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LABOR LAW

I. SCOPE OF ARBITRAL AUTHORITY

A. INTRODUCTION

Hotel and Restaurant Employees v. Michelson's Food Services, Inc.[1] provided the Ninth Circuit with an opportunity to elaborate on the scope of an arbitrator's authority under a collective bargaining agreement. For the first time, the court articulated its position on whether arbitration may proceed when a grievant asserts that the union is not making a good faith effort to prosecute his or her claim.[2]

1. 545 F.2d 1248 (9th Cir. Nov., 1976) (per Duniway, J.; the other panel members were Wallace J. and Richey, D.J.).

2. Vaca v. Sipes, 386 U.S. 171 (1967), marked the Supreme Court's first attempt to define a union's duty of fair representation to the members of its bargaining unit. The *Vaca* Court held that a union has "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct." *Id.* at 177. The duty to represent all members in good faith applies to the negotiation of contracts, as well as the administration of such contracts. The most widely accepted theory as to the source of a union's duty of fair representation is that it flows from the principle of exclusive representation of a bargaining unit. *See* Syres v. Oil Workers, 350 U.S. 892 (1955), *rev'g* 223 F.2d 739 (5th Cir. 1955). For other Supreme Court decisions discussing the duty of fair representation see Humphrey v. Moore, 375 U.S. 335 (1964) (union fulfilled the duty of fair representation when it took a position "honestly, in good faith and without hostility or arbitrary discrimination," and had acted "upon wholly relevant considerations, not upon capricious or arbitrary factors," *id.* at 350); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (union decisions resulting in inequality among employees were not illegal in themselves; a system which credited veterans with pre- as well as post-service employment in measuring seniority was held permissible, *id.* at 342-43). For discussion of various aspects of the duty of fair representation see Aaron, *Some Aspects of the Union's Duty of Fair Representation,* 22 OHIO ST. L.J. 39 (1961); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy,* 13 RUTGERS L. REV. 631 (1959); Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119 (1973); Givens, *Federal Protection of Employee Rights Within Trade Unions,* 29 FORDHAM L. REV. 259 (1960); Hanslowe, *Individual Rights in Collective Labor Relations,* 45 CORNELL L.Q. 25 (1959); Howlett, *Contract Rights of the Individual Employee as Against the Employer,* 8 LAB. L.J. 316 (1957); Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U.L. REV. 362 (1962); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System,* 67 YALE L.J. 1327 (1958). For recent circuit courts of appeals' decisions see UAW Local 417, 83 L.R.R.M. 2512 (6th Cir. 1973); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972); Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972); Price v. International Bhd. of Teamsters, 457 F.2d 605 (3d Cir. 1972); Retana v. Apartment, Motel, Hotel & Electrical Operators Union Local 14, 453 F.2d 1018 (9th Cir. 1972).

B. THE *Michelson's* DECISION

This case arose out of a grievance against the employer, Michelson's Food Services, by an employee, Manning. Manning alleged that Michelson's failed to pay him over $30,000 for work performed under a collective bargaining agreement between Michelson's and Manning's union, the Hotel and Restaurant Employees Union (Union). The collective bargaining agreement created a three-step grievance resolution procedure which provided that: (1) the employer was to be given notice of the grievance and an opportunity to rectify the problem; (2) if the employee remained dissatisfied, the Union and Michelson's were required to seek a resolution of the dispute; and (3) if step (2) proved unsuccessful, either the Union or Michelson's then had the right to make a unilateral demand for submission of the dispute to binding arbitration. The contract provided that an arbitration award would be binding on the employer, the Union, and upon any employees concerned.

Manning's grievance followed the appropriate procedure, and the Union ultimately demanded final and binding arbitration. On the day of the arbitration hearing, Manning appeared with his personal counsel and, for the first time, accused the Union of conspiring with the employer to deny him and other similarly situated employees the compensation due them. Manning asserted that the Union could not fairly represent his interests. He demanded that he be joined as a party to the action in order to represent himself and other similarly situated employees. He also demanded that the Union be joined as a defendant in the arbitration proceeding and that punitive damages, attorney's fees, and costs be awarded against either the Union or the employer, or both. Since neither the Union nor the employer was willing to submit to all of Manning's demands for alteration of the arbitration procedures, the arbitrator adjourned the hearing in the hope that the three parties could reach some procedural accord. No accord was reached, and Neither Michelson's nor Manning was willing to leave the disputed procedural aspects to the discretion of the arbitrator.[3] The arbitrator finally took it upon himself to render an interim arbitration award which decreed that: (1) Manning be made a party to the arbitration and that he be bound by the decision; (2) other similarly situated

3. 545 F.2d at 1250.

employees be joined in the proceeding upon notice and agreement to be bound; (3) punitive damages, costs, and attorney's fees be awarded at the arbitrator's discretion against either the Union or Michelson's; (4) the Union seek judicial enforcement of the interim award; and (5) should the court find Manning could not be made a party, the entire dispute would not be arbitrable.[4] The district court denied enforcement of the award in its entirety on the ground that it was outside the scope of the arbitrator's authority.[5] The Ninth Circuit reversed and remanded, finding that the interim arbitral award was only partially in excess of the arbitrator's authority.[6]

Relying upon an earlier decision which held that it was within an arbitrator's authority to allow a grievant to process his own claim,[7] the court of appeal determined that the arbitrator

4. *Id.* at 1251.

5. *Id.*

6. *Id.* at 1255.

