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LABOR LAW

I. APPLICATION OF THE ALL WRITS ACT TO OSHA INSPECTIONS

A. THE CASES AND CONTROVERSIES

Plum Creek Lumber Co. v. Hutton[1]

Plum Creek Lumber Co. is a Minnesota corporation with manufacturing facilities for lumber, plywood, and fiberboard in Columbia Falls, Montana. On January 17, 1978, an OSHA Compliance Officer making a routine inspection following an explosion observed conditions and practices unrelated to the explosion which appeared to violate OSHA standards.[2] The Compliance Officer also received one oral and two written complaints about working conditions by employees in the fiberboard plant.[3] Based on information in the Compliance Officer's report, a complete health and safety inspection was ordered for the Columbia Falls plant.[4]

Inspectors arrived at the plant and announced that they would be inspecting the fiberboard plant, the plywood plant, and the sawmill, and that they would be asking employees to wear dosimeters and air samplers.[5] The Inspectors were told that

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1. 608 F.2d 1283 (9th Cir. 1979) (per Kilkenny, J.; the other panel members were Hufstedler, J. and Grant, D.J., sitting by designation).

2. Brief for Appellant at 10 n.10, Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283 (8th Cir. 1979) ("I observed electrical fixtures and wiring which appeared to be either unsafe or unsuited for the conditions in which they were used; excessive concentrations of fiber dust and poor housekeeping. I detected concentrations of formaldehyde and what may be excessive noise levels.").

3. 29 U.S.C. § 657(f)(1) (1976) states that "[a]ny employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary [of Labor] or his authorized representative of such violation or danger."

4. The Secretary of Labor is required to perform an inspection if he "determines there are reasonable grounds to believe a violation of a health or safety standard exists that threatens physical harm, or that an imminent danger exists." *Id.*

5. 29 C.F.R. § 1903.7(b) (1978) states: "Compliance Safety and Health Officers shall have authority to take environmental samples . . . related to the purpose of the inspec-

their inspection would be limited to the fiberboard plant where the complaints arose, and, due to a safety policy of the company, employees would not be allowed to wear the testing devices.[6] The Inspectors terminated their inspection.

An inspection warrant was obtained which authorized inspection "including air sampling and noise level testing in a reasonable manner and to a reasonable extent, [of] the workplaces or environments where work is performed."[7] Before the warrant was executed, Plum Creek Lumber filed a complaint in the district court which alleged that the noise sampling and air testing equipment was unreliable and dangerous. The district court issued a temporary restraining order pending a hearing. At the hearing the court refused to extend the temporary restraining order, but allowed Plum Creek Lumber to continue its policy against employee participation in testing.[8]

When the OSHA Industrial Hygenists made their inspection, they asked twenty-two employees to wear the testing de-

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tion, employ other reasonable investigative techniques, question privately any employer, owner, operator, or employee of an establishment."

According to the OSHA inspection guidelines, standard procedure requires two types of measurement for assessing an employee's exposure to noise. "The audio dosimeter determines the full shift exposure and the results are the basis of citation. The sound level meter verifies the audio dosimeter's results. A minimum of ten sound level meter measurements are necessary throughout the workshift to represent each personal exposure." Reply Brief for Appellant at A-4, Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283 (9th Cir. 1979).

> A dosimeter is a device designed to measure varying sound levels over a period of time. Sounds enter a microphone, are measured and recorded on a memory cell. The device is approximately the size of a pack of cigarettes, with a wire extending from the main unit to a microphone about the size of a quarter. The main unit may be attached to the employee's belt or pocket, and the microphone to the shirt label. The connecting wire may be attached to the employee's clothing.
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> A personal air contaminant sampler is a battery operated pump, approximately the size of two packs of cigarettes. It is worn in a manner similar to a dosimeter, except that it has a flexible hose and silver dollar sized in place of a wire and microphone.

608 F.2d at 1285 n.1.

6. 29 C.F.R. § 1903.7(c) (1978) states: "Compliance Officers shall comply with all employer safety and health rules and practices at the establishment being inspected. . . ."

7. 608 F.2d at 1285.

