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LABOR LAW

I. NLRB BARGAINING ORDERS AND MUTUAL MISCONDUCT

A. INTRODUCTION

In *NLRB v. Triumph Curing Center (Triumph),*[1] the Ninth Circuit reviewed the propriety of issuing a bargaining order[2] when both a union and an employer have engaged in misconduct.[3] Under the National Labor Relations Act[4] (NLRA or the Act) the National Labor Relations Board (NLRB or the Board) has the authority[5] to order a culpable employer to bargain with the complaining union.[6] Writing for the majority in *Triumph,* Judge Jameson held that denial of a bargaining order where both union and employer engage in misconduct requires a balancing test.[7] The unfair labor practices of the employer are to be balanced against the misconduct of the union. In addition, the court held that issuance of a bargaining order is appropriate unless (1) the employer was less guilty than the union and (2) the union's mis-

1. 571 F.2d 462 (9th Cir. Mar., 1978) (per Jameson, D.J., the other panel members were Browning and Hufstedler JJ.).

2. For general background and history of NLRB issued bargaining orders, *see* C. MORRIS, THE DEVELOPING LABOR LAW, Chapter 10 (1970 & Supp. 1971-75, Supp. 1976, Supp. 1977) [hereinafter MORRIS]; R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING, Chapter VI, §§ 2, 3 (1976) [hereinafter GORMAN]; Carson, *The Gissel Doctrine: When a Bargaining Order Will Issue,* 41 FORDHAM L. REV. 85 (1972) [hereinafter Carson].

3. 571 F.2d at 466-67.

4. 29 U.S.C. §§ 151-188 (1970).

5. 29 U.S.C. § 160(c) (1970). NLRA § 10(c) does not expressly authorize the NLRB to issue bargaining orders but states

> If upon the preponderance of the testimony taken 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 state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such *affirmative action* including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . ."

Id. (emphasis added). "Affirmative action" has been interpreted to include bargaining orders. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 744 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914 (1951).

6. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), is the landmark decision to date on remedial bargaining orders.

7. 571 F.2d at 465.

conduct created a coercive atmosphere which prevented employees from exercising their rights under Section 7[8] of the NLRA.[9]

B. THE FACTS OF TRIUMPH

Triumph Curing Center (the employer) was a general contractor[10] in the San Francisco garment industry. In 1965, without an election, Triumph recognized the International Ladies Garment Workers Union[11] (the union) as the representative of its employees.[12] Thereafter, the employer and the union were parties to several collective bargaining agreements. The last of these agreements expired in September, 1973. Four months prior to the expiration date, the union notified Triumph that it did not want to renew the existing agreement and had requested re-negotiation. Although bargaining sessions occurred over a period of five months, the parties failed to reach any agreement. The employees of Triumph then went on strike to protest employer conduct during negotiations. The beginning of the strike was characterized by mutual misconduct: the employer committed constant unfair labor practices[13] and the union allegedly threatened violence, blocked plant entrances, punctured tires, engaged in breaking and entering, and followed the cars of nonstrikers.[14] As a result of union misconduct, the employer filed charges of unfair labor practices with the NLRB which were subsequently resolved by a settlement agreement. No further union misconduct occurred. Approximately six weeks after the strike began, Triumph closed down operations and moved to the premises of its sewing subcontractor, M.R. Lee.[15] Triumph denied any ownership interest in Lee. However, Triumph had Lee "locked in,"[16] and had re-

8. 29 U.S.C. § 157 (1970). Employee's rights are enumerated in § 7: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.*

9. 571 F.2d at 475-76.

10. Triumph Curing Center was owned and operated by Floyd Andrews, a garment industry general contractor who contracted with garment manufacturers to cut, sew and press the clothing his clients designed. Triumph was Andrews' pressing subcontracting operation. *Id.* at 466.

11. Triumph Curing Center, 222 NLRB No. 103, 627 n.1 (1976) indicates that this title for the union refers to the international union, the local union and the San Francisco Joint Board, the last of which was the Charging Party.

12. 571 F.2d at 466.

13. *Id.* at 475 (quoting findings of the administrative law judge).

14. *Id.* at 476.

15. M.R. Lee was also doing business as Lee's Sewing Company.

16. Andrews testified,

> [I] made special arrangements with Lee so that I would have this company locked in. And so therefore, I pay the rent and I

equipped Lee's facility for pressing operations[17] during the contract re-negotiation period. After its move to Lee's premises, the employer denied union recognition and refused to negotiate with union representatives. The union then moved its picket line to the new location and continued to picket for over a year.[18]

C. THE LEGAL ISSUES

In *Triumph,* the Ninth Circuit was called upon to decide three legal issues. First, the court examined the finding of the NLRB[19] that Triumph and Lee were a joint employer and a single, integrated enterprise.[20] The Ninth Circuit has held[21] that separate business entities may be considered one employer for purposes of NLRB jurisdiction upon consideration of four principal characteristics: (1) interdependent business operations; (2) common management; (3) centralized labor relations; (4) common ownership or financial control.[22] Based upon this well-established test,

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> own the sewing machines at 1875 Mission Street, which is commonly done in San Francisco by many manufacturers in order to make sure they have the needles.

571 F.2d at 467. The testimony further indicated that Andrews held himself out as the owner of Lee, and they had common employees including their labor negotiator and their payroll bookkeeper. *Id.* at 467-68.

17. Andrews ordered and paid for pressing equipment and instructed the supplier to install it at Lee's premises. *Id.* at 468.

18. *Id.* at 466.

19. 222 NLRB No. 103, 627 (1976). The Board's three-member panel consisted of Fanning, Jennings and Penello. The Board considered this case after the General Counsel issued a complaint, pursuant to his authority under NLRA §§ 3(d), 10(b), 29 U.S.C. §§ 153(d), 160(b). Martin S. Bennett, Administrative Law Judge, heard the case in March and April, 1975. 222 NLRB at 628.

20. 571 F.2d at 467-68.

21. Sakrete of Northern California, Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), *cert. denied,* 379 U.S. 961 (1965).

22. *Id.* at 907.

> The principal factors which the Board weighs in deciding whether sufficient integration exists include the extent of:
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> 1. Interrelation of operations;
> 2. Centralized control of labor relations;
> 3. Common management; and
> 4. Common ownership or financial control.
>
> No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show "operational integration," particularly centralized control of labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control.

21 NLRB Ann. Rep. chapter 2, at 14-15 (1956) (footnotes omitted). This jurisdictional issue also arises with regard to unfair labor practices in the runaway shop context. *See, e.g.,* Darlington Manufacturing Co. v. NLRB, 397 F.2d 760 (4th Cir. 1968), *cert. denied,* 393 U.S. 1023 (1969).

the court found substantial evidence of integration which supported a finding that Lee was the "alter ego"[23] of Triumph.[24]

Second, the Ninth Circuit reviewed the ruling of the NLRB that Triumph had committed violations of Sections 8(a)(1)[25] and 8(a)(5)[26] of the Act. Section 8(a)(1) of the NLRA prohibits employer interference with employees in the exercise of their guaranteed rights. Section 8(a)(5) of the NLRA makes it an unfair labor practice for the employer to refuse to bargain collectively with the representative of its employees. The NLRB found that Triumph had solicited withdrawal of its employees from the union and had engaged in sham negotiations[27] while effecting a runaway[28] from its premises to those of sewing subcontractor Lee. The Board also

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23. This term of art describes the General Counsel's theory of NLRB jurisdiction over Triumph/Lee which asserted the dominance of one company over a subservient one. Triumph Curing Center, 222 NLRB No. 103, 628 (1976).

24. The court distinguished *Triumph* from Milo Express, Inc., 212 NLRB 313 (1974) (trucking company co-owned but independently operated). 571 F.2d at 467.

