

# 1982-1983 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW

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## INTRODUCTION

This issue marks the first quarter of a century of publication for the *Boston College Law Review*. As in past years, the December issue is dedicated exclusively to Labor and Employment matters and includes the 1982-1983 *Annual Survey of Labor and Employment Discrimination Law*. This *Annual Survey* is the twenty-second in a series of annual efforts to keep the legal community abreast of significant developments in labor and employment discrimination law. The *Annual Survey* covers a period from June of one year until June of the following year. The *Annual Survey* does not attempt to cover all decisions rendered during the year. Instead, working within this dynamic area of law, the *Annual Survey* seeks to provide a comprehensive treatment of selected cases which consolidate, amplify, or depart from prior law.

## LABOR RELATIONS LAW

## I. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

## A. Elections

1. *\*Prohibitions of Contributions to Union Elections by Nonunion Members:*

United Steelworkers of America v. Sadlowski<sup>1</sup>

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)<sup>2</sup> includes a "Bill of Rights of Members of Labor Organizations" (Bill of Rights).<sup>3</sup> The Bill of Rights, contained in Section 101(a)(2) of the LMRDA, secures the rights of free speech and assembly for labor organization members.<sup>4</sup> This section of the LMRDA, however, subjects these basic rights to the "reasonable" rule-making authority of the labor organization.<sup>5</sup> The Bill of Rights also grants members the right to sue for violations of these rights under section 101(a)(4) of the LMRDA.<sup>6</sup> In potential conflict with the exercise of these statuto-

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\* By Kristina Hansen Wardwell, Staff Member, BOSTON COLLEGE LAW REVIEW.

<sup>1</sup> 102 S. Ct. 2339 (1982).

<sup>2</sup> 29 U.S.C. §§ 401-531 (1976).

<sup>3</sup> 29 U.S.C. §§ 411-415 (1976).

<sup>4</sup> Section 101(a)(2) provides, in pertinent part:

Freedom of speech and assembly — Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings . . .

29 U.S.C. § 411(a)(2) (1976).

<sup>5</sup> Section 101(a)(2) continues:

*Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2) (1976).

<sup>6</sup> Section 101(a)(4) provides, in pertinent part, that a union may not "limit the right of any

rily conferred rights is the adoption of an "outsider rule" by the United Steelworkers of America (USWA), a labor organization which has over 1,300,000 members. This rule, adopted as part of the USWA constitution at its 1978 convention, prohibits nonunion members from making contributions to election campaigns for major union positions and raises two issues.<sup>7</sup> The first issue, whether the USWA outsider rule violates the union members' rights of free speech and assembly, essentially turns on whether the LMRDA's Bill of Rights was intended to extend the full scope of first amendment protection to union members. The second issue, the potential conflict between the outsider rule and the LMRDA's guarantee of the right to sue for violations, raises concerns over the USWA's implementation of the rule as it applies to campaign-related litigation. The USWA prohibition on campaign contributions by nonunion members for candidates for union office is the first of its kind adopted by any American labor organization.<sup>8</sup>

During the *Survey* year, the United States Supreme Court considered the permissibility of the USWA's outsider rule in light of the right of free speech and assembly and the right to sue conferred by the LMRDA's Bill of Rights. In *United Steelworkers of America v. Sadlowksi*,<sup>9</sup> a sharply divided Supreme Court upheld the outsider rule as a valid exercise of a union's reasonable rule-making authority conferred under section 101(a)(2) of the LMRDA.<sup>10</sup> The majority concluded that the LMRDA's Bill of Rights did not incorporate the entire body of first amendment law.<sup>11</sup> In upholding the USWA's outsider rule, the Supreme Court also rejected a challenge to the rule under the right to sue guarantee of section 101(a)(4).<sup>12</sup> In *Sadlowksi*, the Supreme Court reversed the holdings of the lower courts<sup>13</sup> and granted labor organizations considerable latitude in matters relating to self-governance.<sup>14</sup>

The respondent, Edward Sadlowksi, Jr., was a candidate for president of the USWA in its 1977 elections.<sup>15</sup> Sadlowksi, whose financial support came largely from sources outside the union, lost to Lloyd McBride, the candidate endorsed by incumbent management.<sup>16</sup> At the USWA convention in the year following Sadlowksi's unsuccessful bid for election, the USWA adopted the rule prohibiting financial support of candidates in union

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member thereof to institute an action in any court, or in a proceeding before any administrative agency . . . ." 29 U.S.C. § 411(a)(4) (1976).

<sup>7</sup> The outsider rule, Article V, Section 27 of the USWA Constitution, provides, in pertinent part: "No candidate (including a prospective candidate) for any position set forth in Article IV, section 1, and supporter of a candidate may solicit or accept financial support, or any other direct or indirect support of any kind (except an individual's own volunteered personal time) from any non-member." 102 S. Ct. 2339, 2342 (1982). The full text of section 27 is set out in the Appendix to the court of appeals' decision. 645 F.2d 1114, 1126-28 (D.C. Cir. 1981).

<sup>8</sup> *Sadlowksi v. United Steelworkers of America*, 645 F.2d 1114, 1116 (D.C. Cir. 1981), citing Note, *Restriction On "Outsider" Participation in Union Politics*, 55 CHI.-KENT L. REV. 769, 769 (1979) [hereinafter cited as Note, *Restriction On "Outsider" Participation*].

<sup>9</sup> 102 S. Ct. 2339 (1982).

<sup>10</sup> *Id.* at 2350.

<sup>11</sup> *Id.* at 2344-45. First amendment jurisprudence, and the impact of the Sadlowksi opinion thereon, is beyond the scope of this *Survey* chapter.

<sup>12</sup> *Id.* at 2349.

<sup>13</sup> See *infra* text accompanying notes 36-41.

<sup>14</sup> See *infra* text accompanying notes 42-76.

<sup>15</sup> 102 S. Ct. 2339, 2342 (1982).

<sup>16</sup> *Id.* at 2342. Sadlowksi attracted 43 percent of the vote, while his opponent won with 57 percent. *Id.*

elections by non-union members.<sup>17</sup> Sadlowski filed suit against the USWA in the United States District Court for the District of Columbia.<sup>18</sup> The complaint alleged that the USWA's outsider rule violated the right to sue provision of the LMRDA,<sup>19</sup> because it would prohibit a candidate from accepting non-member contributions to finance campaign-related litigation.<sup>20</sup> Such a restriction, according to the plaintiffs, was a violation of section 101(a)(4) of the LMRDA which prohibits a union from limiting a member's right to institute any action, either in court or before an administrative agency.<sup>21</sup>

In ruling on cross-motions for summary judgment, the district court struck down the outsider rule as a violation of the right to sue provision of section 101(a)(4).<sup>22</sup> The district court rejected the advisory opinion<sup>23</sup> of the USWA's Campaign Contribution Administrative Committee which suggested that the outsider rule had a limited scope where campaign related litigation was concerned.<sup>24</sup> First, the court found that the Committee could change its opinion on the scope of the rule at any time.<sup>25</sup> Second, the court stated, the Committee's opinion conflicted with the clear language of the rule.<sup>26</sup> Furthermore, the district court found that section 101(a)(4) previously had been construed to prohibit any limitations on the exercise of the right to sue.<sup>27</sup> In issuing a permanent injunction against the implementation of the rule, the district court held that the outsider rule unduly and unlawfully limited union members' rights "to collect funds necessary to bring suit, to retain counsel and initiate suits or administrative proceedings without fear of disqualification or discipline."<sup>28</sup> The USWA appealed the court's decision to the District of Columbia Court of Appeals.

The appeals court affirmed the district court's opinion, agreeing that the outsider

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<sup>17</sup> *Id.* The delegates on the floor of the USWA convention approved the rule by a margin of 10 to 1. *Id.* For a detailed review of the events and emotions leading up to the outsider rule's adoption, see Note, *Restriction On "Outsider" Participation*, *supra* note 8, at 770-772.

<sup>18</sup> 102 S. Ct. 2339, 2343 (1982). Sadlowski was one of several plaintiffs. Among the other plaintiffs was Edward Sadlowski, Sr., a retired union member who had campaigned for his son in the 1977 election. For a full list of plaintiffs, see *id.* at n.3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 507 F. Supp. 623, 625 (D.D.C. 1981).

<sup>23</sup> In addition to the "outsider rule", section 27 contained a number of related provisions. Among them was one which conferred authority upon the International Executive Board to adopt necessary regulations to implement the rule. It also created a Campaign Contribution Administrative Committee. This Committee was given the power to administer the provisions of section 27 and to disqualify a candidate who violated the outsider rule. 102 S. Ct. 2339, 2342-43 (1982). The full text of section 27 is set out in the Appendix to the court of appeals' decision. 645 F.2d 1114, 1126-28 (D.C. Cir. 1981).

<sup>24</sup> 507 F. Supp. 623, 624 (D.D.C. 1981).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* Presumably, the clear language to which the district court was referring was the outsider rule's prohibition on "financial support, or any other direct or indirect support of any kind . . . from a non-member." See *supra* note 7.

<sup>27</sup> 507 F. Supp. at 625 (citing *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424-25 (1968) and *Operating Engineers Local Union No. 3 v. Burroughs*, 417 F.2d 370 (9th Cir. 1969)).

<sup>28</sup> *Id.*

rule violated the right to sue provision of the LMRDA.<sup>29</sup> In addition, the appeals court accepted Sadlowski's contention, first raised on appeal,<sup>30</sup> that the outsider rule also violated the freedom of speech and assembly provision of section 101(a)(2) of the LMRDA.<sup>31</sup> In so holding, the appeals court construed section 101(a)(2) as placing "essentially the same limits on labor unions with respect to outside campaign contributions that the First Amendment would if it applied to labor unions . . . ."<sup>32</sup> The appeals court expressed particular concern over the difficulties a candidate would encounter in mounting a campaign against entrenched union leadership, even if he were able to obtain the aid of outside contributions.<sup>33</sup> As a result, the court found that the outsider rule flew "squarely in the face of the intent of the LMRDA to 'insure union democracy.'" <sup>34</sup> The appeals court held that the outsider rule ran counter to the section 101(a)(2) proviso, rejecting the USWA's arguments that the *complete* prohibition on outside financial support was a valid exercise of the union's authority to make rules designed to prevent undesirable outside influences from interfering with internal union affairs.<sup>35</sup>

The Supreme Court granted the USWA's petition for certiorari and, in a five-to-four decision, reversed the lower courts' invalidation of the outsider rule.<sup>36</sup> The Court's opinion addressed three substantive issues. First, the Court held that the LMRDA's right of free speech and assembly did not incorporate the entire body of first amendment law.<sup>37</sup> Second, the Court employed a two-tiered analysis to determine whether the outsider rule violated section 101(a)(2) of the LMRDA.<sup>38</sup> Under this method of analysis, the Court first examined the impact of the rule on the interests of free speech and assembly protected by section 101(a)(2).<sup>39</sup> It then concluded that, while the USWA's outsider rule did interfere with rights shielded by section 101(a)(2), the rule nevertheless was valid under the union's reasonable rule-making prerogative.<sup>40</sup> Finally, the Court considered and rejected Sadlowski's contention that the outsider rule violated the right to sue guaranteed under section 101(a)(4) of the LMRDA.<sup>41</sup>

In upholding the USWA's outsider rule, Justice Marshall, writing for the Court, first addressed the nexus between the LMRDA's free speech protections and those extended by the first amendment.<sup>42</sup> In contrast to the court of appeals, the Supreme Court

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<sup>29</sup> 645 F.2d 1114, 1125 (D.C. Cir. 1981).

<sup>30</sup> In deciding to consider the plaintiffs' § 102(a)(2) claims which were first raised on appeal, the appeals court first noted the "widely acknowledged rule" that an appellate court has discretion to uphold summary judgment under a legal theory different than that applied by the trial court. *Id.* at 1120. It then found that in this case it was permissible because the union was not prejudiced. *Id.* "The issue of the denial of free speech under section 101(a)(2) was implicit in the question whether plaintiffs had been denied free speech under the First Amendment, as alleged in their complaint." *Id.* The union, then, had been presented with an opportunity to litigate the matter. *Id.*

<sup>31</sup> *Id.* at 1122.

<sup>32</sup> *Id.* at 1120.

<sup>33</sup> *Id.* at 1121-22.

<sup>34</sup> *Id.* at 1122.

<sup>35</sup> *Id.* at 1122-23.

<sup>36</sup> 102 S. Ct. 2339, 2342 (1982). Justice Marshall wrote the opinion of the Court. *Id.* at 2341-50. Justice White, who authored the dissent, was joined by Chief Justice Burger, Justices Brennan and Blackmun. *Id.* at 2350-55 (White, J., dissenting).

<sup>37</sup> *Id.* at 2344-45.

<sup>38</sup> *Id.* at 2345-49.

<sup>39</sup> *Id.* at 2346-47.

<sup>40</sup> *Id.* at 2345-48.

<sup>41</sup> *Id.* at 2349-50.

<sup>42</sup> *Id.* at 2344-45.

concluded that section 101(a)(2) "should [not] be read as incorporating the entire body of First Amendment law."<sup>43</sup> The Court based this portion of its opinion on the legislative history of section 101(a)(2). Specifically, the Court focused on Congress' adoption of an amendment to the originally proposed LMRDA.<sup>44</sup> This amendment reserved the union's authority to adopt reasonable rules related to the responsibilities of its members.<sup>45</sup> This reservation of union prerogative, the Court found, squarely refuted Sadlowski's contention that Congress intended the scope of section 101(a)(2) to be identical to that of the first amendment.<sup>46</sup> The opinion noted that union rules were valid under section 101(a)(2) and concluded, "so long as they [were] reasonable; they need not pass the stringent tests applied in the First Amendment context."<sup>47</sup>

After the Court decided that reasonable union rules would not be subject to a rigorous first amendment analysis, it next examined the impact of the USWA outsider rule on the interests protected under section 101(a)(2).<sup>48</sup> The Court noted that even if the rule interfered with an interest protected under the section, the rule would still be valid if it reasonably related to the protection of the organization as an institution.<sup>49</sup> Applying the first step of this two-tiered analysis, the Supreme Court found that the outsider rule did affect union members' rights protected by section 101(a)(2) of the LMRDA.<sup>50</sup> The Court acknowledged that Congress adopted the freedom of speech and assembly provision in order to promote union democracy and that this freedom was "particularly critical" in the context of union election campaigns.<sup>51</sup> Furthermore, the Court conceded that a candidate's ability to mount effective challenges to union leadership "may be weakened" by the outsider rule.<sup>52</sup> In so stating, the Court took note of its first amendment decisions protecting contribution and solicitation of financial support in order to further effective advocacy.<sup>53</sup> Moreover, the Court acknowledged that in *Buckley v. Valeo*<sup>54</sup> it held that first amendment rights of contributors as well as candidates may be infringed by contribution limitations.<sup>55</sup> The Court dismissed this line of precedent, in spite of these considerations which would suggest that the rule does interfere with protected interests, because "non-member contributors have no right of expression protected by the statute."<sup>56</sup>

The Court continued its inquiry into the interference of the rule with protected interests by finding that the impact of the outsider rule on section 101(a)(2) rights "may

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<sup>43</sup> *Id.* at 2344.

<sup>44</sup> *Id.* at 2344-45.

<sup>45</sup> See *supra* note 4. The Kuchel amendment prevailed over the McClellan amendment. Senator McClellan said of his amendment that it would "bring to the conduct of union affairs and to union members the reality of some freedoms from oppression that we enjoy as citizens by virtue of the Constitution . . ." 105 CONG. REC. 6472 (1959). The Kuchel amendment, offered as a substitution for the McClellan amendment, was said to "remove the extremes" of the McClellan amendment, 105 CONG. REC. 6721 (1959) (Sen. Cooper) and not to "unduly harass and obstruct legitimate unionism." 105 CONG. REC. 6722 (1959) (Sen. Church).

<sup>46</sup> 102 S. Ct. 2339, 2345 (1982).

<sup>47</sup> *Id.* See *infra* text accompanying notes 62-71 for the Court's reasoning in finding the outsider rule "reasonable."

<sup>48</sup> 102 S. Ct. 2339, 2345-49.

<sup>49</sup> *Id.* at 2346.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 4346 n.6.

<sup>54</sup> 424 U.S. 1 (1976) (per curiam).

<sup>55</sup> 102 S. Ct. 2339, 2346 n.6 (1982) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)).

<sup>56</sup> *Id.*

not be substantial."<sup>57</sup> Central to this finding was the Court's reliance on uncontradicted evidence submitted by the USWA that the outsider rule did not have an adverse effect on the 1981 USWA campaigns.<sup>58</sup> In addition to relying on evidence of successful insurgent campaigns mounted without the aid of outside contributions, the Court noted several factors that lessened the advantages of incumbency in a union election. First, USWA rules forbid staff employees from campaigning on union time or from using union funds and facilities for campaign purposes.<sup>59</sup> Second, staff officers have a contractual right to decide whether or not to participate in any USWA campaign without being subjected to discipline or reprisal.<sup>60</sup> Lastly, the union indicated that the rule would not prohibit the use of outside funds by members not involved in a campaign for the purpose of focusing the attention of the rank and file on a specific problem.<sup>61</sup>

Once it determined that the outsider rule did interfere with section 101(a)(2) protected rights, the Court then turned to the second tier of its analysis by examining the reasonableness of the union's prohibition on the use of outside financial support for union elections.<sup>62</sup> The Court noted the union's fear that the first allegiance of an official who had received outside support might not be to the union.<sup>63</sup> The Court concluded that the outsider rule served a legitimate union purpose and, therefore, was a valid exercise of the union's rule-making authority.<sup>64</sup> The Court examined relevant legislative history and determined that Congress desired to permit unions, rather than outsiders, to control their own affairs.<sup>65</sup>

In upholding the validity of the outsider rule, the Court analogized it to the LMRDA's prohibition of employer contributions to union campaigns.<sup>66</sup> The outsider rule, found the Court, was clearly consistent with the LMRDA's ban on employer contributions designed to minimize the danger of outside influence.<sup>67</sup> The Court rejected several of the plaintiffs' arguments that the rule was not rationally related to the desire to reduce outside influences on union activities.<sup>68</sup> Although the plaintiffs advocated contribution ceilings as a more appropriate alternative than a complete prohibition, the Court noted that ceilings would not affect the solicitation of many small contributors.<sup>69</sup> Similarly, the Court rejected the plaintiffs' assertion that relatives and friends should not be prohibited from making contributions as a "loophole".<sup>70</sup> Finally, the Court stated that

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<sup>57</sup> *Id.* at 2346.

<sup>58</sup> *Id.* at 2347. The case was before the Court on cross-motions for summary judgment; therefore, the Court assumed all evidence submitted by Sadlowski was true. *Id.* at 2347 n.7. In addition, evidence submitted by USWA was relied on only when uncontradicted. *Id.*

<sup>59</sup> *Id.* at 2347. Specifically, the USWA offered evidence that a non-incumbent candidate for district director in a small district raised over \$30,000 from rank and file members fifteen months prior to the election. *Id.* at 2347 n.8.

<sup>60</sup> *Id.* at 2347.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* See *supra* note 5.

<sup>63</sup> 102 S. Ct. 2339, 2347 (1982). The Court stated "USWA feared that officers who received campaign contributions from non-members might be beholden to those individuals and might allow their decisions to be influenced by considerations other than the best interests of the union." *Id.*

<sup>64</sup> *Id.* at 2347-48.

<sup>65</sup> *Id.* at 2348.

<sup>66</sup> *Id.* See 29 U.S.C. § 481(g) (1976).

<sup>67</sup> 102 S. Ct. 2339, 2349 (1982).

<sup>68</sup> *Id.* at 2348-49.

<sup>69</sup> *Id.* at 2349. Sadlowski conducted extensive mail solicitation of small, non-union contributors in the 1977 election. *Id.*

<sup>70</sup> *Id.*

the disclosure rule, which was advocated by the plaintiffs as an alternative to the outsider rule, did not "eradicate the threat of outside influence" on union activity.<sup>71</sup>

After concluding that the bar on outside contributions to union election campaigns was valid under the rule-making provision of section 101(a)(2), the Court then addressed the second major issue of *Sadlovski*: the challenge to the rule under the right to sue provision of the Bill of Rights of the LMRDA. Unlike the district court and court of appeals, the Supreme Court held that the outsider rule did not violate the labor organization members' right to sue granted under section 101(a)(4).<sup>72</sup> In contrast to the lower courts, the Supreme Court did not interpret the outsider rule as prohibiting union members from accepting financial or other support from non-members for the purpose of conducting campaign-related litigation.<sup>73</sup> In making this determination, the Court emphasized the issuance of an opinion by the Campaign Contribution Administration Committee that the outsider rule did not apply to the financing of lawsuits for the purpose of asserting the legal rights of candidates or other union members in connection with elections.<sup>74</sup> In addition, the Court accepted the USWA's explanation of language in the Election Manual which prohibited outside financial support for "[a]ctivities which are designed to extract political gain from legal proceedings."<sup>75</sup> According to the USWA, the prohibition was only intended to cover non-litigation activities which refer to litigation, such as a flyer announcing a legal victory.<sup>76</sup> In summary, a five member majority of the Supreme Court upheld the USWA's "outsider rule." The Court acknowledged that the rule would have some impact on rights Congress intended to protect.<sup>77</sup> It stated however, that the rule was "rationally related to a legitimate and protected purpose"<sup>78</sup> and thus was sheltered by the union's rule-making prerogative under section 101(a)(2).<sup>79</sup>

Four dissenting justices sharply disagreed with the majority's opinion. Justice White, in a dissent joined by Chief Justice Burger, Justices Brennan and Blackmun, examined the legislative history underlying section 101(a)(2).<sup>80</sup> The dissent noted a clear congressional concern with protecting union members from "entrenched corrupt leaders."<sup>81</sup> In addition, the dissenters drew upon Supreme Court cases which identified the LMRDA as a major effort by Congress "to insure union democracy."<sup>82</sup> Specifically, the opinion cited *United Steelworkers of America v. Usery*,<sup>83</sup> wherein the Supreme Court struck down a contract provision which limited eligibility for local union office to members who had attended at least one-half of the regular union meetings for three years prior to the election.<sup>84</sup> The dissenting justices also relied on *Wirtz v. Hotel, Motel & Club Employees Union*,<sup>85</sup> a case which invalidated a union bylaw limiting eligibility for major elective office

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2349-50.

<sup>75</sup> *Id.* at 2350.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> The Court used the terms "rationally related" and "reasonable" interchangeably.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2350-51 (White, J., dissenting).

<sup>81</sup> *Id.* at 2351 (White, J., dissenting).

<sup>82</sup> *Id.* (White, J., dissenting).

<sup>83</sup> 429 U.S. 305 (1977).

<sup>84</sup> *Id.* at 307-08.

<sup>85</sup> 391 U.S. 492 (1968).

to those who had previously held a union office.<sup>86</sup>

Having interpreted both legislative intent and judicial precedent in a light most unfavorable to the USWA's outsider rule, the dissent then suggested that the "reasonableness" of a union's rule promulgated under section 101(a)(2) should be evaluated in such a context.<sup>87</sup> According to the dissenters, the inescapable fact was that the union's internal political machine supports incumbents, thereby making it difficult, if not impossible, for the democratic process to operate within a union electoral process which has such severe financial restrictions.<sup>88</sup> The dissent, therefore, found that the outsider rule "contradicted the values the LMRDA was designed to protect and thwarted its purposes."<sup>89</sup> Furthermore, continued the minority opinion, the outsider rule went far beyond the political contribution limitations previously approved by the Supreme Court in *Buckley v. Valeo* in the context of federal elections.<sup>90</sup> In *Buckley*, the Court upheld an amendment to the Federal Election Campaign Act of 1971 (the Act)<sup>91</sup> which limited personal contributions to a federal political candidate to \$1,000 per candidate per election.<sup>92</sup> The Act, however, did permit a candidate to combine his financial resources with those of his family, subject to ceilings of between \$25,000 and \$50,000 depending upon the federal office sought.<sup>93</sup> Moreover, in *Buckley*, expenditure ceilings placed on a candidate's campaign were invalidated as substantial and direct restrictions on the rights of candidates and citizens to engage in protected political expression.<sup>94</sup> The dissent in *Sadlowski* found that the outsider rule severely limited expenditures.<sup>95</sup> Finally, the dissent was concerned with the severity of the outsider rule which could operate to disqualify a candidate unable to rebut the rule's presumption that he "accepted" the prohibited support.<sup>96</sup>

The dissent also stressed the difficulties a candidate faces, in the best of circumstances, in attempting to unseat an incumbent.<sup>97</sup> There is, according to the dissent, no permanent opposition party within the union.<sup>98</sup> According to authorities cited by the dissent, a candidate's initial campaign must be largely financed through his own funds and loans and gifts from friends.<sup>99</sup> Only when a candidate has crossed the threshold and demonstrated himself to be a viable candidate will he get substantial support from union members.<sup>100</sup>

In upholding the USWA's outsider rule, the *Sadlowski* Court decided three significant issues. First, the Court clearly stated that the so-called "Bill of Rights" of the LMRDA did

<sup>86</sup> *Id.* at 499.

<sup>87</sup> 102 S. Ct. 2339, 2351 (1982). "[B]ut the reasonableness of a particular rule must surely be judged with reference to the paradigmatic situation that Congress intended to address by guaranteeing free elections: a large union with entrenched autocratic leadership bent on maintaining itself by fair means or foul." *Id.* (White, J., dissenting).

<sup>88</sup> *Id.* at 2352-54 (White, J., dissenting). The broad scope of the regulations adopted by the union in defining "financial support" were of particular concern to the dissenters. *Id.* at 2352 (White, J., dissenting).

<sup>89</sup> *Id.* at 2355 (White, J., dissenting).

<sup>90</sup> *Id.* at 2353 (White, J., dissenting).

<sup>91</sup> 18 U.S.C. §§ 591-613 (Supp. IV 1970).

<sup>92</sup> 424 U.S. 1, 23-38 (1976).

<sup>93</sup> 18 U.S.C. § 608(a) (Supp. IV 1970).

<sup>94</sup> 424 U.S. at 39-59.

<sup>95</sup> 102 S. Ct. at 2353 (White, J., dissenting).

<sup>96</sup> *Id.* at 2352-53 (White, J., dissenting).

<sup>97</sup> *Id.* at 2354 (White, J., dissenting).

<sup>98</sup> *Id.* (White, J., dissenting).

<sup>99</sup> *Id.* (White, J., dissenting).

<sup>100</sup> *Id.* (White, J., dissenting).

not extend to union members a right of free speech and assembly equal to that protected by first amendment law.<sup>101</sup> Second, the Supreme Court upheld the USWA's prohibition on outside financial support to union campaigns as a "reasonable" rule which was rationally related to the union's right to reduce outside interference with its internal affairs.<sup>102</sup> Third, the Court interpreted the outsider rule so as to find that it did not violate the right to sue guaranteed under section 101(a)(4) of the LMRDA.<sup>103</sup> The union's authority to make reasonable rules was of paramount importance to the majority in deciding both the first and second issues. The existence of this rule-making proviso was primarily responsible for the Court's finding that the stringent first amendment analysis which is generally applied to situations where the rights of free speech might be infringed need not be applied to restrictions of the rights secured under section 101(a)(2) of the LMRDA.<sup>104</sup>

In *Sadlowski*, the Court gave a permissive interpretation to the meaning of reasonableness.<sup>105</sup> In other union campaign-related cases, reasonableness has not been so broadly construed. In *Wirtz*,<sup>106</sup> where the Court struck down the union bylaw limiting eligibility for office to those who had previously held office, for example, the Court stated that the LMRDA's command of free and democratic union elections must be considered<sup>107</sup> when determining whether a candidacy qualification requirement meets the reasonableness requirement of section 401(c) of the LMRDA.<sup>108</sup> In *Wirtz*, the union bylaw would have disqualified ninety-three percent of the rank and file union members from eligibility for union office.<sup>109</sup> Similarly, in *United Steelworkers of America v. Usery*,<sup>110</sup> the Court struck down a bylaw which would have resulted in disqualification of over ninety-six percent of members from eligibility to run in a union election.<sup>111</sup> While the rules struck down in *Wirtz* and *United Steelworkers v. Usery* may have presented more grievous interferences with the democracy of the union's electoral process than the outsider rule, *Sadlowski* nonetheless represents a reduction in the level of scrutiny exercised by the Supreme Court when reviewing rules affecting internal union elections. Furthermore, these precedents highlight the paramount importance previously placed by the Supreme Court on protecting the rank and file from abuses of entrenched union leadership through the preservation of a democratic election process.

In *Sadlowski*, the Supreme Court demonstrated significant deference to a union's right to self-governance. This respect for the union's power is further manifested by the Court's acceptance of the union's internal administrative interpretation of the impact of the rule on the right to sue guarantee of section 101(a)(4).<sup>112</sup> In conclusion, in *United*

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<sup>101</sup> *Id.* at 2344-45. It should be noted that the Court acknowledged that contribution limitations potentially infringe first amendment rights of contributors as well as candidates. *Id.* at 2346 n.6 (citing *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976)). In the instant case, however, the Court pointed out that "the non-member contributors have no right of expression protected by the [LMRDA]." 102 S. Ct. 2339, 2346 n.6 (1982) (emphasis in original).

<sup>102</sup> *Id.* at 2346.

<sup>103</sup> *Id.* at 2349-50.

<sup>104</sup> *Id.* at 2344-45.

<sup>105</sup> *Id.* at 2346-47.

<sup>106</sup> See *supra* notes 85 & 86 and accompanying text.

<sup>107</sup> 391 U.S. 492, 499 (1968).

<sup>108</sup> 29 U.S.C. § 481(e) (1976).

<sup>109</sup> 391 U.S. at 502.

<sup>110</sup> 429 U.S. 305 (1977).

<sup>111</sup> *Id.* at 306-07.

<sup>112</sup> See *supra* notes 74-76 and accompanying text.

*Steelworkers of America v. Sadlowski*, a majority of the Supreme Court indicated a decided willingness to leave to the union the management and control of its internal affairs, including its electoral process. In so doing, the Supreme Court ignored the real and significant obstacles an insurgent candidate faces in a union election.

2. \**Representation Elections and Employer Interference: RCA Del Caribe, Inc.*<sup>1</sup> and *Bruckner Nursing Home*<sup>2</sup>

Section 8(a)(2) of the National Labor Relations Act (the Act) provides "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."<sup>3</sup> The National Labor Relations Board (the Board) has interpreted this section to require strict employer neutrality in the context of competing union claims regarding the representation of a recognized unit of workers. The leading case in this area is *Midwest Piping*.<sup>4</sup> In rival union situations, *Midwest Piping* dictates that when two or more labor organizations have filed representation petitions, an employer may not negotiate with the competing organizations until such time as the "real question concerning representation" has been resolved through the mechanism of a Board-conducted election.<sup>5</sup> Where an incumbent union is being challenged, the Board has held that an employer faced with a pending petition from an outside union must not bargain with the incumbent or challenging union until such time as one or the other has been certified following a Board-conducted election.<sup>6</sup> Since its inception, the *Midwest Piping* doctrine has encountered resistance, particularly from the circuit courts asked to enforce it.<sup>7</sup> In this *Survey* year, the Board examined the *Midwest Piping* doctrine and changed it substantially.

In *RCA Del Caribe, Inc.*, the Board established new guidelines concerning situations wherein an incumbent union is challenged by an "outside" union.<sup>8</sup> The Board concluded that an employer should not be required to withdraw from bargaining with an incumbent union merely because a representation petition has been filed.<sup>9</sup> In *Bruckner Nursing*

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<sup>1</sup> 262 N.L.R.B. No. 116, 110 L.R.R.M. 1369 (1982).

<sup>2</sup> 262 N.L.R.B. No. 115, 110 L.R.R.M. 1374 (1982).

<sup>3</sup> National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(2) (1981).

<sup>4</sup> *Midwest Piping and Supply Co., Inc.*, 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945).

<sup>5</sup> *Id.* at 1061, 17 L.R.R.M. at 40. Whether or not there is in fact a "real question concerning representation" is determined by the validity of the union's petitions. The union is required to show a minimum of support in order to establish a "real question." See *infra* notes 20-26 and accompanying text.

<sup>6</sup> *Shea Chemical Corporation*, 121 N.L.R.B. 1027, 1029, 42 L.R.R.M. 1486 (1958). A union is "certified" after the N.L.R.B. accepts the results of the election and formally recognizes that one union has the power to bargain for a defined group of employees.

<sup>7</sup> See, e.g., *Inter-Island Resorts, Ltd. d/b/a Kona Surf Hotel*, 201 N.L.R.B. 139, 82 L.R.R.M. 1279 (1973), *enf. denied*, 507 F.2d 411, 87 L.R.R.M. 2075 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042, 89 L.R.R.M. 2614 (1975); *Playskool, Inc.*, a Division of Milton Bradley Company, 195 N.L.R.B. 560, 79 L.R.R.M. 1507 (1972), *enf. denied*, 477 F.2d 66, 82 L.R.R.M. 2916 (7th Cir. 1973), *supp. op.*, 205 N.L.R.B. 1009, 84 L.R.R.M. 1129 (1973); *Pittsburgh Valve Company*, 114 N.L.R.B. 193, 36 L.R.R.M. 1550 (1955), *enf. denied*, 234 F.2d 565, 38 L.R.R.M. 2294 (4th Cir. 1956); *American Bread Company*, 170 N.L.R.B. 85, 67 L.R.R.M. 1430 (1968), *enf. denied*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969).

<sup>8</sup> *RCA Del Caribe, Inc.*, 262 N.L.R.B. No. 116, 110 L.R.R.M. 1369 (1982).

<sup>9</sup> *Id.* at 9-10, 110 L.R.R.M. at 1370-71.

*Home*,<sup>10</sup> the Board set forth a new policy with respect to the requirements of employer neutrality in rival union initial-organizing situations.<sup>11</sup> The Board indicated that it would no longer find section 8(a)(2) violations in rival union situations when an employer recognized a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board.<sup>12</sup> The intended effect of these two decisions was to stabilize further the collective-bargaining process by injecting more precise definitions of employer choices and risk extant in recognition of labor organizations.<sup>13</sup>

This chapter will first examine the *Midwest Piping* doctrine as it existed prior to this *Survey* year.<sup>14</sup> To fully appreciate the significance of *RCA Del Caribe* and *Bruckner Nursing Home*, familiarity with the background and evolution of the *Midwest Piping* doctrine is also necessary.<sup>15</sup> Next, the *RCA Del Caribe* and *Bruckner Nursing Home* decisions will be explained, and the Board's analysis will be outlined in an effort to understand the effect of these decisions.<sup>16</sup> Finally, the positive and negative aspects of each case will be discussed to discover the import of the new analyses.<sup>17</sup> It will be suggested that these two cases do, as intended by the Board, work to stabilize and define the neutrality required of employers by section 8(a)(2) of the the Act.<sup>18</sup>

As originally formulated, the *Midwest Piping* doctrine was an attempt by the Board to ensure that, in a rival union situation, an employer would not render aid to one of two or more unions competing for exclusive bargaining representative status. The "aid" feared by the Board often took the form of a grant of recognition in advance of a Board-conducted election.<sup>19</sup> In *Midwest Piping*, the Board held that rival claims from competing unions (in the form of representation petitions) would best be resolved if the employer followed a course of strict neutrality with respect to the competing unions until such time as the "real question concerning representation" had been resolved through the mechanism of a Board-conducted election.<sup>20</sup>

In the initial cases following *Midwest Piping*, the Board established the principle that the duty of strict employer neutrality and the necessity of a Board-conducted election were operative only when a representation petition had been filed with the Board.<sup>21</sup> In later decisions, however, the Board removed the requirement that a petition was a

<sup>10</sup> 262 N.L.R.B. No. 115, 110 L.R.R.M. 1374 (1982).

<sup>11</sup> *Id.* at 9-14, 110 L.R.R.M. at 1376-78. "Rival union initial-organizing situations" arise when two or more unions face each other in an election, and neither can claim the benefits associated with incumbency.

<sup>12</sup> *Id.* at 9-10, 110 L.R.R.M. at 1376.

<sup>13</sup> *Id.* at 10-12, 110 L.R.R.M. at 1376-78.

<sup>14</sup> See *infra* notes 19-26 and accompanying text.

<sup>15</sup> See *infra* notes 27-46 and accompanying text.

<sup>16</sup> See *infra* notes 47-109 and accompanying text.

<sup>17</sup> See *infra* notes 110-123 and accompanying text.

<sup>18</sup> See *infra* notes 124-137 and accompanying text.

<sup>19</sup> "Rival union situation" refers to those occasions in which there is no incumbent union involved in the bargaining. *Id.* at 4, 110 L.R.R.M. at 1375. In *Midwest Piping* itself, the Board found that an employer gave unlawful assistance to a labor organization when the employer recognized one of two competing labor organizations, both of which had filed representation petitions, and both of which had campaigned extensively for the mantle of exclusive bargaining representative. In the context of that case, the Board held that the employer had arrogated the resolution of the representation issue, and that a Board-conducted election was the "best" means of ascertaining the true desires of employees. *Midwest Piping*, 63 N.L.R.B. at 1060-61, 17 L.R.R.M. at 40-41.

<sup>20</sup> *Id.* at 1061, 17 L.R.R.M. at 40.

<sup>21</sup> See, e.g., *Ensher, Alexander & Barsoom, Inc.*, 74 N.L.R.B. 1443, 1444-45, 20 L.R.R.M. 1282 (1947).

prerequisite to the finding of a "real" or "genuine" question concerning representation.<sup>22</sup> This action was due in part to the Board's desire to recognize the existence of a rival union contest even before formal invocation of the Board's election procedures to ensure that those procedures would be available.<sup>23</sup> Thus, if more than one union enjoyed at least some employee support, the Board considered the election procedure the best way to guarantee employees a fair, free opportunity to choose their bargaining representative.<sup>24</sup> The Board described the "support" that a union must have to trigger the operation of the *Midwest Piping* doctrine as a claim that was not a "naked claim," "clearly unsupportable," or a claim that was at least "colorable."<sup>25</sup> Thus, prior to *Bruckner Nursing Home*, the Board's policy effectively required strict employer neutrality where any question existed concerning representation in rival union initial-organizing situations, even though no petition had been filed unless and until a Board-conducted election had been held and the results certified.<sup>26</sup>

The primary difficulties arising out of this modification of the original representation petition-tied *Midwest Piping* doctrine were concerned largely with definitional problems inherent in the terms "naked claim,"<sup>27</sup> "clearly supportable claim,"<sup>28</sup> and "colorable claim."<sup>29</sup> These problems prevented the Board from providing any clear standards concerning the fine line between a colorable claim and a naked one.<sup>30</sup> A court's application of the evolving *Midwest Piping* doctrine, therefore, frequently allowed a minority union with little support to forestall the recognition of a majority union in an effort to buy time and enable it to gather support or to frustrate its rivals.<sup>31</sup> The result was Board intervention, in the name of employee choice, that actually worked to impede and frustrate the expression of employee preference, and ultimately, the collective-bargaining process.<sup>32</sup> Moreover, this result was often the basis for the circuit courts' refusal to enforce many Board decisions.<sup>33</sup> The courts took the view that the question concerning representation was resolved whenever an employer recognized a bona fide majority claimant and had not actually aided the unrecognized labor organization.<sup>34</sup> The Board resisted criticisms by the courts, maintaining that the Board's election machinery was still the optimum means of resolving the rival union representation question.<sup>35</sup>

<sup>22</sup> See, e.g., *Pittsburgh Valve Company, Inc.*, 114 N.L.R.B. 193, 194-96, 36 L.R.R.M. 1550, 1551-52 (1955), *enf. denied*, 234 F.2d 565, 38 L.R.R.M. 2294 (4th Cir. 1956).

<sup>23</sup> *Bruckner Nursing Home*, 262 N.L.R.B. at 5, 110 L.R.R.M. at 1375.

<sup>24</sup> *Id.* at 56, 110 L.R.R.M. at 1375.

<sup>25</sup> *Playskool, Inc., a Division of Milton Bradley Company*, 195 N.L.R.B. 560, 560, 79 L.R.R.M. 1507, 1507 (1982), *enf. denied*, 477 F.2d 66, 82 L.R.R.M. 2916 (7th Cir. 1973), *supp. op.*, 205 N.L.R.B. 1009, 84 L.R.R.M. 1129 (1973).

<sup>26</sup> *Bruckner Nursing Home*, 262 N.L.R.B. at 5-9, 110 L.R.R.M. at 1375-76.

<sup>27</sup> *Robert Hall Gentilly Road Corporation, d/b/a Robert Hall Clothes, et al.*, 207 N.L.R.B. 692, 693, 84 L.R.R.M. 1538, 1539 (1973).

<sup>28</sup> *Playskool, Inc., a Division of Milton Bradley Company*, 195 N.L.R.B. 560, 560, 79 L.R.R.M. 1507, 1507 (1972), *enf. denied*, 477 F.2d 66, 82 L.R.R.M. 2916 (7th Cir. 1973).

<sup>29</sup> *American Bread Company*, 170 N.L.R.B. 85, 88, 67 L.R.R.M. 1430, 1433 (1968), *enf. denied*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969).

<sup>30</sup> See *Bruckner Nursing Home*, 262 N.L.R.B. at 7, 110 L.R.R.M. at 1376.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 8, 110 L.R.R.M. at 1376.

<sup>33</sup> See cases cited *supra*, at note 5.

<sup>34</sup> See *Air Master Corporation, Inc.*, 142 N.L.R.B. 181, 184, 53 L.R.R.M. 1004, 1007 (1963), *enf. denied*, 339 F.2d 553, 57 L.R.R.M. 2657 (3rd Cir. 1964).

<sup>35</sup> See *Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel*, 201 N.L.R.B. 139, 142 n.2., 82 L.R.R.M. 1279, 1282 n.12 (1973), *enf. denied*, 507 F.2d 411, 87 L.R.R.M. 3075 (9th Cir. 1974).

The application of the *Midwest Piping* doctrine in the setting of an incumbent being challenged by a rival union was somewhat different. In decisions immediately following *Midwest Piping*, the Board held that the continued negotiation of a contract after the filing of a representation petition was not a violation of section 8(a)(2) of the National Labor Relations Act within the meaning of *Midwest Piping*.<sup>36</sup> The Board later reversed this holding in *Shea Chemical Corporation*,<sup>37</sup> holding that an employer faced with a pending petition from an outside union must cease bargaining with the incumbent and maintain a posture of strict neutrality with respect to both the incumbent and the challenging labor organization, until such time as one or the other has been certified following a Board-conducted election.<sup>38</sup> The Board in *Shea Chemical Corporation* explained that by defining neutrality so as to prevent continued negotiation between an incumbent and an employer in the face of a validly supported petition, a challenging union could make its case to the unit employees free from possible undue influence by the incumbent presence in continuing negotiations.<sup>39</sup> As in the initial-organizing situation, the Board required strict employer neutrality and a Board-conducted election in the incumbent setting out of concern that employees have the greatest possible freedom in the selection of their collective bargaining representatives.<sup>40</sup>

The *Shea Chemical* adaptation of *Midwest Piping* was problematic in situations involving incumbent representatives because it failed to accord the incumbent the advantages which it would otherwise enjoy. The Board had previously encouraged the adoption of these advantages in the interest of industrial stability.<sup>41</sup> *Shea Chemical* had effectively allowed the promotion of employee free choice to be at the price of effective representation. With the threat of impending election and without the advantages of incumbency, a union is likely to ignore employee concerns, and instead focus its energies on the retention of this majority status.<sup>42</sup>

Thus, on the eve of the *Bruckner Nursing Home* and *RCA Del Caribe* decisions, the Board's original *Midwest Piping* decision had evolved into a wide-reaching doctrine that defined section 8(a)(2) of the Act's "strict neutrality" requirement so as to prevent employer recognition in initial-organizing, rival union situations, even when one union's "colorable" claim was in fact tenuous at best. The *Midwest Piping* doctrine as applied to situations involving a rival union's challenge in an incumbent situation was similarly restrictive. The incumbent majority status was effectively presumed to be questionable with no more evidence than a pending election petition. The consequent disruption of the bargaining process, the circuit courts' refusal to uniformly enforce Board applications of this doctrine made it increasingly evident that the Board's effort to promote employee free choice was at the price of the stability of the collective bargaining process, and that some reexamination of the *Midwest Piping* doctrine was necessary to correct these problems.

During the Survey year the Board redefined the longstanding *Midwest Piping* doctrine as it applied in organizational situations in which incumbent unions were involved and when an initial organization campaign was underway. In *RCA Del Caribe, Inc.*, the Board

<sup>36</sup> William D. Gibson Co., Division of Associated Spring Corporation, 110 N.L.R.B. 660, 662, 35 L.R.R.M. 1092, 1093 (1954).

<sup>37</sup> 121 N.L.R.B. 1027, 42 L.R.R.M. 1486 (1958).

<sup>38</sup> *Id.* at 1029, 42 L.R.R.M. at 1487.

<sup>39</sup> *See id.*

<sup>40</sup> *RCA Del Caribe*, 262 N.L.R.B. at 8, 110 L.R.R.M. at 1370.

<sup>41</sup> *See id.*

<sup>42</sup> *Id.*

re-examined its application of the *Midwest Piping* case to incumbent situations, and established new guidelines concerning instances where an incumbent union is challenged by an "outside" union.<sup>43</sup> The Board concluded that requiring an employer to withdraw from bargaining after a petition has been filed with the Board was not the best means of assuring employer neutrality.<sup>44</sup> In another decision, *Bruckner Nursing Home*, the Board set forth a new policy with respect to the requirements of employer neutrality in rival union initial-organizing situations.<sup>45</sup> The Board indicated that it would no longer find section 8(a)(2) violations in rival union situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board.<sup>46</sup> The Board decided *RCA Del Caribe* and *Bruckner Nursing Home* as companion cases. *RCA Del Caribe* will be examined first.

In *RCA Del Caribe*, the parties consisted of Local 2333 of the International Brotherhood of Electrical Workers (IBEW), Union Independiente, and the employer RCA Del Caribe, Inc.<sup>47</sup> IBEW had been functioning as the exclusive representative of a unit consisting of hourly paid production and maintenance employees of RCA Del Caribe, Inc. since April 30, 1971.<sup>48</sup> Pursuant to such recognition, RCA Del Caribe and IBEW had executed a collective bargaining agreement effective from April 30, 1971 until February 1, 1972, which was thereafter renewed for a period effective from January 8, 1972 until January 2, 1975.<sup>49</sup> During the month of November 1974, RCA Del Caribe and IBEW commenced negotiations for a new collective-bargaining agreement to succeed the contract which was to expire on January 2.<sup>50</sup> The negotiations continued until January 8, at which time IBEW submitted RCA Del Caribe's final offer to the unit employees, who subsequently rejected the offer.<sup>51</sup> Thereafter, beginning on January 9, unit employees engaged in a strike authorized by IBEW in support of IBEW's bargaining demands.<sup>52</sup>

On January 27, Union Independiente filed a petition for certification of representation, seeking to represent RCA Del Caribe's production and maintenance employees.<sup>53</sup> Also on January 27, RCA Del Caribe and IBEW were served with copies of that petition.<sup>54</sup> In view of the pendency of the petition filed by Union Independiente, RCA Del Caribe refused to recognize or negotiate with IBEW.<sup>55</sup> Consequently, on February 24, IBEW submitted to RCA separate sheets signed by 157 unit employees, a majority of the 227 bargaining unit employees, which authorized IBEW to continue to represent the employees as their collective-bargaining representative.<sup>56</sup> The evidence indicated that the signatures on the authorization sheets had been affixed between February 17 and 24. They were obtained voluntarily and without coercion or other unlawful means.<sup>57</sup> On February 24, RCA determined that the signatures of the 157 employees were bona fide after

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<sup>43</sup> *RCA Del Caribe, Inc.*, 262 N.L.R.B. No. 116, 110 L.R.R.M. 1369 (1982).

<sup>44</sup> *Id.* at 9, 110 L.R.R.M. at 1370.

<sup>45</sup> *Bruckner Nursing Home*, 262 N.L.R.B. No. 115, 110 L.R.R.M. 1374 (1982).

<sup>46</sup> *Id.* at 9-10, 110 L.R.R.M. at 1376-77.

<sup>47</sup> *RCA Del Caribe*, 262 N.L.R.B. at 2-4, 110 L.R.R.M. at 1369.

<sup>48</sup> *Id.* at 4, 110 L.R.R.M. at 1369.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 5, 110 L.R.R.M. at 1369.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

comparing them with the employees' signatures in its records.<sup>58</sup> In addition, on February 23, a petition was also signed by approximately 157 unit employees requesting that the National Labor Relations Board dismiss the representation petition filed by Union Independiente.<sup>59</sup> On February 24, RCA Del Caribe determined that the signatures of this petition were also bona fide by comparing the signatures on the petition with the employees' signatures in its records.<sup>60</sup> On February 25, upon IBEW's request, RCA Del Caribe agreed to resume negotiations for a new collective-bargaining agreement, and, on February 26, RCA and IBEW executed a new collective-bargaining agreement to succeed the 1972-75 agreement.<sup>61</sup>

Union Independiente filed a charge, alleging that the employer had assisted the incumbent union in violation of section 8(a)(2) of the Act. The General Counsel agreed with Union Independiente, and contended that, by executing a contract with IBEW with full knowledge of the representation petition filed by Union Independiente, RCA Del Caribe had violated the requirement established in *Midwest Piping*, that an employer maintain strict neutrality in the face of competing representational claims.<sup>62</sup> The General Counsel argued further that, through its conduct, RCA had rendered unlawful assistance to IBEW in violation of sections 8(a)(1) and (2) of the National Labor Relations Act and that it also had violated section 8(a)(3) of the Act because the executed agreement contained a union-security clause.<sup>63</sup> RCA Del Caribe claimed that it was not obligated to refrain from recognizing IBEW because the mere filing of the representation petition by Union Independiente did not raise a "real question concerning representation," as required by *Midwest Piping*.<sup>64</sup> RCA argued that an employer does not violate the Act if he verifies the union's apparent majority before executing a collective-bargaining agreement with that majority representative.<sup>65</sup>

The Board concluded that requiring an employer to withdraw from bargaining after a petition had been filed was not the best means of assuring employer neutrality. Thus, the mere filing of a representation petition by a challenging union no longer forces an employer to withdraw from bargaining or executing a contract with an incumbent union.<sup>66</sup> Under this new rule, an employer may conduct post-petition negotiations or execute a contract with an incumbent without violating section 8(a)(2) of the National Labor Relations Act.<sup>67</sup> An employer would, however, violate section 8(a)(5) of the Act by withdrawing from bargaining with the incumbent based solely on the fact that a petition had been filed by an outside union.<sup>68</sup> The new rule would not preclude an employer from withdrawing recognition of the incumbent in good faith based on other objective considerations.<sup>69</sup>

Applying the new rule to the facts in *RCA Del Caribe*, the Board found that the employer's continued negotiations and execution of a contract with the incumbent IBEW

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 5-6, 110 L.R.R.M. at 1370.

<sup>62</sup> *Id.* at 6, 110 L.R.R.M. at 1370.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 10-11, 110 L.R.R.M. at 1371.

<sup>67</sup> *Id.* at 11, 110 L.R.R.M. at 1371.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at n.13, 110 L.R.R.M. at n.13.

were not violations of the Act within the meaning of section 8(a)(2). The complaint was accordingly dismissed.<sup>70</sup>

The Board's conclusions were based on its recognition that the National Labor Relations Act's concern for stability in collective-bargaining relationships, embodied in the doctrine of the presumption of continuing majority status, had not been given due consideration.<sup>71</sup> The Board explained that while the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent and should not serve to strip it of the advantages and authority it could otherwise legitimately claim.<sup>72</sup> The Board concluded that an employer in an existing collective-bargaining situation could not observe strict neutrality.<sup>73</sup> The Board recognized that an employer may have difficulty in maintaining strict neutrality in the collective-bargaining situation because an incumbent union, at the time of challenge by an outside union, is often in the process of — and perhaps close to completing — negotiation of a contract.<sup>74</sup> According to the Board, if an employer continued to bargain employees could perceive a preference for the incumbent union, whether or not the employer holds that preference.<sup>75</sup> If an employer withdrew from bargaining, however, particularly when agreement was imminent, it could be interpreted by the employees as a repudiation of the incumbent and a preference for the rival.<sup>76</sup> Moreover, the Board reasoned, to prohibit negotiations until a ruling on the results of a new election occurred might work undue hardship on employers, unions, and employees.<sup>77</sup> Further, the Board recognized that depending on the timing of the election, waiting for a ruling on the results could require employees to work without a contract unnecessarily. In addition, the Board reasoned that such a rule allows an outside union to interfere with an incumbent that is in the process of, and perhaps close to completing, negotiation of a contract that would be acceptable to a majority of the union. Thus, the Board came to its ultimate conclusion that preservation of the status quo through an employer's continued bargaining with an incumbent was the better way to approximate employer neutrality.<sup>78</sup>

In *RCA Del Caribe*, the Board also explained the specific effects of its new approach.<sup>79</sup> The new approach does not insulate incumbent unions from a legitimate outside challenge.<sup>80</sup> As before, a timely filed petition will put an incumbent to the test of demonstrating that it is still the majority choice for exclusive bargaining representation.<sup>81</sup> After the Board's decision, however, although a valid petition has been filed, an incumbent will retain its earned right to demonstrate its effectiveness as a representative in the current negotiating process.<sup>82</sup> Nevertheless, the Board warned that if the challenging union should prevail in an election following the execution of a contract with the incumbent

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<sup>70</sup> *Id.* at 12-13, 110 L.R.R.M. at 1371.

<sup>71</sup> *Id.* at 8-10, 110 L.R.R.M. at 1370-71.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 10, 110 L.R.R.M. at 1371.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 11, 110 L.R.R.M. at 1371.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

union, the contract with the incumbent would be considered null and void. The rival union's successful challenge could not, therefore, be nullified on the basis of contractual terms.<sup>83</sup>

The facts in a companion case, *Bruckner Nursing Home*, differed from *RCA Del Caribe* in certain fundamental ways. In *Bruckner Nursing Home*, the Board focused its attention on initial-organizing situations involving two or more rival labor organizations.<sup>84</sup> The parties involved in *Bruckner Nursing Home* were Local 144, Hotel Hospital, Nursing Home & Allied Health Services Union, S.E.I.U., AFL-CIO (Local 144), Local 1135, Joint Board, Nursing Home and Hospital Employees Division (Local 1115), and the employer, Abraham Grossman d/b/a Bruckner Nursing Home.<sup>85</sup> In the spring of 1984, Local 144 and Local 1115 began organizational activities at the employer's nursing home facility.<sup>86</sup> In early September of 1974, Local 144 notified the employer that it possessed a majority of signed authorization cards and a date was set for a card count.<sup>87</sup> Shortly thereafter, Local 1115 notified the employer that it was engaged in organizational activity with employees and that the employer should not extend recognition to any other labor organization.<sup>88</sup> On September 23, 1974, Local 1115 filed charges against the employer and Local 144 alleging that they had violated sections 8(a)(1) and 8(b)(1)(A) by interfering with the employees' right to select a union of their choice.<sup>89</sup> The card count was conducted on September 27, 1974, the employer being informed thereafter that Local 144 represented a majority of its employees.<sup>90</sup> Local 144 subsequently requested collective bargaining. The employer refused, pending the outcome of the unfair labor practice charges filed by Local 1115.<sup>91</sup> On November 29, 1974 the unfair labor practice charges filed by Local 1115 were dismissed by the Regional Director.<sup>92</sup> Negotiations between Local 144 and the employer commenced shortly thereafter and culminated in the execution of a collective-bargaining agreement on December 18, 1974.<sup>93</sup> Local 1115 then filed, on March 7, 1975, the charges at issue in this proceeding, namely that the employer had violated section 8(a)(2) by recognizing and negotiating with an uncertified union while another union possessed a "colorable claim" to representation.<sup>94</sup>

With respect to the foregoing facts, the Administrative Law Judge found that Local 1115 possessed a "colorable claim" to representation based on its continuous efforts to obtain employee support during the fall of 1974, and the fact that it had actually obtained a few authorization cards.<sup>95</sup> The Administrative Law Judge concluded that the employer "by executing a collective-bargaining agreement . . . in the face of a real question concerning representation which had not been settled by the special procedures of the Act" had rendered unlawful assistance to Local 144 in violation of section 8(a)(2) of the Act.<sup>96</sup> In what had become a standard remedy in this type of setting, the Administrative

<sup>83</sup> *Id.* at 12, 110 L.R.R.M. at 1371.

<sup>84</sup> *Bruckner Nursing Home*, 262 N.L.R.B. at 4, 110 L.R.R.M. at 1375.

<sup>85</sup> *Id.* at 2, 110 L.R.R.M. at 1374.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*, 110 L.R.R.M. at 1375.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 3, 110 L.R.R.M. at 1375.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

Law Judge ordered the employer to cease giving effect to the collective-bargaining agreement with Local 144, and to withdraw and withhold recognition from Local 144 unless or until it was certified in a Board-conducted election.<sup>97</sup>

In *Bruckner*, however, after reviewing its experience with *Midwest Piping*,<sup>98</sup> the Board concluded that its task of reconciling the various interests of policy and law mandated a rule which would give equal consideration to each of those interests in the light of industrial reality.<sup>99</sup> Accordingly, the Board voiced its intention no longer to find section 8(a)(2) violations in rival union, initial-organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority before a valid petition for an election has been filed with the Board.<sup>100</sup> The Board held that where no petition has been filed, an employer is free to grant recognition to a labor organization with an uncoerced majority, so long as it does not render assistance of the type which would otherwise violate section 8(a)(2) of the Act.<sup>101</sup> The application of this rule to the facts in the instant case, therefore, made it clear that since no petition had been filed by either of the rival unions, the recognition granted to Local 144 was based properly on the employer's determination of its uncoerced, unassisted majority status.<sup>102</sup>

The Board explained that by making the filing of a valid petition the operative event for the imposition of strict employer neutrality in rival union, initial-organizing situations, a clearly defined rule of conduct would be established, thereby furthering the goals of both employee free choice and industrial stability.<sup>103</sup> The Board explained that in situations where a rival organization could not command the support of at least thirty percent of the unit, it would be unfair to allow that union to forestall an employer's recognition of another organization which represented an uncoerced majority of employees and thereby frustrate the establishment of a collective-bargaining relationship.<sup>104</sup> The Board further explained that an employer, by virtue of these new guidelines, no longer would have to guess whether a real question concerning representation had been raised, but would instead be able to recognize a labor organization unless the employer had received notice of a properly filed petition.<sup>105</sup> The Board stressed that in a situation where a valid petition has been filed, the need for resolution of the representation issue, prior to employer recognition, is necessary to prevent undue influence or premature decisions by the

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<sup>97</sup> *Id.* at 3-4, 110 L.R.R.M. at 1375.

<sup>98</sup> *Id.* at 4-9, 110 L.R.R.M. at 1375-76.

<sup>99</sup> *Id.* at 9, 110 L.R.R.M. at 1376.

<sup>100</sup> *Id.* at 9-10, 110 L.R.R.M. at 1376.

<sup>101</sup> *Id.* at n.13, 110 L.R.R.M. at n.13. The Board emphasized that an employer would still be found liable under section 8(a)(2) for recognizing a labor organization which does actually have majority employee support. *Id.* (citing *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard Altmann Texas Corporation] v. N.L.R.B.*, 366 U.S. 731 (1961)). This Board stated that this "longstanding principle applies in either a single or rival union organizational context and is unaffected by the revised *Midwest Piping* doctrine announced in this case." *Id.*

<sup>102</sup> *Id.* at 14, 110 L.R.R.M. at 1378.

<sup>103</sup> *Id.* at 10, 110 L.R.R.M. at 1377.

<sup>104</sup> *Id.* at 10-11, 110 L.R.R.M. at 1377. The Board explicitly stated that it considered this 30% figure to represent a definition of the term "substantial" in a representational context. The Board explained that "experience had shown that . . . when no labor organization had at least 30% support, the chances of achieving majority support for union representation were too remote to justify an election. We likewise regard the failure of a rival union to muster at least a 30% showing of interest to be a reliable indication that an election held solely at that union's request would be unnecessary." *Id.* at n.14.

<sup>105</sup> *Id.* at 11, 110 L.R.R.M. at 1377.

employer.<sup>106</sup> The Board also emphasized that this new approach provides a satisfactory answer to problems created by execution of dual authorization cards.<sup>107</sup> The Board explained that a validated petition supported by a thirty percent showing indicates sufficient doubt in the reliability of any organization's apparent majority to require resolution of the competing claims through the Board's election process.<sup>108</sup> Finally, the Board concluded that the Supreme Court's recognition that Board-conducted elections are not the sole means of ascertaining employee preferences justifies, if not mandates, an end to the Board's absolute refusal to rely on cards in *Midwest Piping* situations.<sup>109</sup>

The importance of the re-examination of the *Midwest Piping* doctrine in *Bruckner Nursing Home*, and the consequent redefinition of the Board's longstanding *Midwest Piping* doctrine requiring an employer to maintain strict neutrality in the face of competing initial union representational claims lies in two areas. First, it will severely restrict<sup>110</sup> the ability of a small minority — less than thirty percent of the employees — to force an employer to withhold recognition of an organization that can clearly establish majority support without the benefit of a Board-conducted election. Second, a de facto majority union will be able to expand its energies as a representative, thereby avoiding a waste of time and energy defending itself against a union that cannot even show enough support to warrant a valid representation petition. These two effects should increase the stability in the collective-bargaining process by recognizing the right of employees to organize without the benefit of a Board-conducted election. No longer will the Board inject itself into situations where it is unnecessary or counterproductive. The Board's decision in *Bruckner Nursing Home* represents a recognition of the difficulties inherent<sup>111</sup> in the application of a standard that draws no precise lines as to when a claim is "colorable," or "clearly unsupportable."<sup>112</sup> Under *Bruckner Nursing Home*, the Board now requires a union to show support of at least thirty percent of the employees. The Board reasoned that this will ensure that there will be strict employer neutrality only in those situations which seriously require it.

The importance of *RCA Del Caribe* lies in the fact that no longer will the Board's requirement for strict employer neutrality in incumbent situations unnecessarily disrupt the stability of the collective-bargaining relationship in situations where no substantial doubt of incumbent majority exists.<sup>113</sup> The Board emphasized in this decision, however, that "as before, a timely filed petition will put an incumbent to the test of demonstrating that it still is the majority choice for exclusive bargaining representative."<sup>114</sup> The recognition of the special status of an incumbent union indicates a judgment that, having once

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<sup>106</sup> *Id.* at 11-12, 110 L.R.R.M. at 1377.

<sup>107</sup> *Id.* at 12, 110 L.R.R.M. at 1377. It is not unusual for employees confronted by solicitations from rival unions to sign authorization cards for more than one union. Dual cards reflect the competing organizational campaigns. They may indicate shifting employee sentiments or employee desire to be represented by either of two rival unions. See *id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 13, 110 L.R.R.M. at 1377.

<sup>110</sup> See *id.* at 10-11, 110 L.R.R.M. at 1377.

<sup>111</sup> In fact, this rejection results in an apparent return to the original application of the *Midwest Piping* doctrine to rival union, initial-organizing situations. See Ensher, Alexander & Barsom, Inc., 74 N.L.R.B. 1443, 1445, 10 L.R.R.M. 1282, 1284 (1947) (duty of strict employer neutrality and the necessity of a Board-conducted election were operative only when a representation petition had been filed with the Board.)

<sup>112</sup> See *supra* notes 25-30 and accompanying text.

<sup>113</sup> *RCA Del Caribe*, 262 N.L.R.B. at 11, 110 L.R.R.M. at 1371.

<sup>114</sup> *Id.*

achieved the mantle of exclusive bargaining representative, a union ought not to be deterred from its representative functions even though its majority status is under challenge.<sup>115</sup> The Board has accordingly developed the doctrine of presumption of continuing majority status for the incumbent in order to give a majority representative some reasonable degree of insulation and freedom to fulfill its mandate from employees in its dealings with the employer.

A central criticism of the Board's redefinition of the *Midwest Piping* doctrine in *RCA Del Caribe* was voiced in the dissents written by Chairman Van de Water and Member Jenkins. The dissenting Members were concerned about the undue influence an employer might have by virtue of its decision to continue bargaining with the incumbent union.<sup>116</sup> The majority addressed this criticism by suggesting that a withdrawal from bargaining might in fact signal a repudiation of the incumbent and preference for the rival.<sup>117</sup> This predicament, the Board determined, was best resolved by preserving the status quo through an employer's continued bargaining with an incumbent.<sup>118</sup> In his dissent, Member Jenkins explained that while he shared the majority's concern over the Board's unsuccessful enforcement efforts in the courts, he believed that the Board could resolve the difficulty through a fine tuning of rather than a major overhaul of *Midwest Piping*.<sup>119</sup> Member Jenkins suggested that the major weakness of the *Midwest Piping* analysis had been the Board's failure to define clearly what was required by way of employee support to warrant finding that a real question concerning representation exists.<sup>120</sup> He proposed, therefore, a minimum of a fifteen percent showing of employee support for a rival union before strict neutrality would be triggered by a Board election.<sup>121</sup> Member Jenkins' solution would decrease the number of essentially frivolous claims that have heretofore been able to hold the bargaining relationship. It does not, however, recognize the unavoidable delays associated with elections.<sup>122</sup> It also places considerably less emphasis on the fact that an employer retains the right to withdraw from negotiation if he believes in good faith that the incumbent no longer had majority support.<sup>123</sup> In such a situation, an employer would in fact be unlikely to continue negotiating since any resulting contract could be declared null and void if the incumbent later lost the election.

*RCA Del Caribe* represents the Board's recognition that its original applications of *Midwest Piping*'s strict neutrality rule to incumbent settings was the more appropriate approach. *RCA Del Caribe* has also returned to the incumbent union its earned right to

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<sup>115</sup> See *id.* at 11-12, 110 L.R.R.M. at 1371.

<sup>116</sup> See *id.* at 17-18, 110 L.R.R.M. at 1372-73.

<sup>117</sup> See *id.* at 10, 110 L.R.R.M. at 1371.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 22, 110 L.R.R.M. at 1373-74.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 23, 110 L.R.R.M. at 1373-74. Specifically, Member Jenkins proposed a 15% showing of employee support for a rival union as the requirement for holding a Board-conducted election.

<sup>122</sup> *Id.* at n.19, 110 L.R.R.M. at n.19. Chairman Van de Water noted that in the Board's Forty-Fifth Annual Report the processing time for elections in fiscal year 1980 was approximately 38 days. This delay, he suggests, was not significant enough to warrant change in the system. The Chairman failed to address the possibility of this five week delay occurring just as contract negotiations were concluding. This delay could surely put a cloud over the contract negotiations. Depending on the relationship between the employer and the incumbent union, this could be sufficient to trigger further delays. Indeed, an employer might be inclined to support an election delay if he was disappointed in the bargaining position of the incumbent union. *Id.*

<sup>123</sup> See *id.* at n.13.

demonstrate its effectiveness as a representative at the bargaining table. An outside union will now be required to view the incumbent as the previously elected majority that it is, and not as a union artificially deprived of the attributes of its office. The *RCA Del Caribe* decision does of course suffer from some of the same problems that earlier gave rise to abandonment of this approach. The incumbent has an advantage in that it can do more than promise action — it can actually act as representative. This advantage is balanced, however, against the fact that it has been earned by a previous election, and the additional expectations of useful action the employees may rightfully expect from their representative. The Board's decision in *RCA Del Caribe* represents a belief that stability in the collective-bargaining process can best be achieved by minimizing the distractions for all parties concerned. Thus, to ensure the swift and mutually beneficial outcome of the bargaining process, the Board has determined that the incumbent should retain the benefit of presumed majority as a way of approximating employer neutrality.

The decision in *Bruckner Nursing Home*, while important, is perhaps more a refinement, than a redefinition of the *Midwest Piping* doctrine. Prior to the *Bruckner Nursing Home* decision, courts were unwilling to enforce Board decisions in which the Board had recognized a small minority of employees as a "substantial" interest, sufficient to warrant an end of any bargaining.<sup>124</sup> In this case, the Board held that, although an employer no longer will automatically violate section 8(a)(2) by recognizing one of several rival unions before an election petition has been filed, "an employer will still be found liable under section 8(a)(2) for recognizing a labor organization which does not actually have majority employee support."<sup>125</sup> A possible result of this new rule is that employers will follow the safest course, which would be simply to refuse recognition, as clearly authorized under Supreme Court decisions.<sup>126</sup> Thus, the *Bruckner Nursing Home* decision will most likely only affect those situations in which the election of a union is so clearly assured that an employer exposes himself to little or no risk of later Board sanctions by recognizing what the employer knows to be a clear majority. The likelihood of employers recognizing a union that does not have a clear majority seems small since the risks of nullification of any agreements arising out of bargaining<sup>127</sup> and possible liabilities under section 8(a)(2) for recognizing a labor organization which did not actually have majority employee support would seem to be avoided best by a delay of the bargaining process until a clear majority (Board-certified or otherwise) presents itself.<sup>128</sup>

The Board's problems with the identification of a "colorable claim" have been so numerous that it seems this decision has been long overdue. The Board has long needed a viable yardstick for identifying a "genuine issue" concerning representation. The only possible problem with the Board's assignment of thirty percent as sufficient measure of support to warrant "genuine issue" status to the rival representational claims is perhaps the level of the percentage. Member Jenkins suggests that perhaps fifteen percent might be more appropriate.<sup>129</sup> Certainly the selection of any percentage is arbitrary in part, but

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<sup>124</sup> See cases cited *supra* at note 7.

<sup>125</sup> *Bruckner Nursing Home*, 262 N.L.R.B. at n.13, 110 L.R.R.M. at n.13 (citing *International Ladies' Garment Workers' Union, AFL-CIO [Bernhardt-Altman Texas Corp.] v. N.L.R.B.*, 366 U.S. 731 (1961)).

<sup>126</sup> *Id.* (citing *Linden Lumber Division, Summer & Co. v. N.L.R.B.*, 419 U.S. 301 (1974) (authorizing good faith refusal of recognition of union when employer believes it does not have majority support)).

<sup>127</sup> See *RCA Del Caribe*, 262 N.L.R.B. at 12, 110 L.R.R.M. at 1371.

<sup>128</sup> *Id.*

<sup>129</sup> *RCA Del Caribe*, 262 N.L.R.B. at 23, 110 L.R.R.M. at 1373-74.

according to the Board, experience has shown that thirty percent is an appropriate number.<sup>130</sup> The *Bruckner Nursing Home* decision represents the Board's recognition of the need for some kind of line-drawing. It would seem that fifteen percent, especially in small businesses would pose many of the same dangers as the ambiguous distinction previously made.

The *RCA Del Caribe* and *Bruckner Nursing Home* decisions represent the Board's recognition of the appeals courts' rejection of some of the Board's applications of the *Midwest Piping* doctrine.<sup>131</sup> The Board wisely has attempted to redefine its guidelines for employers faced with rival unions' claims to prevent needless disruption of the bargaining process by unions that have no substantial claim of majority. The effect of these cases on other Board decisions has already begun to be understood. As was perhaps presaged by *Bruckner Nursing Home* and *RCA Del Caribe*, the NLRB has more recently overruled its 1972 *Telautograph Corp.*<sup>132</sup> decision and held that an employer's neutrality in the face of a union decertification petition can best be assured by maintaining the status quo.<sup>133</sup> In *Dresser Industries*,<sup>134</sup> the Board ruled that withdrawal by the employer from bargaining or executing a contract may no longer be automatic upon the "mere" filing of a decertification petition because that response does not give due weight to the incumbent union's continuing presumption of majority status.<sup>135</sup> This reasoning clearly tracks that found in *RCA Del Caribe* and adheres to the concept of a rebuttable, residual presumption of majority status in the incumbent union after the first year of certification.<sup>136</sup> Of course, the Board's ruling does not erode "the principle that an employer may withdraw from bargaining if, on the basis of objective evidence, it has a good faith doubt as to the union's continued majority status."<sup>137</sup>

*RCA Del Caribe* and *Bruckner Nursing Home* represent the Board's most recent attempt to balance the protection of the employee's right to choose their representatives without undue influence by their employer with the need for stability in the collective-bargaining process. The cases also represent, at least in part, an implicit recognition of the role courts have assumed in this area. The courts have failed to enforce Board decisions due primarily to the lack of precision in the Board's decision-making process. The Board's decisions in *Bruckner Nursing Home* and *RCA Del Caribe* should work to lessen the extent to which courts decide whether the Board's decision can be enforced justifiably. The decisions do make clear, however, that no longer will elected majority representatives be stripped of their attributes in order to place a rival union on an equal footing with the incumbent. The Board's decisions have set the stage for what it hopes will be a more stable collective-bargaining process. Prior to this *Survey* year, stability in the collective-bargaining process was, in the Board's opinion, best achieved through strict employer neutrality. In the initial-organizing stage, rival union situation strict neutrality was defined so as to require an employer to refrain from recognizing any of the competing unions until after a Board-conducted election. *Bruckner Nursing Home* represents a definition of strict neutrality that permits an employer to recognize a union that is not faced

<sup>130</sup> *Bruckner Nursing Home*, 262 N.L.R.B. at n.14, 110 L.R.R.M. at n.14.

<sup>131</sup> See *id.* at 8-9, 110 L.R.R.M. at 1376. See also *RCA Del Caribe*, 262 N.L.R.B. at 12, 110 L.R.R.M. at 1371.

<sup>132</sup> 199 N.L.R.B. 892, 81 L.R.R.M. 1337 (1972).

<sup>133</sup> *Dresser Industries*, 264 N.L.R.B. No. 145, 111 L.R.R.M. 1436, 1438 (1982).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 6, 111 L.R.R.M. at 1438.

<sup>136</sup> See *id.* at 6-8, 111 L.R.R.M. at 1437-38.

<sup>137</sup> *Id.*

with a challenging union of significance. In the past the "significance" standard was left largely undefined. Finally, the Board has seen fit to set the standard for defining "colorable claims" at thirty percent. Strict neutrality in initial, rival union situations, after *Bruckner Nursing Home*, will require an employer to refrain from negotiating only when faced with rival unions that each have shown at least a thirty percent interest among employees, or have filed a representation petition with the Board. In the incumbent situation, the Board has decided to return to its original interpretation of "strict neutrality." Employers without additional information will henceforth be permitted to continue negotiations with an incumbent union. Together these two redefinitions will serve to increase the stability of the collective-bargaining system. After many years of experimentation with varying formulas for employer strict neutrality, the Board has decided that the risks involved do not outweigh the possible benefits to the employees' right to free and effective representation through the collective-bargaining system.

3. \*A Return to the Shopping Kart Standard for Campaign Misrepresentations:  
Midland National Life Insurance Co.<sup>1</sup>

The responsibility of directing the elections in which employees determine whether they shall be represented by a labor organization is delegated to the National Labor Relations Board (the Board) under section 9 of the National Labor Relations Act.<sup>2</sup> From its inception, the Board has wrestled with the problem of what action it should take when an employer or a union engages in misleading campaign tactics.<sup>3</sup> In *General Shoe Corp.*,<sup>4</sup> the Board ruled that representation elections should take place under "laboratory conditions."<sup>5</sup> The Board then embarked on an effort to regulate the content of both employer and union campaign propaganda in a series of subsequent decisions.<sup>6</sup>

In 1962, the Board decided *Hollywood Ceramics Co.*<sup>7</sup> In that case, the Board sought to

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<sup>1</sup> 263 N.L.R.B. 127, 110 L.R.R.M. 1489 (1982).

<sup>2</sup> 29 U.S.C. § 159 (1976).