8. *Id.*

vices. Only three employees eventually participated in the tests. Most of the employees based their refusal on the fact that company policy forbade cooperation.[9] Because of the low employee participation, the investigation of noise and air contamination problems was inconclusive.

Subsequent to the inspection, OSHA filed an answer and a counterclaim seeking to enjoin Plum Creek from interfering with the OSHA inspection through its policy proscribing employee cooperation. The district court noted that there was little chance that the testing devices posed a safety hazard.[10] However, the court also noted that there were other methods of testing, and even though the method in question was the most reasonable, the court held that in the absence of a specific law, it did not have the authority to subject Plum Creek to any possible additional safety risks.[11]

Noblecraft Industries Inc. v. Secretary of Labor[12]

Plaintiff is an employer engaged in the same types of lumber processing and manufacturing of wood products as Plum

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9. Plum Creek Lumber Co. v. Hutton, 452 F. Supp. 575, 576 (D. Mont. 1978). The notice stated:

> It is the intention of Plum Creek to cooperate with these representative personnel so long as their activities do not unreasonably jeopardize the health or safety of our employees or interfere with your work. In this regard, it is unlikely that OSHA representatives will approach selected employees and request that these employees wear noise and air contamination sampling devices upon their person while performing their normal duties. A Federal District Court Judge in Missoula, ruled on Feb. 9, 1978, that you are not required to wear these devices. In the opinion of Plum Creek management, the wearing of noise and air sampling devices will create an unreasonable and unnecessary safety hazard for employees and interfere with your work . . . The company policy is that employees will not wear these devices and the company takes full responsibility for your decision not to wear them.

Brief for Appellant at 13, Plum Creek Lumber v. Hutton, 608 F.2d 1283 (9th Cir. 1979).

10. At the hearing, the Plum Creek Safety Officer and the fiberboard division manager testified that the dosimeter and personal air sampler were dangerous methods of testing. On cross-examination both men admitted that they had never heard of anyone being injured by wearing a dosimeter, that they had never seen one before, and that they had no idea how it operated. Brief for Appellant at 14, Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283 (9th Cir. 1979).

11. Plum Creek Lumber Co. v. Hutton, 452 F. Supp. 575, 577. (D. Mont. 1978).

12. 614 F.2d 199 (9th Cir. 1980) (per Merrill, J.: the other panel members were Goodwin, J. and Schnacke, D.J., sitting by designation).

Creek. In the course of an OSHA inspection, a Compliance Officer took several very short noise level readings on a hand-held dosimeter while machinery in the plant was idling. Each reading was for thirty seconds or less. Based on these readings, the Compliance Officer computed the level of noise employees were exposed to over an eight hour shift, and cited plaintiff with violation of the OSHA "noise standard."[13]

In its appeal, plaintiff contended that the Compliance Officer's computation did not take into account the fact that some of the machinery was occasionally shut down. The court noted that the noise level often fluctuated far above idling level during the course of the work shift, and concluded that "the citation was supported by substantial evidence."[14]

The question here presented is how far the Ninth Circuit will go in aiding OSHA, an administrative agency, in the performance of its duties.[15]

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13. Occupational Noise Exposure, 29 C.F.R. § 1910.95 (1978).

> (a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response . . . .
>
> (b) (1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Table G-16 — PERMISSIBLE NOISE EXPOSURES

Duration per day, hours	Sound level dBA slow response
8	90
6	92
4	95
3	97
2	100
1½	102
1	105
½	110
¼ or less	115

14. 29 U.S.C. § 660(a) (1976) provides: "The findings of the [Occupational Safety and Health Review] Commission with respect to questions of fact, if supported by substantial evidence on the record considered as whole, shall be conclusive." *See* Todd Shipyards Corp. v. Secretary of Labor, 568 F.2d 683, 685 n.4 (9th Cir. 1978) ("Because there is no factual issue before [the court] the Commissioner's orders must be affirmed."); Brennan v. OSHRC, 511 F.2d 1139, 1141 (9th Cir. 1975).