25. 29 U.S.C. § 158(a)(1) (1970). NLRA § 8(a) states: "It shall be an unfair labor practice for an employer," 8(a)(1), "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title." *Id.* Section 8(a)(1) provides protection for employees against employer reprisals for concerted activities protected by section 7 of the Act. *See* note 8 *supra*. Section 8(a)(1) violations are discussed at length in: GORMAN, *supra* note 2, at ch. VII; MORRIS, *supra* note 2, at ch. 5.

26. 29 U.S.C. § 158(a)(5) (1970). § 8(a) states, "It shall be an unfair labor practice for an employer" 8(a)(5) ". . . to refuse to bargain collectively with the representatives of his employees . . . ." *Id.* This section establishes the duty to bargain and protects employees from employers who breach this statutory duty. 8(a)(5) violations are discussed at length in: GORMAN, *supra* note 2 at ch. XX; MORRIS, *supra* note 2 at ch. 11; Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653 (1966).

27. 571 F.2d at 465. Negotiations are considered "sham" when a party fails to "confer in good faith," as required by NLRA § 8(d), 29 U.S.C. § 158(d) (Supp. 1978), *i.e.*, when a party simply goes "through the outward motions knowing that they [are] a sham . . . ." Cox, *supra* at 1413. Several noteworthy cases among the myriad on this issue are: NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978) (court denied enforcement to Board order distinguishing "sham" from "hard" bargaining); NLRB v. Holmes Tuttle Broadway Ford, Inc., 465 F.2d 717 (9th Cir. 1972) (after ten month negotiation, employer offered seven week contract); NLRB v. Montgomery Ward & Co., 13 F.2d 676 (9th Cir. 1943) (employer rejected every union proposal and refused to offer counterproposals).

28. 571 F.2d at 465. A runaway shop is a company which moves its location in order to avoid union recognition or collective bargaining. Several important cases in this field are: Ethyl Co., 231 NLRB No. 40 (1977) (partial relocation of production deemed a variety of runaway); Royal Norton Manufacturing Co., 189 NLRB 489 (1971) (employer purchased new facility at new location); Garwin Corp., 153 NLRB 664 (1965), denied enforcement in part, Local 57 ILGWU v. NLRB (Garwin), 374 F.2d 295 (D.C. Cir. 1967) (N.Y. garment manufacturer relocated to Florida); Bonnie Lass Knitting Mills, Inc., 126 NLRB 1396 (1960) (employer switched from manufacturing to jobbing in order to avoid bargaining); NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957) (shoe manufacturer refused to bargain over relocation to plant 12 miles away). *But see* Darlington Manufacturing Co. v. NLRB, 397 F.2d 760 (4th Cir. 1968) (complete shutdown of business is not actionable).

found that Triumph had refused to recognize the union at the Lee location and had refused to bargain collectively.[29] The Ninth Circuit panel agreed with the Board that the record documented 8(a)(1) and 8(a)(5) violations. The court therefore held that the employees had engaged in a legitimate unfair labor practice strike against the employer.

Third, the Ninth Circuit considered whether issuance of a bargaining order was improper in view of the union's misconduct during the strike. Relying on a recent decision by the Second Circuit,[30] the majority affirmed the Board's ruling that denial of a bargaining order was unwarranted.[31] The Triumph court's holding that there was a joint employer and its holding that the employer had committed unfair labor practices, were unanimously decided on principles of law well settled in the Ninth Circuit.[32] This note is addressed solely to the merits of the court's decision not to deny the bargaining order.

D. Propriety of a Bargaining Order

Impact of Mutual Misconduct

It is problematical to fashion a remedy for unfair labor practices when both union and employer engage in misconduct.[33] If there were no question of *union* misconduct, a bargaining order would be the proper remedy where employer unfair labor practices were (1) "outrageous and pervasive"; or (2) where employer violations were less extraordinary but "undermine[d] majority strength and impede[d] the election processes."[34] Where a union

29. 571 F.2d at 465-66. Refusal to negotiate by itself constitutes a violation of 8(a)(5). NLRB v. Katz, 369 U.S. 736 (1962).

30. Donovan v. NLRB, 520 F.2d 1316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

31. 571 F.2d at 478. The administrative law judge previously found that denial of the bargaining order was unwarranted. 222 NLRB at 628.

32. Joint employer issue, *see* Sakrete of Northern California, Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965). 8(a)(1) violations, *see* NLRB v. Sky Wolf Sales, 470 F.2d 827 (9th Cir. 1972) (employer made promises conditioned on signing decertification petition); NLRB v. Deutsch Co., 445 F.2d 902 (9th Cir. 1971), *cert. denied*, 405 U.S. 988 (1972) (employer sent letters to employees with revocation of card form enclosed); NLRB v. Texas Independent Oil Co., Inc., 232 F.2d 447 (9th Cir. 1956) (foreman solicited withdrawal from union). 8(a)(5) violations, *see* NLRB v. Holmes Tuttle Broadway Ford, Inc., 465 F.2d 717 (9th Cir. 1972) (playing "cat and mouse" is not good faith bargaining); NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957) (setting up new corporation to avoid bargaining violates 8(a)(5)).

33. 571 F.2d at 476, *citing* Donovan v. NLRB, 520 F.2d at 1323 (2d Cir. 1975).

34. NLRB v. Gissel Packing Co., 395 U.S. 575, 613-14 (1969).

was attempting to gain recognition,[35] and was not guilty of misconduct, and employer misconduct had a coercive effect, issuance of a bargaining order had a deterrence rationale. By requiring the guilty employer to bargain, the Board denied him the benefits of his coercive practices.[36] The Board did not require a union to show majority support after the employer had made a "free" choice impossible.[37] However, when both union and employer have engaged in misconduct, both may have exerted some coercive influence on the employees.

When a union and an employer have been guilty of misconduct, both the Board and the courts have applied a balancing test. The balancing test requires ascertaining whether union misconduct was so serious as to mandate denial of an otherwise appropriate bargaining order.[38] The test also gives the Board and the courts the flexibility needed to support their holdings with respect to the policies underlying the Act. It is the purpose of the NLRA to reduce industrial strife, by defining the legal obligations of the parties and by protecting their legal rights.[39] In promoting this purpose of the Act, the courts also try to avoid benefiting a culpable party.[40]

The Doctrines of Laura Modes and Donovan

In its analysis, the *Triumph* court reviewed two distinct lines of cases which discussed denial of a bargaining order in the con-

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35. After collecting a majority of authorization cards from bargaining unit employees, a union can gain recognition in two ways: (1) the employer voluntarily recognizes the employees' representative or (2) the union or employer files for an NLRB election pursuant to NLRA § 10(c)(1)(A)(i), 29 U.S.C. § 160(c)(1)(A)(i) (1970).

36. NLRB v. Gissel, 395 U.S. at 610, 612. *See* Carson, *supra* note 2 at 105.

37. NLRB v. Gissel, 395 U.S. at 614-15.

38. 571 F.2d at 575-76. *See generally* NLRB v. World Carpets of New York, 463 F.2d 57 (2nd Cir. 1972).

39. 29 U.S.C. § 141(b) (1970);

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Id. See also 29 U.S.C. § 151 (1970).

40. "The employer should not be permitted to profit from his wrongful refusal to bargain." 571 F.2d at 477; *see* note 36 *supra.*

text of mutual union-employer misconduct. The *Triumph* employer relied upon the doctrine enunciated by the NLRB in *Laura Modes Company.*[41] In *Laura Modes,* a bargaining order was denied on the grounds that the union showed "total disinterest" in using the peaceful processes of the Board.[42] Union misconduct which led to a finding of disinterest in peaceful resolution involved resort to, and encouragement of, violent tactics—both before and after the union filed 8(a)(1) and 8(a)(5) violations against the employer. In *Laura Modes,* the Board justified denial of a bargaining order on the additional grounds that a fair election was still possible. Thus, the right of employees to bargain through the union was protected, while the irresponsible and unprovoked violence by the union received no sanction.