7. Association of Indus. Scientists v. Shell Dev. Co., 348 F.2d 385, 389 (9th Cir. 1965), *relying on* John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964). In addition to providing for the exclusive bargaining capacity of a majority representative, § 9 (a) of the Labor Management Relations Act, 29 U.S.C. § 159(a) (1970), states that

> any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

On its face, the § 9 (a) proviso gives individual employees the right to present grievances directly to the employer. Early cases interpreting the proviso indicated that within the contractual grievance procedure, the individual possessed rights identical to those of the bargaining representative. Hughes Tool Co. v. NLRB, 147 F.2d 690 (5th Cir. 1945). Further, it has been held that the power of a representative to settle grievances without the consent of the individuals affected should be narrowly restricted. Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711 (1945), *aff'd on rehearing,* 327 U.S. 661 (1946). However, more recently, the courts have tended to reduce the role of the individual in the grievance process; the § 9 proviso has been rendered largely unenforceable by the courts, based on the belief that conformity to the needs and realities of collective bargaining will be achieved only if the agent has exclusive authority to process grievances. *See, e.g.,* Black-Clawson Co. v. International Assoc. of Machinists, 313 F.2d 179, 184-86 (2d Cir. 1962); Ostrofsky v. United Steelworkers of America, 171 F. Supp. 782, 790-91 (1959), *aff'd,* 273 F.2d 614 (4th Cir.), *cert. denied,* 363 U.S. 849 (1960); *see generally* Comment, *Federal Protection of Individual Rights Under Labor Contracts,* 73 YALE L.J. 1215 (1964). For a commentator's endorsement of this judicial approach see Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601 (1956), in which it is noted that § 9 was not intended to give an individual employee an independent right to present his or her own grievances to th employer. *Id.* at 623-24. Instead, the proviso was designed to assure an employee the right to present a claim which his or her union declined to process. *Id. See also* 93 CONG. REC. 4904 (1947).

had the power to designate Manning a party to the arbitration.[8] Such a decision is procedural in nature and committed to the discretion of an arbitrator.[9] However, whether Manning was bound by the arbitral award was dependent not upon the arbitrator's authority to make a Manning a party but upon the Union's authority as the sole bargaining agent to bind itself and its members under a collective bargaining agreement.[10] Since there was an effective collective bargaining agreement containing an arbitration clause, the arbitrator's decision was binding on Manning with or without his express authorization.[11]

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8. *Id.* at 1252.

9. *Id.* In John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), the Supreme Court stated that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557. *See* Tobacco Workers Int'l Union Local 317 v. Lorillard Corp., 448 F.2d 949, 954 (4th Cir. 1971); Brotherhood of Teamsters v. Consolidated Freightways Corp. of Del., 335 F.2d 642, 644 (9th Cir. 1964); Sunrise Undergarment Co. v. Undergarment & Negligee Workers Union Local 62, 419 F. Supp. 1282, 1286 (S.D.N.Y. 1976). In both Association of Indus. Scientists v. Shell Dev. Co., 348 F.2d 38 (9th Cir. 1965), and in *Michelson's,* the Ninth Circuit continued to vest primary authority to process grievances in the bargaining agent. However, the Ninth Circuit recognized that an employee is empowered to process a claim as long as the arbitrator permits him or her to do so.

10. Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1970), provides in pertinent part that

> [r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment . . . .

Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5) (1970), states in pertinent part that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ."

11. 545 F.2d at 1252. The *Michelson's* court also noted that an arbitration award arrived at under an effective bargaining agreement would not bind Manning in such "exceptional circumstances as fraud, breach of the duty of fair representation and the like." *Id.* Since Manning was already bound by the arbitrator's decision, the Ninth Circuit rejected his attempt to condition his participation in the arbitration upon assent to his proposals. The employee can neither decrease the arbitrator's powers nor enlarge them: "Manning's attempt to exercise the prerogative of the small boy who owns the baseball and takes the ball home if he cannot make the rules must fail." *Id.* at 1253. *Cf.* Avon Prods., Inc. v. International Union AFL-CIO Local 710, 386 F.2d 651 (8th Cir. 1967), in which the Eighth Circuit held that an employer could not frustrate the arbitration process by claiming that the way the union framed the issues in dispute was incorrect, thereby relieving him of the contractual duty to submit all disagreements to arbitration. *Id.* at 656. *Avon* cited a Ninth Circuit opinion, Independent Soap Workers of Sacramento v. Proctor & Gamble Mfg. Co., 314 F.2d 38 (9th Cir.), *cert. denied,* 374 U.S. 807 (1963), which held that neither party could unilaterally evade the arbitration provisions of the agreement by refusing to stipulate to the grievance. *Id.* at 43.

The court recognized that the Union could have presented a grievance on behalf of all Michelson's employees who were in Manning's position if such a claim had been asserted at the outset of the dispute resolution procedure.[12] However, the Union had not done so, and, since the arbitrator authorized the joinder of other employees solely at Manning's insistence, the court held that the arbitrator was without authority to tranform the proceeding into a class action at the arbitration stage.[13] Manning's demands for punitive damages, costs, and attorney's fees were also presented when arbitration was about to commence. The court acknowledged that the particular relief chosen by an arbitrator is not always limited to the precise measure requested in an original grievance.[14] Nevertheless, it held that "extraordinary remedies are not available at the arbitration stage unless they have been put in issue from the beginning."[15]

The court found that the award delineated two underlying disputes: (1) the original wage dispute between Manning and Michelson's; and (2) the allegation of collusion and bad faith by Manning against the Union.[16] While the grievance regarding unpaid wages was subject to resolution under the terms of the bargaining agreement, Manning's claim that the Union breached its duty of fair representation was collateral to the collective bargaining agreement and thus to the agreement to arbitrate.[17] Since an arbitrator's authority arises from the terms of the collective bargaining agreement, an arbitrator is not empowered to decide

12. 545 F.2d at 1253-54.

13. *Id.* at 1253.

14. *Id.* at 1254. *See* Tobacco Workers Int'l Union Local 317 v. Lorillard Corp., 448 F.2d 949, 954 (4th Cir. 1971) (form of relief—retroactive pay—was a matter of grievance procedure which is committed to arbitrator's discretion); Local 127, United Shoe Workers of America v. Brooks Shoe Mfg. Co., 298 F.2d 277, 301 (3d Cir. 1962).