<sup>3</sup> See, e.g., *Maywood Hosiery Mills*, 64 N.L.R.B. 146, 150, 17 L.R.R.M. 90, 91 (1945) and *Corn Products Refining Co.*, 58 N.L.R.B. 1441, 1442, 15 L.R.R.M. 104, 105 (1944) (holding the Board cannot censor all information targeted at employees during elections, and that employees have the ability to recognize propaganda and discount it). But see *Fickett-Brown Mfg.*, 53 N.L.R.B. 106, 13 L.R.R.M. 98 (1943) (employer's statements interfered with employees' free choice). See generally, Aldrich & Carlson, *One Step Forward and Two Steps Back: The Shopping Kart-General Knit Dance*, 32 MERCER L. REV. 743, 744-745 (1981).

<sup>4</sup> 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948).

<sup>5</sup> *Id.* at 127, 21 L.R.R.M. at 1341. The Board announced its laboratory conditions standard by stating:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible to determine the uninhibited desires of the employees. It is our duty to determine whether they have been fulfilled. When in the rare, extreme case the standard drops too low . . . the requisite laboratory conditions are not present and the experiment must be conducted over again.

*Id.*

<sup>6</sup> See, e.g., *United Aircraft Corp.*, 103 N.L.R.B. 102, 31 L.R.R.M. 1437 (1953); *The Gummed Products Co.*, 112 N.L.R.B. 1092, 1093-1094, 36 L.R.R.M. 1156 (1955) ("The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election.").

<sup>7</sup> 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962).

preserve laboratory conditions for the exercise of the employees' free choice by holding that the Board would set aside elections in which there had been a misrepresentation of a material fact involving a substantial departure from the truth.<sup>8</sup> Under the *Hollywood Ceramics* rule, the misrepresentation must have occurred at a time when the other party, or parties to the election were prevented from making an effective reply, so that the misrepresentation may reasonably have been expected to have had a significant impact on the election.<sup>9</sup> The Board applied the *Hollywood Ceramics* standard of review to election propaganda for the following fifteen years. In 1977, however, the Board overruled *Hollywood Ceramics* in *Shopping Kart Food Market, Inc.*<sup>10</sup> The *Shopping Kart* majority criticized the operation of the *Hollywood Ceramics* rule during the several years since its announcement.<sup>11</sup> The *Shopping Kart* Board claimed its earlier decision in *Hollywood Ceramics* to review misleading election propaganda resulted in: the restriction of free speech, inconsistent results before the Board and the courts, and increased litigation which delayed the finalization of election results.<sup>12</sup> Thus, in *Shopping Kart*, a majority of the Board ruled that it would no longer probe the truth or falsity of campaign statements, but instead, rely on the capability of employees, as mature individuals, to recognize campaign propaganda.<sup>13</sup> Less than twenty months later, a new Board majority overruled *Shopping Kart* in *General Knit of California, Inc.*<sup>14</sup> In *General Knit*, the Board reinstated the *Hollywood Ceramics* standard after concluding that the rule announced in *Shopping Kart* was "inconsistent with our responsibility to ensure fair elections."<sup>15</sup>

During the *Survey* year, another new majority of the National Labor Relations Board further extended the trail of Board inconsistency regarding election propaganda. In *Midland National Life Insurance Co.*,<sup>16</sup> the Board announced it was overruling *General Knit* and *Hollywood Ceramics*, and returning to the "sound rule" governing Board review of campaign misrepresentations set forth in *Shopping Kart*.<sup>17</sup> Consequently, at present, the Board will not probe into the truth or falsity of campaign statements and will not set aside elections because of misleading representations.<sup>18</sup>

The dispute in *Midland* arose when the Board and the U.S. Court of Appeals

<sup>8</sup> *Id.* at 224, 51 L.R.R.M. at 1601.

<sup>9</sup> *Id.*, 51 L.R.R.M. at 1602. In determining whether a significant impact had occurred, the Board stated it would consider whether the information was likely to have a *de minimus* effect on the election, whether the party making the statement possessed substantial and intimate knowledge of the facts which would increase its persuasive value, whether the employees had independent knowledge with which to evaluate the information, and whether the statements were so extreme as to put the employees on notice of their untruth. *Id.*

<sup>10</sup> 228 N.L.R.B. 1311, 94 L.R.R.M. 1705 (1977).

<sup>11</sup> *Id.* at 1312, 94 L.R.R.M. at 1706.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1313, 94 L.R.R.M. at 1707. In its decision to no longer set aside elections because of misleading statements, the Board nevertheless, reserved the right to set aside elections where deceptive practices consist of improperly involving the Board and its processes, or where the use of forged documents "render the voters unable to recognize propaganda for which it is." *Id.* at 1313, 94 L.R.R.M. at 1708. Furthermore, Chairman Murphy, in a concurring opinion which secured the majority in *Shopping Kart*, stated her intention to continue setting aside elections "where a party makes an egregious mistake of fact." *Id.* at 1314, 94 L.R.R.M. at 1708 (Murphy, Chairman, concurring).

<sup>14</sup> 239 N.L.R.B. 619, 99 L.R.R.M. 1687 (1978).

<sup>15</sup> *Id.* at 620, 99 L.R.R.M. at 1688.

<sup>16</sup> 263 N.L.R.B. 127, 110 L.R.R.M. 1489 (1982).

<sup>17</sup> *Id.* at 129, 110 L.R.R.M. at 1490.

<sup>18</sup> *Id.* at 133, 110 L.R.R.M. at 1494.

ordered a second representation election after finding that the employer, Midland National Life Insurance Co., had engaged in unfair labor practices and interfered with the first election.<sup>19</sup> The second election resulted in a tie vote but the union, Local 304A of the Food & Commercial Workers, again filed objections to the election with the National Labor Relations Board.<sup>20</sup> The union's objections were based on the employer's actions on the day before the second election.<sup>21</sup> On that afternoon, the employer distributed campaign literature to the employees with their paychecks.<sup>22</sup> One of the distributions was a six-page document containing photographs of three local businesses and a textual description for each photo that contained misrepresentations about the conduct of Local 304A at these other businesses.<sup>23</sup> The document also contained a photocopy of the union's financial report which it had filed with the Department of Labor in accordance with the Labor Management Reporting and Disclosure Act of 1959.<sup>24</sup> The employer supplied an inaccurate description of certain items listed on the disclosure document along with the photocopy.<sup>25</sup> The union did not learn of the employer's distribution until the following morning, three and one half hours before the employees voted.<sup>26</sup>

The union filed objections to the employer's campaign literature with the Board claiming that it contained substantial material misrepresentations.<sup>27</sup> Upon consideration of the union's objections, the hearing officer concluded the document contained "numerous misrepresentations of a substantial nature."<sup>28</sup> In addition, given the fact that the union learned of the literature's existence only three and one half hours before the election, and thus did not have time to respond effectively, the hearing officer ordered a third election be held in accordance with the rule of *Hollywood Ceramics*, as adopted in *General Knit*.<sup>29</sup>

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<sup>19</sup> 244 N.L.R.B. 3, 102 L.R.R.M. 1156 (1979), enforced 621 F.2d 901, 104 L.R.R.M. 2293 (8th Cir. 1980).

<sup>20</sup> *Id.* at 127, 110 L.R.R.M. at 1489. The vote was 107 in favor of the Union and 107 against the Union with one void ballot and twenty challenged ballots. *Id.*

<sup>21</sup> *Id.*, 110 L.R.R.M. at 1489.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, 110 L.R.R.M. at 1489-90. One of the photographs in the employer's literature depicted a deserted local plant. *Id.* at 128, 110 L.R.R.M. at 1490. The accompanying text stated that the union had engaged in a strike at the plant, violence ensued, and "now all the workers are gone." *Id.* The document then stated, "What did Local 304A do for them? Where is the Local 304A job security?" *Id.* In actuality, the union and its members had not been on strike when the plant closed. *Id.* The employees had in fact worked for one and one half years following the strike, before the plant was closed down. *Id.*

<sup>24</sup> *Id.* See Labor Management Reporting and Disclosure Act, 29 U.S.C. § 431 (1976).

<sup>25</sup> 263 N.L.R.B. at 128-29, 110 L.R.R.M. at 1490. The photocopy was marked to emphasize expenditures for union officers and employees. *Id.* Although the statement showed the union had receipts of over \$500,000, the line labeled disbursements "on behalf of individual members" on the form showed nothing was spent. The text of the employer's document emphasized this disparity by claiming "nothing was spent on behalf of individual Union members." *Id.* at 129, 110 L.R.R.M. at 1490. The employer failed to add, however, that the Department of Labor's instructions for completing this particular form state that the category labeled funds spent "on behalf of individual members" should only reflect "other than normal operating expenses incurred by the Union." *Id.*

<sup>26</sup> *Id.* at 128, 110 L.R.R.M. at 1490.

<sup>27</sup> *Id.* at 127, 110 L.R.R.M. at 1489.

<sup>28</sup> *Id.* The hearing officer concluded the document was designed to portray the Union as an organization staffed by "highly paid individuals and employees who were ineffectual as bargaining representatives, and that as a consequence, employees would suffer with respect to job security and compensation." *Id.* at 129, 110 L.R.R.M. at 1490.

<sup>29</sup> *Id.*

A majority of the full National Labor Relations Board decided to reverse the hearing officer's ruling and certify the results of the election.<sup>30</sup> At the outset of its opinion, the three member majority explained the reversal was based on the decision to overrule *General Knit* and *Hollywood Ceramics*.<sup>31</sup> After "painstaking evaluation" and "careful consideration," the majority announced the Board would return to the "sound rule" articulated in *Shopping Kart Food Market, Inc.*<sup>32</sup>

In its opinion, the three member majority began with a lengthy review of the history of the Board's treatment of the campaign propaganda issue from the pre-*General Shoe* era of the Wagner Act<sup>33</sup> to the present.<sup>34</sup> Turning to a discussion of the *Midland* case, the Board first established the fact that Congress has entrusted the Board with a wide degree of discretion to establish procedures that ensure employees are provided a fair and free choice of bargaining representatives.<sup>35</sup> The Board's exercise of discretion, according to the majority, must be consistent with the concept of majority rule embodied in section 9(a) of the National Labor Relations Act.<sup>36</sup> After weighing the concept of majority rule, along with other critical factors,<sup>37</sup> the majority explained the Board is free to promulgate a rule governing the electoral process that constitutes a "justifiable and reasonable adjustment of the democratic process."<sup>38</sup> The majority stated a return to the *Shopping Kart* standard alleviated many difficulties, including the Board's ability to ensure certain and final election results as well as the minimization of dilatory claims.<sup>39</sup> Accordingly, the majority characterized its holding in *Midland* as a "justifiable and reasonable adjustment of our electoral process."<sup>40</sup>

In support of its decision to return to the *Shopping Kart* rule governing election propaganda, the majority emphasized the uncertainty associated with the subjective review of election propaganda under the *Hollywood Ceramics* standard.<sup>41</sup> In the majority's view, application of the *Hollywood Ceramics* standard had resulted in "vague and inconsistent rulings" that restricted free speech and increased litigation.<sup>42</sup> In contrast, the ma-

<sup>30</sup> *Id.* The members of the Board constituting the *Midland* majority were Members Zimmerman, Hunter, and Chairman Van de Water. *Id.*

<sup>31</sup> *Id.* at 129-130, 110 L.R.R.M. at 1490.

<sup>32</sup> *Id.* at 129, 110 L.R.R.M. at 1490.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 129-31, 110 L.R.R.M. at 1490-1492. The majority traced the Board's treatment of what it termed a "troublesome area." *Id.* at 129, 110 L.R.R.M. at 1490. After reviewing the Board's major decisions regarding election propaganda, the majority concluded the Board's past practice concerning its role in regulating campaign misrepresentation shows unquestionably that "reasonable, informed individuals can differ, and indeed have differed . . . in their views of the Board's proper role in policing such misrepresentations." *Id.* at 130, 110 L.R.R.M. at 1492.

<sup>35</sup> *Id.* at 131, 110 L.R.R.M. at 1492. The majority cited *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 19 L.R.R.M. 2128 (1946).

<sup>36</sup> *Id.* Section 9(a) states in pertinent part:

"Representatives designed or selected for the purpose of collective bargaining by the majority of employees in a unit appropriate for such purposes shall constitute the exclusive representatives of all the employees in such unit . . ." 29 U.S.C. § 159 (a) (1976).

<sup>37</sup> 263 N.L.R.B. at 131, 110 L.R.R.M. at 1492. The other factors which the majority gleaned from *N.L.R.B. v. A.J. Tower Co.*, *supra* note 35, included preserving the secrecy of the ballot, insuring the certainty and finality of election results, and minimizing unwarranted and dilatory claims by those opposed to the election results. *Id.*

<sup>38</sup> *Id.* citing *A.J. Tower Co.*, 329 U.S. at 332-333.

<sup>39</sup> 263 N.L.R.B. at 131, 110 L.R.R.M. at 1492.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

majority reasoned, the *Shopping Kart* standard "draws a clear line between what is and what is not objectionable."<sup>43</sup> The "clear line" which the majority saw in *Shopping Kart* is accomplished by not setting aside any election on the basis of the substance of a representation made during the campaign, but rather, by focusing only on the "deceptive manner" in which the representation was made.<sup>44</sup> Thus, in accordance with this distinction, the majority ruled that in the absence of forgery, through which no voter could recognize campaign propaganda, the Board will not set aside an election that is challenged due to campaign misrepresentations. Instead, the Board will trust the employees involved in a campaign to evaluate the substantive content of "mere propaganda."<sup>45</sup>

Unlike the "unwieldy and counterproductive"<sup>46</sup> *Hollywood Ceramics* standard, the majority claimed its decision in *Midland National* to reject election challenges based on alleged campaign misrepresentations will lead to "definite results that are both predictable and speedy."<sup>47</sup> Furthermore, the majority also criticized the unwarranted "protectionism" reflected by the *Hollywood Ceramics* standard.<sup>48</sup> According to the Board majority, the rule of *Shopping Kart*, in addition to providing a definitive and consistent treatment of campaign misrepresentations, more appropriately respects the maturity of employees and their ability to exercise a skeptical assessment of information by "recognizing campaign propaganda for what it's worth and discounting it."<sup>49</sup>

At the close of the *Midland* opinion, the majority defended its decision to once again change the existing rule concerning campaign misrepresentations. The members of the majority expressed their understanding that their decision to return to the rule of *Shopping Kart* would "cause concern."<sup>50</sup> Nevertheless, the majority reaffirmed its "emphatic belief" that the *Shopping Kart* standard is the "most appropriate accommodation of all the interests here involved, and should be given a fair chance to succeed."<sup>51</sup> After balancing the benefits obtained through the reinstatement of *Shopping Kart*<sup>52</sup> against the possibility that some voters may be deceived by erroneous campaign propaganda, the

<sup>43</sup> *Id.*, quoting *General Knit of California, Inc.*, 239 N.L.R.B. 619, 99 L.R.R.M. 1687 (1977) (Penello, Member, dissenting).

<sup>44</sup> 263 N.L.R.B. at 131, 110 L.R.R.M. at 1493.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 132, 110 L.R.R.M. at 1493.

<sup>47</sup> *Id.* The majority claimed the definite and speedy results will occur under the new standard because the "incentive for protracted litigation" is reduced, as is the potential for disagreement between the Board and the courts. *Id.* Furthermore, the potential for delay is "almost nonexistent" under the majority's new standard because "objections alleging false or inaccurate statements can be summarily rejected at the first stage of the Board's proceedings." *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* See *supra* note 13. See also *Illinois Community Hospital*, 224 N.L.R.B. 632, 638, 92 L.R.R.M. 1640, 1640 (1976). The Board majority also admitted, however, that the sophistication of employees was recognized "to a certain extent" under *Hollywood Ceramics*. 263 N.L.R.B. at 132, 110 L.R.R.M. at 1493.

<sup>50</sup> 263 N.L.R.B. at 132, 110 L.R.R.M. at 1493. The majority compared its *Midland* decision to "General Knit's quick retreat from *Shopping Kart* in 1978." See, e.g., *N.L.R.B. v. Mosey Mfg. Co.*, 595 F.2d 375, 100 L.R.R.M. 3134 (7th Cir. 1979) (Appeals court uncertain of which of the Board's "on again, off again" standards to apply since the disposition of the election challenge spanned a period covered by both *Shopping Kart* and *General Knit*.).

<sup>51</sup> 263 N.L.R.B. at 132, 110 L.R.R.M. at 1493.

<sup>52</sup> According to the majority the benefits include: definite, speedy, and predictable results; the removal of impediments to free speech caused by the *Hollywood Ceramics* standard which would overturn an election or cause "endless delay" because of an "inadvertent error"; and minimizing disagreement between the Board and the courts, thereby promoting "uniformity in national labor law". *Id.*

majority concluded that the balance "unquestionably" favored the *Shopping Kart* standard.<sup>53</sup> Exercising its "administrative flexibility," therefore, and acknowledging frankly that "the policy views of the Board have changed,"<sup>54</sup> the majority summarized the Board's holding. After *Midland National Life Insurance Co.*, the National Labor Relations Board will not investigate the truth or falsity of campaign statements, and will not set aside elections because of misleading campaign representations.<sup>55</sup> Only when forged documents are involved, preventing employees from recognizing propaganda for what it is, will the Board intervene and set aside an election result.<sup>56</sup> Because the allegations raised by the union in *Midland* consisted solely of the employer's use of material misrepresentations, the Board applied the *Shopping Kart* doctrine and dismissed the union's objections, thereby certifying the election result.<sup>57</sup>

Two members of the National Labor Relations Board strongly dissented in the *Midland* case.<sup>58</sup> The dissenters were dismayed that for the second time in five years, a "bare majority" of the Board abandoned the "flexible and balanced *Hollywood Ceramics* standard," and substituted an "ultra permissive standard that places a premium on the well timed use of deception, trickery, and fraud."<sup>59</sup> The dissenters criticized the majority for relinquishing the Board's obligation to ensure full freedom of choice for employees in elections by regulating the use of fraud and deceit as campaign tools.<sup>60</sup> The dissenters claimed that the "illusory benefits" of speed and reduced litigation, sought by the majority's return to the *Shopping Kart* rule, should never take precedence over the preservation of the integrity of the election process.<sup>61</sup>

The dissenters also vigorously defended the *Hollywood Ceramics* rule from the majority's attacks.<sup>62</sup> Contrary to the majority's view, the dissenters contended the Board did not attempt to scrutinize elections completely through the application of the *Hollywood Ceramics* standard.<sup>63</sup> Rather, the *Hollywood Ceramics* standard, according to the dissenters, functioned only to keep election propaganda within certain bounds.<sup>64</sup> The dissenters also

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 133, 110 L.R.R.M. at 1494.

<sup>56</sup> *Id.* The majority also stated it would continue to set aside elections when a Board document has been altered so as to indicate an endorsement by the Board of a party in the election. *Id.* at 133 n.25, 110 L.R.R.M. at 1494 n.25. The Board stated it would also continue to regulate campaign conduct consisting of "threats, promises and the like." *Id.* at 133, 110 L.R.R.M. at 1494.

<sup>57</sup> *Id.* at 133, 110 L.R.R.M. at 1494.

<sup>58</sup> Members Fanning and Jenkins dissented. Both Members had also dissented together in *Shopping Kart*. See 228 N.L.R.B. at 1315, 94 L.R.R.M. at 1709.

<sup>59</sup> 263 N.L.R.B. at 133, 110 L.R.R.M. at 1494 (Fanning and Jenkins, Members, dissenting).

<sup>60</sup> *Id.* at 134, 110 L.R.R.M. at 1495 (Fanning and Jenkins, Members, dissenting.)

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* The dissenters quoted language from *Hollywood Ceramics* itself in support of their position. *Id.* In that case the Board stated:

The Board has limited its intervention in cases of this type because an election by secret ballot, conducted under Government auspices should not be lightly set aside, and because we realize that additional elections upset the plant routine and prevent stable labor-management relations. We are also aware that absolute precision of statement and complete honesty are not always attainable in a campaign, nor are they expected by employees. Election campaigns are hotly contested and feelings frequently run high. At such times, a party may in its zeal overstate its own virtues and the vices of the other without essentially impairing laboratory conditions.

140 N.L.R.B. at 223-24, 51 L.R.R.M. at 1601.

<sup>64</sup> 263 N.L.R.B. at 134, 110 L.R.R.M. at 1495 (Fanning and Jenkins, Members, dissenting).

acknowledged the ability of employees to recognize some campaign misrepresentations and discount them.<sup>65</sup> In the dissenters' view, the Board had accommodated this fact through its flexible application of the *Hollywood Ceramics* doctrine, taking the facts of each case into account before setting aside an election.<sup>66</sup>

In place of the adaptable *Hollywood Ceramics* rule, however, the dissenters claimed the *Midland* majority has created an irrebuttable presumption that employees can always recognize misrepresentations, with the exception of forgery, and discount them.<sup>67</sup> The dissenters concluded that the majority's approach to the regulation of campaign propaganda thus abandoned employees "utterly to the mercies of unscrupulous campaigners."<sup>68</sup> Consequently, in complete contrast to the majority's view, the dissenters chose to apply the *Hollywood Ceramics* analysis to the facts of *Midland*.<sup>69</sup> They concluded that the employer had engaged in substantial misrepresentations at the last minute in an attempt to fraudulently influence the employees' free choice.<sup>70</sup> By tolerating the employer's conduct, the dissenters found that the majority had abandoned the Board's statutorily imposed oversight responsibility.<sup>71</sup> The dissenters, therefore, concluded that the employees' right to a free, undistorted choice in a representation election is frustrated by the Board's *Midland* opinion.<sup>72</sup> According to the *Midland* dissent, the majority's ruling preserved only the right to engage in lies, trickery, and fraud.<sup>73</sup>

The Board's announcement in *Midland* that it will no longer set aside elections because of the use of deceptive propaganda and misrepresentations during a campaign appears to be an unfortunate development. The *Midland* holding seems inconsistent with the Board's obligation to ensure a free and uninhibited choice for employees selecting a bargaining representative. The Board majority apparently fails to appreciate the damage inflicted upon the integrity of the Board's election process when even a small number of employees are influenced by deceptive campaign propaganda. In addition, reinstitution of the *Shopping Kart* rule eliminates any possible deterrent against the use of fraudulent campaign tactics. The intention of the *Midland* majority, that is, to reduce unnecessary litigation and devise a clear, consistent approach to the problem of deceptive campaign propaganda, is commendable. By totally abandoning the review of fraudulent and deceptive electioneering, however, the Board appears to go too far and relinquishes too much responsibility in its effort to achieve its desired objectives.

In its *Midland* opinion, the majority noted that a balancing of the benefits achieved by the reinstatement of the *Shopping Kart* rule, against the "possibility that some voters may be misled by erroneous campaign propaganda"<sup>74</sup> unquestionably favors the deregulation of campaign propaganda achieved through the *Shopping Kart* rule.<sup>75</sup> As the dissent more properly states, however, the achievement of benefits such as the reduction in the

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* The dissenters expressed particular concern over the "expert cadre of professional opinion molders who devise campaigns for many of our representation elections." *Id.*

<sup>69</sup> *Id.* at 135, 110 L.R.R.M. at 1496 (Fanning and Jenkins, Members, dissenting).

<sup>70</sup> *Id.* The dissent termed the employer's use of the Union's financial report an "elaborately conceived fraud." *Id.* *Midland's* use of the form, according to the dissenters constituted "a fraudulent misrepresentation of the most serious and extreme nature." *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 133, 110 L.R.R.M. at 1494 (Fanning and Jenkins, Members, dissenting).

<sup>74</sup> See *supra* notes 52-53 and accompanying text.

<sup>75</sup> *Id.*

amount of litigation before the Board should never take precedence over the Board's duty to preserve the integrity of the election process.<sup>76</sup> Contrary to the majority's reasoning, the integrity of the Board's electoral process is threatened even by the prospect that only "some" voters may be misled by deceptive campaign propaganda. As one empirical study of representation elections has illustrated,<sup>77</sup> while a majority of the employees surveyed were not influenced by election propaganda when they ultimately cast their vote, nineteen percent of the employees in the study were persuaded by propaganda.<sup>78</sup> Most importantly, however, in over one-quarter of the representation elections analyzed in the study, the votes of the nineteen percent of the employees influenced by propaganda determined the outcome of the election.<sup>79</sup> In the *Midland* case, it was only necessary for one employee to be deceived by the employer's literature in order to maintain the deadlock that blocked a majority for the union.<sup>80</sup> Accordingly, the outcome of the *Midland* majority's balancing seems erroneous. The majority fails to recognize that the deception of a seemingly insignificant number of voters can nevertheless determine the outcome of the entire election.

The most serious threat to the integrity of representation elections posed by the *Midland* decision is the removal of a major deterrent to campaign misconduct.<sup>81</sup> Under the *Hollywood Ceramics* standard, there was at least some point, albeit a vague one, at which the Board would step into the emotional atmosphere of a representation election and force campaign rhetoric back within certain bounds.<sup>82</sup> After the Board's pronouncement in *Midland* that it will close its eyes to all campaign misrepresentations, with the exception of forgery, both employers and unions are now free to launch a last minute propaganda

<sup>76</sup> 263 N.L.R.B. at 134, 110 L.R.R.M. at 1495 (Fanning and Jenkins, Members, dissenting). See also *General Knit of California, Inc.*, 239 N.L.R.B. at 623, 99 L.R.R.M. at 1690.

<sup>77</sup> See Getman & Goldberg, *The Behavioral Assumptions Underlying N.L.R.B. Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976) [hereinafter cited as Getman & Goldberg, *Campaign Misrepresentations*]. See also Getman & Goldberg, *N.L.R.B. Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975) [hereinafter cited as Getman & Goldberg, *Campaign Tactics*].

<sup>78</sup> Getman & Goldberg, *Campaign Misrepresentations*, *supra* note 77 at 264. The authors of the study examined 31 elections in an attempt to verify the assumptions under which the Board justifies its regulation of representation elections. The authors found, through interviews conducted before and after the representation elections, that the electioneering engaged in by the parties during the campaign had absolutely no effect on 81 percent of the voters. *Id.* at 283. See also *General Knit of California, Inc.*, 239 N.L.R.B. at 621, 99 L.R.R.M. at 1689, and *Shopping Kart Food Market*, 228 N.L.R.B. at 1313, 94 L.R.R.M. at 1707. On the basis of their findings, the authors recommended that the Board overrule *Hollywood Ceramics* and refuse to set aside any election that is challenged because of an alleged misrepresentation of fact or law. Getman & Goldberg, *Campaign Misrepresentations*, *supra* note 77 at 284.

<sup>79</sup> Getman & Goldberg, *Campaign Misrepresentations*, *supra* note 77 at 281. See also *General Knit*, 239 N.L.R.B. at 622, 99 L.R.R.M. at 1690.

<sup>80</sup> See *supra* note 20.

<sup>81</sup> See Truesdale, *From General Shoe to General Knit: A Return to Hollywood Ceramics*, 30 LAB. L.J. 67, 68 (1979) (*Hollywood Ceramics* has maintained the integrity of the Board's electoral process by "establishing a boundary beyond which parties understand they cannot tread without significant risk that success at the polls will be vitiated by properly filed post election objections."). See also, *J.I. Case v. N.L.R.B.*, 55 F.2d 202, 205, 95 L.R.R.M. 2480, 2482 (8th Cir. 1977) ("If either side departs substantially from the truth, that side must accept the consequences if the misrepresentation, whether or not intended, could reasonably be expected to affect significantly the outcome of the election.").

<sup>82</sup> See Aldrich & Carlson *supra* note 3 at 766 ("[t]he deterrence argument is perhaps the most compelling argument raised by the *General Knit* majority.").

blitz based on fraudulent or deceptive information without any fear of Board reprisal.<sup>83</sup> Consequently, by completely eliminating the possibility of Board intervention, the *Midland* majority has removed the incentive for a campaigning party to temper the content of their election propaganda before distribution.<sup>84</sup> The *Midland* ruling, therefore, lifts the restraints from unscrupulous individuals who seek to interfere with the employees' free election through the use of deceitful campaign trickery.<sup>85</sup> Not even the *Shopping Kart* rule, which the *Midland* majority sought to reinstate through its decision went this far.<sup>86</sup>

The Board's decision to completely withdraw from the regulation of serious campaign misrepresentations is an unnecessary and extreme course of action. In place of the radical abdication of its responsibility exemplified by the Board's *Midland* opinion, it is possible for the Board to frame a workable standard of review governing campaign misrepresentations and to abide by it. The Board continues to be bound by its self-imposed duty to guarantee that representation elections occur under "laboratory conditions."<sup>87</sup> The standard created by the Board in *General Knit* appears to be the most reasonable and workable standard that has been developed for the regulation of serious and damaging campaign misrepresentations.<sup>88</sup>

The opinion of the Board majority in *General Knit* recognized each of the objections to the *Hollywood Ceramics* doctrine raised by the *Midland* majority.<sup>89</sup> Accordingly, the Board structured a standard in *General Knit* that would allow the waging of a vigorous campaign by the parties, but also protect the right of employees to a free and uninhibited choice in the election. The *General Knit* rule protects employers from campaigners who distort election issues at the last minute through the use of substantial misrepresentations

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<sup>83</sup> An election where parties engage in election eve deceptions in the hope that the other party will lack sufficient time to respond has been referred to by one commentator, a former Board Member as "election by bombshell." See Truesdale, *supra* notes 81 and 70. See also Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 92 (1964).

<sup>84</sup> See Miller, *The Getman, Goldberg, and Herman Questions*, 28 STAN. L. REV. 1163, 1170 (1976) (Former N.L.R.B. Chairman Miller states: "Yet those of us who are directly involved in counseling people who are facing campaigns know that N.L.R.B. decisional law does have a deterrent effect. We know it because our clients seek and follow our advice as to what may and may not be done during these campaigns.").

<sup>85</sup> 263 N.L.R.B. at 134, 110 L.R.R.M. at 1495 (Fanning and Jenkins, Members, dissenting).

<sup>86</sup> In *Shopping Kart*, then Chairman Murphy, who filed the determinative concurring opinion to form a majority, agreed with the basic principles set forth in *Hollywood Ceramics*. 228 N.L.R.B. at 1314, 94 L.R.R.M. at 1708 (Murphy, Chairman, concurring). Unlike the other two members of the *Shopping Kart* majority who advocated the same permissive standard as that adopted by the *Midland* majority, Chairman Murphy supported setting an election aside where a party has made an "egregious mistake of fact." *Id.*

<sup>87</sup> See *supra* note 5 and accompanying text.

<sup>88</sup> See *supra* note 15 and accompanying text. See also Raskin, *Deregulation of Union Campaigns: Restoring the First Amendment Balance*, 28 STAN. L. REV. 1175, 1179 (A.H. Raskin in an analysis of the Getman & Goldberg study, *supra* notes 77-78, suggests a standard for the regulation of elections under which no election would be set aside on the grounds that a party engaged in deceptive campaign tactics unless the margin of defeat or victory is less than 20 percent.).

<sup>89</sup> See *General Knit*, 239 N.L.R.B. at 620, 99 L.R.R.M., at 1689. See also Modine Manufacturing Co., 203 N.L.R.B. 527, 530, 83 L.R.R.M. 1133, 1136 (1973) (the Board undertook an extensive review of the operation of the *Hollywood Ceramics* rule and stated, "We do not wish to have unrealistic standards, or insist upon such improbable purity of word or deed that will obstruct or delay our administrative task of conducting elections in so high a number of cases that any hard fought campaign will almost inevitably result in our elections being invalidated." *Id.* cited in *General Knit* of California Inc., 239 N.L.R.B. at 623, 99 L.R.R.M. at 1591.

of material facts, relevant to the campaign. The *General Knit* majority added a further component to its standard that was not emphasized by the Board in *Hollywood Ceramics*. Under *General Knit*, the campaigner engaging in the misrepresentations must be perceived by the employees to possess "special knowledge" that would legitimize his or her statements in the eyes of the employees.<sup>90</sup> Framed in this way, the *General Knit* standard can operate as a narrow rule, invoked by the Board to set aside only those elections in which all the required elements are present and in which the laboratory conditions of the election have been seriously impaired.<sup>91</sup>

The *Midland National Life Insurance Co.* majority characterized its decision to deregulate campaign propaganda as the product of administrative decision making, based largely on the experience gained through "the constant process of trial and error."<sup>92</sup> It remains to be seen what experience the Board will gain from its resurrection of *Shopping Kart's* restrained approach to the regulation of campaign propaganda. Perhaps *Midland* is the first in a series of steps by the new Board membership to further deregulate representation elections. The Board may next seek to deregulate representation elections by removing its restrictions on coercive or threatening speech by campaigners.<sup>93</sup> One fact that is evident from the Board's experience with the issue of regulating the content of campaign propaganda was explicitly recognized by the Board majority in *Midland*. The majority found that the cumulative experience of the Board shows that "reasonable minds can, and indeed have differed over the most appropriate resolution of this issue."<sup>94</sup> Given the fact that the *Midland* majority also admitted frankly that "the policy views of the Board have changed,"<sup>95</sup> it is foreseeable that in the future, as reasonable minds continue to differ, and the policy views of the Board continue to change along with its membership, the problem of whether the Board should regulate the content of election propaganda will be the subject of repeated Board review.

#### 4. *\*A Less Restrictive View of Irregularly Marked Ballots: Kaufman's Bakery*<sup>1</sup>

Under section 9(c) of the National Labor Relations Act, the National Labor Relations Board (the Board) is authorized to administer a representation election to an appropriate unit of employees.<sup>2</sup> The U.S. Supreme Court has ruled that through the Act, Congress has entrusted the Board with a wide degree of discretion in establishing procedures and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees.<sup>3</sup> One of the issues that has plagued the Board over the years in its effort to

<sup>90</sup> 239 N.L.R.B. at 620, 99 L.R.R.M. at 1684-88. See also Truesdale, *supra* note 81 at 70.

<sup>91</sup> See, e.g., *Mosey Mfg. Co. v. N.L.R.B.*, 701 F.2d 610, 112 L.R.R.M. 2822, 2830-2832 (7th Cir. 1983) (Swygert, Senior Circuit Judge, dissenting) (an extensive listing of cases in which the Board applied narrowly the *General Knit* misrepresentation doctrine).

<sup>92</sup> 263 N.L.R.B. at 132, 110 L.R.R.M. at 1493.

<sup>93</sup> See Truesdale, *supra* note 81 at 74 (quoting from *Oshman's Sporting Goods, Inc. v. N.L.R.B.*, slip op. p. 5 (9th Cir., 1978) ("It is tempting to seize upon the (Getman & Goldberg) study and go farther than the Board did in *Shopping Kart*, holding we will no longer sustain orders setting aside elections, or set aside orders sustaining them in cases of threats as well as in cases of claimed misrepresentations in election campaigns.")). See also Miller, note 84 *supra* at 1169-1170.

<sup>94</sup> 263 N.L.R.B. at 132, 110 L.R.R.M. at 1493.

<sup>95</sup> *Id.*

\* By Michael K. Fee, Staff Member, BOSTON COLLEGE LAW REVIEW.

<sup>1</sup> 264 N.L.R.B. No. 33, 111 L.R.R.M. 1261 (1982).

<sup>2</sup> 29 U.S.C. § 159(c).

<sup>3</sup> *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330-31, 19 L.R.R.M. 2128 (1946).

safeguard representation elections is the problem of unclear or irregularly marked ballots. The validity of such ballots may determine the outcome of close elections. The Board has engaged in various attempts to address this issue, but the Board has had difficulty framing a doctrine that may be consistently applied to ballots challenged because of the unconventional, perplexing, or indefinite manner in which they are completed.<sup>4</sup>

Parties involved in representation elections have generally challenged the validity of two types of irregularly marked ballots before the National Labor Relations Board. On the one hand, the validity of a ballot may be challenged when a voter has not followed the ballot instructions and instead of indicating his preference in the appropriate box on the front of the ballot, the voter places some type of written message on the reverse side.<sup>5</sup> On the other hand, the validity of a ballot may be challenged when it has been marked on the proper side, but the nature of the markings, or their location on the ballot, leads to conflicting interpretations of the voter's intent.<sup>6</sup> In *San Joaquin Compress & Warehouse Co.*,<sup>7</sup> the Board was confronted with a ballot of the latter type.<sup>8</sup> In that case, the Board ruled that the manner in which the ballot was marked rendered the ballot an "enigma."<sup>9</sup> Accordingly, due to the "irregular nature of the markings on the ballot," and because the intent of the voter was unclear, the Board declared the ballot void.<sup>10</sup>

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<sup>4</sup> See, e.g. *Western Electric Co., Inc.*, 97 N.L.R.B. No. 144, 29 L.R.R.M. 1187 (1951) (Board holds ballot which has no markings on the front where the choice should be indicated, but rather has "AFL" clearly written across the back is void.). But see *N.L.R.B. v. Manhattan Corp.*, 620 F.2d 53, 104 L.R.R.M. 2700 (5th Cir. 1980), cert. denied 101 S. Ct. 3050, 107 L.R.R.M. 2632 (1981) (Appeals court reversed the Board's decision to void a ballot with nothing written on the front, only the word "no" written on the back. The court ordered that vote counted as a valid vote against the union.). See also *N.L.R.B. v. Titche-Goettinger Co.*, 433 F.2d 1045, 75 L.R.R.M. 2561 (5th Cir. 1970) (Board's decision to void a ballot with only the word "no" on its back is reversed.).

<sup>5</sup> See, e.g. *Missoula Textile Services*, 261 N.L.R.B. No. 116, 110 L.R.R.M. 1179 (1982); *Mallin Bros. Co.*, 261 N.L.R.B. No. 145, 110 L.R.R.M. 1200 (1982).

The Board articulated a rule governing the validity of ballots marked on the reverse side in *Columbus Nursing Home Inc.*, 188 N.L.R.B. No. 131, 76 L.R.R.M. 1417 (1971). In that case, the ballot in question contained boxes for each competing union in the election, as well as a box labeled "neither." 76 L.R.R.M. at 1418. The voter left the designated boxes blank and instead wrote "neither" and "X" on the back of the ballot. *Id.* The Board ruled the ballot was void because the voter's total disregard for the instructions rendered any attempt to interpret his intent "speculative." *Id.* Despite court of appeals decisions to the contrary, see, e.g. *Hy-Lond Convalescent Hospital v. N.L.R.B.*, 110 L.R.R.M. 2220, 2223 n.5 (9th Cir. 1982), the Board continued to void ballots marked on their back until *Columbus Nursing Home* was overruled in 1982. See *Hydro Conduit Corp.*, 260 N.L.R.B. No. 178, 109 L.R.R.M. 1320, 1321 (1982) (The word "si" written on the back of a ballot for a single union election by a Spanish speaking employee is an "unambiguous expression of voter intent.") *Id.*

<sup>6</sup> See, e.g. *Wackenhut Corp. v. N.L.R.B.*, 666 F.2d 464, 109 L.R.R.M. 2499 (11th Cir. 1982) (Instructions on the ballot asked "Do you want to be represented by the Union?" One union was listed on the ballot and the instructions further asked for an "X" to be placed in either the box marked "Yes" or the one marked "No." The employee wrote "No" in both boxes.). See also *Mercy College*, 212 N.L.R.B. No. 134, 87 L.R.R.M. 1116 (1974) (A ballot contained a clear "X" in the "Yes" box and a faint "X" "No" box that had been shaded over.).

<sup>7</sup> 251 N.L.R.B. No. 7, 105 L.R.R.M. 1007 (1980).

<sup>8</sup> 105 L.R.R.M. at 1008. The ballot was marked in pencil with what appeared to be a check mark or an "X" and additional random markings in the "No" box. *Id.* There were no markings in the "Yes" box. *Id.*

<sup>9</sup> *Id.* The Board claimed it was unable to discern whether the additional marks in the "No" box were an attempt to emphasize a no vote, or an attempt to obliterate the no vote and cast a "no choice" vote. *Id.*

<sup>10</sup> *Id.* Member Jenkins dissented in *San Joaquin Compress*, 105 L.R.R.M. at 1008 (Jenkins,

During the *Survey* year, in *Kaufman's Bakery, Inc.*,<sup>11</sup> the National Labor Relations Board decided to overrule *San Joaquin Compress* and sustain the validity of a ballot irregularly marked in only one box.<sup>12</sup> The Board announced that it would thereafter consider a ballot with a "mark in only one box, despite some irregularity, as presumptively a valid indication of the intent of the voter."<sup>13</sup> This result, according to the Board, is consistent with the Board's long established policy of attempting to give effect to voter intent whenever possible.<sup>14</sup> Consequently, after *Kaufman's Bakery*, a participant in a representation election may not challenge the validity of a ballot irregularly marked, but nonetheless, marked in favor of one of the options presented on the ballot.

In *Kaufman's Bakery*, the Regional Director of the National Labor Relations Board had presided over a representation election in which the Kaufman's employees voted over whether to engage the International Longshoreman's Association (the Union) as their collective bargaining agent.<sup>15</sup> A tally of the votes cast by twenty-six eligible voters revealed nine votes in favor of the Union, nine votes against the Union, and six votes were challenged.<sup>16</sup> Two of the challenged ballots were marked in pencil with an "X" and additional marks within the "Yes" box.<sup>17</sup> The "No" box was left unmarked by the voters, and there were no other marks on the ballots.<sup>18</sup> The Regional Director reviewed the irregularly marked ballots in accordance with the Board's decision in *San Joaquin Compress*.<sup>19</sup> The Regional Director ruled the ballots from the Kaufman's Bakery election did not contain the same type of marks that constituted an "inadequate manifestation of voter intent" and lead to the voiding of the ballot challenged in *San Joaquin Compress*.<sup>20</sup> Rather, the Regional Director concluded the voters who marked the ballots challenged from Kaufman's Bakery were attempting to emphasize their "Yes" votes with additional markings.<sup>21</sup>

Both the employer and the Union filed exceptions to the Regional Director's ruling with the full five-member panel of the National Labor Relations Board.<sup>22</sup> A four-member majority of the Board announced that it agreed with the Regional Director's conclusion that the ballots should be counted as valid "Yes" votes in favor of the Union, but the Board disagreed with the Regional Director's analysis.<sup>23</sup> The majority reasoned that it was

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Member, dissenting). He felt that the ballot had been marked "substantially in compliance with the instructions given." *Id.* He conceded that the ballot was marked irregularly, but he felt the ballot "indicated with a reasonable certainty the voter's intent." *Id.* He also chastized the majority for establishing a rule that "any irregularity in the making of a voter's choice presumptively makes his or her intent unclear." *Id.*

<sup>11</sup> 264 N.L.R.B. No. 33, 111 L.R.R.M. 1261 (1982).

<sup>12</sup> *Id.* at 3, 111 L.R.R.M. at 1261. The majority stated it was adopting the position stated by Member Jenkins in his dissent in *San Joaquin Compress*. *Id.* at 2 n.1, 111 L.R.R.M. at 1261 n.1.

<sup>13</sup> *Id.* at 3, 111 L.R.R.M. at 1261.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1, 111 L.R.R.M. at 1261.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2, 111 L.R.R.M. at 1261.

<sup>18</sup> *Id.* The other ballots were challenged on voter eligibility grounds. In the *Kaufman's Bakery* decision, the Board adopted the regional director's findings as to these challenged votes. *Id.* The regional director sustained the challenge to the votes cast by two employees and dismissed the other challenges ordering the two ballots to be opened and counted. *Id.*

<sup>19</sup> For a discussion of *San Joaquin Compress*, see *supra* notes 7-10 and accompanying text.

<sup>20</sup> 264 N.L.R.B. No. 33 at 2, 111 L.R.R.M. at 1261.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 3, 111 L.R.R.M. at 1261.

<sup>23</sup> *Id.* The *Kaufman's Bakery* majority consisted of Chairman Van de Water, Members Jenkins, Zimmerman and Hunter. *Id.*

the Board's "long standing and established policy to give effect to voter intent whenever possible."<sup>24</sup> In accordance with that policy, the majority reasoned that when a ballot contained an "X" almost entirely within the "Yes" or the "No" box, and when no irregular markings appear outside the marked box, "there can be little doubt" that the voter intended that his vote be counted for or against the particular union.<sup>25</sup> The majority then explicitly overruled *San Joaquin Compress* to the extent that it was inconsistent with their instant opinion.<sup>26</sup>

At the close of the *Kaufman's Bakery* opinion, the Board majority elaborated on the rationale behind its decision.<sup>27</sup> The majority acknowledged that it was "of course, impossible to determine with absolute certainty" what a voter is trying to say through stray marks he may make on a ballot.<sup>28</sup> In light of this fact, the majority then reviewed the *San Joaquin Compress* decision in which the Board was faced with a challenge to a ballot essentially similar to the ones at issue in *Kaufman's Bakery*.<sup>29</sup>

In *San Joaquin Compress*, the Board had ruled that the voter who drew lines over his original "X" mark might have been attempting to nullify that decision and lodge a "no choice" vote.<sup>30</sup> The *Kaufman's Bakery* majority, in contrast, viewed this scenario as unlikely given the clear ballot instructions that state, "if you spoil this ballot, return it to the Board Agent for a new one."<sup>31</sup> The majority also reasoned that the practice of invalidating a ballot whenever there is the "slightest variance from the normal manner of ballot marking" would cause the disenfranchisement of many voters whose ballots essentially indicated their intent.<sup>32</sup> Consequently, because the ballots at issue in *Kaufman's Bakery* were completed substantially in compliance with the instructions, and because there was no suggestion from the markings that the voters were attempting to identify themselves, the Board majority concluded its opinion by restating its holding that the "irregularly marked ballots indicate with reasonable certainty the employee's intent to vote" for the union.<sup>33</sup>

Member Fanning dissented from the Board majority opinion in *Kaufman's Bakery*.<sup>34</sup> As the sole dissenter, Member Fanning claimed the ballots at issue in *Kaufman's Bakery* "illustrate the impracticality" of the Board's decision to decipher the intent of voters whose ballots "fall short of a clear and unambiguous expression of intent."<sup>35</sup> Member Fanning restated a position he had advocated prior to *Kaufman's Bakery* in favor of a formal Board rule that would automatically invalidate ballots not properly marked on their face in accordance with the instructions.<sup>36</sup> According to Member Fanning, the ballots in *Kaufman's Bakery* may either represent an attempt by a voter to emphasize his choice, or an attempt to obliterate his vote and cast a "no choice" vote.<sup>37</sup> Member Fanning found it foreseeable that in his haste, a voter might disregard the Board's instructions and

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *supra* notes 8 & 9.

<sup>30</sup> 264 N.L.R.B. No. 33 at 3, 111 L.R.R.M. at 1261.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 3-4, 111 L.R.R.M. at 1261-1262.

<sup>33</sup> *Id.* at 4, 111 L.R.R.M. at 1262.

<sup>34</sup> 264 N.L.R.B. No. 33 at 5, 111 L.R.R.M. at 1262 (Fanning, Member, dissenting in part).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* See also *Hydro Conduit Corp.*, 260 N.L.R.B. No. 178, 109 L.R.R.M. 1320, 1321 (1982) (Fanning, Member, concurring and dissenting).

<sup>37</sup> 264 N.L.R.B. No. 33 at 5-6, 111 L.R.R.M. at 1262 (Fanning, Member, dissenting in part).

alter his original ballot rather than obtaining a new one.<sup>38</sup> Therefore, under the reasoning of *San Joaquin Compress*, and because the Board's decision to adopt one of the two possible interpretations of the ballot's meaning was based on an "unwarranted degree of speculation," Member Fanning stated that he would declare the ballots challenged in *Kaufman's Bakery* void.<sup>39</sup>

The National Labor Relations Board's disposition of *Kaufman's Bakery* appears to be the correct approach to the problem of irregularly marked ballots. While it is clearly within the Board's discretion to do so, the Board has never adopted a policy such as that advocated by Member Fanning,<sup>40</sup> that would regard any ballot marked in an unorthodox manner as void.<sup>41</sup> Rather, the Board has chosen to count ballots whenever the intent of the voter is clearly apparent.<sup>42</sup> Under this policy, the Board has chosen to accept several different types of irregularly marked ballots as valid expressions of voter intent.<sup>43</sup> Given the type of questionable ballots the Board has accepted in the past, the Board's decision to invalidate ballots with unclear markings in a single box after *San Joaquin Compress* appears irreconcilable with prior Board practice. Thus, in the absence of a rule invalidating all irregularly marked ballots, the Board's decision to overrule *San Joaquin Compress* in *Kaufman's Bakery* is consistent with the Board's practice of defining what type of ballot markings are a satisfactory expression of voter intent.<sup>44</sup>

In addition, the Board's decision in *Kaufman's Bakery* to widen the range of acceptable ballot markings aligns the Board with the view of irregularly marked ballots held by the courts of appeals. Various circuit courts have reviewed Board decisions on ballot validity in light of a statutory policy that "favors inclusion of ballots where intent can be determined."<sup>45</sup> In some instances these courts have reversed Board decisions to invalidate ballots that are irregularly marked when the courts felt it was possible to discern the proper intent of the voter.<sup>46</sup> While at one time the Board openly defied circuit court

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<sup>38</sup> *Id.* See also note 31 *supra* and accompanying text.

<sup>39</sup> 264 N.L.R.B. No. 33 at 6, 111 L.R.R.M. at 1262 (Fanning, Member, dissenting in part).

<sup>40</sup> See *supra* note 36 and accompanying text.

<sup>41</sup> See *N.L.R.B. v. Whitinsville Spinning Ring Co.*, 199 F.2d 585, 588, 31 L.R.R.M. 2051, 2053 (1st Cir. 1952).

<sup>42</sup> *Id.* See also *N.L.R.B. v. Saulk Valley Mfg. Co.*, 486 F.2d 1127, 1133, 84 L.R.R.M. 2674, 2677 (9th Cir. 1973) ("It is well established however that in representative elections, the Board will count all ballots where the voters' intent has been clearly manifested, even if the voter has not followed the proper designation procedure, provided that mode of designation does not reveal the voter's identity.").

<sup>43</sup> See, e.g., *Garod Radio Corp.*, 32 N.L.R.B. 1010, 8 L.R.R.M. 240 (1941) (The letters "CIO" written in the box under a local union's name is a valid vote for the union); *Abtex Beverage Corp.*, 237 N.L.R.B. No. 203, 99 L.R.R.M. 1107 (1978) (Ballot marked with an "X" in both the "Yes" and the "No" boxes is a valid yes vote because the "No" box had some circular pen marks over it); *Daylight Grocery Co. v. N.L.R.B.*, 678 F.2d 905, 110 L.R.R.M. 2915 (11th Cir. 1982) (The Board found a ballot manifests "clear intent" where the "Yes" box had a check mark, and the "No" box had a check mark and some evidence of an erasure); *Belmont Smelting Works*, 115 N.L.R.B. 1481, 37 L.R.R.M. 1131 (1956) (A complete "X" in one box is a valid vote despite the presence of a diagonal line in the other box).

<sup>44</sup> *Id.*

<sup>45</sup> *Daylight Grocery Co. v. N.L.R.B.* *supra* note 43 at 2918 quoting *N.L.R.B. v. Saulk Valley Mfg. Co.*, 486 F.2d at 1136.

<sup>46</sup> See, e.g., *N.L.R.B. v. Leonard Creations of California*, 638 F.2d 111, 106 L.R.R.M. 2488, 2489 (9th Cir. 1981) (N.L.R.B. erred in holding a ballot invalid when the "No" box contained a complete "X" and the "Yes" box contained three-quarters of a fully drawn "X". Given the presence of the completed "X", the voter clearly intended to vote "no") and *N.L.R.B. v. Connecticut Foundry Co.*,

review of a policy invalidating certain types of irregularly marked ballots,<sup>47</sup> the Board's decision in *Kaufman's Bakery* will no doubt be well received by courts that would prefer to count a ballot "if there is a clear expression of preference, regardless of the irregularity of the mark on the ballot."<sup>48</sup>

The Board's decision in *Kaufman's Bakery* marks the second time during the *Survey* year that the Board has reversed its more restrictive views of irregularly marked ballots. Earlier in the year, the Board had overruled its policy of invalidating ballots that are marked on their reverse side in *Hydro Conduit Corp.*<sup>49</sup> These decisions, when coupled with the Board's *Survey* year decision to cease its practice of reviewing the content of representation election campaign propaganda that is allegedly misleading,<sup>50</sup> seem to represent a Board decision to limit its subjective review of representation elections. Like the "troublesome area" of campaign misrepresentations, the problem of irregularly marked ballots has been subject to different views from different Board memberships.<sup>51</sup> Therefore, until a Supreme Court statement on the proper treatment of irregularly marked ballots is received, the currently permissive Board position represented by *Kaufman's Bakery*, despite its acceptance by some courts of appeals, may only be temporary.

B. \**Majority Union Access to Public School Mailboxes: Perry Educational Association v. Perry Local Educators' Association*<sup>1</sup>

Since 1970 several federal and state courts have considered the constitutionality of provisions in collective bargaining contracts that grant the incumbent bargaining representative of public school teachers access to the interschool mail system, but deny such access to minority unions.<sup>2</sup> While it has been argued that such exclusions abridge the first amendment free speech rights of minority unions, only the Seventh Circuit<sup>3</sup> found that

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110 L.R.R.M. 3307, 3310-3311 (2d Cir. 1982) (The Board abused its discretion by invalidating a ballot marked "No" in both the "No" and the "Yes" boxes. Ballot clearly indicates the voter's intent to vote against the union.). See also *Mycalex Div. of Spaulding Fibre Co. v. N.L.R.B.*, 481 F.2d 1044, 83 L.R.R.M. 2650 (2d Cir. 1973) (per curiam).

<sup>47</sup> See *Columbus Nursing Home Inc.*, 188 N.L.R.B. No. 131, 76 L.R.R.M. 1417, 1418 n.4 ("To the extent that this finding is in conflict with the U.S. Court of Appeals for the Fifth Circuit in *N.L.R.B. v. Titcher-Goettinger Co.*, 433 F.2d 1045, 75 L.R.R.M. 2561, we respectfully disagree and adhere to our view until such time as the U.S. Supreme Court has passed on the matter.").

<sup>48</sup> *N.L.R.B. v. Wrape Forest Indus. Inc.*, 596 F.2d 817, 819, 101 L.R.R.M. 2001 (8th Cir. 1979) (en banc).

<sup>49</sup> 260 N.L.R.B. No. 178, 109 L.R.R.M. 1320 (1982). See also note 5 *supra*.

<sup>50</sup> *Midland National Life Ins. Co.*, 263 N.L.R.B. 127, 110 L.R.R.M. 1489 (1982).

<sup>51</sup> *Midland National*, 263 N.L.R.B. at 132, 110 L.R.R.M. at 1493.

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<sup>1</sup> 103 S. Ct. 948 (1983).

<sup>2</sup> See, e.g., *Connecticut State Federation of Teachers v. Board of Ed. Members*, 538 F.2d 471 (2d Cir. 1976); *Memphis American Federation of Teachers Local 2032 v. Board of Ed.*, 534 F.2d 699 (6th Cir. 1976); *Teachers Local 3724 v. North St. Francis County School District*, 103 L.R.R.M. 2865 (E.D. Mo. 1979); *Haukedahl v. School District No. 108*, No. 75-C-3641 (N.D. Ill. May 14, 1976); *Federation of Delaware Teachers v. De La Warr Board of Ed.*, 335 F. Supp. 385 (D. Del. 1971); *Local 858, American Federation of Teachers v. School District No. 1*, 314 F. Supp. 1069 (D. Colo. 1970); *Maryvale Educators Ass'n v. Newman*, 70 A.D.2d 758, 416 N.Y.S.2d 876, *appeal denied*, 48 N.Y.2d 605, 424 N.Y.S.2d 1025 (App. Dis. 1979); *Geiger v. Duval County School Board*, 357 So.2d 442 (Fla. App. 1978); *Clark Classroom Teachers Assoc. v. Clark County School District*, 91 Nev. 143, 532 P.2d 1032 (1975) (per curiam).

<sup>3</sup> Actually, the Seventh Circuit previously found the policy unconstitutional, in *Teachers Local*

such provisions violated the first and fourteenth amendments in *Perry Local Educator's Assn. v. Hohlt*.<sup>4</sup> During the *Survey* year, the United States Supreme Court, on writ of certiorari,<sup>5</sup> reversed the court of appeals decision in *Perry*, holding that a majority union's exclusive access to an interschool mail system was not unconstitutional.<sup>6</sup>

The *Perry* case involved an internal mail system which was operated by the Metropolitan School District of Perry Township, Indiana. The system was designed to permit the rapid transmission of personal and official business between and among the various teachers and administrators in the school system, as well as to facilitate the delivery of messages from certain private organizations which had been granted permission to use the system.<sup>7</sup> Before 1977, both the petitioner, Perry Education Association (PEA), and the respondent, Perry Local Educators' Association (PLEA), represented teachers in the school district and had equal access to the mail system.<sup>8</sup> In 1977, however, the Indiana Education Employment Relations Board held an election and certified the winner, PEA, as the exclusive representative of teachers in the Perry district.<sup>9</sup> Following the election, the school district negotiated a collective bargaining agreement with PEA which allowed PEA "access to teachers' mailboxes,"<sup>10</sup> but stipulated that "these access rights shall not be granted to any other 'school employee organization.'"<sup>11</sup> The agreement added that other school employee organizations were free to use any other means to communicate with teachers in the district including bulletin boards, public address systems, personal meetings and the United States mail.<sup>12</sup> According to the agreement, however, the exclusive access only existed while the bargaining agent remained the teachers' sole representative.<sup>13</sup> Furthermore, the agreement provided that once the union's preferential access status was challenged and a representational contest commenced, all unions must be afforded equal access to all communication facilities, including the school mail system.<sup>14</sup>

PLEA filed an action against PEA and the Perry Township School Board, contending that PEA's preferential access to the mail system violated its right to freedom of speech under the first amendment and the equal protection clause of the fourteenth amendment.<sup>15</sup> After the district court granted PEA's motion for summary judgment, PLEA appealed.<sup>16</sup> The Court of Appeals for the Seventh Circuit reversed the district court's holding,<sup>17</sup> stating that "without an independent reason why equal access . . . is undesirable, the special duties of [PEA] does not justify opening the system to [PEA] alone."<sup>18</sup>

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399 v. Michigan City Area Schools, No. 72-5-94 (N.D. Ind. Jan. 24, 1973), but that case was vacated on other grounds, 499 F.2d 115 (7th Cir. 1974).

<sup>4</sup> 652 F.2d 1286 (7th Cir. 1981).

<sup>5</sup> 103 S. Ct. 948, 954 (1983). PEA sought Supreme Court review by way of an appeal, 103 S. Ct. at 953, the Court actually dismissed the appeal for want of jurisdiction, *id.* at 954, and regarded the petitioners' jurisdictional statement as a petition for a writ of certiorari. *Id.* Furthermore, the name of the case was changed to *Perry Education Assn. v. Perry Local Educator's Assn., et al.* *Id.* at 948.

<sup>6</sup> *Id.* at 960.

<sup>7</sup> *Id.* at 951-52.

<sup>8</sup> *Id.* at 952.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* "School employee organization" is an Indiana term of art which applies to PLEA. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 952-53.

<sup>14</sup> *Id.* at 953.

<sup>15</sup> *Id.* See, *Perry Local Educators Assn. v. Hohlt*, IP 79-189-C (S.D. Ind. 1980).

<sup>16</sup> *Id.* See, *Perry Local Educators Assn. v. Hohlt*, 652 F.2d 1286 (7th Cir. 1981).

<sup>17</sup> 103 S. Ct. at 953.

<sup>18</sup> 652 F.2d at 1300.

Accordingly, the court held that the school district violated the minority union's first amendment rights by opening the system to PEA, but denying its use to PLEA.<sup>19</sup> PEA then appealed to the United States Supreme Court.<sup>20</sup>

The majority opinion in *Perry*, written by Justice White,<sup>21</sup> began by explaining that the interschool mailing system was public property and that the constitutional standards by which limitations upon the access to public property must be evaluated differ depending on the "character of the property at issue."<sup>22</sup> The Court stated that public property may fall into one of three categories, each requiring a different constitutional analysis: First, property which is specifically devoted to assembly and debate, like streets and parks, where the state's ability to limit expressive activity is sharply circumscribed.<sup>23</sup> Second, property which the state has voluntarily opened up to public expression. According to the *Perry* Court, all such expression must remain uncensored as long as the state chooses to keep the property available to the public.<sup>24</sup> Third, the Court referred to property which is owned or controlled by the government, but not designated as a forum for public communications. The Court stated that expression may be limited as long as the limitations are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>25</sup> The Court found that the interschool mailing system involved in *Perry* fell into the third category.<sup>26</sup> The Court stated the such property is owned or controlled by the government, but was not a traditional public forum.<sup>27</sup>

Having determined that the mailboxes were not a public forum, the Court explained that the school district had the right to make distinctions in access based on the subject matter and speaker identity, provided such distinctions were "reasonable in light of the purpose which the forum at issue serves."<sup>28</sup> The Court found that the difference between access provided PEA and PLEA was reasonable for three reasons: First, the Court maintained that PEA needed the interschool mail facilities to perform effectively its exclusive representational obligations. The Court recognized that PLEA had no such obligations.<sup>29</sup> Second, according to the Court, the exclusion of PLEA, as a rival union, was a means of insuring "labor-peace within the schools."<sup>30</sup> Finally, the Court recognized that

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<sup>19</sup> *Id.* at 1290.

<sup>20</sup> *See supra* note 5.

<sup>21</sup> 103 S. Ct. at 951. The opinion was joined by Chief Justice Burger, and Justices Blackmun, Rehnquist, and O'Connor.

<sup>22</sup> *Id.* at 954.

<sup>23</sup> *Id.* at 955.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* The respondents argued first that because the district had opened the system to certain private organizations, it had created a public forum to which PLEA must be admitted. *Id.* at 956. The Court disagreed, *citing* *Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976) (allowing civilian speakers at a military base was not a public forum) and *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (opinion of Blackmun, J.) (plurality holding city transit system rental of advertising space could be limited). The Court added that even if a "limited" public forum had been created, the right of access would only include organizations of a "similar character," and not PLEA. 103 S. Ct. at 956. The respondents then alleged that because PLEA once actually had access to the mailboxes, a public forum existed forever. *Id.* The Court again rebuked them, pointing out that, since that time, PEA had become the exclusive bargaining representative of the teachers and, as such, PLEA no longer had a legitimate reason for using the system, as it had once. *Id.*

<sup>27</sup> 103 S. Ct. at 956.

<sup>28</sup> *Id.* at 957.

<sup>29</sup> *Id.* at 958.

<sup>30</sup> *Id.* at 959.

PLEA still had substantial alternative channels for union-teacher communications, including bulletin boards, meeting facilities, and the United States mail.<sup>31</sup> Accordingly, the Court held that the differential access was reasonably consistent with the school district's legitimate interest in "preserv[ing] the property . . . for the use to which it is lawfully dedicated."<sup>32</sup>

The Court next addressed PLEA's claim that the school district's plan violated the equal protection clause. The Court began by stating that because no fundamental right of PLEA's had been burdened, the school district's equal access policy need only rationally further a legitimate state purpose.<sup>33</sup> Because the mail system was not a public forum, the Court concluded, such a legitimate state purpose existed in the furtherance of the effective performance of the special responsibilities held by an exclusive bargaining representative such as PEA.<sup>34</sup> Again, because such responsibilities of PEA were not shared by PLEA, the Court held that the distinctions in access were allowable, and did not violate the equal protection clause.<sup>35</sup>

Justice Brennan wrote a dissenting opinion in *Perry* and was joined by three other justices.<sup>36</sup> According to the dissent, PLEA's first amendment rights had been violated without the advancement of any substantial state interest.<sup>37</sup> The dissent stated that the exclusive access given to PEA by the school district was a form of "viewpoint discrimination,"<sup>38</sup> which the Supreme Court had previously held as unconstitutional.<sup>39</sup> The dissent began its analysis by disagreeing with the majority's identification of the major issues involved. The relevant issue, according to the dissent, was not the character of the forum and whether the plaintiffs had an absolute right of access, but instead, whether the limitation discriminated on the basis of content, thereby impermissibly denying equal access. In the dissent's view, once the government has allowed the discussion of certain subject matter, it may not enforce limitations that discriminate among viewpoints within that subject matter, whether the forum involved is public or non-public.<sup>40</sup>

In support of its conclusion that viewpoint discrimination is unlawful, Justice Brennan, writing for the dissent, then described two lines of cases in this area. In the dissent's view, the first line demonstrated that the Court had consistently prohibited the government from discriminating among viewpoints on particular issues falling within the realm of protected speech.<sup>41</sup> The opinion stated that the second line showed that in certain circumstances, the government may not interfere with the choice of subject matter and

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<sup>31</sup> *Id.* The Court also pointed out that under Indiana law, PLEA may have access to the mailboxes while a representational election is in process. *Id.* at 953.

<sup>32</sup> *Id.* at 958, citing *United States Postal Service v. Council of Greenburgh Civics Ass'n*, 453 U.S. 114, 129-30 (1981).

<sup>33</sup> 103 S. Ct. at 960.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* The dissent was joined by Justices Marshall, Powell, and Stevens. *Id.*

<sup>37</sup> *Id.* (Brennan, J., dissenting).

<sup>38</sup> *Id.* at 961 (Brennan, J., dissenting).

<sup>39</sup> See *supra* note 34.

<sup>40</sup> *Id.* at 963 (Brennan, J., dissenting).

<sup>41</sup> *Id.* at 961-62 (Brennan, J., dissenting). These cases included *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (denying Jehovah Witnesses access to park held unconstitutional); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969) (suspension of students wearing black armbands in protest of the Vietnam War held unconstitutional); *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (order to disallow nonunion employees from speaking about collective bargaining held unconstitutional).

must remain "content neutral."<sup>42</sup> The dissent then distinguished three cases relied upon by the majority which allowed content-based exclusions in a non-public forum.<sup>43</sup> According to Justice Brennan, the forums in these cases, which included transit system advertising, a military base and a prison, were "unusual," and in addition to being non-public, the prohibited speech was clearly "incompatible with the forum."<sup>44</sup> Furthermore, the dissent added that none of these cases involved viewpoint discrimination.<sup>45</sup>

Justice Brennan also rejected the majority's conclusion that the differential access in *Perry* was based on the status of the unions and not on any intent to discriminate on the basis of viewpoints. In the dissent's view, the intent to discriminate can be inferred from the relevant effects of the limiting policy.<sup>46</sup> Accordingly, the dissent determined that based on the record of the Court of Appeals for the Seventh Circuit, the effects of the exclusive access policy would be for teachers to receive "self-laudatory descriptions of the activities" of the petitioner and to be denied "the critical perspective offered by" the respondents.<sup>47</sup> The dissent added that the only practical reason for PEA to seek such a policy was to deny rival unions like PLEA access to channels of communications.<sup>48</sup> Such a purpose, the dissent maintained, amounted to censorship under the first amendment which cannot be justified merely by PEA's special responsibilities as exclusive bargaining representative.<sup>49</sup> The dissent concluded, therefore, that the decision of the court of appeals should be affirmed.<sup>50</sup>

*Perry* is significant because it enables unions such as PEA, to enjoy an exclusive means of communication with its members. The Court's holding clearly favors incumbent unions because it maintains that exclusivity does not unconstitutionally hinder the free speech rights of minority unions. This is so because the mailbox access system used in *Perry* was a privilege, designed to be extended to one union, and not a right which would have to be denied to all but one union. If, as was the case with all other organizations seeking to use the mail system,<sup>51</sup> the principal of the school — a government agent — chose the one union to which this privilege could be extended, this could result in viewpoint discrimination. In *Perry*, however, the choice was not based on a union's viewpoint but, as the majority said, on the "status" of being the exclusive bargaining representative for the teachers.<sup>52</sup> Even if one could argue that this "status" was a manifestation of viewpoint, it is a viewpoint that was preferred and chosen, not by the school district as an agent of the

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<sup>42</sup> 103 S. Ct. at 932-33. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980); *Carey v. Brown*, 447 U.S. 455 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

<sup>43</sup> *Id.* at 963 (Brennan, J., dissenting). These cases included *Lehman v. Shaker Heights*, *supra* note 26; *Greer v. Spock*, *supra* note 26 and *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (proscription of labor union organizational activities in a prison held constitutional).

<sup>44</sup> 103 S. Ct. at 963 (Brennan, J., dissenting).

<sup>45</sup> *Id.* (Brennan, J., dissenting).

<sup>46</sup> *Id.* at 965 (Brennan, J., dissenting).

<sup>47</sup> *Id.* (Brennan, J., dissenting), quoting *Perry Local Educator's Assn. v. Hohlt*, 652 F.2d at 1296.

<sup>48</sup> 103 S. Ct. at 966 (Brennan, J., dissenting).

<sup>49</sup> *Id.* (Brennan, J., dissenting). This is so, according to the dissent because, although the board may have a legitimate interest in granting PEA access, there is no legitimate interest served in denying PLEA access. *Id.* at 967 (Brennan, J., dissenting). Furthermore, there is absolutely no evidence that granting such access would jeopardize "labor peace." *Id.* at 968 (Brennan, J., dissenting).

<sup>50</sup> *Id.* at 969 (Brennan, J., dissenting).

<sup>51</sup> *Id.* at 963 (Brennan, J., dissenting).

<sup>52</sup> *Id.* at 960.

state, but by the teachers, collectively acting as a non-state entity. Their decision then forms the rational basis for the state action which allowed only one union access to the interschool mail. In practical terms, as long as there is an unchallenged bargaining representative, no other union has the privilege, but if several unions seek to be the representative, all may invoke the privilege. As long as there is an alternative means of communicating with teachers, open to all unions, such as the public mails, all channels of communication are never shut off completely and only certain channels, under special circumstances, are limited.

The majority's opinion in *Perry* also encourages labor organization because access to the interschool mail may be granted solely upon the "dual authorization" of the school district and the unions. If access could be granted by the permission of the principal alone, instead of by the mutual agreement of the school district and the unions,<sup>53</sup> the principals, as agents of management, could undercut the power of an incumbent union by allowing access to other competing unions.<sup>54</sup> Nevertheless, the dissent in *Perry* disagreed with the majority's view that the "dual authorization" requirement was an adequate safeguard for employees' collective bargaining rights. Specifically, the dissent feared that by collaborating with the school district, the incumbent union could effectively "squeeze out" rival unions.<sup>55</sup>

The dissent's fear of discriminatory collaboration is unpersuasive for a number of reasons. The dissent's fear is grounded in the assumption that either no alternative access to the teachers existed, or that it had been shut off by the collusive powers of the incumbent union and the school district, or by a lack of manpower or money on the part of the alternative unions to use the other forums for communication. At least under the facts of *Perry*, the former possibility is simply not true. Furthermore, the latter possibility implies the sort of conspiracy, ill-preparedness, or inconsequentiality which even access to the internal mail system would not be able to overcome. Presently, the district and the union have structured a plan whereby the union in power has a privilege which supplements the efficiency of its representational function. In addition, the plan permits alternative input and even allows extension of its privilege to those who seriously challenge its representational status.

Finally, it should be pointed out that under the *Perry* Court's reasoning, other access systems will withstand constitutional scrutiny provided that alternative means of access are available. If such other forums are closed or limited, the system would be open to suspicion. In addition, if the exclusive status of the union was to be ended, or if other unions were indiscriminately, or at least unreasonably, allowed to use the system, a claim of viewpoint discrimination could be valid. This would be so because some government agent would be making the choice as to which "viewpoint" of the subject matter could be heard, and which could not. Similarly, if any outside organization, such as right-to-work councils, or other marginally related groups were permitted to use the system, the case could come up for re-examination.

In summary, the Supreme Court in *Perry Education Assn. v. Perry Local Educator's Assn.*

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<sup>53</sup> *Id.* at 952.

<sup>54</sup> This is probably what the majority meant by "insuring labor peace." *Id.* at 959. Of course, the dissent attacked this terminology with the lack of any evidence of union feuding during the days of shared access. *Id.* at 968 (Brennan, J., dissenting). This attack is misplaced because there must have been some discord, or else PLEA would not have requested an election to select a single representative. *Id.* at 952.

<sup>55</sup> *Id.* at 965-66 (Brennan, J., dissenting).

held that access to an interschool mail system by an exclusive bargaining representative does not violate the first or fourteenth amendments as long as the forum remains non-public, alternative access remains open, and the union's representation remains exclusive.

## II. UNFAIR LABOR PRACTICES

### A. Employer Unfair Labor Practices

#### 1. \*Employer Repudiation of Illegal Conduct by its Agents: Broyhill Co.<sup>1</sup>

When an employer's supervisors engage in unlawful conduct under the National Labor Relations Act (the Act), the company may wish to repudiate that conduct in order to insulate itself from charges of an unfair labor practice.<sup>2</sup> To be effective, the company's repudiation must disavow any connection with the unlawful activity of its supervisors, thereby eliminating the need for a remedial order from the National Labor Relations Board (the Board).<sup>3</sup> In *Passavant Memorial Area Hospital*,<sup>4</sup> the Board adopted a standard for determining the adequacy of an employer's repudiation.<sup>5</sup> The *Passavant* standard requires the repudiation to be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct."<sup>6</sup> In addition, the employer must adequately inform its employees of its position by publishing the repudiation to the employees and refraining from engaging in proscribed conduct after the notification.<sup>7</sup> Finally, the repudiation must assure the employees that the employer will not interfere with the exercise of the employees' rights under the Act in the future.<sup>8</sup>

Although the Board is in agreement that *Passavant* is the correct test for determining the effectiveness of an employer's repudiation,<sup>9</sup> confusion exists over the proper application of the standard to the facts of each case.<sup>10</sup> In most instances, the problem arises because of the presence of vague requirements in the test such as a "timely" and "unambiguous" repudiation and an "adequate publication" of it.<sup>11</sup> The confusion caused by this language has created practical difficulties for employers, because when a company learns that one of its agents has committed an unlawful act, it needs to know with certainty exactly what would constitute a repudiation which will effectively obviate the need for a remedial order.<sup>12</sup>

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<sup>1</sup> Broyhill Co., 260 N.L.R.B. 1366, 109 L.R.R.M. 1314 (1982).

<sup>2</sup> See *Passavant Memorial Area Hosp.*, 237 N.L.R.B. 138, 98 L.R.R.M. 1492 (1978).

<sup>3</sup> Broyhill Co., 260 N.L.R.B. 1366, 109 L.R.R.M. 1314 (1982).

<sup>4</sup> 237 N.L.R.B. 138, 98 L.R.R.M. 1492 (1978).

<sup>5</sup> *Id.* at 138-39, 98 L.R.R.M. at 1492-93.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Materials Research Corp.*, 246 N.L.R.B. 398, 402, 102 L.R.R.M. 1561, 1565 (1979); *Lucky Stores Inc.*, 245 N.L.R.B. 647, 650, 102 L.R.R.M. 1448, 1450 (1979); *Laredo Coca-Cola Bottling Co.*, 241 N.L.R.B. 167, 177 n.12, 100 L.R.R.M. 1545 (1979), *enforced* N.L.R.B. v. *Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338, 103 L.R.R.M. 2904 (5th Cir. 1980), *cert. denied* 449 U.S. 889, 105 L.R.R.M. 2658 (1980).