15. It is accepted procedure for a federal court to grant relief to aid an administra-

B. BACKGROUND

The All Writs Act (The Act) is a tool which enables courts to issue any orders necessary to the preservation and protection of their jurisdiction.[16] The Act has been used to convey jurisdiction over those who, although not parties to an action, are in a position to frustrate an order of the court,[17] including those nonparties who have not taken any action to hinder justice but are in a position to do so.[18] Because the federal courts are courts of limited jurisdiction, the Act is an indispensible tool used by the courts to bring controversies to their final conclusion, an "essential step in the administration of justice."[19] However, "conduct not shown to be detrimental to the court's jurisdiction or exercise thereof, could not be enjoined under the Act."[20]

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tive agency in the performance of its investigative duties. Marshall v. Able Contractors, 573 F.2d 1055, 1057 (9th Cir. 1978); *see also* Island Airlines, Inc. v. C.A.B., 352 F.2d 735, 744 (9th Cir. 1965) (Injunctive relief will be granted to the United States "to prevent interference with the means it adopts to exercise its powers of government and carry into effect its policies.").

16. 28 U.S.C. §§ 1651-1656 (1976). *Id.* § 1651(a) states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." Section 1651 was consolidation of §§ 342, 376, and 377 of Title 28. Section 377 provided in part: "The Supreme Court, the Circuit Court of Appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions . . . ."

17. Board of Educ. v. York, 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (order issued requiring parents to send their child to a particular school in furtherance of a school desegregation plan).

18. United States v. McHie, 196 F. 586 (N.D. Ill. 1912) (a federal court has the power to impound books and papers as evidence in a trial even if the property of third parties, when they are shown to be essential to the outcome of the case in a criminal action.

19. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942) ("A federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice intrusted to it."). *See, e.g.*, Harris v. Nelson, 394 U.S. 286 (1969) where the Supreme Court overturned a Ninth Circuit ruling and held that a lower court could use the All Writs Act to compel the answering of interrogatories in a habeas corpus proceeding. The Court held that when there were no alternative methods of discovering the truth, it was "the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Id.* at 300. *See also Ex parte* Peterson, 253 U.S. 300 (1920), where the Court determined that it had the inherent authority to hire an auditor when the case could not be resolved without one.

20. ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978). The court overturned a district court order for a prejudgment writ of garnishment, where the case was not an action to recover on a debt, there was no showing of a great likelihood of recovery, and no indication that there would be a problem in enforcing any final order. The court stated, "[i]t must be shown that the writ was directed at conduct which, left

In *In re United States,*[21] the Ninth Circuit ruled that federal courts did not have the authority to issue a writ ordering the telephone company to provide technical assistance to the F.B.I. in a court authorized wiretap. The court held that the Omnibus Crime Control Act,[22] which authorized the wiretap in question and the devices being used, did not give the court the statutory authority to order the assistance over the phone company's refusal to cooperate. The court believed that it would subject the company to criminal prosecution if it issued—and the company obeyed—the writ. The court also noted that it was possible for the F.B.I. to carry out the wiretap without telephone company assistance and, therefore, the court did not have the inherent authority to issue the order.[23]

In cases involving similar factual situations in other federal districts, the courts have held that once the district court grants an order directing the telephone company to furnish facilities and technical assistance, the appeals courts would not reverse.[24] The courts in these circuits have held that once an order based on probable cause was validly issued by a district court, that court had the inherent power to order the telephone company to provide technical assistance.[25]

In *United States v. New York Telephone,* the Supreme

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unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion." *Id.* at 1359 (quoting Callaway v. Benton, 336 U.S. 132, 149-50 (1949)).

21. 427 F.2d 639 (9th Cir. 1970).

22. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970).

23. In reaction to the Ninth Circuit's decision, Congress enacted 18 U.S.C. § 2(a)(ii), which made it legal for a common carrier to assist law enforcement officials, and 18 U.S.C. § 2518, authorizing federal courts to grant writs ordering technical assistance if compensation is given.

24. Michigan Bell Tel. Co. v. United States, 565 F.2d 385 (6th Cir. 1977); United States v. Southwestern Bell Tel. Co., 546 F.2d 243 (8th Cir. 1976); United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976).