The union in *Triumph* relied upon a decision representing the alternative line of cases, *Donovan v. NLRB.*[43] In *Donovan,* the Second Circuit granted enforcement of the Board's bargaining order after balancing the mutual employer and union violations, and finding the employer more culpable. The *Donovan* employer had violated 8(a)(1), 8(a)(3) and 8(a)(5) of the Act by threats, by interrogation and coercion of employees, by refusing to reinstate certain striking employees and by refusing to bargain.[44] Union misconduct, on the other hand, was much less serious and was limited to the early part of the strike. In holding that denial of the bargaining order was unwarranted, the Second Circuit rested its decision upon the grounds that (1) a fair election was "doubtful if not impossible"[45] and (2) union misconduct was outweighed by the company's frequent and recurring unfair labor practices.

The majority of the Ninth Circuit agreed with the Second Circuit in *Donovan:* denial of a bargaining order is an "extraordinary sanction"[46] appropriate only when an employer is less guilty and a union's conduct created the coercive atmosphere.[47] The *Triumph* majority declined to apply the precedent

41. 144 NLRB 1592 (1963).

42. *Id.* at 1596.

43. 520 F.2d 1316 (2d Cir. 1975); for a brief discussion of Donovan, *see* GORMAN, *supra* note 2 at 104.

44. 520 F.2d at 1319.

45. *Id.* at 1322.

46. *Id.* at 1321.

47. *Id.*; NLRB v. World Carpets of New York, 463 F.2d at 62 (2d Cir. 1972) (minimal employer misconduct); NLRB v. United Mineral & Chemical Corp., 391 F.2d 829 (2d Cir. 1972) (minor employer violations; distinguished *Laura Modes*).

of *Laura Modes,* distinguishing the cases at bar by the lack of actual union violence.[48] The court also noted which factors[49] it deemed most significant in balancing mutual violations. The primary factor was the absence of further violence after the settlement agreement. In *Triumph,* union misconduct was limited to a few people and occurred only at the outset of the strike. The court reasoned that this indicated union good faith and showed that the union did not have a "total disinterest in enforcing its legal rights through the peaceful legal process . . . ."[50] The *Triumph* majority therefore concluded that the equities balanced in favor of not applying *Laura Modes.*[51] Union misconduct was similar to that in *Donovan* in that it was short lived, not as grievous as that in cases where bargaining orders were denied, and was less serious than the constant unfair labor practices of the employer which clearly undermined union strength.

The Distinction Between Representation and Contract Disputes

The union in *Triumph* had been the established representative for some time. The court stressed the difference between denying a bargaining order in such a case and in the case where representation status has not yet been determined. The majority opinion emphasized that cases in which the Board has denied bargaining orders, were union recognition disputes. The clear distinction between these cases and *Triumph* was that denial of the bargaining order would have disrupted a long standing bargaining relationship, and allowed a runaway employer to profit from his misconduct by avoiding union recognition. Since the union was the established representative before the occurrence of violations, forcing the union to prove a majority would not restore the status quo ante.[52] Thus the majority of the court extended by analogy the reasoning of *Donovan,* where the union was still seeking recognition, to the *Triumph* case, where the union had already gained recognition. This extension was also in keeping with the suggestion in *Laura Modes* that denial is proper where such an order will not "unduly prejudice" the employees.[53] The *Triumph* employees' long standing choice of union representative

48. 571 F.2d at 476. *But see id.* at 478 (dissenting opinion).

49. Union good faith, 571 F.2d at 478; misconduct remedied, *id.* at 477-78; lack of actual violence, *id.* at 476; extent and timing of misconduct, *id.* at 476-77.

50. Laura Modes Company, 144 NLRB at 1596.

51. 571 F.2d at 475 (quoting administrative law judge).

52. *Id.* at 477.

53. 144 NLRB at 1596.

would have been prejudiced because little potential for a fair election existed after the employer's extreme conduct.

In her dissent,[54] Judge Hufstedler suggested, without explanation, that there is no distinction between cases where the union has established a bargaining relationship with the employer and cases where the union is attempting to gain recognition. Judge Hufstedler maintained that the distinction made by the majority was one without a difference.[55] Hufstedler stated that the "potential for employee intimidation" was the same whether violence occurred before or after recognition: union majority status was in question[56] because of the union's violence.

E. The Significance of Triumph

The rule in *Triumph* will apply to all situations in which both the union and the employer engage in misconduct, and employer unfair labor practices make a bargaining order an appropriate remedy. Adoption of a balancing test to be applied in the context of mutual employer and union violations of the NLRA, allows for flexibility and acknowledges the complexities of each case. Use of a balancing test also avoids a harsh per se rule[57] that union misconduct always requires denial of a bargaining order. This case by case assessment of culpability is a necessity. In *Triumph,* the Ninth Circuit panel appeared to recognize the realities of unfair labor practice strikes: they are "heated"[58] affairs. When such a strike takes place in the context of a contract dispute, traditional notions of justice could be offended by a rule that allowed the employer to commit serious and continual viola-

54. 571 F.2d at 478.

55. *Id.* at 479. Hufstedler cited NLRB v. World Carpets, 463 F.2d 57 (2d Cir. 1972). This case by itself fails to substantiate her assertion, since it took place in a representation dispute.

56. The dissent fails to note that a decertification petition, circulated by a disgruntled supervisor, failed. 571 F.2d at 469. Therefore, apparently union majority status was not in question. Additionally, the court noted that if there were a legitimate challenge to union representation, then petition by Triumph or its employees would be the proper decertification procedure. Decertification procedure is provided for in NLRA § 9(c)(1)(A)(ii), 29 U.S.C. § 159(c)(1)(A)(ii) (1970) and NLRA § 9(e), 29 U.S.C. § 159(e) (1970).

57. But Hufstedler, dissenting, argued that a balancing test was inappropriate because the sole relevant factor was coercive impact and not guilt. "But this kind of balancing is beside the point when the real issue is the impact of union violence upon the employees' continued support of the union." 571 F.2d at 480. She suggested that denial of a bargaining order is proper whenever a prima facie case of employee intimidation is made and the union cannot show that the coercive impact has been dissipated.

58. The administrative law judge said, "Needless to say, this early [mis]conduct did take place in the early days of a heated strike." 571 F.2d at 475.

tions, and then, to force the established union into proving its majority status if the union engaged in any misconduct. The danger of employer instigation of strike misconduct would be far greater if issuance of the bargaining order were denied in such a case.

The rule in *Triumph* could have been strengthened, however, by a clearer definition of its limits. The court failed to indicate when denial of a bargaining order would be proper. Thus, the question of what type of union misconduct mandates denial was left open. The Ninth Circuit panel discussed the factors it deemed important in balancing mutual misconduct: earlier resolution of unfair labor practice charges, union good faith in abiding by the resolution, lack of actual violence, and the extent and timing of the misconduct. However, the opinion did not suggest which factors were controlling. Refusal to specify controlling factors may reflect a conscious and desireable Ninth Circuit policy to avoid an explicit holding which would be vulnerable to manipulation or abuse. The court's use of the *Laura Modes* facts made it clear that more serious and prolonged union violations, together with less pervasive employer violations, would have required denial of the bargaining order.