15. *Id.* at 1254. However, the court remarked: "[I]t may be that, if a grievant claims such damages from the beginning, and that claim is processed through all stages required by the agreement, the arbitrator can consider it . . . . We express no opinion as to what the arbitrator's powers would be in such a case; it is not before us." *Id.*

16. *Id.* at 1251. In denying that the arbitration clause in *Michelson's* covered the fair representation issue, the Ninth Circuit relied on Nedd v. United Mine Workers of America, 400 F.2d 103 (3d Cir. 1968), which held that the union's duty of fair representation is created by its relationship to its members. *Id.* at 105-06. *See* note 2 *supra.* Thus, even in light of the policy established in the "Steelworkers' Trilogy," which favors interpreting an arbitration clause to cover an asserted dispute unless it is absolutely clear that the dispute is not covered, the Union's duty of fair representation was not an arbitrable issue. 545 F.2d at 1254. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

17. 545 F.2d at 1251.

a claim sounding in tort.[18] And as the duty to arbitrate is created by the bargaining agreement, neither an employer nor a union is required to submit to arbitration an issue which is not a subject of the agreement.[19] Therefore, the court held that the arbitrator lacked authority to render a decision on the merits of a claim alleging breach of the duty of fair representation.[20]

Because Manning asserted not only that the Union had failed to represent his interests properly but also that it would ineffectively represent him in the arbitration proceedings, Michelson's argued that it would be inappropriate to allow the proceedings to continue. The Ninth Circuit panel disagreed and held that the arbitration of Manning's wage dispute should go forward despite his allegations of bad faith and fraud.[21] The court reasoned that Manning's interests were adequately protected: (1) he was able to participate in the arbitration proceeding, (2) he could sue the Union for bad faith, and (3) he could sue Michelson's for breach of contract.[22] Further, to allow Manning to terminate an arbitration proceeding by waiting until the hearing to assert that the

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18. *Id. See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); Nedd v. United Mine Workers of America, 400 F.2d 103, 105-06 (3d Cir. 1968).

On the subject of the division of employee rights into tort and contract law see Cowan, *Rule or Standard in Tort Law,* 13 RUTGERS L. REV. 141 (1958). *See* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship,* 61 MICH. L. REV. 1435 (1963), wherein the author states that problems of individual rights in collective bargaining contract administration cannot be satisfactorily solved by such a mechanical division. For a discussion of the need to protect the individual against the union, as well as the employer, in the collective bargaining context see Hanslowe, *supra* note 2. The tort principles which operate to protect individual rights are spelled out by the Supreme Court in Steel v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

19. 545 F.2d at 1251. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

20. 545 F.2d at 1251, 1253.

21. *Id.* at 1254-55.

22. *Id.* at 1252. A judicial remedy is provided by § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1970), which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

For a summary of the legislative history of § 301 see the appendix to the dissenting opinion of Justice Frankfurter in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 485 (1957).

In order to prevail in a § 301 suit, the employee would have to establish the union's bad faith in order to overturn or modify the arbitrator's award. *See* 545 F.2d at 1252.

Union was not properly representing him and was "in cahoots" with his employer "would . . . frustrate the purposes of the grievance procedures in the agreement and the purposes of industrial arbitration . . . ."[23]

C. Impact of Excluding Union's Breach of Good Faith From Arbitral Consideration

The court acknowledged that requiring arbitration to proceed when the employee alleges bad faith on the part of his or her representative "is not a happy solution."[24] Indeed, a union's conduct in prosecuting a grievance intimately affects the outcome of an arbitrator's decision on the merits of a claim. If a union's failure to represent a grievant with due diligence results in a reduced award, the amount of the award may be attacked in a subsequent suit. If a union's inadequate representation results in a decision in favor of the employer, a court may later overturn the arbitral award. However, the arbitration process is designed to avoid such expensive and time-consuming litigation. Therefore, it is not practical to allow arbitration to proceed unless the issue of bad faith is also considered by the arbitrator.

Moreover, in holding that an employee's interest in a grievance is adequately protected by the ability to attack an arbitral award and by the discretion of an arbitrator to make the employee a party, the court took a short-sighted view of employee rights. Since a grievant's participation in arbitration is permissive rather than mandatory, protection of employee rights through self-representation is not guaranteed.[25] If a grievant is not

23. 545 F.2d at 1254. *See* Desrosiers v. American Cyanamid Co., 377 F.2d 864, 870-71 (2d Cir. 1967); Hiller v. Liquor Salesmen's Union Local No. 2, 338 F.2d 778 (2d Cir. 1964). The *Michelson's* court criticized Manning for raising his claims for the first time at the initial arbitration hearing. 545 F.2d at 1255. The implication of the court's criticism is that the bad faith issue could have been raised at an earlier stage. Practically speaking, this suggestion is illogical. Under a collective bargaining agreement like the one in *Michelson's,* an employee would have no basis upon which to make such an allegation until representatives of the union and company met to solve the dispute. If the union's representative is not presenting the employee's claim in good faith, it will only become apparent at the resolution stage which immediately precedes arbitration. Thus, while arbitration is the final stage of the grievance procedure, it will be the first occasion for the employee to raise a claim of bad faith or collusion.

24. 545 F.2d at 1255.

25. For analysis of the right of a grievant to intervene in the arbitration of his grievance see Aaron, *supra* note 2, which suggests that even if policy considerations favored union settlement of grievances against an employee's will, it does not follow that the individual should be excluded from arbitration, *id.* at 51-52; Note, *Rights of Individual*

permitted to participate, a law suit, even if successful, forces an employee to expend money and time in order to vindicate rights denied by virtue of union conduct. Additionally, exclusion of the bad faith issue from arbitration allows unions to subject less-favored members of the bargaining unit to subtle discrimination. A union may diligently prosecute the grievances of loyal members, while processing with less promptness and efficiency the grievances of nonunion members, those who have opposed the union in the past, or those who are currently members of an insurgent faction within the union. Allowing arbitration to proceed when a union merely "contends that it has acted, is acting, and will act in good faith,"[26] will not discourage this type of discrimination. The *Michelson's* court was concerned over the possibility of a disingenuous claimant's sabotaging arbitration efforts. The Court should have balanced this concern with the potential for discrimination against those whose claims of bad faith or collusion are valid.

D. Conclusion

The court's attempt to protect the interests of all parties to a grievance resolution under collective bargaining agreements failed to take into account the practical effects of excluding union

Workers in Union-Management Proceedings, 66 Yale L.J. 946 (1957), in which it is asserted that "[e]xclusive control over *initiating* arbitration enables the union and the employer to agree to settlements that cannot be attacked by dissatisfied employees," thereby stabilizing industrial relations—but that the right of a grievant to intervene in pending arbitration will not disturb this stability. *Id.* at 952-53 (emphasis in original).