<sup>10</sup> See Broyhill Co., 260 N.L.R.B. 1366, 1366-67, 109 L.R.R.M. 1314, 1315 (1982), where both the majority and the two members in dissent applied *Passavant*. Each side reached different results only through varying applications of the standard. See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *United Postal Service*, 253 N.L.R.B. 1203, 106 L.R.R.M. 1063 (1981), where the employer

During the *Survey* year, the issue of whether an employer had adequately repudiated the unlawful conduct of its supervisors was before the Board in *Broyhill Company*.<sup>13</sup> Applying the *Passavant* standard, a majority of the Board found that the employer's repudiation sufficiently disavowed the unlawful activity of its supervisors.<sup>14</sup> Although the dissent also applied *Passavant*, it concluded that the employer had not effectively repudiated the conduct of its agent.<sup>15</sup>

*Broyhill* arose after a company supervisor made a series of remarks to employees within his department that violated the Act.<sup>16</sup> Specifically, the remarks threatened plant closure and job termination if a union were established within the company.<sup>17</sup> Additionally, the supervisor instructed an employee to keep him informed about any union activity.<sup>18</sup> There was no dispute between the parties that these statements violated section 8(a)(1) of the Act, which in the absence of an effective repudiation, would give rise to a cause of action.<sup>19</sup>

As a result of the supervisor's statements, several employees filed a charge of unfair labor practices with the Board and the Board initiated an investigation.<sup>20</sup> The company did not learn of its supervisor's conduct until five weeks after the supervisor made the statements, when the Board's investigating agent first met with the company's officers.<sup>21</sup> The next day, the employer voluntarily posted a "Notice to All Employees" on its bulletin board.<sup>22</sup> The notice expressed the company's regret that the improper conduct may have occurred and expressly disavowed the supervisor's statements that violated the Act.<sup>23</sup> In addition, the notice stated that the company would not "in any other manner interfere with or coerce its employees in the exercise of their rights to organize or engage in union activities."<sup>24</sup> The investigating agent brought the matter before an Administrative Law Judge, who concluded that the notice effectively disavowed all unlawful conduct on the part of the employer and its supervisors.<sup>25</sup>

Applying the *Passavant* standard, the Board in *Broyhill* found that the company's notice sufficiently repudiated the unlawful statements of its supervisor and obviated the need for a remedial order.<sup>26</sup> The Board ruled that the notice was timely, stating that it had been posted immediately after the employer learned of the supervisor's conduct.<sup>27</sup>

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published an ameliorative notice which nevertheless failed to repudiate the conduct of its agent because the notice did not meet the standard set forth in *Passavant*. See also, *Lake Development Management Co.*, 259 N.L.R.B. 791, 109 L.R.R.M. 1027 (1981).

<sup>13</sup> 260 N.L.R.B. 1366, 109 L.R.R.M. 1314 (1982).

<sup>14</sup> *Id.*, 109 L.R.R.M. at 1315.

<sup>15</sup> *Id.* at 1368, 109 L.R.R.M. at 1316.

<sup>16</sup> *Id.* at 1370, 109 L.R.R.M. at 1315.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1367, 109 L.R.R.M. at 1315.

<sup>19</sup> *Id.* at 1366, 109 L.R.R.M. at 1315.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1367, 109 L.R.R.M. at 1316. The notice to all employees noted that a charge of unfair labor practices had been filed against the company and that an investigation was pending. *Id.* The company stated that it made an investigation and "concluded that a supervisor of the company may have acted in an improper manner." *Id.* The notice concluded with a description of the employees' Section 7 rights in the traditional "we will not" language often employed in the Board's notices. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, 109 L.R.R.M. at 1315.

<sup>26</sup> *Id.* at 1366, 109 L.R.R.M. at 1315.

<sup>27</sup> *Id.*

The Board reasoned that the repudiation was timely, despite the five week delay between the violation and the posting of the notice, because the company acted in good faith and lacked actual knowledge of the infraction during that period.<sup>28</sup> Moreover, the Board recognized that its own remedial orders were never posted within five weeks of the commission of an unfair labor practice and therefore the company's notice was certainly timely.<sup>29</sup>

After finding that the repudiation was timely, the Board concluded that the other factors of the *Passavant* test were also satisfied. Accepting the Administrative Law Judge's conclusions, the Board decided that the posting of the notice on the company bulletin board was adequate publication of the repudiation. The Board made this decision even though it noted that only three out of five employees who testified at the hearing stated that they had seen the notice.<sup>30</sup> The Board also held that the notice was "sufficiently specific" under the *Passavant* tests in spite of its failure to name the supervisor whose comments were at issue or to mention the circumstances under which these unlawful statements were made.<sup>31</sup> Finally, the Board criticized the dissent's application of the *Passavant* standard to the facts of *Broyhill*. According to the majority, the dissent's opinion was "highly technical" and "mechanical."<sup>32</sup> Specifically, the Board noted that the result reached by the dissent, carried to its logical end, would require the company to post a second notice under the Board's order "disavowing the unlawful conduct in terms virtually identical to those appearing in the notice (the Company) has already posted."<sup>33</sup>

Members Fanning and Jenkins, dissenting in part, agreed that the correct standards for determining the adequacy of the company's notice were set forth in *Passavant*.<sup>34</sup> Their approach differed, however, in the application of these standards to the facts of the case.<sup>35</sup> The dissent believed that the five week delay in posting the notice was untimely, and that the mere posting of the notice on the bulletin board was inadequate.<sup>36</sup> Furthermore, the dissent found that the notice inadequately identified the illegal conduct.<sup>37</sup> Thus, the dissent concluded that the notice was ineffective as a repudiation.<sup>38</sup>

Although the Board used the proper legal standard in *Broyhill*, it misapplied the facts of the case to that standard. As the dissent correctly argued, the Board's decision was erroneous for three major reasons. Namely, the notice was untimely, inadequately published, and insufficiently specific.<sup>39</sup> First, the notice was not posted until five weeks after the unlawful conduct occurred.<sup>40</sup> In *Passavant*, a seven week delay was declared to be "untimely."<sup>41</sup> Another misapplication of the standard resulted from the Board's focus on the good faith and lack of actual knowledge of the employer in *Broyhill*.<sup>42</sup> The employer's actual knowledge should be irrelevant. During those five weeks before the repudia-

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1366-67, 109 L.R.R.M. at 1315.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1367, 109 L.R.R.M. at 1315.

<sup>35</sup> *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1366, 109 L.R.R.M. at 1315.

<sup>41</sup> *Passavant*, 237 N.L.R.B. at 138-39, 98 L.R.R.M. at 1493.

<sup>42</sup> *Broyhill*, 260 N.L.R.B. at 1366, 109 L.R.R.M. at 1314.

tion was made the threatened employees were inhibited from engaging in protected activities, regardless of the actual knowledge of the employer. The purposes of the Act are fulfilled only by examining the mental state of the employees, not the employer. Moreover, it must be recognized that the supervisor was the employer's agent. To require the employer to have actual knowledge of his agent's unlawful conduct would discourage employers from policing their agents to the detriment of employees. Consequently, the Board's focus on the good faith of the employer is misplaced because this consideration ignores the prejudicial effect of delay upon the exercise of the employees' protected rights.

The second problem with the Board's decision in *Broyhill* is its finding that the employer's notice was adequately published. The employer in *Broyhill* placed the notice of repudiation on the company's bulletin board.<sup>43</sup> From this fact, the majority concluded that all employees "had an adequate opportunity to read the notice if they so chose."<sup>44</sup> As the dissent pointed out, however, two out of the five employees who testified at the hearing stated that they had not seen the notice.<sup>45</sup> In addition, no evidence was presented with regard to the likelihood that the rest of the employees had seen the notice.<sup>46</sup> The Board's opinion also does not consider where the bulletin board was located or for how long the notice was posted.<sup>47</sup> Consequently, the notice should not have been held to be adequately posted in this proceeding. Because the need for a notice of repudiation arises only when one of the employer's agents engages in unlawful conduct, the employer should be required to prove that the notice of repudiation reached all its employees. Requiring anything less denies employees the full protection offered by the Act when an employer admits a violation.

Finally, the Board incorrectly concluded that the employer's notice was sufficiently specific. The notice in *Broyhill* did not identify the supervisor who engaged in the unlawful conduct.<sup>48</sup> Furthermore, the notice did not admit any violation of the Act, but instead only stated that a supervisor "may have acted in an improper manner."<sup>49</sup> If an employer wishes to shield itself from charges of an unfair labor practice it should have the burden of identifying the guilty supervisor and specifying the exact conduct it wishes to repudiate. A repudiation must identify precisely the conduct involved if the message is to be understood by all employees.

In summary, the *Passavant* standard should be strictly applied and the burden of proof should be placed on the employer to satisfy that standard. If such an approach were taken, employers would be alerted that they will be held to a strict standard and will therefore make future repudiations more likely to be effective. After all, repudiation only becomes an issue after both sides have agreed that an unfair labor practice has occurred. To protect employees, the Board and the courts must require employers to convincingly demonstrate that there is no longer a need for a remedial order. Any lesser standard diminishes the effectiveness of the Act's prohibitions.

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<sup>43</sup> *Id.*, 109 L.R.R.M. at 1315.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1367, 109 L.R.R.M. at 1315.

<sup>46</sup> *See id.* at 1368, 109 L.R.R.M. at 1316.

<sup>47</sup> *See id.*

<sup>48</sup> *Id.* at 1367, 109 L.R.R.M. at 1316.

<sup>49</sup> *Id.*

2. \**Employer's Duty to Bargain — Subcontracting Work and Partial Closing: Marriott Corp.*<sup>1</sup>

Read together, sections 8(a)(5) and 8(d) of the National Labor Relations Act (Act)<sup>2</sup> establish the obligation of an employer and the representative of its employees to bargain over "wages, hours, and other terms and conditions of employment. . . ."<sup>3</sup> A unilateral change with respect to any subject within this category violates the statutory duty to bargain collectively and is subject to a National Labor Relations Board (Board) remedial order.<sup>4</sup> Congress, however, intentionally left the phrase "wages, hours, and other terms and conditions of employment" without more specific definition so that the Board could more precisely define it in light of particular industrial practices.<sup>5</sup> Two such practices are partial closings and subcontracting.

In *First National Maintenance Corp. v. NLRB*,<sup>6</sup> the United States Supreme Court decided the issue of whether an employer's decision to close part of its business was subject to compulsory collective bargaining.<sup>7</sup> In *First National Maintenance*, the employer, who provided maintenance services for commercial customers, structured its business so that specific employees serviced particular customers.<sup>8</sup> Unable to reach a contract agreement with one of its customers, the employer discontinued its services to the customer and discharged the employees servicing that account.<sup>9</sup> The *First National Maintenance* Court held that the employer's decision to discontinue its services and discharge its employees "was not within the scope of "terms and conditions of employment," and therefore, was not a subject of compulsory collective bargaining.<sup>10</sup> Consequently, after *First National Maintenance*, an employer's decision to close part of its business does not require mandatory collective bargaining.

In *Fibreboard Paper Products Corp. v. NLRB*,<sup>11</sup> the United States Supreme Court reached the contrary result regarding whether an employer's decision to lay-off its employees and subcontract the work previously performed by them was a subject of

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<sup>1</sup> 264 N.L.R.B. No. 178, 111 L.R.R.M. 1354 (1982).

<sup>2</sup> 29 U.S.C. § 158(a) (1976) provides in part: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees. . . ." 29 U.S.C. § 158(d) (1976) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

<sup>3</sup> For text of relevant sections of the Act, see *supra* note 2. While the employer and the employees' representative are required to bargain over these subjects, neither is legally obligated to yield. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

<sup>4</sup> *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981).

<sup>5</sup> *Id.* at 675.

<sup>6</sup> 452 U.S. 666 (1981).

<sup>7</sup> *Id.* at 667.

<sup>8</sup> *Id.* at 668.

<sup>9</sup> *Id.* at 669-70. By terms of its contracts, the employer hired personnel separately for each customer and did not transfer employees between locations. *Id.* at 668.

<sup>10</sup> *Id.* at 686.

<sup>11</sup> 379 U.S. 203 (1964).

compulsory collective bargaining.<sup>12</sup> The work subcontracted in *Fibreboard* consisted of maintenance work at the employer's plant.<sup>13</sup> The employer's action was motivated by a desire to save labor costs.<sup>14</sup> The *Fibreboard* Court held that the employer's decision to subcontract the maintenance work was within the ambit of "terms and conditions of employment," and therefore, was subject to mandatory collective bargaining.<sup>15</sup>

After *First National Maintenance* and *Fibreboard*, while an employer's decision to close part of its business does not require collective bargaining, an employer's decision to subcontract work previously performed by its employees does require collective bargaining. The distinction between partial closings and subcontracting, however, is not always readily apparent.<sup>16</sup>

During the *Survey* year, in *Marriott Corporation*,<sup>17</sup> the Board addressed the question of whether an employer's decision to discontinue one of its departments and hire out the work previously done by the department was a mandatory subject of collective bargaining.<sup>18</sup> The Board stated that a critical factor in this determination was whether the employer engaged in subcontracting or a partial closing.<sup>19</sup> In order to make this distinction, the Board applied a four-pronged test that focused on whether the employer's action concerned an "aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union," or whether it represented a substantial change in operations or lay at the "very core of entrepreneurial control."<sup>20</sup> Applying this test to the facts of *Marriott Corp.*, the Board determined that the employer's decision was subject to mandatory collective bargaining.<sup>21</sup>

In *Marriott Corp.*, the employer owned a commissary operation that prepared and distributed food products to the employer's restaurants.<sup>22</sup> The commissary was composed of five departments, one of which prepared shrimp.<sup>23</sup> Due to the escalating market price of raw shrimp and problems concerning quality and portion control, the employer entered an oral agreement with a company named Fishking to supply the commissary with processed shrimp for distribution.<sup>24</sup> A few months later, the employer laid off its 12 shrimp processing department employees and phased out its shrimp processing operation.<sup>25</sup> Within the next few months, the employer sold some of its shrimp processing equipment to Fishking for \$30,000 and returned its leased machines to the lessor.<sup>26</sup> The employer retained ownership of the freezers and hydraulic system previously used in shrimp processing as well as the plant area formerly used in this processing.<sup>27</sup>

Addressing the employer's actions, the Administrative Law Judge found that while

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<sup>12</sup> *Id.* at 204-05.

<sup>13</sup> *Id.* at 206.

<sup>14</sup> *Id.* at 213-14.

<sup>15</sup> *Id.* at 215.

<sup>16</sup> See R. GORMAN, BASIC TEXT ON LABOR LAW, 517 (1976) [hereinafter cited as GORMAN].

<sup>17</sup> 111 L.R.M. 1354 (1982).

<sup>18</sup> *Id.* at 1354-55.

<sup>19</sup> *Id.* at 1355-56.

<sup>20</sup> *Id.* at 1356.

<sup>21</sup> *Id.* at 1357.

<sup>22</sup> *Id.* at 1354.

<sup>23</sup> *Id.* at 1354-55.

<sup>24</sup> *Id.* at 1355.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1357.

<sup>27</sup> *Id.*

the employer had violated section 8(a)(5) of the Act<sup>28</sup> by failing and refusing to bargain with the union over the effects of discontinuing its shrimp operations, the employer's actual decision to discontinue the operations was not a subject of mandatory collective bargaining.<sup>29</sup> The Administrative Law Judge based this determination on his finding that the employer's action represented a "major shift in the direction of the company."<sup>30</sup> The Board's General Counsel filed exceptions to the Administrative Law Judge's determination, asserting that the employer was obligated to bargain over its decision to discontinue the operations and hire out the work.<sup>31</sup>

The National Labor Relations Board agreed with the Administrative Law Judge's finding concerning the employer's duty to bargain over the effects of its action. The Board disagreed, however, with the Administrative Law Judge's finding with respect to the employer's statutory duty to bargain over its decision.<sup>32</sup> The Board noted that while the Board and courts generally have held subcontracting to be within the scope of mandatory collective bargaining, they generally have held partial closings to be outside the ambit of this process.<sup>33</sup> Nevertheless, the Board observed that the distinction between subcontracting and partial closing is not always readily apparent.<sup>34</sup> To clarify the distinction between subcontracting and partial closing, the Board reasoned it was necessary to review the particular facts of each case and decide whether the employer's action concerns an "aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union," or whether it represents either a substantial change in operations, or lies at the "very core of entrepreneurial control."<sup>35</sup> If the action fell within the former category, the Board observed, it would be a suitable subject for mandatory collective bargaining.<sup>36</sup> If, however, the employer's action fell within the latter category, the Board stated, it would not be a suitable subject for compulsory collective bargaining.<sup>37</sup>

Noting that the distinction between subcontracting and partial closing is not always readily apparent, the Board examined four factors to draw this distinction: (1) the nature of the employer's business before and after the action taken, (2) the extent of capital expenditures, (3) the basis for the action, and (4) the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives.<sup>38</sup> Reviewing the facts of *Marriott Corp.* with respect to the first factor, the nature of the employer's business before the action taken, the Board rejected the "narrow" characterization of the employer's business as shrimp processing.<sup>39</sup> Instead, the Board characterized the employer's business as providing foodstuffs to its individual restaurants.<sup>40</sup> Considering the nature of the employer's business both before and after the employer's action, the Board deter-

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<sup>28</sup> For the text of § 8(a)(5) of the Act, see *supra* note 2.

<sup>29</sup> *Marriott Corp.* 111 L.R.R.M. 1354, 1354-55 (1982).

<sup>30</sup> *Id.* at 1356.

<sup>31</sup> *Id.* at 1354.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1355.

<sup>34</sup> *Id.* at 1356.

<sup>35</sup> *Id.* (quoting *General Motors Corporation, GMC Truck & Coach Division*, 191 N.L.R.B. 951, 77 L.R.R.M. 1537 (1971)).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

mined that it did not change. The Board reasoned that the business still provided processed shrimp to its restaurants.<sup>41</sup>

With respect to the second factor, the extent of capital expenditures, the Board found that while not *de minimis*, the expenditures were not sufficiently substantial to remove the employer from the statutory duty to bargain collectively.<sup>42</sup> Turning to the third factor, the basis for the employer's action, the Board found that such actions occurred primarily because of concern over escalating costs as well as portion and quality control.<sup>43</sup> With respect to the fourth factor, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives, the Board noted that since production costs include such factors as wages, fringe benefits and other employment costs over which the union can exercise substantial control, production costs are particularly suitable for resolution through collective bargaining.<sup>44</sup> Finally, examining quality and portion control, the Board found that while the potential union input would not be as direct as it is in production costs, quality control is a common concern in collective bargaining.<sup>45</sup> Consequently, the Board was unwilling to find that collective bargaining would be of minimal value to the employer in achieving its objective of quality and portion control.<sup>46</sup> In light of its examination of these four factors, the Board concluded that the employer's action of closing its shrimp processing department and contracting out the work to Fishking was suitable for collective bargaining, and therefore, was a mandatory subject of collective bargaining.<sup>47</sup>

Chairman Van de Water, joined by Member Hunter, issued a separate concurring and dissenting opinion. While agreeing with the majority that the employer violated section 8(a)(5) of the Act<sup>48</sup> by refusing to bargain over the effects of its decision,<sup>49</sup> they disagreed with the majority's holding that the employer's decision was a subject of mandatory collective bargaining.<sup>50</sup> Believing that the "simple truth" of the case was that the employer left the shrimp processing business, the dissenters disagreed with the majority's characterization of the employer's business as providing foodstuffs to its individual restaurants.<sup>51</sup> Instead, the dissent viewed the employer's action as a partial closing.<sup>52</sup> Relying on what it discerned to be the United States Supreme Court's "plain holding" in *First National Maintenance Corp. v. NLRB*<sup>53</sup> — "that an employer's decision to close down a part of its business for economic or other business reasons is outside the scope of the mandatory bargaining obligation . . .," — the dissent concluded that the employer's action was not a subject of compulsory collective bargaining.<sup>54</sup> The dissent added that the

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<sup>41</sup> *Id.* at 1356.

<sup>42</sup> *Id.* at 1356-57.

<sup>43</sup> *Id.* at 1357.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> For the text of the pertinent sections of the National Labor Relations Act, see *supra* note 2.

<sup>49</sup> See 111 L.R.R.M. 1354, 1358-59 (1982) (Chairman Van de Water and Member Hunter concurring in part and dissenting in part).

<sup>50</sup> *Id.* at 1355.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 453 U.S. 666 (1981).

<sup>54</sup> 111 L.R.R.M. 1354, 1358-59 (1982) (Chairman Van de Water and Member Hunter concurring in part and dissenting in part).

problem of quality and portion control can only be solved by the employer, and accordingly, was not suitable for collective bargaining.<sup>55</sup>

The majority's analysis in *Marriott Corp.* successfully synthesizes the approaches to the issue of subcontracting and partial closing that were enunciated by the United States Supreme Court in *Fibreboard* and *First National Maintenance*. The *Fibreboard* Court held that an employer's decision to lay off its employees and subcontract out the work previously performed by them was a subject of mandatory collective bargaining.<sup>56</sup> The Court based its holding in *Fibreboard* on several factors. First, the Court reasoned that the phrase "conditions of employment" literally covered subcontracting.<sup>57</sup> The Court stressed that the phrase certainly covered the termination of employment that was caused by the subcontracting.<sup>58</sup> In addition, the Court noted that mandatory bargaining would effectuate the Act's statutory objective by "bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."<sup>59</sup> Second, the Court found that the employer's decision to "contract out" did not "alter the Company's basic operation."<sup>60</sup> In reaching this finding, the Court reasoned that the maintenance workers performed the same work in the same plant, and that no capital investment was contemplated.<sup>61</sup> Third, the Court determined that the employer's reason for "contracting out" — to reduce labor costs — was peculiarly suitable for resolution through collective bargaining.<sup>62</sup> The Court emphasized that its holding was restricted to the "contracting out" situation involved in *Fibreboard*, contracting that involves replacement of bargaining unit employees with those of an independent contractor to do the same work under similar employment conditions.<sup>63</sup>

Justice Stewart wrote a concurring opinion in *Fibreboard* which has proven to be more influential than the majority's opinion.<sup>64</sup> He stated that not all management decisions potentially affecting job security are subjects of compulsory collective bargaining.<sup>65</sup> He noted that some of these decisions may have only an indirect and uncertain impact on job security.<sup>66</sup> Finally, he stressed that regardless of the impact of the employer's decision on employment, nothing in the Court's holding could be construed as imposing a duty to bargain collectively regarding managerial decisions that "lie at the core of entrepreneurial control."<sup>67</sup> Justice Stewart reasoned that, regardless of whether they resulted in the termination of employment, management "decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves conditions of employment. . . ."<sup>68</sup>

In *First National Maintenance Corp. v. NLRB*,<sup>69</sup> the Supreme Court held that an

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<sup>55</sup> *Id.* at 1359.

<sup>56</sup> 379 U.S. 203, 213-15 (1964).

<sup>57</sup> *Id.* at 210.

<sup>58</sup> *Id.* at 210.

<sup>59</sup> *Id.* at 210-11.

<sup>60</sup> *Id.* at 213.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 213-14.

<sup>63</sup> *Id.* at 215.

<sup>64</sup> *Id.* at 217. See GORMAN, *supra* note 18 at 511.

<sup>65</sup> *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

<sup>66</sup> See *id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 452 U.S. 666 (1981).

employer's decision to close part of its business was not subject to compulsory collective bargaining.<sup>70</sup> The Court reasoned that the employer's decision involved a change in the scope and direction of the enterprise and was not "primarily about conditions of employment [even] though the effect of the decision may be necessary to terminate employment."<sup>71</sup> The Court indicated that both employees and management had an interest in the decision: employees were interested in retaining their jobs while management was interested in "remaining free from the constraints of the bargaining process to the extent essential for the running of a profitable business."<sup>72</sup> Applying a balancing test to the facts of *First National Maintenance*, the Court determined that the harm likely to be done to an employer's discretion in deciding to close part of its business for economic reasons outweighed the benefit that might be gained through the employees' participation in the decision.<sup>73</sup> The Court cautioned, however, that its holding was limited to the type of situation in *First National Maintenance*, in which: (1) the employer had no intention to replace the discharged employees or move the operation elsewhere, (2) the employer's sole purpose was to reduce economic loss, and (3) the union had no control or authority over the factors that caused the employer's economic loss.<sup>74</sup>

While *Fibreboard* and *First National Maintenance* are the Supreme Court's leading decisions on subcontracting and partial closing, neither decision presents as complex a situation as that in *Marriott Corp.* In *Marriott Corp.*, the employer closed its shrimp processing department, discontinued processing shrimp, and subcontracted its shrimp processing work out to Fishking.<sup>75</sup> Despite the Board's characterization of the employer's action as subcontracting,<sup>76</sup> and the dissent's characterization of the action as a partial closing,<sup>77</sup> the employer's action actually presented a hybrid situation involving both subcontracting and partial closing. Since the situation in *Marriott Corp.* was not limited to a subcontracting problem as was *Fibreboard*, or to a partial closing problem as was *First National Maintenance*, neither decision is directly on point. Nonetheless, in formulating a test to apply to the hybrid situation in *Marriott Corp.*, the Board drew upon and harmonized the principles articulated by the Supreme Court in *Fibreboard* and *First National Maintenance*.

First, the *Marriott Corp.* majority determined that a major consideration in deciding whether an employer's action is a subject of mandatory collective bargaining is whether it involves an "aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union," or whether it constitutes either a substantial change in operation or lies at the "core of entrepreneurial control."<sup>78</sup> This analytical framework reflects principles espoused by the Supreme Court in both *Fibreboard* and *First National Maintenance*. It reflects the *Fibreboard* Court's emphasis on whether the employer's action was suitable for resolution through collective bargaining,<sup>79</sup> or whether it altered the

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<sup>70</sup> *Id.* at 667, 686.

<sup>71</sup> *Id.* at 677 (quoting *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart J., concurring)).

<sup>72</sup> 452 U.S. at 677-79.

<sup>73</sup> *Id.* at 686.

<sup>74</sup> *Id.* at 687. The fee dispute that led to the contract's termination and the discharge of the employees servicing the contract was between the employer and a customer. *Id.*

<sup>75</sup> 111 L.R.R.M. 1354, 1355 (1982).

<sup>76</sup> *Id.* at 1356.

<sup>77</sup> *Id.* at 1358.

<sup>78</sup> *Id.* at 1356.

<sup>79</sup> See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213-14 (1964).

company's basic operations.<sup>80</sup> Further, it echoes Justice Stewart's concurring opinion's emphasis on whether the employer's action altered the scope or direction of the enterprise or "lies at the core of entrepreneurial control."<sup>81</sup>

The analytical framework enunciated by the majority in *Marriott Corp.* also incorporates the *First National Maintenance* Court's concern for both the employer's freedom in deciding whether to close part of its business for economic reasons and the benefits that might be gained through collective bargaining.<sup>82</sup> Under the *Marriott Corp.*'s analytical framework, if the employer's action involves a substantial change in operations or lies at the core of entrepreneurial control, then collective bargaining will not be required and the employer will be allowed to operate freely.<sup>83</sup> If, however, the employer's actions involve an aspect of the employer/employee relationship that is conducive to resolution through bargaining with the union, then the benefits that might be derived through collective bargaining take precedence and collective bargaining is required.<sup>84</sup> The four factors utilized by the *Marriott Corp.* Court to determine whether an employer's action is a subject of compulsory collective bargaining also incorporate the analytical framework of *Fibreboard* and *First National Maintenance*. These four factors are the nature of the employer's business before and after the action, the extent of capital expenditures, the basis for the employer's action, and the ability of the union to engage in meaningful bargaining in light of the employer's situation and objectives.<sup>85</sup> The Supreme Court considered all four of these factors in both *Fibreboard*<sup>86</sup> and *First National Maintenance*.<sup>87</sup>

In sum, *Marriott Corp.*'s analytical framework successfully reconciles and incorporates the approaches and principles articulated by the Supreme Court in the leading cases of *Fibreboard* and *First National Maintenance*. Consequently, practitioners, courts and the NLRB should avoid a literal definitional approach and utilize *Marriott Corp.*'s analytical framework to determine whether a hybrid situation involving both partial closing and subcontracting is a subject of mandatory collective bargaining.

3. \**Employee's Right to Representation at Investigatory Interviews*: E.I. du Pont de Nemours and Co. v. N.L.R.B.<sup>1</sup> and Pacific Telephone and Telegraph Co. v. N.L.R.B.<sup>2</sup>

Section 7 of the National Labor Relations Act (the Act) provides that employees may engage in concerted activity for the purpose of mutual aid and protection.<sup>3</sup> Section 8(a)(1)

<sup>80</sup> See *id.* at 213.

<sup>81</sup> *Id.* at 223.

<sup>82</sup> See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981).

<sup>83</sup> *Marriott Corp.*, 111 L.R.R.M. 1354, 1356 (1982).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213, 215 (1964). For a further discussion of the *Fibreboard* Court's use of these four factors, see *supra* notes 60-63 and accompanying text.

<sup>87</sup> See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667, 687-88. For a further discussion of the *First National Maintenance Corp.* Court's use of these four factors, see *supra* notes 66-69 and accompanying text.

The *First National Maintenance Corp.* Court modified one of these factors indicating that the extent of investment or withdrawal of capital was not crucial. 452 U.S. at 688. *Marriott Corp.* incorporated this modification in its analytical framework. 111 L.R.R.M. at 1357, n.14.

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<sup>1</sup> 707 F.2d 1076 (9th Cir. 1983).

<sup>2</sup> 711 F.2d 134 (9th Cir. 1983).

<sup>3</sup> Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976) provides:

of the Act allows employees to assert their section 7 rights by making it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of concerted activities.<sup>4</sup> In *N.L.R.B. v. J. Weingarten*,<sup>5</sup> the Supreme Court held that an employer violated section 8(a)(1), and thus an employee's right to engage in a protected activity, when the employer denied an employee's request for union representation at an investigatory interview which that employee reasonably believed would result in disciplinary action.<sup>6</sup> The Court agreed with the National Labor Relations Board (the Board) that representation at an investigatory interview under such circumstances was protected concerted activity under section 7.<sup>7</sup> The availability and quality of representation guaranteed by the *Weingarten* decision were the subject of two Ninth Circuit cases which were decided during the *Survey* year. In *E.I. du Pont de Nemours and Co. v. N.L.R.B.*,<sup>8</sup> the Ninth Circuit held that employees in a nonorganized, nonunion firm are not automatically entitled to the presence of a co-worker at an investigatory interview under the same circumstances in which organized employees would be entitled to a union representative.<sup>9</sup> The quality of representation, when an employee is entitled to it, was addressed by the Ninth Circuit in *Pacific Telephone and Telegraph Co. v. N.L.R.B.*<sup>10</sup> In *Pacific*, the court held that employees who are entitled to a representative are entitled to be informed of the nature of the matter being investigated and allowed to consult with a union representative *before* an investigatory interview which the employee reasonably believes will result in discipline.<sup>11</sup>

This chapter will discuss the two Ninth Circuit decisions separately. First, the chapter will address the issue of nonunion representation by outlining briefly those cases in which the courts have considered the section 7 requirements of "concertedness" and "mutual aid and protection." The chapter will then discuss *E.I. du Pont*, setting forth the court's rationale, and conclude with an analysis of the rationale in light of *Weingarten* and

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Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by section 158(a)(3) of this title.

<sup>4</sup> Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 (a)(1) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights granted in section 157 of this title."

<sup>5</sup> 420 U.S. 251 (1975). In *Weingarten*, the employee worked at the employer's lunch counter at one of the employer's retail stores, and was suspected of buying food for less than full price. *Id.* at 254. The employer summoned the employee to a meeting, at which the employee requested union representation. *Id.* This request was denied. *Id.* The employee cleared herself of buying the food below the stated price, but in an emotional outburst admitted to taking free lunches. *Id.* at 255. Although this practice was allowed at the employee's previous store, it was not allowed at her present location. *Id.* The employer used professional security personnel to interrogate the employee. *Id.* At the close of the interview, the employer asserted that the employee owed money for lunches she took for free. *Id.* When the union learned of the private meeting forced upon the employee, it began an unfair labor practice proceeding. *Id.* The Board found that the management policy was not clear, and that the employee owed nothing. *Id.* at 256.

<sup>6</sup> *Id.* at 260-61.

<sup>7</sup> *Id.*

<sup>8</sup> 707 F.2d 1076 (9th Cir. 1983).

<sup>9</sup> *Id.* at 1080.

<sup>10</sup> 711 F.2d 134 (9th Cir. 1983).

<sup>11</sup> *Id.*

previous decisions by the Board and courts. Second, the issue of consultation prior to the investigatory interview will be discussed. The chapter will consider prior Board cases and then contrast the Board's position with the Ninth Circuit's rationale in *Pacific Telephone & Telegraph*.

#### 1. *E.I. du Pont v. N.L.R.B.*

A single employee's request for representation at a disciplinary hearing is protected by section 7 of the Act if it is a "concerted activity," and if it is taken for the "mutual aid" or "protection" of the employees.<sup>12</sup> The circuit courts, however, have not agreed which acts by individual employees qualify for section 7 protection. For example, the Third Circuit in *Mushroom Transportation Co. v. N.L.R.B.*,<sup>13</sup> took the position that the actor must have group activity in mind as the ultimate goal, and the individual activity must be in preparation of or otherwise related to future group action, in order to qualify for section 7 protection.<sup>14</sup> Although the ultimate fruition of group action is not required, the *Mushroom* court held that the action must be attempted with the purpose of effecting such group action.<sup>15</sup>

The *Mushroom* decision was not favorably viewed by the Fifth Circuit in *Anchortank, Inc. v. N.L.R.B.*<sup>16</sup> In that case, the Fifth Circuit stated that the *Weingarten* emphasis on the effect of representation on all employees in the workplace explained why the employee's request for representation was concerted activity.<sup>17</sup> The *Anchortank* court was not concerned with the purpose behind the employee's act.<sup>18</sup> The court noted that *Weingarten* did not require the employee's request to have group action as a purpose.<sup>19</sup> Thus, the *Anchortank* court focused only on whether the individual employee's action was felt by a group of employees.<sup>20</sup>

The circuits have thus split over the section 7 requirements for protected activity. The failure of previous decisions to distinguish between the separate elements of "concerted activity" and "mutual aid and protection" offered the Ninth Circuit an opportunity to provide a clear standard when it considered the facts of *E.I. du Pont*.

The employee in *E.I. du Pont* was recovering from a workplace accident and was docked in pay when he made an unauthorized visit to his doctor.<sup>21</sup> The employee refused to sign his time card and was suspended. Thereafter, the employer requested the employee to sign a "Development Program" which listed conditions for his continued employment. The employee asked for copies of the conditions, but the employer refused to comply with the request. The employee then stated that he would not sign the document unless a co-employee was present as a witness. The employer terminated the employee when he again refused to sign without a co-employee witness.<sup>22</sup>

The employee filed charges against the employer with the Regional Director of the N.L.R.B., alleging various unfair labor practices. The Administrative Law Judge found

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<sup>12</sup> 29 U.S.C. § 157 (1976).

<sup>13</sup> 330 F.2d 683 (3rd Cir. 1964).

<sup>14</sup> 330 F.2d at 685.

<sup>15</sup> *Id.*

<sup>16</sup> 618 F.2d 1153 (5th Cir. 1980).

<sup>17</sup> *Id.* at 1161.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 707 F.2d at 1077.

<sup>22</sup> *Id.*

that the employer violated sections 7 and 8(a)(1) of the Act, and his decision was affirmed by the National Labor Relations Board.<sup>23</sup> The employer appealed to the United States Court of Appeals for the Ninth Circuit.

The circuit court framed only one issue to be determined: "whether [the employee's] request meets the 'concerted activities' requirement for protection under section 7."<sup>24</sup> The court held that under the facts of the case, the request did not meet the requirement.<sup>25</sup>

The court noted at the beginning of its opinion that previous cases have failed to distinguish between the requirement of concerted activity and the requirement of mutual aid and protection.<sup>26</sup> The court noted that it was possible for an employee's action to be for the mutual aid and protection of other employees, and yet fail to be protected by section 7 because the action was not concerted, but rather "the isolated conduct of a single employee."<sup>27</sup>

The court looked to *Weingarten* for guidelines on section 7 requirements.<sup>28</sup> The court noted, however, that because *Weingarten* dealt with a union represented workplace, the Supreme Court "assumed without discussion that a request invoking union assistance is concerted activity."<sup>29</sup> The Ninth Circuit noted that the *Weingarten* assumption was justified because "the union had been organized through concerted activity and stood as a guarantee that concerted activity would follow the request for help."<sup>30</sup> Thus, the court stated that concertedness was "inherent in union activity."<sup>31</sup>

The court recognized that although an employee's request cannot be assumed to be concerted where there is no union, the *Weingarten* decision cannot be limited only to the union setting.<sup>32</sup> The court stated that the facts of a given case may indicate that certain requests for representation in a nonunionized workplace may be protected, while other requests may not.<sup>33</sup> The court held that the request of a single employee is not itself concerted activity, but may be "transformed" into concerted action by "the backdrop of other group activity or, possibly, indications of future activity." Such a "backdrop" may "endow the request [for co-worker representation] in a nonunion setting, with *Weingarten* protection."<sup>34</sup> In this way, the court stated, an employee provides the court with a "showing that the requesting employee acts as part of a group."<sup>35</sup>

In deciding the case against the employee, the Ninth Circuit noted that the employee did not show a backdrop of group activity.<sup>36</sup> The court rejected the theory that the employee's request was "incipient group activity."<sup>37</sup> The court noted that the employee "had no clear plans for future activity."<sup>38</sup> In reaching these conclusions, the court pointed

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1078.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1079.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

to the employee's intentions to protect only himself, and his willingness to waive the request for the co-worker's presence if copies of the Development Program were provided to him.<sup>39</sup> Because the court found no backdrop of other group activity, it denied the enforcement of the Board's order to reinstate the employee.<sup>40</sup>

The Ninth Circuit opinion is in sharp contrast to the Board's position regarding representation at disciplinary proceedings. In the Board's *Materials Research Corp.*<sup>41</sup> opinion, which was cited by the *E.I. du Pont* court as presenting the identical issue,<sup>42</sup> the Board found concerted activity in the nature of the employee's request.<sup>43</sup> The Board noted that the activity of requesting and obtaining representation at a disciplinary interview is concerted because the representative seeks to protect not only the individual's rights, but also, in so doing, gives assurance to all other employees that they too can expect such assistance if needed in the future.<sup>44</sup>

The *E.I. du Pont* court took issue with the Board's view of *Weingarten's* union setting. The Board's *Materials Research* opinion states that the fact pattern of *Weingarten* happens to place the representation issue in the context of a unionized plant.<sup>45</sup> Thus, the Board stated that the union representation found in *Weingarten* did not indicate that the right in *Weingarten* was in any way predicated upon the union's rights to exclusive representation in matters of collective bargaining.<sup>46</sup> Because the Board attached no significance to the union setting, its focus remained on the nature of "*Weingarten* representation" which the Board found to be concerted action for mutual aid and protection of employees.<sup>47</sup>

The Ninth Circuit was unwilling to allow the Board to expand section 7 rights without a clear showing of concertedness.<sup>48</sup> The *E.I. du Pont* court observed that concerted activity is a statutory requirement which must be present even if it produces anomalous results.<sup>49</sup> The *E.I. du Pont* court's distinction between concerted activity and mutual aid and protection resulted in the failure of the Board's reasoning to convince the court that both section 7 requirements are met by the mere request of an employee for representation at an investigatory interview. The Board's contention that an employee's request for a representative gives assurance to other employees that they too can expect similar assistance in the future is correct, but the Ninth Circuit did not recognize the

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1080.

<sup>41</sup> 262 N.L.R.B. No. 122, 110 L.R.R.M. 1401 (July 20, 1982).

<sup>42</sup> *Materials Research* and a companion case involving the same appellant as the Ninth Circuit case, *du Pont de Nemours & Co.*, have been appealed to the Third Circuit. *E.I. du Pont de Nemours & Co. (Slaughter)*, 262 N.L.R.B. No. 123 (July 20, 1982), appeal docketed, No. 82-3363 (3d Cir. Aug. 4, 1982).

<sup>43</sup> In *Materials Research*, the employer refused to allow a nonunion employee to have a co-worker represent him at a meeting in which the employer issued a written warning to the employee. 262 N.L.R.B. No. 122, 110 L.R.R.M. 1401, 1402 (1982).

<sup>44</sup> *Id.* See also 420 U.S. at 260.

<sup>45</sup> 262 N.L.R.B. No. 122, 110 L.R.R.M. at 1403.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, 110 L.R.R.M. at 1405-06.

<sup>48</sup> 707 F.2d at 1079.

<sup>49</sup> *Id.* at 1078 n.2. The circuit court stated: Commentators have criticized the artificiality of a construction of § 7 that results "in statutory protection for an activity engaged in by two employees while the very same activity engaged in by one remains unprotected." Gorman & Finkins, *The Individual and the Requirement of 'Concert' Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 329 (1981). This artificiality, however, is one decided upon by Congress when it drafted § 7. It is not a choice that can be undone by courts on policy reasons. *Id.*

assurance as concerted activity.<sup>50</sup> Rather, the assurance to other employees demonstrates that the action is for mutual aid and protection of employees. Yet the "mutual aid" requirement alone does not bring the employee's request for representation within section 7 protection, since the request itself must at least be associated with concerted activity.<sup>51</sup>

The Ninth Circuit addressed the concerted activity requirement by referring to *Weingarten*, which first recognized the right to representation where disciplinary action might result. The court found no specific reference to concertedness, and thus determined that the *Weingarten* Court assumed concertedness because of the involvement of a union.<sup>52</sup> Absent a union setting, the Ninth Circuit was unwilling to make any assumptions concerning the concertedness of the action of a single employee. The court required a specific showing that a single employee's request for representation is concerted action.<sup>53</sup> The Board, on the other hand, did not attach such significance to *Weingarten*'s union setting, and thus, did not require such a showing.

The *E.I. du Pont* court took issue with the Board's view of *Weingarten*'s union setting, because it clearly distinguishes between the *nature* of the activity (concerted or an act of a single employee) and the *purpose* of the activity (for the benefit of all or for the benefit of a single employee). The *E.I. du Pont* decision makes it clear that the Act protects only those activities taken by more than one employee for the benefit of more than one employee. The requirement is consistent with the Act's stated goal of fostering *organizational* activity,<sup>54</sup> as opposed to the individual actions of employees which may thwart collective activity even if engaged in for an avowed purpose to benefit other employees. In this way, the Act promotes organization of workers, not the confusion which may result from single employees acting independently in the name of all employees.

Unfortunately, however, the *E.I. du Pont* decision falls short of lending clarity to the application of section 7 requirements. By allowing a "backdrop of group activity" to "transform" a single act of an employee into a concerted act,<sup>55</sup> the court left the door open for more litigation in this area. The court lays down a firm requirement that there "be a showing that the requesting employee acts as part of a group."<sup>56</sup> This requirement could have been more straightforward: if the employee is not a member of a union or is not joined in his request by at least one other employee, the request is not protected. Instead, through the metaphysics of a "backdrop" of group activity, which the court loosely defines as a "history of group activity or possibly, indications of future group activity,"<sup>57</sup> the Board will be invited to transform a single employee's act into a concerted act. As expressed by the court, the standard frustrates the court's own effort to explain the requirements needed for section 7 protection and to eliminate needless and costly litigation over the representation issue, which now must be handled on a case by case basis.

A firm standard denying protection to the requests of single employees in the nonunion setting would further another purpose of the Act. Employees, unable to obtain the protection and security of representation on their own, would be encouraged to

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<sup>50</sup> 707 F.2d at 1079.

<sup>51</sup> *Id.*

<sup>52</sup> See *supra* notes 28-31 and accompanying text.

<sup>53</sup> 707 F.2d at 1079.

<sup>54</sup> 29 U.S.C. § 151 (1976).

<sup>55</sup> See *supra* notes 32-35 and accompanying text.

<sup>56</sup> 707 F.2d at 1079.

<sup>57</sup> *Id.*

organize and request such representation as a group.<sup>58</sup> The impetus to organize and ultimately conduct employee affairs through the collective bargaining method is the primary purpose of the Act. The protection of individual activity such as a single employee's request for representation in a disciplinary meeting results in one less benefit a union is able to offer as an advantage over nonorganization. Thus, the better policy would be to encourage employees to organize by withholding section 7 protection from all but those actions which are in fact concerted.

## II. *PACIFIC TELEPHONE AND TELEGRAPH v. N.L.R.B.*

The Ninth Circuit was faced with a different aspect of the right to *Weingarten* representation in *Pacific Telephone and Telegraph v. N.L.R.B.*<sup>59</sup> In *Pacific*, the issue was not whether the employee's request for representation was protected, but whether the employee has a right to a certain quality of representation once he has asserted rights established in *Weingarten*. Specifically, the court decided whether an employee requesting representation at a disciplinary interview has a right to consult with the representative prior to the disciplinary interview and whether the employee has a right to be informed of the nature of the matter being investigated.

Two Board cases have previously discussed these issues. In *Climax Molybdenum Co., a Division of Amax Co. Inc.*,<sup>60</sup> the Board asserted that an employee has a right to consultation prior to the investigatory interview. The Board noted that the "knowledgeable" representative required by the Supreme Court's *Weingarten* decision did not permit the employer to put "blinders on the union representative by denying him the opportunity of learning the facts" by means of denying a consultation prior to the interview.<sup>61</sup> Although the *Climax* decision was denied enforcement by the Tenth Circuit on other grounds,<sup>62</sup> the court agreed that the employee has a right to prior consultation.<sup>63</sup> The court held that either the employer must give the employee enough time to seek consultation on his own, prior to the interview, or the employer must provide company time to do so.<sup>64</sup> While *Climax* recognized the right to prior consultation, it did not specify what information, if any, was to be provided to the employee and his representative at the time of consultation. This question was addressed by the Board in a subsequent case.

In *Southwestern Bell Telephone Co.*,<sup>65</sup> the Board held that information relevant to the investigation must be provided to the employee.<sup>66</sup> The Board's decision was not enforced by the circuit court on other grounds,<sup>67</sup> but the court, considering other provisions of the

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<sup>58</sup> Wall Street Journal, July 5, 1983, at 1, col. 5. The article contained the following reaction to the *E.I. du Pont* decision:

The U.S. Chamber of Commerce praises the court's reversal, saying that it preserves management's right to discuss problems individually with nonunion employees. But one labor board lawyer says that if the NLRB had been upheld, unions might have been the losers. He says, "The more employees have the right to do things without a union, the less likely they are to seek one."

*Id.*

<sup>59</sup> 711 F.2d 134 (9th Cir. 1983).

<sup>60</sup> 227 N.L.R.B. 1189, *enf. den.* 584 F.2d 360 (10th Cir. 1978).

<sup>61</sup> 227 N.L.R.B. at 1190.

<sup>62</sup> *Climax Molybdenum v. N.L.R.B.*, 584 F.2d 360 (10th Cir. 1978).

<sup>63</sup> *Id.* at 365.

<sup>64</sup> *Id.*

<sup>65</sup> 251 N.L.R.B. 612 (1981).

<sup>66</sup> *Id.* at 614.

<sup>67</sup> *Southwestern Bell Telephone Co. v. N.L.R.B.*, 667 F.2d 470, 474 (5th Cir. 1982).

Act, held that the union would have a right to the information if it was relevant to the bargaining function.<sup>68</sup> The court stated that providing the information was part of the employer's duty to bargain under the Act.<sup>69</sup> These issues resurfaced in a different context in *Pacific*.

In *Pacific*, two telephone installer/repairmen were called in from the field and ordered to report to a customer service manager. Each employee asked why he was being summoned, but the manager refused to give a reason and asked whether either employee wanted union representation. Each responded that he wanted representation, and was informed only that the meeting concerned "an incident the previous week."<sup>70</sup> The chief union steward then arrived and told the employees that he knew nothing of the reasons for the interview. The steward was also told nothing except that there "was a problem."<sup>71</sup> Each employee was interviewed separately by a security representative, and another customer service manager.

The incident involved the installation of phone equipment against company rules, by one of the employees in the home of the other employee. After finding out the nature of the interview from the first employee interviewed, the steward requested that he be allowed to consult with the other employee prior to his interview. The steward's request was denied by the manager who claimed it would jeopardize the investigation. The employees were later discharged for their infraction of the company rules.

The employees brought an unfair labor practice charge against the employer.<sup>72</sup> They charged that the employer violated section 8(a)(1) of the Act by refusing to inform the employees, or their union representative of the nature of the matter being investigated as well as by refusing to allow them to consult with the union representative before their interviews.<sup>73</sup> The Administrative Law Judge (ALJ) found that under *Weingarten*, the employees had the right to insist on the presence of a union representative at interviews which they reasonably believed would result in disciplinary action, and under the Board's decision in *Climax*, they had the right to prior consultation with their union representative.<sup>74</sup> The ALJ further found that the employees had a right to be informed prior to the interview of the nature of their alleged misconduct because such a right is inherent in the right to prior consultation.<sup>75</sup> The employer took exception to the ALJ's ruling and appealed to the Board.<sup>76</sup>

The Board agreed with the ALJ's ruling, stating that the employees had a section 7 right to consultation with their union representatives prior to the interviews, and that the employer was required to inform the employees of the nature of the matter to be discussed at the interview.<sup>77</sup>

On appeal, the Ninth Circuit considered both issues — whether an employee has the right to a pre-interview conference and whether an employee has the right to be informed of the subject matter of the interview and the nature of any charge of impropriety the

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<sup>68</sup> *Id.* at 474-75 n.4.

<sup>69</sup> *Id.*

<sup>70</sup> 262 N.L.R.B. No. 127, 110 L.R.R.M. 1411, 1414 (Hunter, Member, dissenting) (1982).

<sup>71</sup> *Id.*

<sup>72</sup> 711 F.2d at 136.

<sup>73</sup> *Id.*

<sup>74</sup> 262 N.L.R.B. No. 127, 110 L.R.R.M. at 1414 (Hunter, M., dissenting).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 711 F.2d at 136.

employer may make. The court stated that the answer depends upon the nature of the employee's right to act in concert.<sup>78</sup>

The court held that the employee's right to representation at an investigatory interview encompasses the right of a pre-interview consultation with the representative as well as the right to be informed of the nature of the interview.<sup>79</sup> The court stated that these rights are within the scope of the general *Weingarten* right of representation.<sup>80</sup> The court stated that unless relevant information was provided to the employee and an opportunity to confer with the representative was granted, "the ability of the union representative effectively to give the aid and protection sought by the employee would be seriously diminished."<sup>81</sup>

The court further held that although the representation at an investigatory interview is a right which must be requested by the employee, and not offered by the employer, "once representation has been afforded the representative may speak for the employee he represents and either the union representative or the employee may make the request for pre-interview conference."<sup>82</sup> The court provided no further discussion on the issue and affirmed the Board's decision. Therefore, the Board's *Pacific* opinion will be examined and a critique offered on its decision to expand the *Weingarten* rights beyond the mere grant of a representative at an investigatory interview.

The Board considered that the *Weingarten* right would be ineffective without prior consultation because the representative is "precluded from performing his envisioned role as a 'knowledgeable' representative."<sup>83</sup> The Board also noted that the representative's role in *Weingarten* was described as eliciting favorable facts and saving the employer valuable production time by getting to the bottom of the incident.<sup>84</sup> Moreover, the Board noted, the *Weingarten* representative would be of special service when the employee is inarticulate or inhibited, and thus unable to explain well the facts pertinent to the inquiry.<sup>85</sup> The Board explained that knowledge is a better basis than ignorance in performing the representative role in labor-management relations.<sup>86</sup>

The Board made the argument that proper consultation would in turn be ineffective unless the employee or union representative at least had enough information so that they would be advised of the subject matter of the interview.<sup>87</sup> Prior consultation, the Board stated, is merely an "aspect of that function which enables the representative to fulfill his role."<sup>88</sup> The Board found that requiring prior consultation and information regarding the matter being investigated was consonant with the *Weingarten* concept of representation at the interview. The Board supported its statement by noting that prior consultation would assist the employer by enabling the employee to elicit favorable facts and would save the employer production time by getting to the bottom of the incident.<sup>89</sup> The Board

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 262 N.L.R.B. No. 127, 110 L.R.R.M. at 1412.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 262 N.L.R.B. No. 127, 110 L.R.R.M. at 1412 n.8.

<sup>89</sup> *Id.*, 110 L.R.R.M. at 1412.

noted that the consultation would assist the employee who may be too fearful or inarticulate to relate accurately the incident being investigated.<sup>90</sup>

The Board also addressed several counter arguments to their holding. First, the Board stated, the requirement of prior consultation and information did not interfere with legitimate employer prerogatives;<sup>91</sup> the employer is still free to reject the collective course and forego the interview.<sup>92</sup> Second, the Board asserted that the requirements imposed would not transform the interview into an adversarial proceeding, as cautioned by the *Weingarten* Court.<sup>93</sup> The employer is free, the Board pointed out, to insist that he is only interested in hearing the employee's account of the story.<sup>94</sup> In further support for its position, the Board observed that the prior consultation and notice requirements are limited. According to the Board, the consultation is merely an opportunity for the representative to become familiar with the employee's circumstances.<sup>95</sup> The requirement to provide information need only be a "general statement as to the *subject matter* of the interview" which identifies the misconduct for which discipline may be imposed.<sup>96</sup>

The Board found further support in *Weingarten* for the proposition that the requirements imposed in *Pacific* merely recognized the right of employees to band together when their terms and condition of employment are threatened by employer prerogatives in investigatory and disciplinary misconduct.<sup>97</sup> Thus, the Board stated, the measures imposed in *Pacific* would further balance the inequities which exist between an employer's "investigatory machinery" and the "isolated employee."<sup>98</sup>

The dissenting member of the Board disagreed with the *Pacific* majority's interpretation of *Weingarten*'s "knowledgeable" representative. The opinion acknowledged that *Weingarten* requires a "knowledgeable" representative, but it disagreed with the majority opinion which interpreted "knowledgeable" to mean one who is familiar with the specifics of the employee's situation. Rather, dissenting Member Hunter asserted that "knowledgeable" means only that the representative be familiar with management-employee relations in general.<sup>99</sup> The dissent was concerned that the majority's extension of *Weingarten* rights was a transformation of the proceedings into an adversary contest — a transformation forbidden by *Weingarten*.<sup>100</sup> The dissent asserted that the *Pacific* decision would encourage union representatives to act as counsel, rather than as fact finders, which was the role envisioned by *Weingarten*.<sup>101</sup> The dissent also believed that the balance, sought to be achieved by section 7 between employer and employee was upset by the *Pacific* majority in favor of the employee.<sup>102</sup> The dissent took this position because it believed that there are compelling policy reasons why an employer might need to prevent prior consultation

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* See also *Glomac Plastics, Inc.*, 234 N.L.R.B. 1309, 1310 (1978).

<sup>93</sup> 262 N.L.R.B. No. 127, 110 L.R.R.M. at 1412-13; see also *Weingarten*, 420 U.S. at 264.

<sup>94</sup> 262 N.L.R.B. No. 127, 110 L.R.R.M. at 1412; see also *Southwestern Bell Telephone Co. v. N.L.R.B.*, 667 F.2d 470, 473-74 (5th Cir.1982); but see *N.L.R.B. v. Texaco*, 659 F.2d 124, 126 (9th Cir. 1981) (no total bar on representative's participation is allowed).

<sup>95</sup> 226 N.L.R.B. No. 127, 110 L.R.R.M. at 1413.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, 110 L.R.R.M. at 1414 (Hunter, M., dissenting).

<sup>100</sup> *Id.*, 110 L.R.R.M. at 1415 (Hunter, M., dissenting).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

and withhold information until the interview.<sup>103</sup> These policy reasons included the need to prevent employees from coordinating stories, and the need for employers to conduct investigatory interviews in the most efficient way possible.<sup>104</sup> The dissent noted that withholding information until the interview may be the best way to discern the truth of an incident, which the dissent asserted is in the best interests of both employer and employees.<sup>105</sup> The dissent warned that the information requirement may lead to a "procedural minefield" which will only impede the fact finding process envisioned by the Supreme Court in *Weingarten*.<sup>106</sup>

While section 7 is not completely elastic and is limited in its scope,<sup>107</sup> the Supreme Court has allowed the Board to interpret the scope of section 7 rights liberally and thus encourage the evolutionary development of those rights.<sup>108</sup> Applying the *Weingarten* recognition of the right to representation to a particular set of facts led the Board to expand section 7 rights to include a right to prior consultation. A right to the opportunity to meet with the union representative, if only briefly, in order to familiarize the representative with the employee and the facts which may be important to the interview is one which seems reasonable, and within the power of the Board to recognize. The *Pacific* opinion guards against a full blown adversarial proceeding by specifying the limitations placed on the consultation and by noting that the information of the subject matter of the interview is in no way similar to the "discovery" activity which precedes an adversarial proceeding.<sup>109</sup> It thus appears that the right to prior consultation is a permissive adaptation of section 7 rights by the Board.<sup>110</sup>

The need for information supplied by the employer prior to the interview is less apparent, for two reasons. First, an employee who is summoned to an interview which he reasonably believes will result in disciplinary action indicates that the employee already has a good indication as to the subject matter of the interview. If not, it is difficult to imagine how the employee's fear of discipline could be "reasonable" and why the employee should have a right to a *Weingarten* representative. Furthermore, employers routinely give the employee and the union a statement of the nature of the alleged misconduct to be investigated.<sup>111</sup> Thus, the requirement will only bear on those situations where the employer has, presumably for good reasons, decided to withhold the information until the interview so that it will be used most effectively to elicit the truth from the employee.

Second, the condition stated by the Board which requires a general statement as to the subject matter of the interview does not provide a clear enough standard for either employee or employer. The employee may always object that the statement is too general; the employer may always insist that the statement is specific enough. For example, the statement in *Pacific* by the employer that the interview concerned an "incident last week" could certainly have been specific enough. The employee was required only to recall the events of the previous week, and determine which of them might subject him to discipline. Since the incident involved was one for which the employee could be terminated, it is difficult indeed to imagine that the employee was unable to determine the event in

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, 110 L.R.R.M. at 1416 (Hunter, M., dissenting).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300, 310 (1965).

<sup>108</sup> *Weingarten*, 420 U.S. at 266.

<sup>109</sup> 226 N.L.R.B. No. 127, 110 L.R.R.M. at 1413.

<sup>110</sup> See 420 U.S. at 266-68.

<sup>111</sup> 226 N.L.R.B. No. 127, 110 L.R.R.M. at 1415 (Hunter, M., dissenting).

question. Yet, because the Board failed to set forth exactly what type of information must be given to the employee, more "procedural mines" may interfere with an efficient investigation by the employer.

The *Weingarten* right was provided so that the imbalance of power between employer and employee could be equalized in the interview context.<sup>112</sup> The goal of the interview is fact finding. The role of the representative is to assist the employee so that the facts may be put in proper perspective in front of the employer.<sup>113</sup> Correctly exercised, the rights granted in *Weingarten* should go a long way to prevent premature action by an employer in discharging an employee, thus putting into motion the long and often burdensome procedure of grievance-arbitration. Proper exercise of the *Weingarten* right to representation may discourage a protracted grievance procedure initiated by the union since the employee was dismissed for just cause.

*E.I. du Pont* and *Pacific* represent possible extensions of section 7 rights in various situations where an employee requests or receives representation at an investigatory interview. When examined together, the cases raise further questions which may have to be addressed by the Board in the future. For example, in the nonunion setting, is there a right of prior consultation if the employee's request is "concerted activity?" If so, with whom should the employee consult? Does the employer have the right to keep information from a nonunion co-worker on the grounds of confidentiality? While the union representative is easily identifiable and held to certain duties, it is difficult to identify which co-worker has the rights and responsibilities set forth in *Pacific*. After the interview, the co-worker's status as representative has ended. Does he or she bear any responsibility to other employees to keep information confidential? These questions point out the difficulty involved in expansion of section 7 rights under *Weingarten*. Each extension of the representation rights opens new possibilities for further demands that the right be extended again to apply to a slightly different fact situation. Such expansion is particularly vexing to employers whose interest in the interview procedure is the quick and efficient resolution of the problem at hand. The balance originally struck in *Weingarten* between employers and employees may in fact be tipping in favor of the employees.

### B. Union Unfair Labor Practices

#### 1. \*Hot Cargo Remedies: *Shepard v. N.L.R.B.*<sup>1</sup>

Section 8(e) of the National Labor Relations Act (Act)<sup>2</sup> prohibits and nullifies agreements between labor organizations and employers whereby the employer agrees to cease or refrain from transacting business with another person.<sup>3</sup> Since section 8(a) defines these

<sup>112</sup> 420 U.S. at 263.

<sup>113</sup> *Id.* at 264.

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<sup>1</sup> 103 S. Ct. 665, 112 L.R.R.M. 2369 (1983).

<sup>2</sup> 29 U.S.C. § 158(e) (1976).

<sup>3</sup> *Id.* Section 8(e) provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any employer, or to cease doing business with any other person, and any contract or agreement entered into . . . containing such an agreement shall be to such extent unenforceable [sic] and void. . . .

so-called "hot cargo" contracts as an unfair labor practice, the National Labor Relations Board (Board) is authorized, under section 10(c) of the Act,<sup>4</sup> to issue cease and desist orders<sup>5</sup> and to take affirmative action to remedy hot cargo contracts.<sup>5</sup>

During the *Survey* year, in *Shepard v. National Labor Relations Board*,<sup>6</sup> the Supreme Court considered whether the Board was required to order a make-whole remedy — reimbursement — for a violation of section 8(e) of the Act.<sup>7</sup> The Court held that the Board had acted within its authority in deciding that, in this case, reimbursement would not effectuate the remedial policies of the Act.<sup>8</sup> The Court based its decision, in part, on its finding that the Act does not require the Board to order "complete relief" for every unfair labor practice.<sup>9</sup> The Court's holding is significant because it resolves a conflict between the Ninth Circuit<sup>10</sup> and the District of Columbia Circuit.<sup>11</sup>

In *Shepard*,<sup>12</sup> respondent Building Material and Dump Truck Drivers, Teamsters Local 36 (Union) and respondent contractors' associations and member contractors (Contractors) entered into a collective bargaining agreement (Agreement) which prohibited the Contractors from dealing with nonunion dump truck operators.<sup>13</sup> Generally, the Contractors in the San Diego area hired dump truck operators through brokers on a daily basis.<sup>14</sup> The Agreement, according to the court of appeals, had the effect of insuring that the Contractors gave subcontracts only to signatory brokers who then referred hauling jobs only to union truck operators.<sup>15</sup>

Petitioner Larry Shepard owned and operated a dump truck in the San Diego area.<sup>16</sup> Shepard had contracted with Terra Trucking Company, a broker who had signed the Agreement.<sup>17</sup> The Union informed Terra Trucking that, pursuant to the Agreement, it could not deal with seven nonunion owner-operators, including Shepard.<sup>18</sup> Terra Trucking then informed these nonunion owner-operators that they either had to join the Union or find a different broker.<sup>19</sup> Shepard, against his will and "under protest," joined the Union and paid the initiation fee and dues.<sup>20</sup>

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<sup>4</sup> 29 U.S.C. § 160(c) (1976).

<sup>5</sup> *Id.* Section 10(c) provides in pertinent part:

If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

*Id.*

<sup>6</sup> 103 S. Ct. 665, 112 L.R.R.M. 2369 (1983).

<sup>7</sup> *Id.* at 667, 112 L.R.R.M. at 2369.

<sup>8</sup> *Id.* at 670, 112 L.R.R.M. at 2372.

<sup>9</sup> *Id.*

<sup>10</sup> Joint Council of Teamsters v. N.L.R.B., 671 F.2d 305, 109 L.R.R.M. 2181 (9th Cir. 1981).

<sup>11</sup> Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 v. N.L.R.B., 669 F.2d 759, 108 L.R.R.M. 3153 (D.C. Cir. 1981).

<sup>12</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 112 L.R.R.M. 2369 (1983).

<sup>13</sup> *Id.* at 667, 112 L.R.R.M. at 2370.

<sup>14</sup> *Id.* at 667, 112 L.R.R.M. at 2369.

<sup>15</sup> Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 v. N.L.R.B., 669 F.2d 759, 762, 108 L.R.R.M. 3153, 3154 (D.C. Cir. 1981).

<sup>16</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 667, 112 L.R.R.M. 2369, 2369 (1983).

<sup>17</sup> *Id.* at 667, 112 L.R.R.M. at 2370.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Claiming that the Agreement constituted a violation of section 8(e) of the Act, Shepard and respondent California Dump Truck Owners Association (Association) filed charges with the Board.<sup>21</sup> The complaint was initially heard by an Administrative Law Judge (ALJ).<sup>22</sup> The ALJ found that the individual dump truck owner-operators were independent contractors and that, therefore, they could not be treated as employees of the Contractors for purposes of the Agreement.<sup>23</sup> In addition, the ALJ found that the Agreement provisions in which the Union and Contractors agreed not to deal with nonunion owner-operators violated section 8(e) of the Act because these provisions had a prohibited secondary purpose.<sup>24</sup> In conclusion, the ALJ recommended that the Board issue a cease and desist order, and require the Union and the Contractors to reimburse those owner-operators who were compelled to join the Union for amounts paid to the Union for dues, initiation fees and fringe benefit contributions.<sup>25</sup>

While affirming the findings of the ALJ and adopting his recommended order, the

<sup>21</sup> *Id.* at 667-68, 112 L.R.R.M. at 2370. Shepard's original complaint included a charge of a violation of section 8(b)(4) of the Act. *Id.* at 668, 112 L.R.R.M. at 2370. Section 8(b)(4) prohibits secondary boycotts and 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 —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(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. . . .

29 U.S.C. § 158(b)(4) (1976). Shepard, at the request of the Board's Regional Director, modified his complaint and alleged only a violation of section 8(e). *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 668, 112 L.R.R.M. 2369, 2370 (1983). The Association — one of the respondent contractors' associations which were parties to the Agreement with the Union — filed suit with Shepard because it wished to contract with nonunion operators. *Id.* at 667-68, 112 L.R.R.M. at 2370. The Regional Director then consolidated Shepard's and the Association's charges and filed a complaint against the Union and Contractors alleging only a violation of section 8(e). *Id.*

<sup>22</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 668, 112 L.R.R.M. 2369, 2370 (1983). The ALJ decision appears in full in the Board's later decision. *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36*, 249 N.L.R.B. 386, 387-95, 104 L.R.R.M. 1279 (1980).

<sup>23</sup> *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36*, 249 N.L.R.B. 386, 391, 104 L.R.R.M. 1279, 1280 (1980).

<sup>24</sup> *Id.* at 391-94, 104 L.R.R.M. at 1280-82. The ALJ also found that the Agreement was not protected by the section 8(e) proviso clause. *Id.* at 394, 104 L.R.R.M. at 1282. The proviso clause excludes from the section 8(e) prohibition "agreement[s] between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . ." 29 U.S.C. § 158(e) (1976). The ALJ reasoned that since the hauling done by the owner-operators was to and from construction sites and not within the confines of a particular site, it was clear that the proviso did not include the Agreement. *Building Materials and Dump Truck Drivers, Teamsters Local Union No. 36*, 249 N.L.R.B. 386, 394, 104 L.R.R.M. 1279, 1282 (1980).

<sup>25</sup> *Building Materials and Dump Truck Drivers, Teamsters Local Union No. 36*, 249 N.L.R.B. 386, 395, 104 L.R.R.M. 1279, 1280 (1980) (the Union and the Contractors were jointly and severally liable).

Board omitted the ALJ's recommendation for reimbursement.<sup>26</sup> In a footnote to its decision, the Board stated three reasons for not ordering reimbursement.<sup>27</sup> First, the Board found insufficient evidence that the alleged losses were "directly attributable to actual coercion" by the Union.<sup>28</sup> Second, the Board believed an order for reimbursement was "overbroad and inappropriate" for violations of section 8(c).<sup>29</sup> Finally, the Board noted that independent contractors could pursue damage claims under section 303 of the Act.<sup>30</sup>

After the Board had issued its order, the Union petitioned the court of appeals for review and argued that the Board had erred in finding that the truck operators were independent contractors.<sup>31</sup> Shepard and the Associations also petitioned for review, arguing that the remedy ordered by the Board was inadequate.<sup>32</sup> The court of appeals affirmed the Board's order in its entirety.<sup>33</sup>

In its review of the record, the court of appeals concluded that the Board was correct in finding that the truck operators were independent contractors because they had not surrendered control over their operations to the brokers.<sup>34</sup> When reviewing the Board's remedy, the court noted its limited authority to change the Board's exercise of discretion.<sup>35</sup> Because the Board's remedial powers are broad, discretionary ones, they are subject to only limited review.<sup>36</sup> In addition, since the Board uses its own unique knowledge and expertise in designing a remedy, the court noted that the remedy must be given special respect by reviewing courts.<sup>37</sup> The court set forth the Supreme Court standard that a Board remedial order cannot be changed unless it is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."<sup>38</sup> Since

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<sup>26</sup> *Id.* at 386, 104 L.R.R.M. at 1280. Pursuant to the Act, a three-member panel of the Board reviewed the ALJ's decision because exceptions to that decision were filed by the parties. *Id.*

<sup>27</sup> *Id.* at 386 n.2, 104 L.R.R.M. at 1280 n.2.

<sup>28</sup> *Id.* The full text of the Board's explanatory footnote is as follows:

The Board has on one occasion adopted without comment an Administrative Law Judge's recommended Order containing such a remedy. *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers Inc.)*, 208 NLRB 184, 201 (1974). In the present case, however, there is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by Respondents. Furthermore, we find a reimbursement order, typically used to "make whole" employees for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators ordered by the Administrative Law Judge would not effectuate the remedial policies of the Act. See *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. [Mechanical Handling Systems, Inc.] v. N.L.R.B.*, 365 U.S. 651 (1961).

*Id.* (Emphasis supplied).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 v. N.L.R.B.*, 669 F.2d 759, 762, 108 L.R.R.M. 3153, 3154 (D.C. Cir. 1981). The Contractors intervened in support of the Board's order. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 766, 108 L.R.R.M. at 3157.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (quoting *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540, 12 L.R.R.M. 739, 742 (1943)).

the court found the Board's cease and desist order would be sufficient to deter future wrongdoing under the Act, it held that the order could not be disturbed.<sup>39</sup>

Following the court of appeal's affirmation of the Board's decision, Shepard appealed to the United States Supreme Court<sup>40</sup> in order to resolve a conflict between the District of Columbia Circuit's ruling in *Shepard* and a similar case in the Ninth Circuit, *Joint Council of Teamsters v. N.L.R.B.*<sup>41</sup> Upon facts similar to *Shepard*, the *Joint Council* court had remanded the case to the Board for either an order for reimbursement or an explanation why reimbursement would not effectuate the policies of the Act.<sup>42</sup> Shepard and the Association, relying upon the reasoning of the Ninth Circuit in *Joint Council of Teamsters*, argued that when money is collected illegally, the Board should order a refund unless a rational reason exists for not ordering reimbursement.<sup>43</sup> In the instant case, Shepard and the Association argued, reimbursement should be required.<sup>44</sup>

The *Shepard* Court, however, concluded that the Ninth Circuit viewed the Board's discretion in fashioning a remedy too narrowly.<sup>45</sup> The Supreme Court found that the Board's decision that reimbursement would not effectuate the policies of the Act was reasonable.<sup>46</sup> Therefore, the Court held that the Board was not required to order reimbursement.<sup>47</sup>

In upholding the Board's refusal to order reimbursement, the Supreme Court offered four basic reasons for its action. First, orders of the Board, the Court stated, will be upheld if they are within the discretionary powers of the Board. In this case, the Court found that the Board reasonably limited the use of reimbursement orders to cases in which actual coercion has been found. Second, since the Board is empowered to order remedial and not punitive relief, the Court decided the Board's decision was reasonable in not ordering reimbursement. Third, in the Court's view, the Board appeared to have followed the pattern of the Act in ordering reimbursement only in cases in which judicial damages would be available. Finally, the Court ruled nothing in the Act requires the Board to order complete relief for every unfair labor practice; the Board is authorized to use its discretion in fashioning remedies.

In analyzing the discretion to be afforded the Board, the *Shepard* Court noted that Congress had authorized the Board to use its discretion in determining which remedies would effectuate the policies of the Act.<sup>48</sup> In addition, the Court stated, the Board's remedies must be afforded special respect by courts because of the Board's knowledge and expertise.<sup>49</sup> In determining whether the Board's order was within its discretion, the

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<sup>39</sup> *Id.* at 767, 108 L.R.R.M. at 3158.

<sup>40</sup> The Supreme Court granted certiorari in *Shepard v. N.L.R.B.*, 102 S. Ct. 2232 (1982).

<sup>41</sup> *Joint Council of Teamsters v. N.L.R.B.*, 671 F.2d 305, 109 L.R.R.M. 2181 (9th Cir. 1981).

<sup>42</sup> *Id.* at 310-13, 109 L.R.R.M. at 2184-86.

<sup>43</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 669, 112 L.R.R.M. 2369, 2371 (1983) (quoting *Joint Council of Teamsters v. N.L.R.B.*, 671 F.2d 305, 310, 109 L.R.R.M. 2181, 2184 (9th Cir. 1981)).

<sup>44</sup> *Id.*

<sup>45</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 669, 112 L.R.R.M. 2369, 2371 (1983).

<sup>46</sup> *Id.* The policies of the Act, the Court noted, are the prevention and stoppage of unfair labor practices. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* The Supreme Court had noted this mandate for special respect for Board remedies in prior cases. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32, 71 L.R.R.M. 2481, 2495 n.32 (1969). See *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216, 57 L.R.R.M. 2609, 2614 (1964).

Court examined the reasoning used by the Board to reach its decision.<sup>50</sup>

In a previous case, *Phelps Dodge Corp. v. N.L.R.B.*,<sup>51</sup> the *Shepard* Court noted, the Board had been given guidelines concerning the disclosure of the basis of its orders.<sup>52</sup> In *Phelps Dodge Corp.*, the Court had reminded the Board that although it may use its discretion to fashion remedies, it must also take responsibility in exercising its judgment within its statutory powers.<sup>53</sup> Since federal courts are charged with judicial review of Board orders, the *Phelps Dodge Corp.* Court reasoned, the Board should be required to disclose the basis of its order so as to avoid needless litigation and to provide for speedy enforcement of its orders.<sup>54</sup> The *Phelps Dodge Corp.* Court concluded that the Board should give a clear indication that it has exercised the discretion which was granted by Congress.<sup>55</sup>

In applying these principles to the facts in *Shepard*, the Court concluded that although the explanation given by the Board for its order was contained in a brief footnote,<sup>56</sup> the explanation could reasonably be interpreted to mean that the Board had decided to treat cases in which actual coercion was found differently from cases in which no actual coercion was found.<sup>57</sup> Ordering reimbursement only when actual coercion is found, the Court held, is within the Board's discretion.<sup>58</sup> The *Shepard* Court acknowledged that the scope of the Board's explanation was less than ideal, but concluded that it was adequate to support the Board's order.<sup>59</sup>

In ruling that the Board has power to order remedial and not punitive damages, the *Shepard* Court affirmed the Board's reliance on *Local 60, United Brotherhood of Carpenters and Joiners of America v. N.L.R.B.*<sup>60</sup> in choosing to limit its remedy in *Shepard*.<sup>61</sup> In *Carpenters Local 60*, the Court had held that the Board's power was to grant remedial and not punitive relief.<sup>62</sup> As a result, the *Carpenters Local 60* Court had ruled, the Board could not order a union to reimburse dues to workers who were required to join the union under an illegal "closed shop" contract absent evidence that any employee was coerced into becoming or remaining a union member.<sup>63</sup> The *Shepard* Court apparently presumed that the Board had concluded that *Carpenters Local 60* supported, by analogy, its decision not to order reimbursement in *Shepard*.<sup>64</sup> The *Shepard* Court held that the Board's decision, ordering reimbursement only in cases in which actual coercion is found, was consistent with the Board's remedial power.<sup>65</sup>

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<sup>50</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 669, 112 L.R.R.M. 2369, 2371 (1983).

