiction under the NLRA would have required the Court in these cases to determine the rights of foreign entities under domestic law, thus interfering in the area of foreign relations. In contrast, the domestic secondary employers in Allied sought damages under the NLRA for purely secondary union conduct. Assertion of jurisdiction required the Court to determine only the rights of domestic entities, resulting in no interference in foreign relations.

The United States Constitution specifically gives Congress and the
President concurrent power over international affairs.136 Thus, when foreign relations would be affected directly by determining the rights of foreign entities under federal labor laws, as was the case in *Benz* and its progeny, it is more appropriate for the Court to use the object approach to the commerce jurisdiction issue. Otherwise, the Court would exceed the scope of its power under the Constitution by exercising a power reserved to Congress and the President. When, however, the determination of rights under the federal labor laws threatens no interference in the realm of foreign affairs, as was the case in *Allied*, it is appropriate for the Court to analyze the effects of union conduct to determine whether or not the conduct is in commerce. In this situation, the Court's assertion of jurisdiction does not exceed its constitutionally granted power.

The *Allied* Court's focus on the effects of the ILA's action rather than on its foreign objective was appropriate because a secondary boycott allegation was at issue. Section 8(b)(4)(B) of the NLRA prohibits union conduct which furthers union goals in a dispute with one employer while adversely affecting another employer.137 Thus, section 8(b)(4)(B) is designed to shield neutral secondary employers from the adverse effects of union activity in disputes in which the secondary employer is not otherwise involved.138 Because section 8(b)(4)(B) is concerned with the secondary effects of union conduct, it would be anomalous for the Court to focus exclusively on the object of the primary dispute to determine the commerce jurisdiction issue and disregard the secondary effects of that dispute which section 8(b)(4)(B) specifically prohibits. To accomplish the purpose of section 8(b)(4)(B), the Court must consider how and in what degree a secondary employer is affected by union conduct. Therefore, the object of the primary dispute should not be dispositive of the commerce jurisdiction issue in the context of a section 8(b)(4)(B) action.

Furthermore, in secondary boycott situations involving foreign entities, strict adherence to the "object" approach to resolve the commerce jurisdiction issue could potentially undermine the purpose of section 8(b)(4)(B)—to prevent neutral secondary employers from bearing the economic burdens of the disputes of others. In *Allied*, the object of the ILA's conduct—Soviet military policy in Afghanistan—was arguably not in commerce within the meaning of the NLRA.139 If only

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137. See supra note 2.
138. See supra notes 38-43 and accompanying text.
139. 456 U.S. at 222-23.
the object of the union's conduct were considered in resolving the commerce jurisdiction issue, the ILA's conduct would probably fall outside the commerce jurisdiction of the NLRA and section 8(b)(4)(B) would not be applicable. The result would be that injured secondary employers would be barred from recovering under the NLRA.

Carrying the "object" analysis to its extreme, a union could circumvent the secondary boycott provisions of the NLRA and engage in otherwise prohibited secondary activity by claiming that its action was a political protest against the policies and/or actions of a foreign nation. For example, to protest the imposition of martial law in Poland, the plumber's union might have refused to install a particular brand of pipe because it was made from copper mined in Poland. The object of the union's conduct would have been to protest Polish military policy. Therefore, even though American manufacturers, wholesalers, and retailers of that brand of pipe would have been injured by the union's action, the "object" analysis would deny them recovery under section 8(b)(4)(B) because the union's object was not "in commerce." Because the United States engages in a large volume of trade with numerous foreign countries, great potential exists for unions to undermine the purpose of section 8(b)(4)(B) by claiming to have political disputes with foreign nations. Therefore, because a secondary boycott allegation was at issue in Allied, the Court properly focused on the effects of the ILA's action to resolve the commerce jurisdiction issue.

B. Secondary Boycott

1. Ruin or substantial loss: how foreseeable?

The Court's conclusion that the ILA's action was prohibited by section 8(b)(4)(B) rested on its finding that the cessation of business between Allied, Waterman and Clark was an object of the ILA's action. To make this determination, the Court applied the standard set forth in NLRB v. Retail Store Employees Union Local 1001, which established that union activity violates section 8(b)(4)(B) if it "reasonably can be expected to threaten neutral parties with ruin or substantial loss." Thus, Allied stands for the proposition that when union conduct foreseeably threatens neutral parties with financial ruin or substantial loss, that effect is an object of the union's conduct prohibited by section 8(b)(4)(B).