26. 545 F.2d at 1252. The panel asserted that it would be contrary to the spirit, if not the letter, of Vaca v. Sipes, 386 U.S. 171 (1967), to hold that arbitration should not proceed where the union has made such an assertion. 545 F.2d at 1252. It is true that in *Vaca*, the Supreme Court held that an individual employee had no absolute right to have his or her grievance arbitrated and that the union had not breached its duty of fair representation merely because the underlying grievance was meritorious. 386 U.S. at 195. However, in *Vaca*, the union had diligently processed the grievance through several procedural steps, including representation of the grievant through acts by the union's business representative, attempts to amass considerable evidence in support of the grievant's case, attempts to find alternative work for the injured grievant, and joining the employer's efforts at medical rehabilitation for him. The *Vaca* standard of proof of good faith representation requires more than a mere assertion by the union that it has acted and will continue to act in good faith. Even if one ignores these implications for the standard of proof to be applied in a suit brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970), the removal of all consideration of the duty of good faith representation from the grievance procedure places exclusive responsibility for fulfillment of the duty upon the courts. If the arbitrator were empowered to consider aspects of that duty which were within his or her range of competence, motivation to fulfill that duty would rest with the union at the grievance level.

bad faith from arbitral consideration. There seems little reason to cling to a traditional doctrine if allowing an arbitrator to consider all claims will result in a just and final resolution of a grievance.

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II. JURISDICTION OF THE NLRB UNDER SECTION 10(k) OF THE NLRA

A. INTRODUCTION

A jurisdictional dispute[1] gave rise to the charge of unfair labor practices in *NLRB v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 433* (*Ornamental Ironworkers*).[2] Plaza Glass Company was awarded a contract to construct doors and windows in an apartment building. The work was being done by its own employees, members of the Glaziers, Glassworkers and Glass Warehouse Workers Union, Local 636 (Glaziers). The International Association of Bridge, Structural, and Ornamental Ironworkers Local 433 (Ironworkers) contended that the work should have gone to its members and threatened to slow down or stop the project unless Plaza Glass hired them.[3] The Glaziers maintained that reassignment would violate its contract with Plaza Glass and might be grounds for picketing the job site.[4] At this point, Plaza Glass filed unfair labor practice charges with the National Labor Relations Board against both unions. The Board, under the authority of section 10(k) of the National Labor Relations Act,[5] heard the dispute and found both unions

1. The term "jurisdictional dispute" denotes a "work assignment dispute" and these terms are often used interchangeably. The typical work assignment dispute involves the assertion by rival unions of the right to have work performed by their members. "Work assignment dispute" has been used, in the representation context, to mean a dispute over which union, if any, has the right to represent or bargain for a group of workers. *See* 23 VAND. L. REV. 1376, at 1376 n.1 (1970).

2. 549 F.2d 634 (9th Cir. Jan., 1977) (per Carter, J.; the other panel members were Duniway and Choy, JJ.), *cert. denied*, 434 U.S. 832 (1977).

3. The basis of the Ironworkers' claim to the apartment project work was not entirely clear from the Ninth Circuit opinion.

4. 549 F.2d at 636. *See* note 12 *infra*.

5. Section 10(k), 29 U.S.C. § 160(k) (1970), provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they

guilty of unfair labor practices but affirmed the assignment of the work to the Glaziers.[6]

When the Ironworkers failed to notify the NLRB Regional Director of its compliance with the Board's section 10(k) determination, the Board followed with a section 8(b)(4)(D)[7] unfair labor practice complaint.[8] The Ironworkers then filed its answer to this complaint. The Board granted its General Counsel's motion to strike the Ironworkers' denials and motion for summary judgment. The Board reasoned that all the issues raised in the Ironworkers' denials were resolved in the section 10(k) proceeding or by the General Counsel's evidence in support of his motions.[9] The Ninth Circuit affirmed,[10] holding that, when 10(k) findings are

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> have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The type of conduct which brings about the Board's jurisdiction to hear a work dispute under 10(k), is defined at 29 U.S.C. § 158(b)(4)(D) (1970) which makes it an unfair labor practice for a labor organization or its agents

> to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> * * * *
>
> forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . .

For a thorough treatment of the various conflicts and general background involved in a work dispute heard under section 10(k), see *NLRB v. Plasterers' Union*, 404 U.S. 116 (1971) and Note, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. CHI. L. REV. 389 (1971).

6. 549 F.2d at 636-37.

7. 29 U.S.C. § 158(b)(4)(D) (1970).

8. The National Labor Relations Board is empowered under § 8(b)(4)(D) of the Act, independently from its 10(k) jurisdiction, to hear and determine unfair labor practices. Thus where a party to a 10(k) proceeding does not comply with the Board's decision, the Board may issue a subsequent unfair labor practice charge against that party under § 8(b)(4)(D). The subsequent 8(b)(4)(D) unfair labor practice charge may be based upon the same conduct as the 10(k) charge.

9. 549 F.2d at 637.

10. In affirming the findings of the NLRB in granting the motion to strike the Ironworkers' denials and, in granting summary judgment, the Ninth Circuit panel remarked

> [t]he Board could reasonably infer from this failure to notify the Regional Director that the union was still demanding the work in violation of § 8(b)(4)(D). Since no evidence was presented by respondent either in the § 10(k) proceeding or in the

not contradicted, it is proper to rely on them in an 8(b)(4)(D) hearing.[11] The court also held that, although the unions entered into a voluntary settlement,[12] the Board's authority to hear the dispute was not foreclosed because the employer was not a party to such a settlement and was not bound by it.[13]

B. Section 10(k) Findings in the Section 8(b)(4)(D) Context

Ironworkers argued that it was error to use the section 10(k) findings to determine the section 8(b)(4)(D) unfair labor practice charge. Ironworkers contended that the Administrative Procedure Act (APA)[14] guaranteed a formal hearing before the Board made its section 8(b)(4)(D) determination.[15] The Ninth Circuit panel noted that the APA does not apply to section 10(k) proceedings.[16] But the panel stated that findings of a proceeding which is governed by the APA may nevertheless be used as evidence in a subsequent proceeding which is governed by the APA.[17] The

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> hearing on the motions, summary judgment was proper . . . . The implication, then, is that if there is no compliance, the charge is not dismissed. In order to comply, a party is required to notify the Board of its intent to comply. Respondent did not do so. Therefore, the Board was justified in acting on the prior charge.

549 F.2d at 639.

11. *Id.* at 638-39.

12. A hearing of the work dispute between the Glaziers and the Ironworkers was conducted pursuant to § 10(k) of the Act, in May, June and July of 1974. However, in March of 1974, the two unions had submitted the dispute to arbitration by the Dispute Board. *Id.* at 636-37.