<sup>51</sup> 313 U.S. 177, 8 L.R.R.M. 439 (1941).

<sup>52</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 669, 112 L.R.R.M. 2369, 2371 (1983).

<sup>53</sup> *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194, 8 L.R.R.M. 439, 446 (1941).

<sup>54</sup> *Id.* at 197, 8 L.R.R.M. at 447.

<sup>55</sup> *Id.* at 197, 8 L.R.R.M. at 447-48.

<sup>56</sup> See *supra* notes 27-28 and accompanying text.

<sup>57</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 669, 112 L.R.R.M. 2369, 2371 (1983). The Court assumed the Board meant actual coercion to include threats, strikes, picketing, and other egregious situations which would constitute violations of section 8(b)(4). *Id.* See *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 259, 56 L.R.R.M. 2225, 2227-28 (1964).

<sup>58</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 669, 112 L.R.R.M. 2369, 2371 (1983).

<sup>59</sup> *Id.*

<sup>60</sup> 365 U.S. 651, 47 L.R.R.M. 2900 (1961).

<sup>61</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 669, 112 L.R.R.M. 2369, 2371 (1983).

<sup>62</sup> *Local 60, United Bhd. of Carpenters and Joiners of America v. N.L.R.B.*, 365 U.S. 651, 655-56, 47 L.R.R.M. 2900, 2901-02 (1961).

<sup>63</sup> *Id.*

<sup>64</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 669, 112 L.R.R.M. 2369, 2371 (1983).

<sup>65</sup> *Id.*

In addition to limiting its remedy appropriately, the *Shepard* Court determined, the Board had acted reasonably in interpreting the Act to require reimbursement only in the situations in which the Act provides for judicial damages.<sup>66</sup> Section 303 of the Act,<sup>67</sup> the *Shepard* Court noted, provides judicial damage remedies for illegal secondary activities.<sup>68</sup> The *Shepard* Court further noted that section 303 provides a remedy only if there is a violation of section 8(b)(4), which requires proof of coercion.<sup>69</sup> Congress is entitled, according to the *Shepard* Court, to establish a remedy for some violations of federal law, even if it does not provide a remedy for all violations.<sup>70</sup>

Since the Board is an administrative agency, and not a court, the *Shepard* Court reasoned, it does not have the power to order equitable relief.<sup>71</sup> While a court might be responsive to a plea for "complete relief," according to the *Shepard* Court, the Board does not have the power to order compensatory damages for injuries resulting from illegal conduct.<sup>72</sup> Rather, the *Shepard* Court explained, the Board is authorized to fashion remedies which will stop and prevent unfair labor practices.<sup>73</sup> The *Shepard* Court found that nothing in the Act required the Board to order complete relief for every unfair labor practice.<sup>74</sup> The Board, therefore, the *Shepard* Court concluded, had acted within its power when it denied reimbursement because reimbursement would not effectuate the policies of the Act.<sup>75</sup>

Justice O'Connor wrote the only dissent, disagreeing with the majority on two legal grounds as well as on factual grounds.<sup>76</sup> While she agreed with the majority that the Board had the authority to determine that reimbursement in this case would not effectuate the policies of the Act, she did not believe that the Board had given an adequate explanation for its order.<sup>77</sup> Justice O'Connor argued that each of the Board's three

<sup>66</sup> *Id.* at 670, 112 L.R.R.M. at 2372.

<sup>67</sup> 29 U.S.C. § 187 (1976). Section 303 provides in pertinent part:

(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 [8(b)(4)]."

(b) "Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . without respect to the amount in controversy, or in any other court, and shall recover the damages by him sustained and the cost of the suit."

*Id.*

<sup>68</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 670, 112 L.R.R.M. 2369, 2371-72 (1983).

<sup>69</sup> *Id.* The Court noted that *Shepard* and the Board agreed that section 303 only provides remedies for violations of section 8(b)(4). *Id.* The dissent in *Connell Construction* also noted that Congress had made the choice to provide section 303 remedies to situations in which there was pressure to sign contracts in violation of section 8(e) and to limit violations of section 8(e) that did not involve coercion to Board remedies. *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 647-50, 89 L.R.R.M. 2401, 2413-14 (1975) (Stewart, J., Douglas, J., Brennan, J., Marshall, J., dissenting).

<sup>70</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 670, 112 L.R.R.M. 2369, 2372 (1983).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* The differences between courts and administrative agencies are discussed in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-44 (1940).

<sup>73</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 670, 112 L.R.R.M. 2369, 2372 (1981). See *United Automobile Workers v. Russell*, 356 U.S. 634, 642-43, 42 L.R.R.M. 2142, 2145 (1958).

<sup>74</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 670, 112 L.R.R.M. 2369, 2372 (1983).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

reasons for its order was defective or insufficient to support its decision.<sup>78</sup> Since she viewed the explanations as inadequate, Justice O'Connor would have remanded the case to the Board for its consideration of whether or not reimbursement would further the Act's prohibition of hot cargo contracts.<sup>79</sup>

In her dissent, Justice O'Connor argued that each of the Board's justifications for its order was faulty. Justice O'Connor rejected the Board's first reason, that the evidence was insufficient to prove the owner-operators' losses had been the direct result of coercion by the Union and Contractors. Because the ALJ had found that Shepard and others had joined the Union and had paid fees and dues under protest as a result of the Union's enforcement of the hot cargo contract, Justice O'Connor believed there was ample evidence of losses directly attributable to coercion by the Union and the Contractors.<sup>80</sup>

Next, Justice O'Connor rejected the Board's second reason, that reimbursement orders are "overbroad and inappropriate" for violations of section 8(e). She acknowledged that reimbursement would be an inappropriate remedy for an individual who would have joined the Union even if it had not attempted to enforce the illegal provision.<sup>81</sup> Nevertheless, she argued, in this case, reimbursement would not be "inappropriate" because the ALJ had found that Shepard had joined the Union only as a result of the hot cargo contract and that he would not have joined otherwise.<sup>82</sup>

Finally, Justice O'Connor rejected the Board's third reason, that owner-operators could pursue a section 303 damage award. A section 303 damage award, she argued, is available for individuals harmed by a section 8(b)(4) violation, not a section 8(e) violation.<sup>83</sup> Since there was no finding of a section 8(b)(4) violation in this case, Justice O'Connor argued that a section 303 remedy was not available to the petitioners.<sup>84</sup>

Justice O'Connor acknowledged that the Court must affirm a Board order, even if not completely clear, if its reasoning can be inferred reasonably.<sup>85</sup> Nevertheless, she argued, an agency decision cannot be upheld unless the grounds of the decision were within the agency's authority.<sup>86</sup> This order should not be affirmed, Justice O'Connor argued, because the Board's statements did not support the denial of reimbursement.<sup>87</sup>

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<sup>78</sup> *Id.* The three reasons the Board had given are: that the losses were not shown to be the direct result of actual coercion by the Union and Contractors; that an order for reimbursement is "overbroad and inappropriate" for violations of section 8(e); and that a section 303 remedy may be pursued by owner-operators who are independent contractors. *Building Materials and Dump Truck Drivers, Teamsters Local No. 36*, 249 N.L.R.B. 386, 386 n.2, 104 L.R.R.M. 1279, 1280 n.2 (1980). For the text of the Board's explanation, see *supra* note 28 and accompanying text.

<sup>79</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 670, 112 L.R.R.M. 2369, 2372 (1983).

<sup>80</sup> *Id.* at 672, 112 L.R.R.M. at 2374.

<sup>81</sup> *Id.* at 673, 112 L.R.R.M. at 2374.

<sup>82</sup> *Id.* In support of her argument, Justice O'Connor cited *Local 60, United Bhd. of Carpenters and Joiners of America v. N.L.R.B.* in which the Court reversed the Board's order of reimbursement because there was no evidence that union membership had been compelled by an unfair practice. *Local 60, United Bhd. of Carpenters and Joiners of America v. N.L.R.B.*, 365 U.S. 651, 655-56, 47 L.R.R.M. 2900, 2901-02 (1961). She apparently concluded that if there was such evidence, then reimbursement should be ordered. *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 673, 112 L.R.R.M. 2369, 2374 (1983).

<sup>83</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 673, 112 L.R.R.M. 2369, 2374 (1983). See *supra* notes 65-69 and accompanying text.

<sup>84</sup> *Id.*

<sup>85</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 673, 112 L.R.R.M. 2369, 2374 (1983) (citing *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

<sup>86</sup> *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

<sup>87</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 673, 112 L.R.R.M. 2369, 2374 (1983).

Justice O'Connor did not believe, as did the majority, that the Board's order inferred its decision to award reimbursement only for violations of section 8(b)(4).<sup>88</sup> She concluded, therefore, that the case should be remanded to the Board for a decision as to whether or not reimbursement would effectuate the policies of the Act.<sup>89</sup>

The *Shepard* opinion is significant because it affirms the power of the Board and the great weight to which Board orders are entitled. The Board's order in *Shepard* followed precedent and the pattern of the Act. In its past decisions, the Board awarded reimbursement only in hot cargo cases in which it found coercion, and therefore, a violation of section 8(b)(4), as well as section 8(e).<sup>90</sup> In *Local 814, International Bhd. of Teamsters (Santini Brothers) v. N.L.R.B.*,<sup>91</sup> the Board ordered reimbursement of independent owner-operators who had joined the union because of the union's successful coercion of the employer to enforce a hot cargo agreement.<sup>92</sup> The coercion found in *Santini Brothers* included work stoppages which lasted until the employer agreed not to hire independent owner-operators unless they joined the union.<sup>93</sup> The Board found, in *Santini Brothers*, that the union violated section 8(b)(4), as well as section 8(e), of the Act.<sup>94</sup> Accordingly, reimbursement was ordered.<sup>95</sup> *Shepard* is easily distinguished from *Santini Brothers* because in *Shepard* no violation of section 8(b)(4) was found.<sup>96</sup> In *Joint Council of Teamsters v. N.L.R.B.*,<sup>97</sup> a case involving facts similar to *Shepard*, the Board refused to order reimbursement because no actual coercion was found.<sup>98</sup> Based upon its past decisions, the Board was therefore absolutely correct in its refusal to order reimbursement in *Shepard* because no actual coercion, and no violation of section 8(b)(4) was found.

Justice O'Connor seemed to believe the distinction between cases involving violations of both sections 8(b)(4) and 8(e) and cases involving only a violation of section 8(e) is not significant enough to justify ordering reimbursement only in the former cases.<sup>99</sup> This distinction, however, was properly acknowledged by the majority of the *Shepard* Court as being consistent with the pattern of the Act.<sup>100</sup> As the *Shepard* Court explained, in section 303, the Act provides for judicial damages only when section 8(b)(4) has been violated.<sup>101</sup> By ordering reimbursement only in cases in which the Act permits damages, the majority maintained, the Board acted reasonably in *Shepard*.<sup>102</sup> Ignoring the Board's attempt for consistency, Justice O'Connor apparently felt that since the petitioners could not receive

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<sup>88</sup> *Id.* at n.5.

<sup>89</sup> *Id.* at 673, 112 L.R.R.M. at 2374.

<sup>90</sup> *E.g.*, *Local 814, International Bhd. of Teamsters (Santini Bros.) v. N.L.R.B.*, 546 F.2d 989, 93 L.R.R.M. 2800 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818, 96 L.R.R.M. 2512 (1977); *Joint Council of Teamsters v. N.L.R.B.*, 671 F.2d 305, 109 L.R.R.M. 2181 (9th Cir. 1981). *See Newspaper and Periodical Drivers and Helpers Union, Local No. 921 v. N.L.R.B.*, 509 F.2d 99 (9th Cir. 1974) (reimbursement not ordered because no coercion found).

<sup>91</sup> 546 F.2d 989, 93 L.R.R.M. 2900 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818, 96 L.R.R.M. 2512 (1977).

<sup>92</sup> *Santini Bros.*, 208 N.L.R.B. 184, 201, 85 L.R.R.M. 1518, 1519 (1974).

<sup>93</sup> *Id.* at 189-201, 85 L.R.R.M. at 1521.

<sup>94</sup> *Id.* at 198-201, 85 L.R.R.M. at 1519.

<sup>95</sup> *Id.* at 201-02, 85 L.R.R.M. at 1519.

<sup>96</sup> *See Shepard v. N.L.R.B.*, 103 S. Ct. 665, 667-68, 112 L.R.R.M. 2369, 2370 (1983).

<sup>97</sup> 671 F.2d 305, 109 L.R.R.M. 2181 (9th Cir. 1981).

<sup>98</sup> *Id.* at 310-11, 109 L.R.R.M. at 2184.

<sup>99</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 672-73, 112 L.R.R.M. 2369, 2374 (1983).

<sup>100</sup> *Id.* at 669-70, 112 L.R.R.M. at 2371-72.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

damages under section 303, they should be able to obtain reimbursement.<sup>103</sup>

In addition to following precedent and the pattern of the Act, the *Shepard* Court properly acted within its limited authority to review Board orders. In a prior decision, *Phelps Dodge Corp.*,<sup>104</sup> the Court required the Board to disclose the basis of its order because the Court believed an explanation by the Board was necessary to make limited judicial review of Board orders effective.<sup>105</sup> The Board in *Phelps Dodge Corp.* had ordered reinstatement of employees who had been refused employment solely because of their union membership.<sup>106</sup> Noting that Congress could not define all possible remedies to effectuate the Act, the *Phelps Dodge Corp.* Court reasoned that the Board, due to its expertise, must be given discretion to fashion remedies, subject to limited judicial review.<sup>107</sup> The *Phelps Dodge Corp.* Court concluded that it would not hinder the Board's exercise of discretion, but required the Board to give the Court a clear indication that it has properly exercised the discretion authorized by Congress.<sup>108</sup> In its consideration of the Board's explanation for its order in *Shepard*, the majority of the Court reasonably concluded that the Board had expressed its intent to limit reimbursement orders to cases involving actual coercion.<sup>109</sup> The majority further concluded that the Board had clearly acted within its authorized discretion by limiting reimbursement remedies to those "especially egregious situations."<sup>110</sup>

In a prior decision, *Virginia Electric and Power Co. v. N.L.R.B.*,<sup>111</sup> the Court concluded that the Board's order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the act."<sup>112</sup> In its evaluation of the Board's order for reimbursement to employees who were coerced by their employer to join a specific union to retain their jobs, the *Virginia Electric and Power Co.* Court found that the Board had concluded reimbursement was proper because the employees had suffered a loss as a result of coercion.<sup>113</sup> Affirming the Board's order, the Court stated that it could not find that reimbursement would not effectuate the policies of the Act.<sup>114</sup> Since the Board found that *Shepard* suffered no loss due to coercion, the *Shepard* Court appropriately concluded that reimbursement was not necessary to effectuate the policies of the Act, and that the Board's order did effectuate those policies.

Acknowledging the Board's unique knowledge and expertise, the Court, in *N.L.R.B. v. Gissel Packing Company*,<sup>115</sup> stated that the Board's choice of remedy must "be given special respect by reviewing courts."<sup>116</sup> In fact, the Court has held, in *N.L.R.B. v. Food Store Employees Union, Local 347*,<sup>117</sup> that if the Board's order contains an inconsistency, the

<sup>103</sup> *Id.* at 673, 112 L.R.R.M. at 2374.

<sup>104</sup> 313 U.S. 177, 8 L.R.R.M. 439 (1941).

<sup>105</sup> *Id.* at 195-97, 8 L.R.R.M. at 447.

<sup>106</sup> *Id.* at 181-85, 8 L.R.R.M. at 440-41.

<sup>107</sup> *Id.* at 192-94, 8 L.R.R.M. at 446.

<sup>108</sup> *Id.* at 196-97, 8 L.R.R.M. at 447-48.

<sup>109</sup> *Shepard v. N.L.R.B.*, 103 S. Ct. 665, 668-69, 112 L.R.R.M. 2369, 2371 (1983).

<sup>110</sup> *Id.* at 669, 112 L.R.R.M. at 2371.

<sup>111</sup> 319 U.S. 533, 12 L.R.R.M. 739 (1943).

<sup>112</sup> *Id.* at 540, 12 L.R.R.M. at 742. See *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 215-17, 57 L.R.R.M. 2609, 2614 (1964).

<sup>113</sup> 319 U.S. at 543-44, 12 L.R.R.M. at 744.

<sup>114</sup> *Id.*

<sup>115</sup> 395 U.S. 575, 71 L.R.R.M. 2481 (1969).

<sup>116</sup> *Id.* at 612 n.32, 71 L.R.R.M. at 2495 n.32.

<sup>117</sup> 417 U.S. 1, 86 L.R.R.M. 2209 (1974).

Court must remand the case to the Board rather than substitute its own judgment.<sup>118</sup> Since the majority in *Shepard* found no inconsistency in the Board's order, there was no need to remand the case to the Board, as Justice O'Connor had suggested. On the contrary, the *Shepard* Court acted properly in affirming the Board's order.

In *Shepard v. N.L.R.B.*, the Supreme Court, has thus reaffirmed the great deference to be given to Board opinions. The Board's discretion in fashioning remedies under the Act, according to the *Shepard* Court, is subject only to limited judicial review because of the Board's expertise in preventing and stopping unfair labor practices. Affirming the Board's order, the Court acknowledged that the Board is empowered to limit its orders of reimbursement to cases which involve actual coercion.

2. \**Validity of Union Rule Restricting Resignation from Membership:*  
Machinists, Local 1327 [Dalmo Victor]<sup>1</sup>

Section 7 of the National Labor Relations Act<sup>2</sup> gives all employees the right not only to engage in a wide variety of "concerted activities for the purpose of collective bargaining or other mutual aid or protection," but also the right to refrain from any such activities.<sup>3</sup> These rights are expressly protected from union interference by section 8(b)(1)(A), which makes it unlawful for a labor organization to "restrain or coerce . . . employees in the exercise of rights guaranteed in Section 7."<sup>4</sup>

The restrictions on union interference set forth in section 8(b)(1)(A) and consequently, the scope of the employees' section 7 rights, however, are not unlimited. An express statutory proviso grants unions the "authority to prescribe its own rules with respect to the acquisition or retention of membership."<sup>5</sup> Examining the legislative history of section 8(b)(1), including this proviso, the Supreme Court in *NLRB v. Allis-Chalmers Manufacturing Co.*,<sup>6</sup> stated that a union rule which is internal in its scope and application may be enforced against employees attempting to exercise their section 7 rights without necessarily violating section 8(b)(1)(A).<sup>7</sup> The *Allis-Chalmers* Court defined an internal rule

<sup>118</sup> *Id.* at 9, 86 L.R.R.M. at 2211-12.

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<sup>1</sup> 263 N.L.R.B. No. 141, 111 L.R.R.M. 1115 (1982).

<sup>2</sup> 29 U.S.C. §§151-169 (1976).

<sup>3</sup> Section 7 provides:

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

29 U.S.C. §157 (1976).

<sup>4</sup> Section 8(b)(1)(A) states:

It shall be an unfair labor practice for a labor organization or its agents —  
(1) to restrain or coerce

(A) employees in the exercise of the rights guaranteed in section 7:

*Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .

29 U.S.C. § 158(b)(1)(A) (1976).

<sup>5</sup> *See id.*

<sup>6</sup> 388 U.S. 175, 65 L.R.R.M. 2449 (1967).

<sup>7</sup> *Id.* at 195, 65 L.R.R.M. at 2457. In *Allis-Chalmers*, several union members were fined by the union for crossing the picket line and returning to work during a lawful and properly-called strike

as one which has been properly adopted by the union,<sup>8</sup> applies only to those employees who "enjoy[] full union membership"<sup>9</sup> and is enforceable in a way which does not affect the members' employment status.<sup>10</sup>

The analytical framework for evaluating union rules established in *Allis-Chalmers* was clarified by the Supreme Court in *Scofield v. N.L.R.B.*<sup>11</sup> While the *Scofield* Court affirmed the parameters of internality as defined in *Allis-Chalmers*,<sup>12</sup> it set forth a second standard — a second level of inquiry — for ascertaining the validity of union constitutional provisions and by-laws. In addition to meeting the *Allis-Chalmers* criteria, the Court stated, an internal union rule may be enforced only if it does not frustrate any overriding labor policy inherent in the Act.<sup>13</sup> Describing the method of analysis as a "dual approach," the *Scofield* Court thus summarized that "[section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."<sup>14</sup> Under this method, a union rule which forbids members from crossing a picket line during an authorized strike may be enforced through the imposition of fines without violating section 8(b)(1)(A).<sup>15</sup>

In contrast to valid internal regulations, external union rules — those applied outside of the union — are not enforceable against employees who choose to exercise their section 7 right to refrain from concerted activities. Thus, the Supreme Court has held that once the union-member relationship has been severed by the lawful resignation of the member, the imposition of sanctions by the union against the former member for engaging in conduct proscribed by the union is an unfair labor practice in violation of section 8(b)(1)(A). In both *N.L.R.B. v. Granite State Joint Board, Textile Workers Union of America, Local 1029*<sup>16</sup> and *Booster Lodge No. 405, International Association of Machinists & Aerospace Workers v. N.L.R.B.*,<sup>17</sup> the Supreme Court concluded that where neither the union's constitution nor by-laws contained any restriction on the resignation of members, the union could not lawfully fine employees who had resigned and returned to work during an authorized strike.<sup>18</sup> The Court based this rule on the premise that "when there

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against the defendant company, in violation of the union constitution and by-laws. *Id.* at 177, 65 L.R.R.M. at 2449. The Supreme Court held, contrary to the contention of the members, that the fines did not restrain or coerce the employees in the exercise of rights guaranteed by section 7 within the meaning of section 8(b)(1)(A). *Id.* at 195, 65 L.R.R.M. at 2457.

<sup>8</sup> *Id.* at 195, 65 L.R.R.M. at 2456-57.

<sup>9</sup> *Id.* at 196, 65 L.R.R.M. at 2457.

<sup>10</sup> *Id.* at 195, 65 L.R.R.M. at 2457.

<sup>11</sup> 394 U.S. 423, 70 L.R.R.M. 3105 (1969). In *Scofield*, the petitioners, union members employed on a piecework basis, were fined and suspended by their union for violating a union rule relating to production ceilings. *Id.* at 424-26, 70 L.R.R.M. at 3105-06. In defense to an action brought by the union to collect the fines, the members argued that union enforcement of the rule was an effort to "restrain or coerce" them in violation of section 8(b)(1). *Id.* at 426-27, 70 L.R.R.M. at 3106. The Supreme Court ruled that the production ceiling could be enforced by the union without contravening the Act. *Id.* at 436, 70 L.R.R.M. at 3110.

<sup>12</sup> *Id.* at 428-29, 70 L.R.R.M. at 3107.

<sup>13</sup> *Id.* at 429, 70 L.R.R.M. at 3107.

<sup>14</sup> *Id.* at 430, 70 L.R.R.M. at 3108.

<sup>15</sup> *Allis-Chalmers*, 388 U.S. at 195, 65 L.R.R.M. at 2457.

<sup>16</sup> 409 U.S. 213, 81 L.R.R.M. 2853 (1972).

<sup>17</sup> 412 U.S. 84, 83 L.R.R.M. 2189 (1973).

<sup>18</sup> *Id.* at 89-90, 83 L.R.R.M. at 2191-92; *Granite State*, 409 U.S. at 217-18, 81 L.R.R.M. at 2855. The union in *Booster Lodge* sought to distinguish the result in *Granite State* on the ground that the union's constitution contained a provision which expressly prohibited members from strikebreaking.

is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man on the street."<sup>19</sup>

Since neither case presented the problem of construing an express union restriction on a member's right to resign, the Court in both instances was careful to leave open the important question of the extent to which the union may limit or curtail that right.<sup>20</sup> During the *Survey* year, in *Machinists, Local 1327 [Dalmo Victor]*,<sup>21</sup> the National Labor Relations Board (Board) confronted this issue. The Board considered the validity of a union constitutional provision which restricted a member's right to resign from the union to nonstrike situations.<sup>22</sup> Four of the five Board members held that a union rule prohibiting resignation from the organization during a strike or within 14 days preceding its commencement was an unreasonable restriction on a member's section 7 right to resign.<sup>23</sup> Members Fanning and Zimmerman, however, writing the principal opinion, went on to state that a union rule which places a 30-day limitation on the effective date of resignation would be considered a reasonable limitation on this right to resign.<sup>24</sup> In their concurring opinion, Chairman Van de Water and Member Hunter agreed that the constitutional provision was invalid but expressly denounced the 30-day limitation proposed by Members Fanning and Zimmerman.<sup>25</sup> Dissenting Member Jenkins, arguing that the constitutional provision was reasonable, did not expressly address the 30-day resignation limitation issue.<sup>26</sup> *Dalmo Victor* is significant in that it is the first Board decision to examine the validity of a union rule which limits the members' right to resign in order to subject them to the unifying influence of the union's internal rule-making authority.

In *Dalmo Victor*, the respondent union had adopted a constitutional provision stating that resignation by a member during a strike or within 14 days of its commencement would not relieve that member of either his obligation to refrain from working, or his obligation to observe the picket line.<sup>27</sup> Several months after the commencement of an authorized

412 U.S. at 88-89, 83 L.R.R.M. at 2191. The *Booster Lodge* Court, however, refused to impose this obligation on nonmembers or to find an implied post-resignation commitment in the constitutional provision. *Id.* at 89-90, 83 L.R.R.M. at 2192.

<sup>19</sup> *Granite State*, 409 U.S. 217, 81 L.R.R.M. at 2854-55.

<sup>20</sup> *Booster Lodge*, 412 U.S. at 88, 83 L.R.R.M. at 2191 ("[w]e leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act."); *Granite State*, 409 U.S. at 217, 81 L.R.R.M. at 2855 ("We do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign.").

<sup>21</sup> 263 N.L.R.B. No. 141, 111 L.R.R.M. 1115 (1982).

<sup>22</sup> *Id.* at 3-4, 111 L.R.R.M. at 1116.

<sup>23</sup> *Id.* at 11, 111 L.R.R.M. at 1118; *id.* at 15, 111 L.R.R.M. at 1119 (Van de Water, Chairman and Hunter, Member, concurring).

<sup>24</sup> *Id.* at 12, 111 L.R.R.M. at 1118. Members Fanning and Zimmerman further noted that "under extraordinary circumstances, a union may need more than the 30 days found reasonable herein to dispose of the administrative matters arising from the resignations." *Id.* at 12 n.21, 111 L.R.R.M. at 1118 n.21.

<sup>25</sup> *Id.* at 15, 111 L.R.R.M. at 1119 (Van de Water, Chairman and Hunter, Member, concurring).

<sup>26</sup> *Id.* at 40, 111 L.R.R.M. at 1126 (Jenkins, Member, dissenting).

<sup>27</sup> *Machinists, Local 1327 [Dalmo Victor]*, 231 N.L.R.B. 719, 96 L.R.R.M. 1160 (1977). The constitutional provision provided as follows:

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

strike, three members submitted resignations to the union and returned to work.<sup>28</sup> These members challenged the lawfulness of the fines subsequently imposed.<sup>29</sup>

In its original decision, the Board found that the constitutional provision was not a restriction on a member's right to resign, but rather an unlawful restriction on the post-resignation conduct of former members.<sup>30</sup> Accordingly, the Board ruled that the union had violated section 8(b)(1)(A) by fining the three resigning members.<sup>31</sup> On appeal to the United States Court of Appeals for the Ninth Circuit, however, the court denied enforcement of the Board's order on the ground that the constitutional provision was a restriction on a member's right to resign and not an unlawful attempt to control the conduct of employees who are no longer members.<sup>32</sup> Concluding that the case "presents the question reserved by the [Supreme] Court in *Granite State and Booster Lodge*," the circuit court remanded it to the Board for a determination of the provision's validity.<sup>33</sup>

In the principal opinion of the Board, Members Fanning and Zimmerman approached the question as one requiring the balancing of two fundamental and inherently conflicting labor law principles: The employee's section 7 right to refrain from collective activity and the union's legitimate interest in protecting itself and its members in collective economic activity.<sup>34</sup> These Board members initially concluded that neither of these interests is absolute.<sup>35</sup> They recognized that the section 7 right to refrain gives employees the right to resign — a right which is not forever lost when an employee becomes a union member.<sup>36</sup> Members Fanning and Zimmerman reasoned, however, that the right to resign is not a right to instantaneously leave the union when its members have chosen to exercise their right to strike.<sup>37</sup> They asserted that the Supreme Court, in *Allis-Chalmers*, had laid to rest the notion of an absolute right to refrain from union activity.<sup>38</sup> As such, Members Fanning and Zimmerman cited the *Allis-Chalmers* case as support for the proposition that a union has a legitimate and statutorily-based interest in maintaining its status as a representative for the majority of its members, especially during a strike.<sup>39</sup> This interest, they concluded, supports the finding that "certain limited restrictions may be imposed on the right to resign from a union."<sup>40</sup>

Having thus formulated a balancing of interests standard for ascertaining the validity of a union rule restricting the right to resign, Members Fanning and Zimmerman then turned to the question of whether a union rule which distinguished, for resignation purposes, between strike and nonstrike periods effected a reasonable balance of the interests involved. Initially, they noted that in *Scofield v. N.L.R.B.*,<sup>41</sup> the Supreme Court

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primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

*Id.*

<sup>28</sup> *Id.* at 720, 96 L.R.R.M. at 1161.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 720-21, 96 L.R.R.M. at 1161.

<sup>31</sup> *Id.* at 720, 96 L.R.R.M. at 1161.

<sup>32</sup> *N.L.R.B. v. Machinists, Local 1327*, 608 F.2d 1219, 1222, 102 L.R.R.M. 2583, 2585 (9th Cir. 1979).

<sup>33</sup> *Id.*

<sup>34</sup> *Machinists, Local 1327 [Dalmo Victor]*, 263 N.L.R.B. No. 141 at 5, 111 L.R.R.M. at 1116-17.

<sup>35</sup> *Id.* at 6, 111 L.R.R.M. at 1117.

<sup>36</sup> *Id.* at 9, 111 L.R.R.M. at 1117.

<sup>37</sup> *Id.* at 9, 111 L.R.R.M. at 1117-18.

<sup>38</sup> *Id.* at 7, 111 L.R.R.M. at 1117.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 394 U.S. 423, 70 L.R.R.M. 3105 (1969).

asserted that members must be free to leave a union in order to escape membership conditions that they consider onerous.<sup>42</sup> In addition, these Board members cited to the *Granite State* decision<sup>43</sup> in which the Court recognized that circumstances might arise that would compel a member to resign during a strike, notwithstanding that fact that the resigning member had earlier endorsed the strike.<sup>44</sup> Finding nothing in these and other Court decisions to suggest that a member's right to resign should be limited to nonstrike situations, the Board held that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's section 7 right to resign," thereby violating section 8(b)(1)(A) of the Act.<sup>45</sup>

Desiring, however, to establish a salutary rule which would provide guidance in future situations,<sup>46</sup> Members Fanning and Zimmerman then sought to formulate a proper balance which would accommodate both the union's interests and the member's right to resign. In order for a union to be able to assess its strength during the course of a strike and to protect those employees who have joined in the walkout, these members asserted that the union may require members who seek to resign immediately before or during a strike to give reasonable notice of the effective date of their resignations.<sup>47</sup> Although recognizing that the definition of "reasonable" may vary from situation to situation, they stated that a rule which restricts a union member's rights to resign for a period no greater than 30 days following the tender of the resignation reflects a reasonable balance between the union members' right to resign from the union, as well as the union's interest in protecting its remaining members, and in disposing of administrative matters arising from the resignations.<sup>48</sup>

While Chairman Van de Water and Member Hunter agreed that the constitutional provision is an invalid restriction on the member's right to resign, they sharply criticized the 30-day rule adopted by Members Fanning and Zimmerman. Analyzing the quartet of relevant Supreme Court cases,<sup>49</sup> they asserted that the proper standard of analysis is the clear distinction between "internal" and "external" union actions.<sup>50</sup> These cases, Chairman Van de Water and Member Hunter explained, established that while internal union activities — those applying to full union members pursuant to a properly adopted rule which serves a legitimate union goal — may be lawful under the Act, external actions — those seeking to coerce nonmembers — expressly violate section 8(b)(1).<sup>51</sup> The 30-day rule, Chairman Van de Water and Member Hunter maintained, effectively allowed a union to transform a prohibited external rule into a protected internal rule merely by

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<sup>42</sup> *Dalmo Victor*, 263 N.L.R.B. No. 141 at 9-10, 111 L.R.R.M. at 1118, citing *Scotfield*, 394 U.S. at 430, 70 L.R.R.M. at 3108.

<sup>43</sup> *Granite State Joint Board, Textile Workers Union of America, Local 1029*, 409 U.S. 213, 81 L.R.R.M. 2853 (1972).

<sup>44</sup> *Dalmo Victor*, 263 N.L.R.B. at 10, 111 L.R.R.M. at 1118, quoting *Granite State*, 409 U.S. at 217-18, 81 L.R.R.M. at 2855 ("Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind.").

<sup>45</sup> 263 N.L.R.B. No. 141 at 11, 111 L.R.R.M. 1118.

<sup>46</sup> *Id.* at 12, 111 L.R.R.M. at 1118.

<sup>47</sup> *Id.* at 11, 111 L.R.R.M. at 1118.

<sup>48</sup> *Id.* at 12, 111 L.R.R.M. at 1118.

<sup>49</sup> *Id.* at 16, 111 L.R.R.M. at 1119 (Van de Water, Chairman and Hunter, Member, concurring) (citing *Booster Lodge*, 412 U.S. 84, 83 L.R.R.M. 2187; *Granite State*, 409 U.S. 213, 81 L.R.R.M. 2853; *Scotfield*, 394 U.S. 423, 70 L.R.R.M. 3105; *Allis-Chalmers*, 388 U.S. 175, 65 L.R.R.M. at 2449).

<sup>50</sup> 263 N.L.R.B. No. 141 at 17-18, 111 L.R.R.M. at 1119-20 (Van de Water, Chairman and Hunter, Member, concurring).

<sup>51</sup> *Id.* at 18, 111 L.R.R.M. at 1120.

voting to do so.<sup>52</sup> These members charged that by sanctioning this result, the majority had improperly altered the internal/external distinction inherent in the Act.<sup>53</sup>

Chairman Van de Water and Member Hunter further argued that the majority's balancing standard is based on the flawed premise that the mere institutional interests of the union can stand on equal footing with the express statutory rights of the employee.<sup>54</sup> Even assuming that the employee's right and the union's interests are subject to balancing, they asserted that the position of the employee who may be placed in financial jeopardy by adhering to the strike should be given much greater consideration.<sup>55</sup> Concluding, therefore, that the majority's 30-day rule contradicts Supreme Court precedent and ignores the proper standard for evaluating the validity of union rules, the concurring opinion adopted the view that any restriction on a member's right to resign violates section 8(b)(1)(A).<sup>56</sup>

Dissenting Member Jenkins asserted that the constitutional provision is valid according to the Supreme Court's interpretation of section 8(b)(1)(A).<sup>57</sup> In accord with the *Scofield* and *Allis-Chalmers* guidelines, he found that the provision was properly adopted, reflected legitimate union interests, and was reasonably enforced.<sup>58</sup> In addition, he asserted that the provision did not impair any Congressionally-established labor law policy reflected in the Act.<sup>59</sup> Since the members "freely, knowingly, and expressly" agreed to limit their right to resign in order to strengthen the effectiveness of a decision to strike, he maintained that the constitutional provision merely permits the Union to enforce its contract with the members.<sup>60</sup> Member Jenkins thus would refuse to permit a member who had voluntarily accepted the benefits and liabilities of union membership to breach his contract by resigning during a strike and crossing the picket line.<sup>61</sup>

The language of the three separate opinions reveals that the 30-day rule set forth in the principal opinion of Members Fanning and Zimmerman reflects the current posture of a majority of the Board. Although Chairman Van de Water and Member Hunter expressly disavowed the 30-day limitation on resignation, they repeatedly referred to the rule as "the majority's,"<sup>62</sup> thereby implying that dissenting Member Jenkins endorses the rule. This implication seems to be justified. Since Member Jenkins would have found that constitutional provision which limits the right to resign to non-strike periods valid, it is reasonable to infer that he would also accept the less restrictive 30-day limitation.<sup>63</sup> It appears, therefore, that a majority of three members of the Board would uphold a union

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<sup>52</sup> 263 N.L.R.B. No. 141 at 29, 111 L.R.R.M. at 1123.

<sup>53</sup> *Id.* at 28, 111 L.R.R.M. at 1122.

<sup>54</sup> *Id.* at 25-26, 111 L.R.R.M. at 1122.

<sup>55</sup> *Id.* at 27, 111 L.R.R.M. at 1122.

<sup>56</sup> *Id.* at 32, 111 L.R.R.M. at 1123-24.

<sup>57</sup> *Id.* at 33, 111 L.R.R.M. at 1123-24 (Jenkins, Member, dissenting).

<sup>58</sup> *Id.* at 37-38, 111 L.R.R.M. at 1125.

<sup>59</sup> *Id.* at 38-39, 111 L.R.R.M. at 1125.

<sup>60</sup> *Id.* at 39, 111 L.R.R.M. at 1125.

<sup>61</sup> *Id.* at 39, 111 L.R.R.M. at 1126. Allowing a member to do so, Member Jenkins asserted, would be to effectively allow him to "have his cake and eat it too." *Id.*

<sup>62</sup> *Id.* at 15, 17, 23, 25-32, 111 L.R.R.M. at 1119, 1121-23 (Van de Water, Chairman and Hunter, Member, concurring).

<sup>63</sup> Member Jenkins' statement that "... the constitutional provision here in issue does not constitute a flat prohibition on all resignations, but merely restricts their effect during ongoing, lawful strikes ..." supports the conclusion that he would also uphold a less restrictive limitation, such as that proposed by Members Fanning and Zimmerman. *Id.* at 39, 111 L.R.R.M. at 1125 (Jenkins, Member, dissenting).

constitutional provision which prevents a resignation from taking effect for no greater than 30 days.

Ascertaining the validity of the Board's decision to strike down the union rule in question, and of the principal opinion's 30-day rule requires an application of the standards set forth in the relevant Supreme Court decisions. As mentioned, the approach espoused by the Supreme Court in *Allis-Chalmers* and *Scofield* describes a two-tiered level of scrutiny for evaluating a union regulation in light of the limitations of section 8(b)(1)(A).<sup>64</sup> The initial determination is whether the subject matter of the union rule is internal or external. If it is external — if the rule affects a union member's status as an employee and not merely as a union member, or if it seeks to regulate employees who are not members — the inquiry should terminate with a finding that the rule violates section 8(b)(1)(A).<sup>65</sup> If the scope of the rule is internal, a second level of analysis is required. At this juncture, the rule must be analyzed in terms of the union interest involved and the extent to which it infringes on any policies embedded in the Act.<sup>66</sup>

Only dissenting Member Jenkins expressly discussed the threshold internal/external question.<sup>67</sup> An analysis of the principal and concurring opinions, however, reveals a consensus among all five Board members that union rules which restrict member resignations satisfy the initial requirement of internality. With respect to the principal opinion, it seems clear that the proposed balancing test amounts to an examination of union interests and the labor law policies of section 7 — in effect, an application of the second step of the *Scofield* dual approach.<sup>68</sup> Since this examination is mandated only after determining that the rule is not patently external in scope, the principal opinion's discussion of the rule on this level necessarily implies that the union action satisfies the internal/external-prong of the *Scofield* test.

Similar reasoning may be applied to extract a similar conclusion from the language of the concurring opinion. Although Chairman Van de Water and Member Hunter accuse the Board of seeking to redefine the internal/external dichotomy by proposing a 30-day rule,<sup>69</sup> they stop short of claiming that the rule itself is actually external. A plausible interpretation of their position is that while any union rule restricting resignations violates section 8(b)(1)(A), it does so not because it is external, but rather because it violates national labor policy by seeking to alter the internal/external distinction inherent in the Act.<sup>70</sup> As with the principal opinion, therefore, the fact that Chairman Van de Water and Member Hunter have reached the second, "policy" tier of analysis set forth in *Scofield*, implies that the rules are at least internal in scope.

This apparently unanimous conclusion correctly applies the first prong of the analytical scheme established by the *Scofield* and *Allis-Chalmers* decisions. Union regulations which limit a member's right to resign from the union do not directly impair a member's status as an employee, at least no more so than did the rules imposing fines against

<sup>64</sup> See *supra* notes 6-15 and accompanying text.

<sup>65</sup> See *supra* notes 16-19 and accompanying text.

<sup>66</sup> See *supra* note 14 and accompanying text.

<sup>67</sup> 263 N.L.R.B. No. 141 at 37, 111 L.R.R.M. at 1125 (Jenkins, Member, dissenting). Member Jenkins reasoned that "union rules and their enforcement are an internal matter . . ." *Id.*

<sup>68</sup> See *supra* notes 12-15 and accompanying text.

<sup>69</sup> 263 N.L.R.B. No. 141 at 28, 111 L.R.R.M. at 1122.

<sup>70</sup> See *id.* ("[B]y allowing a union to compel an employee to remain a member subject to the union's rules and authority for 30 days beyond an expressed desire to resign, the majority has effectively altered the internal/external distinction which Congress has so carefully embedded in the Act.").

strikebreaking members which were found valid in *Allis-Chalmers*.<sup>71</sup> Furthermore, such a rule affects the conduct only of full union members.<sup>72</sup> Although a union constitutional provision restricting a member's right to resign compels employees to maintain the very membership status required to satisfy the standard of internality, the rule does not (and clearly cannot) apply to nonmembers. Indeed, rules limiting a member's right to resign seem to fall directly within the context of the proviso to section 8(b)(1)(A) as rules which pertain to the "retention of membership."<sup>73</sup> There would seem to be little doubt that union rules which restrict a member's right to resign and are enforced through fines comport with the basic Supreme Court definition of internality. The validity of a union restriction on member resignation, therefore, turns on the legitimacy of the union interest underlying the rule and the extent to which the rule violates any policy of the Act.<sup>74</sup>

The *Allis-Chalmers* decision clearly establishes that a union's desire to maintain its status as a bargaining representative, especially during a strike, is a legitimate union interest.<sup>75</sup> To the extent that a rule which restricts resignations seeks to maintain union solidarity in a strike situation, then, the rule reflects a recognized and well-accepted union objective. The *Allis-Chalmers* Court, moreover, observed that a union, as a pseudo-legislative body, is entitled to operate under a majority rule principle and thus may bind those members who disagree with the collective union decision.<sup>76</sup>

Yet while a union member may subject his individual rights to the authority of the union, the Supreme Court decisions in *Granite State* and *Booster Lodge* indicate that the policy considerations of employee autonomy and the section 7 right to withdraw from the collective bargaining entity are paramount. The *Granite State* Court noted that a member may exercise his right to refrain from even those concerted union activities which he had earlier endorsed, despite the union's desire to maintain its cohesiveness.<sup>77</sup> The Court implied that the interests of the individual employee — especially the equitable interests that may arise during the course of a strike<sup>78</sup> — take precedence over any contractual obligations which might be inferred from the member's conduct. Thus, the right to resign from the union and cross the picket line is not waived even though the resigning member

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<sup>71</sup> See *supra* note 7 and accompanying text.

<sup>72</sup> Arguably, this conclusion is required by virtue of the Ninth Circuit's decision in the case that the union rule was not an attempt to control the conduct of nonmembers. See *supra* note 32.

<sup>73</sup> See *supra* note 4.

<sup>74</sup> See *Scofield*, 394 U.S. at 431, 70 L.R.R.M. at 3108. ("The inquiry must therefore focus on the legitimacy of the union interest indicated by the rule and the extent to which any policy of the Act may be violated by the [rule].").

<sup>75</sup> 388 U.S. at 181, 65 L.R.R.M. at 2451. In upholding the union's right to fine strikebreaking members, the Court observed that a basic element of the federal labor policy embodied in the Act "is the power in the chosen union to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes." *Id.* (footnote omitted).

<sup>76</sup> *Id.* at 180, 65 L.R.R.M. at 2451.

<sup>77</sup> 409 U.S. at 217-18, 81 L.R.R.M. at 2855. ("[W]here . . . there are no restraints on the resignation of members, we conclude that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.") (footnote omitted).

<sup>78</sup> See *id.* at 217, 81 L.R.R.M. at 2855 ("Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.").

ratified the strike and the strike breaking penalties and participated in the strike itself.<sup>79</sup> Incursions into the section 7 right to resign, therefore, cannot be so significant as to sap the underlying spirit of the Section.

The Board's conclusion that a union rule prohibiting member resignations during strike periods violates section 8(b)(1)(A) reflects a proper application of these principles. Although the union provision does not prohibit all resignations, it obviously prevents a union member from exercising his section 7 rights at the time when those rights are of the greatest value to the member, during a strike.<sup>80</sup> By thus depriving the section of much of its vitality, the rule violates the labor policy of employee autonomy, a policy recognized as fundamentally important by the *Booster Lodge* Court.<sup>81</sup> In addition, the rule ignores the equitable concerns voiced in the *Booster Lodge* decision.<sup>82</sup> Although the union constitution in that case did not contain an express provision limiting a member's right to resign, the presence or absence of such a provision would appear to be irrelevant with respect to these concerns. The likelihood that a strike will cause undue hardship on a striking member is the same regardless of whether a union constitution purports to maintain an employee's loyalty by securing his membership status. Presumably, the Court's recognition of and deference to this likelihood would remain constant as well.

The 30-day rule advanced in the principal opinion, however, reserves the employee's section 7 rights while recognizing the interests of the union as a collective bargaining entity, thereby adequately accommodating the competing interests set forth in the second branch of the *Scofield* test. Although the Supreme Court has interpreted the policy considerations of the Act as elevating the employees right to refrain above union interests, a careful reading of the decisions reveals, contrary to the position adopted by the concurring opinion, that the employee's section 7 rights are not necessarily absolute. In *Allis-Chalmers*, the Court expressly rejected a "literal" reading of sections 7 and 8(b)(1)(A) that would permit union members to violate collective union decisions with impunity.<sup>83</sup> Further support for this interpretation is found in the language of the *Booster Lodge* and *Granite State* decisions, where the question left open by the Court was framed in terms of the extent to which a union may limit the freedom to resign, not merely whether a union may do so.<sup>84</sup> The Court thus appears to have implied that while an employee's section 7 rights must be protected, this protection may be implemented in a way which does not completely negate union interests. Under a 30-day rule, a member's ability to sever ties with the union would depend not on external variables such as the duration of a strike — variables over which he may have little control — but rather on his own volition. Although the rule prevents a resignation from taking effect immediately, it would not seem to place any significant burdens on the resigning member or dissuade a member committed to resigning. Thus, in accord with the *Scofield* Court's directive, the rule does not "invade or

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<sup>79</sup> The decisions in *Booster Lodge* and *Granite State* establish that a waiver of the right to resign will not be inferred from implicit indicators such as a vote to strike, ratification of strikebreaking penalties or participation in a strike. *Booster Lodge*, 412 U.S. at 89-90, 83 L.R.R.M. at 2191-92, citing *Granite State*, 409 U.S. 2131, 81 L.R.R.M. 2853; see also *supra* note 18, discussing the *Booster Lodge* Court's refusal to imply a restriction in a union constitution provision which did not expressly restrict the right to resign.

<sup>80</sup> See *supra* note 76.

<sup>81</sup> See *supra* notes 17-19 and accompanying text.

<sup>82</sup> See *supra* note 19 and accompanying text.

<sup>83</sup> 388 U.S. at 178-80, 65 L.R.R.M. at 2450.

<sup>84</sup> See *supra* note 19.

frustrate" the important section 7 policies and the right to resign.<sup>85</sup> The rule gives unions a chance, however, to react to the pending depletion of its strike force, and allows them to make careful decisions concerning the interests of the remaining loyal members in a way which does not hamper the exercise of the disgruntled members' right to resign.

Regardless of whether the 30-day rule is the binding position of the Board, the decision in *Dalmo Victor*, if respected by the courts, should significantly impact on union-member relations in two ways. Even assuming the validity of the 30-day restriction, the Board's holding clearly eliminates the ability of a union to pose any significant obstacles in the way of voluntary member resignation. The union member who desires to cross an authorized picket line and return to work but who wishes to avoid the fines authorized by the Supreme Court in *Allis-Chalmers* may now do so by tendering his resignation and waiting thirty days before going back to his job. By allowing members to escape the influential effect of fines and similar sanctions in this manner, the Board's ruling substantially limits a union's ability to prevent its members from abandoning it during a strike.<sup>86</sup> This result, in turn, may affect the basic structure of union strike discipline. If the imposition or threat of fines has the effect not of securing the obedience of members, but rather of inducing them to exercise their section 7 right to resign, the effectiveness of the fine as a means of inducing and maintaining member loyalty will be greatly reduced. If fines imposed against strikebreakers do have this "backfire" effect, and assuming that a union has no desire to deplete its ranks through large scale resignations, the Board's ruling may cause a shift away from the use of fines toward alternative (and perhaps more positively reinforcing) methods of implementing union decisions.<sup>87</sup>

With respect to the 30-day rule articulated in the principal opinion, a question remains about the effect of the footnote which recognized the possibility that extraordinary circumstances may justify a restriction of longer than 30 days.<sup>88</sup> If the 30-day rule adopted by the Board is based purely on administrative considerations (i.e. clerical matters pertaining to the recording of the resignation, dues payments, etc.), it is somewhat difficult to envision "extraordinary circumstances" that would require an extension of the 30-day limitation. Conversely, the Board may be indicating that factors outside of the administrative context — for example, factors such as the timing of the resignation(s) in relation to the current status of union-employer negotiations — could warrant exceptions to the 30-day rule. If this is the case, the concurring opinion's description of the footnote as a "loophole tailor-made for enterprising litigation"<sup>89</sup> may prove correct. The absence of articulated standards underlying the "salutary" 30-day limit makes it difficult to define or predict the "extraordinary circumstances" to which Members Fanning and Zimmerman refer.<sup>90</sup> Further decisions will be required to determine whether the foot-

<sup>85</sup> See *Scofield*, 394 U.S. 423, 429, 70 L.R.R.M. at 3107 ("[I]f the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1).").

<sup>86</sup> See generally, Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: Allis Chalmers*, 1970 DUKE L.J. 1067, 1097 (1970).

<sup>87</sup> See, e.g., *id.* at 1103 ("... ultimately the union must rely upon persuasiveness of a more rational nature than fines to implement their decisions since the fine merely induces exercise of the section 7 right to resign . . .").

<sup>88</sup> 263 N.L.R.B. No. 141 at 12 n.21, 111 L.R.R.M. at 1118 n.21.

<sup>89</sup> 263 N.L.R.B. at 15 n.23, 111 L.R.R.M. at 1119 n.23 (Van de Water, Chairman, and Hunter, Member, concurring).

<sup>90</sup> Given the Board's emphasis on accommodating administrative concerns, see *supra* note 4, one plausible explanation is that the 30-day period derives from the monthly payment schedule for dues, a schedule utilized by many unions. See Gould, *supra* note 86 at 1102-03.

note reflects a willingness on the part of the Board to be more flexible with respect to the "vitality" of a member's section 7 rights.

Furthermore, the decision in *Dalmo Victor* fails to clarify the scope of its own applicability. The Board's 30-day rule validates union provisions which, to a limited extent, restrict a member's right to resign. Such provisions must be contrasted with those that inhibit a member's post-resignation conduct — provisions which, by virtue of the holdings in *Granite State* and *Booster Lodge*, are external and *de facto* invalid.<sup>91</sup> Unfortunately, while these doctrines are easily articulated, the procedural history of the case highlights the fact that a union's constitutional provision which may legally limit a member's right to resign (at least up to 30 days) is not always easily distinguishable from one which illegally proscribes post-resignation conduct. Reflective of the Board's disagreement with the court of appeals' description of the provision as a restriction on resignations, the principal opinion accepted the court's finding as the law of the case only, otherwise treating the provision as a restriction on post-resignation conduct.<sup>92</sup> Neither the Board nor the Court, however, set forth interpretive standards for ascertaining when a union has actually placed a reasonable restriction on its members' rights to resign and not a condition on post-resignation activities.<sup>93</sup> Unions seeking to take advantage of the Board's 30-day rule will thus have to exercise great care in drafting their constitutional provisions in order to guarantee their enforceability and to avoid violating the prohibitions expounded in *Booster Lodge* and *Granite State*.

These shortcomings notwithstanding, the Board's decision in *Dalmo Victor* striking down the union constitutional provision restricting a member's right to resign to nonstrike periods properly applies the relevant Supreme Court interpretations of sections 7 and 8(b)(1)(A) of the Act. Moreover, the 30-day rule established by Members Fanning and Zimmerman — a rule which appears to be the current Board position on the issue — accommodates union interests without significantly detracting from the section 7 policies of employee autonomy.

### 3. \**Secondary Boycotts and the Publicity Proviso*: Delta Air Lines, Inc.<sup>1</sup>

Under Section 8(b)(4)(ii)(B) of the Labor Management Relations Act (LMRA)<sup>2</sup> a union may not threaten, coerce or restrain any person engaged in commerce to force that person to cease doing business with any other person.<sup>3</sup> This provision outlaws secondary

<sup>91</sup> See *supra* text accompanying notes 15-19.

<sup>92</sup> 265 N.L.R.B. No. 141 at 3 n.4, 13 n.22, 111 L.R.R.M. at 1116 n.4, 1118-19 n.22.

<sup>93</sup> In Local Lodge No. 1994, International Association of Machinists and Aerospace Workers [O.K. Tool Company, Inc.], 215 N.L.R.B. 651, 653, 88 L.R.R.M. 1120, 1122 (1974), the Board treated an identically worded union provision as a prohibition on postresignation strikebreaking. The decision in *O.K. Tool Company, Inc.* formed much of the basis for the initial Board ruling in *Dalmo Victor*, 231 N.L.R.B. 719, 720-21, 96 L.R.R.M. 1160, 1161-62. See *supra* notes 30-31 and accompanying text.

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<sup>1</sup> 263 N.L.R.B. No. 153, 111 L.R.R.M. 1159 (1982).

<sup>2</sup> As amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704(a), 73 Stat. 542-43, 29 U.S.C. (Supp. 10, 1963) § 158(b)(4).

<sup>3</sup> The Act provides in part:

8(b) It shall be an unfair labor practice for a labor organization . . .

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . .

boycotts, which are exertions of pressure by a union against an employer with whom the union has no labor dispute in order to force him to cease doing business with another employer with whom the union does have a labor dispute.<sup>4</sup> The statute protects neutral employers from becoming enmeshed in labor disputes not of their own making and beyond their power to resolve.<sup>5</sup> A proviso to section 8(b)(4)(ii)(B), however, exempts certain kinds of publicity other than picketing from the statute's prohibition.<sup>6</sup> According to this proviso, the prohibition does not reach any coercive non-picketing publicity which truthfully informs the public that a secondary employer is distributing goods produced by an employer with whom the union has a primary dispute, and which does not induce any employees other than those of the primary employer to withhold their services.<sup>7</sup>

The proviso is generally recognized as an outgrowth of Senate concern for first amendment considerations.<sup>8</sup> National Labor Relations Board (NLRB or the Board) and

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(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, . . .

29 U.S.C. § 158(b)(4).

<sup>4</sup> A. Cox, D.C. Bok, R.A. GORMAN, *LABOR LAW*, 722 (Ninth ed. 1981). As an example of a secondary boycott, these authors describe the following scenario:

[A] union may seek to organize the employees at Company P, or may seek to extract economic concessions during a collective bargaining negotiation with Company P. An inducement of P's employees to engage in a work stoppage would be treated as 'primary' concerted activity, and a request to Company S which buys the product of Company P to refrain from doing so would be a 'primary' product boycott. . . . But if the request to Company S is unsuccessful, and the union attempts to coerce in turn that company to cease buying from . . . Company P — and that coercion takes the form of appealing to S's employees to engage in a work stoppage or to S's customers to boycott S's product — the union's pressure becomes 'secondary.'

*Id.*

<sup>5</sup> Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 U. KAN. L. REV. 653, 653 (1971). Such activity is considered "secondary" because it is an indirect means of exerting pressure on the party whose conduct the union really wants to influence, the employer with whom the union has the dispute. *Id.*

<sup>6</sup> The publicity proviso to section 8(b)(4) states:

*Provided further*, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods or not to perform any services, at the establishment of the employer engaged in such distribution; . . .

Section 8(b)(4)(ii)(B) of the LMRA as codified at 29 U.S.C. § 158(b)(4)(ii)(B).

<sup>7</sup> *Id.* See also *United Steel Workers of America and Pet, Incorporated*, 244 N.L.R.B. 96, 102 L.R.R.M. 1046 (1979), *reversed on other grounds* *Pet, Inc. v. N.L.R.B.*, 641 F.2d 545, 106 L.R.R.M. 2477 (8th Cir. 1981) where the Board found that the United Steel Workers did not violate section 8(b)(4)(ii)(B) by engaging in handbilling calling for a total consumer boycott of Pet in support of a strike against one of its subsidiaries. The Board stated that consumer boycott publicity fell outside the protection of the proviso only if it resulted in refusals by employees, other than the primary's, to perform their services, or if the publicity was untruthful. *Id.* at 100, 102 L.R.R.M. at 1049.

<sup>8</sup> In *N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 55 L.R.R.M. 2961 (1964) the Supreme Court stated:

'The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of

judicial decisions, moreover, have interpreted the protection of the publicity proviso broadly.<sup>9</sup> Accordingly, non-picketing publicity has lost the protection of the proviso only where it is untruthful, fails to identify the nature of the primary dispute or induces employees other than the primary employer's to withhold their services.<sup>10</sup> The proviso even protects publicity which advocates total consumer boycotts of the secondary employer.<sup>11</sup>

During the *Survey* year, however, the NLRB construed the protection of the proviso more narrowly. In *Hospital and Service Employees Union, Service Employees International Union, Los Angeles, Calif. and Delta Air Lines, Inc. (Delta Air Lines)*<sup>12</sup> the Board limited the proviso's protection to coercive publicity aimed at the secondary employer which concerns the primary dispute.<sup>13</sup> *Delta Air Lines* involved handbills and advertisements which truthfully identified the primary dispute, the parties, and their relationship, and did not induce any secondary employees to withhold their services. The Board nevertheless removed these handbills and advertisements from the proviso's protection because they contained additional information, unrelated to the primary dispute, which pertained solely to the secondary employer's business and was damaging to him.<sup>14</sup> Without the

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a secondary employer to stop all trading with him but not such publicity which has the effect of cutting off his deliveries or inducing his employees to cease work.'

*Id.* at 70-71, 55 L.R.R.M. at 2966. See also *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 55 L.R.R.M. 2957 (1964) where the Court stated: "The proviso was the outgrowth of a profound Senate concern that unions' freedom to appeal to the public for support of their case be adequately safeguarded." *Id.* at 55, 55 L.R.R.M. at 2960.

<sup>9</sup> See *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46 (1964) ("There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception . . ." *Id.* at 55. The Court in *Servette, Inc.* went on to interpret the proviso broadly to find that products "produced by an employer" included products distributed by a wholesaler with whom the primary dispute exists. *Id.*). *United Steel Workers of America and Pet, Inc.*, 244 N.L.R.B. 96, 102 L.R.R.M. 1046 (1979), *reversed on other grounds* *Pet, Inc. v. N.L.R.B.*, 641 F.2d 545, 106 L.R.R.M. 2477 (8th Cir. 1981) (where the board was willing to allow handbilling and other publicity which called for a total consumer boycott of a secondary employer); *Florida Gulf Coast Building Trades Council and The Edward J. DeBartolo Corporation*, 252 N.L.R.B. 702, 105 L.R.R.M. 1273 (1980) *enforced* *Edward J. DeBartolo Corp. v. N.L.R.B.*, 662 F.2d 264, 108 L.R.R.M. 2729 (4th Cir. 1981) (where the Board utilized a broad reading of the proviso to find that the union's failure to identify the primary employer specifically by name did not make the publicity untruthful. *Id.* at 704 n.2, 105 L.R.R.M. at 1274 n.2.). In the Fourth Circuit Court of Appeals' enforcing opinion, the Court stated moreover, that the proviso's language "is not to be read literally but instead is to be broadly construed." 662 F.2d 264, 299, 108 L.R.R.M. 2729, 2732 (1981).

<sup>10</sup> See *supra* note 4.

<sup>11</sup> See e.g., *Florida Gulf Coast Building Trades Council and The Edward J. DeBartolo Corporation*, 252 N.L.R.B. 702, 105 L.R.R.M. 1273 (1980) *enforced* *Edward J. DeBartolo Corp. v. N.L.R.B.*, 662 F.2d 264, 108 L.R.R.M. 2729 (4th Cir. 1981) (handbilling that called for total consumer boycott of shopping mall upheld when primary dispute was with a construction company building a store for only one of the tenants); *International Union of Operating Engineers, Local 139 and Oak Construction, Inc.*, 226 N.L.R.B. 759, 93 L.R.R.M. 1385 (1976) (handbilling that called for total consumer boycott of telephone company upheld when primary dispute was with a nonunion contractor who constructed manholes and underground telephone conduits); *Local 662, Radio and Telephone Engineers and Middle South Broadcasting Co.*, 133 N.L.R.B. 1698, 49 L.R.R.M. 1042 (1961) (handbilling that called for non-patronization of firms that advertised on certain radio stations upheld where primary dispute was with the radio stations).

<sup>12</sup> 263 N.L.R.B. No. 153, 111 L.R.R.M. 1159 (1982).

<sup>13</sup> *Id.* at 8-9, 111 L.R.R.M. at 1161.

<sup>14</sup> *Id.* at 10, 111 L.R.R.M. at 1162.

protection of the proviso, the NLRB ruled, the publicity constituted secondary boycott activity prohibited by section 8(b)(4)(ii)(B).<sup>15</sup>

The dispute in *Delta Air Lines* originated when Delta Air Lines (Delta) legally terminated its contract for janitorial services with National Cleaning Company (National) and began contracting out janitorial work to Statewide, a non-union janitorial service.<sup>16</sup> National, a party to a collective bargaining agreement with the Hospital and Service Employees Union (the union), then laid off five employees who had worked at Delta.<sup>17</sup> The union thereafter had a primary labor dispute with Statewide, the non-union company, but no primary dispute with Delta.<sup>18</sup> As Delta had lawfully terminated its contract with Nationwide, it was a neutral party.<sup>19</sup> Thus, any pressure exerted by the union against Delta was secondary to the primary dispute.<sup>20</sup> In furtherance of the primary dispute, however, the union distributed handbills at Delta's administrative offices in the Los Angeles International Airport and in front of Delta's downtown Los Angeles ticket office.<sup>21</sup>

Four different handbills, referred to by the Board as Handbills A, B, C, and D, were distributed at different times, and portions of them were published in union newspapers.<sup>22</sup> Handbill A contained an appeal to the public to boycott Delta because it did "not provide AFL-CIO conditions of employment."<sup>23</sup> On the reverse side the handbill listed critical National Transportation Board (NTB) and Civil Aeronautics Board (CAB) statistics pertaining to Delta's accident and consumer complaint records.<sup>24</sup> Handbill B included the same NTB and CAB statistics concerning Delta's accident record.<sup>25</sup> Neither Handbill A nor B referred to Statewide or the existence of a primary dispute.<sup>26</sup> Handbills C and D contained the same NTB and CAB information but also included introductory statements on side one.<sup>27</sup> Handbill C stated that Delta had caused union members to become unemployed and had subcontracted with a non-union "maintenance company."<sup>28</sup> Handbill D's introductory statement was more specific. It identified Statewide by name and explained that the NTB and CAB statistics were being brought to the public's attention in furtherance of a primary labor dispute with Statewide.<sup>29</sup>

Delta filed charges with the NLRB, alleging that the union had violated the secondary boycott provisions of the LMRA by distributing the handbills and publishing portions of them in union newspapers, with the object of forcing Delta to cease doing business with

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<sup>15</sup> *Id.* at 11, 111 L.R.R.M. at 1162.

<sup>16</sup> *Id.* at 2, 111 L.R.R.M. at 1160.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 3, 111 L.R.R.M. at 1160.

<sup>22</sup> *Id.* at 3-5, 111 L.R.R.M. at 1160. Specifically, Handbill A was published in the September editions of the *Service Union Reporter* (SUR) and the *Service Union Reporter, Political Action Report*, (SURPAR) and Handbill C in the October edition of these two newspapers. In addition the union published a block advertisement in the September edition of SUR and the October edition of SURPAR. The Board treated the advertisements as extensions of the published handbills. *Id.*

<sup>23</sup> *Id.* at 3, 111 L.R.R.M. at 1160.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 7, 111 L.R.R.M. at 1161.

<sup>27</sup> *Id.* at 4, 111 L.R.R.M. at 1160.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Statewide, the primary employer.<sup>30</sup> An administrative law judge, finding that the NTB and CAB information was unrelated to any dispute with Delta and was misleading and "highly coercive,"<sup>31</sup> ruled that the union's handbilling and advertising violated section 8(b)(4)(ii)(B).

In filing exceptions to these conclusions,<sup>32</sup> the union made three arguments. First, the union asserted that Handbills A, B, and C were not even at issue because they had been voluntarily withdrawn from circulation.<sup>33</sup> Second, the publicity proviso of section 8(b)(4)(ii)(B) protected Handbill D, the union claimed, because it contained only truthful information and identified the primary dispute.<sup>34</sup> Finally, the union asserted that even if the inclusion of the NTB and CAB statistics placed Handbill D outside of the protection of the publicity proviso, the handbill was nevertheless protected by the Free Speech clause of the first amendment.<sup>35</sup>

Finding that the handbills were used to coerce Delta to stop working with Statewide, the Board held that all four handbills and the newspaper advertisements violated the general prohibition of section 8(b)(4)(ii)(B) because they were used to coerce the secondary employer to stop doing business with Statewide.<sup>36</sup> Moreover, the publicity proviso did not protect the challenged literature because, in the Board's view, the handbills and advertisements were not intended to advise the public truthfully about the nature of the primary dispute.<sup>37</sup> Finally, the Board refused to find that the first amendment protected the union publicity.<sup>38</sup>

In determining that the union's publicity was unlawful, the Board first decided that the handbilling and advertising fell within the prohibition of section 8(b)(4).<sup>39</sup> The Board pointed out that section 8(b)(4) prohibited activity designed to coerce or restrain any person from doing business with any other person.<sup>40</sup> Since the union did not dispute that the publicity was designed to bring economic pressure on Delta to force it to stop doing business with Statewide,<sup>41</sup> the Board ruled that the publicity clearly fell within the proscription of section 8(b)(4).<sup>42</sup> Thus the major issue before the Board was whether the publicity proviso saved the handbilling and advertising from violating section 8(b)(4).<sup>43</sup>

Turning to the union's publicity proviso argument, the Board noted that the proviso protects all publicity, other than picketing, which is designed "for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer."<sup>44</sup> The Board indicated that protected publicity can not "have an effect of inducing any individuals employed by any person other than the primary employer" to

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<sup>30</sup> *Id.* at 2, 111 L.R.R.M. at 1160.

<sup>31</sup> *Id.* at 4, 111 L.R.R.M. at 1160.

<sup>32</sup> All parties excepted to the Administrative Law Judge's factual findings. *Id.* at 2, 111 L.R.R.M. at 1160.

<sup>33</sup> *Id.* at 5, 111 L.R.R.M. at 1160.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, 111 L.R.R.M. at 1160-61.

<sup>36</sup> *Id.* at 13-14, 111 L.R.R.M. at 1163.

<sup>37</sup> *Id.* at 8-9, 111 L.R.R.M. at 1161-62.

<sup>38</sup> *Id.* at 13-14, 111 L.R.R.M. at 1163.

<sup>39</sup> *Id.* at 5-6, 111 L.R.R.M. at 1161.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 6, 111 L.R.R.M. at 1161.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

withhold their services.<sup>45</sup> Since all parties stipulated that the union's conduct did not cause any of Delta's employees to engage in a work stoppage,<sup>46</sup> the Board narrowed the issue to whether the handbills were for the purpose of truthfully informing the public within the meaning of the proviso.<sup>47</sup>

The Board stated that, at a minimum, the proviso requires that publicity advise the public of the nature of the dispute and of the secondary employer's relationship to the dispute.<sup>48</sup> Since Handbills A and B failed to mention Statewide or indicate that a primary dispute existed with an employer other than Delta, the Board concluded that they were not for the purpose of truthfully advising the public and therefore violated section 8(b)(4).<sup>49</sup> The Board recognized that Handbills C and D in contrast to Handbills A and B, did identify the nature of the primary dispute.<sup>50</sup> These handbills also included, however, adverse statistical information about Delta's accident and consumer complaint record.<sup>51</sup> In the Board's view the NTB and CAB statistics constituted threats, restraint or coercion for an unlawful purpose within the meaning of section 8(b)(4)(ii)(B).<sup>52</sup> The publicity proviso did not protect such coercive information which attacked a secondary employer for reasons unrelated to its role in the primary dispute according to the Board.<sup>53</sup> The proviso requires, the Board reasoned, that *all* coercive publicity aimed at a secondary employer must be related to the primary dispute in order to be "for the purpose of truthfully advising the public."<sup>54</sup>

In finding the literature unprotected under the publicity proviso, the Board emphasized two factors. First, the Board asserted that the express language of the "for the purpose" clause of the proviso supported its interpretation.<sup>55</sup> It noted that the proviso stated that nothing in section 8(b)(4) shall be construed to prohibit "publicity, other than picketing, for the purpose of truthfully advising the public" of the nature of the primary dispute.<sup>56</sup> The Board read this language to mean that *all* coercive information contained in secondary publicity had to be for the purpose of truthfully advising the public of the primary dispute.<sup>57</sup> According to the Board's interpretation, the inclusion of any coercive information unrelated to the primary dispute did not satisfy the express requirements of the proviso and removed the publicity from its protection.<sup>58</sup>

In addition to its analysis based on the wording of the provision, the Board asserted that its "all or nothing" interpretation furthered the Congressional purpose in enacting section 8(b)(4).<sup>59</sup> According to the Board, Congress enacted section 8(b)(4) to protect neutral secondary employers from becoming involved in labor disputes not of their own making.<sup>60</sup> If unions were allowed to publish coercive and unrelated information about the

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<sup>45</sup> *Id.*, quoting § 8(b)(4)(ii)(B) of the L.M.R.A.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 6-7, 111 L.R.R.M. at 1161.

<sup>49</sup> *Id.* at 7, 111 L.R.R.M. at 1161.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 8, 111 L.R.R.M. at 1161.

<sup>53</sup> *Id.* at 8-11, 111 L.R.R.M. at 1161-62.

<sup>54</sup> *Id.* at 8, 111 L.R.R.M. at 1161.

<sup>55</sup> *Id.* at 8-9, 111 L.R.R.M. at 1161.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 9, 111 L.R.R.M. at 1161-62.

<sup>60</sup> *Id.*

secondary employer, according to the Board, secondary employers would be drawn into labor disputes not their own.<sup>61</sup> Thus, in the Board's view, the Congressional objective of insulating secondary employers mandates that *all* coercive information regarding secondary employers be related to the primary dispute.<sup>62</sup> A contrary interpretation of the proviso, the Board stated, would contradict the Congressional intent behind section 8(b)(4).<sup>63</sup>

On the basis of its interpretation of the proviso of section 8(b)(4), the Board found that the union had not included the NTB and CAB statistical information for the purpose of truthfully informing the public of the nature of the primary dispute.<sup>64</sup> In the Board's view this information was misleading because it implied that the union had an independent dispute with Delta over Delta's poor flying record.<sup>65</sup> The adverse statistics had nothing to do with the primary dispute with Statewide over janitorial services.<sup>66</sup> Inclusion of the unrelated NTB and CAB information, the Board determined, removed the handbills from the protection of the publicity proviso. The distribution of the handbills therefore, in the Board's view, violated section 8(b)(4)(ii)(B).<sup>67</sup>

Having disposed of the union's arguments under the publicity proviso, the Board considered the union's alternative contention that the first amendment protected the handbills and advertisements.<sup>68</sup> The Board simply asserted that as an administrative agency it was compelled to presume the constitutionality of the statute it was charged with administering.<sup>69</sup> Thus, the Board presumed that its finding of an LMRA violation was consistent with the constitution and the congressional intent to outlaw secondary boycotts.<sup>70</sup>

In a concurring and dissenting opinion, Member Zimmerman criticized the Board for interpreting the proviso so narrowly.<sup>71</sup> He asserted that once the union truthfully identified the nature of the primary dispute, it was free to include in its publicity any additional information aimed solely at the secondary employer.<sup>72</sup> The only restrictions recognized by Zimmerman were those expressly mentioned in the proviso, namely, that the additional information also be truthful and not induce any employees, other than the primary employer's, to withhold their services.<sup>73</sup> Member Zimmerman suggested that his broad reading of the proviso was consistent with the proviso's legislative history, prece-

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<sup>61</sup> *Id.* at 9-10, 111 L.R.R.M. at 1162.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 10, 111 L.R.R.M. at 1162.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 11, 111 L.R.R.M. at 1162. The Board also found that the publication of Handbills A and C in the union newspapers were violative of § 8(b)(4)(ii)(B) for the same reasons that the distribution of the Handbills was violative of the section. *Id.* at 12, 111 L.R.R.M. at 1162.

<sup>68</sup> *Id.* at 13-14, 111 L.R.R.M. at 1163.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> The majority holds that *all* apparently coercive information in handbills, or in other nonpicketing publicity, aimed at a secondary employer must relate to the primary dispute in order for such publicity to be privileged under the proviso. In so doing, it misconstrues the language of the proviso, misreads its legislative history, misapplies Board precedent, and mistakenly ignores serious constitutional issues.

*Id.* at 33, 111 L.R.R.M. at 1168.

<sup>72</sup> *Id.* at 34, 111 L.R.R.M. at 1168.

<sup>73</sup> *Id.* at 37, 111 L.R.R.M. at 1169.

dent, the language of the proviso and first amendment considerations underlying the proviso's enactment.<sup>74</sup>

According to Member Zimmerman, the sparse legislative history, coupled with pertinent Board and Supreme Court precedent, indicates that the proviso's underlying purpose is to safeguard labor unions' first amendment rights.<sup>75</sup> The Board's narrow interpretation, in Zimmerman's view, restricted union speech in violation of the first amendment.<sup>76</sup> He acknowledged that picketing as a mixture of speech and conduct could be restricted without raising a first amendment problem.<sup>77</sup> The first amendment prohibited content-based restriction on speech.<sup>78</sup> He contended that sensitivity to these first amendment concerns inspired Congress to exclude publicity other than picketing from 8(b)(4)'s prohibition.<sup>79</sup> According to Zimmerman, Congress recognized that it could not prohibit non-picketing publicity without infringing a union's freedom of expression.<sup>80</sup> He also cited precedent that indicated that the proviso resulted from Congressional awareness of first amendment guarantees.<sup>81</sup> Thus, in Member Zimmerman's view, the Board's narrow interpretation of the proviso violated the constitutional guarantee of free speech which Congress and the judiciary had sought to protect.<sup>82</sup> The proviso's underlying concern for

<sup>74</sup> *Id.* at 34, 111 L.R.R.M. at 1168.

<sup>75</sup> *Id.* at 35-39, 111 L.R.R.M. at 1168-69. To support his theory that the proviso was added in response to first amendment considerations, Zimmerman examined in depth two remarks made by then Senator John F. Kennedy. Senator Kennedy chaired the conference between the Senate and House to resolve the differences between their two versions of the bill. *Id.* at 35, 111 L.R.R.M. at 1168. The first statement was made in response to the House passed revisions of section 8(b)(4) which contained no publicity proviso. Senator Kennedy is quoted as saying: "One of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression. The portions of the House bill which have this effect are unacceptable." 105 CONG. REC. 15222 (daily ed.) reprinted in II LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 1708, as quoted in *Delta Air Lines*, 263 N.L.R.B. No. 253 at 35, 111 L.R.R.M. at 1168 (Member Zimmerman concurring and dissenting).