140. Id. at 224. See supra notes 111-14 and accompanying text.
142. Id. at 614.
The Allied Court extended the applicability of the Retail Store Employees "ruin or substantial loss" test in the area of secondary boycotts. Retail Store Employees involved secondary product picketing, i.e., union picketing designed to persuade customers of a secondary employer not to purchase a product sold by the secondary employer because that product is manufactured by an employer with whom the union has a dispute. Allied, however, did not involve secondary product picketing. The ILA did not actually picket Allied, nor did it ask Allied's customers not to purchase Soviet products. Instead, the ILA simply refused to handle Soviet goods. Because the Court did not distinguish the union conduct at issue in Retail Store Employees from that in Allied, it appears that the Court does not intend the Retail Store Employees test to be confined to secondary product picketing cases, but intends it to have a broader application.

Moreover, the Allied Court employed the "ruin or substantial loss" test to determine both that the cessation of business between Allied, Waterman and Clark was an object of the union's conduct and to determine that the ILA's conduct violated section 8(b)(4)(B). However, in Retail Store Employees, the Court held that the union's picketing violated section 8(b)(4)(B) because it threatened the secondary employers with ruin or substantial loss. Thus, after Allied, the "ruin or substantial loss" test is applicable to determine not only whether union conduct violates section 8(b)(4)(B), but also to determine what objective is sought by a union secondary boycott. As a result, the "ruin or substantial loss" test may now apply in all secondary boycott situations.

The Allied Court's holding narrowed only slightly the parameters of the "ruin or substantial loss" test as defined by Retail Store Employees and Tree Fruits. Retail Store Employees established that when the secondary employer derives ninety percent or more of its income from sales of a struck product, secondary product picketing threatens neutrals with ruin or substantial loss. In Retail Store Employees, the secondary employers (the title companies which sold Safeco insurance

143. See supra notes 86-91 and accompanying text.
144. See supra notes 10-14 and accompanying text.
145. 456 U.S. at 224. See supra notes 110-14 and accompanying text.
147. 447 U.S. at 609. See supra notes 92-98 and accompanying text. The Court noted in Retail Store Employees that "[i]f secondary picketing were directed against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product, neither Tree Fruits nor today's decision necessarily would control." 447 U.S. at 615 n.11.
policies) derived ninety percent of their business from the sale of the
struck product (Safeco insurance policies).\textsuperscript{148} The Court found that the
union's product picketing threatened the secondary employers with
financial ruin because it effectively asked customers to cease patroniz-
ing them altogether.\textsuperscript{149} Therefore, the Court held that the union's con-
duct was an illegal secondary boycott.\textsuperscript{150} Tree Fruits, on the other
hand, established that when the struck product is but one of many
products sold by the secondary employer, secondary product picketing
limited to the struck product does not coerce neutral parties and there-
fore does not violate section 8(b)(4)(B).\textsuperscript{151}

In holding that the ILA's action had the objective of causing a
cessation of business between the neutral secondary employers and
thus violated section 8(b)(4)(B), the Allied Court followed the reason-
ing of Retail Store Employees. Approximately eighty-five percent of
Allied's imports, amounting to twenty-five million dollars annually,
came from the Soviet Union.\textsuperscript{152} Therefore, the Court held that the
ILA's refusal to handle those imports threatened Allied with ruin or
substantial loss.\textsuperscript{153} As a result, the holding in Allied moved the upper
limit of "ruin or substantial loss" from ninety percent or more of the
secondary employer's income to eighty-five percent or more of the sec-
ondary employer's income—not a substantial change. Consequently,
the holding in Allied contributed little to the definition of "ruin or sub-
stantial loss" which will render union conduct violative of section
8(b)(4)(B).

2. Nature of primary dispute irrelevant to
section 8(b)(4)(B) violation

The Allied Court's holding that section 8(b)(4)(B) is applicable
even in the absence of a primary labor dispute recognized the legisla-
tive purpose and intent of section 8(b)(4)(B). Section 8(b)(4)(B) was
drafted to prevent neutral parties from becoming the victims of contro-
versies in which they are not involved.\textsuperscript{154} To limit application of sec-
tion 8(b)(4)(B) to union secondary activity that involves only labor-
related primary disputes would destroy the protection Congress in-

\textsuperscript{148} 447 U.S. at 609.
\textsuperscript{149} \textit{Id.} at 614.
\textsuperscript{150} \textit{Id.} at 614-15.
\textsuperscript{151} \textit{See supra} text accompanying notes 86-91. \textit{See also} Soft Drink Workers Union v.
NLRB, 657 F.2d 1252 (D.C. Cir. 1980).
\textsuperscript{152} 257 N.L.R.B. 1075, 1084 (1981).
\textsuperscript{153} 456 U.S. at 224.
\textsuperscript{154} \textit{See supra} note 43 and accompanying text.
tended to give neutral secondary employers. Such a limitation would permit unions to engage in secondary activity and avoid the prohibition of section 8(b)(4)(B) simply by claiming to have a primary dispute which is not labor-oriented.