In her dissent, Judge Hufstedler argued that the impact of enforcing the bargaining order was to ignore the coercive effect of union violence on the exercise of employee rights. This criticism is clearly applicable to representation disputes. The weakness of Hufstedler's argument, however, is that she failed to explain why there is no difference between a representation dispute and a contract dispute occurring after representation has been established. Hufstedler cited neither facts nor law to support her conclusion that there is no difference. She focused on the effect of union violations upon union majority status. Her concern was whether union violence created an atmosphere of coercion and intimidation in which employees would be afraid to seek to end a strike or change their union representation. According to Hufstedler, employees might have such fears because "even where the violence is not directed against employees it may suggest to them that the union is willing to resort to force in resolving disputes in the future."[59] Thus, Hufstedler urged denial of a bargaining order wherever a prima facie showing of union violence is

59. 571 F.2d at 479. See critique of dissenting opinion at note 56 *supra* and accompanying text.

made, regardless of how coercive the employer's violations were.[60] Her suggestion of remand for further findings as to the extent of union violence seemed justified although not entirely serious. She was both aware that additional findings were impractical at this late date and prepared to deny the bargaining order without them.[61]

The dissent in *Triumph* appeared to favor denial of a bargaining order if the union engaged in any coercive conduct. This extreme view failed to take sufficient account of possible practical results. In focusing exclusively on union majority status, Hufstedler failed to address the ultimate inequity of allowing the *Triumph* employer to prevail. Denial of the bargaining order on the rationale of vindicating employee rights where they were threatened by union coercion, would have effectively decertified the chosen representative of those employees. In addition, denial of the bargaining order in the contract dispute context, rather than solely in the representational election context, would allow the employer to profit from the gravest of unfair labor practices where the question of union majority appeared only tangential.

F. Conclusion

The Ninth Circuit adoption of a balancing test of mutual union-employer misconduct appropriately recognizes the practical realities of labor disputes. Applying the test to balance the *Triumph* employer's 8(a)(1) and 8(a)(5) violations against the union's less serious and less prolonged misconduct, the Ninth Circuit granted enforcement of the Board's order to bargain. This result is justified in view of the gravity of this runaway employer's constant violation of the NLRA, and in view of the protection afforded to employee rights. As the Board noted in *Laura Modes,* "the employees' right to choose the Union as their representative survives the Union's misconduct."[62]

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60. *See* note 57 *supra* and accompanying text.
61. 571 F.2d at 480 n.2.
62. 144 NLRB at 1596.

II. THE DUTY OF FAIR REPRESENTATION: ANOTHER LOOK AT ARBITRARY CONDUCT

A. INTRODUCTION

In *Robesky v. Qantas,*[1] the Ninth Circuit reviewed the standard of conduct required of a union in processing the grievances of bargaining unit members. Writing for the court,[2] Justice Browning held that "arbitrary"[3] union conduct in the handling of grievances may be grounds for a breach of the duty of fair representation[4] suit[5] against a union by an employee where the cause of action is based upon either intentional or unintentional union conduct.[6] Where the union acted intentionally, arbitrariness as grounds for a breach of the statutory duty of fair representation, may be found when union conduct had no rational basis.[7] Where the union acted unintentionally, arbitrariness may be found where: (1) the acts reflect reckless disregard for the rights of the individual employee, (2) the acts severely prejudice the injured employee, and (3) the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case.[8] In *Robesky,* the Ninth Circuit panel agreed with the district court that the union had probably acted intentionally. However, the Ninth Cir-

1. 573 F.2d 1082 (9th Cir. Mar., 1978) (per Browning, J.; the other panel members were Trask and Kennedy, JJ.).

2. Kennedy, J. filed a concurring opinion. 573 F.2d 1091-92.

3. "Arbitrary" union conduct was first held actionable in a duty of fair representation suit in Vaca v. Sipes, 386 U.S. 171 (1967).

4. A union's duty of fair representation is: "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 is implied from the union's statutory right to act as the exclusive representative of member-employees. 29 U.S.C. § 159(a) (1977). The duty was first recognized in Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944), a racial discrimination case which arose under the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (1972). For general background on the duty, see C. MORRIS, THE DEVELOPING LABOR LAW, Chapter 27 (1971 & Supp. 1971-75, Supp. 1976, Supp. 1977); R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING, Chapter XXX (1976) [hereinafter GORMAN]; Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119 (1973) [hereinafter Clark]; Cox, *The Duty of Fair Representation,* 2 VILL. L. REV. 151 (1957); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship,* 61 MICH. L. REV. 1435, 1469-72, 1482-1526 (1963).

5. Such lawsuits are authorized under § 301 of the Labor Management Reporting Act, 29 U.S.C. § 185 (1977), which states in part, "(b) [A]ny such labor organization may sue or be sued as an entity . . . in the courts of the United States."

6. 573 F.2d at 1088.

7. *Id.* at 1088-89.

8. *Id.* at 1090.

cuit held that a remand for further findings was required even if the union's conduct was unintentional, since such conduct may have been so "egregious" as to amount to reckless disregard for the employee's rights. Remand was also required because the trier of fact could reasonably conclude that the appellant employee suffered severe prejudice and that policy considerations were not served by shielding the union from liability.

B. THE FACTS OF *Robesky v. Qantas*

The plaintiff, Ann Robesky, was a reservation sales agent for Qantas Airways (the employer) for five years, and was represented by the International Association of Machinists and Aerospace Workers (the union). During the course of her employment, Robesky was frequently absent because of serious migraine headaches and was often heavily medicated while at work. The employer made numerous attempts to remedy the problems of excessive absenteeism and poor work performance. When plaintiff was informed of her suspension and possible termination, her union representative appeared on her behalf at the hearing and appealed the ruling of termination. Qantas denied the appeal, and the union vice president filed for arbitration. The union leadership decided not to arbitrate Robesky's grievance[9] and attempted to negotiate a compromise with Qantas. The union succeeded in negotiating the compromise which provided that Robesky be reinstated subject to a ninety-day probationary period and that Robesky be denied back pay and certain seniority rights.[10] The plaintiff rejected this compromise settlement, allegedly because the union failed to disclose to her[11] that under the settlement, it had relinquished the right to arbitrate the grievance. When Robesky was later informed that the union would not arbitrate, she sued her employer Quantas for breach of contract and her union

9. The union contended that their decision was based on a low evaluation of the merits of Robesky's grievance. *Id.* at 1086. However, the district court found that "union negligence" led to tardy filing for arbitration after the contractual deadline had passed. *Id.* at 1086, n.9.

10. *Id.* at 1086.

11. There was conflicting testimony on the issue of Robesky's knowledge. The union representative testified, somewhat equivocally, that he had informed her that the union would not arbitrate, *id.* at 1087, n.11; Robesky testified that if she had known of the union decision, she would have accepted the settlement. *Id.* at 1087. The Ninth Circuit said, "The trial court made no finding as to the state of appellant's knowledge at the time she received Qantas' offer of reinstatement. The court said, 'It is not clear just what ROBESKY understood about her situation.'" *Id.* The court, specifically requesting a finding on the issue, added, "If on remand the court finds against appellant on this crucial issue of fact, appellant will have no claim." *Id.*

for breach of its duty of fair representation under the Railway Labor Act.[12] The district court entered judgment for both the defendant employer and the defendant union and the plaintiff appealed.

C. The Issues Presented

The Ninth Circuit was faced with two issues. First, the court reviewed the propriety of the trial court's entry of judgment for the employer on the plaintiff's contract claim. Robesky alleged that the employer had violated the collective bargaining agreement first, by refusing her request for a leave of absence and second, by insisting on termination rather than adopting a less extreme course. The Ninth Circuit affirmed the lower court decision by holding that Robesky's request for a leave of absence failed to satisfy requirements under the applicable contract provision. The Ninth Circuit panel held that the employer Qantas was justified in terminating the plaintiff in that Qantas had afforded the delinquent employee reasonable opportunity to achieve acceptable performance. The court pointed out that before resorting to discharge the employer made repeated efforts to solve the problem, including conferences, oral and written warnings and admonitions, suspensions from daily work, and a two-week leave of absence.