The second statement quoted by Member Zimmerman was made by Senator Kennedy when the compromise bill, which contained the publicity proviso as added by the Senate, was adopted. Senator Kennedy stated:

[W]e were able to persuade [the House] to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

105 CONG. REC. 16414 (daily ed. September 3, 1959), reprinted in II LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 1432, as quoted in *Delta Air Lines*, at 36, 111 L.R.R.M. at 1168 (Member Zimmerman concurring and dissenting).

Among the Supreme Court precedents cited by Zimmerman was the watershed case of *N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, Local 760, and Tree Fruit Labor Relations Committee, Inc.*, 377 U.S. 58 (1964). He also quoted *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46 (1964): "The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded . . ." *Id.* at 55, *Delta Air Lines*, at 40, 111 L.R.R.M. at 1169.

<sup>76</sup> *Id.* at 35-37, 111 L.R.R.M. at 1168-69.

<sup>77</sup> *Id.* at 41, 111 L.R.R.M. at 1170, quoting Justice Stevens' concurring opinion in *N.L.R.B. v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619 (1980).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 40, 111 L.R.R.M. at 1169.

<sup>80</sup> *Id.* at 37-38, 111 L.R.R.M. at 1168-69.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 39, 111 L.R.R.M. at 1169.

free speech, according to Member Zimmerman, mandated a broad reading of the proviso.<sup>83</sup>

Turning to the language of the statute, Member Zimmerman maintained that it requires no more than that the information presented identify the relationship between the primary and secondary employers.<sup>84</sup> Absent legislative intent to the contrary, Zimmerman could find no basis in the proviso language for a limitation on additional truthful information to buttress an appeal for a consumer boycott of a secondary employer.<sup>85</sup> Moreover, according to Member Zimmerman, the Board and the courts previously had held that such an appeal could call for a boycott of the secondary employer's entire business and not merely for a limited boycott of the product or services involved in the primary dispute.<sup>86</sup> He reasoned, therefore, that if the proviso protects a boycott which extended beyond the primary dispute, it must also protect publicity that included information which extended beyond the primary dispute.<sup>87</sup>

Given the ambiguity of the proviso's language, Member Zimmerman felt the Board was compelled to interpret the proviso in a way that most reflected constitutional considerations.<sup>88</sup> He implied that the Board violated this mandate of statutory construction by interpreting the proviso so narrowly that a union's constitutional right of free speech was impinged.<sup>89</sup> Taken together, the legislative history, the language of the proviso and the constitutional considerations impelled Member Zimmerman to reject the majority's restrictive interpretation of the proviso and embrace instead the interpretation that publicity, to be protected, need only be truthful and not induce any non-primary employees to withhold services.<sup>90</sup>

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<sup>83</sup> "[I]f appeals to consumers take the form of 'publicity other than picketing,' the proviso comes into play and any resultant deterrence of customers of the secondary employer will be tolerated because of the preference afforded freedom of speech." *Id.* at 41, 111 L.R.R.M. at 1170.

<sup>84</sup> *Id.* at 37, 111 L.R.R.M. at 1168-69.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 40, 111 L.R.R.M. at 1170 *citing, inter alia*, *United Steel Workers of America and Pet, Incorporated*, 244 N.L.R.B. 96, 102 L.R.R.M. 1046 (1979), *reversed on other grounds* *Pet, Inc. v. N.L.R.B.*, 641 F.2d 545, 106 L.R.R.M. 2477 (8th Cir. 1981); *International Brotherhood of Electrical Workers and Middle South Broadcasting Co.*, 133 N.L.R.B. 1698, 49 L.R.R.M. 1042 (1961); *International Union of Operating Engineers Local 139 and Oak Construction, Inc.*, 226 N.L.R.B. 759, 93 L.R.R.M. 1385 (1976); *American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55 and Great Western Broadcasting Corporation, d/b/a KXTV*, 150 N.L.R.B. 467, 58 L.R.R.M. 1019 (1964).

<sup>87</sup> *Id.* at 42, 111 L.R.R.M. at 1170. Zimmerman also pointed out that the Board had also read broadly the proviso's requirement that the information be truthful. He noted that in *Florida Gulf Coast Building Trade Council and Edward J. DeBartolo*, 252 N.L.R.B. 702, 105 L.R.R.M. 1273 (1980), *enforced* *Edward J. DeBartolo Corporation v. N.L.R.B.*, 662 F.2d 264 (4th Cir. 1981) and *Central Indiana Building and Construction Council and K-Mart Corporation*, 257 N.L.R.B. 86, 107 L.R.R.M. 1463 (1981), the Board found that a union's failure to identify the primary employer specifically by name in its handbill did not render the handbill untruthful. *Id.* at 43-45, 111 L.R.R.M. at 1170-71.

<sup>88</sup> *Id.* at 47-48, 111 L.R.R.M. at 1171.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 48, 111 L.R.R.M. at 1172. In applying his reasoning to the instant case, Member Zimmerman found that Handbills A and B were not protected by the proviso because they did not even meet the minimum requirement of identifying the primary dispute. Thus he joined the majority in finding that they violated section 8(b)(4). Handbills C and D, however, did sufficiently identify the primary dispute in his view. Moreover, according to his broad interpretation of the proviso, the inclusion of the additional NLRB and CAB statistics pertaining to Delta's accident and consumer report record did not remove Handbills C and D from the proviso's protection. Therefore,

In a separate opinion, Member Jenkins also concurred in part and dissented in part.<sup>91</sup> Jenkins concurred with the Board in all but its treatment of the publication of Handbills A and C in union newspapers.<sup>92</sup> According to Jenkins, section 8(b)(4) prohibits conduct which has a reasonably foreseeable consequence of forcing a neutral business into a labor dispute not of its own making.<sup>93</sup> In his opinion, the publication of information in a union newspaper of limited circulation was not such conduct.<sup>94</sup> Rather, in his view, the foreseeable impact of such intra-union communication on a neutral business was trivial.<sup>95</sup> For that reason, Member Jenkins contended that the challenged newspaper publications were not coercive within the meaning of section 8(b)(4)(ii)(B).<sup>96</sup> Member Jenkins also felt that a restriction on a union's use of its own newspapers raised attendant first amendment problems.<sup>97</sup> Absent legislative intent to the contrary, Jenkins asserted that such a restriction was inappropriate.<sup>98</sup>

The significance of *Delta Air Lines* lies in its imposition of a limitation on the information that a union may use in handbills or other nonpicketing publicity pertaining to a secondary employer.<sup>99</sup> This limitation seems inconsistent with both the first amendment guarantee of free speech and prior judicial and administrative decisions which interpret the proviso broadly. Although the Board's decision may be consistent with the spirit of section 8(b)(4) that secondary employers should be insulated from labor disputes not of their own making,<sup>100</sup> it seems inconsistent with constitutional guarantees of freedom of expression. The proviso was apparently added in response to congressional concerns that a prohibition of all union publicity would abridge first amendment rights.<sup>101</sup> The pertinent legislative history, moreover, does not indicate any lesser concern for first amendment protection of publicity related only to a secondary employer than for publicity related to a primary dispute.<sup>102</sup> The Board, however, found a distinction between the two in the language of the proviso. It interpreted the "for the purpose of truthfully advising the public" phrase as limiting the publicity to only that information which was intended to inform the public of the secondary employer's relation to the primary dispute.<sup>103</sup> Read in context, the phrase could give rise to such an interpretation.<sup>104</sup> Alternatively, the phrase could be interpreted as meaning that the publicity need only disclose the nature of the primary dispute. That disclosure could be viewed as publicity for the purpose of truthfully advising the public of the primary dispute. The inclusion of additional truthful information would, therefore, have no effect on the publicity's acceptability. The legisla-

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Member Zimmerman dissented with the majority to the extent it found Handbills C and D violative of section 8(b)(4). *Id.* As to the publication of Handbills A and C in the union newspaper, Zimmerman agreed with the majority that Handbill A's publication was a violation of section 8(b)(4) but in his view, Handbill C's was not. *Id.* at 49-50 n.76, 111 L.R.R.M. at 1172 n.76.

<sup>91</sup> *Id.* at 17-32, 111 L.R.R.M. at 1163-67.

<sup>92</sup> *Id.* at 27-32, 111 L.R.R.M. at 1166-67.

<sup>93</sup> *Id.* at 29-30, 111 L.R.R.M. at 1167.

<sup>94</sup> *Id.* at 30, 111 L.R.R.M. at 1167.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 31, 111 L.R.R.M. at 1167.

<sup>98</sup> *Id.*

<sup>99</sup> See *supra* text accompanying note 13.

<sup>100</sup> See *supra* note 5 and accompanying text.

<sup>101</sup> See *supra* note 75.

<sup>102</sup> *Id.*

<sup>103</sup> See *supra* text accompanying notes 44-54.

<sup>104</sup> See *supra* note 6.

tive history, moreover, indicates no Congressional intent to differentiate between publicity relating only to the primary dispute and any other publicity.<sup>105</sup> Absent express language to the contrary, it seems that Congress recognized that all truthful publicity deserves first amendment protection.

As Member Zimmerman cautioned, whenever a statute is ambiguous, it should be construed to accord with constitutional guarantees.<sup>106</sup> The Board's narrow interpretation limits a union's constitutional right to print and distribute truthful information about a secondary employer. Given the absence of legislative history supporting such a narrow view, and the ambiguity of the proviso's language, the Board should not have interpreted the statute so narrowly as to raise this potential first amendment problem.

Furthermore, precedent exists which suggests that the proviso should be interpreted as broadly as is consistent with Congress' purpose in enacting section 8(b)(4).<sup>107</sup> Neither the Board nor the courts have interpreted the section or the proviso to mean that a secondary employer should be *completely* insulated from a primary labor dispute. The Supreme Court in *NLRB v. Fruit and Vegetable Packers, Local 760 (Tree Fruits)*,<sup>108</sup> for example, held that picketing at a secondary site did not violate section 8(b)(4)(ii)(B) if it "followed the product."<sup>109</sup> In other words, the Court refused to protect secondary employers from on-site picketing which was used to persuade customers to cease buying only the products of the struck primary employer.<sup>110</sup> Furthermore, non-picketing publicity has been upheld by the courts and the Board even though it contained an appeal for a *total* consumer boycott of the secondary, and not just a boycott of the primary's product distributed by the secondary.<sup>111</sup> The courts and the Board should have realized subjecting the secondary employer to limited picketing and publicity calling for a total consumer boycott would enmesh that secondary employer in the primary dispute.<sup>112</sup> It appears, however, that neither the courts nor the Board have recognized that Congress' intent in enacting section 8(b)(4) was to insulate completely the secondary employer from involvement in the primary dispute. Hence, the Board's limitation in *Delta Air Lines* of protected publicity to information pertaining solely to the primary dispute cannot be justified on the basis of Congressional intent to insulate secondary employers.

Given the concomitant constitutional concerns, the ambiguity of the proviso's language and the lack of legislative history indicating a narrow interpretation, the Board's interpretation of the proviso seems unsupportable. If followed in future Board and court decisions, however, the inclusion in a handbill or other non-picketing publicity of any information which does not pertain to the primary dispute will remove that publicity from the protection of the proviso and reduce it to coercive activity in violation of section 8(b)(4)(ii)(B).

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<sup>105</sup> See *supra* note 75.

<sup>106</sup> 263 N.L.R.B. No. 153 at 47, 111 L.R.R.M. at 1171.

<sup>107</sup> See *supra* note 9.

<sup>108</sup> 377 U.S. 58 (1964).

<sup>109</sup> *Id.* at 72.

<sup>110</sup> *Id.*

<sup>111</sup> See *supra* note 11.

<sup>112</sup> "The publicity proviso clearly envisions that secondary employers may become enmeshed in labor disputes as a result of their relationship with a primary employer, provided that such entanglement neither induces the secondary's employees to halt work nor interrupts deliveries to it." 263 N.L.R.B. at 40, 111 L.R.R.M. at 1169 (Member Zimmerman dissenting in part).

## III. CONCERTED ACTIVITY

A. \*Concerted Activity Under Section 7: Comet Fast Freight, Inc.<sup>1</sup>

The National Labor Relations Act<sup>2</sup> was enacted to equalize the bargaining positions between employers and employees and to facilitate peaceful resolution of work-related grievances.<sup>3</sup> Section 7 of the Act grants an employee the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."<sup>4</sup> An employer who coerces, restrains or interferes with an employee's exercise of his section 7 rights engages in an unfair labor practice in violation of section 8(a)(1) of the Act.<sup>5</sup> Consequently, an employee discharged for exercising his protected rights may challenge his discharge and seek reinstatement.<sup>6</sup>

Although an employee is protected by the Act when he engages in a concerted activity, the definition and scope of the term "concerted activities" has plagued the National Labor Relations Board and the courts for many years.<sup>7</sup> The problem of defining the parameters of this term is particularly acute when an employee takes unilateral action which may benefit his fellow employees.<sup>8</sup>

There have been two general approaches to defining the term "concerted activities," a restrictive approach and a constructive approach.<sup>9</sup> Examples of the restrictive approach are found in the *National Labor Relations Board v. Northern Metal Co.*<sup>10</sup> and *Mushroom Transportation Co. v. National Labor Relations Board*<sup>11</sup> decisions. In these cases, the United

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\* By Carole Cattaneo Gori, Staff Member, BOSTON COLLEGE LAW REVIEW.

<sup>1</sup> 262 N.L.R.B. No. 40, 110 L.R.R.M. 1321 (1982).

<sup>2</sup> 29 U.S.C. §§ 151-68 (1976 and Supp. V 1981).

<sup>3</sup> See generally 29 U.S.C. § 151 (1976).

<sup>4</sup> 29 U.S.C. § 157 (1976).

<sup>5</sup> 29 U.S.C. § 158(a)(1) (1976).

<sup>6</sup> Blaw-Knox Foundry & Mill Machinery, Inc., 247 N.L.R.B. 333, 351, 103 L.R.R.M. 1222, 1223 (1980); Thermofill, Inc., 244 N.L.R.B. 1056, 1059, 102 L.R.R.M. 1271, 1271 (1979); Steere Dairy, Inc., 237 N.L.R.B. 1350, 1353, 99 L.R.R.M. 1434, 1434 (1978); Self Cycle & Marine Distributor Co., 237 N.L.R.B. 75, 96-97, 98 L.R.R.M. 1517, 1518 (1978); Air Surrey Corporation, 229 N.L.R.B. 1064, 1072-73, 95 L.R.R.M. 1212, 1213 (1977); McLean Trucking Company, 216 N.L.R.B. 925, 925, 88 L.R.R.M. 1649, 1649 (1975).

<sup>7</sup> *National Labor Relations Board v. Northern Metal Company*, 440 F.2d 881, 884-85, 76 L.R.R.M. 2958, 2960-61 (3d Cir. 1971). The court of appeals in *Northern Metal* reviewed the two interpretations afforded to this term before adopting the most restrictive reading of the statute. *Id.* For recent Board decisions construing this provision, see *Blaw-Knox Foundry & Mill Machinery*, 247 N.L.R.B. 333, 345-51, 103 L.R.R.M. 1222, 1222 (1980); *Ontario Knife Company*, 247 N.L.R.B. 1288, 1288-89, 103 L.R.R.M. 1309, 1309-10 (1980); *Datapoint Corp.*, 246 N.L.R.B. 234, 235, 102 L.R.R.M. 1464, 1465-66 (1979); *Steere Dairy, Inc.*, 237 N.L.R.B. 1350, 1351-53, 99 L.R.R.M. 1434, 1434 (1978). See also *infra* notes 9-17 and accompanying text.

<sup>8</sup> *Id.*

<sup>9</sup> *National Labor Relations Board v. Northern Metal Company*, 440 F.2d 881, 884-85, 76 L.R.R.M. 2958, 2960-61 (3d Cir. 1971). For a comprehensive discussion of these two approaches, see generally Comment, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152 (1972). See also, Note, *Representation During Hiatus Period: Anchortank, Inc. v. NLRB*, 23 B.C. L. REV. 114, 114-15 (1981).

<sup>10</sup> 440 F.2d 881, 76 L.R.R.M. 2958 (3d Cir. 1971). In *Northern Metal*, a probationary employee sought to enforce a provision of a collective bargaining agreement. *Id.* at 882-83, 76 L.R.R.M. at 2959-60. Adopting the restrictive interpretation of section 7, the court held that the employee did not engage in protected activity because none of the employee's co-workers shared his concern. *Id.* at 886-87, 76 L.R.R.M. at 2959-60.

<sup>11</sup> 330 F.2d 683, 56 L.R.R.M. 2034 (3d Cir. 1964). In *Mushroom*, an employee was discharged for threatening to report his employer for I.C.C. violations. *Id.* at 684, 56 L.R.R.M. at 2035. The court

States Court of Appeals for the Third Circuit indicated that to demonstrate that there was concerted activity in a particular instance, an employee must show that he was in fact acting with other employees to guarantee a collective right.<sup>12</sup> Accordingly, other employees must share the employee's concern, and the grievance must, if remedied, benefit the collective workforce.<sup>13</sup> This approach, therefore, requires that the employee's actions have both the purpose and effect of aiding a collective interest in order to be protected activity under the Act.<sup>14</sup>

Under the constructive approach, an employee need not show that he was actually acting with other employees.<sup>15</sup> This approach requires only that the effects of the employee's action would benefit his co-workers, for there to be concerted activity.<sup>16</sup> The leading case espousing the constructive approach is *National Labor Relations Board v. Interboro Contractors, Inc.*<sup>17</sup> In that case, the United States Court of Appeals for the Second Circuit stated that an employee's attempt to enforce the provisions of a collective bargaining agreement may be deemed concerted activities within the meaning of the Act, even if such action were unilateral and without the support of other employees.<sup>18</sup>

During the *Survey* year, the National Labor Relations Board (NLRB) reconsidered the definition and, hence, the scope of the term "concerted activities" under section 7 of the Act. In *Comet Fast Freight, Inc.*,<sup>19</sup> the NLRB, in a two-to-one decision, held that an employee's refusal to drive an unsafe truck did not constitute concerted activity because his co-workers did not share his concern about the safety of the truck.<sup>20</sup> In a vigorous dissent,<sup>21</sup> Member Jenkins attacked the majority's reliance on a restrictive construction of section 7.<sup>22</sup>

In *Comet Fast Freight, Inc.*, Richard Chandler challenged his discharge from employment following his refusal to drive a truck which he considered unsafe for operation.<sup>23</sup> Chandler had worked for the respondent company for approximately two weeks.<sup>24</sup> His responsibilities included driving the respondent's trucks.<sup>25</sup> Chandler was assigned to Truck No. 10 during the major portion of his employment.<sup>26</sup> Other employees had driven Truck No. 10 on occasion.<sup>27</sup> On May 7, 1982, Chandler came close to having an

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held that the employee did not engage in protected activities, reasoning that none of the employee's co-workers were planning to join with the employee in protest. *Id.* at 684-85, 56 L.R.R.M. at 2035-36.

<sup>12</sup> *National Labor Relations Board v. Northern Metal Company*, 440 F.2d at 884, 76 L.R.R.M. at 2961 (quoting *Indiana Gear Works v. NLRB*, 371 F.2d 283, 286 (7th Cir. 1967)); *Mushroom Transportation Company v. National Labor Relations Board*, 330 F.2d at 685, 56 L.R.R.M. at 2035-36.

<sup>13</sup> *Id.*

<sup>14</sup> Note, *Representation During Hiatus Period*, *supra* note 9, at 115.

<sup>15</sup> Comment, *Constructive Concerted Activity*, *supra* note 9, at 158-59.

<sup>16</sup> *Id.*

<sup>17</sup> 388 F.2d 495, 67 L.R.R.M. 2083 (2d Cir. 1967).

<sup>18</sup> *Id.* at 499-500, 67 L.R.R.M. at 2087. The court stated: "Furthermore, while interest on the part of fellow employees would indicate a concerted purpose, activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees." *Id.* at 500, 67 L.R.R.M. at 2087.

<sup>19</sup> *Comet Fast Freight, Inc.*, 262 N.L.R.B. No. 40, 110 L.R.R.M. 1321 (1982).

<sup>20</sup> 110 L.R.R.M. at 1321.

<sup>21</sup> See *infra* notes 23-42 and accompanying text.

<sup>22</sup> See *infra* notes 44-53 and accompanying text.

<sup>23</sup> 110 L.R.R.M. at 1321.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

accident because the turn signals in the truck were not operating.<sup>28</sup> He immediately reported this defect to the company's manager and recommended that the truck receive repairs.<sup>29</sup> The company refused to make the repairs and terminated Chandler's employment when he refused to drive the truck in its state of disrepair.<sup>30</sup>

The Administrative Law Judge concluded that Chandler possessed a reasonable belief as to the truck's condition, and that his refusal to drive Truck No. 10 involved concerted activity protected by section 7 of the Act.<sup>31</sup> Accordingly, the Administrative Law Judge held that Chandler's employer had interfered with the exercise of his section 7 rights and that the discharge was in violation of section 8(a)(1).<sup>32</sup> In reaching this conclusion, the Administrative Law Judge noted that Chandler's complaint centered around a safety problem which was of concern to all of his co-workers.<sup>33</sup> The Administrative Law Judge recognized that although Chandler was concerned only for his own safety in refusing to drive the truck,<sup>34</sup> his action, nevertheless, could be considered concerted activity.<sup>35</sup>

In reversing the Administrative Law Judge's decision,<sup>36</sup> a majority of the Board stated that the fact that Chandler's concern for safety did not involve co-workers, by itself, would not defeat his claim.<sup>37</sup> The majority stated, however, that since none of Chandler's co-workers objected to driving the truck, the truck's condition was not a common concern.<sup>38</sup> Accordingly, the majority concluded that Chandler did not engage in protected concerted activity.<sup>39</sup> In reaching this conclusion, the majority distinguished five cases<sup>40</sup> cited by the Administrative Law Judge, noting that in those cases other employees shared the concerns of the discharged employee.<sup>41</sup> Emphasizing the fact that only Chandler believed that the truck was unsafe and that none of the respondent's other employees objected to driving the truck, the majority stated that its conclusion was supported by prior case law.<sup>42</sup>

In a vigorous dissent,<sup>43</sup> Member Jenkins argued that the Board's decision in *Comet Fast Freight, Inc.* reversed many years of Board precedent.<sup>44</sup> Member Jenkins noted that prior Board decisions indicated that an employee who reasonably believes that a piece of

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* While the Board accepted the Administrative Law Judge's findings of fact, it rejected his conclusions of law. *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The Administrative Law Judge reported that "Richard Chandler stated in his pretrial affidavit that 'I was looking out for myself, not the other drivers. The other drivers didn't mind driving the red truck like I did.'" 110 L.R.R.M. at 1321 n.7.

<sup>39</sup> 110 L.R.R.M. at 1321.

<sup>40</sup> 110 L.R.R.M. at 1321 n.3. The Board distinguished Datapoint Corporation, 246 N.L.R.B. 234, 102 L.R.R.M. 1464 (1979), Thermofill, Inc., 244 N.L.R.B. 1056, 102 L.R.R.M. 1271 (1979), Pink Moody, Inc., 237 N.L.R.B. 39, 98 L.R.R.M. 3463 (1978), Air Surrey Corporation, 229 N.L.R.B. 3064, 95 L.R.R.M. 1212 (1977) and Carbet Corporation, 191 N.L.R.B. 892, 77 L.R.R.M. 1722 (1971). 110 L.R.R.M. at 1321 n.3.

<sup>41</sup> 110 L.R.R.M. at 1321 n.3.

<sup>42</sup> *Id.* at 1322-23 (Jenkins, Member, dissenting).

<sup>43</sup> *Id.* at 1323-25 (Jenkins, Member, dissenting).

<sup>44</sup> *Id.* at 1323 (Jenkins, Member, dissenting).

equipment is unsafe may refuse to operate the equipment.<sup>45</sup> Such a refusal, the dissent continued, had been upheld by the Board because of the Board's interest in the safety of all company employees.<sup>46</sup> The dissent then stated that the Board had in the past protected an employee's right to refuse to operate unsafe equipment without proof that others were injured by the equipment or that others had taken action regarding the problem.<sup>47</sup>

After noting that the Board previously had found that factual circumstances similar to those in *Comet Fast Freight, Inc.* indeed constituted concerted activity protected by the Act,<sup>48</sup> the dissent outlined the policy considerations underlying these decisions.<sup>49</sup> Member Jenkins stated that Congress has declared that safe and healthful employment conditions are in the public interest.<sup>50</sup> In order to further the intent of other legislation, the Board must recognize these objectives in administering the National Labor Relations Act.<sup>51</sup> Thus, the dissent concluded, the majority's failure to recognize concerted activity in this case "can only lead to injustice in the market place, and confusion as to present and future Board law."<sup>52</sup>

To understand the divergent views of the Board in *Comet Fast Freight, Inc.* concerning the nature of Chandler's activities, it is necessary to review prior decisions involving an employee's request for section 7 protection. Specifically, consideration of prior case law relating to unilateral action by an employee with regard to safety conditions of the workplace may aid in determining whether the majority or the dissent in *Comet Fast Freight, Inc.* followed precedent.

Contrary to the restrictive approach followed in *Comet Fast Freight, Inc.*, the Board previously had applied the constructive approach in determining when concerted activity has occurred. For example, in *Alleluia Cushion Co.*,<sup>53</sup> the Board used the constructive approach when it held that an employee's efforts to report his employer's violations of the Occupational Safety and Health Act constituted concerted activity even though none of the employee's co-workers expressed a similar interest in these safety hazards.<sup>54</sup> Jack Henley, a janitor at Alleluia Cushion Co., discovered various unsafe conditions at the company's plant.<sup>55</sup> Henley reported these conditions to management.<sup>56</sup> When nothing

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<sup>45</sup> *Id.* (Jenkins, Member, dissenting) (citing *Alleluia Cushion Co., Inc.*, 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975); *Self Cycle & Marine Distributor, Inc.*, 237 N.L.R.B. 75, 98 L.R.R.M. 1517 (1978); *Ontario Knife Company*, 247 N.L.R.B. 1288, 103 L.R.R.M. 1309 (1980); *Steere Dairy, Inc.*, 237 N.L.R.B. 1350, 99 L.R.R.M. 1434 (1978); *Blaw-Knox Foundry & Mill Machinery, Inc.*, 247 N.L.R.B. 333, 103 L.R.R.M. 1222 (1980); *Consolidated Freightways*, 253 N.L.R.B. 988, 106 L.R.R.M. 1076 (1981); *Bay-Wood Industries, Inc.*, 249 N.L.R.B. 403, 104 L.R.R.M. 1228 (1980); *John Sexton & Co., A Division of Beatrice Food Co.*, 217 N.L.R.B. 80, 88 L.R.R.M. 1502 (1975), *enforced*, 596 F.2d 717).

<sup>46</sup> 110 L.R.R.M. at 1323.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1323 n.13.

<sup>49</sup> *Id.* at 1323-24.

<sup>50</sup> *Id.* at 1323-24 (quoting *Alleluia Cushion*, 221 N.L.R.B. at 1000, 91 L.R.R.M. at 1132).

<sup>51</sup> 110 L.R.R.M. at 1323-24.

<sup>52</sup> *Id.* at 1324.

<sup>53</sup> 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975).

<sup>54</sup> *Id.* at 1000-01, 91 L.R.R.M. at 1133.

<sup>55</sup> *Id.* at 999, 91 L.R.R.M. at 1132. Henley "began complaining about safety conditions, including the lack of instruction regarding chemicals used in production, the absence of protective guards on machines, his inability to communicate safety instructions to the majority of employees who were Spanish-speaking, and the absence of first aid stations, eyewash stations, and an overall safety program." *Id.*

<sup>56</sup> *Id.*

was done to remedy these problems, Henley notified the Occupational Safety and Health Administration (OSHA).<sup>57</sup> After an OSHA official inspected the plant, the company terminated Henley's employment.<sup>58</sup>

In holding that Henley's actions constituted concerted activity, the Board stated that while Henley acted alone in his protest, the absence of any outward support by Henley's co-workers did not establish that the other employees lacked his concern.<sup>59</sup> The Board stated that assurance of safe working conditions is a matter of great concern for all employees.<sup>60</sup> The Board explained:

. . . [s]ince minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find implied consent thereto and deem such activity to be concerted.<sup>61</sup>

The Board then concluded that because the effect of Henley's actions encompassed the well-being of his co-workers, his activities constituted concerted activities.<sup>62</sup> Thus, the *Alleluia Cushion* Board indicated that implied consent was adequate to establish "concerted activity" within the meaning of the Act.

Similarly, the United States Court of Appeals for the District of Columbia employed the constructive approach in *Banyard v. NLRB*.<sup>63</sup> In this decision, the court reversed the Board's discretionary dismissal of an employee's petition for review concerning his discharge after refusing to drive an overloaded truck.<sup>64</sup> The petitioner, Banyard, had worked for the McLean Trucking Company and its predecessor for twenty-two years.<sup>65</sup> Banyard was dispatched to drive a truck which he believed to be overloaded in violation of Ohio law.<sup>66</sup> Banyard refused to drive the truck and was fired the next day.<sup>67</sup> Noting that in section 141 of the Labor Management Relations Act, Congress declared that employers, employees or labor unions do not possess "any right in their relation with each other to engage in acts or practices which jeopardize the public health, safety or interest,"<sup>68</sup> the court remanded the case to the Board to determine the propriety of Banyard's discharge.<sup>69</sup> On remand, the Board held that Banyard's activities constituted concerted activities, and therefore, ordered the company to reinstate him as an employee.<sup>70</sup>

Although *Alleluia Cushion*<sup>71</sup> and *Banyard*<sup>72</sup> arguably are distinguishable from *Comet*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1000-01, 91 L.R.R.M. at 3133.

<sup>60</sup> *Id.* at 1001, 91 L.R.R.M. at 3133.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1000-03, 91 L.R.R.M. at 1133.

<sup>63</sup> 505 F.2d 342, 87 L.R.R.M. 2001 (D.C. Cir. 1974).

<sup>64</sup> *Id.* at 349, 87 L.R.R.M. at 2001-06.

<sup>65</sup> *Id.* at 344, 87 L.R.R.M. at 2001-02.

<sup>66</sup> *Id.* at 343-44, 87 L.R.R.M. at 2001-02.

<sup>67</sup> *Id.* at 344, 87 L.R.R.M. at 2002.

<sup>68</sup> *Id.* at 347, 87 L.R.R.M. at 2004 (citing 29 U.S.C. § 141 (1976)).

<sup>69</sup> *Banyard v. National Labor Relations Board*, 505 F.2d at 347, 349, 87 L.R.R.M. at 2004, 2006.

<sup>70</sup> 216 N.L.R.B. 925, 88 L.R.R.M. 1649 (1975).

<sup>71</sup> 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975). See *supra* notes 53-62 and accompanying text.

<sup>72</sup> 505 F.2d 342, 87 L.R.R.M. 2001 (D.C. Cir. 1974). See *supra* notes 63-71 and accompanying text.

*Fast Freight, Inc.* in that, in the former two cases, the employees' discharges resulted from their attempts to enforce federal and state legislation,<sup>73</sup> other Board opinions indicate that this distinction may not mandate the *Comet Fast Freight, Inc.* result. For example, in *Air Surrey Corporation*,<sup>74</sup> the Board stated that the finding of concerted activity upon a showing only of benefit to the workplace should extend to situations where the employee's concerns do not find their roots in other legislative enactments.<sup>75</sup> Accordingly, under the *Air Surrey Corporation* rationale, an employee's effort to insure safe working conditions could qualify as concerted activity, even absent a showing that other workers shared his concern.<sup>76</sup>

In *Air Surrey Corporation*,<sup>77</sup> Patton, an employee of Air Surrey, received a paycheck which was dishonored due to insufficient funds.<sup>78</sup> Other employees experienced the same problem with their paychecks.<sup>79</sup> After Patton made an inquiry at the company's bank as to the company's bank balance, he was discharged from employment.<sup>80</sup> The Board ordered Air Surrey to reinstate Patton.<sup>81</sup> In reaching this conclusion, the Board stated that *Alleluia Cushion* did not stand for the proposition that concerted activity is defined more liberally when an employee is seeking to enforce statutory policies than when he is making some other complaint.<sup>82</sup> Rather, the Board concluded that an individual's actions are concerted when they relate to employment conditions which are of mutual concern to all employees.<sup>83</sup>

Another decision in which the Board has applied the constructive approach is *Thermofill, Inc.*<sup>84</sup> In *Thermofill, Inc.*, the Board ordered reinstatement of Thomas Singer, who was discharged for complaining about safety conditions within the respondent's plant.<sup>85</sup> Singer walked off his job after discovering that the machine which he operated was cluttered by scrap boxes.<sup>86</sup> The Board stated that the scrap boxes' proximity to the machine caused an unsafe working condition.<sup>87</sup> Noting that Singer's reason for not

<sup>73</sup> *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 999, 91 L.R.R.M. 1131, 1132 (1975) (Occupational Safety and Health Act); *Banyard v. National Labor Relations Board*, 505 F.2d 342, 343, 87 L.R.R.M. 2001, 2003-04 (D.C. Cir. 1974) (Ohio state law).

<sup>74</sup> 229 N.L.R.B. 1064, 95 L.R.R.M. 1212 (1977).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 229 N.L.R.B. 1064, 95 L.R.R.M. 1212 (1977).

<sup>78</sup> *Id.*, 95 L.R.R.M. at 1212.

<sup>79</sup> *Id.* at 1066, 95 L.R.R.M. at 1212.

<sup>80</sup> *Id.* at 1067, 95 L.R.R.M. at 1212.

<sup>81</sup> *Id.* at 1073, 95 L.R.R.M. at 1212-13.

<sup>82</sup> *Id.* at 1064, 95 L.R.R.M. at 1212.

<sup>83</sup> *Id.* Responding to the dissent's narrow reading of *Alleluia Cushion*, the Board stated: By interpreting *Alleluia Cushion* in the restrictive manner expressed in his dissent, our colleague indicates that he misperceives the import of that decision. In our judgment, that decision rests not only on the statutorily expressed concern of the Federal and state governments with respect to safety conditions and a corresponding accommodation of the principles embodied within that legislation with the principles of our own Act, but also on the premise that an individual's actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees.

*Id.*

<sup>84</sup> 244 N.L.R.B. 1056 (1979).

<sup>85</sup> *Id.* at 1057.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

finishing his work shift resulted from these conditions, the Board stated that Singer's protest "was therefore a protest about conditions of employment which were of concern to all employees subjected to those conditions."<sup>88</sup> The Board held that Singer engaged in protected activity even absent a showing that other employees joined him in his protest.<sup>89</sup> Thus, even though Singer's complaint centered around an unsafe working condition unrelated to any violation of federal or state law, the Board held that Singer was deemed to be acting in concert.

The decisions concerning the scope of section 7, therefore, have not resolved the issue of whether unilateral actions by an employee are protected under the Act.<sup>90</sup> Although several Board decisions prior to *Comet Fast Freight, Inc.* indicate that the Board was favoring the constructive approach in defining the scope of section 7, circuit court cases employing the restrictive approach<sup>91</sup> continued to reject the constructive approach. The debate over the scope of section 7 emerged again in the majority and dissenting opinions in *Comet Fast Freight, Inc.*<sup>92</sup>

In light of prior Board decisions concerning the scope of section 7, the dissent's criticisms of the majority's analysis are well founded. In *Alleluia Cushion*,<sup>93</sup> *Banyard*,<sup>94</sup> *Air Surrey*<sup>95</sup> and *Thermofill*,<sup>96</sup> the Board adopted the constructive approach in defining section 7 activities. The majority's analysis in *Comet Fast Freight, Inc.* marks a retraction of this expansive view of protected activity. In *Comet Fast Freight, Inc.*, the majority stated that the absence of concern by Chandler's co-workers over the truck's safety demonstrated that Chandler was not engaged in concerted activity.<sup>97</sup> Moreover, the Board noted that Chandler's co-workers did not share a "common cause" with him in his effort to protest against the unsafe vehicle.<sup>98</sup> The Board's language reflects an insistence upon both concerted purpose and effect to fulfill the concerted activity requirement.<sup>99</sup> Thus, the majority's opinion adopts the restrictive approach advocated by the Third Circuit.<sup>100</sup>

Conversely, the dissent in *Comet Fast Freight, Inc.* analyzed Chandler's petition under the constructive approach to defining concerted activity.<sup>101</sup> The dissent's interpretation of

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<sup>88</sup> *Id.* at 1058-59. The Board adopted the Administrative Law Judge's findings.

<sup>89</sup> *Id.* at 1059. In *Thermofill*, the Board adopted the Administrative Law Judge's conclusions. *Id.* at 1056. The Administrative Law Judge found the following:

The stacking of heavy boxes close to work stations to a formidable height in an unstable manner affected the efficiency and safety of all employees who worked in the extruder building. Singer's protest was therefore a protest about the conditions of employment which were of concern to all employees subjected to those conditions. It was accordingly protected concerted activity even absent a showing that other employees joined in his walkout where, as here, there is no evidence that fellow employees disavowed the substance of his complaint.

*Id.* at 1058-59.

<sup>90</sup> See *supra* notes 54-90 and accompanying text.

<sup>91</sup> See *supra* notes 10-11 and accompanying text.

<sup>92</sup> See *supra* notes 23-53 and accompanying text.

<sup>93</sup> See *supra* notes 54-67 and accompanying text.

<sup>94</sup> See *supra* notes 64-72 and accompanying text.

<sup>95</sup> See *supra* notes 75-84 and accompanying text.

<sup>96</sup> See *supra* notes 85-90 and accompanying text.

<sup>97</sup> *Comet Fast Freight, Inc.*, 262 N.L.R.B. No. 40, 110 L.R.R.M. 1321, 1321 (1982).

<sup>98</sup> 110 L.R.R.M. at 1321.

<sup>99</sup> See *supra* notes 10-14 and accompanying text.

<sup>100</sup> *Id.*

<sup>101</sup> *Comet Fast Freight, Inc.*, 262 N.L.R.B. No. 40, 110 L.R.R.M. 1321, 1323-25 (1982) (Jenkins, dissenting).

concerted activity under section 7 did not require a showing of concerted purpose or of common concern.<sup>102</sup> In this view, where the effect of an employee's conduct benefits the entire workforce — in this case, a complaint about defective equipment — the requirements of section 7 are met.<sup>103</sup> No showing of common concern by fellow workers is necessary.<sup>104</sup> The restrictive approach adopted by the Board in *Comet* limits the protection afforded to an employee under section 7 of the Act. Prior to *Comet Fast Freight, Inc.*, the Board deemed an employee to be acting in concert so long as the effects of his actions would benefit his co-workers.<sup>105</sup> By insisting upon concerted purpose as well as concerted effect for section 7 protection, the Board in *Comet Fast Freight, Inc.*, is imposing a heavy burden of proof upon the employee who acts unilaterally in response to unsafe working conditions. Under the *Comet Fast Freight, Inc.* analysis, an employee must make an affirmative showing that he was acting with other employees to guarantee section 7 protection.<sup>106</sup> This type of requirement could have a chilling effect upon an employee's exercise of his section 7 rights. Without the support of other employees, a worker who complains about unsafe conditions at his workplace may risk losing his job.

Given the Board's narrow reading of section 7 in this case, employees may, in the future, be required to show both concerted purpose and effect to be granted section 7 protections. *Comet Fast Freight, Inc.* indicates that concerted activity may be found only where other employees join the petitioner in acknowledging a safety problem. Furthermore, although an employee may be motivated by selfish concerns, some showing of desire to aid the entire workforce may be required. Finally, the effect of the employee's activities must inure to the benefit of all workers. Although *Comet Fast Freight, Inc.*, standing alone, may not mark a reversal of Board policy, the legal practitioner should be aware that the Board may apply more stringent standards in its future interpretations of section 7 of the Act.

*After the close of the Survey year and while this issue was in the process of being printed, the Board amplified its Comet Fast Freight, Inc. reasoning and expressly repudiated the principles adopted in Alleluia Cushion, Co. and its progeny. Meyers Industries, Inc., 268 N.L.R.B. No. 73 (January 6, 1984).*

#### IV. EMPLOYEE BENEFITS

##### A. \*Contributions to Taft-Hartley Trusts: Truck Drivers Local Union No. 449<sup>1</sup>

Although the Labor Management-Relations Act<sup>2</sup> generally prohibits an employer from making payments to any representative of his employees,<sup>3</sup> an exception is made in order to allow the employer to contribute to certain employee benefit trust funds, known as Taft-Hartley trusts.<sup>4</sup> The basis for payments into these trust funds must be laid out in a

<sup>102</sup> 110 L.R.R.M. at 1323-24 (Jenkins, dissenting).

<sup>103</sup> *Id.* (Jenkins, dissenting).

<sup>104</sup> *Id.* (Jenkins, dissenting).

<sup>105</sup> See *supra* notes 54-90 and accompanying text.

<sup>106</sup> *Comet Fast Freight, Inc.*, 262 N.L.R.B. No. 40, 110 L.R.R.M. 1321, 1321-22 (1982).

\* By Anne Ackenhusen, Staff Member, BOSTON COLLEGE LAW REVIEW.

<sup>1</sup> 265 N.L.R.B. No. 199, 112 L.R.R.M. 1220 (1982).

<sup>2</sup> 29 U.S.C. §§ 141-197 (1976).

<sup>3</sup> 29 U.S.C. § 186(a) (1976).

<sup>4</sup> 29 U.S.C. § 186(c)(5) (1976). These trusts are known as Taft-Hartley trusts because they are set up under the auspices of the Taft-Hartley Act, which is another name for the Labor Management

detailed written agreement between the union and the employer.<sup>5</sup> While the trust funds themselves are provided for under the main bargaining contracts, their precise details are often contained in a separate document, known as a stipulation.<sup>6</sup>

During the *Survey* year, the National Labor Relations Board (Board), in *Truck Drivers Local Union 449*,<sup>7</sup> held that stipulation reached pursuant to a provision in a collective-bargaining agreement must be consistent with the bargaining agreement, and cannot be altered unilaterally by the union and the trustees of the pension fund.<sup>8</sup> The Board also held that the trustees, in urging the adoption of the unilaterally-altered stipulation, acted as agents of the union.<sup>9</sup> The Board concluded that the union, and the trustees acting as its agent, violated section 8(b)(3) of the National Labor Relations Act (NLRA),<sup>10</sup> which prohibits a labor union from refusing to bargain collectively with an employer, when they sought to force an employer to make contributions into a pension fund not required by the collective-bargaining agreement.<sup>11</sup>

In *Truck Drivers*, Universal Liquor Corporation and Eric Liquor Company, Inc. had jointly negotiated collective-bargaining contracts with a warehousemen's union for 1976-1979.<sup>12</sup> The agreements provided that "seasonal, casual or part-time employees shall not be entitled to any fringe benefits."<sup>13</sup> Article XVI of the agreements required employers to make contributions in specified amounts to the New York Teamsters Council Pension and Retirement Fund, which is a Taft-Hartley trust.<sup>14</sup> According to the agreement, the employers were to contribute on behalf of "any and all of its employees covered by this Agreement."<sup>15</sup> The bargaining agreements stated that the parties agreed to execute simultaneously stipulations submitted to them by the pension fund trustees.<sup>16</sup> These stipulations set forth the terms of pension fund participation.<sup>17</sup> Under the collective-

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Relations Act. *See id.* Such trust funds may pay only for "medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance." 29 U.S.C. § 186(c)(5)(A) (1976).

<sup>5</sup> 29 U.S.C. § 186(c)(5)(B) (1976).

<sup>6</sup> *See, e.g.*, *Truck Drivers Local Union No. 449*, 265 N.L.R.B. No. 199, 112 L.R.R.M. 1220, 1221 (1982).

<sup>7</sup> 265 N.L.R.B. No. 199, 112 L.R.R.M. 1220 (1982).

<sup>8</sup> *Id.* at 1225.

<sup>9</sup> *Id.* at 1225-27.

<sup>10</sup> *Id.* at 1224. The N.L.R.A. is found at 29 U.S.C. §§ 151-69 (1976), with section 8(b)(3) of the N.L.R.A. being 29 U.S.C. § 158(b)(3).

<sup>11</sup> 112 L.R.R.M. at 1221. The labor organization must be the representative of the employees for section 8(b)(3) of the N.L.R.A. to apply. 29 U.S.C. § 158(b)(3) (1976).

<sup>12</sup> 112 L.R.R.M. at 1221. Although the union and each employer entered into separate contracts, the contract provisions relevant to this case are identical. *Id.* Two other employers who were not involved in the instant suit participated in the joint negotiations as well. *Id.*

<sup>13</sup> *Id.* "Seasonal" employees are those who work during seasons where the employer has temporarily increased business. *Id.* "Casual or part-time" employees are those who work to cover for absenteeism, vacations, illnesses, and when there is an unbalanced work load during part of the week. *Id.*

Specific exceptions were made, however, to the general provision preventing seasonal, casual, or part-time employees from receiving benefits. *Id.* at 1225. For example, one provision of the agreement required welfare fund contributions to be made on behalf of "all casual employees," and another, dealing with holidays, similarly referred to "casual employees." *Id.*

<sup>14</sup> *Id.* at 1221.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

bargaining contracts, the pension fund trustees reserved the right to refuse contributions from employers who failed to execute such a stipulation.<sup>18</sup>

Both of the employers and the union signed their respective 1976-79 collective-bargaining agreements without incident.<sup>19</sup> Pursuant to Article XVI of these agreements, the union, Universal and Erie each subsequently executed stipulations, or pension fund participation agreements.<sup>20</sup> The stipulations stated that the employer agreed "to contribute for any and all of his regular full-time and any and all other employees covered by this Agreement" to the pension fund.<sup>21</sup> Each stipulation also contained a clause certifying that the terms of the stipulation were identical to those in the collective-bargaining agreement.<sup>22</sup>

During the 1976-79 term of the collective-bargaining agreement, Universal and Erie made contributions to the pension fund on behalf of only full-time employees.<sup>23</sup> In 1978, however, the trustees of the pension fund<sup>24</sup> brought suit against Erie, alleging that Erie was not paying its obligated contributions to the fund.<sup>25</sup> In particular, the trustees contended that Erie was required under the stipulation to make contributions on behalf of all employees, not simply full-time employees.<sup>26</sup> Following an answer by Erie denying any such obligation, the trustees ceased to pursue the litigation.<sup>27</sup>

During 1979, Universal and Erie jointly negotiated successor collective-bargaining agreements with the union.<sup>28</sup> The provisions of the 1976-79 contract were incorporated verbatim into the new agreement, including the provision which stated that the parties would simultaneously execute stipulations submitted by trustees of the pension fund.<sup>29</sup> Despite the earlier suit by the trustees, the only discussion about pensions which took place during the negotiations concerned the amounts of contributions to be made to the fund, and the effective dates of contribution.<sup>30</sup> The union's chief negotiator neither submitted new stipulations to the employers, nor indicated that any other modifications in the existing stipulations would be forthcoming.<sup>31</sup>

Following the signing of the collective-bargaining agreements, Erie and Universal continued to contribute to the pension fund for their full-time employees.<sup>32</sup> The union then requested that Erie and Universal sign new stipulations for the pension fund in

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* The stipulations also provided that pension fund coverage could be extended to union employees who were not members of the bargaining unit, as well as to nonunion employees. *Id.*

<sup>22</sup> *Id.* at 1222.

<sup>23</sup> *Id.* Universal occasionally made pension fund contributions for a casual employee due to clerical error. *Id.*

<sup>24</sup> *Id.* at 1222. The board of trustees which administers the fund is composed of four members selected by the participating employers, and four selected by the participating local unions. *Id.* at 1221. The Labor Management Relations Act requires equal representation of employees and employers in fund administration. 29 U.S.C. § 186(c)(5)(B) (1976).

<sup>25</sup> 112 L.R.R.M. at 1222.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1222.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* No one representing the pension fund trustees was present during the negotiations, nor were the trustees consulted regarding the negotiations. *Id.*

<sup>32</sup> *Id.*

accordance with the bargaining agreements.<sup>33</sup> The new stipulations provided that the employers would contribute to the pension fund on behalf of all employees doing the same work as bargaining unit employees, without regard to their status as full-time, part-time, casual or seasonal.<sup>34</sup> The new stipulations stated that no agreement between the employer and union could alter this rule, and that in the event that there was an agreement between the employer and union inconsistent with the terms, of the stipulation, such inconsistent provisions would be void.<sup>35</sup>

Erie and Universal refused to sign the stipulations, maintaining that they were not required to make pension fund contributions on behalf of seasonal, casual or part-time employees.<sup>36</sup> The pension fund trustees then joined in the union's demands, contending that the employers were liable for these pension fund payments.<sup>37</sup> The trustees subsequently refused, in accordance with the collective-bargaining agreement, to accept contributions to the fund made by the employers.<sup>38</sup>

Erie and Universal then brought suit against the union alleging the union had committed an unfair labor practice by unilaterally attempting to modify the provisions of the collective-bargaining agreements through its agents, the trustees.<sup>39</sup> The administrative law judge recommended dismissal of the complaint.<sup>40</sup>

Based on his interpretation of the collective-bargaining agreement as a whole,<sup>41</sup> and the circumstances surrounding the 1979 contract negotiation,<sup>42</sup> the judge found that the pension plan covered seasonal, casual and part-time employees.<sup>43</sup> Furthermore, the judge held that even if the agreement did not encompass such employees, the pension fund

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<sup>33</sup> *Id.* at 1223.

<sup>34</sup> *Id.* Contributions were to be made for employees doing the same work as bargaining unit employees, whether or not the employees were members of the bargaining unit or the union itself. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1223. Universal subsequently obtained a temporary restraining order from the Federal District Court for the Western District of New York which enjoined the fund from refusing to accept contributions. *Id.*

<sup>39</sup> *Id.* at 1220-21.

<sup>40</sup> *Id.* at 1223.

<sup>41</sup> *Id.* The administrative law judge believed that Article IV of the collective-bargaining agreement which provided that "seasonal, casual or part-time employees shall not be entitled to any fringe benefits under this Agreement, or contributions with respect thereto" had to be interpreted in the light of those contract provisions which dealt specifically with fringe benefits. *Id.* The judge compared the vacation and holiday provisions of the contract, which specifically stated when coverage was intended only for full-time employees, with the pension fund provisions. *Id.* Because the contract language dealing with the pension fund required contributions on behalf of "any and all employees," the judge found that this provision gave definition to the general reference to "fringe benefits." *Id.* Hence, in his opinion, all unit employees, including casual employees, were covered. *Id.* at 1223-24.

<sup>42</sup> *Id.* at 1224. The administrative law judge believed that Erie was on notice of the trustees' position concerning pension fund coverage, because of a prior lawsuit between the two where pension fund contributions were at issue. *Id.* at 1224 & n.12. See *supra* notes 24-27 and accompanying text. He found this notice imputable to Universal because Universal's attorney was familiar with the suit. 112 L.R.R.M. at 1224 n.12. The administrative law judge believed that this previous action militated against finding that there was an established practice for pension fund contributions. *Id.* He thus concluded that by agreeing to reexecute stipulations submitted by the pension fund trustees, both employers "invit[ed]" the trustees to submit stipulations clarifying their position regarding contributions for casual employees. *Id.* at 1224.

<sup>43</sup> 112 L.R.R.M. at 1223.

trustees had not been acting as agents of the union.<sup>44</sup> He cited *NLRB v. Amax Coal Co.*<sup>45</sup> for the proposition that the union-designated trustees were not necessarily acting on behalf of the union when operating in their capacity as trustees on behalf of the pension fund beneficiaries.<sup>46</sup> In *Amax* the Supreme Court held that employer-designated trustees of a Taft-Hartley trust are not representatives of the employer for purposes of collective bargaining.<sup>47</sup> Accordingly, the judge concluded that the union had not committed any unfair labor practices.<sup>48</sup> The employers appealed this decision to the National Labor Relations Board.<sup>49</sup> On appeal, the Board disagreed with both the administrative law judge's interpretation of the collective-bargaining agreements, and his findings concerning the actions of both the union and the trustees.<sup>50</sup> The Board, in concluding that the union and the trustees acting as its agent, violated section 8 (b)(3) of the NLRA, interpreted the collective-bargaining agreements as providing for pension fund contributions on behalf of only full-time employees.<sup>51</sup> In addition, the Board found that the parties' agreements to execute stipulations were not an invitation to the trustees to amend the stipulations.<sup>52</sup> The court determined, therefore, that both the union and the fund trustees had attempted to modify the collective-bargaining agreements.<sup>53</sup>

In reaching its decision, the Board examined the 1976-79 stipulations, which stated that the employers would contribute to the pension fund on behalf of "any and all . . . regular full-time and any and all other employees covered by this Agreement."<sup>54</sup> The Board decided that the word "Agreement" referred to the stipulations themselves, and not to the collective-bargaining agreements.<sup>55</sup> As the stipulations also covered non-bargaining unit employees and non-union employees, the Board held that the disputed phrase referred to these full-time employees only, and not to part-time or casual employees.<sup>56</sup> The Board further stated that the stipulations correctly certified that the terms of the stipulations were identical to those of the collective-bargaining agreements.<sup>57</sup>

In support of its conclusion that the employers had agreed to contribute on behalf of only the full-time employees, the Board also reviewed the general provision of the collective-bargaining contracts which stated "[s]easonal, casual, or part-time employees shall not be entitled to any fringe benefits . . . or contributions with respect thereto."<sup>58</sup> The

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<sup>44</sup> *Id.* at 1224.

<sup>45</sup> 453 U.S. 322 (1981).

<sup>46</sup> 112 L.R.R.M. at 1224.

<sup>47</sup> *Id.* (citing *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981)).

<sup>48</sup> 112 L.R.R.M. at 1224. The judge did not believe the union was doing anything other than fulfilling its duties as the employees' representative when it mailed several requests to the employers asking them to sign new stipulations, and thus modify the collective-bargaining agreements. *Id.*

For the actual text of the administrative judge's opinion, see *Truck Drivers Local Union No. 449*, 265 N.L.R.B. No. 199, app.

<sup>49</sup> 112 L.R.R.M. at 1224.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1224-25.

<sup>52</sup> *Id.* at 1225.

<sup>53</sup> *Id.* at 1226.

<sup>54</sup> *Id.* at 1225.

<sup>55</sup> *Id.* In support of this interpretation, the Board referred to *S.M. Flickinger Co., Inc. v. Phillip Ross, Industrial Comm'r's*, Nos. PR-20-79 and PR-21-79 (Indus. Bd. of Appeals, N.Y. State Dep't. of Labor, May 15, 1980), where the Industrial Board of Appeals of the New York State Department of Labor reached the same conclusion when interpreting an identical stipulation. 112 L.R.R.M. at 1225.

<sup>56</sup> 112 L.R.R.M. at 1225.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Board noted that the parties had created exceptions to this provision very deliberately where such exceptions were intended, as other sections of the agreements used specific language when including casual employees in their coverage.<sup>59</sup> The Board pointed out that there was no such specific exception applying the pension provision to seasonal, casual, or part-time employees.<sup>60</sup>

Finally, the Board believed that the employers' practice of making pension fund contributions only on behalf of full-time employees during the term of the 1976-79 collective-bargaining agreements supported the employers' position that the 1979-82 agreements did not obligate them to make contributions for seasonal, casual, or part-time employees.<sup>61</sup> The Board found that the incorporation of all the relevant language of the 1976-79 contract into the 1979-82 contracts without discussion indicated the parties' belief that the agreements' language was "sufficiently precise," and that the parties intended pension fund contributions to be made only on behalf of full-time employees.<sup>62</sup>

Having established that the collective-bargaining agreements did not provide for the disputed pension fund payments, the Board considered the authority of the trustees to introduce new stipulations.<sup>63</sup> The Board noted that the trustees' authority must be exercised within the bounds of the collective-bargaining agreements.<sup>64</sup> According to the Board, the parties contemplated that the stipulations submitted to them would be consistent with the collective-bargaining agreements.<sup>65</sup> Accordingly, the Board rejected the administrative law judge's holding that the parties had "invited" the trustees to amend the stipulations when they consented to execute stipulations submitted by the trustees.<sup>66</sup> The Board reasoned that if the parties had intended to extend pension fund coverage to seasonal, casual, and part-time employees, they would have stated this intention.<sup>67</sup>

Given the trustees' lack of authority to go beyond the collective-bargaining unit, the Board found that the union and the pension fund trustees had tried to modify or alter the 1979-82 collective-bargaining agreements through their attempts to impose their interpretations of the agreements upon the employers.<sup>68</sup> The Board emphasized three factors in support of this finding: the actions of the trustees in mailing letters to the

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<sup>59</sup> *Id.* For examples of the exceptions used in other sections of the agreement, see *supra* note 13.

<sup>60</sup> 112 L.R.R.M. at 1225.

<sup>61</sup> *Id.* The text of the Board's decision erroneously states that the employers' practice during the term of the 1976-79 collective-bargaining agreements supported their position regarding the 1976-79 agreements. See *id.*

<sup>62</sup> *Id.* The Board stated that because the union negotiator, who was in a position to know different stipulations would soon be submitted by the pension fund, did not mention the modified stipulations during the 1979-82 contract negotiations, the employers were led to believe any "successor" stipulations would be consistent with the terms of the collective-bargaining agreements. *Id.*

<sup>63</sup> *Id.* at 1225-26.

<sup>64</sup> *Id.* at 1226.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1225. The Board relied on its decision in *Warehousemen's Union Local 334*, 253 N.L.R.B. 1090, 106 L.R.R.M. 1201 (1981), *enforcement denied*, 670 F.2d 855, 109 L.R.R.M. 3226 (9th Cir. 1982). 112 L.R.R.M. at 1225. In *Warehousemen's Union*, the Board held that the trustees could not establish a vision care plan for employees when the employers had refused to agree to such a plan during contract negotiations with the union. *Id.* (citing *Warehousemen's Union Local 334*, 253 N.L.R.B. 1090, 106 L.R.R.M. 1201 (1982)). The Board stated that, although the employers agreed to be bound by the decision of the trustees, the discretionary authority of the trustees extended only to decisions related to benefit plans specifically agreed upon. 112 L.R.R.M. at 1226 (citing *Warehousemen's Union Local 334*, 253 N.L.R.B. 1090, 1091, 106 L.R.R.M. 1201, 1202 (1982)).

<sup>67</sup> 112 L.R.R.M. at 1226.

<sup>68</sup> *Id.*

employers urging them to execute the modified stipulations; their subsequent threats to terminate the employers' participation in the fund if they did not remit pension fund contributions for their seasonal, casual, and part-time employees; and, their ultimate enforcement of this threat.<sup>69</sup> The Board decided that the union acted together with the pension fund trustees in attempting to alter the collective-bargaining agreements because of the actions of the union's business agent.<sup>70</sup> The Board noted that this union agent had sent Erie a letter containing the new pension fund stipulation and requesting that Erie execute the stipulation.<sup>71</sup> The agent subsequently sent additional letters to both employers asking them to sign the stipulations.<sup>72</sup> Moreover, the Board recognized that the union agent did not protest when the trustees threatened to, and later did terminate pension benefits to all of the employees they represented.<sup>73</sup>

Having determined that both the trustees and the union had attempted to modify the collective-bargaining agreement, the Board next concluded that the trustees of the pension fund had acted as agents of the union.<sup>74</sup> In support of this conclusion, the Board noted that it previously had found that trustees of a Taft-Hartley trust may be agents of the parties to a collective-bargaining agreement.<sup>75</sup> In particular, the Board noted that in *Local 80, Sheet Metal Workers International Association*,<sup>76</sup> trustees were held to have acted as agents of a union when they refused to accept contributions from an employer acting pursuant, as in the instant case, to authority granted by collective-bargaining agreements.<sup>77</sup> According to the Board, when the trustees here refused to accept pension fund

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* The union business agent was also a welfare fund trustee. *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* See, e.g., *Warehousemen's Local 334*, 253 N.L.R.B. 1090, 106 L.R.R.M. 1201 (1981), *enforcement denied*, 670 F.2d 855, 109 L.R.R.M. 3226 (9th Cir. 1982) (union's trustees were acting on behalf of the union when they attempted to institute a vision care plan which had been rejected by employers as part of collective-bargaining agreement); *Jacobs Transfer, Inc.*, 227 N.L.R.B. 1231, 95 L.R.R.M. 1589 (1977) (trustees were agents of both union and employer for purposes of accepting contributions that were made in compliance with backpay awards); *L & M Carpet Contractors, Inc.*, 218 N.L.R.B. 802, 89 L.R.R.M. 1733 (1975) (union trustee who requested audit of employer's records was agent of union); *Local 80, Sheet Metal Workers Int'l Assoc.*, 161 N.L.R.B. 229, 63 L.R.R.M. 1261 (1966) (trustees were agents of union when they refused to accept employer contributions under collective-bargaining agreement).

<sup>76</sup> 161 N.L.R.B. 229, 63 L.R.R.M. 1261 (1966).

<sup>77</sup> 112 L.R.R.M. at 1226. In *Sheet Metal Workers* the union had insisted that a collective-bargaining contract must include provisions for an industry promotion fund before it would execute the contract. *Id.* at 1226 n.18 (citing *Local 80, Sheet Metal Workers Int'l Assoc.*, *supra* note 76).

The employer signed the contract, but indicated that it agreed to the promotion fund under protest. 112 L.R.R.M. at 1226 n.12 (citing *Local 80, Sheet Metal Workers Int'l Assoc.*, *supra* note 76). The employer then attempted to make contributions to other employee benefit funds established pursuant to the collective bargaining agreement, but not to the industry promotion fund. 112 L.R.R.M. at 1226 n.12 (citing *Local 80, Sheet Metal Workers Int'l Assoc.*, *supra* note 76). The trust funds would not accept the contributions based upon a provision in the agreement which prohibited them from accepting any payments which were less than the amount due under all the funds established by the contract. 112 L.R.R.M. at 1226 n.12 (citing *Local 80, Sheet Metal Workers Int'l Assoc.*, *supra* note 75). The Board found that the trustees, by acting pursuant to the specific contractual mandate, were agents of both the union and the employer. 112 L.R.R.M. at 1226 (citing *Local 80, Sheet Metal Workers Int'l Assoc.*, *supra* note 76). It concluded that the union, by its agents the trustees, violated section 8(b)(3) of the NLRA in refusing to accept any payments by the employer

contributions from the employers because they would not execute the stipulations, they were using the authority vested in them by the collective-bargaining agreements on behalf of the union.<sup>78</sup> Specifically, the Board noted that the union fully backed the trustees' erroneous interpretation of the collective-bargaining agreements and was willing to sacrifice the pension benefits of all employees.<sup>79</sup>

The Board also rejected the administrative law judge's use of *NLRB v. Amax Coal Co.* as support for his finding that the trustees were not acting as agents of the union.<sup>80</sup> The Board noted that in *Amax*, the Supreme Court specifically stated that trustees "can neither require employer contributions not required by the original collectively bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions."<sup>81</sup> The Board concluded, therefore, that the *Amax* decision did not preclude, and in fact was consistent with, a finding that the trustees were acting as agents of the union.<sup>82</sup>

The Board then explained that, in addition to being supported by precedent, its finding that both the union and the trustees had violated section 8(b)(3) of the NLRA was necessary in order to protect the integrity of the collective-bargaining process.<sup>83</sup> To allow unilateral changes to be made in the terms of collective-bargaining agreements, stated the Board, would undermine the whole bargaining process, taking away the certainty of contract terms.<sup>84</sup>

The *Truck Drivers* decision is significant because it emphasizes that benefit fund trustees must exercise their authority within the bounds of the collective-bargaining agreement.<sup>85</sup> Employers cannot be bound to any trust provisions beyond these limits. The Board's decision clearly indicates that it will not allow unilateral changes to be made in collective-bargaining contracts. Trustees who attempt to make such alterations may be found to be representatives of the party trying to make the change.<sup>86</sup>

The Board's decision in *Truck Drivers* is supported by prior Board holdings and relevant Supreme Court case law. The National Labor Relations Board has firmly established that the trustees of a Taft-Hartley trust are the agents of both parties to the collective-bargaining agreement.<sup>87</sup> Moreover, the Supreme Court's dicta in *NLRB v. Amax Coal Co.*, as well as its holding in *UMW Health & Retirement Fund v. Robinson*<sup>88</sup> support the Board's finding that the trustees of a Taft-Hartley trust cannot unilaterally alter the terms of a trust which have been established by a collective-bargaining agreement.<sup>89</sup>

In *Amax*, the Supreme Court stated that the trustees of an employee benefit fund can

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to the benefit funds until the employer agreed to contribute to the promotion fund. 112 L.R.R.M. at 1226 (citing Local 80, Sheet Metal Workers Int'l Assoc., *supra* note 76).

<sup>78</sup> 112 L.R.R.M. at 1226.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1227. For a discussion of the administrative law judge's reliance on *Amax*, see *supra* notes 45-47 and accompanying text.

<sup>81</sup> 112 L.R.R.M. at 1227 (emphasis added by the Board) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. at 336).

<sup>82</sup> 112 L.R.R.M. at 1227.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* The Board cited its decision in *Warehousemen's Union Local 334*, 253 N.L.R.B. 1090, 1091-92, 106 L.R.R.M. 1201, 1203 (1981) for this proposition. 112 L.R.R.M. at 1227.

<sup>85</sup> See 112 L.R.R.M. at 1227.

<sup>86</sup> See *supra* notes 8-10 and accompanying text.

<sup>87</sup> See *supra* notes 75-77 and accompanying text.

<sup>88</sup> 455 U.S. 562 (1982).

<sup>89</sup> *Id.* at 573-74; *NLRB v. Amax Coal Co.*, 453 U.S. at 336.

neither require employer contributions not provided for in the collective-bargaining agreement, nor modify the union's or employer's claims regarding employer contributions.<sup>90</sup> This language was set forth after the Court decided that trustees are not representatives of the party which appointed them for the purposes of collective bargaining or the adjustment of grievances.<sup>91</sup> The administrative law judge in the instant case went beyond the bounds of *Amax* when he held that, because the individual trustees were not automatically representatives of their appointing parties, the whole board of trustees, including both employer- and union-appointed trustees, could not be found to be acting on behalf of one party or the other.<sup>92</sup> The *Amax* decision made no such broad statement.

The Supreme Court's recent decision in *UMW Health & Retirement Fund v. Robinson* also supports the Board's declaration that unilateral alteration of trust terms established by a collective-bargaining contract is prohibited. In *Robinson*, the Supreme Court held that the trustees of a Taft-Hartley trust must enforce the terms of the trust as set forth in the collective-bargaining agreement unless alteration is required in order to comply with federal law.<sup>93</sup> Because no such federal law was at issue in the *Truck Drivers* case, it is clear that the terms of the collective-bargaining agreements, and the stipulations referenced within those contracts, must govern the pension trust.

The *Truck Drivers* decision has established that trustees of a Taft-Hartley trust cannot unilaterally alter the terms of the trust as set forth in the collective-bargaining agreement, just as a party to the agreement cannot undertake such a unilateral modification.<sup>94</sup> The Board's holding represents a rational policy decision because, as was pointed out by the Board in *Truck Drivers*, to allow unilateral change in an agreement negotiated between two parties is to destroy the certainty of the document.<sup>95</sup>

## V. ANTITRUST

### A. \**Union Standing in Antitrust Actions: Associated General Contractors v. California State Council of Carpenters*<sup>1</sup>

Under section 4 of the Clayton Antitrust Act, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."<sup>2</sup> Private antitrust enforcement under section 4 is significant, not only as a means for those who are damaged by antitrust violations to recoup losses, but also as a deterrent to would be violators.<sup>3</sup> The broad language of

<sup>90</sup> 453 U.S. at 336.

<sup>91</sup> *Id.* at 334.

<sup>92</sup> See *supra* notes 45-47 and accompanying text for a discussion of the administrative law judge's reasoning.

<sup>93</sup> 455 U.S. at 573-74.

<sup>94</sup> If such a unilateral modification is made by the union, it violates section 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3) (1976), while if it is made by the employer, it violates section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1976).

<sup>95</sup> See 112 L.R.R.M. at 1227. See also *Warehousemen's Union Local 334*, 253 N.L.R.B. 1090, 1091, 109 L.R.R.M. 1201, 1203 (1981), *enforcement denied*, 670 F.2d 855, 109 L.R.R.M. 3226 (9th Cir. 1982).

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<sup>1</sup> 103 S. Ct. 897 (1983), 112 L.R.R.M. 2753.

<sup>2</sup> 15 U.S.C. § 15 (Supp. V 1981).

<sup>3</sup> *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723, 4724 (1982).

section 4, in particular, the term "any person" has led, however, to interpretive difficulties for the courts. Therefore, a threshold question in antitrust litigation is whether the party claiming damages is a "person" injured within the meaning of the antitrust laws.<sup>4</sup>

During the Survey year, in *Associated General Contractors, Inc. v. California State Council of Carpenters*,<sup>5</sup> the United States Supreme Court reversed the Ninth Circuit Court of Appeals, and held that, based on the allegations contained in its complaint, the plaintiff union was not a person injured by reason of a violation of the antitrust laws within the meaning of section 4 of the Clayton Act.<sup>6</sup> Drawing on the specific allegations of the complaint, the Court reasoned that the harms suffered by the Union, even if intentional and provable, were too indirect to support a section 4 action.<sup>7</sup> Furthermore, the speculative nature of the relationship between the defendant's actions and the harm to the Union, and the existence of other more direct victims of the alleged illegal actions which could lead to duplicative awards of complex apportionment, led the Court to conclude that the Union did not have a cognizable claim under the antitrust laws.<sup>8</sup>

The Union's complaint, filed as a class action suit on behalf of numerous affiliated unions and councils,<sup>9</sup> alleged that the defendants conspired to "weaken, destroy and restrain" both the trade of certain contractors, and "free exercise of the business activities" of the Union.<sup>10</sup> The complaint contended that the defendants, a multi-member trade association composed of construction contractors, "coerced" landowners and general contractors who were not members of the local unions, thereby causing unionized subcontractors to lose business and, accordingly, to weaken the bargaining relationship between the union and signatory employers.<sup>11</sup> The Union claimed that these acts violated the Clayton Act<sup>12</sup> and sought \$25,000,000 in damages.<sup>13</sup>

The complaint was dismissed by the district court in 1975<sup>14</sup> because it alleged only "a rather vague, general conspiracy" that was not a matter of antitrust law but rather a typical labor dispute that should have been resolved by the National Labor Relations Board.<sup>15</sup> The court of appeals reversed the decision more than five years later,<sup>16</sup> holding that the plaintiffs had standing to recover damages for injuries due to the defendant's conduct, by alleging an "industry-wide boycott against all subcontractors with whom the Unions had signed agreements. . . ."<sup>17</sup> The Ninth Circuit believed that the allegations satisfied the requirement that the defendants' activities created a viable antitrust violation with foreseeable injuries specifically intended to harm the plaintiffs.<sup>18</sup>

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<sup>4</sup> For a complete discussion of standing in antitrust litigation, see Berber and Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977); and Sherman, *Antitrust Standing from Loeb to Malamud*, 51 N.Y.U. L. REV. 374 (1976).

<sup>5</sup> 103 S. Ct. 897 (1983), 112 L.R.R.M. 2753 (1983).

<sup>6</sup> *Id.* at 908-09, 112 L.R.R.M. at 2760.

<sup>7</sup> *Id.* at 911, 112 L.R.R.M. at 2762.

<sup>8</sup> *Id.*, 112 L.R.R.M. at 2762.

<sup>9</sup> 103 S. Ct. at 899, 112 L.R.R.M. at 2753.

<sup>10</sup> *Id.* at 901, 112 L.R.R.M. at 2754.

<sup>11</sup> 103 S. Ct. 900, 112 L.R.R.M. at 2753-54.

<sup>12</sup> 15 U.S.C. § 15 (Supp. V 1981).

<sup>13</sup> 103 S. Ct. at 901, 112 L.R.R.M. at 2754.

<sup>14</sup> *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 404 F. Supp. 1067, 1073 (N.D. Cal. 1975).

<sup>15</sup> *Id.* at 1069.

<sup>16</sup> *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 648 F.2d 527, 529 (9th Cir. 1980).

<sup>17</sup> *Id.* at 537.

<sup>18</sup> *Id.* at 537-38.

The Supreme Court, in reversing the Ninth Circuit ruling, noted that although the alleged coercion of third parties by the defendants may have been unlawful, it did not necessarily follow that the Union had standing under the Clayton Act to sue for damages resulting from this unlawful coercion.<sup>19</sup> Justice Stevens, speaking for a majority of the Court, refused to take for granted the literal meaning of the Clayton Act provision regarding "injured persons," preferring instead to examine the legislative history behind the Act.<sup>20</sup> This examination made it "perfectly clear that [Congress] expected the courts to . . . draw on common law traditions" to determine the Act's scope.<sup>21</sup> The Court then proceeded to trace these common law traditions through a series of cases<sup>22</sup> which showed a clear tendency on the part of courts to limit who may recover antitrust damages, and to specifically eliminate anyone only "tangentially affected" by the antitrust violation.<sup>23</sup> In accordance with these traditions, the Court stated, it was required to evaluate three factors: the plaintiff's harm, the defendant's alleged wrongdoing, and the relationship between them.<sup>24</sup>

In examining these three factors, the Court noted that every possible injury which could be traced to a particular wrongdoing was not automatically entitled to a judicial remedy.<sup>25</sup> Nor, stated the Court, was the intent of the alleged wrongdoer determinative.<sup>26</sup> Instead, the Court focused its inquiry on the nature of the plaintiff union's injury to determine if the injury was within the area of harm that the antitrust laws were meant to deter.<sup>27</sup>

Addressing the nature of the harm to the plaintiff, the Court first noted that the plaintiff was not harmed by the alleged restraint of trade either as a consumer or as a competitor.<sup>28</sup> In fact, noted the Court, it was not even clear that the restraint of trade itself was necessarily harmful to unions.<sup>29</sup> In this regard, the Court determined that in theoretical terms, uninhibited competition among contractors can actually help unions,<sup>30</sup> and that in practical terms, the alleged wrongdoings in this case were only indirectly linked to that plaintiff's injuries which the Court added, "may have been produced by independent factors."<sup>31</sup> Furthermore, the Court pointed out that damages alleged by the Union were at least one step removed from the injuries allegedly sustained by the unionized firms who were themselves the proper parties to assert an antitrust claim.<sup>32</sup> The

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<sup>19</sup> 103 S. Ct. at 902, 112 L.R.R.M. at 2755.

<sup>20</sup> *Id.* at 904, 112 L.R.R.M. at 2756.

<sup>21</sup> *Id.* at 905, 112 L.R.R.M. at 2758, *quoting* National Society of Professional Engineers v. United States, 435 U.S. 679, 687-88 (1978).

<sup>22</sup> *Loeb v. Eastern Kodak Co.*, 183 F. 704 (3d Cir. 1910); *Southern Pacific Co. v. Darnell-Taenzler Lumber Co.*, 245 U.S. 531 (1918); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Illinois Brick v. Illinois*, 431 U.S. 720 (1977); and *Blue Shield of Virginia, Inc. v. McCready*, 50 U.S.L.W. 4723 (1982).

<sup>23</sup> 103 S. Ct. at 907, 112 L.R.R.M. at 2759.

<sup>24</sup> *Id.*, 112 L.R.R.M. at 2759.