13. *Id.* at 637, 640-41. The language of 29 U.S.C. § 160(k) (1970) which specifies that "the parties to such dispute [may] submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute . . ." *id.*, within ten days of notice that a charge has been filed—has come to be called "the 10(k) abstention clause." 23 Vand. L. Rev. 1376, 1377 (1970). This clause "specifically prohibits the NLRB from resolving a dispute out of which an alleged unfair labor practice arises if the 'parties to such a dispute' have agreed upon voluntary adjustment." *Id.*

14. 5 U.S.C. §§ 551-559, 701-706 (1970).

15. 5 U.S.C. § 554 (1970) applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ." 5 U.S.C. § 551(7) (1970) defines "adjudication" as "agency process for the formulation of an order." 5 U.S.C. § 551(6) (1970), in turn, defines "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing."

16. In *Int'l Tel. & Tel. Corp. v. Local 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428 (1975), the Supreme Court held that the APA does not apply to § 10(k) proceedings because it does not satisfy the congressional requirements for a "final disposition" since the "Board does not order anybody to do anything at the conclusion of a 10(k) proceeding." *Id.* at 443. *See also* NLRB v. Plasterers' Union, 404 U.S. 116 (1971), in which the Supreme Court stated that "[n]o cease-and-desist order against either union or employer results from such a proceeding . . . ." *Id.* at 126.

17. The panel cited *Bricklayers, Masons and Plasterers' Int'l Union of America v.*

court explained that "[w]hen these findings are not contradicted, as in the case at bar, they may be the sole basis for a subsequent finding."[18]

The Ninth Circuit panel also rejected the contention of the Ironworkers that the different standards of proof required in each proceeding prevent use of section 10(k) findings in section

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NLRB, 475 F.2d 1316 (D.C. Cir. 1973), in which the Court of Appeals for the District of Columbia Circuit said:

> When, as at present, the section 10(k) determination does not end the matter and an unfair labor practice complaint issues, the proceedings become adjudicatory. Should a factual issue be involved as to the unfair labor practice, the usual intermediate decision of the Trial Examiner would be required under the A.P.A., section 554(c)(2). Here, however, the prohibited conduct constituting the unfair labor practice was not denied. The only factual dispute was whether there had been an agreed method of settlement. This had been resolved by the Board in the section 10(k) proceedings. To relitigate it, as the Unions sought, would not have been consistent with the plan of the statute. Nor does that plan require the Board, after the unfair labor practice complaint has issued, to require the evidence upon which it has rendered its section 10(k) decision to be reconsidered by a Trial Examiner who would then recommend a decision.

Id. at 1322.

In *Bricklayers*, the only factual dispute was whether there had been an agreed method of settlement; there was no denial of the prohibited conduct constituting the unfair labor practice. *Id.* at 1322. Similarly in *Ornamental Ironworkers*, the Ironworkers introduced no new evidence as to the unfair labor practice violation. 549 F.2d at 639. *In accord*, in the representation context, that no APA intermediate hearing is required absent additional evidence as to the representational issue: Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941), NLRB v. W.S. Hatch Co., 474 F.2d 558 (9th Cir. 1973). *See also* NLRB v. E-Z Davies Chevrolet, 395 F.2d 191 (9th Cir. 1968).

18. 549 F.2d at 638. The panel noted that this furthers the policy of "modern cases [which] favors not relitigating matters already resolved in a prior setting." *Id.* United States v. Consol. Mines and Smelting Co., 455 F.2d 432, (9th Cir. 1971) which held it was settled law that

> when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory—even though a pertinent statute prescribes such a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks.

Id. at 453. *See also* NLRB v. W.S. Hatch Co., 474 F.2d 558 (9th Cir. 1973), NLRB v. Redmore Corp., 418 F.2d 890 (9th Cir. 1969). In *NLRB v. Mar Salle, Inc.*, 425 F.2d 566 (D.C. Cir. 1970), the District of Columbia Circuit had to decide when summary judgment was appropriate in the context of collective bargaining representation. The *Mar Salle* court said that "section 10 of the Act 'cannot logically mean that an evidentiary hearing must be held in a case where there is no issue of fact.'" *Id.* at 573, *quoting* Macomb Pottery Co. v. NLRB, 376 F.2d 450, 452 (7th Cir. 1967).

8(b)(4)(D) violation hearings by the Board.[19] In a section 10(k) proceeding the Board need only have reasonable cause to believe that there has been an unfair labor practice. In a section 8(b)(4)(D) proceeding, the unfair labor practice must be shown by a preponderance of the evidence.[20] The court found that the Board did not merely rely on the section 10(k) findings but reconsidered them and came to an independent conclusion as to whether an unfair labor practice had occurred.[21] According to the panel, "it seems clear that the preponderance standard was applied and met."[22]

C. Section 10(k) Jurisdiction of the NLRB

A major holding of the *Ornamental Ironworkers* court was that the Board properly asserted jurisdiction over the dispute.[23] Ironworkers argued that Plaza Glass was bound by the ruling of the Dispute Board because Plaza Glass had an agreement to present such matters to the National Joint Board for the Settlement of Jurisdictional Disputes, a predecessor of the Dispute Board.[24] Thus, Ironworkers contended that all parties had agreed to be bound by the Dispute Board's determination.[25] The court rejected this argument, adopting the position taken by the NLRB in *Bricklayers, Masons and Plasterers' International Union, Local No. 1 (Lembke Construction Co.)*[26] which held that an arbitration agreement with one board does not operate to bind the employer to the decisions of that board's successor.[27] Ironworkers also as-

19. 549 F.2d at 638-39.

20. *Id.* at 638. *See* NLRB v. Plasterers' Union, 404 U.S. 116, 122 n.10 (1971).

21. 549 F.2d at 638.

22. *Id.* at 638.

23. *Id.* at 637, 640-41. The panel stated that "[t]he NLRB's findings of fact will be upheld if supported by 'substantial evidence' and its legal conclusions affirmed unless 'arbitrary and capricious.'" *Id.* at 640, *citing* NLRB v. Int'l Longshoremen's & Warehousemen's Union Local 50, 504 F.2d 1229, 1214 (9th Cir. 1974), *cert. denied,* 420 U.S. 973 (1975).

24. The National Joint Board for the Settlement of Jurisdictional Disputes was formed in October 1949. This board was dissolved in 1973 and replaced with the Dispute Board.