25. Michigan Bell Tel. Co. v. United States, 565 F.2d 385, 389 (6th Cir. 1977) ("Without assistance . . . an entire . . . investigation grounded on probable cause would be nullified."); United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 246 (8th Cir. 1976) ("To hold other (*sic*) otherwise would effectively allow the telephone company rather than the district court to decide when pen register surveillance should be used."); United States v. Illinois Bell Tel. Co., 531 F.2d 809, 814 (7th Cir. 1976) ("The authority to compel cooperation of the telephone company is concomitant of the power to search, because the telephone company could not frustrate the exercise of the district court's order by refusing to cooperate.").

Court then granted certiorari to a Second Circuit decision striking down a district court order directing the telephone company to furnish facilities and technical assistance to the F.B.I.[26] The Court reinstated the district court order based on the statutory authority of the district court under the All Writs Act rather than inherent authority. The Supreme Court noted the congressional reaction to the Ninth Circuit decision in *In re United States,* and interpreted that reaction to imply that Congress, in amending the Omnibus Crime Control Act, contemplated the type of order granted by the district court and, therefore, under the All Writs Act, the court had the power to issue a writ it deemed necessary to its jurisdiction.[27] The Supreme Court stated that "no distinction is to be made between orders in aid of a court's own jurisdiction, and orders designed to better enable a party to effectuate his rights and duties."[28]

Until 1978, warrants were not mandated for OSHA inspections. In *Marshall v. Barlows,*[29] the Supreme Court held that an OSHA inspection was a search, and therefore warrants were required. The Court noted that to justify an administrative search, "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' "[30] This decision has been interpreted by lower courts to imply that they had the authority to issue warrants for OSHA inspections pursuant to the Occupational Health and Safety Act of 1970,[31] and a complaint by an employee plus statements of an OSHA inspector were enough to support a warrant.[32] In addition, 29 C.F.R. 1903.4(d) authorizes the Secretary of Labor to obtain a warrant for inspection in an

26. United States v. New York Tel., 434 U.S. 159 (1977). In this case, the F.B.I. had requested that the telephone company lease the necessary lines so that wiretapping devices could be installed and used undetected. The telephone company refused and advised the F.B.I. to string a separate set of cables from the "subject apartment."

27. In *In re* United States Order Authorizing Use of Pen Register, 538 F.2d 956, 961 (2d Cir. 1976), the court noted in dictum that "the [All Writs] Act, even if found to be applicable here, is entirely permissive in nature; it in no way mandates a particular result or the entry of a particular order."

28. United States v. New York Tel., 434 U.S. at 175.

29. 436 U.S. 307 (1978).

30. *Id.* at 320 (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)).

31. Marshall v. Huffhines Steel Co., 7 OSHC 1850 (N.D. Tex. 1979).

32. Marshall v. W & W Steel Co., 604 F.2d 1322 (10th Cir. 1979).

ex parte application without notice.[33]

The courts have generally limited the scope of OSHA inspection warrants to those specific areas about which the employees complained.[34] One recent decision denied OSHA Compliance Officers the right to interview employees when interviews were not specified on the face of the warrant.[35]

C. The Reasoning of the Court

Plum Creek Lumber

In *Plum Creek Lumber,* the district court refused to grant OSHA's request for an order directing Plum Creek to rescind its policy proscribing employee cooperation with the air sampling and noise testing.[36] Plum Creek had claimed that the devices in question posed a safety hazard because their use could distract employees.[37] Plum Creek also argued that the dosimeters were not required by statute,[38] and, therefore, the court did not have the authority to order Plum Creek's cooperation.

OSHA argued that it had a statutory duty to inspect workplaces and issue citations specifically describing safety and health violations.[39] To facilitate the performance of this duty, OSHA is given the authority to "consult with employees concerning matters of occupational safety and health to the extent

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33. *Id.* at 1326; Marshall v. Trinity Indus., 7 OSHC 1851, 1854 (W.D. Okla. 1979).