Second, the court reviewed the entry of judgment for the union on the plaintiff's duty of fair representation claim. The Ninth Circuit reversed, based on the failure of the lower court to use the proper standard[13] as enunciated in *Vaca v. Sipes*.[14] In

12. 45 U.S.C. §§ 151 et seq. (1971). Robesky sued under 45 U.S.C. § 152 (delineating the general duties of employer and employee) and 45 U.S.C. § 182 (including air carriers within the coverage of the Act).

13. The trial court stated, "There is no evidence of ill will, prejudice or deliberate bad faith on the part of the UNION . . . ." 573 F.2d at 1086. This reflects the pre-Vaca requirement of a strict showing of union bad faith in order to prove a breach of the duty of fair representation. The bad faith standard was originally enunciated by the United States Supreme Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) and followed by the circuits, *see, e.g.*, Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir.), *cert. denied*, 371 U.S. 920 (1962). The bad faith requirement was rejected by the U.S. Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967) and by some of the circuits, *see, e.g.*, Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Retana v. Apartment Operators Local 14, 453 F.2d 1018 (9th Cir. 1972); Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972). While a later case, Amalgamated Association of Street Employees v. Lockridge, 403 U.S. 274 (1971), suggested that conduct must be deliberate or intentional to be actionable, the later case has never been applied and has questionable precedential value. *See* Clark, *supra* note 4 at 1125-26.

14. 386 U.S. 171 (1967).

Vaca, the United States Supreme Court held that the test for whether a union has breached its duty of fair representation, is whether it has acted in an "arbitrary, discriminatory or . . . bad faith"[15] manner toward a member of the collective bargaining unit. The trial court held that the union's nondisclosure of its decision not to arbitrate was neither discriminatory nor in bad faith, but never considered whether the nondisclosure was arbitrary. The Ninth Circuit held that reversal was called for because the trial court applied an improper standard in failing to consider whether union conduct was arbitrary. Unless upon the evidence a reasonable person could not have found that the union acted arbitrarily, reversal was mandated. The panel then noted that a trier of fact could conclude that the union acted arbitrarily under either of two theories and remanded for further findings, explicitly requesting a finding as to Robesky's knowledge of the union's refusal to arbitrate at the time when she rejected the compromise offer of reinstatement.[16] The ramifications of the Ninth Circuit's new ruling as to what constitutes arbitrariness as grounds for a suit based upon breach of the duty of fair representation, is the sole topic for discussion below.

D. What is Required of a Union Under the Standard Which Proscribes Arbitrary Conduct?

The Vaca Standard

The *Vaca* court held that a union breached its duty of fair representation, where its conduct was *arbitrary*, even though not in bad faith. In *Vaca*, the Supreme Court expanded the union's duty of fair representation by holding that an employee need not show a *prima facie* case of *bad faith* on the part of the union, in order to establish a breach.

The high court ruled that the sole basis of union liability is *its* own conduct: i.e., if the union had "ignored" or "perfunctorily handled" the grievance.[17] Thus, the merits of the grievance are not dispositive; rather, the union's procedures are at the heart of a breach of duty. The court expressly stated that a union has discretion to decide not to arbitrate, and a valid exercise of that discretion is not a breach of the union's statutory duty.[18] In ana-

15. *Id.* at 190.

16. *See* note 11 *supra.*

17. Vaca v. Sipes, 386 U.S. at 191.

18. "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individ-

lyzing the impact of holding that the union's decision might be deemed a breach upon appeal, the high court said that such a rule would destroy the union's incentive to settle grievances short of arbitration.[19] The union's failure to consider arbitration would have been a breach. In this case, however, since the union had diligently represented the employee, and carefully considered and investigated before making its decision not to arbitrate, no breach was established.

Ninth Circuit Expansion of Arbitrariness

The standard outlined in *Robesky* attempts to clarify the meaning of the term arbitrary as it is applied to union conduct toward bargaining unit members. The Ninth Circuit suggested that arbitrary union conduct may be found under either of two theories. First, *deliberate* or *intentional* union conduct which is the basis of a breach of fair representation suit, is arbitrary if such a course of action had no rational basis. Second, *involuntary* union conduct which is the subject of such a suit, is arbitrary if the union acted with reckless disregard, the employee was severely prejudiced, and policy[20] is not served by protecting the union from liability. The court did not *expressly* expand the Ninth Circuit test for arbitrariness. However, its analysis of the arbitrariness test under an intentional conduct theory and under an unintentional conduct theory added new components to the test and *effectively* expanded prior holdings.[21]

In analyzing what conduct will be considered arbitrary where the union has intentionally acted or failed to act, the Ninth Circuit panel defined "lacking a rational basis" as an unreasoned or irrational decision or one based on insubstantial reasons. It is well settled, (and stipulated to by the union in this case) that

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ual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement." *Id.*

19. *Id.* at 192-93. The court's rationale rested on the idea that unions, trying to ensure their freedom from liability, might refuse to settle short of arbitration since decisions to settle would leave them legally liable to the employee for damages. This would render the grievance machinery useless.

20. The policy considerations which may favor limiting union liability include: the need for union discretion to screen meritless grievances; possible dissipation of union collective strength and bargaining power; union control of allocation of resources for arbitration; possible impairment of the interests of co-workers or of the majority. 573 F.2d at 1091.

21. *See, e.g.*, Fountain v. Safeway Stores, 555 F.2d 753 (9th Cir. 1977) (refusal to process "bad case" is not arbitrary); NLRB v. General Truck Drivers, 545 F.2d 1173 (9th Cir. 1976) (requiring rational decision making); Retana v. Apartment Operators Local 14, 453 F.2d 1018 (9th Cir. 1972) (requiring rational justification).

"arbitrary" means "without a rational basis." However, appellate consideration of whether the union's reasons were "too insubstantial" will now allow the courts more leeway to examine the merits of a grievance and therefore to assess the validity of the union's decision itself, rather than the validity of the *means* used to reach the decision.[22] In *Robesky,* the trial court found that the union intentionally withheld from the plaintiff, knowledge of its decision not to arbitrate. The union's reason for this nondisclosure was its fear that if Qantas learned of the union's low opinion of Robesky's grievance, the union's bargaining position would be much weakened. The Ninth Circuit examined the union's reason and apparently concluded that it was insubstantial,[23] and that the union had acted arbitrarily. Thus, under the intentional conduct test for arbitrariness, the Ninth Circuit was able to use "substantiality" of union's reasons, to examine the validity of the actual decision.

In analyzing what unintentional conduct is arbitrary, the court approached a negligence standard more closely than in any prior Ninth Circuit decision.[24] The court reiterated that simple negligence violating the tort standard of due care, has not been held to breach the duty of fair representation.[25] However, the Ninth Circuit panel appeared to hold that whenever the union had, without policy justification, both recklessly disregarded employee rights and prejudiced the employee, this conduct was

22. "[S]ome circumstances may justify a holding that a union's reason was simply too insubstantial to support its action." 573 F.2d at 1089, quoting Clark, *supra* note 4 at 1139. The court omitted Clark's cautious and thoughtful discussion as to what limited circumstances might justify consideration of the merits. Clark warns, "If [a union] has performed its statutory function properly, it should not be subject to a duty of fair representation suit merely because a court disagrees with its decision." *Id.* at 1132. "Too much emphasis on requring an 'appropriate' decision, however, could encourage courts simply to substitute their own judgments for union decisions they dislike." *Id.* at 1140.

The Ninth Circuit has selectively applied a merits evaluation: *compare,* Robesky v. Qantas, 573 F.2d 1082 (1978) (court evaluates merits of union decision but *not* merits of grievance) *with* Fountain v. Safeway Stores, Inc., 555 F.2d 753 (1977) ("the question of arbitrariness is tied inextricably to the merits . . . ." *Id.* at 756).