<sup>25</sup> *Id.* at 908, 112 L.R.R.M. at 2759.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, 112 L.R.R.M. at 2760.

<sup>28</sup> *Id.* at 909, 112 L.R.R.M. at 2760.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, 112 L.R.R.M. at 2760. The Court maintained that the greater the freedom which contractors have to subcontract with whomever they please, the higher the profits that can be passed on to the worker, either directly through his earnings, or indirectly through improved working conditions. *Id.*

<sup>31</sup> 103 S. Ct. at 911, 112 L.R.R.M. at 2762.

<sup>32</sup> *Id.* at 913, 112 L.R.R.M. at 2763.

existence of these parties, noted the Court, supported the denial of standing to the more remote parties.<sup>33</sup> Finally, the Court determined that the Union's damage claims were either highly speculative in the alleged form,<sup>34</sup> or remediable under other laws.<sup>35</sup>

The Court concluded its analysis by noting the practical difficulties inherent in maintaining the plaintiff's suit.<sup>36</sup> Given the strong interest in minimizing the complexity of antitrust litigation, the Court pointed to severe problems in this case in identifying and apportioning damages among subcontractors, the workforce, unions, and union members.<sup>37</sup> Particularly concerned about the potential for double recoveries multiplied over treble-damage liabilities, the Court dismissed the Union's complaint.<sup>38</sup>

Justice Marshall, the only member of the Court who refused to join the majority opinion, filed a dissent<sup>39</sup> which criticized the Court's failure to consider the value of the defendant's intent. Citing *Bigelow v. RKO Pictures*,<sup>40</sup> Justice Marshall noted that antitrust violations are essentially "tortious acts" and, in this case, where the tort was "intentional," the directness of the harm should not be a factor since intentional tortfeasors are liable even for the unforeseen consequences of their conduct.<sup>41</sup> Therefore, Justice Marshall maintained, dismissal of the complaint was not warranted merely on the basis of unspecified, indirect, or speculative damage allegations.<sup>42</sup> Justice Marshall also contended that there was no risk of double recovery since the union sought recoveries from injuries that were distinguishable for the injuries of other parties.<sup>43</sup> Using the example of union dues, Justice Marshall noted that it was a matter of simple subtraction to separate distinct recoveries and that difficulties in ascertaining damage claims should not bar recovery.<sup>44</sup> Justice Marshall concluded by emphasizing that the Court's concern for the weakness of the plaintiff's case based solely on its pleading should not have required dismissal of the case.<sup>45</sup>

*Associated General Contractors* was decided on the sufficiency of the complaint and, therefore, it is possible that a more carefully drafted complaint in a similar situation might allow for standing. Although the Court examined a number of factors, all of which weighed against the plaintiff's standing in this case, the Court failed to indicate which, if any, of the factors were ultimately dispositive. Thus, a future plaintiff runs the risk, on the basis of this opinion, of failing the standing test if he does not satisfy any of these factors. Nevertheless, the Court does make several statements which could be used in determining what standards would be dispositive for similar claims in the future and, thus, could help future practitioners in designing more successful allegations and complaints.

The most standard-oriented statement made by the Court is the three-prong test

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<sup>33</sup> *Id.*, 112 L.R.R.M. at 2763.

<sup>34</sup> *Id.* at 911, 112 L.R.R.M. at 2762.

<sup>35</sup> *Id.* The Court found the damage claim highly speculative "[p]artly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors." *Id.*

<sup>36</sup> 103 S. Ct. 911-12, 112 L.R.R.M. at 2762-63.

<sup>37</sup> *Id.* at 912, 112 L.R.R.M. at 2763.

<sup>38</sup> *Id.*

<sup>39</sup> 103 S. Ct. 913, 112 L.R.R.M. at 2763 (Marshall, J., dissenting).

<sup>40</sup> 327 U.S. 251, 264 (1946).

<sup>41</sup> 103 S. Ct. at 914, 112 L.R.R.M. at 2761 (Marshall, J., dissenting).

<sup>42</sup> 103 S. Ct. at 916, 112 L.R.R.M. at 2766 (Marshall J., dissenting).

<sup>43</sup> 103 S. Ct. at 915-16, 112 L.R.R.M. at 2765 (Marshall, J., dissenting).

<sup>44</sup> *Id.* (Marshall, J., dissenting).

<sup>45</sup> 103 S. Ct. at 916, 112 L.R.R.M. at 2766 (Marshall, J., dissenting).

designed to determine if a party qualifies as a "person" under section 4.<sup>46</sup> This test, according to Justice Stevens, requires the Court to evaluate: a) the plaintiff's harm; b) the defendant's alleged wrongdoing; and c) the relationship between them.<sup>47</sup> The Court, however, never specifically referred to this test again in the opinion, and as such never clearly enunciated how it should be applied. Nonetheless, it would appear from the Court's opinion that while no single prong of the test is dispositive of the plaintiff's claim, the first and third prongs are the most important for the establishment of standing, especially when, as in this case, all three factors "weigh heavily against judicial enforcement of the plaintiff's claim."<sup>48</sup>

The first factor, the plaintiff's harm, stands at a threshold position in the evaluation of standing. The enabling act itself specifically requires that the plaintiff be "a person who shall be injured,"<sup>49</sup> but injury alone is insufficient because "the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."<sup>50</sup> The injury alleged should, therefore, be one that the antitrust laws are designed to deter, and to deter for that particular plaintiff.<sup>51</sup> In this regard, the Court struggled with the fact that the plaintiff in this case was a labor union and not a consumer or a competitor in the restrained market.<sup>52</sup> Although it did not specifically say that a consumer or a competitor would definitely have had standing on similar facts, the Court did say that labor unions with the type of injuries alleged here are not necessarily part of the class the antitrust statutes are designed to protect.<sup>53</sup> Furthermore, the injury alleged must flow directly from the defendant's wrongdoing; the injury cannot be, as the Court claimed it was here, "highly speculative."<sup>54</sup> The injury alleged must be specific, direct, and judicially manageable.<sup>55</sup> The Court was acutely aware of the remedial problems posed by complex antitrust litigation.<sup>56</sup> As such, the easier the damages are to apportion, the lesser the risks of double recovery, and the clearer the proof that these awards might not be granted pursuant to some other law, the more likely a court should be to entertain the action.<sup>57</sup> If only because section 4 claims include treble damages, the Court indicates that future claims should allege specific, identifiable, and distributable antitrust damages.

Being primarily preoccupied with the other two factors, the Court dealt only briefly with factor two — the alleged wrongdoing of the defendant.<sup>58</sup> The Court considered this factor on its own only in terms of the defendant's motive which, the complaint in the case

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<sup>46</sup> 103 S. Ct. at 907, 112 L.R.R.M. at 2759.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 913, 112 L.R.R.M. at 2763.

<sup>49</sup> 15 U.S.C. § 15 (Supp. V 1981).

<sup>50</sup> 103 S. Ct. at 913 n.31, 112 L.R.R.M. at 2759 n.31.

<sup>51</sup> *Id.*, 112 L.R.R.M. at 2759 n.31, citing *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723 (1982) (consumer of psychotherapeutic services injured by conspiracy to restrain market for such services allowed to recover treble damages).

<sup>52</sup> 103 S. Ct. at 909, 112 L.R.R.M. at 2761.

<sup>53</sup> *Id.* at 910, 112 L.R.R.M. at 2761.

<sup>54</sup> *Id.* at 911, 112 L.R.R.M. at 2762.

<sup>55</sup> *Id.*, 112 L.R.R.M. at 2762.

<sup>56</sup> *Id.* at 911-12, 112 L.R.R.M. at 2762.

<sup>57</sup> *Id.*, 112 L.R.R.M. at 2762.

<sup>58</sup> The Court's decision to limit its discussion of intent was ironic in light of the Court's previous admonition that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . ." *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962).

alleged, was an improper one.<sup>59</sup> In this regard, the Court stated that, while intent may support the plaintiff's overall claim, it is "not a panacea that will enable any complaint to withstand a motion to dismiss."<sup>60</sup> Justice Marshall's dissent sharply criticized this aspect of the opinion, contending that a formative allegation of intent, based on tort law damage theory, automatically extends recovery to include even the most remotely damaged parties.<sup>61</sup> According to Marshall, once intent has been alleged, any party who has been injured must be allowed to maintain an antitrust suit. Justice Marshall's interpretation, however, would open up a floodgate of litigation, permitting anyone, despite the absolute remoteness of their claim, to show that an intentional antitrust violation had a causal link to their injury. Such an argument, however, is inconsistent with relevant precedent<sup>62</sup> as well as the Court's previous interpretation of Congressional intent which the Court has assumed did not permit individuals who are only "tangentially affected by an antitrust violation" to maintain a treble damages action.<sup>63</sup> This interpretation also tends to make the deterrence element of treble damage claims overly harsh should duplicative recovery occur.<sup>64</sup> Also, it would potentially limit recovery in cases where intent is either very difficult to prove or non-existent.<sup>65</sup> Since antitrust recovery is designed to protect those whom violations actually effect, an "intent" requirement is not very helpful.<sup>66</sup> Thus, the alleging party is left uncertain of the value of making allegations pertaining to the "intent" behind the wrongdoings of the defendant.

The final factor, the relationship between the plaintiff's harm and the defendant's wrongdoing, appears to be the most crucial to the Court because it involves two elements of the fact pattern which seem essential to the Court's dismissal of the complaint. The first element is the actual lack of directness between the defendant's wrongdoing and the plaintiff's harm.<sup>67</sup> The Court believed that, in this case, the "chain of causation" contained "several somewhat vaguely defined links."<sup>68</sup> The vagueness of these links, the Court maintained, diluted the Union's complaint to an extent that provoked the Court to state, "the alleged effects on the union may have been produced by independent factors."<sup>69</sup> The second element of the injury/wrongdoing relationship which led to the dismissal was that there existed a class of persons who stood directly between the parties in the causal chain.<sup>70</sup> The fact that a group of nonunionized contractors were the direct targets of the defendant's activities caused the Court not only to question why these "victims" were not parties and whether they had been injured, but also to express doubt as to whether there was actually any injury at all.<sup>71</sup> Troubled by the prospect of double recoveries in antitrust claims presented by a broadening of the term "persons," the Court maintained that, based on the "private attorney general" motivations behind the enactment of section 4, only those claims for which the plaintiff has proven that he is the most

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<sup>59</sup> 103 S. Ct. at 907, 112 L.R.R.M. at 2759.

<sup>60</sup> *Id.*, 112 L.R.R.M. at 2760.

<sup>61</sup> 103 S. Ct. at 913, 112 L.R.R.M. at 2763 (Marshall, J., dissenting).

<sup>62</sup> Described in the opinion at 103 S. Ct. at 907, 112 L.R.R.M. at 2757, and discussed, *infra* notes 22-23 and accompanying text.

<sup>63</sup> *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723, 4726 (1982).

<sup>64</sup> 103 S. Ct. at 907, 112 L.R.R.M. at 2759.

<sup>65</sup> *Sherman*, *supra* note 5, at 388-89.

<sup>66</sup> *Id.*

<sup>67</sup> 103 S. Ct. at 906, 112 L.R.R.M. at 2758.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 911, 112 L.R.R.M. at 2758.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

viable "private attorney general" to press such a claim, may be entertained.<sup>72</sup> If any factor is to be held dispositive in future claims based on *Associated General Contractors*, it is this one: for a plaintiff to be allowed to bring a massive antitrust suit it must be clear, first, that there are no other parties who would have a superior suit, or perhaps, who should be joined to this suit; and second, that this plaintiff is the one whose specific damages the defendant should be made liable to pay in treble.

In summary, *Associated General Contractors v. California State Council of Carpenters* held that the unions in question failed to state a claim, and that they did not have standing to sue because of the indirectness of their injury, the speculative and complex nature of their damages, the existence of less remote parties who might have superior claims, and the availability of alternative remedies. This case also demonstrates the concern which the Supreme Court has for the problem of balancing "private antitrust enforcement and redress for injury" against "treble damages 'overkill' and a litigational avalanche."<sup>73</sup> As such, the case holds a valuable lesson for future union antitrust complainants; in order to persuade the Court to allow its case, the union must design allegations which demonstrate that its action will result in effective enforcement and redress and not cause injudicious and unnecessary overkill.

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<sup>72</sup> *Id.*, 112 L.R.R.M. at 2758.

<sup>73</sup> Sherman, *supra* note 5, at 405.

## EMPLOYMENT DISCRIMINATION LAW

## I. PROCEDURAL DEVELOPMENTS

A. *\*Burdens of Production and Proof in Individual Disparate Treatment Litigation:*  
*Miller v. WFLI Radio Incorporated*<sup>1</sup>

Title VII of the Civil Rights Act of 1964<sup>2</sup> (Title VII) proscribes employers' intentional discrimination against an employee because of race, color, religion, sex, or national origin.<sup>3</sup> The Supreme Court of the United States has held that an employee who charges an employer with individual disparate treatment in violation of Title VII must establish a prima facie case by a preponderance of the evidence.<sup>4</sup> According to the Supreme Court, an employee can establish a prima facie case of individual disparate treatment by proving that (1) he belongs to a racial minority; (2) he applied and was qualified for a position for which the employer was seeking applicants; (3) he was rejected despite his qualifications; and (4) after his rejection, the position remained open and the employer continued to seek applicants.<sup>5</sup> When the Court articulated these elements of a prima facie case, it reserved the discretion to modify them somewhat, depending on the factual context of a given case.<sup>6</sup>

Once the plaintiff employee has established a prima facie case by a preponderance of the evidence, according to the Court, there is a presumption that the employer has unlawfully discriminated against the individual employee.<sup>7</sup> Although the Court has recognized that at all times, the burden of persuasion in an individual disparate treatment suit remains with the plaintiff, the Court has stated that if the trier of fact believes the plaintiff's evidence, and the employer makes no response to that evidence, the trial court must enter judgment for the plaintiff because no issue of fact remains in the case.<sup>8</sup>

The Supreme Court has stated that in order to rebut this presumption, the defendant employer must articulate a legitimate, nondiscriminatory reason for the employee's rejection.<sup>9</sup> According to the Court, the defendant must produce admissible evidence which would allow the trier of fact rationally to conclude that there was no intentional, unlawful discrimination in order to rebut the presumption created by the established

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<sup>1</sup> 687 F.2d 136 (6th Cir. 1982).

<sup>2</sup> 42 U.S.C. § 2000e-2.

<sup>3</sup> *Id.* This statute states in pertinent part: "Unlawful Employment Practices (a) It shall be unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . ." *Id.*

<sup>4</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981).

<sup>5</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>6</sup> *Id.* at n.13.

<sup>7</sup> *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981).

<sup>8</sup> *Id.* at 254.

<sup>9</sup> *Id.* at 254-55.

prima facie case.<sup>10</sup> Since the Court has stated that the defendant must produce evidence which is admissible in court, his burden of production will not be met by mere statements in the pleadings or in his attorney's closing argument.<sup>11</sup>

Finally, assuming that the defendant has met his burden of production and therefore, rebutted the presumption created by the plaintiff's prima facie case, the Court has held that the plaintiff must be permitted to demonstrate by a preponderance of the evidence that the reasons proffered by the defendant were not his true reasons, but instead, were mere pretexts for discrimination.<sup>12</sup> According to the Court, the plaintiff can do this in either of two ways: (1) directly, by persuading the court that a discriminatory reason more likely motivated the employer, or (2) indirectly, by demonstrating that the employer's proffered explanation is unworthy of credence.<sup>13</sup> In applying this paradigm, however, it was unclear whether a court could infer a legitimate reason for an employer's preference from evidence produced at trial where that reason was different from that raised by the employer as a rebuttal to the plaintiff's prima facie case.

During the *Survey* year, the United States Court of Appeals for the Sixth Circuit decided *Miller v. WFLI Radio Incorporated*.<sup>14</sup> In that case, the Sixth Circuit applied the paradigm for determining the presence of unlawful employment discrimination that had been developed by the Supreme Court.<sup>15</sup> The Sixth Circuit held that a trial court properly may infer a legitimate reason for an employer's preference, even though that reason was not clearly and fully developed by the employer, so long as the plaintiff has a full and fair opportunity to disprove that reason.<sup>16</sup> This holding is significant because it enables a trial court, in cases where the defendants' proffered reasons for its allegedly discriminatory behavior have been disproved, to find a legitimate reason not clearly developed by the employer based on the trial record.<sup>17</sup>

In *Miller*, a female employee brought a Title VII suit against her employer, a radio station, for alleged sex-based discrimination.<sup>18</sup> The plaintiff, Norma Miller, had been the station's most successful seller of the station's available advertising time slots. Miller was so successful that she had been promoted to sales manager.<sup>19</sup> Some time after Miller's promotion, the station rehired Johnny Eagle as a sales person. Eagle was a former employee and long-time friend of one of the station's owners.<sup>20</sup> Mr. Eagle's success as a salesperson for WFLI was questionable.<sup>21</sup>

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<sup>10</sup> *Id.* at 255.

<sup>11</sup> *Id.* at n.9.

<sup>12</sup> *Id.* at 256.

<sup>13</sup> *Id.* Note that in disparate impact cases — that is, cases where a facially neutral practice results in discrimination — plaintiffs must use a different paradigm to prevail in a Title VII action. To establish a prima facie case of disparate impact discrimination, the plaintiff must show that a facially neutral employment practice has a significantly discriminatory impact. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). If that showing is made, the employer must then demonstrate that each requirement has a manifest relationship to the employment in question, in order to avoid a finding of discrimination. *Id.* at 446-47. The plaintiff nevertheless prevails if he shows that the employer was using the practice as a pretext for discrimination. *Id.* at 447. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

<sup>14</sup> 687 F.2d 136 (6th Cir. 1982).

<sup>15</sup> *Id.* at 138.

<sup>16</sup> *Id.* at 138-39.

<sup>17</sup> See *id.*

<sup>18</sup> *Id.* at 137-38.

<sup>19</sup> *Id.* at 137.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

In 1978, the station decided to reduce its number of saleable advertising slots and informed Miller that she would have to begin splitting her advertising accounts with Eagle.<sup>22</sup> She refused to do so and was discharged. The station filed a separation notice with the Tennessee Department of Employment Security indicating that Miller had been discharged because her position had been deleted.<sup>23</sup> After Miller's termination, Eagle assumed most of her former duties and was given the title "National Sales Manager."<sup>24</sup>

Miller filed a Title VII action in federal district court against the station alleging sex-based discrimination.<sup>25</sup> The station answered that she was terminated because she was inefficient, disloyal and temperamental.<sup>26</sup> A United States Magistrate, hearing the case without a jury, determined that Miller successfully had established a *prima facie* case of sex-based discrimination and that the station's proffered reasons for her discharge were specious and pretextual.<sup>27</sup> The Magistrate, however, held that Miller had failed to satisfy her burden of proving unlawful discrimination, concluding that the discharge of Miller was based on a simple preference for the services of Eagle, although this reason was not clearly advanced by the station.<sup>28</sup> Apparently, the Magistrate inferred this legitimate business preference from the testimony of two of the station's owners at the trial.<sup>29</sup>

In deciding *Miller*, the Sixth Circuit began with the burden of proof analysis developed by the Supreme Court in *Texas Department of Community Affairs v. Burdine*.<sup>30</sup> Under this analysis, a plaintiff alleging unlawful discrimination initially must establish a *prima facie* case of discrimination.<sup>31</sup> The *Miller* court noted that if the plaintiff succeeds in establishing a *prima facie* case, the defendant assumes the burden of *producing*, as distinct from *proving*, a legitimate, non-discriminatory reason for its actions.<sup>32</sup> Finally, if the defendant produces evidence of legitimate purpose, the *Miller* court explained, the plaintiff must carry her *burden of proof* that she was in fact a victim of sex discrimination.<sup>33</sup> The court noted that the plaintiff may sustain this burden by showing by a preponderance of the evidence that the defendant's proffered reasons are not legitimate, but rather pretexts which mask discriminatory conduct.<sup>34</sup> According to the court, the plaintiff may show pretext in either one of two ways: (1) directly, by affirmative evidence of discrimination, or (2) indirectly, by demonstrating that the employer's proffered explanation lacks credence.<sup>35</sup> The *Miller* court also stated that the trier of fact resolves the question of whether the plaintiff has satisfied her burden of proving discrimination by a preponderance of the evidence.<sup>36</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 138.

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

<sup>30</sup> *Id.* (citing *Burdine*, 450 U.S. 248, 256 (1981)).

<sup>31</sup> 687 F.2d at 138.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (citing *Burdine*, 450 U.S. at 256).

<sup>36</sup> 687 F.2d at 138.

Having thus set forth the allocations of burdens in individual disparate treatment litigation under Title VII, the *Miller* court stated that the Magistrate had departed from this norm by inferring a legitimate business reason for Miller's discharge other than those specifically advanced by the defendant.<sup>37</sup> Stating that if the station had discharged Miller because of a simple preference for Eagle it should have argued so from the beginning, the *Miller* court nevertheless refused to reverse judgment for Miller as a matter of law.<sup>38</sup> The court reasoned that to do so, would be "too mechanical an application of the *Burdine* paradigm."<sup>39</sup>

In support of its refusal to reverse the lower court's holding, the court explained that the trial testimony of two of the station's owners revealed a "strong suggestion" that they were determined to rehire Johnny Eagle.<sup>40</sup> Because of this testimony, according to the court, it would be unfair to hold that the "simple business preference" argument had never been raised at all, although the station did not develop or pursue it.<sup>41</sup> The *Miller* court suggested, however, that it would have reversed the Magistrate's decision had there been *no* support in the record that Miller's discharge was based on a non-discriminatory preference for Eagle's services.<sup>42</sup>

The *Miller* court observed that the station had neither pleaded nor emphasized that Miller's discharge was based on a preference for Eagle.<sup>43</sup> The court further noted that the Magistrate apparently had inferred this defense from recorded testimony.<sup>44</sup> In light of these observations, the court of appeals concluded that Miller had not had a full and fair opportunity to respond to this proffered defense.<sup>45</sup> The *Miller* court, therefore, held that the case had to be remanded for reconsideration.<sup>46</sup> The court explained that the remand was required to allow Miller to present evidence showing the station's argument that it honestly preferred Eagle's services was also a pretext for discrimination.<sup>47</sup> Finally, the court stated that its opinion did not compel the Magistrate to reach a different holding upon rehearing.<sup>48</sup> Accordingly, the *Miller* court vacated and remanded the case for further consideration.<sup>49</sup>

A single dissenting judge would have reversed the decision of the Magistrate and remanded for a determination of the back pay owed to Miller.<sup>50</sup> The dissent stated that since Miller had established the *prima facie* case of discrimination, and had shown the station's proffered explanation to be pretext, she was entitled to judgment in her favor.<sup>51</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 139.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 138.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 139.

<sup>46</sup> *Id.* According to the court, a remand would allow the factual issue, whether Miller was the victim of unlawful discrimination, to be clarified. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 139-40 (Churchill, D.J., dissenting).

<sup>51</sup> *Id.* at 140.

The dissent argued that *Burdine* requires that a plaintiff have a full and fair opportunity to respond to legitimate business reasons proffered by the defendant and that the reason proffered by the Magistrate, therefore, need not be addressed by the plaintiff.<sup>52</sup> Apparently, the dissent would have reversed because the defendant radio station in *Miller* had failed to present its argument that it simply preferred Eagle's services in its pleadings or explicitly in its argument at trial.<sup>53</sup> This conclusion implies that the dissent deemed it improper for the Magistrate to infer the defense merely from the trial testimony.<sup>54</sup>

According to the majority in *Miller*, the dissent's analysis of the Magistrate's decision is too mechanical an application of the *Burdine* paradigm.<sup>55</sup> Under the circumstances of *Miller*, this is perhaps correct. In *Miller*, the true state of affairs appeared to be that the owners of the station were looking for an opportunity to rehire an old friend, Johnny Eagle.<sup>56</sup> Eagle's rehiring, however, required that Miller be discharged. The station, unaware that a preference for Eagle based on friendship was a legally sufficient defense to the charge of sex discrimination, instead attempted to rely on pretexts that Miller was uncooperative and temperamental to respond to her prima facie case.<sup>57</sup> The Magistrate, upon hearing the testimony of the station's owners, inferred that the decision to rehire Eagle was the true reason for Miller's discharge.<sup>58</sup> Consequently, the Magistrate decided that the preference was not unlawfully discriminatory and held for the station.<sup>59</sup> In so deciding, the Magistrate refused to hold the station liable for its mistaken evaluation of what constituted a defense to a Title VII action. The Magistrate's decision, therefore, although not based on a mechanical application of the *Burdine* paradigm, is defensible insofar as it looked beyond the station's pleadings and legal argument to determine the actual facts and reasons which were really involved, and ultimately concluding that the underlying reasons were legally defensible.<sup>60</sup> The Magistrate's decision, however, was contrary to *Burdine* since it did not allow Miller a full and fair opportunity to address this argument.<sup>61</sup>

The Sixth Circuit's holding in *Miller* is significant for two reasons. First, the holding upheld the trial court's inference of defenses, from testimony, that were not explicitly articulated in the defendant's pleadings or argument.<sup>62</sup> The allowance of such inferences by the trial court, however, is qualified by the requirement that a full and fair opportunity be allowed for the plaintiff to address them.<sup>63</sup> Moreover, there apparently must be a basis for such inferences in the trial record.<sup>64</sup> The *Miller* holding, therefore, suggests that where the plaintiff neglects to make an obvious defense in his answer to a charge of

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<sup>52</sup> *Id.* at 139.

<sup>53</sup> *See id.* at 139-40.

<sup>54</sup> *See id.*

<sup>55</sup> *Id.* at 139.

<sup>56</sup> *See id.* at 137.

<sup>57</sup> *See id.* at 137-38.

<sup>58</sup> *See id.* at 138-39.

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *Id.* at 138 (citing *Burdine*, 450 U.S. at 258).

<sup>62</sup> 687 F.2d at 139.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.*

violating Title VII, the trial judge may come to his rescue and raise the defense himself, if the trial record supports it.

Second, and perhaps more importantly, the *Miller* court's holding implicitly endorses a defense that an employee's discharge was based on a non-discriminatory preference for the services of another.<sup>65</sup> The *Miller* court's endorsement of a defense phrased in such general terms may make it more difficult for future Title VII plaintiffs to sustain their burdens of proof. Unless the courts require that the defendant employer specifically state a non-discriminatory basis of such preference, it probably will be more difficult in future litigation for a plaintiff to show pretext. In responding to allegations of unlawful discrimination, a Title VII defendant may plead that he denied employment to the plaintiff merely because the employer had a non-discriminatory preference for someone else. Assuming, however, that the court's endorsement of this defense affects both plaintiff and defendant equally in Title VII cases, it nevertheless will demand a more subjective evaluation by the factfinder and hence likely will render the outcome of such litigation less predictable. This is so because where a defendant pleads that his employment decision was based on a simple non-discriminatory preference, and the plaintiff in turn claims this defense to be a pretext, the trial judge must decide which side will prevail. This decision often will not be aided by direct evidence; therefore, the trial judge will have to base his decision on which of the parties appears more believable.

B. *\*Consent Decree in EEOC Action Cuts Off Charging Parties' Right-to-Sue:*  
*Adams v. Procter & Gamble Mfg. Co.*<sup>1</sup>

Title VII of the Civil Rights Act of 1964<sup>2</sup> protects employees of and applicants for employment from discrimination based on race, color, religion, sex or national origin.<sup>3</sup> The 1972 amendments to section 706(f)(1) of Title VII<sup>4</sup> grant the Equal Employment Opportunity Commission (EEOC) enforcement powers which had been absent from the

<sup>65</sup> See *id.* at 138-39.

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<sup>1</sup> 697 F.2d 582, 30 FEP Cases 1228 (4th Cir. 1983) (per curiam; en banc).

<sup>2</sup> Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1976)).

<sup>3</sup> See, e.g., *General Telephone Co. v. EEOC*, 446 U.S. 318, 323, 22 FEP Cases 1196 (1980).

<sup>4</sup> Pub. L. 92-261, §§ 2-8, 10, 11, 13, 86 Stat. 103-113 (codified as amended at 42 U.S.C. §§ 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17 (1976)). Section 706(f)(1) of Title VII, as amended, reads in pertinent part:

(f)(1) If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . , the Commission has

original statutory scheme.<sup>5</sup> Specifically, the amendments authorize the EEOC to bring a civil action against a party who has been charged by an employee or applicant for employment with an unlawful employment practice if the EEOC is unable to secure a conciliation agreement from the alleged Title VII offender which is acceptable to the EEOC.<sup>6</sup> As amended, the statute accords the parties claiming the existence of a Title VII violation the express right to intervene in a suit commenced by the EEOC.<sup>7</sup> In addition, the present section requires the EEOC to notify the aggrieved parties of their individual right to sue if the EEOC dismisses the charge, or has not entered into a conciliation agreement to which the person aggrieved is a party.<sup>8</sup>

During the *Survey* year, the United States Court of Appeals for the Fourth Circuit, in *Adams v. Procter & Gamble Mfg. Co.*,<sup>9</sup> held that the entering of a consent decree in a civil action brought by the EEOC under section 706(f)(1) extinguished the right of the charging parties to bring an individual action based on the same claim *unless* the parties had intervened in the EEOC action prior to the entry of the consent decree.<sup>10</sup> Central to the *Adams* holding was the court's finding that a consent decree is a judgment on the merits, which under the doctrine of res judicata requires the dismissal of any subsequent suit brought by the charging parties.<sup>11</sup> The Fourth Circuit holding is in agreement with the decisions reached by the two other appeals courts which have considered the effect of an adjudication on the merits in an EEOC action on a later action brought by a charging party.<sup>12</sup> The court's decision in *Adams*, however, is contrary to the EEOC's position that a

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not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. . . .

42 U.S.C. § 2000e-5(f)(1) (1976).

<sup>5</sup> The Senate Report on the 1972 amendments to the Civil Rights Act of 1964 noted that the "failure to grant the EEOC meaningful enforcement powers has proven a major flaw in the operation of Title VII." S. REP. NO. 415, 92d Cong., 1st Sess. 4 (1971).

Prior to 1972, the only civil actions authorized (other than private lawsuits) were actions by the Attorney General upon suspicion of a pattern or practice of discrimination. See *General Telephone Co. v. EEOC*, 446 U.S. 318, 327, 22 FEP Cases 1196, 1199-1200 (1980).

<sup>6</sup> 42 U.S.C. § 2000e-5(f)(1) (1976); see *supra* note 4 for relevant text of the provision. An individual, of course, retains his private right of action. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

<sup>7</sup> 42 U.S.C. § 2000e-5(f)(1) (1976).

<sup>8</sup> *Id.* The statute grants the aggrieved party ninety days from the date of such notice to bring a civil action. *Id.*

<sup>9</sup> 697 F.2d 582, 30 FEP Cases 1228 (4th Cir. 1983) (per curiam; en banc).

<sup>10</sup> *Id.* at 583, 30 FEP Cases at 1229.

<sup>11</sup> *Id.*

<sup>12</sup> *Jones v. Bell Helicopter Co.*, 614 F.2d 1389, 1389, 22 FEP Cases 773, 773 (5th Cir. 1980) (Private Title VII action barred when same claim was at issue in earlier action brought by the EEOC and was set aside for failure to comply with the Administrative Procedure Act); *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115, 1119, 14 FEP Cases 817, 819 (8th Cir. 1977) (Once EEOC files an action under § 706(f)(1), an individual may not institute an independent action, but rather has the right to intervene); see also *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 870 n.62, 11 FEP Cases 167, 202 n.62 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 12 FEP Cases 1090 (1976) (Charging party has "an unconditional right to intervene in order to protect his or her own interests in a § 706 suit brought by the Commission, which [suit] otherwise cuts off the private party's right to sue under Title VII."). Compare *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 526-27, 22

consent decree does not bind the charging parties who reject the terms of the settlement contained in the decree.<sup>13</sup>

The underlying controversy in *Adams* commenced in 1976 when the EEOC brought an action against Procter & Gamble in response to employment discrimination charges filed by over two dozen employees.<sup>14</sup> During the ensuing three year discovery period none of the charging parties exercised their statutory right to intervene.<sup>15</sup> Negotiations between the EEOC and Procter & Gamble eventually resulted in a consent decree.<sup>16</sup> Following the entry of the consent decree, the EEOC issued right-to-sue letters to the charging parties who had rejected the awards under the decree.<sup>17</sup> When sixteen of the charging parties instituted individual actions in federal district court against Procter & Gamble pursuant to their right-to-sue notices, the court granted the company's motion to dismiss the individual actions.<sup>18</sup>

According to the district court, the EEOC's filing of a suit and the subsequent entry of a consent decree extinguished the right of the charging parties to initiate their own Title VII actions.<sup>19</sup> In so holding, the court relied upon the clear language of section 706(f)(1).<sup>20</sup> In other words, the court found that "consent decree" and "conciliation or settlement agreement" were not interchangeable terms. The district court set forth what in its opinion was the "fundamental" distinction between the two.<sup>21</sup> A consent decree, the district court stated, was an agreement between the EEOC and the party charged with the Title VII violation following the institution of a civil suit by the EEOC.<sup>22</sup> A conciliation agreement, in contrast, was a settlement agreement reached by the employer and the EEOC prior to the initiation of a suit.<sup>23</sup> The district court emphasized that the charging parties have no right to take part in the negotiations leading up to a conciliation or

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FEP Cases 554 (5th Cir. 1980) (Court held that procedural dismissal of EEOC action did not operate as res judicata where EEOC could have, but did not, file a subsequent suit. Court acknowledged that a charging party who did not intervene in an EEOC action cannot initiate a lawsuit on the same claim merely because the party is not satisfied with the outcome of the EEOC suit.).

<sup>13</sup> 678 F.2d 1190, 1192, 28 FEP Cases 1463, 1464 (4th Cir. 1982). The EEOC asserted that the charging parties were only potential witnesses in its agency action and were not bound by the terms of a settlement decree that they refused to accept. *Id.*

A consent decree has been defined as an "[a]greement by defendant to cease activities asserted as illegal by government. . . . Upon approval of such agreement by the court the government's action against the defendant is dropped." H.C. BLACK, BLACK'S LAW DICTIONARY, 370 (5th ed. West 1979).

<sup>14</sup> 697 F.2d 582, 583, 30 FEP Cases 1228, 1229 (4th Cir. 1983).

<sup>15</sup> 678 F.2d 1190, 1190, 28 FEP Cases 1463, 1463 (4th Cir. 1982).

<sup>16</sup> 697 F.2d 582, 583, 30 FEP Cases 1228, 1229 (4th Cir. 1983). Pursuant to the terms of the consent decree, Procter & Gamble agreed *inter alia* to compensatory awards for the employees who had instituted the action. 678 F.2d 1190, 1192, 28 FEP Cases 1463, 1464 (4th Cir. 1982).

<sup>17</sup> 697 F.2d 582, 583, 30 FEP Cases 1228, 1229 (4th Cir. 1983). A "right-to-sue" letter is a notice the EEOC is authorized to issue to charging parties when the EEOC dismisses the charges, fails to file a suit within 180 days of the filing of the charges, or has entered into a conciliation agreement to which the person aggrieved is a party. 42 U.S.C. § 2000e-5(f)(1) (1976). A properly issued right-to-sue letter is a jurisdictional prerequisite to the institution of a private cause of action under Title VII. See *Nilsen v. City of Moss Point*, 621 F.2d 117, 120, 24 FEP Cases 1077, 1078 (5th Cir. 1980); *Hiduchenko v. Minneapolis Medical and Diagnostic Center, Ltd.*, 467 F. Supp. 103, 107, 19 FEP Cases 460, 462 (D. Minn. 1979).

<sup>18</sup> 30 FEP Cases 1225, 1228 (D. Md. 1981).

<sup>19</sup> *Id.* at 1226.

<sup>20</sup> *Id.* See note 4 *supra* for the text of § 706(f)(1).

<sup>21</sup> 30 FEP Cases 1225, 1228 (D. Md. 1981).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

settlement agreement, whereas they have an unqualified right to intervene in an EEOC suit which may eventually culminate in a consent decree.<sup>24</sup> The court observed that its ruling did not limit the right of allegedly injured employees to seek relief, reasoning that the reservation of the charging parties' statutory right to intervene once the EEOC files a suit adequately safeguarded the individuals' interests.<sup>25</sup> In addition, the court noted that its holding would have the beneficial effect of preventing duplicative proceedings.<sup>26</sup>

On appeal, the Fourth Circuit, in a two-to-one panel decision, vacated and remanded the district court's dismissal of the individual actions.<sup>27</sup> Specifically, the panel court held that the charging parties' private rights of action were not terminated by the EEOC's institution of a section 706 action or the entry of a consent decree.<sup>28</sup> Accordingly, the court found that the EEOC had issued the right-to-sue letters properly.<sup>29</sup> The panel court identified a number of factors in support of its decision. It observed that the legislative history indicated no congressional intent to cut off private rights of action following the filing of an EEOC action.<sup>30</sup> More particularly, the court found no basis in the legislative history to conclude that Congress intended only unacceptable pre-suit settlements, and not unacceptable consent decrees, to keep private rights of action alive.<sup>31</sup> In addition, an examination of other remedial statutes in which the automatic termination of a private right to sue was expressly revoked suggested, in the panel's opinion, that Congress had no such intention in the section 706(f)(1) context.<sup>32</sup> The panel court also found that Congress intended to provide for parallel and possibly overlapping remedies under Title VII.<sup>33</sup> Furthermore, the panel court opined that a conciliation agreement, as that term was defined in section 706(f)(1), meant any form of negotiated settlement and included consent decrees.<sup>34</sup> Moreover, not being a party to the agreement simply meant not agreeing to its terms, rather than not being eligible for its benefits.<sup>35</sup> This reasoning was based upon the panel's interpretation of dicta in *General Telephone Co. v. EEOC*.<sup>36</sup> In that case, the Supreme Court held that the EEOC may seek classwide relief under section 706(f)(1) without class action certification pursuant to Fed. R. Civ. P. 23.<sup>37</sup> In support of its position, the panel court cited *General Telephone* dicta which provided that "[u]nder section 706(f)(1), the aggrieved person may bring his own action . . . if the agency has . . . reached a conciliation or settlement agreement with the employer that the [charging] party finds unsatisfactory."<sup>38</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1226.

<sup>26</sup> *Id.* ("The statutory right to intervene serves the dual purpose of protecting the interests of the private parties and preventing duplicative proceedings.").

<sup>27</sup> 678 F.2d 1190, 1192, 28 FEP Cases 1463, 1464 (4th Cir. 1982).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1193-94, 28 FEP Cases at 1465-66. The court's examination of legislative history is a lengthy analysis which relies to a great extent on a comparison of the disjunctive with the conjunctive.

<sup>31</sup> *Id.* at 1194, 28 FEP Cases at 1466.

<sup>32</sup> *Id.*, 28 FEP Cases at 1465-66.

<sup>33</sup> *Id.*, 28 FEP Cases at 1466. The court noted Supreme Court language which found in Title VII "a general intent [by Congress] to accord parallel or overlapping remedies against discrimination." *Id.* (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)).

<sup>34</sup> 678 F.2d 1190, 1194, 28 FEP Cases 1464, 1466 (4th Cir. 1982).

<sup>35</sup> *Id.*

<sup>36</sup> 446 U.S. 318, 22 FEP Cases 1196 (1980).

<sup>37</sup> *Id.* at 323-24, 22 FEP Cases at 1198-99.

<sup>38</sup> 678 F.2d 1190, 1194, 28 FEP Cases 1464, 1466 (4th Cir. 1982) (citing *General Telephone Co. v. EEOC*, 446 U.S. 318, 326, 22 FEP Cases 1196, 1199 (1980)).

In a dissenting opinion, Senior Circuit Judge Haynsworth stated that the district court correctly dismissed the individual suits.<sup>39</sup> According to Judge Haynsworth, charging parties who fail to intervene in an EEOC action should be barred from filing any subsequent individual action once a consent decree is issued.<sup>40</sup> Despite conferring preclusive effect on a consent decree, Judge Haynsworth noted an implicit exception if the EEOC action is terminated on a technical basis which would not have such a preclusive effect.<sup>41</sup> Agreeing with the reasoning of the district court, Judge Haynsworth distinguished a conciliation agreement from a consent decree because of the different positions held by intervening parties in the two instances.<sup>42</sup> The dissent stated that although a charging party has no right to participate in the negotiation of a conciliation agreement, it does have an opportunity to participate in the events leading up to the entry of a consent decree through the absolute statutory right of intervention provided by section 706(f)(1).<sup>43</sup> In addition, the dissent noted the lack of incentive an employer will have to settle disputes with the EEOC, if a charging party may reject the terms of such settlements.<sup>44</sup> Finally, Judge Haynsworth dismissed the majority's use of *General Telephone* as inapposite to the instant case because in that case the employer sought a holding that any judgment would have a preclusive effect on all individual claims, including the claims of persons who were not charging parties.<sup>45</sup> The panel dissent concluded that the *General Telephone* dicta cited by the majority referred *only* to members of the class who filed no charges.<sup>46</sup>

The Fourth Circuit Court of Appeals entered an order granting rehearing en banc.<sup>47</sup> It then rejected the panel decision and affirmed the judgment of the district court.<sup>48</sup> Adopting Judge Haynsworth's reasoning, the en banc Fourth Circuit held that the conclusion of an EEOC action by consent decree precluded any subsequent suits on the same claim by charging parties who had not intervened in the EEOC action.<sup>49</sup> The court found that a consent decree clearly was a judgment on the merits.<sup>50</sup> Furthermore, in the Fourth Circuit's opinion, a charging party's unqualified right to intervene rendered the statutory scheme "fair and reasonable."<sup>51</sup> Finally, the Fourth Circuit noted that if a charging party does not intervene "it is not unfair to conclude that he placed the conduct of the litigation entirely upon the EEOC and expressed a conclusive willingness to be bound by the outcome."<sup>52</sup> The Fourth Circuit did, however, note that this rule should not

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<sup>39</sup> 678 F.2d 1190, 1196, 28 FEP Cases 1463, 1467 (4th Cir. 1982) (Haynsworth, J., dissenting).

<sup>40</sup> *Id.* (Haynsworth, J., dissenting).

<sup>41</sup> *Id.* (Haynsworth, J., dissenting).

<sup>42</sup> *Id.*, 28 FEP Cases at 1467-68 (Haynsworth, J., dissenting).

<sup>43</sup> *Id.*, 28 FEP Cases at 1468 (Haynsworth, J., dissenting).

<sup>44</sup> *Id.* (Haynsworth, J., dissenting).

<sup>45</sup> *Id.* (Haynsworth, J., dissenting).

<sup>46</sup> *Id.* (Haynsworth, J., dissenting).

<sup>47</sup> 697 F.2d 582, 30 FEP Cases 1228 (4th Cir. 1983) (per curiam). The en banc Fourth Circuit voted 5 for rehearing en banc, 4 against, with one disqualification. *Id.* at 584, 30 FEP Cases at 1230 (Widener, J., concurring).

<sup>48</sup> *Id.* at 583-84, 30 FEP Cases at 1229-30. Judge Widener agreed with the majority's per curiam decision on the merits, but wrote a separate concurrence on procedural grounds. *Id.* at 584, 30 FEP Cases at 1230. He noted a possible procedural difficulty with the court's authority for the rehearing. *Id.*

<sup>49</sup> *Id.* at 583, 30 FEP Cases at 1230.

<sup>50</sup> *Id.*, 30 FEP Cases at 1229.

<sup>51</sup> *Id.* The consent decree awarded benefits which were available to the charging parties. *Id.*

<sup>52</sup> *Id.*

apply where the EEOC's action was concluded on technical grounds without a judgment on the merits.<sup>53</sup>

The Fourth Circuit also agreed with Judge Haynsworth's conclusion that the panel's reliance on the *General Telephone* dicta was misplaced.<sup>54</sup> According to the en banc majority, *General Telephone* related to the effect of a judgment on persons who were *not* charging parties and had *no* right of intervention.<sup>55</sup> Therefore, the Fourth Circuit held that *General Telephone* was "inapplicable to the preclusive effect of a judgment upon charging parties who had not exercised their right of intervention."<sup>56</sup>

Finally, the en banc Fourth Circuit acknowledged concerns that a charging party may not recognize any reason to intervene until it is too late.<sup>57</sup> Nevertheless, the opinion emphasized that its decision rested on the plain meaning of section 706(f)(1).<sup>58</sup> Furthermore, the court admonished those who invoke the machinery of section 706(f)(1) to take a continuing interest or participation in the proceedings.<sup>59</sup>

Three members dissented from the en banc Fourth Circuit's decision, relying on the reasoning of the panel court's majority opinion.<sup>60</sup> Emphasizing the "real-life situation" involving Title VII suits, the dissent noted that there was nothing in either the statutory framework or the record of the case at bar that revealed any obligation of either the EEOC or the employer to keep the charging parties apprised of the progress of their case.<sup>61</sup> The dissent observed that the imminence or entry of a consent decree might be unknown to the charging parties until it was too late.<sup>62</sup> Furthermore, the dissent countered the plain-meaning reasoning of the majority, stating that section 706(f)(1) is sufficiently ambiguous to require judicial interpretation.<sup>63</sup> Finally, the dissent cited *General Telephone* dicta which indicated that a court may require an individual who wishes to claim under a judgment obtained by the EEOC to relinquish his right to bring a separate private action.<sup>64</sup> The dissent stated that this language in *General Telephone* only made sense if EEOC-obtained judgments were not binding on employees.<sup>65</sup>

The en banc majority rendered an opinion that is consistent with existing precedent on the preclusive effect of an adjudication on the merits in an EEOC action.<sup>66</sup> The significance of the Fourth Circuit's opinion in *Adams* lies in the court's decision to confer preclusive effect upon a *consent decree* entered in a civil action brought by the EEOC against an alleged Title VII offender. *Adams*, if followed by other courts, assures defendants that the terms of a consent decree will be binding on all charging parties, rather

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<sup>53</sup> *Id.*, 30 FEP Cases at 1230. *Accord*, *Truvillion*, *supra* note 12, at 526.

<sup>54</sup> 697 F.2d at 583-84, 30 FEP Cases at 1229-30. *See supra* notes 30-34 and accompanying text.

<sup>55</sup> 697 F.2d at 584, 30 FEP Cases at 1230.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (Phillips, J., dissenting). *See supra* notes 22-29 and accompanying text.

<sup>61</sup> 697 F.2d at 585, 30 FEP Cases at 1231 (4th Cir. 1983) (Phillips, J., dissenting).

<sup>62</sup> *Id.* (Phillips, J., dissenting).

<sup>63</sup> *Id.* (Phillips, J., dissenting). Presumably, the ambiguity to which the court refers is whether conciliation agreement, as used in § 706(f)(1), means only a "conciliation" agreement or any form of negotiated settlement including a consent decree.

<sup>64</sup> *Id.* (Phillips, J., dissenting); *see supra* notes 27-29 and accompanying text.

<sup>65</sup> 697 F.2d at 586, 30 FEP Cases at 1231-32 (Phillips, J., dissenting).

<sup>66</sup> *See supra* note 12.

than serving as a possible floor for future negotiations with attorneys for individual claimants.<sup>67</sup>

The Fourth Circuit's majority en banc opinion, in contrast to the dissent and panel opinions, correctly recognizes the distinction between consent decrees and conciliation agreements, as well as the policy against duplicative court proceedings. The unqualified statutory right of intervention affords charging parties the opportunity to participate in the negotiations leading up to a consent decree. Such an opportunity, the district court explained, is conspicuously absent from the process of reaching a conciliation agreement.<sup>68</sup> Furthermore, a close look at the reasoning of the dissent and the majority panel opinion<sup>69</sup> reveals several significant weaknesses. First, while resting their conclusion of legislative intent on the lack of express statutory language concerning the preclusive effect of a consent decree,<sup>70</sup> the dissent ignores that portion of the history which points to the clear intent of Congress to avoid duplication of proceedings.<sup>71</sup> Instead, the dissenting position looks to *General Telephone* where the Supreme Court declined to require class certification of the EEOC.<sup>72</sup> According to the dissent, the Supreme Court in *General Telephone* accepted the threat of a multiplicity of suits by not binding all persons similarly situated.<sup>73</sup> The dissent fails, however, to note the fundamental difference between the parties in *General Telephone* and those in the case before it. In *General Telephone*, the parties who would have been bound by a class action had not initiated a charge, whereas in *Adams* the charging parties possessed, but did not exercise, the statutory right to intervene. Moreover, in its selective use of the *General Telephone* dicta, the dissent neglects the Supreme Court's statement in that opinion that "unlike the Rule 23 class representative, the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged. *The individual victim is given his right to intervene for this very reason.*"<sup>74</sup>

Finally, the dissent fails to appreciate the limited purpose of an EEOC civil suit and resulting consent decree will serve if it is not binding on all the involved parties. Defendants' motivation to reach a settlement with the EEOC would be drastically reduced if the dissent's position were adopted. It should also be recognized that if the consent decree is not binding on the charging parties, it is unlikely that the defendant would be bound by such an order.

While the en banc majority is supported by the better, if somewhat formalistic, legal reasoning and federal policy aimed at avoiding multiple suits, the dissent's view does have the backing of strong equitable arguments. The dissent is justifiably concerned that the statute obligates neither the EEOC nor the employer to apprise the charging parties of

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<sup>67</sup> This certainty is lacking in the Eighth Circuit where the court of appeals suggested that a consent decree will not bind a charging party if he was never informed of the filing of the EEOC civil action. *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115, 1120-22, 14 FEP Cases 817, 820-21 (8th Cir. 1977).

<sup>68</sup> See *supra* note 13.

<sup>69</sup> 697 F.2d 585, 585-86, 30 FEP Cases 1228, 1230-32 (4th Cir. 1983) (Phillips, J., dissenting). The dissent's reasoning is articulated in its greatest detail in the superceded majority panel opinion. 678 F.2d 1190, 1191-96, 28 FEP Cases 1463, 1463-67 (4th Cir. 1982).

<sup>70</sup> 678 F.2d 1190, 1194, 28 FEP Cases 1463, 1465-66 (4th Cir. 1982).

<sup>71</sup> See 30 FEP Cases 1225, 1226 (D. Md. 1981).

<sup>72</sup> 678 F.2d 1190, 1194, 28 FEP Cases 1463, 1465-66 (4th Cir. 1982).

<sup>73</sup> *Id.* at 1194-95, 28 FEP Cases at 1466.

<sup>74</sup> 446 U.S. 318, 331, 22 FEP Cases 1196, 1201 (1980) (emphasis supplied).

the progress of negotiations.<sup>75</sup> Indeed, the EEOC does not consider itself under any obligation and it does not routinely keep all charging parties even generally informed of the course of its conciliation-settlement negotiations.<sup>76</sup> Moreover, there was no evidence in the *Adams* case that the charging parties were ever sufficiently advised of the progress of the proceedings so that they might make an informed decision as to whether to intervene.<sup>77</sup>

The inadequacies of the statutory scheme are further highlighted by other appellate cases arising under section 706(f)(1). In *McClain v. Wagner Electric Corp.*,<sup>78</sup> the charging party claimed he was informed of neither the filing of the EEOC civil action nor the entry of the consent decree.<sup>79</sup> While holding that a charging party's statutory right of intervention is his sole legal recourse once the EEOC has filed a civil action,<sup>80</sup> the Eighth Circuit opined that Congress could not have intended "to create a situation in which an individual employee without fault or lack of diligence on his own part might find himself unable to file his own suit or to intervene in a suit filed by the Commission."<sup>81</sup> In *Jones v. Bell Helicopter Co.*,<sup>82</sup> a seven-year delay between the time the charging party filed his claim with the EEOC and the time the EEOC commenced a civil action against the defendant resulted in a dismissal of the EEOC's suit on the merits.<sup>83</sup> This dismissal was held to be a bar to any subsequent suit by the individual charging parties.<sup>84</sup> As in both *McClain* and *Adams*, the record in *Jones* did not indicate whether the EEOC had informed Jones of the progress of his complaint until the suit was filed seven years later.<sup>85</sup> While ruling against the plaintiff in *Jones*, the Fifth Circuit was quick to point out the grave shortcomings of the system.<sup>86</sup>

Strong equitable considerations, coupled with an alleged ambiguity in the statutory language of section 706(f)(1), led the dissent in *Adams* to advance a position which is most appealing, but is not supported by the weight of legal or policy reasoning. The amendments to section 706(f)(1) have been in operation for just over a decade. Experience, demonstrated by *Adams*, *McClain* and *Jones*, reveals serious inadequacies in the statute's operation.

The dissent in *Adams* advanced a position which may be the most equitable in grievous cases. It is, however, a task for the legislature, not the judiciary, to respond to the

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<sup>75</sup> 697 F.2d 582, 585, 30 FEP Cases 1228, 1231 (4th. Cir. 1983) (Phillips, J., dissenting).

<sup>76</sup> *Id.* (Phillips, J., dissenting).

<sup>77</sup> *Id.* (Phillips, J., dissenting).

<sup>78</sup> 550 F.2d 1115, 14 FEP Cases 817 (8th Cir. 1977).

<sup>79</sup> *Id.* at 1119, 14 FEP Cases at 819.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1121, 14 FEP Cases at 821. Ultimately, the charging party lost his right to intervene on a procedural issue. *Id.*

<sup>82</sup> 614 F.2d 1389, 22 FEP Cases 773 (5th Cir. 1983).

<sup>83</sup> *Id.* at 1390, 22 FEP Cases at 774.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1391, 22 FEP Cases at 774-75. The Fifth Circuit, while ruling against the plaintiff, stated:

We cannot forebear from pointing out the ineptitude, sloth and indifference with which the E.E.O.C. processed Jones' complaint. The Commission was designed to protect substantive rights, not shield discrimination in a bureaucratic milieu. . . . Jones himself was not without fault, for he showed a singular lack of interest in pressing his claim, but he did not deserve to be penalized by the E.E.O.C.'s failure to provide decent governmental process.

*Id.*

lessons of the last ten years. Clearly, Congress should establish a statutory framework through which charging parties are kept informed of EEOC negotiations and any pending disposition of the suit. Such a system would ensure a fair process for the charging parties, while at the same time assuring all parties of the binding nature of a consent decree entered into by the EEOC.<sup>87</sup>

C. *\*Burden of Proof for Denial of Damages in Title VII Cases: Patterson v. Greenwood School District 50*<sup>1</sup>

Title VII of the Civil Rights Act of 1964<sup>2</sup> prohibits employers from discriminating against an employee because of the employee's race, color, religion, sex, or national origin.<sup>3</sup> If a court finds that a person has been intentionally discriminated against, the court may enjoin the employer from engaging in the unlawful practice and order appropriate affirmative action.<sup>4</sup> The affirmative action may include reinstatement or hiring of the employee with or without back pay.<sup>5</sup> A court cannot order relief if an individual was refused employment or advancement or was suspended or discharged for any reason other than the prohibited discrimination.<sup>6</sup>

In *McDonnell Douglas Corporation v. Green*,<sup>7</sup> and later in *Texas Department of Community Affairs v. Burdine*,<sup>8</sup> the Supreme Court set forth the allocation of the burden of proof for proving discrimination in a Title VII case.<sup>9</sup> The Court emphasized in *Burdine* that,

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<sup>87</sup> The alternative to this proposal, although not advocated herein, is to amend the statute to provide that the adjudication of an EEOC suit on the merits does not bar a charging party from filing his own suit on the same claim.

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\* By Anne Ackenhusen, Staff Member, BOSTON COLLEGE LAW REVIEW.

<sup>1</sup> 696 F.2d 293, 30 FEP Cas. 825 (4th Cir. 1982).

<sup>2</sup> 42 U.S.C. §§ 2000e-2000e-17 (1976).

<sup>3</sup> Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1976).

<sup>4</sup> Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1976), states in pertinent part:

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 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. . . .

*Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1976), concludes with: No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this Title.

*Id.*

<sup>7</sup> 411 U.S. 792, 5 FEP Cas. 963 (1973).

<sup>8</sup> 450 U.S. 248, 25 FEP Cas. 113 (1981).

<sup>9</sup> *Id.* at 252-56, 25 FEP Cas. at 115-16; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-04, 5 FEP Cas. at 969. The plaintiff must first prove by a preponderance of the evidence a prima facie case of discrimination against the defendant-employer. *Id.* at 802, 5 FEP Cas. at 969. The burden of production then shifts to the defendant to rebut the presumption of discrimination created by the plaintiff's prima facie case by producing evidence of legitimate, nondiscriminatory reasons for its

although the burden of production may shift to the defendant during the course of a case alleging discrimination, the ultimate burden of persuading the trier of fact that the defendant-employer intentionally discriminated against the plaintiff remains with the plaintiff at all times.<sup>10</sup>

While distributing the burden of proving discrimination, the Supreme Court has not specifically addressed the standard and burden of proof required *after* discrimination has been shown in order for a Title VII plaintiff to be awarded relief. During the *Survey* year in *Patterson v. Greenwood School District 50*,<sup>11</sup> the Fourth Circuit Court of Appeals dealt with the latter issue in the context of a claim for back pay and a promotion under Title VII.<sup>12</sup> The Fourth Circuit found that once a plaintiff establishes that she has been discriminated against, the defendant-employer bears the burden of proving by clear and convincing evidence that the plaintiff would not have been promoted even in the absence of discrimination.<sup>13</sup> If the employer does not meet this burden of proof, the plaintiff will prevail in obtaining the injunctive relief sought.<sup>14</sup>

In the *Patterson* case, Mrs. Patterson was one of four persons interviewed for the position of assistant principal at an intermediate school in Greenwood School District.<sup>15</sup> Three of the candidates for the position were female.<sup>16</sup> The sole male of the four interviewees was unanimously recommended for the position by the interviewer, and his selection was confirmed subsequently by the School District Board of Trustees.<sup>17</sup> Mrs. Patterson brought a Title VII action against the school, alleging she had been discriminated against upon the basis of sex.<sup>18</sup> The magistrate who heard the case upheld the plaintiff's claim.<sup>19</sup> In finding sex discrimination, the magistrate took into consideration the individual interviewees' education<sup>20</sup> and teaching experience,<sup>21</sup> as well as the all-male composition of the selection panel and the fact that the panel was looking for an applicant who fit a male stereotype.<sup>22</sup> The magistrate also noted that, although the usual procedure was to consult an applicant's immediate supervisor regarding the applicant's qualifications, the person who supervised both the plaintiff and the male candidate was never consulted.<sup>23</sup> That supervisor who was a principal at the school where both candidates

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actions. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254, 25 FEP Cas. at 115. If the defendant carries this burden, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.* at 256, 25 FEP Cas. at 115.

<sup>10</sup> 450 U.S. at 253, 25 FEP Cas. at 115.

<sup>11</sup> 696 F.2d 293, 30 FEP Cas. 825 (4th Cir. 1982).

<sup>12</sup> *Id.* at 295, 30 FEP Cas. at 826.

<sup>13</sup> *Id.* at 295, 30 FEP Cas. at 826.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 294, 30 FEP Cas. at 825.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The magistrate pointed out that although the job vacancy announcement was limited to persons with a Masters Degree in Administration and Supervision, the male who was selected for the job did not have such a degree when he was hired. *Id.* The other three candidates held the requisite advanced degree. *Id.* at 294-95, 30 FEP Cas. at 826.

<sup>21</sup> *Id.* at 294, 30 FEP Cas. at 825. The magistrate relied on the fact that the male applicant ultimately hired had significantly less teaching experience than the other candidates for the position. *Id.*

<sup>22</sup> *Id.* at 294, 30 FEP Cas. at 825-26.

<sup>23</sup> *Id.* at 294, 30 FEP Cas. at 825.

taught,<sup>24</sup> later testified that Mrs. Patterson was a more qualified administrator than the male who was hired.<sup>25</sup>

The district court adopted the magistrate's conclusion that there had been sex discrimination.<sup>26</sup> The court awarded Mrs. Patterson both back pay and a promotion to the next available administrative position.<sup>27</sup>

Upon appeal to the Fourth Circuit, the school district argued that the plaintiff was not entitled to relief because, even absent sex discrimination in selecting the male assistant principal,<sup>28</sup> the other two female candidates who were interviewed for the position would have been appointed before Mrs. Patterson.<sup>29</sup> Three of the interviewers stated that they had rated the plaintiff the lowest of the three women interviewed for the job.<sup>30</sup> A fourth interviewer testified that he would have picked another female candidate over Mrs. Patterson.<sup>31</sup> Although the plaintiff apparently had a good record of performing administrative duties, based on the interviewers' assessment of Mrs. Patterson's answers to questions and upon the characteristics she exhibited during the interview, they believed the other women would interact better with parents, teachers and students as an assistant principal.<sup>32</sup> The court indicated that the record demonstrated that the other two females interviewed were equally qualified, if not more qualified, for the position than Mrs. Patterson.<sup>33</sup> Each of the female candidates held a Masters Degree in Education, and had extensive teaching experience.<sup>34</sup>

The court declared that once the judiciary finds a plaintiff has been discriminated against in violation of Title VII, it has broad remedial powers to grant injunctive relief and to order appropriate affirmative action.<sup>35</sup> It noted, however, that a further investigation must be made if retroactive promotion and back pay are sought.<sup>36</sup> The court relied on both the language of Title VII and case law for this proposition.<sup>37</sup> According to the court, section 706(g) of the Civil Rights Act<sup>38</sup> makes it clear that back pay and promotion

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<sup>24</sup> *Patterson v. Greenwood School Dist.* 50, No. 78-665-3, Master's Report Findings of Fact No. 12 (D.S.C. Aug. 18, 1981).

<sup>25</sup> 696 F.2d at 294, 30 FEP Cas. at 825.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The school district continued to deny that it was improperly motivated. *Id.* It did not, however, appeal the ruling finding it guilty of sex discrimination. *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 294, 30 FEP Cas. at 826. Five persons conducted the interviews. *Patterson v. Greenwood School Dist.* 50, No. 78-665-3, Master's Report Findings of Fact No. 5 (D.S.C. Aug. 18, 1981).

<sup>31</sup> 696 F.2d at 294, 30 FEP Cas. at 826.

<sup>32</sup> *Id.* The negative characteristics cited by the interviewers included "nervousness," "a high-pitched," and an "overdominating personality." *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 294-95, 30 FEP Cas. at 826. Mrs. Patterson had taught for seventeen years, but had no previous experience as an assistant principal. *Id.* Another female candidate had nine years of teaching experience and was appointed to a different administrative position shortly after the interview. *Id.* at 295, 30 FEP Cas. at 826. The third female applicant had nine years of experience, which included serving as a school principal, and was working as a principal for an elementary school at the time of the appellate court's decision. *Id.*

<sup>35</sup> *Id.* The court cited EEOC v. Ford Motor Co., 645 F.2d 183, 200, 25 FEP Cas. 774 (4th Cir. 1981) for this proposition. 696 F.2d at 295, 30 FEP Cas. at 826.

<sup>36</sup> 696 F.2d at 295, 30 FEP Cas. at 826.

<sup>37</sup> *Id.*

<sup>38</sup> 42 U.S.C. § 2000e-5(g) (1976). For the relevant language of this section, see *supra* note 5.

are available only where an employee would have received the promotion had she not been the victim of discrimination.<sup>39</sup> The court stated that other court decisions further clarify this point, demonstrating that the reason back pay is granted is to put the plaintiff in the position she would have enjoyed but for the discrimination.<sup>40</sup> The implication is that if there is no damage resulting from the discrimination, no remedy need be awarded.

According to the court, once a plaintiff has established that she was discriminated against, the burden of proof which determines whether relief will be granted to the plaintiff shifts to the defendant.<sup>41</sup> The court held that the plaintiff must prevail unless the defendant proves by "clear and convincing evidence" that the plaintiff would not have been promoted absent discrimination.<sup>42</sup>

Neither the magistrate nor the district court judge had made any findings of fact regarding whether Mrs. Patterson would have been hired for the position of assistant principal if there had been no discrimination.<sup>43</sup> The court of appeals, however, proceeded to decide this factual issue.<sup>44</sup> Although the usual rule requires an appellate court to remand when a factual issue which was unresolved below is material to the outcome of the case;<sup>45</sup> the court stated that an exception can be made where the record permits only one resolution of the question.<sup>46</sup> The court found the facts in *Patterson* fell within this exception.<sup>47</sup> The appellate court thus held that the evidence contained in the record was clear and convincing, showing that Mrs. Patterson would not have been selected as the assistant principal absent discrimination.<sup>48</sup> In the appeals court's opinion, any other resolution by the district court would be clearly erroneous.<sup>49</sup> Consequently, the appellate court did not remand for further proceedings.<sup>50</sup> The court concluded that Mrs. Patterson had not suffered any damage as a result of her sex-based discrimination, and hence was not entitled to a remedy.<sup>51</sup> Thus, the court reversed the portion of the district court's judgment which awarded the plaintiff a promotion and back pay.<sup>52</sup>

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<sup>39</sup> 696 F.2d at 295, 30 FEP Cas. at 826.

<sup>40</sup> *Id.* The court cited *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-23, 10 FEP Cas. 1181 (1975); *Hill v. Western Elec. Co.*, 596 F.2d 99, 104, 14 FEP Cas. 490 (4th Cir. 1979); and, *Day v. Mathews*, 530 F.2d 1083, 1085, 12 FEP Cas. 1131 (D.C. Cir. 1976). 696 F.2d at 295, 30 FEP Cas. at 826.

<sup>41</sup> 696 F.2d at 295, 30 FEP Cas. at 826. The court referred to *Day v. Mathews*, 530 F.2d 1083, 1085, 12 FEP Cas. 1131 (D.C. Cir. 1976). 696 F.2d at 295, 30 FEP Cas. at 826.

<sup>42</sup> 696 F.2d at 295, 30 FEP Cas. at 826. The cases the court cited were *Marotta v. Usery*, 629 F.2d 615, 618, 24 FEP Cas. 17 (9th Cir. 1980); *Davis v. Bd. of School Comm'rs*, 600 F.2d 470, 474, 22 FEP Cas. 1579 (5th Cir. 1979); *Day v. Mathews*, 530 F.2d 1083, 1085, 12 FEP Cas. 1131 (D.C. Cir. 1976). 696 F.2d at 295, 30 FEP Cas. at 826.

<sup>43</sup> 696 F.2d at 295, 30 FEP Cas. at 826.

<sup>44</sup> *Id.* at 295-96, 30 FEP Cas. at 827.

<sup>45</sup> *Id.* at 295, 30 FEP Cas. at 826. The court cited *Pullman-Standard v. Swint*, 456 U.S. 273, 28 FEP Cas. 1073 (1982) for this proposition. 696 F.2d at 295, 30 FEP Cas. at 826.

<sup>46</sup> 696 F.2d at 295, 30 FEP Cas. at 827. The court referred to *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337, 341 (5th Cir. 1982). 696 F.2d at 295, 30 FEP Cas. at 827.

<sup>47</sup> 696 F.2d at 295, 30 FEP Cas. at 827.

<sup>48</sup> *Id.* at 296, 30 FEP Cas. at 827. In reaching the conclusion that Mrs. Patterson would not have been promoted even absent discrimination, the court considered the testimony of the four interviewers who said they would have selected another female applicant ahead of the plaintiff, as well as the relative qualifications of the female applicants. *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

*Patterson v. Greenwood School District* is noteworthy because it formulates and resolves two issues which are presented when determining whether to deny a remedy to a Title VII plaintiff after discrimination has been established. Prior to this decision, the Fourth Circuit had never addressed these issues. The first issue involves the allocation of the burden of proving that a remedy should or should not be available and the second involves the standard of proof. Of relevance to both these issues is the Supreme Court's pronouncement in favor of an award of back pay once discrimination has been established.<sup>53</sup> In *Albemarle Paper Company v. Moody*<sup>54</sup> the Court stated that "... given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."<sup>55</sup> The dual purposes of Title VII of the Civil Rights Act which are noted in *Albemarle* appear to operate in favor of presuming a promotional remedy once discrimination has been established.<sup>56</sup>

Given the presumptions for the award of back pay and promotion, it is not surprising that all of the courts which have ruled on the issue have held that the burden of proving a plaintiff would not have been promoted or hired in the absence of discrimination is upon the defendant-employer, once an individual has demonstrated that there was discrimination.<sup>57</sup> The courts have reasoned that because the difficulty in determining what would have happened absent the discrimination is attributable to the employer's unlawful action, it is only fair that any resulting uncertainty be resolved against the employer.<sup>58</sup> To put the

<sup>53</sup> See *infra* notes 55-56 and accompanying text.

<sup>54</sup> 422 U.S. 405, 10 FEP Cas. 1181 (1975).

<sup>55</sup> *Id.* at 421, 10 FEP Cas. at 1189.

<sup>56</sup> The Fifth Circuit has declared that the presumptive entitlement to relief applies to both back pay and individual injunctive relief. *Davis v. Bd. of School Comm'rs*, 600 F.2d 470, 474, 22 FEP Cas. 1579, 1581 (5th Cir. 1979); *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094, 1095, 18 FEP Cas. 1759, 1759 (5th Cir. 1976). See also *Day v. Mathews*, 530 F.2d 1083, 1085, 12 FEP Cas. 1131, 1133 (D.C. Cir. 1976).

<sup>57</sup> See, e.g., *Patterson v. Greenwood School Dist.* 50, 696 F.2d at 295, 30 FEP Cas. at 826; *Marotta v. Usery*, 629 F.2d 615, 618, 24 FEP Cas. 17, 19 (9th Cir. 1980); *Davis v. Bd. of School Comm'rs*, 600 F.2d 470, 475, 22 FEP Cas. 1579, 1581 (5th Cir. 1979); *Richerson v. Jones*, 551 F.2d 918, 924-25, 14 FEP Cas. 1348, 1352 (3d Cir. 1977); *Day v. Mathews*, 530 F.2d 1083, 1085, 12 FEP Cas. 1131, 1132 (D.C. Cir. 1976); *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094, 1095, 18 FEP Cas. 1759, 1759-60 (5th Cir. 1976); *Cooper v. Allen*, 467 F.2d 836, 840, 4 FEP Cas. 1219, 1222 (5th Cir. 1972).

The Fifth Circuit has generally stated that once discrimination has been found against a class of employees, the class is presumptively entitled to back pay. *Mims v. Wilson*, 514 F.2d 106, 110, 10 FEP Cas. 1359, 1362 (5th Cir. 1975); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379, 7 FEP Cas. 627, 638 (5th Cir. 1974). This circuit places the initial burden on the individual employee to bring himself within the class and to demonstrate the harmful effect of the discrimination on him individually. *Mims v. Wilson*, 514 F.2d 106, 110, 10 FEP Cas. 1359, 1362-63 (5th Cir. 1975); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379-80, 7 FEP Cas. 627, 638 (5th Cir. 1974). These courts hold the burden of proof then shifts to the employer to prove by clear and convincing evidence that the employee would not have been hired or promoted. *Mims v. Wilson*, 514 F.2d 106, 110, 10 FEP Cas. 1359, 1363 (5th Cir. 1975); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380, 7 FEP Cas. 627, 638 (5th Cir. 1974).

<sup>58</sup> *League of United Latin American Citizens v. City of Salinas Fire Dep't*, 654 F.2d 557, 559, 27 FEP Cas. 408, 410 (11th Cir. 1981); *Day v. Mathews*, 530 F.2d 1083, 1086, 12 FEP Cas. 1131, 1133 (D.C. Cir. 1976). This allocation of the burden of proof also comports with the principle that a party should have the burden of proving facts particularly within its own knowledge. *Id.* at 1086 n.5, 12 FEP Cas. at 1133 n.5.

burden on the plaintiff would ignore the presumption in favor of recovery and require the plaintiff to relitigate the liability issue.<sup>59</sup>

The imposition of this burden on the defendant by the appellate courts must, however, be reconciled with the Supreme Court's decision in *Texas Department of Community Affairs v. Burdine*.<sup>60</sup> In *Burdine*, the Supreme Court declared that the plaintiff retains the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against him.<sup>61</sup> *Burdine*, however, speaks only to the initial establishment of discrimination.<sup>62</sup> Once the plaintiff has proved intentional discrimination, *Burdine* is, apparently, no longer applicable since it does not address the question of damages which was at issue in *Patterson*.<sup>63</sup>

Although the appellate courts agree that the defendant has the burden of proving that a remedy should not lie, they differ with respect to the degree of certainty with which the defendant must meet his burden of proof.<sup>64</sup> The Fourth Circuit in *Patterson*, along with the majority of courts, requires that the defendant employer establish by clear and convincing evidence that the plaintiff would not have been promoted absent discrimination.<sup>65</sup> The Third Circuit, however, favors a preponderance of the evidence standard for denial of a plaintiff's remedy.<sup>66</sup> The difference between these standards is relative: the "clear and convincing evidence" test places a greater burden upon the defendant than does the "preponderance of the evidence" test.<sup>67</sup>

The courts using the "clear and convincing evidence" standard for rebutting the presumption of relief in Title VII cases do not state the justification for the application of this particular standard.<sup>68</sup> The early precedent relied upon by courts for the "clear and

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<sup>59</sup> See *Kamberow v. GTE Automatic Elec., Inc.*, 603 F.2d 598, 602, 20 FEP Cas. 602, 605 (7th Cir. 1979).

<sup>60</sup> See *supra* notes 6-9 and accompanying text.

<sup>61</sup> *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253, 25 FEP Cas. 113.

<sup>62</sup> *Id.* at 252-56, 25 FEP Cas. 115-16.

<sup>63</sup> See *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362-63 n.9, 29 FEP Cas. 1259, 1264 n.9 (11th Cir. 1982); *League of United Latin American Citizens v. City of Salinas Fire Dep't*, 654 F.2d 557, 559, 27 FEP Cas. 409, 410 (9th Cir. 1981).

The Fourth Circuit Court of Appeals appears to implicitly hold that the *Burdine* standard is inapplicable to the issue of damages, as well. See *Patterson v. Greenwood School Dist.* 50, 696 F.2d 293, 30 FEP Cas. 825. In *Patterson*, the circuit court did not refute the district court's holding that the plaintiff's only burden of proof is that which is spelled out in *Burdine*. *Id.* See *Patterson v. Greenwood School Dist. 50*, No. 78-665-3, Order (D.S.C. Sept. 3, 1981). The district court stated that, thus, the plaintiff does not have the burden of establishing she would have been selected for the position if discrimination had not occurred. *Id.*

<sup>64</sup> See *infra* notes 64-65 and accompanying text.

<sup>65</sup> See, e.g., *Patterson v. Greenwood School Dist.*, 696 F.2d at 295, 30 FEP Cas. at 826; *Marotta v. Usery*, 629 F.2d 615, 618, 24 FEP Cas. 17, 19 (9th Cir. 1980); *Davis v. Bd. of School Comm'rs*, 600 F.2d 470, 474, 22 FEP Cas. 1579, 1581 (5th Cir. 1979); *Day v. Mathews*, 530 F.2d 1083, 1085, 12 FEP Cas. 1131, 1132 (D.C. Cir. 1976).

<sup>66</sup> See *Richerson v. Jones*, 551 F.2d 918, 924-25, 14 FEP Cas. 1348, 1352 (3d Cir. 1977).

<sup>67</sup> *McBaine, Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 251 (1944). A showing of a preponderance of the evidence is generally considered to mean that the evidence presented by the burdened party in support of its contention is of greater weight than that produced by the opposition. *Id.* at 247.