25. 549 F.2d at 640.

26. 194 N.L.R.B. 649 (1971).

27. *Id.* at 650-51. However, note the dissent of Judge Fanning in this decision, in which he states:

> Nor do I find any rule of contract law which would free this Employer from his contractual commitment to these two unions. Clearly, the Bricklayers and the Carpenters, the principal parties to this work assignment dispute, are and at all times have been bound to the Joint Board . . . . The Employer has

serted that, even if there was no express consent, Plaza Glass had impliedly consented by assisting Glaziers in presenting its case to the Dispute Board.[28] The court also rejected this argument stating "Plaza Glass simply complied with a request for materials from the union that represented its employees. There was no indication that this cooperation was intended as a commitment to be bound by the Dispute Board's decision."[29]

D. Conclusion

The *Ornamental Ironworkers* opinion was well supported in its holding that an APA governed proceeding may make evidentiary use of the findings of a non-APA governed proceeding. Further, common sense supports this holding. Ironworkers had already failed to refute the unfair labor practice charge in the section 10(k) proceeding and offered no new evidence in subsequent denials of the section 8(b)(4)(D) violation charge. It was therefore unconvincing for Ironworkers to argue that an APA hearing was necessary in order to fully present the unfair labor practice when it had already failed to offer evidence on the charge in two proceedings.

However, the holding regarding the Board's jurisdiction does not rest on such a solid foundation. The legislative purposes of 10(k) were to reduce work stoppages brought about by jurisdictional strikes and to protect the interest of the public and the neutral employer caught between two warring unions.[30] Holding

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> enjoyed the full benefit of these labor agreements, which included his promise to be bound by Joint Board decisions. Both unions were entitled to, and did, rely on this contractual commitment. It is therefore, in my opinion, too late for this Employer to argue that his promise is not a promise at this time because the Joint Board was reorganized and reformed after a hiatus. Under accepted contract law where the duty of a party is discharged by the failure of a condition to exist he is again subject to that duty if he permits continued performance of the contract without notice to the other party that he desires modification of the contract.

194 N.L.R.B. at 654.

28. 549 F.2d at 640-41.

29. *Id.* at 641.

30. Work disputes were so prevalent immediately following World War II, that President Truman requested legislation to prevent the resultant work stoppages. *See* Annual Message On the State of the Union, PUB. PAPERS 1, 4 (1947). Section 10(k) was designed to prevent union unfair labor practices in support of demands for assignments of work to a particular union. For a comprehensive review of the subject, see Atleson, *The NLRB and Jurisdictional Disputes: The Aftermath of CBS*, 53 Geo. L.J. 93 (1964). *See also* Memorandum of Senator Morse, 93 Cong. Rec. 1890 (1947).

that the employer must be a party to the private dispute settlement even where the unions have arbitrated an agreement does not appear to implement these purposes. Although the NLRB has interpreted section 10(k) in this manner,[31] others have argued that these purposes would be better served by encouraging voluntary adjustment by the disputing unions, even without the employer.[32] Moreover, the court sanctions the employer's "cooperation" with the union of its choice without judicially mandating the point at which cooperation becomes collusion. Where the employer, such as Plaza Glass, is not bound by the arbitration board, it can aid the union to which it wants the work awarded and still not be present or represented in the proceeding. Thus, having preserved the NLRB's jurisdiction to hear the dispute, the employer has one more opportunity to prevail should the favored union lose at the arbitration stage.

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III. INJUNCTIONS AND THE PROMISE TO SUBMIT TO BINDING ARBITRATION

A. INTRODUCTION

Section four of the Norris-LaGuardia Act[1] prohibits federal

31. In *Bricklayers, Masons and Plasterers' Int'l Union, Local No. 1 (Lembke Construction Co.)*, 194 N.L.R.B. 649, the court stated:

> The Board has consistently interpreted Section 10(k) to mean that the employer making the work assignment, as well as the rival unions claiming the work, comprise the "parties to such dispute," and that all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that section.

32. *Id.* at 650-51. An alternative theory to that of the NLRB is that voluntary adjustment by the disputant unions is not the "dispute" referred to in § 10(k). Under this theory, the employer is not a party to the arbitration; voluntary agreement by the rival unions alone invokes the abstention clause. It is argued that this interpretation of § 10(k) will minimize jurisdictional (work dispute) strikes and finalize settlements at the earliest possible stage.

1. 29 U.S.C. § 104 (1970). This section provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> "(a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * *
>
> "(e) Giving publicity to the existence of, or the facts

courts from enjoining strikes over labor disputes. However, section 301 of the Labor-Management Relations Act[2] authorizes federal lawsuits for breaches of collective bargaining agreements. Thus, under limited circumstances, federal courts are empowered to issue injunctions when a union violates an express or implied promise to refrain from striking (no-strike clause) during the term of the collective bargaining agreement. This exception to the injunction ban applies only if the strike is precipitated by a union-management dispute which is subject to binding arbitration under the provisions of an employer-union contract.[3] Such an injunction is commonly referred to as a *Boys Markets* injunction.[4]

During the past term, the Ninth Circuit decided two cases dealing with the propriety of issuing an injunction where an arbitrator had jurisdiction over some aspect of the dispute. *Alyeska Pipeline Service Co. v. International Brotherhood of Teamsters*[5] involved a strike over a dispute not covered by the contractual arbitration procedure. The separate issue of whether the picketing itself breached the contract's no-strike clause was submitted

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involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence:

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

* * *

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

2. 29 U.S.C. § 185(a) (1970). Section 301 of the Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

3. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970). In *Boys Markets* the Supreme Court overruled its fairly recent decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), where the Court read the Norris-LaGuardia Act as prohibiting all injunctions, despite the strong federal policy favoring arbitration.

For more information on this subject, *see Federal Labor Policy and the Scope of the Prerequisites for a Boys Market Injunction*, 19 ST. LOUIS L.J. 328 (1975); *Boys Market Injunctions: Strict Scrutiny of the Presumption of Arbitrability*, 1977 LAB. L.J. 30; Note, *Labor Injunctions, Boys Markets, and The Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972).