23. 573 F.2d at 1089.

24. *See generally* Fountain v. Safeway Stores, 555 F.2d 753 (9th Cir. 1977) (union not liable for justifiably concluding that grievance was a "bad case"); NLRB v. General Truck Drivers, 545 F.2d 1173 (9th Cir. 1976) (court granted enforcement to NLRB order based on union's failure to consider minority interests in bumping rights); Dente v. International Organization of Masters, Mates and Pilots, Local 90, 492 F.2d 10 (9th Cir.), *cert. denied,* 417 U.S. 910 (1974); (union's negligent delay in processing arbitration was not actionable since it was not "arbitrary abuse"); Retana v. Apartment Operators Local 14, 453 F.2d 1018 (9th Cir. 1972) (court reversed dismissal based on failure to exhaust intra-union remedies, where union was totally unresponsive to plaintiffs' discharges).

25. 573 F.2d at 1088.

more than simple negligence, it was "egregious unfairness." And, egregious unfairness is arbitrary conduct. This test for arbitrariness also expands the union's duty of fair representation since addition of the three elements that make up "egregious unfairness" appears to make the union liable for conduct which has not been actionable in the past.

E. CRITIQUE

The Theoretical Basis of a Union's Duty of Fair Representation

The standard of fair representation in *Vaca v. Sipes* reflects a judicial policy to impose upon unions an affirmative duty of responsible representation. The duty itself rests upon the role of the union as exclusive representative of employees in an organized bargaining unit. In the *Vaca* opinion, the union's conduct was only actionable if it "ignored" or "perfunctorily" handled an employee's grievance.[26] The Supreme Court rejected judicial involvement in determining the merits of grievances between parties to a collective bargaining agreement.[27]

Since *Vaca,* however, some courts have tended to discuss the duty of fair representation in terms of negligence or a duty of care.[28] The major concern of the *Vaca* court was an appropriate remedy for *procedural* deficiencies in the union's handling of grievances. To measure union conduct in the handling of grievances in terms of a duty of care, on the other hand, introduces the tort concepts of fault and causation, muddles terminology[29] and opens the door to judicial evaluation of union decisions on the merits.

The controversy over an appropriate standard of fair repre-

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26. 386 U.S. at 191.

27. *Id.* at 192-93, 195.

28. *See, e.g.,* Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) (union failure to file notice was "negligent handling" and actionable). *But see,* De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970), *cert. denied,* 400 U.S. 877 (1970) ("due care has not been made part of a union's duty . . . ." *Id.* at 284).

> The standards imposed here, however, are not clear. I suggest the difficulty stems from use of the term "arbitrary" to define a standard of care, when instead it should describe the standard we apply on reviewing the adequacy of the procedures followed by the union in the processing and resolution of grievances. The court attempts to define the term "arbitrary" by using tort concepts of culpability.

573 F.2d at 1091-92 (Kennedy, J., concurring).

sentation is widespread.[30] Some commentators have suggested that negligence *is* an appropriate standard.[31] It has also been suggested that union motives be considered.[32] The concurring judge in *Robesky* argued that the proper standard would test abuse of the union's discretion, thereby stressing the procedural inadequacies.[33] The standard of fair representation to which a union should be held is worthy of deeper analysis than can be provided here; Supreme Court clarification is clearly needed. However, in the absence of such clarification, the impact of the Ninth Circuit test enunciated in *Robesky,* warrants scrutiny.

The Practical Application of the Robesky *Test for Arbitrary Union Conduct*

Unions should be responsible for communicating to members, decisions which affect them. If the Ninth Circuit intended to expand the duty of fair representation to include such communication (and it may well be justifiable to do so) then the court chose a poor fact situation upon which to base new law. *Robesky* leaves little if any room for the district court to absolve the union of a breach, absent a showing that the plaintiff actually knew of the union's decision not to arbitrate. And yet, just as in *Vaca,* the union in *Robesky* was diligent in its attempts to win the plaintiff's reinstatement. Additionally, in *Robesky,* the union went further than is legally required in defending this grievant. It therefore seems unfair to hold the union (and, ultimately, all of its dues-paying members) liable for damages for what appears to be a minor error compared to the efforts made on the plaintiff's behalf.

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30. *See* note 4 *supra.* While the commentators recognize a trend towards a less stringent standard, their individual approaches differ as much as those of the courts. *See* Clark, *supra* note 4, at 1122 (§ I, "In Search of a Standard").

31. *See* GORMAN, *supra* note 4, at 720.

> It remains to be seen whether, just as over the years there has been a gradual liberalizing from a requirement of hostility or invidious discrimination to one of arbitrary or perfunctory conduct, courts will more openly acknowledge that a union—at least in the processing of grievances as opposed to the negotiation of a new contract—owes the employees it represents a duty of due care in the protection of their interests.

Id. at 721. *But see* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (mere errors are not enough); Deute v. International Organization of Masters, 492 F.2d 10 (9th Cir.), *cert. denied,* 417 U.S. 910 (1974) (negligent delay is not actionable); Bazarte v. United Transportation Union, 429 F.2d 868 (3d Cir. 1970) (union negligence or poor judgment is not enough to support a claim of unfair representation).

32. Clark, *supra* note 4 at 1137.

33. 573 F.2d at 1092. He contradicts *Vaca* by saying the trial court should examine the merits of the grievance. *Id.*

The real difficulty in *Robesky*, is that the union's nondisclosure (either intentional or unintentional) of its decision not to arbitrate deprived *Robesky* of her only remedy. In an effort to find a remedy for this plaintiff,[34] the Ninth Circuit fails to avoid the pitfall of screening union decisions for their wisdom, rather than for adherence to procedural safeguards. It is certainly appropriate for the court to evince grave concern for the employee in a case of discharge.[35] It is also clear that the court would require unions to inform their grievants of decisions that affect the employees' interests. But, taking even these justifiable concerns into account, it is questionable whether the *Robesky* nondisclosure rises to the level of an actionable breach. The facts in this case do not approach the level of union conduct held to be arbitrary in other Ninth Circuit cases.[36] If the court wished to protect this employee who was left with no remedy, and to notify unions of an affirmative duty towards the employees they represent, it should have said so clearly, rather than attempting to redefine arbitrariness. As it stands, the Ninth Circuit's efforts to protect Robesky and other aggrieved employees, may lead to the anomolous result of less aggressive union action in support of members. For, under the aggressive *Robesky* analysis, the union would not have been liable if it had merely informed the plaintiff of the decision not to arbitrate and had gone no further in trying to negotiate a compromise. This is clearly a poor result on policy grounds.

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34. The court's confidence in this remedy for Robesky may be misplaced. Since the employer has been dismissed, the sole remedy would be monetary damages. Those attributable to the union could be very limited under *Vaca*. The Ninth Circuit stated, "The union's silence led to appellant's discharge . . . ." 573 F.2d at 1091, indicating the court's willingness to hold the union wholly liable in damages for Robesky's firing. But the *Vaca* court stated clearly that such a remedy is improper:

> A more difficult question is, what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not.
> * * * *
> The governing principle, then, is to apportion liability . . . according to the damage caused by the fault each . . . . In this case, even if the Union had breached its duty, all or almost all of [plaintiff's] damages would still be attributable to his allegedly wrongful discharge by [his employer].

386 U.S. at 196-98. Note that, unlike this case, *Vaca* involved employer misconduct also.

35. The court describes discharge cases in the oft-repeated phrase, "industrial equivalent of capital punishment." 573 F.2d at 1091. The court's special concern is echoed by other circuits. "A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge—the industrial equivalent of capital punishment." Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F.2d 181, 183 (4th Cir. 1972).

36. *See* note 24 *supra*.