34. *See In re* Central Mine Equip. Co., 7 OSHC 1185 (E.D. Mo. 1979) (warrant must set a time limit on scope of the investigation); Marshall v. Pool Offshore Co., 467 F. Supp. 978 (W.D. La. 1979) (warrant based on employee's complaint limited to that person's employer even though other employers share the same construction site); Marshall v. Trinity Indus., 7 OSHC 1851 (W.D. Okla. 1978) (warrant authorizing wall to wall search based on employee complaint concerning one area struck down as overly broad).

35. Marshall v. Wollaston Alloys Inc., [1979] 9 OSHR (BNA) 629 (D.C. Mass. 1979).

36. Plum Creek Lumber Co. v. Hutton, 452 F. Supp. 575 (D. Mont. 1978).

37. The company safety director testified at the hearing that one employee who had worn the device was distracted by the testing and hit twice by boards where he was working. On cross-examination the officer admitted that he had no first-hand knowledge of the accident, that no injury resulted, and that though he knew the employee had been distracted, it was "virtually all assumption" that the OSHA devices were responsible. Brief for Appellant at 16 n.14, Plum Creek Lumber v. Hutton, 608 F.2d 1285 (9th Cir. 1979).

38. 29 C.F.R. § 1910.95(a) (1980) requires a standard sound level meter at slow response. The OSHA Compliance Officers were attempting to use the dosimeters in conjunction with a standard sound level meter to verify the results. *See* note 5 *supra.*

39. 29 U.S.C. §§ 657(a), 658(a), 659(a) (1976).

they deem necessary,"[40] to "take environmental samples . . . related to the purpose of the inspection, [and] employ other reasonable investigative techniques."[41] OSHA argued that although having the employees wear the devices was not the only possible method of making the tests, it was the most practical and the most accurate. The Supreme Court had already stated that the All Writs Act was not limited to cases of strict necessity. Rather, it is a legislatively approved source of procedural instruments designed to achieve the rational ends of law.[42]

The court reached three factual conclusions in deciding not to issue the writ. First, the court concluded that the dosimeter and the personal air sampler were reasonable methods of testing and were allowable under the Occupational Safety and Health Act of 1970, but that those particular devices were not required by law.[43] Second, the court looked to see whether Plum Creek was taking an action which had the effect of hindering the fact finding inquiry. The court was unable to find that Plum Creek had intentionally changed conditions to impede the inspection.[44] Third, the court determined that there were other methods of taking noise level readings and air samples, and, therefore, the court was able to reach a conclusion on the facts without requiring Plum Creek to provide assistance.[45]

The court concluded that the safety factor, however slight, outweighed any argument by OSHA that this was the best method of testing.[46]

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40. 29 C.F.R. § 1903.10 (1980).

41. *Id.* § 1903.7(b) (1980).

42. Price v. Johnson, 334 U.S. 266, 282 (1948). *See, e.g.*, United States v. New York Tel. Co., 434 U.S. 159 (1977) (F.B.I. probably could have installed their equipment without the aid of the telephone company); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (affirming decision to issue writ of habeas corpus even though not strictly necessary for the exercise of its duties when its use as an aid was reasonably necessary in the interests of justice).

43. 452 F. Supp. at 577.

44. *Id.*

45. *Id.* The Court suggested two possible alternatives: in the "area method," a stationary sampler is placed in an area of high noise or fumes and measures the levels for the area; the second method is to have an OSHA Compliance Officer wear the devices and move around with the workers in the course of the workday.

46. United States v. New York Tel. Co., 434 U.S. at 189 (Stevens, J., dissenting) ("The fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the statute, cannot be, a sufficient basis for issuance of the writ."). *See, e.g.*, Sampson v. Murray, 415 U.S. 61 (1974) where a

On its appeal to the Ninth Circuit, the Secretary made two arguments: that the district court had the statutory authority under the All Writs Act to issue the requested order, and that the court also had the inherent authority to order Plum Creek to provide cooperation in the interest of bringing the case to its logical conclusion.