4. *Id.*

5. 557 F.2d 1263 (9th Cir. Apr., 1977) (per Burns, J.; the other panel members were Hufstedler and Trask, JJ.).

to arbitration. While noting that federal courts are powerless to enjoin a strike over a nonarbitrable dispute pending arbitration of the no-strike clause question,[6] the *Alyeska* court affirmed an injunction enforcing the arbitrator's determination that the strike did violate this clause.[7] In *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*,[8] the union sought an injunction to prevent the employer from altering employee work schedules pending the arbitrator's decision as to whether such unilateral action violated the collective bargaining agreement. The *Greyhound* court held that an employer's alteration of the status quo lacked the tendency, inherent in strikes, to "frustrate and interfere with the arbitral process. . . ."[9] In the absence of any express promise by the employer to refrain from such action, the court refused to issue an injunction.[10]

B. Supréme Court Background

In both cases, the Ninth Circuit applied the recent Supreme Court decision of *Buffalo Forge Co. v. United Steelworkers.*[11] In *Buffalo Forge,* members of the Steelworkers employed by Buffalo Forge refused to cross picket lines established by another group of Buffalo Forge's employees.[12] The Steelworkers were bound by a collective bargaining agreement which contained a no-strike clause. Buffalo Forge sought an injunction under section 301, asserting that the work stoppage by the Steelworkers violated the no-strike clause. The federal district court concluded that the Steelworkers' actions constituted a sympathy strike which was not forbidden by the no-strike clause and therefore denied injunctive relief, reasoning that since the Steelworkers' strike was not over an arbitrable grievance, it did not qualify for a *Boys Markets* injunction.[13] The court of appeals agreed.[14]

6. *Id.* at 1266, *citing* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

7. *Id.* at 1268.

8. 550 F.2d 1237 (9th Cir. Apr., 1977) (per Sneed, J.; the other panel members were Hufstedler and Kilkenny, JJ.).

9. *Id.* at 1238.

10. *Id.* at 1239.

11. 428 U.S. 397 (1976).

12. For more detailed analysis of the sympathy strike issue, *see* Abrams, *The Labor Injunction and the Refusal to Cross Another Union's Picket Line,* 26 Case W. Res. L. Rev. 178 (1975); *The Applicability of Boys Markets Injunctions to Refusals to Cross a Picket Line,* 76 Colum. L. Rev. 113; *see also* Note, *Boys Markets Injunctive Relief in the Sympathy Strike Context: Buffalo Forge from a Management Perspective,* 17 Santa Clara L. Rev. 665 (1977).

13. 428 U.S. at 402-03. *See* Boys Markets v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

14. *Id.* at 403-04.

In a five-to-four decision, the Supreme Court affirmed,[15] thereby limiting the power of a federal court to issue injunctions. The Court held that, although the sympathy strike may have presented an arbitrable issue under the no-strike provision of the contract, the strike was not enjoinable pending arbitration since the underlying dispute was not subject to binding arbitration.[16] The Court reasoned that the *Boys Markets* exception was designed "to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties."[17] That policy does not apply where the dispute giving rise to a strike is not subject to a labor contract's settlement procedures.[18] In such a situation, a federal court may not issue an injunction until an arbitrator determines that the strike itself violates a no-strike clause.[19]

C. THE *Alyeska* DECISION

In *Alyeska,* the employer and several unions, including the defendant, Teamsters' Local 959, entered into a comprehensive collective bargaining agreement, the Trans-Alaska Pipeline System Project Agreement (TAPS Agreement).[20] This contract included a broad no-strike clause[21] and covered all "new construc-

15. *Id.* at 413.

16. *Id.* at 407-11.

17. *Id.* at 407.

18. *Id.*

19. For further discussion of the *Buffalo Forge* decision, see Note, 22 VILL. L. REV. 183 (1977); *Striking a Balance Between the Norris-LaGuardia and the Labor Management Relations Acts: Is it Still Feasible after Buffalo Forge?*, 29 U. FLA. L. REV. 525 (1977); 44 U. CHI. L. REV. 321 (1977).

20. 557 F.2d at 1264.

21. *Id.* at 1265 n.1. Sections 1-3 of Article VII of the TAPS Agreement provided as follows:

> 1. During the term of this Project Agreement, there shall be no strikes, picketing, work stoppages, slowdowns or other disruptive activity for any reason by the Union or by any employee, and there shall be no lockout by the Contractor.
>
> 2. Failure of any Union or employee to cross any picket line established at the Project site is a violation of this Article.
>
> 3. The Union shall not sanction, aid or abet, encourage or continue any work stoppage, strike, picketing or other disruptive activity at the Project site and shall undertake all possible means to prevent or to terminate any such activity. No employee shall engage in activities which violate this Article. Any employee who participates in or encourages any activities which interfere with the normal operation of the Project shall be subject to disciplinary action, including discharge. The Union shall not be liable for acts of employees for which it has

tion work"[22] on the Alaskan pipeline. Later, employees of CBI, a construction subcontractor, chose Local 959 as their bargaining agent. Local 959 and CBI had a dispute over assignment of certain "backhaul" work[23] and Local 959 set up pickets on the only access road to an oil transfer point facility, thereby halting all carrier service to and from the site. The employer sought injunctive relief in a federal district court for the union's alleged breach of the no-strike clause.[24] The district court determined that the dispute underlying the strike was not arbitrable under the contract since the dispute did not specifically relate to "new construction work." Therefore, the district court, following the ruling of the Supreme Court in *Buffalo Forge,* refused to issue an injunction.[25] Alyeska then initiated arbitration proceedings which resulted in a decision that the strike did violate the contract's no-strike provisions. Subsequently, the district court issued an injunction enforcing the award of the arbitrator.[26]

On appeal, the Ninth Circuit panel first considered whether the lower court properly denied Alyeska's original complaint for a *Boys Markets* injunction. The *Alyeska* court agreed that the parties were not contractually bound to arbitrate the dispute giving rise to the strike.[27] Relying on *Buffalo Forge,* the court of appeals held that, although the propriety of the strike was an arbitrable issue, the district court lacked the power to grant a *Boys Markets* injunction pending arbitration.[28]

The *Alyeska* court then dealt with the question of whether the arbitrator had jurisdiction to decide the validity of the strike when the underlying dispute was outside the collective bargaining agreement. The court noted that "[a]uthority or jurisdiction

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no responsibility. The International Union General President or Presidents will immediately instruct, order and use the best efforts of his office to cause the Local Union or Unions to cease any violation of this Article. An International Union complying with this obligation shall not be liable for unauthorized acts of its Local Union. The failure of the Contractor to exercise its rights in any instance shall not be deemed a waiver of its rights in any other instance.