<sup>68</sup> See cases cited *supra* note 64. For instance, in *Patterson* the Fourth Circuit cited three cases from three different circuits in support of its holding that the defendant must produce clear and convincing evidence that the plaintiff would not have been promoted absent discrimination. *Patterson v. Greenwood School Dist. 50*, 696 F.2d at 295, 30 FEP Cas. at 826. In neither the *Patterson* case nor the cases cited within *Patterson*, was the choice of the "clear and convincing evidence" standard

convincing" language involved the dismissal of black teachers as their forces were reduced because of the desegregation of the schools.<sup>69</sup> In such cases, courts stated that the school boards had to justify dismissal of black teachers by "clear and convincing evidence."<sup>70</sup>

The courts' rationalization of their selection of the "clear and convincing evidence" standard as the requisite burden of proof for an employer to avoid a grant of Title VII relief is questionable, if it is based solely upon the desegregation cases. It is possible that this standard was imposed in the desegregation decisions merely because the courts of the 1960's were tiring of the school boards' failure to desegregate.

The goals of the Civil Rights Act itself offer more persuasive support for the use of the "clear and convincing" standard for burden of proof. Title VII of the Act was designed "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment."<sup>71</sup> Maximum deterrence of employment discrimination is achieved if an employer is able to avoid an award of back pay and promotion only upon offering the most persuasive evidence that the employee would not have been promoted absent discrimination. Otherwise, it is more probable that an employee demonstrating discrimination will be unable to obtain a meaningful remedy for discrimination.

The more lenient "preponderance of the evidence" standard utilized by the Third Circuit is supported by an alternate rationale.<sup>72</sup> Although the selection of this standard of proof was not explained by the Third Circuit in its Title VII relief case,<sup>73</sup> the "preponderance of the evidence" standard has been used by the Supreme Court in a teacher dismissal case of constitutional dimensions.<sup>74</sup> In *Mount Healthy City School District v. Doyle*,<sup>75</sup> the plaintiff teacher sued for reinstatement with back pay because of an allegedly wrongful discharge from his employment.<sup>76</sup> The teacher had carried his burden of showing that the exercise of his first amendment rights was a "substantial factor" in his employer's decision not to rehire him.<sup>77</sup> The Court required that the defendant-employer show by a

discussed. See *id.*; *Marotta v. Usery*, 629 F.2d 615, 618, 24 FEP Cas. 17, 19 (9th Cir. 1980); *Davis v. Bd. of School Comm'rs*, 600 F.2d 470, 474, 22 FEP Cas. 1579, 1581 (5th Cir. 1979); *Day v. Mathews*, 530 F.2d 1083, 1085, 12 FEP Cas. 1131, 1132-33 (D.C. Cir. 1976).

<sup>69</sup> *Hill v. Franklin County Bd. of Educ.*, 390 F.2d 583, 584 (6th Cir. 1968); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77, 79, 9 FEP Cas. 1111, 1112 (6th Cir. 1968); *Wall v. Stanley County Bd. of Educ.*, 378 F.2d 275, 276-77, 9 FEP Cas. 1095, 1095-96 (4th Cir. 1967); *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189, 190, 1 FEP Cas. 488, 488-89 (4th Cir. 1966); *Smith v. Bd. of Educ.*, 365 F.2d 770, 774-75, 9 FEP Cas. 1081, 1082-83 (8th Cir. 1966); *Williams v. Kimbrough*, 295 F. Supp. 578, 585-86 (W.D. La.), *aff'd*, 415 F.2d 874 (5th Cir. 1969).

<sup>70</sup> *Wall v. Stanley County Bd. of Educ.*, 378 F.2d 275, 278, 9 FEP Cas. 1095, 1097 (4th Cir. 1967); *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189, 193, 1 FEP Cas. 488, 490 (4th Cir. 1966); *Williams v. Kimbrough*, 295 F. Supp. 578, 585 (W.D. La.), *aff'd*, 415 F.2d 874 (5th Cir. 1969). The other cases cited *supra* note 68 did not use the "clear and convincing evidence" language, despite the fact that they were used in later cases to support a requirement of this degree of proof. See *Hill v. Franklin County Bd. of Educ.*, 390 F.2d 583, 584 (6th Cir. 1968); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77, 79, 9 FEP Cas. 1111, 1112 (6th Cir. 1968); *Smith v. Bd. of Educ.*, 365 F.2d 770, 9 FEP Cas. 1081 (8th Cir. 1966).

<sup>71</sup> H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401.

<sup>72</sup> See *Richerson v. Jones*, 551 F.2d 918, 924-25, 14 FEP Cas. 1348, 1352 (3d Cir. 1977).

<sup>73</sup> *Id.*

<sup>74</sup> *Mount Healthy II City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977).

<sup>75</sup> 429 U.S. 274 (1977).

<sup>76</sup> *Id.* at 276.

<sup>77</sup> *Id.* at 287.

preponderance of the evidence that it would have decided not to rehire the teacher even absent the protected conduct.<sup>78</sup>

In *Mount Healthy*, the Supreme Court used the lower "preponderance of the evidence" standard,<sup>79</sup> rather than the more stringent "clear and convincing evidence" test. If the Supreme Court is willing to use the more lenient "preponderance of the evidence" test when awarding damages in an area as protected as are first amendment rights, a similar standard is arguably appropriate in the Title VII field.

With the *Patterson* decision, the Fourth Circuit joins the other appellate courts ruling on the issue of the burden of proof in Title VII damages cases.<sup>80</sup> These courts believe that once the plaintiff has proved discrimination, the burden of proof is on the defendant-employer to show that the plaintiff would not have been hired or promoted even absent discrimination.<sup>81</sup> The Fourth Circuit agrees with the majority of circuits in holding that the defendant must prove its case for denying relief by "clear evidence."<sup>82</sup> The Third Circuit stands alone in utilizing the "preponderance of the evidence" standard.<sup>83</sup>

## II. SEX DISCRIMINATION

### A. \**Employer's Liability for Sexual Harassment*: *Henson v. City of Dundee*<sup>1</sup>

Title VII of the Civil Rights Act of 1964<sup>2</sup> prohibits employment discrimination on the basis of sex, race, color, religion, and national origin. The statute seeks to establish the equality of all employees of an organization with respect to the "terms, conditions, or privileges of employment."<sup>3</sup> Title VII claims based upon sexual harassment have been accorded different treatment in the courts, than have those based upon racial, religious, or ethnic harassment.<sup>4</sup> Although courts have always accepted that a right of action exists under Title VII for these latter type claims, the courts initially declined to find a similar right of action for sexual harassment.<sup>5</sup> In 1977, however, in *Barnes v. Costle*,<sup>6</sup> the

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See *supra* note 57 and accompanying text.

<sup>81</sup> *Id.*

<sup>82</sup> See *supra* note 65 and accompanying text.

<sup>83</sup> See *supra* note 66 and accompanying text.

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<sup>1</sup> 682 F.2d 897, 29 FEP Cas. 787 (11th Cir. 1982).

<sup>2</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976).

<sup>3</sup> Section 703(a) of the Act provides, in pertinent part:

(a) Employer practices. It shall be an unlawful employment practice for an employer —  
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

*Id.* at § 2000e-2(a).

<sup>4</sup> See Significant Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535, 546 & n.54 (1981).

<sup>5</sup> See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated without reported decision*, 562 F.2d 55 (9th Cir. 1977); *Barnes v. Train*, 13 FEP Cas. 123 (D.D.C. 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983, 15 FEP Cas. 345 (D.C. Cir. 1977).

<sup>6</sup> 561 F.2d 983 (D.C. Cir. 1977).

groundbreaking case in this area, the Court of Appeals for the District of Columbia Circuit ruled that sexual harassment by supervisory personnel, when coupled with an adverse employment consequence,<sup>7</sup> is actionable under Title VII.<sup>8</sup> The court further held that employers could be held vicariously liable for the actions of their supervisory personnel if they knew of the harassment and failed to take appropriate action.<sup>9</sup> The *Barnes* holding was extended in 1979, in *Miller v. Bank of America*.<sup>10</sup> In *Miller*, the Court of Appeals for the Ninth Circuit became the first court to impose vicarious liability on an employer for a supervisor's sexual harassment which resulted in a discharge where the employer had no knowledge of the harassment.<sup>11</sup> The court ruled that the language of section 701(b) of Title VII, which defines an employer as including "any agent of such a person,"<sup>12</sup> makes an employer liable as a principal for any Title VII violation resulting in a discharge which was committed by a supervisor in the course of his or her employment.<sup>13</sup>

This line of cases was extended in 1980, in *Brown v. City of Guthrie*,<sup>14</sup> when an employer was held liable under Title VII for a supervisor-created discriminatory work environment which resulted from sexual harassment and that caused a constructive discharge.<sup>15</sup> The court, applying the then recent Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment which prohibit the creation "of an intimidating, hostile or offensive working environment,"<sup>16</sup> ruled that the harassment had created an "impermissible condition of employment."<sup>17</sup> Though the court noted that the standard for gauging an employer's liability for sexual harassment by his agents was unsettled, the court determined that the city was liable "even under the more stringent" actual knowledge test of employer liability.<sup>18</sup>

This line was further extended by the Court of Appeals for the District of Columbia Circuit in 1981, in *Bundy v. Jackson*.<sup>19</sup> In *Bundy*, a female plaintiff had initially filed suit in federal district court claiming that she had been denied promotions because of her sex and her refusal to submit to sexual advances.<sup>20</sup> Though the district court held that her allegations regarding the sexual advances were fully proved, it nevertheless failed to find

<sup>7</sup> Plaintiff *Barnes* had alleged that she was fired because she refused her superior's sexual advances. *Barnes v. Train*, 13 FEP Cas. 123, 124 (D.D.C. 1974).

<sup>8</sup> 561 F.2d at 990, 995.

<sup>9</sup> *Id.* Later the same year, a similar conclusion was reached by the Third Circuit in *Tompkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977). The *Barnes* court qualified its holding somewhat, however, noting in dicta that an employer could be relieved of liability upon a showing that the supervisor violated established company policy without the company's knowledge and that the employer took appropriate action after learning of the harassment. *Barnes v. Costle*, 561 F.2d at 993.

<sup>10</sup> 600 F.2d 211 (9th Cir. 1979).

<sup>11</sup> *Id.* at 213.

<sup>12</sup> 42 U.S.C. § 2000e(b) (1976).

<sup>13</sup> 600 F.2d at 213.

<sup>14</sup> 22 FEP Cas. 1627 (W.D. Okla. 1980).

<sup>15</sup> *Id.* at 1632-33.

<sup>16</sup> *Id.* at 1631 (quoting 29 C.F.R. § 1604.11 (1980)).

<sup>17</sup> *Id.* at 1632.

<sup>18</sup> *Id.* at 1633. The court noted that even if actual knowledge were necessary to hold an employer liable, *Brown's* employer had actual knowledge of the harassment because *Brown* had complained to the highest officer in the defendant police department and he had disregarded her complaint. *Id.*

<sup>19</sup> 641 F.2d 934, 24 FEP Cas. 1155 (D.C. Cir. 1981).

<sup>20</sup> *Bundy v. Jackson*, 19 FEP Cas. 828, 829 (D.D.C. 1979).

any adverse employment consequences.<sup>21</sup> Instead, the court ruled that she had been denied promotions because of her work performance and not her sex.<sup>22</sup> Accordingly, the district court entered judgment for the defendant, concluding that sexual harassment which does not lead to the denial of tangible job benefits does not constitute a claim under Title VII.<sup>23</sup> The Court of Appeals for the District of Columbia Circuit reversed, ruling that an employee need not be fired or forced to resign to be able to obtain the protection of Title VII in cases of sexual harassment.<sup>24</sup> Rather, the court held that sexual harassment itself constitutes a violation of the statute.<sup>25</sup> Based upon the district court's findings that the harassment was considered "standard operating procedure . . . a normal condition of employment in the office,"<sup>26</sup> and that the department director and other top officials had notice of the harassment and took no action to stop it,<sup>27</sup> the circuit court held the employer liable for the harassment.<sup>28</sup>

This line of cases was consolidated and clarified during the *Survey* year, in *Henson v. City of Dundee*.<sup>29</sup> In *Henson*, the Court of Appeals for the Eleventh Circuit addressed the question of what should be the extent of an employer's liability for cases of sexual harassment and established a two-tier standard. It ruled that an employer is strictly liable for sexual harassment by supervisors that causes tangible job detriment to the subordinate employee.<sup>30</sup> Where the employee seeks to hold the employer responsible for sexual harassment that creates an offensive work environment but does not result in tangible job detriment, however, the court ruled that the employee must show that the employer knew or should have known of the harassment and failed to take prompt corrective action.<sup>31</sup>

In *Henson*, the plaintiff, Barbara Henson, was a dispatcher in the Dundee police department.<sup>32</sup> She had been hired by the department, along with one other female and four males, in January, 1975 under the federal Comprehensive Employment Training Act (CETA).<sup>33</sup> She alleged that during the two years she had worked for the department she and her female co-worker had been subjected to sexual harassment by the chief of the police department, John Sellgren.<sup>34</sup> According to her complaint, this harassment caused her to resign under duress in January, 1977.<sup>35</sup> In May, 1977, Henson filed a complaint

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<sup>21</sup> *Id.* at 832 (Conclusion of Law No. 2).

<sup>22</sup> *Id.* (Conclusion of Law No. 3).

<sup>23</sup> *Id.* (Conclusions of Law Nos. 5 & 6).

<sup>24</sup> 641 F.2d at 943, 24 FEP Cas. at 1160.

<sup>25</sup> *Id.*

<sup>26</sup> 19 FEP Cas. at 931 (Finding of Fact No. 38).

<sup>27</sup> A co-worker and several supervisors had subjected plaintiff to a series of sexual advances. 641 F.2d at 939-40, 24 FEP Cas. at 1156-57. When plaintiff complained to her supervisors' superior, he responded that "any man in his right mind would want to rape you," and invited her to his apartment for a liaison. *Id.* at 940, 24 FEP Cas. at 1157. After subsequently being denied a promotion, she consulted with her second and third-line supervisors, the department director, and the company's EEO Officers. *Id.* at 941, 24 FEP Cas. at 1158. All of these men, however, took no corrective action, did not investigate her complaint, and frustrated her efforts to complain. *Id.* On these facts, employer liability could be limited to cases where the employer knew or should have known of the harassment and still took no corrective action. *Id.*

<sup>28</sup> *Id.* at 943, 24 FEP Cas. at 1159.

<sup>29</sup> 682 F.2d 897, 29 FEP Cas. 787 (11th Cir. 1982).

<sup>30</sup> *Id.* at 910, 29 FEP Cas. at 798.

<sup>31</sup> *Id.* at 905, 29 FEP Cas. at 794.

<sup>32</sup> *Id.* at 899, 29 FEP Cas. at 788.

<sup>33</sup> *Id.*, 29 FEP Cas. at 788-89.

<sup>34</sup> *Id.*, 29 FEP Cas. at 789.

<sup>35</sup> *Id.*

against the city with the EEOC alleging sexual harassment.<sup>36</sup> The EEOC issued her a right to sue letter on January 31, 1978 and she commenced her suit in the district court in March, 1978.<sup>37</sup>

During trial in the district court, plaintiff alleged she had been subjected to three types of sexual harassment in violation of Title VII. First, she charged that Sellgren had created a hostile and offensive working environment for her and other women in the police station.<sup>38</sup> Second, she claimed that her resignation constituted a constructive discharge based on sex.<sup>39</sup> Finally, she alleged that Sellgren had prevented her from attending the local police academy because of her refusal to engage in sexual relations with him.<sup>40</sup>

During the opening arguments, the district judge expressed his reservation about the viability of a Title VII claim based upon the types of sexual harassment alleged by Henson.<sup>41</sup> Following the close of plaintiff's case, the court granted defendant's motion for involuntary dismissal of the action, pursuant to rule 41(b) of the Federal Rules of Civil Procedure.<sup>42</sup> From the judge's bench comments and his memorandum accompanying the dismissal order, the circuit court discerned three bases for the dismissal.<sup>43</sup> First, the district court determined that Henson's claim that she suffered a hostile and demeaning working environment did not, standing alone, make out a claim under Title VII.<sup>44</sup> Second, although the district court agreed that her claim that she had been forced to resign because of a sexually demeaning work environment was a cognizable claim for constructive discharge under Title VII, the court did not accept her testimony that she had resigned because of the work environment.<sup>45</sup> Rather, the court found that Henson

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Because the city had not contended that the complaint was the subject of an untimely charge to the EEOC, any objections to the timeliness of the charge were waived. *Id.* at n.1, 29 FEP Cas. at n.1 (citing *Zipes v. Trans World Airlines, Inc.*, 102 S.Ct. 1127, 1132 (1982)).

<sup>38</sup> *Id.* at 899, 29 FEP Cas. at 789. Plaintiff and her former female co-worker, Dicks, testified that Sellgren subjected them to numerous harangues of demeaning sexual inquiries and vulgarities during plaintiff's term of employment. *Id.* Additionally, plaintiff testified that Sellgren repeatedly requested that she have sexual relations with him. *Id.* The court did not permit plaintiff to introduce evidence that Sellgren had also made advances to Dicks. *Id.* Plaintiff further testified that she had complained of Sellgren's conduct in 1976 to the city manager, but that the manager had taken no action to restrain Sellgren. *Id.*

<sup>39</sup> Specifically, plaintiff charged that on January 18, 1977, Sellgren suspended her for two days on the pretext that she had brought food into the dispatch room in violation of department policy. *Id.* According to plaintiff, this policy had not been previously enforced. *Id.* at 899-900, 29 FEP Cas. at 789. Plaintiff testified that she regarded the suspension as a warning that she would be fired if she did not accede to Sellgren's sexual advances. *Id.* at 900, 29 FEP Cas. at 789.

<sup>40</sup> *Id.* Both Henson and Dicks testified that during the period in question, two of the male dispatchers were sent to the academy. *Id.* This testimony was corroborated by other witnesses and the dispatcher's employment records. *Id.* Henson testified that Sellgren had made it clear to her that he would help her gain the approval of the city manager to attend the academy if she would agree to have a relationship with him. *Id.* The city manager testified that Henson was qualified to attend the academy and that she would have permitted Henson to attend if Sellgren had informed her of Henson's interest. *Id.*

<sup>41</sup> *Id.* at 900 & n.2, 29 FEP Cas. at 789-90 & n.2.

<sup>42</sup> *Id.* at 900 & n.3, 29 FEP Cas. at 790 & n.3.

<sup>43</sup> *Id.* at 900, 29 FEP Cas. at 790.

<sup>44</sup> *Id.* Although Sellgren subjected the two women to vulgar language and almost daily inquiry into their sexual habits and proclivities, the district court concluded that there was no Title VII violation unless the conduct inflicted some tangible job detriment. *Id.* at 900-01, 29 FEP Cas. at 790.

<sup>45</sup> *Id.* at 901, 29 FEP Cas. at 790.

had resigned because a Dundee police officer with whom she was having an affair had been forced to resign in January 1977 and had subsequently moved elsewhere, with Henson following.<sup>46</sup> Lastly, the district court recognized that Henson's claim that she had been prevented from attending the police academy because of her refusal to have sexual relations with Sellgren stated a claim under Title VII.<sup>47</sup> The judge ruled, however, that such a claim had not been proven in the case before him. The district judge discounted her testimony that Sellgren had demanded sex as a precondition for attendance at the academy, stating that her testimony "was not believed by me, as the Trial Judge."<sup>48</sup> The court also made a specific finding that none of the male CETA dispatchers had been sent to the police academy.<sup>49</sup> Consequently, the court ruled that Henson had not been denied an available promotion because of her refusal to submit to Sellgren's alleged sexual advances as she had alleged.<sup>50</sup>

Appealing to the Court of Appeals for the Eleventh Circuit, Henson challenged the district court's determination that her work environment allegations did not state a claim under Title VII for sexual harassment.<sup>51</sup> She also challenged the district court's holdings on her constructive discharge and police academy claims.<sup>52</sup> The circuit court reversed in part, affirmed in part, and remanded the case with instructions to the district court.<sup>53</sup>

On appeal, Henson contended that a plaintiff states a valid Title VII claim by alleging that sexual harassment perpetrated or permitted by an employer has created a hostile or offensive work environment regardless of whether the plaintiff has suffered tangible job detriment from working in the environment.<sup>54</sup> The appellate court agreed with this contention, reversed the district court's order and remanded for a new trial on the claim.<sup>55</sup> Noting that courts have held that an employer violates Title VII by creating or condoning a working environment that significantly and adversely affects an employee because of his or her race or ethnicity, regardless of any other tangible job detriment,<sup>56</sup> the court determined that it is similarly a violation of Title VII to create a hostile environment through sexual harassment even if no further job detriment exists.<sup>57</sup> The court stated that a "pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. There is no requirement that an employee . . . prove in addition . . . tangible job detriment."<sup>58</sup>

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<sup>46</sup> *Id.* The city's records indicated that Henson began an affair in 1976 with Robert Owens, a policeman with the Dundee police department. *Id.* at 908, 29 FEP Cas. at 796. Owens, who was married at the time, came under official pressure and was forced to resign on January 12, 1977, because of the affair with Henson. *Id.*, 29 FEP Cas. at 796-97. Owens subsequently found employment with the Davenport police department. On January 28, 1977 Henson tendered a letter of resignation to the town manager in which she stated that she had "sincerely enjoyed" working on the Dundee force but that due to "work conditions and job security," she would seek work elsewhere. *Id.*, 29 FEP Cas. at 797. Subsequently, Henson was employed by the Davenport police department. *Id.*

<sup>47</sup> *Id.* at 901, 29 FEP Cas. at 790.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* The court also found that Sellgren had not made any sexual advances to Dicks. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 913, 29 FEP Cas. at 801.

<sup>54</sup> *Id.* at 901, 29 FEP Cas. at 790.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 901 & n.4, 29 FEP Cas. at 791 & n.4.

<sup>57</sup> *Id.* at 902, 29 FEP Cas. at 791.

<sup>58</sup> *Id.* The court cited to *Bundy v. Jackson*, 641 F.2d 934, 943-46 (D.C. Cir. 1981) as supporting

The court noted, however, that not every instance of sexual harassment gives rise to an actionable claim under Title VII for a hostile work environment.<sup>59</sup> Rather, the court determined that plaintiffs must allege and prove five separate elements in order to establish such a claim.<sup>60</sup> These elements include: (1) The employee belongs to a protected group. This is satisfied by a stipulation that the employee is a man or woman.<sup>61</sup> (2) The employee was subject to unwelcome sexual harassment. To define sexual harassment, the court quoted the EEOC regulations which define sexual harassment as including "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."<sup>62</sup> In order for the conduct to be unwelcome, according to the court, the employee must not have solicited or incited it, and the employee must regard the conduct as undesirable or offensive.<sup>63</sup> (3) The harassment complained of must have been based upon sex. Because the essence of a disparate treatment claim under Title VII is that an employee is singled out for adverse treatment on the basis of a prohibited criterion,<sup>64</sup> the court stated that the plaintiff must show that but for her sex, she would not have been the object of harassment.<sup>65</sup> (4) The harassment complained of must have affected a "term, condition or privilege" of employment. The court determined that for sexual harassment to state a claim under Title VII, the harassment must be sufficiently pervasive so as to alter the conditions of employment and create a hostile work environment.<sup>66</sup> The court noted, though, that the mere utterance of epithets will not suffice to state a claim.<sup>67</sup>

The fifth element of a sexual harassment claim, according to the court, is *respondeat superior*. The court held that a plaintiff when seeking to hold her employer liable for the hostile environment created by a supervisor,<sup>68</sup> or a co-worker, must show that the employer knew or should have known of the harassment and failed to take corrective action.<sup>69</sup> The court ruled that an employee can either demonstrate that the employer knew of the harassment by proving that she complained to higher management, or can

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its conclusion. *Id.* See *supra* notes 19-28 and accompanying text. See also 1980-1981 Annual Survey of Labor Relations and Employment Discrimination Law, 23 B.C. L. REV. 82, 279-89 (1982); Significant Development, *supra* note 3, at 555-57. The court also cited, with approval, to the recent EEOC guidelines on sexual harassment, 29 C.F.R. § 1604.11 (1982). 682 F.2d at 903 & n.7. 29 FEP Cas. at 792 & n.7.

<sup>59</sup> 682 F.2d at 903, 29 FEP Cas. at 792.

<sup>60</sup> *Id.* at 903-05, 29 FEP Cas. at 792-94.

<sup>61</sup> *Id.* at 903, 29 FEP Cas. at 792.

<sup>62</sup> *Id.* (quoting 29 C.F.R. § 1604.11(a) (1981)).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, 29 FEP Cas. at 793 (citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *United States v. International Bhd. of Teamsters*, 431 U.S. 324, 335 n.15 (1977); *Lee v. Conecuh County Bd. of Educ.*, 634 F.2d 959, 961-62 & n.3 (5th Cir. 1981)).

<sup>65</sup> *Id.* at 904, 29 FEP Cas. at 793. The court noted that in the typical case in which a male supervisor makes overtures to a female subordinate, it will be obvious that male workers were not treated similarly. *Id.* The court also noted, however, that in cases where the overtures were made to workers of both sexes, or where the conduct complained of was equally offensive to workers of both sexes, the only remedies available would be state law remedies. Title VII provides no remedy for such a situation. *Id.*

<sup>66</sup> *Id.*, 29 FEP Cas. at 793-94.

<sup>67</sup> *Id.*, 29 FEP Cas. at 794. The court stated that "[w]hether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances." *Id.*

<sup>68</sup> The court assumed for purposes of the discussion that Sellgren was Henson's supervisor and not her employer. *Id.* at 905 n.9, 29 FEP Cas. at 794 n.9. If, on remand, Sellgren was found to be her employer, then the city would be liable without the operation of *respondeat superior*. *Id.*

<sup>69</sup> *Id.* at 905, 29 FEP Cas. at 794.

raise an inference of knowledge or constructive knowledge on the part of the employer by showing that the harassment was pervasive.<sup>70</sup>

The court determined that Henson had made a *prima facie* showing of all the elements necessary to establish a Title VII violation.<sup>71</sup> Accordingly, the court remanded to the district court for a new trial to allow Henson to prove her claims.<sup>72</sup> Because Henson did not seek reinstatement as a dispatcher, the court noted that it was unlikely that she would be able to obtain an injunction to prevent police department practices which no longer affect her.<sup>73</sup> She would, however, be entitled to nominal damages if she prevailed in the new trial, and thereby become eligible for an award of attorney's fees.<sup>74</sup>

The court turned next to Henson's constructive discharge claim, affirming the district court's dismissal of the claim.<sup>75</sup> Henson alleged that she had resigned from her job because of Sellgren's sexual harassment, and charged that her resignation amounted to a constructive discharge in violation of Title VII.<sup>76</sup> The city, for its part, asserted that she had resigned because the officer with whom she had been having an affair had been forced to resign from the police department.<sup>77</sup> The district court found for the city on this issue.<sup>78</sup> The circuit court noted that the evidence before the district court was such that it could reasonably support two entirely different versions of the events leading to Henson's resignation.<sup>79</sup> Determining, however, that the ruling of the district judge was not clearly erroneous, the circuit court affirmed his dismissal of the constructive discharge count.<sup>80</sup>

Lastly, the court addressed Henson's claim that Sellgren had prevented her from attending the police academy because of her refusal to have sexual relations with him. As noted previously, the district court had not believed Henson's testimony on this issue.<sup>81</sup> Specifically, the trial judge found that Sellgren had never sexually propositioned the other female dispatcher and that no male dispatcher had ever attended the academy.<sup>82</sup> The judge did not permit Henson to introduce evidence corroborating her testimony that Sellgren had made sexual advances to the other female dispatcher, however.<sup>83</sup> Addition-

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* The court noted that an employee, in disparate treatment cases may generally establish a *prima facie* case by means of a lesser evidentiary showing than would be needed to prevail on the merits. *Id.* at n.11, 29 FEP Cas. at n.11. Establishing a *prima facie* case in disparate treatment litigation shifts the burden of production to the employer. *Id.* This serves to "progressively sharpen the inquiry into the elusive factual question of intentional discrimination" in cases where prohibited criteria and legitimate job-related criteria blend in the employment decision. *Id.* (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 n.8 (1981)).

Cases of sexual harassment, however, do not present elusive questions of intent. Thus, the court determined that a specific *prima facie* showing was unnecessary. *Id.* Rather, the court ruled that district courts should employ normal principles of pleading and proof allocation while remaining flexible in light of cases of superior knowledge on the part of one party or the other. *Id.*

<sup>72</sup> *Id.* at 905, 29 FEP Cas. at 794.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 905-06 & n.12, 29 FEP Cas. at 794-95 & n.12.

<sup>75</sup> *Id.* at 907-08, 29 FEP Cas. at 796-97.

<sup>76</sup> *Id.* at 899-900, 29 FEP Cas. at 789.

<sup>77</sup> *Id.* at 908, 29 FEP Cas. at 796.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 907-08 & nn.16-17, 29 FEP Cas. at 796-97 & nn.16-17.

<sup>80</sup> *Id.* at 907-08, 29 FEP Cas. at 796-97. For a discussion of why the court chose the "clearly erroneous" standard of review see *id.* at 906-07, 29 FEP Cas. at 795-96.

<sup>81</sup> *Id.* at 901, 29 FEP Cas. at 790. See *supra* notes 47-50 and accompanying text.

<sup>82</sup> *Id.* at 911, 29 FEP Cas. at 800.

<sup>83</sup> *Id.*

ally, Henson's testimony that male dispatchers had attended the academy was corroborated by several other witnesses. Moreover, the employment records of two male dispatchers clearly indicated that they had been sent to the police academy during the period in question.<sup>84</sup> Consequently, the circuit court ruled that both of these factual findings were clearly erroneous and remanded for a new trial on the claim.<sup>85</sup>

The circuit court began its analysis of the count by stating the general principle that "[a]n employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."<sup>86</sup> The court set out five elements which an employee must prove in order to establish a violation of Title VII on grounds of sexual harassment of this kind. The first three elements of a *quid pro quo* claim are identical to the first three elements of a hostile work environment claim: namely, that the employee belongs to a protected group; that the employee was subject to sexual harassment; and that the harassment was based upon sex.<sup>87</sup> Although not identical, the fourth element of a *quid pro quo* claim is similar to the fourth element of a hostile work environment claim. The one distinction is that in the latter type of claim, the harassment must affect a "term, condition, or privilege" of employment,<sup>88</sup> whereas in the former, the court held that the complainant's reaction to the harassment must have affected *tangible* aspects of her compensation, terms, conditions, or privileges of employment.<sup>89</sup> According to the court, the acceptance or rejection of the harassment must have been either an express or implied condition to the receipt of a tangible job benefit or the cause of a tangible job detriment for the harassment to create a cause of action under Title VII.<sup>90</sup>

With respect to the fifth element, however, *respondeat superior*, the court ruled that a substantially different standard applies to *quid pro quo* sexual harassment claims than to claims based on a hostile work environment. In a work environment claim, according to the court, the employee must prove that the employer knew or should have known of the harassment and failed to take prompt corrective action.<sup>91</sup> In a *quid pro quo* case, however, the court ruled that an employer is strictly liable for sexual discrimination by supervisors that causes tangible job detriment.<sup>92</sup> The court recognized that it was requiring different treatment of employers in the two types of harassment cases, but determined that the differing treatment was justified by differences in the effect of the authority of the supervisor in the two types of cases.<sup>93</sup>

The court noted its assumption that the work environment can be rendered hostile or offensive in equal degrees through the acts of supervisors, co-workers, or outsiders.<sup>94</sup> The capacity of any person to create a hostile working environment, according to the court, is

<sup>84</sup> *Id.* & n.24, 29 FEP Cas. at 800 & n.24.

<sup>85</sup> *Id.* at 911-13, 29 FEP Cas. at 800-01.

<sup>86</sup> 682 F.2d at 908, 29 FEP Cas. at 797. *See id.* at n.18, 29 FEP Cas. at n.18.

<sup>87</sup> *Id.* at 909, 29 FEP Cas. at 797. *See supra* notes 61-65 and accompanying text.

<sup>88</sup> 682 F.2d at 904, 29 FEP Cas. at 793-94. *See supra* notes 66-67 and accompanying text.

<sup>89</sup> 682 F.2d at 909, 29 FEP Cas. at 797.

<sup>90</sup> *Id.* (citing 29 C.F.R. § 1604.11(a)(1) & (2) (1981)).

<sup>91</sup> *Id.* at 905, 29 FEP Cas. at 794. *See supra* notes 68-70 and accompanying text.

<sup>92</sup> 682 F.2d at 910, 29 FEP Cas. at 798. *See Bundy v. Jackson*, 641 F.2d 934, 943, 29 FEP Cas. 1155, 1159 (D.C. Cir. 1981); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979). *Cf.* 29 C.F.R. § 1604.11(c) (1982) (no exception to employer liability for conduct of agent or supervisor). *But see* *Tompkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977) (actual or constructive knowledge and failure to take corrective action required before employer liable under Title VII for sexual harassment resulting in tangible job detriment).

<sup>93</sup> 682 F.2d at 910, 29 FEP Cas. at 799.

<sup>94</sup> *Id.*

not necessarily enhanced by any authority, actual or apparent, which the employer has conferred upon that person.<sup>95</sup> Rather, the court noted, because a supervisor who insults or harasses an employee generally does so for his own reasons and through his own means, he acts outside of the scope of his authority.<sup>96</sup> Consequently, the court ruled that "[h]is conduct cannot automatically be imputed to the employer any more so than can the conduct of an ordinary employee."<sup>97</sup> In a *quid pro quo* case, however, the court stated that a supervisor relies upon his apparent or actual authority to extort sexual favors from an underling. According to the court, this extortion is the essence of the *quid pro quo* claim.<sup>98</sup> Consequently, because the supervisor in that case is using his "actual or apparent authority to 'hire, fire, discipline or promote' " for a prohibited purpose, the court held that his conduct can fairly be imputed to the source of the authority.<sup>99</sup>

In an opinion concurring in part and dissenting in part, Judge Clark took exception to the court's establishment of the two-tier standard.<sup>100</sup> The judge noted that the majority had placed a "knew or should have known" restriction on an employer's liability for a hostile environment created by a supervisor or co-worker.<sup>101</sup> The judge agreed with the majority's restriction so far as it applied to actions of co-workers, but dissented to the extent that the majority applied the restriction to the actions of supervisors.<sup>102</sup> Citing to the EEOC sexual harassment regulations, the judge noted that these regulations make a clear distinction between a hostile environment created by a supervisor and one created by a co-worker and provide for strict liability in the former situation.<sup>103</sup> The judge stated that he would hold "that a woman in the workplace should be able to obtain relief against an employer when her supervisor creates a hostile working environment without having to prove that the employer knew about it."<sup>104</sup> Among the responsibilities which an employer delegates to its supervisors, the judge noted, is the duty to create a pleasant working environment.<sup>105</sup> According to the judge, if the supervisor uses his position to create a hostile and offensive work environment through sexual harassment, the employer should be liable.<sup>106</sup> The judge based his conclusion on his belief that a supervisor, by virtue of his position, is in a better position to create an offensive environment than are other employees, because women employees are not likely to complain about a supervisor for fear of retribution.<sup>107</sup> Judge Clark disagreed with the majority's belief that the ability of any person "to create a hostile or offensive environment is not necessarily enhanced or diminished by the degree of authority which the employer confers upon that individual," and he dissented on that ground.<sup>108</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* But see 29 C.F.R. § 1604.11(c) (1982) (employer strictly liable for harassment by supervisor or agent).

<sup>98</sup> 682 F.2d at 910, 29 FEP Cas. at 799.

<sup>99</sup> *Id.* (quoting *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979)). The court set out in a footnote the elements of a *prima facie* case in the *quid pro quo* situation for the benefit of the district court on remand. See *id.* at 911 n.22.

<sup>100</sup> *Id.* at 913-14, 29 FEP Cas. at 801-02 (Clark, J., concurring in part and dissenting in part).

<sup>101</sup> *Id.* at 913, 29 FEP Cas. at 801 (citing Majority Opinion at 905).

<sup>102</sup> *Id.* at 913-14, 29 FEP Cas. at 801-02.

<sup>103</sup> *Id.* at 913, 29 FEP Cas. at 801 (citing 29 C.F.R. § 1604.11(a)(3), (c) & (d) (1981)).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 913-14, 29 FEP Cas. at 802.

<sup>108</sup> *Id.* (quoting Majority Opinion at 910).

The majority in *Henson* was generally correct in its disposition of the case. It correctly determined that claims based upon sexual harassment that creates a hostile working environment are actionable under Title VII without further job detriment, as is the case for claims based upon racial or ethnic harassment. It correctly overturned the district court's ruling on Henson's police academy claim, as the lower court's ruling was clearly in error on the issue. And, though the appellate court might have been a little more circumspect in its affirmance of the trial judge's ruling on Henson's constructive discharge claim, in light of his apparent bias to her claims, the affirmance was not incorrect, because the evidence was such that it could support two differing conclusions, and the district court's ruling was not clearly in error.

On the issue of an employer's liability for sexual harassment, however, Judge Clark's position appears to be the better one. The reasons given by the majority do not seem to justify the different treatment accorded employer's liability in the work environment and the *quid pro quo* cases. The majority's suggestion that a person's capacity to create an offensive working environment is not enhanced by the actual or apparent authority given him by the employer is unpersuasive. Logically, it would seem that a supervisor is in a better position than a co-worker to retaliate against the harassed employee if that employee complains of the harassment. It is this potential retaliation which seems to cause most harassed persons to refrain from complaint. Assuming, then, that the employer would take corrective action if the harassed employee were to complain, it would seem to be fair to hold the employer liable in situations where the employee is hesitant to complain because of the potential retaliatory power given a supervisor by the employer. This is essentially the argument advanced by Judge Clark in his dissenting opinion. In this regard, Judge Clark's opinion offers a better conclusion than that of the majority.

In summary, the decision in *Henson* is a logical continuation on the path of Title VII sex discrimination litigation. As in *Miller*, the court imposed vicarious liability for sexual harassment by a supervisor that resulted in tangible job detriment regardless of whether the employer knew of the harassment.<sup>109</sup> As in *Bundy*, the court recognized that Title VII is violated when a supervisor creates a discriminatory work environment regardless of whether the harassed employee resigned or suffered tangible job detriment.<sup>110</sup> All that is needed now is the combination that Judge Clark would have made: namely, holding an employer vicariously liable when a supervisor creates a discriminatory work environment regardless of whether the employer knew or should have known of the harassment. If this standard is adopted in the future, the judiciary will finally signal that it is ready to treat sexual harassment as no less serious an offense than other forms of harassment. This recognition of the seriousness of sexual harassment would affirm one of the goals put forth by Congress when it enacted Title VII: the establishment of the sexual equality of all employees with respect to the "terms, conditions or privileges of employment."

B. \**Title IX's Coverage Extends to Employment: North Haven Board of Education v. Bell*<sup>1</sup>

Title IX of the Education Amendments of 1972<sup>2</sup> prohibit, with a few limited exceptions, sex discrimination in any education program or activity receiving federal financial

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<sup>109</sup> *Id.* at 910, 29 FEP Cas. at 798. See *supra* notes 92-99 and accompanying text.

<sup>110</sup> 682 F.2d at 901, 29 FEP Cas. at 790. See *supra* notes 55-70 and accompanying text.

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<sup>1</sup> 456 U.S. 512 (1982).

<sup>2</sup> Education Amendments of 1972 §§ 901-07, 20 U.S.C. §§ 1681-86 (1976).

assistance. Section 901(a), the substantive section of the statute, provides, in relevant part, that "no person" shall, on the basis of sex, "be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>3</sup> In 1975, the Department of Health, Education, and Welfare, pursuant to its statutory authority,<sup>4</sup> issued regulations to enforce the Title's proscriptions.<sup>5</sup> The Department, interpreting "person" as contained in section 901(a) to include employees as well as students, included in these regulations a series entitled "Subpart E," which prohibit sex discrimination in the employment practices of covered education programs.<sup>6</sup>

The validity of these employment regulations has been challenged in several courts, by a number of schools and universities, as exceeding the authority granted to the Department by Title IX.<sup>7</sup> As a rule, the schools have alleged that Title IX was not meant

<sup>3</sup> Education Amendments of 1972 § 901(a) 20 U.S.C. § 1681(a) (1976). Nine statutory exemptions to § 901(a) coverage follow. Among the specific exemptions included are ones for religious schools, military schools, social fraternities, father-son and mother-daughter activities, and beauty pageant scholarships. See §§ 901(a)(1)-(9).

<sup>4</sup> Education Amendments of 1972 § 902, 20 U.S.C. § 1682 (1976), which provides in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be affected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. . . .

*Id.* (emphasis in the original).

<sup>5</sup> 34 C.F.R. § 106 (1982). The regulations initially appeared at 34 C.F.R. § 86 (1975), but were recodified in connection with the establishment of the Department of Education. HEW's functions under Title IX were transferred in 1979 to the newly created Department of Education by § 301 (a)(3) of the Department of Education Organization Act, 20 U.S.C. § 3441(a)(3) (Supp. V 1981). Because the majority of the regulations were originally issued by HEW, but were enforced in most of the cases considered by both HEW and the Department of Education, hereinafter the generic term "Department" will be used to refer to both agencies unless greater specificity is warranted.

<sup>6</sup> 34 C.F.R. §§ 106.51-.61 (1982). The general introductory section provides:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

*Id.* § 106.51(a)(1).

<sup>7</sup> See *Dougherty Cty. School System v. Harris*, 622 F.2d 735 (5th Cir. 1980), *vacated sub nom.* *Bell v. Dougherty Cty. School System*, 102 S. Ct. 2264 (1982); *North Haven Bd. of Educ. v. Hufstедler*, 621 F.2d 773 (2d Cir. 1980), *aff'd and remanded sub nom.* *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir. 1980), *vacated sub nom.* *United States Dept.*

to reach the employment practices of educational institutions. Four courts of appeals and several district courts have agreed with this assertion, holding that Title IX's protection does not extend to the employees of covered institutions, and that the Department exceeded its statutory grant of authority in promulgating the Subpart E regulations.<sup>8</sup> Two courts of appeals, however, upheld the Department's position, determining that Congress did intend that Title IX cover the employment activities of regulated educational programs.<sup>9</sup> On February 23, 1981, in order to resolve the conflict among the circuits, the Supreme Court granted certiorari<sup>10</sup> to review the decision of the Second Circuit in one of these latter cases, *North Haven Board of Education v. Hufstедler*,<sup>11</sup> in which the circuit court held that Title IX authorized the Department to promulgate the Subpart E regulations.<sup>12</sup>

During the *Survey* year, the Supreme Court, in *North Haven Board of Education v. Bell*,<sup>13</sup> affirmed the Second Circuit's decision, concluding that employment discrimination does come within the ambit of Title IX. Following a review of the statutory language, the legislative history, and the relevant post-enactment history, the Supreme Court concluded that Congress did intend that Title IX reach the employment practices of covered programs.<sup>14</sup> The Court, however, remanded the case to the district court for a determination of whether the programs in question were receiving "federal financial assistance" for purposes of the statute.<sup>15</sup>

The petitioners in *North Haven* were two Connecticut public school boards, the North Haven Board of Education and the Trumbull Board of Education. Each school board had brought suit in federal district court challenging the Department's authority to issue the Subpart E regulation.<sup>16</sup> In their suits, which were joined on appeal, both petitioners asserted that Congress did not intend Title IX to reach employment practices.<sup>17</sup>

The litigation in the *North Haven* case arose in January 1978 when Elaine Dove, a tenured teacher in the North Haven school system, filed a complaint with the Department alleging that the school board had violated Title IX by refusing to rehire her after a one year maternity leave.<sup>18</sup> The Department processed the complaint, claiming authority by virtue of its Subpart E regulations, and initiated an investigation into the school board's

of Educ. v. Seattle Univ., 102 S. Ct. 2264 (1982); *Romeo County Schools v. HEW*, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979); *Junior College Dist. of St. Louis v. Califano*, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *Isleboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979).

<sup>8</sup> Four courts of appeals had so held. See *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir. 1980), vacated sub nom. *United States Dept. of Educ. v. Seattle Univ.*, 102 S. Ct. 2264 (1982); *Romeo County Schools v. HEW*, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979); *Junior College Dist. of St. Louis v. Califano*, 497 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *Isleboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979).

<sup>9</sup> See *Dougherty Cty. School System v. Harris*, 622 F.2d 735 (5th Cir. 1980), vacated sub nom. *Bell v. Dougherty Cty. School System*, 102 S. Ct. 2264 (1982); *North Haven Bd. of Educ. v. Hufstедler*, 621 F.2d 773 (2d Cir. 1980), aff'd and remanded sub nom. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

<sup>10</sup> 450 U.S. 909 (1981).

<sup>11</sup> 629 F.2d 773 (2d Cir. 1980).

<sup>12</sup> *Id.* at 786.

<sup>13</sup> 456 U.S. 512 (1982).

<sup>14</sup> *Id.* at 520-35.

<sup>15</sup> *Id.* at 539-40.

<sup>16</sup> *Id.* at 517.

<sup>17</sup> *Id.* at 517-19.

<sup>18</sup> *Id.* at 517.

employment practices.<sup>19</sup> As part of its investigation, the Department requested from the school board certain information concerning its policies on hiring, seniority, leaves of absence, and tenure.<sup>20</sup> The school board refused to comply with the information request, arguing that the Department lacked authority under Title IX to regulate employment.<sup>21</sup>

After the Department notified the board that it was considering administrative enforcement proceedings because of the board's refusal to cooperate, the school board filed suit in federal district court pursuant to section 903 of Title IX<sup>22</sup> seeking a declaratory judgment that the Subpart E regulations were beyond the scope of the Department's statutory authority, and an injunction forbidding the Department from initiating funding termination proceedings.<sup>23</sup> The district court, agreeing with the school board that Title IX was not intended to reach employment practices, ruled that the regulations were invalid and enjoined the Department from initiating termination proceedings.<sup>24</sup>

The litigation in the *Trumbull* case arose in October 1977, when Linda Potz, a former guidance counselor in the Trumbull school system, filed a complaint with the Department against the Trumbull Board of Education,<sup>25</sup> alleging that the school board had discriminated against her with respect to job assignments, working conditions, and contract renewal.<sup>26</sup> After an investigation, with which the school board cooperated, the Department determined that the board had violated Title IX,<sup>27</sup> and directed the board to take corrective action, including the reinstatement of Potz with back pay.<sup>28</sup> The school board then filed suit in district court, contending that the regulations were invalid and seeking injunctive and declaratory relief identical to that granted in the *North Haven* case.<sup>29</sup> Once again the district court agreed that the Department had exceeded its statutory grant of authority, and granted the relief sought by the board.<sup>30</sup>

The two cases were consolidated on appeal, and the United States Court of Appeals

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Education Amendments of 1972 § 903, 20 U.S.C. § 1683 (1976) provides:

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

*Id.*

<sup>23</sup> 455 U.S. at 518.

<sup>24</sup> *Id.* The decision of the district court is unofficially reported at 19 FEP Cas. 1505 (D. Conn. 1979).

<sup>25</sup> *North Haven*, 456 U.S. at 518.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* The investigation revealed that the school board had required Potz to perform secretarial tasks not required of her male counterparts; had demeaned her in the eyes of her co-workers and counselees; had required her to falsify a Title IX compliance report concerning her job duties and work load; and had fired her solely because of her sex. Brief for Respondent Linda Potz at 2, *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982).

<sup>28</sup> *North Haven*, 456 U.S. at 518.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 518-19.

for the Second Circuit reversed.<sup>31</sup> Finding the language of section 901 unclear and inconclusive, the appellate court examined the available legislative history, and concluded that Title IX was indeed intended to prohibit employment discrimination.<sup>32</sup> The court also determined that the Subpart E regulations were consistent with section 902, the enforcement section of Title IX.<sup>33</sup> That section provides that compliance with the statute's proscriptions may be enforced by the termination of "federal financial assistance"<sup>34</sup> to any "recipient"<sup>35</sup> found in violation of the statute, but limits the effect of the termination to "the particular program, or part thereof, in which such noncompliance has been so found."<sup>36</sup> Ruling that the "pinpoint termination provision" of section 902 applied only to fund terminations *per se*, the court determined that the provision did not limit the Department's authority to issue regulations prohibiting sex discrimination in educational employment.<sup>37</sup>

Thus, the Department could issue the regulations which private plaintiffs would be able to use as a basis for private enforcement action,<sup>38</sup> even if the Department would be unable to terminate the funding to the institution because the program in question did not receive federal funding. Furthermore, the court ruled that if on investigation the Department determined that there were funds which would be subject to termination going to a school, the Department would not be required, prior to the termination, to specify which specific programs receiving financial assistance were covered by the regulations.<sup>39</sup> Because the Department had not exercised its termination authority with respect to the two school boards, however, the court declined to decide whether or not the

<sup>31</sup> North Haven Bd. of Educ. v. Hufstедler, 629 F.2d 773, 776 (2d Cir. 1980).

<sup>32</sup> *Id.* at 785.

<sup>33</sup> See *supra* note 4.

<sup>34</sup> 34 C.F.R. § 106.2(g)(1982) defines federal financial assistance, in pertinent part, as:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

....

(3) Provision of the services of Federal personnel.

....

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

*Id.*

<sup>35</sup> 34 C.F.R. 106.2(h) (1982) defines a recipient as:

[A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

*Id.*

<sup>36</sup> § 902. See *supra* note 4.

<sup>37</sup> 629 F.2d at 785.

<sup>38</sup> The Supreme Court has previously ruled that there is an implied private right of action under Title IX. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

<sup>39</sup> 629 F.2d at 785.

Department could do so in these cases.<sup>40</sup> Rather, it remanded the cases to the district court for determination of whether the school boards had violated the regulations, and, if so, what remedies were appropriate.<sup>41</sup> After their petition for a rehearing *en banc* was denied,<sup>42</sup> the school boards petitioned the Supreme Court for certiorari, which the Court granted.<sup>43</sup>

In its opinion, the Supreme Court upheld the validity of the regulations with respect to employment. The Court agreed with the Second Circuit and the Department that Title IX prohibits sex discrimination against both students and employees.<sup>44</sup> The Court reached this conclusion after an examination of the relevant statutory language, legislative history, and post-enactment history.<sup>45</sup> The Court disagreed, however, with the appellate court's interpretation of the program-specific limitation of Title IX. Whereas the lower court had ruled that the program-specific limitation affected only the termination provisions of section 902 and did not affect the authority of the Department to promulgate regulations,<sup>46</sup> the Supreme Court ruled that the authority of the Department to both issue and enforce Title IX regulations was limited by the program-specific language.<sup>47</sup> "Certainly it makes little sense to interpret the statute . . . to authorize an agency to promulgate rules that it cannot enforce."<sup>48</sup> Though the regulations may be worded broadly and need not be directed at specific programs, the Court ruled, they can be applied validly only to programs that receive federal financial assistance.<sup>49</sup>

The Supreme Court began its analysis with an examination of the statutory language. The Court noted that section 901(a)'s broad directive that "no person" may be discriminated against on the basis of sex appears, on its face, to include employees as well as students.<sup>50</sup> The Court stated: "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'"<sup>51</sup> Because the statute neither expressly nor impliedly excludes employees from its reach, the Court reasoned, it should be interpreted as covering these "persons" absent considerations to the contrary.<sup>52</sup> The Court noted that Congress could have restricted the scope of the statute, if it had so desired, by substituting "student" or "beneficiary" for "person" in section 901(a).<sup>53</sup> The Court noted that the petitioners had argued that because the nine statutory exemptions<sup>54</sup> were directed only at students they indicated that section 901(a) similarly applies only to students.<sup>55</sup> The Court dismissed this argument, however, noting that not all of the exemptions concern students: two of them exempt an entire class of

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Brief for Petitioners North Haven Board of Education and Trumbull Board of Education at 10, *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982).

<sup>43</sup> 450 U.S. 909 (1981).

<sup>44</sup> 456 U.S. at 530.

<sup>45</sup> *Id.* at 520-35.

<sup>46</sup> 629 F.2d at 785-86.

<sup>47</sup> 456 U.S. at 538. "We conclude, then, that an agency's authority under Title IX to both promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902." *Id.*

<sup>48</sup> *Id.* at 537.

<sup>49</sup> *Id.* at n.27.

<sup>50</sup> *Id.* at 520.

<sup>51</sup> *Id.* at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See *supra* note 3.

<sup>55</sup> 456 U.S. at 521.

institutions.<sup>56</sup> Moreover, the Court stated that the absence of an exemption for employment among the specific statutory exemptions lent support to the conclusion that Congress intended employees to fall within the ambit of the statute.<sup>57</sup>

As the statute does not expressly include or exclude employment practices from its scope, however, the Court next sought evidence of Congress's intent in the Act's legislative history. The Court quoted from the introductory remarks of Senator Bayh to his Amendment No. 874 of the Education Amendments of 1972, sections of which became Title IX.<sup>58</sup> Senator Bayh stated: "Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from these programs. . . . The amendment would cover such crucial aspects as . . . *faculty employment*, with limited exceptions."<sup>59</sup> Because the amendment also contained provisions extending Title VII and the Equal Pay Act,<sup>60</sup> however, the petitioners pointed to differences in the heading of the amendment, and noted that only the heading relating to these extensions contained a reference to employment, and suggested that the difference was significant as an indication of intent.<sup>61</sup> The Court dismissed this argument, however, stating that the choice of wording in the headings was insufficient to negate the general intent of the amendment, as related by Senator Bayh.<sup>62</sup>

The Court then turned to the legislative history in the House, but declared that it was even more sparse than that of the Senate.<sup>63</sup> The Court explained that H.R. 7248,<sup>64</sup> the House version of Title IX, contained a general prohibition against sex discrimination similar to that found in section 901 as enacted.<sup>65</sup> But, as the Court noted, one section of the House bill, section 1004, provided that nothing in the bill authorized action by any department against any employment practice, unless the primary purpose of the federal funding involved was to provide employment.<sup>66</sup> The debate in the House did not address this limitation.<sup>67</sup> When the House and Senate versions of the statute were submitted to the Conference Committee, the Court noted, the limitation was deleted.<sup>68</sup> The Conference reports contained no detailed explanation of the deletion, but merely noted that: "The House Recedes."<sup>69</sup> The Court stated that the deletion, as an express and conscious choice,

<sup>56</sup> *Id.* (citing §§ 901(a)(3) & (4)).

<sup>57</sup> *Id.* at 521-22.

<sup>58</sup> See *supra* note 2.

<sup>59</sup> 456 U.S. at 524 (quoting 118 CONG. REC. 5803 (1972)) (emphasis added by Court).

<sup>60</sup> *Id.* at 525.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 525-26 & nn.15-16. The Court noted that while the remarks of one legislator normally are not controlling, Senator Bayh's remarks, as those of the sponsor of the legislation, are the only authoritative guide to the statute's construction. *Id.* at 526-27. This is because the statute was introduced as floor amendment during discussion on the Education Amendments of 1972 and was passed by voice vote almost immediately thereafter. 118 CONG. REC. 5803-15 (1972). As a result of this method of introduction and passage, there were no bill or committee reports which discussed the statute's provisions, nor was there any significant discussion among the members of Congress about the statute prior to its enactment. 456 U.S. at 527. Consequently, according to the Court, Senator Bayh's statements provide the only authoritative indications of Congress' intent in enacting Title IX. *Id.*

<sup>63</sup> 456 U.S. at 527.

<sup>64</sup> H.R. 7248, 92d Cong., 1st Sess., 117 CONG. REC. 39,248 (1971).

<sup>65</sup> 456 U.S. at 527.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (citing 117 CONG. REC. 39,248-63 (1971)).

<sup>68</sup> *Id.* at 527-28.

<sup>69</sup> *Id.* at 528 (quoting S. CONF. REP. NO. 92-798, p. 221 (1972); H.R. CONF. REP. NO. 92-1085, p. 221 (1972)). The Senate report is reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2608, 2671-72.

indicated that "Congress intended that § 901 prohibit gender discrimination in employment."<sup>70</sup>

In so concluding, the Court rejected the petitioner's contention that section 1004 had been deleted to avoid an inconsistency. According to the Court, because the bill which became Title IX included provisions relating to the Equal Pay Act,<sup>71</sup> which did cover employment, petitioners had argued that section 1004 had to be deleted in order to avoid conflict with that portion of the bill.<sup>72</sup> This conflict would have arisen because the limitation contained in section 1004, limiting enforcement action to programs whose primary purpose was to create jobs, would have precluded full enforcement of the amendments to the Equal Pay Act which were contained in the same bill as Title IX. The Court noted, however, that the Conference Committee could easily have avoided the inconsistency by altering the wording of section 1004 to make it clear that the section's limitation only applied to section 901 or could have stated in the Report that the deletion was necessitated to avoid the apparent inconsistency, if such had been their intention in making the deletion.<sup>73</sup> Rather, the statement that "[t]he House recedes" according to the Court, suggests that the Senate version, which was intended to encompass employment, prevailed for substantive reasons.<sup>74</sup>

The Court also rejected the petitioners argument that a specific exclusion for employment, such as was contained in section 1004, was unnecessary to limit the scope of Title IX.<sup>75</sup> Noting that Title IX was consciously patterned after Title VI of the Civil Rights Act of 1964,<sup>76</sup> which prohibits discrimination based on race or national origin in any program receiving federal financial assistance, the petitioners asserted that the addition of a similar limitation in Title VI was not viewed by Congress as altering the scope of that statute.<sup>77</sup> Rather, the petitioners asserted, Congress had agreed before the limitation was added that Title VI did not cover employment and merely added the specific limitation section to make explicit that intent.<sup>78</sup> Consequently, a similar intent should be ascribed to Title IX: it was, they asserted, not intended to reach employment.<sup>79</sup> The Court, however, dismissed this argument stating: "This focus on the history of Title VI . . . is misplaced. It is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX."<sup>80</sup> If Congress had intended, in 1972, to enact a statute that duplicated Title VI's scope, the Court reasoned, they would have enacted an identical statute.<sup>81</sup> Because they did not do so, however, and, according to the Court, because differences between the two

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<sup>70</sup> 456 U.S. at 528.

<sup>71</sup> See *supra* notes 60-61 and accompanying text.

<sup>72</sup> 456 U.S. at 528 & n.18.

<sup>73</sup> *Id.* at 528-29.

<sup>74</sup> *Id.* at 529 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974); *Schwegmann Bros. v. Calvert Drillers Corp.*, 341 U.S. 384, 391-92 (1952)).

<sup>75</sup> *Id.*

<sup>76</sup> Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (Supp. IV 1980). See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979).

<sup>77</sup> 456 U.S. at 529.

<sup>78</sup> *Id.* See Brief, *supra* note 42, at 36-7.

<sup>79</sup> *Id.*

<sup>80</sup> 456 U.S. at 529. "The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation." *Id.*

<sup>81</sup> *Id.* at 530.

statutes must be given their due, the Court concluded that Title IX had been intended to reach employment.<sup>82</sup>

Concluding, then, that the legislative history of the statute supported its reading of the statutory language, the Court turned to an examination of the postenactment history of the statute.<sup>83</sup> The Court first took notice of Senator Bayh's summary of the statute which he had had inserted into the Congressional Record following passage of Title IX.<sup>84</sup> The Court quoted a portion of that description which stated, in part: "Title VI . . . specifically excludes *employment* from coverage . . . *There is no similar exemption for employment in [Title IX].*"<sup>85</sup>

Next, the Court noted that Congress had been given an opportunity to examine the Department's proposed regulations and to disapprove them if they found them inconsistent with its intent.<sup>86</sup> Although a number of resolutions of disapproval were introduced, none were passed.<sup>87</sup> Moreover, during hearing on the resolutions, the Court noted, a majority of the witnesses testified that employees were intended to be protected by the statute.<sup>88</sup> Although the Court noted that Congress' failure to disapprove the regulations does not necessarily demonstrate that Congress considered the regulation with its intent, the Court reasoned that the fact that Congress was aware of the dispute and took no action lent weight to the argument that coverage of employment was intended.<sup>89</sup> Furthermore, according to the Court, because Congress has amended Title IX when it has disagreed with the Department's interpretation of the statute<sup>90</sup> but took no action regarding the employment regulations, Congress's inaction in this instance was a particularly significant guide to its intent.<sup>91</sup> Where an agency's construction of a statute has been fully brought to the attention of Congress and Congress has not sought to alter that construction, though it has altered the statute in other respects, then presumably, the Court reasoned, the agency has correctly discerned the legislative intent.<sup>92</sup> The Court concluded, then, that these postenactment developments lent further credence to its earlier statutory interpretation.<sup>93</sup>

Finally, the Court addressed the "program-specific" limitation of section 902.<sup>94</sup> The Supreme Court disagreed with the circuit court's determination that the limitation of section 902 only limited the Department's authority to terminate funding and not to promulgate regulations.<sup>95</sup> The Court stated that it made little sense to allow an agency to

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 530-31.

<sup>84</sup> *Id.* at 531.

<sup>85</sup> *Id.* (quoting 118 Cong. Rec. 24,684 n.1 (1972)) (first emphasis in original; second emphasis added by Court.).

<sup>86</sup> *Id.* This review period was mandated by § 431 (d)(1) of the General Education Provisions Act, 20 U.S.C. § 1231(d)(1) (1976). See 456 U.S. at 531.

<sup>87</sup> 456 U.S. at 532-33 & nn. 22-24.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 533-34.

<sup>90</sup> *Id.* at 534 & n.25.

<sup>91</sup> *Id.* at 534.

<sup>92</sup> *Id.* at 535 (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979), quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940)).

<sup>93</sup> *Id.*

<sup>94</sup> See *supra* notes 4, 45-49 and accompanying text.

<sup>95</sup> 456 U.S. at 535-36. But see *id.* at n.27 (agreeing with possible narrow interpretation of the Second Circuit's ruling).

issue regulations which it could not enforce.<sup>96</sup> The Court ruled that the Subpart E regulations were consistent with the program-specific limitation because they contained a provision limiting their application only to programs or activities receiving federal financial assistance.<sup>97</sup> The Court declined, however, to undertake to define "program" for purposes of the statute, because the record did not indicate whether the petitioners actually engaged in discrimination nor had either school protested the Department's action on grounds that the alleged discrimination did not affect a federally funded program.<sup>98</sup> Rather, the Court left the definition to the district court on remand.<sup>99</sup>

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented. In his dissent, Justice Powell asserted his belief that the majority's interpretation was neither consistent with the statutory language nor supported by the legislative history.<sup>100</sup> He argued that the majority had undertaken a tortured reading of the statutory language.<sup>101</sup> A natural reading, he stated, would limit the statute's scope to students and to teachers who directly participate in federally funded programs.<sup>102</sup> Justice Powell also stated that legislative history should only be consulted when the statutory language itself is ambiguous, and then only if the history is clear and unambiguous.<sup>103</sup> Because he found the statute's language clear when given a "natural reading," and because he found the legislative history "neither clear nor unequivocal," Justice Powell concluded that the majority had incorrectly interpreted Congress' intent regarding the coverage of employment.<sup>104</sup>

The *North Haven* Court's decision that Congress intended Title IX's protection to reach employees was a correct one. The majority recognized that Congress intended that the statute have a broad reach. The statute was enacted to prevent federal funds from being used to support any form of discrimination in education. When Congress used the word "person" it was attempting to effectuate that goal. If Congress had desired to limit the statute's scope to only students and employees receiving federal grants it could have used language to that end. But, far from limiting the scope of the statute, Congress specifically deleted language that would have precluded the statute's coverage of employees.<sup>105</sup> Consequently, the Court was correct in inferring that Congress did intend that Title IX reach the employment practices of covered programs. This interpretation is further supported by a reading of the relevant postenactment history of the statute. Though Congress was given several opportunities either to amend the statute to prevent the coverage of employment, or to enact resolutions disapproving of the Department's interpretation of the statute, it declined to do so. Congress had, however, amended the statute several other times when the Department's interpretation had conflicted with its own. Consequently, the conclusion is inescapable that Congress did intend Title IX to reach employment and that the Department correctly interpreted the intent of Congress when it promulgated the regulations.

Thus, as a result of *North Haven*, employees of educational institutions are now

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<sup>96</sup> *Id.* at 537.

<sup>97</sup> *Id.* (citing 34 C.F.R. § 106.1 (1980)).

<sup>98</sup> *Id.* at 539-40.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 541 (Powell, J., dissenting).

<sup>101</sup> *Id.* at 541-42.

<sup>102</sup> *Id.* at n.3.

<sup>103</sup> *Id.* at 544.

<sup>104</sup> *Id.* at 550.

<sup>105</sup> See *supra* note 3, 66-82 and accompanying text.

protected by Title IX. This protection apparently extends not only to teachers and counselors, but to all other employees as well, including secretaries, janitors, and other support personnel.<sup>106</sup>

A question which remains unanswered, however, is exactly what constitutes an "education program or activity receiving Federal financial assistance" for purposes of Title IX, and, consequently, to what extent are employees protected. This question is most important in the university and college context, for the Department has taken the position that the entire university or college is the Title IX program funded for purposes of general student aid such as National Direct Student Loans and Guaranteed Student Loans which are granted to students but ultimately are received by the school.<sup>107</sup> This question presumably will be decided this term, because the Court has recently granted certiorari to hear another Title IX case which addresses this issue, albeit in a non-employment situation.<sup>108</sup>

### III. HANDICAP DISCRIMINATION

#### A. \**Discrimination Against the Handicapped — Reevaluating the Scope of Section 504 of the Rehabilitation Act of 1973: Le Strange v. Consolidated Rail Corp.*<sup>1</sup> and *Jones v. Metropolitan Atlanta Rapid Transit Authority*<sup>2</sup>

An express purpose of the Rehabilitation Act of 1973<sup>3</sup> was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals."<sup>4</sup> In furtherance of this goal, section 504 of the Rehabilitation Act prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance."<sup>5</sup> This broad mandate of equal treatment for the handicapped by recipients of federal funds has been construed to encompass discrimination in access to and provision of services by educational,<sup>6</sup> health,<sup>7</sup> and mass transit facilities.<sup>8</sup> It has also been

<sup>106</sup> See 456 U.S. at 541-42 (Powell, J., dissenting).

<sup>107</sup> See 106.2(g)(1)(ii), printed *supra* note 34.

<sup>108</sup> See *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1811 (1983).

\* By Tamara S. Wolfson, Staff Member, BOSTON COLLEGE LAW REVIEW.

<sup>1</sup> 687 F.2d 767 (3rd Cir. 1982), 29 FEP Cases 1150, *cert. granted*, 103 S. Ct. 1181 (1982).

<sup>2</sup> 681 F.2d 1376 (11th Cir. 1982), 29 FEP Cases 729.

<sup>3</sup> The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96, (1976).

<sup>4</sup> 29 U.S.C. § 701(8) (1976) (repealed 1978). The eleven statements of purpose in the 1973 Act were replaced by the 1978 Amendments to the Rehabilitation Act with one statement providing that: "The purpose of this chapter is to develop and implement, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living." 29 U.S.C. § 701 (Supp. II 1978).

<sup>5</sup> Section 504 of the Rehabilitation Act of 1973 provides in relevant part:

No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (Supp. II 1978).

<sup>6</sup> See e.g., *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104, 1108 (N.D. Cal. 1979); *Barnes v. Converse College*, 436 F. Supp. 635, 637 (D.S.C. 1977).

<sup>7</sup> *NAACP v. Wilmington Medical Center, Inc.*, 426 F. Supp. 919, 923 (D. Del. 1977), *rev'd on other grounds sub nom. NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1259 (3rd Cir. 1979).

<sup>8</sup> See e.g., *Leary v. Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977); *United Handicapped Fed'n v.*

established that section 504 prohibits federal grantees from engaging in employment practices which discriminate against the handicapped.<sup>9</sup>

The right of handicapped individuals to be free from discriminatory employment practices in federally funded programs has also been held to be enforceable by a private right of action.<sup>10</sup> The Rehabilitation Act as originally enacted, did not, however, expressly provide for an enforcement mechanism to guarantee compliance with section 504 by federal grantees.<sup>11</sup> In 1978, Congress amended the Rehabilitation Act to correct this omission by adding section 505(a)(2)<sup>12</sup> which incorporated the enforcement provisions set forth in Title VI of the Civil Rights Act of 1964.<sup>13</sup>

The primary enforcement mechanism of Title VI,<sup>14</sup> which prohibits racial discrimination in federally funded programs,<sup>15</sup> is found in section 602.<sup>16</sup> That provision authorizes federal agencies and departments to issue regulations to enforce the prohibition against racial discrimination, and to terminate federal funding in the event of non-compliance.<sup>17</sup> Section 604<sup>18</sup> of Title VI, however, significantly limits the enforcement powers of federal departments and agencies under section 602 by providing that federal departments and agencies are not authorized to take any action "with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment."<sup>19</sup> Thus, only those federal grantees who receive federal funds intended to provide for employment will be subject to Title VI's prohibition against racial discrimination, as enforced by section 602.

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Andre, 558 F.2d 413, 415-16 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.* 548 F.2d 1277, 1284-87 (7th Cir. 1977).

<sup>9</sup> See, e.g., *Hart v. County of Alameda*, 485 F. Supp. 66 (N.D. Cal. 1979); *Whitaker v. Board of Higher Education*, 461 F. Supp. 99, 106-08 (E.D.N.Y. 1978); *Davis v. Bucher*, 451 F. Supp. 791, 796-98 (E.D. Pa. 1978).

<sup>10</sup> *Meiner v. State of Mo.*, 673 F.2d 969, 973 (8th Cir. 1982); *Prewitt v. United States Postal Service*, 662 F.2d 292, 302 (5th Cir. 1981); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979); *Leary v. Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977) (per curiam); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1284-87 (7th Cir. 1977). The Supreme Court has expressly reserved judgement on whether section 504 implies a private right of action. *Southeastern Community College v. Davis*, 442 U.S. 397, 404 n.5 (1979).

<sup>11</sup> See, 29 U.S.C. §§ 701-94 (1976).

<sup>12</sup> 29 U.S.C. § 794(a)(2) (Supp. II 1978).

<sup>13</sup> *Id.* Section 505(a)(2) states in pertinent part: "The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such." *Id.*

<sup>14</sup> 42 U.S.C. §§ 2000d-2000d-4 (1976).

<sup>15</sup> 42 U.S.C. § 2000d ("No person in the United States shall, on the grounds of race color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.")

<sup>16</sup> 42 U.S.C. § 2000d-1 (1976).

<sup>17</sup> *Id.* Section 602 of Title VI provides in pertinent part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity . . . or (2) by any other means authorized by law. . . .

42 U.S.C. § 2000d-1.

<sup>18</sup> 42 U.S.C. § 2000d-3 (1976).

<sup>19</sup> *Id.*

Prior to the *Survey* year, in *Trageser v. Libbie Rehabilitation Center, Inc.*,<sup>20</sup> the Fourth Circuit held that by incorporating the "remedies, procedures, and rights," from section 602 of Title VI into the Rehabilitation Act, Congress also intended to incorporate the limitations of section 604 into the Rehabilitation Act.<sup>21</sup> Accordingly, the *Trageser* court concluded that a plaintiff who failed to establish that the primary purpose of federal financial assistance to the grantee defendant was to provide employment, lacked standing under section 504 to maintain an action challenging employment practices which discriminated against him on the basis of handicap.<sup>22</sup> The *Trageser* analysis has subsequently been adopted by the Eighth<sup>23</sup> and Second<sup>24</sup> Circuits.

During the *Survey* year, three additional circuits addressed the issue of the scope of section 504's prohibition against employment practices which discriminate against the handicapped. In *Scanlon v. Atascadero State Hospital*,<sup>25</sup> the Ninth Circuit adopted the *Trageser* holding and denied relief under the Rehabilitation Act to a victim of diabetes mellitus and blindness in one eye, who alleged that he was refused employment on the basis of his disability, because the primary purpose of federal funding to state hospitals was not to provide employment.<sup>26</sup> In contrast, the Third Circuit in *Le Strange v. Consolidated Rail Corp.*,<sup>27</sup> and the Eleventh Circuit in *Jones v. Metropolitan Atlanta Rapid Transit Authority*,<sup>28</sup> held that by incorporating the rights and remedies of Title VI into the Rehabilitation Act, the 1978 Amendments did not also incorporate the limitations of section 604 of Title VI. Both courts found that handicapped individuals could establish a cause of action under section 504 for employment discrimination without establishing that the federal assistance received by the defendant grantee was targeted towards providing employment opportunities.<sup>29</sup> Consequently, the *Jones* and *Le Strange* holdings represent a significant departure from the approach, first announced in *Trageser*, which restricts the substantive scope of section 504's prohibition of discriminatory employment practices against the handicapped. As a result, the *Jones* and *Le Strange* holdings have prompted a review of the issue by the United States Supreme Court and a resolution is expected during a coming *Survey* year.<sup>30</sup>

In *Trageser*, the Fourth Circuit based its restrictive reading of the scope of section 504 primarily on the similarities between that section and Title VI.<sup>31</sup> The court began its analysis by observing that section 504 of the Rehabilitation Act is modeled after section 601 of Title VI.<sup>32</sup> Both of these provisions, through nearly identical language, prohibit discrimination by recipients of federal funds, with section 504's prohibition applying to discrimination on the basis of handicap, while Title VI applies to discrimination on the

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<sup>20</sup> 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

<sup>21</sup> *Id.* at 89.

<sup>22</sup> *Id.*

<sup>23</sup> *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674-75 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980).

<sup>24</sup> *United States v. Cabrini Medical Center*, 639 F.2d 908, 910-11 (2d Cir. 1981).

<sup>25</sup> 677 F.2d 1271 (9th Cir. 1982).

<sup>26</sup> *Id.* at 1271-72. *Trageser* has also been adopted by one district court during the *Survey* year. *Ward v. Massachusetts Bay Transportation Authority*, 550 F. Supp. 1310, 1311-12 (D. Ma. 1982).

<sup>27</sup> 687 F.2d 767 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983).

<sup>28</sup> 681 F.2d 1376 (11th Cir. 1982), *petition for cert. filed* 51 U.S.L.W. 3535 (Jan. 18, 1983).

<sup>29</sup> *Id.* at 1382; *Le Strange* 687 F.2d at 776.

<sup>30</sup> *Consolidated Rail Corp. v. Le Strange*, *cert. granted*, 103 S. Ct. 1181 (1983).

<sup>31</sup> 590 F.2d at 88-89.

<sup>32</sup> *Id.* at 88.

basis of race, color, or national origin.<sup>33</sup> The *Trageser* court further stated that Title VI's broad mandate against discrimination is limited by section 604 which restricts enforcement of Title VI by federal departments and agencies with respect to discriminatory employment practices to those instances in which providing employment is the primary purpose of the federal funding, or in which employment discrimination would necessarily entail discrimination against the intended beneficiaries of the federal aid.<sup>34</sup> The court also observed that the language of section 604's limitation only refers to enforcement by federal departments and agencies, but nonetheless concluded that section 604 also restricts private actions brought under Title VI.<sup>35</sup>

After examining the statutory structure of Title VI, the court then turned to the effect of the 1978 Amendments to the Rehabilitation Act.<sup>36</sup> The court observed that the 1978 Amendments simultaneously accorded the remedies, procedures, and rights of Title VII of the Civil Rights Act of 1964<sup>37</sup> to federal employees,<sup>38</sup> while providing employees of private employers receiving federal aid with the rights, remedies, and procedures of Title VI.<sup>39</sup> In the court's view, Congress could have provided both federal employees and employees of federal grantees with similar remedies.<sup>40</sup> This differential treatment, the court reasoned, "could not have been inadvertent."<sup>41</sup> The court therefore concluded that the scope of section 504 was restricted by the employment discrimination limitation of section 604 of Title VI.<sup>42</sup>

The Eighth Circuit in *Carmi v. Metropolitan St. Louis Sewer District*,<sup>43</sup> and the Second Circuit in *United States v. Cabrini Medical Center*,<sup>44</sup> relied on substantially similar reasoning as the Fourth Circuit did in *Trageser* in holding that individual action under section 504 is limited by section 604 of Title VI.<sup>45</sup> The Ninth Circuit's opinion in *Scanlon v. Atascadero State Hospital*,<sup>46</sup> citing *Trageser*, *Carmi*, and *Cabrini Medical Center*, and without engaging in any further analysis, similarly held that section 505(a)(2) of the Rehabilitation Act incor-

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<sup>33</sup> *Id.* Compare 29 U.S.C. § 794 quoted in part *supra* at note 5 with 42 U.S.C. § 2000d quoted in part *supra* note 15.