The statutory authority argument was based on the recent Supreme Court decision in *New York Telephone*. The court distinguished *New York Telephone* from *Plum Creek* on several grounds. *New York Telephone* involved a company that was a highly regulated monopoly, and an investigatory method specifically approved by Congress. The F.B.I. in *New York Telephone* could have made their wiretap without telephone company assistance, but their ability to do so without detection would have been severely curtailed. Safety was not as issue, and the telephone company was being paid to provide a service similar to its normal customer service. The court believed that this was different from requiring a private employer to rescind a safety ordinance in order to use a reasonable and approved method, but one not required by statute.[47]

In support of the argument that the court had the inherent authority to order Plum Creek to provide assistance, the Secretary cited *United States v. Southwestern Bell Telephone Co.*[48] and *United States v. Illinois Bell Telephone Co.*[49] The court distinguished these and similar cases because they were "concerned with enlisting the aid of telephone companies to conduct electronic surveillance of criminal activity."[50] The court then reaffirmed the decision of the district court.

Noblecraft

In *Noblecraft,* the OSHA Compliance Officer used a much

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lower court issued a temporary restraining order for a probationary government employee who had been discharged pending an appeal to the Civil Service Commission. The Supreme Court held the lower court could not rule until the administrative decision to discharge did in fact fail to conform to the regulations, and until the decision was final, no court was in a position to judge.

47. 608 F.2d at 1289.

48. 546 F.2d 243 (8th Cir. 1976).

49. 531 F.2d 809 (7th Cir. 1976).

50. 608 F.2d at 1290.

different method of testing. The Officer went into the work area and took several short meter readings on a hand-held dosimeter while all the machinery was idling. The Officer then interviewed several employees to determine how long they were in the area each day. Based on this evidence, plaintiff was cited for a violation of 29 C.F.R. § 1910.95, the noise standard. The citation was upheld by the Occupational Health and Safety Review Commission, and plaintiff appealed to the Ninth Circuit.

The court noted that the citation issued by OSHA was supported by substantial evidence, and dismissed the complaint on this ground.[51]

D. CONCLUSION

The district court's three part analysis in *Plum Creek* appears to be the correct method of analyzing whether a court should issue a writ compelling assistance to a governmental agency in fact finding inquiries. First, a court must determine whether or not a particular investigatory method or device is required by statute or regulation. If so, then the writ, if necessary, should issue under the authority of the All Writs Act when the party refuses to cooperate.

Second, if an individual is blocking the fact finding inquiry, either through action or inaction, that conduct has the practical effect of lessening the court's jurisdiction. Therefore, under the All Writs Act, the court has the power to issue a writ to stop the conduct from interfering with the court's exercise of its jurisdiction.

Third, if the court finds that an individual's actions are having the practical effect of inhibiting the court's ability to bring controversies to a conclusion, then that court has the inherent ability to issue any writs it deems necessary. If the court is able to conclude the proceedings without the use of a writ, however, then it must do so.

The district court applied all three questions to the facts in *Plum Creek* and determined that it would not issue the writ. This appears to create an additional burden for OSHA which

51. 614 F.2d at 205.

has the burden of proof when its citations are contested.[52] It is undisputed that using personal samplers attached to employees over the course of the working day is the most accurate method of testing.

The district court mentioned two possible solutions that might be acceptable to the court: the stationary area sampler, and having an OSHA Officer wear the devices and follow the employees during the course of their workday. Noblecraft offered a third method: taking a few very short samples and coupling them with proof through testimony as to exactly how long the employees are subjected to the particular noise in question. The courts, having denied OSHA the best method of inspection, appear ready to accept a lower standard of proof when the employer rejects use of the most accurate methods.

When the Ninth Circuit in *In re United States* refused to issue a writ ordering the telephone company to provide assistance, it based its decision on the fact that there was no statutory authority. Soon afterward, Congress amended the statute to include such authority.[53] In *Plum Creek,* the court came to a similar conclusion. It is unlikely that Congress will respond in the same manner. In the cases involving telephone company assistance, the courts were involved with enforcing criminal sanctions. The methods used by the F.B.I. had already been specifically approved by Congress and were not the issue. If the Supreme Court had ruled for the New York Telephone Co., it would have put an insurmountable burden on the F.B.I. in carrying out its congressional mandate. In *Plum Creek,* the method being used was the issue, and the court was not faced with a specific congressional mamdate. The burden on OSHA in enforcing its air and noise standards has not been increased. In light of *Noblecraft,* OSHA's burden has been decreased by the court's willingness to accept indirect evidence when OSHA has been precluded from gathering the direct and most accurate evidence of employer noncompliance with OSHA standards.