F. Conclusion

The court has defined arbitrariness to include irrational and egregiously unfair union conduct in handling grievances. This appears to be an expansion of the Ninth Circuit's prior decisions regarding the scope of the duty of fair representation. The use of tort language in this analysis, while similar to that of other courts, tends to obfuscate rather than clarify the policies behind this legal duty and the test used to measure fulfillment of the duty.

As a result of *Robesky,* unions have been put on notice that they must inform their members when they decline to arbitrate a grievance. Failure to do so could lead to a union's being held liable for a member's discharge despite conscientious attempts to win reinstatement for that member.

Lynn C. Rossman

III. Forced Early Retirement and Section 4(f)(2) of the ADEA—Discretion Allowed.

A. Introduction

In *Marshall v. Hawaiian Telephone Co.,*[1] the Ninth Circuit considered the legality of retiring employees involuntarily and solely because of age pursuant to employee retirement plans.[2] Writing for the Ninth Circuit Panel Justice Wright noted that although the Age Discrimination in Employment Act of 1967[3] (ADEA) prohibits discharging employees between the ages of 40 and 65 because of age, involuntary early retirement properly falls within an exception to the ADEA[4] which was designed to prevent the disruption of existing retirement plans. The court held generally that the section 4(f)(2) exception extends to discretionary involuntary retirement because of age. The court also

1. 575 F.2d 763 (9th Cir. May. 1978) (per Wright, J.; the other panel members were Hufstedler and Ely, JJ.).

2. Many employee benefit plans specify a minimum age after which employees may retire *when they choose.* Other plans have a mandatory retirement age upon which employees *must retire.* Still other plans provide that the employer has the option to insist on retirement for the employee after the minimum age and before age 65. This last category of *involuntary early retirement* plans is the main issue in the present case.

3. 29 U.S.C. 621- (1975). This statute was enacted Dec. 15, 1967 and covers employees of ages 40-65. It prohibits, with some exceptions, discrimination in the employment, hiring and firing solely based on age.

4. 575 F.2d at 767.

held specifically that: (1) an employer observed the plan's provisions whether these provisions required or merely permitted early retirement;[5] (2) a bona fide retirement plan cannot be a subterfuge to evade the purposes of the ADEA if the plan was enacted prior to the ADEA;[6] (3) a plan is bona fide if it is genuine and actually pays substantial benefits.[7]

B. The Facts of Hawaiian Telephone Co.

Between September 1972 and June 1973, Hawaiian Telephone Company (the employer) retired eight employees who had not yet reached age 65, solely because of age.[8] The retirement plan, written in 1931, plan *permitted* but did not require the employer to retire any employees who reached age 60.[9] Under the plan, however, employees performing satisfactorily were normally permitted to work until age 65.[10]

The Secretary of Labor brought an action to require the employer to rehire the employees and to enjoin the employer from using age as the sole basis for retiring employees not yet 65.[11] The district court granted the employer's motion for summary judgment and held that the retirements did not violate the ADEA because the employer had a bona fide retirement plan and had paid sufficient retirement benefits to the employees.[12] The Secretary of Labor appealed on behalf of the eight workers.

C. The Issue Presented

Under the ADEA, forced early retirements are permitted when they come with the section 4(f)(2) exception which provides:

> It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is

5. *Id.*
6. 575 F.2d at 766.
7. *Id.*
8. 575 F.2d at 764.
9. *Id.* at 764, n.3.
10. 575 F.2d at 764.
11. *Id.*
12. Dunlop v. Hawaiian Telephone Company, 415 F. Supp. 330, 333 (D. Haw. 1976). The district court reasoned that since the chronological argument, *see* text accompanying notes 15-17 *infra*, could not prevail, the retirement plan would be used as a subterfuge only if it failed to pay substantial benefits. *Id.* at 332.

> not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual.[13]

The main issue addressed by the Ninth Circuit Panel was whether Hawaiian Telephone's action in retiring the workers fell within the section 4(f)(2) exception.[14] In resolving this issue the court considered the underlying statutory questions of whether a plan is a subterfuge, whether a plan is bona fide and, when an employer will be deemed to "observe the terms" of such a plan.

Subterfuge Was Chronologically Impossible

The plaintiff argued that the discretionary *use* of the plan was a subterfuge because the early retirement provision had no economic justification other than age discrimination. In rejecting that argument, the court held that a plan written in 1931 could not be a subterfuge to evade the 1967 ADEA. The Ninth Circuit relied upon a recent Supreme Court case, *United Airlines, Inc. v. McMann.*[15] In *McMann,* the high court reversed a decision of the Fourth Circuit, holding that a previously created pension plan could not have been intended to evade the more recent ADEA.[16] The *Marshall* court found the argument of the Supreme Court in *McMann* dispositive and agreed that subterfuge of the ADEA in any plan written before 1967 was a chronological impossibility.[17]

Bona Fide Plan Is Genuine And Pays Substantial Benefits

The plaintiff's argument that Hawaiian Telephone's retirement plan was not bona fide, was dealt with cursorily and rejected by the Ninth Circuit panel. The court dismissed on legal and factual grounds the plaintiff's argument that the retired employees did not have adequate notice of the employer's option to retire them at age 60 without regard to job performance.[18] The

13. 29 U.S.C. § 623(f)(2) (1975).

14. 575 F.2d at 765.

15. United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) [hereinafter *McMann*], (per Burger, C.J.; White, J., concurring in judgment; Marshall and Brennan, JJ., dissenting).

16. McMann, 434 U.S. at 197 *citing* Brennan v. Taft Broadcasting Co., 500 F.2d 212, 215 (5th Cir. 1974).

17. 575 F.2d at 766. The *Marshall* court waited for the Supreme court decision in *McMann.* Thereupon the plaintiff withdrew this claim.

18. *Id.* This argument on behalf of the plaintiff was discussed by Judge Tuttle, in *Brennan v. Taft.* Holding that the retirement plan in that case was not genuine "because [the plaintiff] accepted the terms of the retirement plant presented to him, upon the

court noted that the employer's plan was genuine, paid substantial benefits[19] and, in addition, that there was no evidence of employer deception in withholding information about the plan.

Discretionary Retirement Provisions Are Within The 4(f)(2) Exemption

In 1968 Congress gave the power to administer the ADEA to the Department of Labor (DOL).[20] The DOL promulgated 29 C.F.R. section 860.110(a),[21] which interpreted the 4(f)(2) exception. This regulation appears consistent with Secretary of Labor Wirtz' opinion, expressed during legislative hearings, that the ADEA would not disrupt existing retirement plans.[22] The regulation states:

> [T]he Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.[23]

However, in 1975, without modifying the Code of Federal Regulations, the DOL issued a report recommending that involuntary retirement be allowed under section 4(f)(2) only when the retirement "is required by the terms of the plan and is not optional . . ."[24]

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urging of his employers, when the one operative provision that might have been detrimental to his interest was concelaed from him." 500 F.2d at 218 (Tuttle, J., dissenting).

19. 575 F.2d at 765-66.

20. 33 Fed. Reg. 9690 (1968).

21. 33 Fed. Reg. 1227 (1968).

22. "[T]he effect of the provision in 4(f)(2) . . . is . . . to protect retirement plans" Zinger v. Blanchette, 549 F.2d at 906, *quoting* Hearings on S.B. 830 in the Subcommittee on Labor of the Senate Committee of Labor and Public Welfare, 90th Cong., 1st Sess., at 53 (1967). It appears that where the original bill was modified in committee, an explicit provision allowing involuntary separation in 4(f)(2) was deleted. The Department of Labor simply put this feature back in as an administrative regulation, without following the normal procedure of holding hearings.

23. 29 C.F.R. § 860.110(a). The ADEA authorized the Secretary of Labor to issue rules and regulations for the administration of the act and to establish "reasonable exemptions in the public interest." 29 U.S.C. § 628 (1975).