<sup>34</sup> 590 F.2d at 88-89.

<sup>35</sup> *Id.* at 89.

<sup>36</sup> *Id.*

<sup>37</sup> 42 U.S.C. § 2000e, *et seq.* Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer of 15 or more persons "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." 42 U.S.C. § 2000e-2(a)(1).

<sup>38</sup> The 1978 Amendments to the Rehabilitation Act added section 505(a)(1), codified at 29 U.S.C. § 794a(a)(1), provides in pertinent part:

The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 . . . including the application of sections 706(f) through 706(k) . . . shall be available with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

*Id.* Section 501 of the Rehabilitation Act prohibits discrimination on the basis of handicap by the Federal Government. 29 U.S.C. § 791(b) (1976).

<sup>39</sup> Section 505(a)(2), codified at 29 U.S.C. § 794a(a)(2).

<sup>40</sup> 590 F.2d at 89.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 620 F.2d 672 (8th Cir. 1981), 22 FEP Cases 1107.

<sup>44</sup> 639 F.2d 908 (2nd Cir. 1981), 24 FEP Cases 1688.

<sup>45</sup> See *id.* at 910-11; 620 F.2d at 674-75.

<sup>46</sup> See *supra* notes 25-26 and accompanying text.

porated the restrictions of section 604 of Title VI.<sup>47</sup> Thus, prior to *Jones* and *Le Strange*, the circuit courts that had construed sections 504 and 505(a)(2) unanimously held that section 505(a)(2) incorporated the limitations of Title VI as well as the rights and remedies of that title into the Rehabilitation Act, and consequently, these courts held that section 504 could provide no relief for handicapped individuals who were victims of employment discrimination by federal grantees unless the purpose of such funding was to provide for employment.<sup>48</sup> Against this background of consistent precedent, the plaintiffs in *Jones* and *Le Strange*, two physically handicapped individuals seeking relief from discriminatory employment practices, were able to argue successfully that the Eleventh and Third circuits respectively, should reject *Trageser* as the correct construction of the Rehabilitation Act of 1973.

In *Le Strange*, the plaintiff, Thomas Le Strange, had been employed as an engineer by the Erie Lackawanna Railroad.<sup>49</sup> In 1971, his left hand and a portion of his left arm were amputated.<sup>50</sup> Le Strange was subsequently denied re-employment with the Railroad.<sup>51</sup> In 1973, the defendant, Consolidated Rail Corp., a recipient of federal loans, became the successor in interest to Erie Lackawanna, and similarly denied re-employment to Le Strange.<sup>52</sup> Le Strange ultimately brought suit for injunctive relief and monetary damages, relying *inter alia*, on section 504 of the Rehabilitation Act.<sup>53</sup> The United States District Court for the Middle District of Pennsylvania, citing *Trageser* and *Carmi*, held that in order to have standing under section 504 to challenge an employment practice, Le Strange must establish that: "1) providing employment is a primary objective of the federal aid received by the defendant, or 2) discrimination in employment necessarily causes discrimination against primary beneficiaries of the federal aid."<sup>54</sup> Le Strange was unable to satisfy either of these tests.

On appeal, the United States Court of Appeals for the Third Circuit avoided the standing question by framing the issue presented for review as whether section 504 of the Rehabilitation Act prevents employment discrimination against the handicapped by recipients of federal funds.<sup>55</sup> The court then noted that the same issue was recently decided by the Supreme Court within the context of Title IX of the Education Amendments of 1972<sup>56</sup> in *North Haven Board of Education v. Bell*.<sup>57</sup> The court reasoned that *North Haven* dictated the approach to be followed in Le Strange's appeal.<sup>58</sup>

The Le Strange court observed that section 901(a) of Title IX, prohibiting discrimination on the basis of sex by educational institutions receiving federal funds, like section

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<sup>47</sup> 677 F.2d at 1272.

<sup>48</sup> *Id.*; *United States v. Cabrini Medical Center*, 639 F.2d at 911; *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d at 674-75; *Trageser v. Libbie Rehabilitation Center, Inc.* 590 F.2d at 89.

<sup>49</sup> 501 F. Supp. 964, 965 (M.D. Pa. 1980).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 966.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Le Strange also relied on the equal protection clause of the fourteenth amendment and 42 U.S.C. § 1983. The district court found that Le Strange failed to state a cause of action under the equal protection clause because he failed to establish the requisite state action. *Id.* at 966-67. The court similarly dismissed the § 1983 claim holding that Le Strange had not demonstrated that the railroad was acting "under color of state law." *Id.* at 967.

<sup>54</sup> *Id.* at 968.

<sup>55</sup> 687 F.2d at 769.

<sup>56</sup> 20 U.S.C. § 1681 *et seq.* (1976).

<sup>57</sup> 102 S. Ct. 1912 (1982).

<sup>58</sup> 687 F.2d 769.

504 of the Rehabilitation Act, is modeled after section 601 of Title VI.<sup>59</sup> In addressing the issue of whether Title IX prohibits sex discrimination in federally funded educational programs, the Supreme Court had first looked to the expansive language of section 901,<sup>60</sup> and concluded that because it "neither expressly nor impliedly excludes employers from its reach, we should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary."<sup>61</sup> The *North Haven* Court had then focused on the legislative history of section 901 to determine whether Congress intended to limit the broad language of section 901.<sup>62</sup> Finding no such intent, the Court concluded that section 901 encompasses sex discrimination by federally funded educational programs.<sup>63</sup>

Following the Supreme Court's approach in *North Haven*, the Third Circuit began its deliberation in *Le Strange* by focusing on the language of sections 504 and 505(a)(2) of the Rehabilitation Act.<sup>64</sup> Noting that the language of section 504 is virtually identical to that of section 901(a) of Title IX,<sup>65</sup> the court adopted the conclusion of the *North Haven* decision that section 504 "neither expressly nor impliedly excludes employees from its reach."<sup>66</sup>

The court next observed that the Rehabilitation Act, unlike Title IX, contains section 505(a)(2) which extends the rights and remedies of Title VI to the Rehabilitation Act.<sup>67</sup> The *Le Strange* court thus addressed the analysis of the *Trageser* court which had found that section 505(a)(2) incorporated the limitations as well as the remedies of Title VI.<sup>68</sup> The court rejected the *Trageser* conclusion on two grounds. First, the court noted that the language of section 604 of Title VI only limits agency action and not private remedies under Title VI.<sup>69</sup> The court stated that Title VI was not the primary mechanism for individual pursuit of equal employment opportunities.<sup>70</sup> Rather, individuals seeking relief from employment practices which discriminate on the basis of race, may invoke Title VII of the Civil Rights Act of 1964.<sup>71</sup> Furthermore, Title VII established the Equal Employment Opportunity Commission as the primary federal agency for the enforcement of Title VII.<sup>72</sup> Thus, in the *Le Strange* court's view Congress sought to limit agency action under Title VI with respect to employment discrimination to prevent various federal agencies from promulgating conflicting sets of rules and regulations with respect to employment discrimination, however, no such rationale existed for limiting private

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<sup>59</sup> *Id.* at 769-70. Section 901(a) of Title IX provides in part that: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1682 (1976). Compare section 901 of Title IX with section 504 of the Rehabilitation Act, quoted in part *supra* at note 5 and section 601 of Title VI quoted in part *supra* at note 15.

<sup>60</sup> 120 S. Ct. at 1917.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1926.

<sup>64</sup> 687 F.2d 769-70.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 770.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* See *supra* notes 31-42 and accompanying text.

<sup>69</sup> 687 F.2d at 770.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* See 42 U.S.C. § 2000e-2(a)(1) quoted *supra* at note 37.

<sup>72</sup> 687 F.2d at 770. See 42 U.S.C. § 2000e-5.

action under Title VI.<sup>73</sup> The court concluded, therefore, that section 604, as its language provides, only limits agency action and not private action under Title VI.<sup>74</sup>

The *Le Strange* court also rejected the significance which the *Trageser* court attached to the fact that the 1978 Amendments to the Rehabilitation Act extended various provisions of Title VII to federal employees but not to employees of federal grantees.<sup>75</sup> According to the *Le Strange* court, this differential treatment could best be explained by the necessity to bypass the Equal Employment Opportunity Commission in cases of handicap discrimination by federal grantees since that agency did not have the expertise to answer the fundamental question of what is a federally funded program.<sup>76</sup> The court, therefore, concluded that the statutory scheme employed in the Rehabilitation Act, as well as the language of section 504, evidenced no intent to limit the scope of section 504's protection to handicapped individuals from employment discrimination by federal grantees.<sup>77</sup>

Following the approach of the Supreme Court in *North Haven*,<sup>78</sup> the Third Circuit next turned to an examination of the legislative history of the Rehabilitation Act and the 1978 Amendments to see whether Congress intended to limit the broad language of section 504.<sup>79</sup> The court observed that the Act's 1973 legislative history contains no indication that Congress sought to exclude employment discrimination from the scope of section 504.<sup>80</sup> On the contrary, several direct indications could be found that Congress intended that section 504 prohibit employment discrimination as well as discrimination in housing and access to other federally funded services.<sup>81</sup> The court supported its reliance on these remarks by pointing out that if a contrary intent were present among members of Congress, it is highly likely that opposition to coverage of employment practices would have been voiced given the legislation's express inclusion of mandated affirmative action

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<sup>73</sup> 687 F.2d at 770-71. The court also stated that the question of whether section 604 of Title VI limited private action was unlikely to even have occurred to Congress since a litigant would only be likely to bring an employment discrimination claim under Title VI if he failed to meet the procedural requirements under Title VII. *Id.* at 771.

<sup>74</sup> *Id.* at 771.

<sup>75</sup> *Id.* See *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d at 89.

<sup>76</sup> 687 F.2d at 771.

<sup>77</sup> *Id.*

<sup>78</sup> See 102 S. Ct. at 1917.

<sup>79</sup> 687 F.2d at 771.

<sup>80</sup> *Id.* at 773.

<sup>81</sup> *Id.*, quoting Senator Cranston who chaired the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare for consideration of the Rehabilitation Act ("Such problems as unfounded discrimination in employment and in housing, difficulties of access to places of work and treatment centers . . . were voiced repeatedly to the committee. . . . Discrimination in placement, hiring and advancement continue to limit the vocational rehabilitation program's ability to effectuate successful rehabilitations . . . . The expenditure of money on vocational programs is not well spent if we do not at the same time take meaningful steps to eliminate architectural barriers and provide substantial accomplishments in employment for handicapped individuals.") 119 CONG. REC. 5882, 93rd Cong., 1st Sess (1973); and Senator Taft ("The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their communities. . . . Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed — utilized in capacities well below the levels of their training, education, and ability. However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all — discrimination.") 119 CONG. REC. 24587, 93rd Cong., 1st Sess. (1973).

programs to encourage hiring of the handicapped by the federal government and federal contractors.<sup>82</sup>

The court then examined the legislative history of the 1978 Amendments to determine whether Congress intended to restrict the scope of section 504 by adding section 505(a)(2).<sup>83</sup> As in the 1973 legislative history, the court found strong evidence that in 1978, Congress intended that the Rehabilitation Act, even as amended by section 505(a)(2), should encompass employment discrimination by federal grantees, regardless of the purpose of the federal funding.<sup>84</sup> In particular, the court noted that prior to consideration of the 1978 amendments by the Senate Committee on Human Resources, the Department of Health, Education and Welfare, pursuant to an executive order directing the HEW to coordinate the issuance of regulations enforcing section 504 by all federal departments and agencies,<sup>85</sup> promulgated regulations designed to enforce section 504.<sup>86</sup> These regulations interpreted section 504 to encompass employment discrimination by federal grantees.<sup>87</sup> The Senate Committee on Human Resources made express reference to the HEW regulations and stated that the 1978 Amendments "codif[y] existing practice as a specific statutory requirement."<sup>88</sup> Additionally, the court noted, the Committee report contains no indications that HEW had exceeded its statutory authority.<sup>89</sup> The court found further support for its reading of the 1978 legislative history in several other proposed amendments to the Rehabilitation Act.<sup>90</sup> For example, an amendment was proposed to exclude alcoholics and drug abusers not qualified for employment from the definition of handicapped persons.<sup>91</sup> In the *Le Strange* court's view, such an amendment would have been unnecessary if section 504 were not intended to cover employment practices.<sup>92</sup>

Finally, the court found further support for its holding in post-enactment statements by the Senate Committee on Labor and Human Resources<sup>93</sup> and by the Attorney General concluding that *Trageser* was decided erroneously.<sup>94</sup> The court concluded its reasoning,

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<sup>82</sup> 687 F.2d at 773-74.

<sup>83</sup> *Id.* at 774.

<sup>84</sup> *Id.* at 776.

<sup>85</sup> 687 F.2d at 744.

<sup>86</sup> See 45 C.F.R. § 84.1 *et seq.*

<sup>87</sup> *Id.*, citing 45 C.F.R. § 84.11. Section 84.11(a) of 45 C.F.R. provides: "No qualified handicapped person shall, on the basis of handicap be subjected to discrimination in employment under any program or activity to which this part applies."

<sup>88</sup> SEN. REP. NO. 95-890, 95th Cong. 2d Sess., at 19 (1978).

<sup>89</sup> 687 F.2d at 744. See also SEN. REP. NO. 95-890, *supra* note 88.

<sup>90</sup> 687 F.2d at 775.

<sup>91</sup> *Id.*, citing 124 CONG. REC. 30322.

<sup>92</sup> 687 F.2d at 775.

<sup>93</sup> *Id.* at 776, quoting S. REP. NO. 316, 96th Cong., 1st Sess., at 13 (1979) ("[*Trageser*] is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of [section 504], regardless of the designated use of the Federal funds received by the employer in question.").

<sup>94</sup> 687 F.2d at 776, quoting Nondiscrimination Based on Handicap in Federally Assisted Programs — Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 FED. REG. 37620, 37628 (1980) ("[T]he Department believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance . . ."). The Attorney General's comments further critiqued *Trageser* and *Carmi* as inconsistent with the legislative history of the Act. See *id.* Executive Order 12250 transferred responsibility for coordinating the enforcement of section 504 by federal agencies and departments from the Department of Health, Education and Welfare to the Attorney General. Executive Order 12250 (1980).

stating: "[T]o eliminate protection against discrimination in employment by federal grantees would eliminate a substantial portion of the small amount of protection afforded the handicapped. What is a commonsensical approach to Title VI, thus, becomes a devastating blow within the context of the Rehabilitation Act."<sup>95</sup>

The Court of Appeals for the Eleventh Circuit, in *Jones v. Metropolitan Atlanta Rapid Transit Authority*,<sup>96</sup> reached an outcome similar to *Le Strange* by holding that section 504 of the Rehabilitation Act is not limited by section 604 of Title VI.<sup>97</sup> The plaintiff in *Jones*, William Jones, like Thomas Le Strange, was a recent amputee who was denied his former position with the Metropolitan Atlanta Rapid Transit Authority (MARTA).<sup>98</sup> Prior to the amputation of his left leg, Jones had been employed by MARTA as a bus driver for fifteen years.<sup>99</sup> Jones was rehired as a traffic checker, but was denied reinstatement as a bus driver.<sup>100</sup> MARTA received federal funds in the form of engineering and construction grants and operating subsidies from the United States Department of Transportation.<sup>101</sup> A portion of this funding was used to subsidize wages of certain MARTA employees, including traffic checkers and bus drivers.<sup>102</sup> The United States District Court for the Northern District of Georgia found that the federal funds received by MARTA were not primarily intended to provide employment and accordingly, dismissed Jones' section 504 claim holding that such a showing was necessary to maintain a cause of action under section 504.<sup>103</sup>

The United States Court of Appeals for the Eleventh Circuit reversed, holding that in order to maintain a cause of action under section 504 of the Rehabilitation Act, a plaintiff need only establish that he is an intended beneficiary of the federal funds received by his employer, and he is not required to show that the primary purpose of that funding is to provide employment.<sup>104</sup> The *Jones* court like the *Le Strange* court<sup>105</sup> reached this holding largely by analyzing the statutory language and the legislative history of the Rehabilitation Act, as amended.<sup>106</sup> In contrast to the Third Circuit, however, the Eleventh Circuit did not rely on the Supreme Court's *North Haven* opinion for support.<sup>107</sup>

The Eleventh Circuit began its analysis in *Jones* by focusing on the plain language of section 504.<sup>108</sup> The court concluded, as did the *Le Strange* court,<sup>109</sup> that the language of that provision unambiguously states that the prohibition against discrimination against the handicapped applies to any program or activity receiving federal funding.<sup>110</sup> There is no indication on the face of section 504, the court reasoned, that its scope is limited to federal grantees receiving federal assistance for the primary purpose of providing em-

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<sup>95</sup> 687 F.2d at 776.

<sup>96</sup> 681 F.2d 1376 (11th Cir. 1982), 29 FEP Cases 729.

<sup>97</sup> 681 F.2d at 1382.

<sup>98</sup> *Id.* at 1377.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1376.

<sup>102</sup> *Id.*

<sup>103</sup> *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 552 F. Supp. 370, 376 (N.D. Ga. 1981).

<sup>104</sup> 681 F.2d at 1382.

<sup>105</sup> See *supra* notes 55-92 and accompanying text.

<sup>106</sup> See 681 F.2d at 1377-82.

<sup>107</sup> See *supra* notes 56-58 and accompanying text.

<sup>108</sup> *Jones*, 681 F.2d 1376, 1379.

<sup>109</sup> See *Le Strange* 687 F.2d at 769-70.

<sup>110</sup> *Jones*, 681 F.2d at 1379.

ployment.<sup>111</sup> The *Jones* court considered the plain language of the statute to be conclusive, but nonetheless, in light of recent authority to the contrary, turned to an examination of the legislative history.<sup>112</sup>

The court first turned to the 1973 legislative history and observed that there was not "even a scintilla of evidence indicating that Congress intended to incorporate section 604 of Title VI into the Rehabilitation Act,"<sup>113</sup> and thus limit the scope of section 504 to federal grantees receiving funds for the primary purpose of providing employment.<sup>114</sup> In fact, the court observed the 1973 legislative history contains no reference to Title VI.<sup>115</sup>

The court then proceeded to examine the legislative history accompanying the 1974 Amendments to the Rehabilitation Act.<sup>116</sup> That legislative history does contain one reference to Title VI; the Senate Report noted that section 504 was "patterned" after section 601 of Title VI.<sup>117</sup> The *Jones* court noted that in *Carmi*,<sup>118</sup> the Eighth Circuit had relied on this reference to Title VI to conclude that Congress had intended to incorporate the limitations of section 604 into the Rehabilitation Act.<sup>119</sup>

The Eleventh Circuit, however, rejected this inference in *Jones* stating that the reference to Title VI was simply an acknowledgement that section 504 of the Rehabilitation Act employed the same expansive language as section 601 of Title VI.<sup>120</sup> The court also noted that had Congress originally intended the Rehabilitation Act to incorporate the provisions of Title VI, the 1978 Amendments making the "remedies, procedures, and rights" of Title VI applicable to suits under section 504 would have been unnecessary.<sup>121</sup> Finally, the court noted that the Rehabilitation Act is remedial in nature, and thus under canons of statutory construction should be accorded a liberal interpretation.<sup>122</sup>

After concluding that section 504, as originally enacted, did not exclude discriminatory employment practices from its reach, the court focused on the effect of the 1978 Amendments.<sup>123</sup> Examining the statutory language of the 1978 Amendments, the court placed particular significance on the observation that section 505 does not simply state that section 504 suits were controlled by Title VI.<sup>124</sup> Instead, the language of section 505 provides that only the "remedies, procedures, and rights" of Title VI are extended to the Rehabilitation Act.<sup>125</sup> Accordingly, the court concluded that section 604 of Title VI, constituting a restriction rather than a "right, procedure, or remedy" was not incorporated into the Rehabilitation Act.<sup>126</sup>

The *Jones* court found further support for this conclusion in the legislative history of the 1978 Amendments.<sup>127</sup> The court stated that the clear purpose of the 1978 Amend-

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*, citing S. REP. NO. 1297, 93rd Cong., 2nd Sess. (1974).

<sup>118</sup> See *supra*, note 43.

<sup>119</sup> 681 F.2d at 1397, citing *Carmi*, 620 F.2d at 675.

<sup>120</sup> 681 F.2d at 1397.

<sup>121</sup> *Id.* at 1380.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1380-81.

<sup>127</sup> *Id.* at 1381.

ments was to *expand* the remedies available to handicapped individuals.<sup>128</sup> Given this purpose, the court reasoned it would be incongruous to construe section 505 as a limitation on standing.<sup>129</sup> Finally, the court relied on the Department of Health, Education, and Welfare regulations promulgated prior to the 1978 Amendments.<sup>130</sup> As the *Le Strange* court noted, these regulations, which interpreted section 504 to prohibit employment discrimination against qualified handicapped individuals by federal grantees regardless of the purpose of the federal grant, were expressly approved by Congress.<sup>131</sup> Thus, the *Jones* court concluded that the 1978 Amendments to the Rehabilitation Act did not restrict the broad language of section 504 by incorporating the employment discrimination exception of section 604 of Title VI.<sup>132</sup>

In contrast to *Trageser*, the decisions in *Jones* and *Le Strange* both provide a well-reasoned analysis of section 504 of the Rehabilitation Act and thus pave the way toward establishing section 504 as a useful tool for eliminating employment barriers to the handicapped by federal grantees. The *Trageser* holding rests primarily on three conclusions drawn by the Fourth Circuit: that section 504, even absent the 1978 Amendments, can be construed as excluding a general prohibition of employment discrimination by federal grantees;<sup>133</sup> that section 604 of Title VI restricts private as well as agency action;<sup>134</sup> and that by incorporating the "remedies, procedures, and rights" of Title VI into the Rehabilitation Act, Congress also intended to incorporate the restriction of Title VI.<sup>135</sup> Each of these findings are convincingly rebutted by *Jones* and *Le Strange*.

In *Trageser*, the Fourth Circuit stated that the 1978 Amendments to the Rehabilitation Act "simply confirms a plausible reading of section 504 as originally enacted,"<sup>136</sup> thereby implying that the court considered the language of section 504 to exclude employment discrimination from its reach. The language of section 504, however, providing that "[N]o otherwise qualified handicapped individual . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance,"<sup>137</sup> does not on its face, as *Jones* and *Le Strange* noted, limit coverage of employment discrimination to only those programs receiving federal funding for the primary purpose of providing employment.<sup>138</sup> Furthermore, as *Le Strange* states, the Supreme Court has construed this same language, as used in section 901 of Title IX, to encompass a prohibition against employment discrimination.<sup>139</sup> The *Le Strange* court's reliance on *North Haven* is particularly noteworthy

<sup>128</sup> *Id.* (emphasis the court's). The court cited comments of Senator Stafford ("The bill allows the rehabilitation program to grow and serve more handicapped individuals and provide these individuals with greater opportunities to maximize their potential.") 124 CONG. REC. S-30311 (daily ed., Sept. 20, 1978); *Id.* at S-15591 (daily ed., Sept. 20, 1978) (Statement by Senator Cranston); *Id.* at S-30303 (Statements by Senator Randolph); and *Id.* at H-13901 (daily ed., May 16, 1978) (Statement by Congressman Jeffords).

<sup>129</sup> 681 F.2d at 1381.

<sup>130</sup> *Id.* See *supra* note 87.

<sup>131</sup> 681 F.2d at 1381-82. See S. Rep. No. 890, 95th Cong., 2d Sess. (1978); *Le Strange*, 687 F.2d at 744.

<sup>132</sup> 681 F.2d at 1382.

<sup>133</sup> *Trageser*, *supra*, 590 F.2d at 89.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> 29 U.S.C. § 794.

<sup>138</sup> *Jones*, *supra*, 681 F.2d at 1378; *Le Strange*, 687 F.2d at 770.

<sup>139</sup> *Le Strange*, 687 F.2d at 796.

because *North Haven* was decided subsequent to the decisions in the *Trageser* line of cases<sup>140</sup> and thus potentially may provide the impetus for those circuits following *Trageser* to reconsider their earlier holdings and guide the Supreme Court's review of this issue. The Eighth Circuit in *Carmi*, after noting the similarities in section 504 and section 901 of Title IX, had relied on cases construing section 901 as covering only direct beneficiaries of federal funds and not extending to the employment practices of federal grantees in reaching a similar construction of section 504.<sup>141</sup> These cases have now been effectively overruled by *North Haven*.

While *North Haven* provides highly relevant precedent for the construction of the statutory language of section 504, analysis of the scope of the Rehabilitation Act also must turn on the effect of the 1978 Amendments, if any, on the broad prohibitions against discrimination against the handicapped of section 504. Although both sections 504 of the Rehabilitation Act and section 901 of Title IX use the same language found in section 601 of Title VI,<sup>142</sup> Title IX contains no provision comparable to section 505(a)(2) of the Rehabilitation Act.<sup>143</sup> Consequently, *North Haven* provides no comparable guidance for the proper construction of that provision.

As *Jones* and *Le Strange* state, *Trageser* concluded that by incorporating the "rights, procedures, and remedies" of Title VI, Congress intended to incorporate the employment discrimination exception of section 604 and that section 604 limits private, as well as agency action.<sup>144</sup> *Trageser* does not provide any support for this latter assertion although the *Trageser* court did acknowledge that the language of section 604 refers only to action by departments and agencies.<sup>145</sup> In contrast to the Fourth Circuit's unsupported assertion that section 604 serves as a substantive limitation on private action under Title VI, the *Le Strange* court examined the statutory scheme of which Title VI is a part,<sup>146</sup> and reasoned that since Title VII provides a broad prohibition against employment discrimination on the basis of race, color, or national origin, it was unlikely that Congress would have even considered it necessary to limit private action with respect to employment practices under Title VI.<sup>147</sup> Furthermore, as Circuit Judge Weiss concurring in *Le Strange* observed, it would seem reasonable for Congress to limit agency but not individual action in order to prevent overzealous administrators from invoking the fund termination sanction of section 602, and thereby threaten the continuation of a valuable program upon the occurrence of one act of employment discrimination.<sup>148</sup>

Even if section 604 was intended to limit private action under Title VI, it does not follow that the 1978 Amendments incorporated this restriction into the Rehabilitation Act. As the *Jones* court observed section 505(a)(2) does not provide that the provisions of Title VI shall govern actions under the Rehabilitation Act, but rather states "the remedies, procedures, and rights set forth in Title VI . . . shall be available"<sup>149</sup> to handicapped persons

<sup>140</sup> The *North Haven* decision was handed down on May 17, 1982.

<sup>141</sup> *Carmi*, 620 F.2d at 675 n.6, citing *Junior College Dist. v. Califano*, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979).

<sup>142</sup> Compare 29 U.S.C. § 794 and 20 U.S.C. § 1681 with 42 U.S.C. § 2000d.

<sup>143</sup> See 20 U.S.C. § 1681 et seq.

<sup>144</sup> *Trageser*, 590 F.2d at 89.

<sup>145</sup> *Id.*

<sup>146</sup> See *Le Strange*, 687 F.2d at 770-71.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 778 (Weiss, J., concurring).

<sup>149</sup> 29 U.S.C. § 794(a)(1).

seeking to enforce the rights provided in section 504.<sup>150</sup> Section 604, a substantive restriction, cannot, as *Jones* states, be categorized as a right, a remedy, or procedure. Moreover, any ambiguity in the statutory language can be resolved by reference to the legislative history. As *Jones* correctly points out, the purpose of the 1978 Amendments was to expand the remedies available to handicapped individuals.<sup>151</sup> This intent is reflected in the language of section 505(a)(2) which provides that the remedies of Title VI shall be "available" under the Rehabilitation Act.<sup>152</sup> This terminology evidences an intent to expand, rather than contract the scope of the Rehabilitation Act. The holding in *Trageser* distorts this language by severely curtailing the remedies available to qualified individuals denied equal employment opportunities because of a physical or mental handicap.

Handicapped individuals may be as likely as minorities and women to be faced with the discriminatory barriers of fear and prejudice from potential employers.<sup>153</sup> Unlike the latter two groups, however, handicapped persons are not aided in their efforts towards equal employment opportunities by a general statutory prohibition against discrimination by private employers.<sup>154</sup> In 1978, Congress estimated the number of unemployed qualified handicapped individuals at seven and a half million.<sup>155</sup> The Rehabilitation Act only prevents employment discrimination against the handicapped by the federal government and federal grantees.<sup>156</sup> To further limit this prohibition against employment discrimination to those federal grantees receiving federal funding for the primary purpose of providing employment, as *Trageser* has done,<sup>157</sup> significantly reduces the number of handicapped individuals who can find relief in section 504 of the Rehabilitation Act. *Jones* and *Le Strange* provide a correct interpretation of the Rehabilitation Act as prohibiting employment discrimination by all federal grantees regardless of the purpose of the federal funding. This holding is consistent both with the statutory language of the Rehabilitation Act and Congressional intent. Whether the holding of *Jones* and *Le Strange* will govern future actions under section 504 is now a question for the Supreme Court and should be answered in a future *Survey* year.

#### A. \*Extending the ADEA to the States — EEOC v. Wyoming<sup>1</sup>

Under the Age Discrimination in Employment Act of 1967 (ADEA),<sup>2</sup> employers are prohibited from discriminating against any individual on the basis of age in their employment practices.<sup>3</sup> The Act provides, however, that it is not unlawful to discriminate on

<sup>150</sup> *Jones*, 681 F.2d at 1380.

<sup>151</sup> *Id.* at 1381.

<sup>152</sup> 29 U.S.C. § 794(a)(1).

<sup>153</sup> See, Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1513, nn.81-83 (1973); Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785, 807, nn.104-105 (1976).

<sup>154</sup> See, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

<sup>155</sup> 124 CONG. REC. H-3971 (daily ed., May 16, 1978) (Statement of Rep. Jeffords).

<sup>156</sup> See 29 U.S.C. § 794 *et seq.*

<sup>157</sup> See *Trageser*, 590 F.2d at 88-90.

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<sup>1</sup> 103 S. Cl. 1054 (1983).

<sup>2</sup> 29 U.S.C. §§ 621-634 (1976).

<sup>3</sup> 29 U.S.C. § 623(a) provides that: "It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;"

The Act protects workers between the ages of forty and seventy. *Id.* at § 631.

the basis of age where age is a bona fide occupational qualification.<sup>4</sup> In 1974, Congress amended the Act to extend the definition of "employer" to include state and local governments.<sup>5</sup> During the *Survey* year, the constitutionality of that amendment was challenged in *EEOC v. Wyoming*.<sup>6</sup> The United States Supreme Court held that Congress had acted constitutionally in extending the provisions of the ADEA to cover the states as employers.<sup>7</sup>

At issue in *EEOC v. Wyoming* was the extent to which federal labor regulations may govern the states in their employment practices. Determining the constitutionality of federal labor legislation when applied to the states actually involves a two-step analysis. First, the Court considers the constitutionality of the legislation itself. This does not present a problem, however, since the Supreme Court has recognized that Congress has the authority to regulate labor practices under the commerce clause.<sup>8</sup> The Supreme Court has found, however, that the scope of Congress' commerce power may be limited by other constitutional provisions.<sup>9</sup> In *National League of Cities v. Usery*,<sup>10</sup> for example, the Supreme Court held that one limitation upon Congress' exercise of the commerce power was the tenth amendment, which protects the sovereignty of the states.<sup>11</sup> The second step in the analysis, therefore, is to determine whether the extension of the federal labor regulations to the states is constitutional within the limits imposed upon the commerce power by the tenth amendment.

Prior to the Court's decision in *EEOC v. Wyoming*, the benchmark case on the issue of the constitutionality of federal labor regulations as applied to the states was *National League of Cities*. In that case, the Supreme Court ruled that amendments extending the Fair Labor Standards Act to the states were an unconstitutional exercise of Congress' commerce power as limited by the tenth amendment.<sup>12</sup> By contrast, the Court in *Wyoming* held that tenth amendment restraints upon Congress' commerce power did not preclude the extension of the ADEA to state and local governments.<sup>13</sup> The *Wyoming* Court did not

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<sup>4</sup> 29 U.S.C. § 623(f) provides that:

It shall not be unlawful for an employer, employment agency, or labor organization — (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business, or where the differentiation is based on reasonable factors other than age;

*Id.*

<sup>5</sup> 29 U.S.C. § 630(b).

<sup>6</sup> 103 S. Ct. 1054 (1983).

<sup>7</sup> *Id.* at 1064.

<sup>8</sup> See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (upholding the constitutionality of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219); *N.L.R.B. v. Jones & Laughlin Steel Company*, 301 U.S. 1 (1936) (upholding the constitutionality of the National Labor Relations Act, 29 U.S.C. §§ 151-168).

The Commerce Clause states that Congress shall have the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., Art. I, § 8, cl. 3.

<sup>9</sup> See *National League of Cities v. Usery*, 426 U.S. 833, 841 (1976) ("Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment, *United States v. Jackson*, 390 U.S. 570 (1968), or the Due Process Clause of the Fifth Amendment, *Leary v. United States*, 395 U.S. 6 (1969).").

<sup>10</sup> 426 U.S. 833 (1976).

<sup>11</sup> *Id.* at 842.

<sup>12</sup> *Id.* at 852.

<sup>13</sup> 103 S. Ct. 1054, 1064 (1983).

overrule *National League of Cities*, but distinguished the two cases. Any analysis of federal labor regulations as applied to the states, therefore, must include principles from both *National League of Cities* and *Wyoming*.

This chapter will examine the issue of the constitutionality of federal labor regulations when extended to the states as employers. The first section of the chapter discusses the doctrine of tenth amendment immunity, emphasizing the Supreme Court's decision in *National League of Cities*, and the subsequent development of a three-prong test by the Court in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*<sup>14</sup> Next, this section considers the application of that test in a recent Supreme Court case, *United Transportation Union v. Long Island Rail Road Co.*<sup>15</sup> The chapter then presents the Court's decision in *EEOC v. Wyoming*. This section demonstrates how the *Wyoming* Court both applied the three-prong *Hodel* test and utilized factors articulated in *National League of Cities*. After an examination of the majority opinion in *Wyoming*, the second section presents the concurring and dissenting opinions. Examination of the dissent demonstrates that the dissent also applied the three-prong test of *Hodel* to the facts in *Wyoming*, yet reached an opposite conclusion as to the constitutionality of extending the ADEA to the states. Finally, the third section of the chapter analyzes the Supreme Court's decision in *Wyoming*. This section first explains the test developed by the Court for determining the constitutionality of federal labor regulations when extended to the states. This analysis reveals that the third prong of the test, the center of disagreement between the majority and minority in *Wyoming*, is the most difficult requirement to determine. This chapter submits that, while the Court reached the correct decision under this test in *Wyoming*, determining the degree of interference of federal regulations into state activities may be difficult. The chapter concludes that when Congress attempts to extend federal labor regulations to the states as employers in the future, it must demonstrate that no significant degree of interference would result to the states from the legislation.

The Supreme Court first considered the impact of the tenth amendment upon Congress' powers under the commerce clause in *National League of Cities v. Usery*.<sup>16</sup> *National League of Cities* involved amendments to the Fair Labor Standards Act (FLSA) which imposed minimum wage and maximum hour requirements upon almost all public employees, including employees of state and local governments.<sup>17</sup> Various individual cities and states, the National League of Cities, and the National Governors' Conference brought an action in federal district court challenging the validity of those amendments.<sup>18</sup> The district court dismissed the complaint.<sup>19</sup> In reaching that decision, the court relied upon an earlier case, *Maryland v. Wirtz*,<sup>20</sup> in which the extension of those provisions to certain public employees had been upheld.<sup>21</sup> The Supreme Court noted probable jurisdiction in *National League of Cities*.<sup>22</sup> The Court then reversed the decision of the district court, holding that, because of the limits imposed by the tenth amendment, the statutory amendments were not within the power granted to Congress by the commerce clause.<sup>23</sup>

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<sup>14</sup> 452 U.S. 264 (1981).

<sup>15</sup> 455 U.S. 678 (1982).

<sup>16</sup> 426 U.S. 833 (1976).

<sup>17</sup> *Id.* at 838-39.

<sup>18</sup> *Id.* at 836-37.

<sup>19</sup> 406 F. Supp. 826, 828 (1974).

<sup>20</sup> 392 U.S. 183 (1968).

<sup>21</sup> *Id.* at 188.

<sup>22</sup> 420 U.S. 906 (1975).

<sup>23</sup> 426 U.S. 833, 852, 856 (1976).

While recognizing that the commerce clause was a grant of plenary power to Congress,<sup>24</sup> the Supreme Court in *National League of Cities* began its analysis by noting that there were constitutional limits upon the authority of Congress, even when exercising a plenary power.<sup>25</sup> In that case, the Court found that the tenth amendment acted as an affirmative constitutional limitation upon the authority of Congress, in that Congress could not use the commerce power to override state sovereignty.<sup>26</sup> The Court recognized that certain attributes of state sovereignty could not be impaired by Congress because the Constitution, through the tenth amendment, prohibited the exercise of such authority by Congress.<sup>27</sup> According to the Court, the states' power to determine the wages and hours of the people they employ represents one such attribute of state sovereignty.<sup>28</sup> Based on its analysis of the interrelation between the tenth amendment and the commerce clause, the Court in *National League of Cities* concluded that the amendments to FLSA imposing minimum wage and maximum hour requirements upon the states were unconstitutional.<sup>29</sup>

In reaching its decision, the *National League of Cities* Court expressed concern with those congressional enactments which would regulate the states as states.<sup>30</sup> By these enactments, the Court meant legislation that would have a direct impact on the states' own activities, and not federal legislation which might simply pre-empt an area of authority shared with the states. Therefore, while it would be appropriate for Congress to exercise its plenary commerce power to regulate private individuals and businesses, Congress could not exercise such broad power with respect to the states.<sup>31</sup> In *National League of Cities*, the legislation in question would have directly regulated the states in their employment practices. Consequently, the legislation was not allowed to stand.<sup>32</sup>

The Court wanted to protect the role of the states, stressing the importance of their "separate and independent existence" in a federal system of government.<sup>33</sup> As articulated by the Court in *National League of Cities*, the test for the constitutionality of federal labor regulations applied to the states concerned whether the federal government was interfering with functions which were essential to the separate and independent existence of the states.<sup>34</sup> Application of this test necessitates looking at the degree of interference, to determine whether the legislation would have a significant adverse impact upon the functioning of the states.<sup>35</sup>

In determining the degree of interference imposed by the amendments to the Fair

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<sup>24</sup> *Id.* at 840.

<sup>25</sup> *Id.* at 841-42. For example, the Court observed that the sixth amendment right to trial by jury and the fifth amendment right to due process had at times acted as constitutional limits upon the exercise of Congress' commerce power. The Court referred to *United States v. Jackson*, 390 U.S. 570 (1968) (clause in Federal Kidnapping Act held unconstitutional because it imposed possibility of death penalty only upon those defendants who exercised their constitutional right to trial by jury); and *Leary v. United States*, 395 U.S. 6 (1969) (statutory presumption of guilt in federal statute involving importation of marijuana held invalid because it denied defendant due process).

<sup>26</sup> 425 U.S. 813, 842-43, and quoting from *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

<sup>27</sup> 426 U.S. at 845.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 852.

<sup>30</sup> *Id.* at 845.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 852.

<sup>33</sup> *Id.* at 844-45, (quoting from *Lane County v. Oregon*, 7 Wall. 71, 76 (1869)).

<sup>34</sup> 426 U.S. at 845-46.

<sup>35</sup> *Id.* at 851.

Labor Standards Act, the Court looked at two factors. First, it considered the financial costs to the states, including the extent to which the states might have to relinquish important governmental activities because of lack of funds.<sup>36</sup> Second, the Court considered the possibility that state policies would be displaced by the federal legislation.<sup>37</sup> The Court found that the minimum wage and maximum hour requirements imposed by the amendments would have an adverse impact upon the states, both in increased costs and in displacement of state policies regarding employment.<sup>38</sup> The Court thus concluded that the amendments, extending the Fair Labor Standards Act to the states, impermissibly interfered with essential governmental functions of state and local governments.<sup>39</sup> Since the amendments exceeded congressional authority under the commerce clause, the Supreme Court in *National League of Cities* held the amendments unconstitutional.<sup>40</sup>

The decision in *National League of Cities* established a doctrine of tenth amendment immunity to protect the states from federal legislation, enacted pursuant to the commerce clause. Federal labor regulations, otherwise permissible under the commerce clause, could not be extended to the states' own employment practices when they would interfere to a significant degree with essential state functions.<sup>41</sup>

After the decision in *National League of Cities*, the Supreme Court further delineated the immunity doctrine in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*<sup>42</sup> *Hodel* involved a challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (the Act),<sup>43</sup> by an association of coal producers.<sup>44</sup> One issue before the Court concerned whether Congress had exceeded the affirmative limitations imposed by the tenth amendment on the exercise of its commerce power.<sup>45</sup> The district court, relying upon *National League of Cities*, held that the Act interfered with a traditional governmental function of the states in contravention of the tenth amendment.<sup>46</sup> The Supreme Court noted probable jurisdiction,<sup>47</sup> and heard the case on direct appeal.<sup>48</sup> The Court upheld the Act in *Hodel* as constitutional.<sup>49</sup>

In reaching its decision in *Hodel*, the Supreme Court first reviewed its decision in *National League of Cities*. The Court then established three requirements, derived from *National League of Cities*, that must be met in order to find that an exercise of congressional commerce power violates the tenth amendment immunity doctrine:

First, there must be a showing that the challenged statute 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

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<sup>36</sup> *Id.* at 846-47.

<sup>37</sup> *Id.* at 847-49.

<sup>38</sup> *Id.* at 846-51.

<sup>39</sup> *Id.* at 851.

<sup>40</sup> *Id.* at 852.

<sup>41</sup> *Id.* at 851.

<sup>42</sup> 452 U.S. 264 (1981).

<sup>43</sup> 30 U.S.C. § 1203 *et. seq.* (1976).

<sup>44</sup> 452 U.S. 264, 273.

<sup>45</sup> *Id.* at 268.

<sup>46</sup> *Id.* at 284-85.

<sup>47</sup> 449 U.S. 817 (1980).

<sup>48</sup> Jurisdiction was invoked under 28 U.S.C. § 1252, providing for direct appeal to the Supreme Court from any decision by a court of the United States invalidating an act of Congress in any suit in which the United States, its agencies, officers or employees are parties. 452 U.S. at 274 n.15.

<sup>49</sup> *Id.* at 268.

ability "to structure integral operations in areas of traditional governmental functions."<sup>50</sup>

Under this three-prong test, the federal legislation must do more than infringe upon the states' regulation of the private sector. First, the legislation must directly regulate the actions of the states themselves. Second, the subject matter of the legislation must involve activities which are traditionally performed by the states, rather than the federal government. Under the third requirement, a court asked to decide this issue must determine whether the degree of interference would be such that the legislation would have a significant adverse impact upon state functioning. In *Hodel*, the Court ruled that the challenge to the federal law failed because the first requirement was not satisfied.<sup>51</sup> Under the Court's analysis, the act in question governed private individuals and businesses, and did not regulate the states as states.<sup>52</sup>

The Supreme Court subsequently relied upon the decision in *National League of Cities* and the three-prong test developed in *Hodel* to reach its decision in *United Transportation Union v. Long Island Rail Road Co.*<sup>53</sup> The issue in that case was whether the tenth amendment doctrine of immunity prohibited application of the Railway Labor Act to a state-owned and operated railroad engaged in interstate commerce.<sup>54</sup> The dispute arose when collective bargaining negotiations between the union and the railroad failed.<sup>55</sup> The Railway Labor Act permitted strikes after a thirty-day cooling off period, while the state law governing collective bargaining prohibited strikes by public employees.<sup>56</sup> The railroad argued that the federal law could not be applied to a state-owned railroad, basing its claim upon the immunity doctrine of *National League of Cities*.<sup>57</sup> The union brought suit in federal district court seeking a declaratory judgment that the labor dispute was governed by the Railway Labor Act, and not the state law.<sup>58</sup> The district court held that the federal Act was applicable, so that the employees had a federally guaranteed right to strike.<sup>59</sup> The United States Court of Appeals for the Second Circuit reversed, holding that the operation of the railroad was an integral state governmental function.<sup>60</sup>

In reaching its decision in *United Transportation*, the Supreme Court relied upon the three-prong test of *Hodel*, finding that the third prong was the key one.<sup>61</sup> Under that requirement, the Court had to determine whether the federal law would directly impair the state's ability to structure its traditional government functions.<sup>62</sup> The *United Transportation* Court concluded that the operation of a railroad engaged in interstate commerce was not a traditional state activity, but rather, had traditionally been a function of private industry.<sup>63</sup> Since the federal regulations did not impair the state's ability to structure its

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<sup>50</sup> *Id.* at 287-88 (citations omitted).

<sup>51</sup> *Id.* at 288.

<sup>52</sup> *Id.*

<sup>53</sup> 455 U.S. 678 (1982).

<sup>54</sup> *Id.* at 680.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 681.

<sup>57</sup> *Id.* at 683.

<sup>58</sup> *Id.* at 684.

<sup>59</sup> *United Transp. Union v. Long Island R.R.*, 509 F. Supp. 1300, 1306 (E.D.N.Y. 1980).

<sup>60</sup> 634 F.2d 19, 27 (2d Cir. 1980).

<sup>61</sup> *Id.* at 684.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 685-86.

traditional functions, the Court ruled that the state could not claim immunity from application of the Railway Labor Act.<sup>64</sup>

In summary, the Court's decision in *National League of Cities* established the doctrine of tenth amendment immunity to limit the federal regulations that could be applied to the states. In *Hodel*, the Court then clarified the relevant factors from its decision in *National League of Cities* into a three-prong test. When the three requirements of the *Hodel* test are met, the Court will refuse to extend the federal legislation to the states, in order to prevent the federal government from interfering in traditional state government functions.

During the *Survey* year, in *EEOC v. Wyoming*,<sup>65</sup> the Supreme Court was again asked to resolve an issue regarding application of federal labor regulations to the states. At issue in the case was whether Congress acted constitutionally when it extended the definition of employer in the Age Discrimination in Employment Act (ADEA)<sup>66</sup> to include state and local governments.<sup>67</sup> The Supreme Court held that the amendment was constitutional.<sup>68</sup>

*Wyoming* involved the mandatory retirement of a fifty-five year old District Game Division Supervisor for the Wyoming Game and Fish Department.<sup>69</sup> After being involuntarily retired, the dismissed employee filed a complaint with the EEOC, charging that the Game and Fish Department had violated the Age Discrimination in Employment Act.<sup>70</sup> The EEOC brought an enforcement action against the state of Wyoming, seeking injunctive and declaratory relief, back pay and liquidated damages.<sup>71</sup> The district court, upon a motion by the defendants,<sup>72</sup> dismissed the EEOC's complaint.<sup>73</sup> The court held that the amendment to the ADEA violated the doctrine of tenth amendment immunity from *National League of Cities*, and was therefore unconstitutional.<sup>74</sup>

Because of the district court's rejection of its complaint, the EEOC filed a direct appeal to the Supreme Court.<sup>75</sup> In a five-to-four decision,<sup>76</sup> the Supreme Court reversed the district court decision, holding that the 1974 amendment to the ADEA, which extended the Act's provisions to state and local governments, was constitutional.<sup>77</sup> The opinion of the Court, written by Justice Brennan, began with a review of the legislative history behind the enactment of the ADEA, emphasizing the purpose of the Act to prohibit arbitrary age discrimination.<sup>78</sup> The Court noted that all prior decisions in the lower federal courts had upheld the amendment extending the ADEA to state and local

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<sup>64</sup> *Id.* at 686.

<sup>65</sup> 103 S. Ct. 1054 (1983).

<sup>66</sup> 29 U.S.C. §§ 621-634 (1976).

<sup>67</sup> 103 S. Ct. 1054, 1057 (1983).

<sup>68</sup> *Id.* at 1064.

<sup>69</sup> *Id.* at 1059.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1059-60.

<sup>72</sup> 514 F. Supp. 595, 596 (1981). The defendants moved to dismiss the complaint for failure to state a claim.

<sup>73</sup> *Id.* at 600.

<sup>74</sup> *Id.*

<sup>75</sup> 103 S. Ct. 1054, 1057 (1983). The direct appeal was filed under 28 U.S.C. § 1252. *Id.*

<sup>76</sup> The opinion of the Court was written by Justice Brennan, joined by Justices White, Marshall, Blackmun, and Stevens. Justice Stevens also filed a concurring opinion. Chief Justice Burger filed a dissenting opinion, in which Justices Powell, Rehnquist, and O'Connor joined. Justice Powell also filed a separate dissenting opinion, in which Justice O'Connor joined.

<sup>77</sup> 103 S. Ct. 1054, 1057, 1064 (1983).

<sup>78</sup> *Id.* at 1057-58.

governments as a constitutional exercise of Congress' power under either the commerce clause or section five of the fourteenth amendment.<sup>79</sup> The Court acknowledged that Wyoming did not argue that the enactment of the ADEA exceeded Congress' power under the commerce clause.<sup>80</sup> Rather, the Court noted, the state of Wyoming relied upon *National League of Cities* to argue that the tenth amendment limitations upon Congress' commerce power precluded application of the ADEA to state and local governments.<sup>81</sup>

In response to this argument, the Court analyzed its recent decisions regarding tenth amendment constraints upon Congress' exercise of commerce power. The Court first emphasized that the purpose of the immunity doctrine from *National League of Cities* was to protect certain core state functions from federal interference.<sup>82</sup> The Court then reaffirmed the three-prong test developed in *Hodel* that must be satisfied in order to find that federal legislation enacted pursuant to the commerce power is invalid.<sup>83</sup> The Court applied the three requirements of the *Hodel* test to the facts in *Wyoming* to reach its decision.

Applying the *Hodel* test, the Court found that the first requirement, that the statute regulated the states as states, was clearly met.<sup>84</sup> The amendment in question would impose the provisions of the ADEA, prohibiting discrimination in employment on the basis of age, directly upon the states as employers. Next, the Court stated that it did not need to resolve whether the second requirement of the *Hodel* test, whether the statute involved an attribute of state sovereignty, was met in *Wyoming*, because the Court focused instead on the third requirement.<sup>85</sup> The Court, therefore, shifted immediately to consideration of the third requirement, whether the statute would impair the states' ability to structure their traditional governmental functions.<sup>86</sup>

The Court admitted that the management of state parks was clearly a traditional state function.<sup>87</sup> The Court noted, however, that it was the degree of interference imposed by a federal regulation upon a traditional state function that must be determined.<sup>88</sup> In *Wyoming*, the Court concluded that the degree of federal intrusion was sufficiently less serious than in *National League of Cities*,<sup>89</sup> and thus distinguished the decision in *National League of Cities* from the holding in *Wyoming*. Because the Court found that the third requirement of the *Hodel* test could not be met in *Wyoming*, the challenge to the amendment's constitutionality failed.<sup>90</sup>

In determining whether the degree of interference was such that the states would be adversely affected by the federal legislation, the Court looked at the two factors established by *National League of Cities*.<sup>91</sup> First, the Court found that in *Wyoming* there was no direct negative financial impact on the states from the application of the ADEA.<sup>92</sup> While

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<sup>79</sup> *Id.* at 1059 and n.6.

<sup>80</sup> *Id.* at 1060.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1060-61. See also note 49 *supra* and accompanying text.

<sup>84</sup> 103 S. Ct. at 1061.

<sup>85</sup> *Id.* at 1061-62. The Court, however, did admit that a determination of the second requirement posed difficulty. *Id.* at 1061.

<sup>86</sup> *Id.* at 1062.

<sup>87</sup> *Id.*, citing *National League of Cities v. Usery*, 426 U.S. at 851.

<sup>88</sup> 103 S. Ct. at 1062.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1062-64. See also notes 35-36 *supra* and accompanying text.

<sup>92</sup> 103 S. Ct. at 1063.

older workers tended to be paid more, the Court found that fact offset by the fact that those workers would not have to be paid pension benefits as long as they continued working, and might receive pension benefits for fewer years when they finally did retire.<sup>93</sup> Second, the Court found that Wyoming was not attempting to pursue any social or economic policies through its mandatory retirement statute, which might be overridden by the imposition of the ADEA.<sup>94</sup> Since the two factors from *National League of Cities* — financial costs and displacement of state policies — were not present in *Wyoming*, the Court concluded that the degree of interference from extension of the ADEA to the states was not sufficient to satisfy the third requirement of the *Hodel* test. Thus, the Court ruled that the extension of the ADEA to the states as employers would not directly impair the states' abilities to structure their traditional functions.<sup>95</sup>

In addition to the two factors from *National League of Cities*, another consideration persuaded the Court that the degree of interference from the legislation would not be severe. The Court found that even with the extension of the ADEA to the states, Wyoming could continue what it had been doing.<sup>96</sup> Under the ADEA, the Court noted, Wyoming would be allowed to continue its policy of mandatory retirement at a specified age, if it could comply with the provision in the ADEA that age be a "bona fide occupational qualification" for the job of game warden.<sup>97</sup>

The *Wyoming* Court thus held that the extension of the ADEA to the states constituted a permissible exercise of Congress' commerce power.<sup>98</sup> Under the Court's ruling, the states would not be protected from application of these particular federal labor regulations by the doctrine of tenth amendment immunity. The Court relied upon the tests developed in *National League of Cities* and *Hodel* to conclude that the ADEA, while regulating the states as states, did not interfere with the states' traditional functions to such a degree as to be unconstitutional.

Justice Stevens, in a concurring opinion in *Wyoming*, took a broader view of the issue before the Court. According to Stevens, the Court in *Wyoming* was construing the scope of Congress' commerce power.<sup>99</sup> Stevens argued in favor of a broad construction of the commerce clause that would allow Congress ample power to regulate the labor market.<sup>100</sup> In addition, Stevens rejected the idea from *National League of Cities* that the tenth amendment doctrine of immunity could limit the scope of Congress' commerce power.<sup>101</sup> Ignoring the tests developed in *National League of Cities* and *Hodel*, Stevens simply found that Congress had the power under the commerce clause to enact the legislation in *Wyoming*.<sup>102</sup>

In arguing that Congress has broad power to enact labor regulations, Stevens stressed the importance of the commerce clause in the Constitution. In Stevens' view, the commerce clause was the response of the framers of the Constitution to the central problem at that time — to secure freedom of trade.<sup>103</sup> A broad construction of the

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1063-64.

<sup>95</sup> *Id.* at 1062.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1064.

<sup>99</sup> *Id.* at 1065.

<sup>100</sup> *Id.* at 1066.

<sup>101</sup> *Id.* at 1067.

<sup>102</sup> *Id.* at 1068.

<sup>103</sup> *Id.* at 1065.

commerce clause by the Court, Stevens stated, would reflect the intent of the framers to confer adequate power on the federal government.<sup>104</sup> Stevens noted that there should be universal agreement today that Congress has the power under the commerce clause to regulate the terms and conditions of employment throughout the economy.<sup>105</sup> According to Stevens, the interdependence of the various segments of the economy, and the magnitude of government employment, may require that Congress have the power under the commerce clause to regulate both the private and the public sector.<sup>106</sup>

In determining the scope of the commerce power, Stevens next considered the issue of limitations imposed upon Congress' exercise of the commerce power by other provisions of the Constitution. While agreeing that Congress could not exceed specific limitations, he did not state what those limitations were.<sup>107</sup> Stevens found, however, no such limitations applicable in *Wyoming*, including any limitation imposed by the tenth amendment.<sup>108</sup> Instead, Stevens labeled the concept of tenth amendment restraints upon the commerce power from *National League of Cities* a "pure judicial fiat."<sup>109</sup> He argued that *National League of Cities* was both incorrectly decided, and inconsistent with the central purpose of the Constitution.<sup>110</sup> Stevens, therefore, would have overruled *National League of Cities* in *Wyoming*.<sup>111</sup>

In summary, Stevens agreed with the result reached by the Court in *Wyoming*, holding the amendments to the ADEA constitutional. Stevens, however, simply concluded that the federal labor regulations, as applied to the states, were a valid exercise of Congress' commerce power because of the broad scope of that power. He found no need to analyze the extent to which the regulations might infringe upon the states' sovereignty.

In a lengthy dissent, those justices who had been in the majority in *National League of Cities*<sup>112</sup> argued that the ADEA was unconstitutional as applied to the states.<sup>113</sup> The dissent, written by Chief Justice Burger, relied upon the three-prong test from *Hodel* to determine that the legislation improperly intruded upon the tenth amendment rights of the states.<sup>114</sup>

Disagreeing with the findings of the majority, the dissenters argued that the second and third requirements of the *Hodel* test were met in *Wyoming*. With respect to the second requirement — whether the ADEA dealt with matters that were attributes of state sovereignty — the dissent stated that Wyoming's goal in enacting a mandatory retirement system was to assure the physical preparedness of its game wardens.<sup>115</sup> The dissent argued that this goal was an attribute of state sovereignty for three reasons. First, the dissent stated, recreation services had been identified in *National League of Cities* as a traditional state activity.<sup>116</sup> Second, the dissent argued that the essence of state power is to

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<sup>104</sup> *Id.* at 1066.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1066-67.

<sup>107</sup> *Id.* at 1067.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Chief Justice Burger, along with Justices Powell, Rehnquist, Stewart and Blackmun had been in the majority in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>113</sup> 103 S. Ct. at 1068.

<sup>114</sup> *Id.* at 1069.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, citing *National League of Cities v. Usery*, 426 U.S. at 851 (1976).

choose who is to be in state government.<sup>117</sup> Finally, the dissent was persuaded by the fact that other states had enacted mandatory retirement laws, indicating that such laws dealt with an attribute of state sovereignty.<sup>118</sup>

In considering the third requirement of the *Hodel* test, the dissent found several ways in which the ADEA would interfere with the states' abilities to structure integral operations. First, the dissent asserted that imposition of the ADEA would lead to increased employment costs for the states.<sup>119</sup> Increased costs would result, in the dissent's view, from the higher pay levels of older workers, from higher pension costs, and from higher health and disability insurance costs.<sup>120</sup> Second, the dissent found noneconomic hardships stemming from extension of the ADEA to the states.<sup>121</sup> The legislation would prevent employers from hiring workers physically best able for the job, according to this argument, and would impede promotion and affirmative action programs by the states.<sup>122</sup>

The dissent thus concluded that the extension of the ADEA to the states was unconstitutional because the three requirements of the *Hodel* test were met. In addition, the dissent considered two other points in support of its view. The dissent rejected the idea that provisions in the ADEA permitting age discrimination, where age was a bona fide occupational qualification,<sup>123</sup> constituted an adequate method for avoiding significant interference with the states' operations.<sup>124</sup> The states would be burdened by meeting a high standard of what constituted a bona fide occupational qualification, the dissent asserted, and by the need to draft new laws on insurance and retirement plans for older workers.<sup>125</sup> Second, the dissent considered a balancing test between the federal and state interests.<sup>126</sup> Weighing the interests involved in *Wyoming*, the dissent concluded that the federal interest in protecting employees against age discrimination was not sufficient to outweigh the states' rights to set standards to meet local needs.<sup>127</sup>

Finally, the dissenters addressed the fourteenth amendment issue not reached by the majority in *Wyoming*. That issue concerned whether the amendments to the ADEA were a constitutional exercise of Congress' power to enact legislation affecting the states under section five of the fourteenth amendment.<sup>128</sup> The dissent argued that neither the Court

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<sup>117</sup> 103 S. Ct. at 1069.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1070.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1071.

<sup>122</sup> *Id.*

<sup>123</sup> 29 U.S.C. § 623(f)(1) provides that age discrimination may be permitted "where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business. . . ."

29 U.S.C. § 623(f)(2) provides that an employer may "observe the terms of a bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ."

<sup>124</sup> 103 S. Ct. at 1072.

<sup>125</sup> *Id.* at 1071.

<sup>126</sup> The balancing test had been alluded to by Justice Blackmun in his concurring opinion in *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976); and in a note by the Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 n.29 (1981). The Court in *EEOC v. Wyoming*, 103 S. Ct. at 1061-62, concluded that it did not have to reach the final balancing step because it found that the legislation did not satisfy the three-prong test of *Hodel*, and thus was constitutional under that test.

<sup>127</sup> 103 S. Ct. at 1072.

<sup>128</sup> *Id.* Section 5 of the fourteenth amendment states that: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

nor Congress had ever determined that mandatory retirement plans violated any rights protected by the fourteenth amendment.<sup>129</sup> According to the dissent, equal protection guarantees did not need to be extended to age classifications under the ADEA because no fundamental right and no suspect class were involved.<sup>130</sup> In support of this argument, the dissent referred to other Supreme Court cases in which equal protection challenges to mandatory retirement plans had been rejected.<sup>131</sup> The dissent thus concluded that analysis of the constitutionality of Wyoming's mandatory retirement system under the fourteenth amendment would produce a similar result.<sup>132</sup>

Justice Powell included a separate dissent in order to challenge the view of history expressed in Justice Stevens' concurring opinion.<sup>133</sup> Powell disputed the central importance of the commerce clause in the Constitution given it by Stevens.<sup>134</sup> He also emphasized the role of the states in the federal system of government created by the Constitution.<sup>135</sup>

In contrast to Stevens' view, Powell argued that removing trade barriers was only one purpose of the Constitution, not the central purpose as claimed by Stevens.<sup>136</sup> In Powell's view, the central purpose of the Constitution was to create a national government.<sup>137</sup> The most important provisions in the Constitution, therefore, were the first three articles which established the government.<sup>138</sup> Powell looked at the language and structure of the Constitution to place the importance of the commerce clause in perspective.<sup>139</sup> He noted that it was only one in a list of enumerated powers granted to Congress.<sup>140</sup> Thus, Powell concluded that the commerce clause should not be as broadly construed as Stevens advocated.<sup>141</sup>

Second, Powell stressed that the Constitution established a federal system of government in which certain powers were reserved to the states.<sup>142</sup> Those reserved powers in turn limited the powers of the national government, including Congress' power under the commerce clause.<sup>143</sup> Powell concluded by voicing concern that Steven's view of the prominence of the commerce clause would allow Congress to override almost any state sovereign function.<sup>144</sup>

The decision in *EEOC v. Wyoming* addresses what continues to be an important issue for the courts, namely, the extent to which federal labor regulations may be applied to the states. More broadly, the Supreme Court's decision in *Wyoming*, and in the earlier cases of *National League of Cities* and *Hodel*, involves the extent to which the doctrine of state sovereignty from the tenth amendment can protect the states against federal intrusion. In

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<sup>129</sup> 103 S. Ct. at 1073.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*, referring to *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); and *Vance v. Bradley*, 440 U.S. 93 (1979).

<sup>132</sup> 103 S. Ct. at 1073.

<sup>133</sup> *Id.* at 1075.

<sup>134</sup> *Id.* at 1075-76. See also notes 135-40 *infra* and accompanying text.

<sup>135</sup> *Id.* at 1077-83. See also notes 141-43 *infra* and accompanying text.

<sup>136</sup> *Id.* at 1076.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1077.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1075-76.

<sup>142</sup> *Id.* at 1077.

<sup>143</sup> *Id.* at 1080-81.

<sup>144</sup> *Id.* at 1081.

concluding that it was constitutional to require that the states as employers not arbitrarily discriminate on the basis of age, the *Wyoming* Court settled the issue only with respect to the ADEA.

While limited in scope, however, the decision in *Wyoming* demonstrates that the doctrine of tenth amendment immunity, first recognized in *National League of Cities*, remains intact. The *Wyoming* Court again recognized that the tenth amendment operates as a limit on Congress' exercise of its plenary commerce power.<sup>145</sup> On this point, the majority and dissenting opinions in *Wyoming* agreed.<sup>146</sup> The only disenchantment with the doctrine of tenth amendment immunity was expressed by Justice Stevens in his concurring opinion, in which he argued that the doctrine was merely a judicial creation.<sup>147</sup>

Since the Supreme Court recognizes tenth amendment limitations on the commerce clause, future attempts by Congress to extend federal labor regulations to the states will undoubtedly face constitutional challenges similar to those raised in *National League of Cities* and *Wyoming*. Clearly, the Court has not established an absolute rule holding all federal labor regulations to be either applicable or inapplicable to the states. Indeed, in *National League of Cities*, the Court refused to allow the Fair Labor Standards Act to be extended to the states.<sup>148</sup> Yet in *Wyoming*, the Court found the extension of the ADEA to the states to be a valid exercise of Congress' commerce power.<sup>149</sup> This chapter will now examine the test that the Court uses in analyzing the constitutionality of federal labor regulations when extended to the states.

The test for constitutionality revolves around the extent to which the states can claim protection against federal legislation by virtue of the tenth amendment, designed to protect the sovereignty of the states. The starting point in the Court's analysis is the three-prong test stated by the Court in *Hodel*, but actually originating in *National League of Cities*. In order for the federal legislation to be declared unconstitutional in its application to the states, all three requirements of the test must be met. If Congress seeks to extend federal labor regulations to the states, the proposed legislation must fail to satisfy at least one of the requirements in order to be upheld as constitutional. This section of this chapter considers those three requirements, and their implications for Congress, in more detail.

Under the first requirement, the legislation must be shown to regulate the states as states. Federal labor regulations that directly govern the states' own employment practices, therefore, will meet this requirement. Both the Fair Labor Standards Act in *National League of Cities* and the ADEA in *Wyoming*, for example, directly dictated certain employment practices to the states as employers.<sup>150</sup> On the other hand, legislation which solely regulates private individuals or businesses, or infringes upon the states' own regulation of the private sector, would not meet the first requirement of the test.<sup>151</sup> That legislation would therefore be upheld as a constitutional exercise of Congress' commerce power.

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<sup>145</sup> *Id.* at 1060.

<sup>146</sup> *Id.* at 1060, 1069.

<sup>147</sup> *Id.* at 1067.

<sup>148</sup> *National League of Cities v. Usery*, 426 U.S. 833, 840 (1976).

<sup>149</sup> 103 S. Ct. at 3064.

<sup>150</sup> *National League of Cities v. Usery*, 426 U.S. 833, 835-36 (1976) (employers must pay minimum hourly wage and pay one and one-half times regular rate for hours in excess of forty); *EEOC v. Wyoming*, 103 S. Ct. 1054, 1056-57 (1983) (unlawful for employers to discriminate on basis of age).

<sup>151</sup> See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

The second prong of the test requires that the legislation address matters which are attributes of state sovereignty. This issue is more difficult to define, and in fact, the majority in *Wyoming* did not resolve the issue in reaching its decision.<sup>152</sup> The dissenting opinion in *Wyoming*, however, suggested several factors to be considered in analyzing what constitutes an attribute of state sovereignty.<sup>153</sup> First, the *Wyoming* dissent noted, several traditional state activities were identified by the Court in *National League of Cities*.<sup>154</sup> If the federal legislation deals with one of these activities, in the view of the dissenters, it is considered to be addressing an attribute of state sovereignty.<sup>155</sup> Another factor, according to the dissent, involves whether other states have enacted laws on that subject.<sup>156</sup> Finding that other government entities have enacted similar legislation creates a presumption that the matter is an attribute of state sovereignty.<sup>157</sup> When federal legislation does involve an attribute of state sovereignty, then it may be found unconstitutional as a violation of the tenth amendment.

For the third requirement of the test to be met, the federal legislation must directly impair the ability of the states to structure their traditional government functions. This concern, to protect core state functions against federal intrusion, prompted the Court's decision in *National League of Cities*. *National League of Cities* established that the degree of interference must be significant for the third requirement to be satisfied.<sup>158</sup> The *National League of Cities* Court relied upon two factors to determine whether the degree of interference was significant: the financial costs that would be imposed upon the states by the legislation, and the possibility that state policies would be displaced by the federal legislation.<sup>159</sup> To those two factors, the Court in *Wyoming* added a third factor to be considered. That factor concerned whether provisions in the legislation allowed the state to continue doing what it had been doing. In *Wyoming*, for example, the Court found that the ADEA provided an exception for age discrimination such as Wyoming's mandatory retirement plan, if age could be shown to be a bona fide occupational qualification.<sup>160</sup>

Comparison of the majority and dissenting opinions in *Wyoming* reveals that each relied upon the test just described. The three-prong test from *Hodel*, therefore, must be accepted as the correct means for determining the constitutionality of federal labor regulations when extended to the states. Nevertheless, the majority and dissent reached opposite conclusions as to the constitutionality of the amendments extending the ADEA to the states. The area of disagreement between the majority and dissenting opinions centered on the third requirement of the *Hodel* test. Both opinions correctly agreed that the essence of the third requirement is the degree of interference imposed by the federal legislation upon the states.<sup>161</sup> Thus the majority and the dissent agreed that the doctrine of tenth amendment immunity protects the states against too much interference by the federal government.<sup>162</sup>

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<sup>152</sup> 103 S. Ct. at 1061.

<sup>153</sup> *Id.* at 1069.

<sup>154</sup> *Id.*, citing *National League of Cities v. Usery*, 426 U.S. at 851 (1976). The traditional state activities identified by the Court were fire prevention, police protection, sanitation, public health, and parks and recreation.

<sup>155</sup> 103 S. Ct. at 1069.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> 426 U.S. at 851-52.

<sup>159</sup> *Id.* at 846-51.

<sup>160</sup> 103 S. Ct. at 1062.

<sup>161</sup> *Id.* at 1062, 1070.

<sup>162</sup> *Id.* at 1060, 1069.

In analyzing the third requirement in *Wyoming*, moreover, the majority and dissenting opinions relied upon the same three factors that were established by the Court in *National League of Cities* and in *Wyoming*. They reached opposite results, however, for each factor. The majority concluded that the ADEA, if extended to the states, would not cause increased financial costs or displace state policies.<sup>163</sup> The dissent, by contrast, argued that extension of the ADEA would create substantial economic and noneconomic hardships for the states.<sup>164</sup> In addition, the majority found that Wyoming could continue its mandatory retirement plan, provided that age was established as a bona fide occupational qualification,<sup>165</sup> whereas the dissent found that to be an impossibly difficult standard to meet.<sup>166</sup> Neither side, however, supported its views on these factors with statistics or evidence from the states as to the effect of the legislation.

Since the majority and the dissent reached opposite results when considering the same three factors, determining the degree of interference imposed by federal legislation poses problems. The Court has neglected to demonstrate how each factor is to be measured. The Court has not clearly established the point at which the degree of interference becomes significant, so that the federal legislation should be deemed unconstitutional as applied to the states. Thus, the degree of interference, while the correct test for the doctrine of tenth amendment immunity, may be an elusive standard.

Nevertheless, this chapter submits that the majority in *Wyoming* correctly concluded that the degree of interference imposed by the ADEA upon the states' activities would not be significant. First, as stated by the majority, any financial burdens imposed on the states by the ADEA would be minimal.<sup>167</sup> That Act does not directly impose any financial expenditures upon the states, as did the minimum wage requirements of the Fair Labor Standards Act in *National League of Cities*.<sup>168</sup> Second, the dissent did not give adequate support for their contention that the ADEA would cause non-economic hardships for the states. The dissent failed to show how the ADEA would affect any specific state policies regarding either promotion or affirmative action. Finally, the majority correctly found that the ADEA permitted mandatory retirement plans by the states, where age could be shown to be a bona fide occupational qualification.<sup>169</sup> This provision mitigates the degree of intrusion imposed upon the states' own activities.

Moreover, this chapter submits that the majority correctly concluded that the degree of intrusion imposed by the legislation in *Wyoming* was less serious than that imposed by the federal labor regulations in *National League of Cities*. As previously stated, the financial costs involved in the minimum wage requirement of the Fair Labor Standards Act in *National League of Cities* imposed a direct burden upon the states.<sup>170</sup> In addition, the *National League of Cities* Court was able to present specific state policies that would be affected by the Fair Labor Standards Act.<sup>171</sup> In *Wyoming*, however, extension of the ADEA to the states would not impose a substantial financial burden upon the states, nor would it significantly affect state policies regarding retirement and promotion. Thus, these two decisions, while reaching opposite conclusions regarding the constitutionality of

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<sup>163</sup> *Id.* at 1063-64.

<sup>164</sup> *Id.* at 1070-71.

<sup>165</sup> *Id.* at 1062.

<sup>166</sup> *Id.* at 1071-72.

<sup>167</sup> *Id.* at 1063.

<sup>168</sup> 426 U.S. at 846.

<sup>169</sup> 103 S. Ct. at 1062.

<sup>170</sup> 426 U.S. at 846.

<sup>171</sup> *Id.* at 847-51.

federal labor regulations extended to the states, are consistent. In addition, the *Wyoming* Court added another factor to help determine the degree of interference with state activities.<sup>172</sup> That factor concerned whether some provision in the proposed legislation would permit the states to continue doing what they had been doing.<sup>173</sup> The ADEA has such a provision whereby the states, or any other employer, may have a mandatory retirement plan if age can be shown to be a bona fide occupational qualification.<sup>174</sup> No such provision existed in the legislation involved in *National League of Cities*. The minimum wage and maximum hour provisions would have been absolutely binding upon the states.<sup>175</sup> Based upon that new factor, therefore, the *Wyoming* Court correctly held that the degree of federal interference was more severe in *National League of Cities*.<sup>176</sup>

Finally, this chapter concludes that Justice Stevens' opinion, although concurring in the majority's holding, erred in its premise that the commerce clause reflected the central purpose of the Constitution to secure freedom of trade. Justice Powell's dissent, written in response to Stevens' opinion, is more accurate historically. Powell places the importance of the commerce clause in correct perspective by pointing out that it is only one in a list of enumerated powers granted to Congress.<sup>177</sup> Furthermore, Powell correctly emphasizes that the Constitution established a federal system of government in which certain powers are reserved to the states.<sup>178</sup> This federal system of government protects the sovereignty of the states against too much federal intrusion. The recognition of the states' role in the federal system is crucial to the doctrine of tenth amendment immunity established by the Supreme Court in *National League of Cities*, *Hodel*, and reaffirmed by its decision in *Wyoming*. The Court's decision in *Wyoming*, upholding the constitutionality of the amendments extending the ADEA to the states as employers, achieves a proper balance between the federal system of government and the sovereignty of the states.

In conclusion, Congress, in attempting to extend federal labor regulations to the states in the future, should be aware of the test established by the Supreme Court through its decisions in *National League of Cities*, *Hodel*, and *Wyoming*. The Court will first look to whether a core state function is involved in the legislation. If so, then the states will be protected by the tenth amendment against congressional regulation in that area. Second, the Court will look at the degree of intrusion imposed by the federal regulations upon the states' activities. The states thus will be protected only when the degree of federal intrusion into a traditional area of state functioning would be significant. Where the degree of federal interference is slight, as in *EEOC v. Wyoming*, the states will not be granted protection by the tenth amendment immunity doctrine of *National League of Cities*.

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<sup>172</sup> 103 S. Ct. at 1062.

<sup>173</sup> *Id.*

<sup>174</sup> 29 U.S.C. § 623(f) (1976).

<sup>175</sup> 426 U.S. at 847-48.

<sup>176</sup> 103 S. Ct. at 1062.

<sup>177</sup> *Id.* at 1077.

<sup>178</sup> *Id.*