The potential danger for abuse by unions would be even greater if political disputes were exempted from section 8(b)(4)(B). A union could readily find some political justification for its conduct and thus escape the prohibition of section 8(b)(4)(B).155 As a result, secondary employers would lose the protection afforded them by section 8(b)(4)(B) and would have to endure secondary pressure simply because the union's action was politically motivated. As the Allied Court noted, such a result would be contrary to both the language and purpose of section 8(b)(4)(B).156

C. First Amendment: Illegality v. Compelling Government Interest

To determine that enjoining the ILA boycott did not infringe upon the ILA's freedom of speech, the Allied Court applied the established principle that illegal activity is not protected by the first amendment.157 Thus, once the Court found that the ILA's conduct violated section 8(b)(4)(B),158 it summarily concluded that it was not protected activity under the first amendment.159 The Court relied upon labor picketing cases to determine that the ILA's boycott was illegal and thus not protected by the first amendment.160 Allied, however, involved neither labor picketing nor any labor controversy. Rather, to voice its opposition to Soviet military policy in Afghanistan, the ILA simply declined to handle Soviet goods.161 Thus, the ILA's action did not entail the physi-

155. See supra text accompanying notes 37-39.
156. 456 U.S. at 224-25. In addition, the Court, agreeing with the court of appeals, stated that:

[It is "more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity."

Id. at 225-26 (quoting Allied, 640 F.2d at 1378).
157. See supra notes 102-05 and accompanying text.
159. 456 U.S. at 226.
160. Id. ("We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment.") (citing NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980) and American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215 (1974)).
cal obstruction and/or intrusion ordinarily associated with picket lines. Therefore, the Court's reliance upon labor picketing cases to determine the first amendment issue was inappropriate.

The Allied Court's summary resolution of the first amendment issue failed to consider adequately the political motivation behind the ILA's boycott. Assembling for the purpose of peaceful action is not unlawful. Moreover, political expression is the kind of speech most jealously protected by the first amendment. The ILA's action was political expression by an organized group and thus constituted an exercise of the union members' right to associate to express political beliefs. The fact that the group expressing its political beliefs was a union should have no bearing on whether the group's conduct was or was not protected by the first amendment.

The Allied Court could have reached the conclusion that the ILA's boycott was not protected activity under the first amendment by a different means less restrictive of first amendment rights. Incidental infringement of first amendment rights may be justified if there exists a compelling government interest. The NLRA was enacted to protect and promote the free flow of commerce. Section 8(b)(4) was specifically designed to prevent the spread of industrial strife. Either or both of these objectives may be considered sufficiently compelling to justify infringement of the ILA's first amendment rights.

A balancing of interests would have been a sounder approach to the first amendment issue than the Allied Court's analysis because it would have considered the political motivation behind the ILA's boycott. Moreover, it would not have required the Court to adopt the somewhat strained analogy between the ILA's refusal to handle Soviet goods and labor picketing.

162. See International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284, 289 (1957) ("Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.") (quoting Bakery Drivers Local v. Wohl, 315 U.S. 769, 776 (1942) (concurring opinion)).


164. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.").


166. See supra note 33 and accompanying text.

167. See supra text accompanying notes 42-44.
D. Procedural Distinctions: Another Facet of Russian Boycott Litigation?

Although the dispute in Allied, like that in Baldovin v. International Longshoremen's Association,168 New Orleans S.S. Association v. General Longshore Workers,169 and Walsh v. International Longshoremen's Association,170 originated in the ILA's boycott of Russian goods, the procedural context in which Allied arose differed in several respects from that in which the other three cases arose. Allied was an action between private parties. Baldovin and Walsh were actions brought by the NLRB.171 In addition, Allied was an action for damages, whereas Baldovin, New Orleans, and Walsh were each actions for injunctive relief.172 As a result of these differences, the jurisdiction of the NLRB under section 10(a)173 and the procedural requirements of section 10(1)174 were not at issue in Allied; nor were the anti-injunction provisions of the Norris-LaGuardia Act.175 Therefore, the Allied Court distinguished the issue addressed by the courts of appeals in Baldovin, New Orleans and Walsh—the jurisdiction of the NLRB over union unfair labor practices under section 10(a) of the NLRA—from that presented in Allied—the scope of the secondary boycott prohibition of the NLRA.176 Thus, the Court framed the issue in Allied narrowly—determination of the scope of section 8(b)(4) in the setting of a boycott of foreign goods.177 The distinction drawn by the Allied Court can be made only by reading the phrase “affecting commerce” which appears in both sections 8(b)(4) and 10(a) of the NLRA as though it had a different meaning in each section. This seems a somewhat artificial dis-