24. 575 F.2d at 767 n.8, *quoting* U.S. Dep't of Labor, Annual Report on Age Discrimination in Employment Act of 1967, at 17 (1975).

The plaintiff's position in *Marshall* was that the DOL interpretation of section 860.110(a) had changed and that only a *mandatory* provision for retirement at a specified age would exempt involuntary separation from the prohibitions of the ADEA. Thus, exercising the discretion to force retirement on certain employees was not passively "observing the terms" of a retirement plan. In rejecting the plaintiff's argument and holding that discretionary as well as mandatory provisions allowed an employer to force retirement pursuant to a bona fide plan, the Ninth Circuit agreed with the Third Circuit in *Zinger v. Blanchette*.[25] In *Zinger*, the Third Circuit held that (1) modifications in DOL viewpoints should not be controlling and (2) 29 C.F.R. Section 860.110(a) should be read so as to broaden the 4(f)(2) exception to include retirement provisions that *permit* involuntary retirement at the option of the employer.[26] The Ninth Circuit acknowledged the change in DOL's interpretation of section 860.110(a) but rejected the plaintiff's claim, joining *Zinger* in a strict adherence to the original interpretive regulation. The court also noted that section 860.110(a) has not been eliminated from the Code of Federal Regulations and that the employer relied upon DOL's interpretation of the 4(f)(2) exception to the ADEA in 1972. The court therefore concluded in the footnote that if in fact the employer relied in good faith, there might be no liability under the ADEA for the forced retirements in any event.[27]

D. CRITIQUE

In a concluding footnote[28] the *Marshall* court pointed out that the decision to broaden the scope of 4(f)(2) will have "limited prospective impact" because of the 1978 Amendment to the ADEA. This amendment adds the following language to 4(f)(2): "[A]nd no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual."[29] Since the new language does not go

25. Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977). [hereinafter *Zinger*]. *Zinger* was decided after the Fourth Circuit decision in *McMann*.

26. 549 F.2d at 909.

27. 575 F.2d at 767 n.8. "Section 7(e) of the ADEA, 29 U.S.C. § 626 (e) (1970), incorporates by reference section 10 of the Portal-to-Portal Act of 1947, which provides in relevant part that 'no employer shall be subject to any liability . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and reliance on any administrative regulation . . . of the agency.' 29 U.S.C. § 259 (1970)." *Id.* The Fourth Circuit in *McMann* alluded to this defense without expressing an opinion as to its merits. 542 F.2d at 220 n. 4.

28. 575 F.2d at 767 n.9.

29. *See, generally*, S. REP. No. 95-493, 95th Cong., 1st Sess. 20, *reprinted in* [1978]

into effect until 1980,[30] the *Marshall* court's optimism may be overstated. In adhering to the *Zinger* rationale, as well as in ignoring the spirit of the 1978 amendment, the Ninth Circuit relinquished the opportunity to take a firm stand against age discrimination. Even the *Zinger* court explicitly recognized the shortcomings of forced early retirement.[31] The Third Circuit *Zinger* court stated that the legislature was responsible for alleviating this problem and that the Secretary of Labor wrongly attempted to modify the ADEA "by court decision or administrative fiat."[32] Congress has now spoken, answering *Zinger* in the 1978 amendment. The Ninth Circuit has apparently chosen to ignore both the Congress and the Department of Labor.

The chronological test for subterfuge which was controlling in *McMann,*[33] states that there can be no subterfuge in a pre-1967 retirement plan because there can be no *intent* to evade the purposes of the ADEA. *Zinger* rejected the chronological argument[34] and focused on whether the retirement benefits are so minimal as to constitute a subterfuge to discharge without adequate compensation.[35] Thus, *Zinger* appears to give management full discretion to make age-based retirement if benefits are not minimal. The *McMann* test opens the door to age discrimination whenever the terms of a retirement plan are subject to the discretion of the employer. Under *McMann,* and now under *Marshall,* a plan is insulated from scrutiny merely because its terms were written

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U.S. Code Cong. & Ad. News 976, 995. The express purpose of the amendment to 4(f)(2) was to repudiate the results of *Zinger* and *McMann. Id.* at 985.

30. *See id.* at 986.

31. *See* 549 F.2d at 909, n.18. The *Zinger* court admitted that "[l]ogically, allowing such a broad exemption may be inconsistent with the prohibition against discrimination in hiring and produce the anomaly that a person who has been involuntarily retired by one company before 65 may not be discriminated against in applying for employment at another company." *Id.*

32. *Id.* at 908. *Zinger* cites a 1976 report from Secretary Brennan of the DOL which stated that a retirement before age 65 is unlawful unless the mandatory retirement provision (1) is constrained in a bona fide . . . retirement plan, (2) is required by the terms of the plan and is not optional and (3) is essential to the plan's economic survival or to some other legitimate purpose (and) not for the sole purpose of moving out older workers. The Zinger court stated: "[T]he Secretary's latter day position is not only contrary to that taken by his predecessor contemporaneously with the consideration and passage of the Act, but also to the views of the Congressional committees which declined that proposal when it was forthrightly presented to them." *Id.* There is, however, considerable dispute as to the meaning of the legislative history, as can be seen in the dissent in *McMann,* 434 U.S. at 208-19.

33. 434 U.S. 192. (White, J., concurring) (disagreeing with the chronological argument, preferring the benefits test as found in *Zinger*).

34. 549 F.2d at 904.

35. *Id.* at 905-07.

before the ADEA was passed. Decisions made pursuant to conditional terms of a plan which allow for discretionary judgments after 1967 should be subject to scrutiny for intent to evade the ADEA by using the retirement plan as a subterfuge. Without such a distinction the chronological argument forecloses a meaningful inquiry as to subterfuge.[36] Employers who have complex retirement plans which were written before 1967 can proceed with impunity despite the purposes of the Act.

The *Marshall* court could have: (1) distinguished *McMann* and found that the chronological argument was not dispositive where discretionary retirements are concerned; (2) accepted the DOL re-interpretaton of its own guidelines and rejected the narrow reading of the regulation in *Zinger*; or (3) applied the 1978 Amendment retroactively to pending litigation.[38]

E. Conclusion

While the court makes a defensible decision in *Marshall,* it is not in tune with the tenor of the ADEA. After ten years of confusion, Congress has strengthened the Act by narrowing exceptions to it and by extending the Act's coverage to age 70. The amendment to section 4(f)(2) will make it difficult to forcibly retire an employee *solely for age.* However, until 1980 employers may violate the spirit of the Act by exercising their option to retire older employees pursuant to pre-1967 pension and retirement plans. The ADEA was enacted, among other reasons, to give older workers the right to dignity, productivity, and economic survival, not to maximize employers' options.

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36. *See* United Airlines, Inc. v. McMann, 434 U.S. at 204-06 (White, J., concurring).

37. As to interpreting the meaning of "observe the terms", a recent case supports the plaintiff in *Marshall.* In Hannan v. Chrysler Motors Corp., 443 F.Supp. 802 (E.D. Mich. 1978) the court accepted the theory that the defendant did not "observe the terms" of its retirement plan when it chose to retire the plaintiff at the age of 55 rather than laying her off. "Chrysler did not demonstrate that it passively observed the provision of its retirement plan at all times and applied it routinely to all employees, the circumstances presented to the Supreme Court in *McMann.* Therefore, the defendant cannot avail itself of (section 4)(f)(2)." *Id.* at 804.

38. In a case now pending before the Third Circuit, *Sikora et. al. v. American Can Co.*, the DOL has put forth the argument that the ADEA 1978 Amendments should be applied retroactively in order to prohibit the defendant from retiring the plaintiffs involuntarily. The claim rests on the DOL reading of *Bradley v. Richmond School Board,* 416 U.S. 696 (1974).