22. *Id.* at 1266 n.3.
23. *Id.* at 1264-65.
24. *Id.* at 1265.
25. *Id.*
26. *Id.* at 1265-66.
27. *Id.*
28. *Id.*

to arbitrate a grievance 'should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[29] Since the contract could be interpreted to cover any picketing which directly affects covered activities, the court upheld the arbitrator's jurisdiction.[30]

Next, the *Alyeska* court determined whether Local 959 was governed by the terms of the TAPS agreement when it represented CBI employees. Local 959 argued that the agreement should not bind it since CBI had not been represented by it when the agreement was made. Emphasizing the national energy crisis, the national importance of the project, and the difficulties of building the pipeline due to the "severe climatic conditions of Alaska,"[31] the court reasoned that the TAPS agreement should be given broad application.[32] To do otherwise, according to the court, would frustrate the "worthwhile goal of industrial peace on the Alaska pipeline project."[33] Moreover, while acknowledging parenthetically that CBI employees may have had no choice of unions,[34] the court stated that their election of Local 959 was nonetheless a voluntary acceptance of the burdens, including the contractual no-strike provisions, as well as the benefits of union affiliation.[35]

Finally, the court stressed that, in reviewing arbitral awards, the proper test is as follows: "An award is legitimate if it draws its essence from the agreement and only when the arbitrator's words manifest an infidelity to this obligation may the courts refuse enforcement of the award."[36] Finding no proof of infidelity, the court ruled that the arbitrator's decision should be upheld.[37]

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29. *Id. quoting* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960).

30. 557 F.2d at 1266.

31. *Id.* at 1267.

32. *Id.*

33. *Id.* The panel also noted that the original parties to the TAPS Agreement must have contemplated that additional employee groups would be joining Local 959. The court stated that "[t]o assure the orderly and timely completion of the pipeline, the TAPS Agreement must apply to these units of employees." *Id.*

34. *Id.*

35. *Id.*

36. *Id. quoting* San Francisco-Oakland News. Guild v. Tribune Pub. Co., 407 F.2d 1327, 1327 (9th Cir. 1969).

37. 557 F.2d at 1267. The arbitrator was not unfaithful in finding that CBI employees were bound by the TAPS Agreement. *Id.* Nor was the arbitrator unfaithful in ruling that picketing ten miles away from the facility was at the "project site". *Id.* at 1268.

The *Alyeska* decision demonstrates the anomalous results which were presaged by the Supreme Court in *Buffalo Forge.* The *Alyeska* arbitrator was not authorized by the collective bargaining agreement to resolve the backhaul work dispute. The *Alyeska* court's broad construction of arbitral jurisdiction, however, affirmed the arbitrator's right to decide whether the no-strike clause was violated. By holding the strike invalid and ordering the union to stop picketing, the arbitrator effectively removed the union's bargaining power regarding the backhaul work dispute. Thus, after *Alyeska,* it appears that an arbitrator is empowered indirectly to decide a nonarbitrable dispute under the guise of making a "no-strike clause" determination.

The results in *Alyeska* may be understandable in light of the fact that 4,000 workers were prevented from completing a project of nationwide importance. However, since the *Alyeska* holding does not appear to be limited to its unique factual setting, its endorsement of the unrestricted applicability of no-strike provisions encourages inequitable interference with a union's exercise of economic strike tactics over matters which are not contractually surrendered. By enlarging an arbitrator's jurisdiction to determine that a strike violates a no-strike clause notwithstanding the fact that the underlying dispute is not subject to binding arbitration, the Ninth Circuit has rendered the distinction made in *Buffalo Forge* a practical nullity.

D. THE *Greyhound* DECISION

In *Amalgamated Transit Union, Divison 1384 v. Greyhound Lines, Inc.,*[38] the Ninth Circuit was presented with a somewhat unusual situation in which the union sought to enjoin the employer from unilaterally implementing disputed changes in terms and conditions of employment, pending the outcome of binding arbitration.[39] The controversy originated when the employer announced its intention to alter its employees' work schedules. Pursuant to the contract, the question of whether such action violated the collective bargaining agreement was submitted to binding arbitration.[40] Before the arbitrator rendered a decision, the union was granted an injunction by the federal district court. In

38. 550 F.2d 1237 (9th Cir. Apr., 1977).
39. *Id.* at 1238.
40. *Id.*

order to prevent irreparable harm to the affected workers, the injunction compelled the employer to maintain the status quo pending the outcome of arbitration.[41] The employer appealed and the Ninth Circuit affirmed.[42] However, the United States Supreme Court, without opinion, vacated the judgment and remanded the case for further consideration in light of its decision in *Buffalo Forge*.[43] On remand, the Ninth Circuit reversed the district court's issuance of the injunction.[44] The panel stated that *Buffalo Forge* established that "[i]n the absence of a promise not to strike, a strike could not be enjoined."[45] The panel reasoned that, by analogy, in order to enjoin Greyhound, there must be a promise by Greyhound not to change work schedules pending arbitration.[46] There was no express promise to this effect and the panel determined that a promise could not be implied merely from the agreement to arbitrate.[47] Therefore the court concluded that the injunction was improper.[48]

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41. *Id.*

42. *Id.* at 1238. *See* Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc., 529 F.2d 1073 (9th Cir.), *vacated and remanded*, 429 U.S. 807 (1976). This earlier opinion is briefly discussed at 7 GOLDEN GATE U.L. REV. 342 (1976).

43. 428 U.S. 397 (1976).

44. 550 F.2d at 1239. The court noted that the arbitrator's ruling was in favor of the employer but rejected the union's claim that the case was thus moot. *Id.* at 1238 n.1.

45. *Id.* at 1238.

46. *Id.*

47. *Id.* Although an agreement to arbitrate may imply a promise not to strike, the court noted that a strike has a great impact on the arbitral process. *Id.* at 1238-39. The court stated that "a strike pending arbitration generally will frustrate and interfere with the arbitral process while the employer's altering the status quo generally will not." *Id.*

48. *Id.* at 1239. In reaching this conclusion, the panel reasoned that the arbitration would be unaffected by the employer's action and that, in any event, the situation could be restored substantially to the status quo ante if the union were to prevail in arbitration. *Id.*