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52. 29 C.F.R. § 2200.73(a) (1978).
53. *Supra* note 23.
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II. OTHER DEVELOPMENTS IN LABOR LAW

In *National Steel and Shipbuilding Co. v. Occupational Safety and Health Review Commission,* 607 F.2d 311 (9th Cir. 1979), the Ninth Circuit held a showing of bad motive was not necessary to support a finding of a willful violation of a safety standard under the Occupational Safety and Health Act of 1970 (OSHA).

During a routine inspection of the company's facility in 1974, an OSHA inspector observed an employee painting inside the hold of an oil tanker. The employee was standing on planking approximately two feet wide, forty-five feet above the bottom of the tank, and touching up blemishes as the scaffolding was dismantled. There were no top or side rails and the painter was not furnished with any type of fall protection. The Secretary of Labor issued a citation for willfully violating section 5(a)(2) of OSHA in permitting the employee to paint while on the unsupported scaffold, because the employer knew this condition was extremely dangerous and violated the regulation on scaffolding.

Adopting the rule that "willfulness" means a conscious, intentional, deliberate and voluntary decision, the Ninth Circuit embraced the majority definition developed in six other circuits which do not require a venial motive.

The company argued that the fact it had never previously received a warning or citation about its scaffolding precluded a charge of willful violation. That contention was dismissed as obliterating the distinction between repeat and willful violations, but the court added that receipt of a prior warning or citation might be a factor in determining whether willfulness exists. That issue, however, was not before the court.

Still unclear is whether and to what degree a good faith belief in nonapplicability of a standard negates the knowledge element of a willful charge. The company raised that issue when it contended that the regulation did not apply to situations in which scaffolding was being taken down because the absence of top and midrails was less dangerous to the painter than the alternative of requiring quadrails would be to those workers engaged in dismantling the scaffold. That good faith defense was inapt because the painter was not engaged in any dismantling

activity and because the record supported the Commission's finding that the company allowed its painter to work from the non-complaint scaffolding due to practical considerations, rather than any good faith belief in nonapplicability of the standard.

In *Local Joint Executive Board, AFL-CIO v. Hotel Circle Inc.*, 613 F.2d 210 (9th Cir. 1980), the court held that a receiver in bankruptcy lacked authority to affirm a collective bargaining agreement by entering negotiations for its modification and extension and adopting its terms. In so holding, the court put unions on notice that court approval is necessary when a long term collective bargaining agreement would extend beyond the term of receivership and bind the estate.

The court noted that a receiver has the general duty to bargain and otherwise comply with the requirements of the National Labor Relations Act, but that limited status as an employer does not embrace adoption of executory agreements without seeking court approval.

Hotel Circle filed for bankruptcy in October 1974, and was operated by the debtor in possession until a receiver was appointed in July 1975. During that time, the hotel continued to operate under a 1973 collective bargaining agreement with the Union which was to expire in 1977. After its appointment in 1975, the receiver sent a representative to discussions between the Union and the hotel's multi-employer bargaining group. In 1975, the receiver's representative voted with other participants to accept a proposed wage increase and extend the life of the agreement. Meanwhile, the receiver negotiated a sale of the hotel, contingent on the purchaser taking clear of any collective bargaining agreements. The bankruptcy court authorized the sale and, in January 1976, issued an order rejecting the collective bargaining agreement.

The decision reflects a policy choice favoring the rights and interests of a successor employer and the flow of capital over the promotion of stability for employees. The court buttressed that argument with *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and determined that requiring the debtor-in-possession or receiver to assume an outstanding collective bargaining agreement would place it in a worse position than a successor employer, which is generally not bound. The decision emphasized the changed status of the debtor in bankruptcy and adopted the Second Circuit's reasoning that a re-

ceiver is not a party to a labor agreement for purposes of resolving conflicts between the bankruptcy and labor laws. *See Shopmen's Local 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975).