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168. 626 F.2d 445 (5th Cir. 1980).
170. 630 F.2d 864 (1st Cir. 1980).
171. New Orleans, like Allied, was an action between private parties. However, because New Orleans involved the enforcement of arbitration awards, and thus the arbitration provisions of the NLRA, it is factually distinguishable from Allied. See New Orleans, 626 F.2d at 465.
172. See supra notes 45-58 and accompanying text for discussion of these cases.
173. See supra text accompanying notes 48-58.
174. See supra note 54 and accompanying text.
175. See supra note 31 and accompanying text.
176. 640 F.2d at 1371. In Allied, the Supreme Court stated that it “granted certiorari to determine the coverage of the secondary boycott provisions of the National Labor Relations Act in this setting.” 456 U.S. at 218 (emphasis added). The court of appeals in Allied Int'l Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1981), stated that “this case does not, as did Baldovin and Walsh, require consideration of the jurisdiction of the National Labor Relations Board . . . .” Id. at 1371 (citations omitted).
177. 456 U.S. at 218. See supra note 101 and accompanying text.
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tinction: NLRB jurisdiction over unfair labor practices extends to persons engaging in unfair labor practices “affecting commerce,” whereas the secondary boycott prohibition protects any person “engaged in commerce or in an industry affecting commerce” from certain union activities.

It is difficult to imagine a situation where a prohibited secondary boycott would not affect commerce given that the victim of the secondary boycott must be engaged in commerce or in an industry affecting commerce to fall within the proscription. Moreover, the definitions of the terms “commerce” and “affecting commerce” in section 2(6) and (7) apply whenever those terms appear in the NLRA. Therefore, the distinction made by the Court in Allied is tenuous at best.

Because the Allied Court did not overrule Baldovin and because it implicitly affirmed the lower court’s narrow statement of the issue in Allied, it is conceivable that Baldovin and Walsh still have preclusive effect over section 10(1) injunctions in the context of a boycott of foreign goods. The court of appeals in Allied held that the NLRA applied to the action brought by a private party against a union even though the NLRB’s jurisdiction over the unfair labor practice was barred by res judicata. Therefore, it is an open question whether the NLRB may enjoin this type of unfair labor practice even though it would sustain a private damages remedy. From a practical standpoint, it is unlikely that the Court would deny NLRB jurisdiction to enjoin a secondary boycott while simultaneously granting private parties monetary relief from the boycott. To do so would allow the boycott to continue and thus allow recoverable damages to increase unnecessarily.

IV. CONCLUSION

The Court framed the issue presented in Allied narrowly—determination of the scope of section 8(b)(4) in the context of a politically-motivated boycott of foreign goods. The Court’s opinion is carefully tailored to address only that issue. Therefore, Allied’s effect on subsequent cases that arise in a different procedural setting may be limited.

Because the Court framed the question presented in Allied so nar-

179. See supra note 2 for text of § 8(b)(4)(B).
180. See supra note 2 for text of § 2(6) and (7).
182. See supra notes 102-11 and accompanying text.
183. 640 F.2d at 1370. See supra note 111 and accompanying text.
184. 456 U.S. at 218. See supra notes 168-74 and accompanying text.
rowly, its resolution of each of the three major issues involved may also carry little weight in future litigation. Although the Court focused on the effects of the ILA’s conduct to determine the commerce jurisdiction issue, it implicitly affirmed the Benz “object” approach. Thus, the Allied Court injected some confusion into the traditional test of commerce jurisdiction. Because the Court’s resolution of the secondary boycott issue was based on the fact that eighty-five percent of Allied’s imports came from the Soviet Union, its holding will provide little guidance in cases where the amount of lost income is less than eighty-five percent. Finally, because the Court’s resolution of the first amendment issue was based on an inappropriate analogy to labor picketing cases and did not consider the political expression aspect of the ILA’s boycott, its reasoning is of little value for future litigation. Therefore, the holding in Allied is extremely narrow and provides only general guidelines for lower courts to decide these issues in future cases involving politically motivated secondary boycotts.

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185. See supra notes 112-15 and accompanying text.
186. See supra notes 116-20 and accompanying text.