Receivers have the power to assume executory agreements. Because the power to assume executory contracts is inferred from the bankruptcy court's power to approve rejection of such agreements, rather than from the Bankruptcy Act itself, the Ninth Circuit approved a restricted interpretation of that power. Although the order of appointment authorizes the receiver to enter into any contracts incidental and usual to the operation of the business, in Ninth Circuit labor law that authority now extends only to contracts "necessary to the daily operation of the business," 613 F.2d at 218. According to the *Hotel Circle* panel, the receiver's duty as an employer under the NLRA is limited to the duty to bargain and retain grievance machinery to process employee disputes.

In *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980), the Ninth Circuit held that the NLRB can revoke the subpoena of a Federal Mediation and Conciliation Service mediator who has information crucial to the resolution of a factual dispute, solely for the purpose of preserving mediator effectiveness.

Joseph Macaluso, Inc. (Company) operated four retail stores in Tacoma and Seattle, Washington. In 1976 the Retail Store Employees Union (Union) was elected the collective bargaining representative for the employees of Company. After several months of bargaining, Union and Company were unable to reach any agreement. Both parties then agreed to enlist the services of the Federal Mediation and Conciliation Service (FMCS). Three meetings were held between Company and Union with an FMCS mediator present.

Soon after the third meeting, Union instituted a National Labor Relations Board (NLRB) proceeding charging that Company had violated section 8(a)(1) and (5) of the National Labor Relations Act (NLRA) by failing to execute the written contract setting forth the agreement reached by the parties during mediation.

At the NLRB hearing to determine whether or not an agreement had been reached, the two Union negotiators testified that all the issues were settled during the first two meetings and the

third meeting was an amicable discussion explaining the agreement to the Company's accountant. The two Company negotiators testified that no conclusions were reached in the first two meetings and at the third meeting the Union negotiators walked out in anger.

The Company subpoenaed the FMCS mediator to testify at the Board hearing. Pursuant to FMCS regulation 1402.2 (29 C.F.R. section 1401.2) the FMCS mediator could not testify without the written permission of the Director of the Service. Permission was not given. The FMCS successfully petitioned to revoke the subpoena on public policy grounds. The administrative law judge concluded that the Union witnesses were more credible and held an agreement had been reached. The judge's conclusions were upheld on review by the NLRB. While the case was before the NLRB, the Company filed a declaratory judgment action in district court to have the existence of a contract determined. The district court judge granted the Company's motion to depose the mediator; however, prior to the deposition the NLRB issued its ruling and the court granted summary judgment against the Company. *Joseph Macaluso v. Retail Store Employees Union Local 1001* (W.D. Wash., No. c77-67, Jan. 30, 1978).

The sole question on appeal was whether or not the NLRB has the power to revoke the subpoena of a mediatory for the purpose of preserving mediator effectiveness.

Pursuant to NLRA section 11(1), 29 U.S.C. section 161(1) (1970), the NLRB has the authority to revoke subpoenas when the evidence required either does not relate to the subject matter or when it is not described with sufficient particularity. In reviewing the statute in the past, the Ninth Circuit has held that it gives the NLRB the power to revoke a subpoena on any grounds "consonant with the overall powers and duties of the NLRB." 618 F.2d at 53 (quoting *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 372-73 (9th Cir. 1965)). The problem which the court faced on appeal was whether the policy of preserving mediator neutrality is outweighed by the policy that the public is entitled to every person's evidence.

The court based its ruling in favor of the FMCS position on strong congressional policy statements in favor of FMCS neutrality. 29 C.F.R. section 1402.2(a)(b) (1970) states that no mediator may testify without the written permission of the director of the service. FMCS regulations all point to the essential need

to keep an appearance of impartiality in order to maintain the integrity of the service. The court also believed a controlling factor was that both parties had voluntarily engaged the services of the mediation service with full knowledge of its rules and regulations.

In *NLRB v. Adams Delivery Service, Inc.*, 623 F.2d 96 (9th Cir. 1980), the court ruled that lack of awareness by an employee that his rights to overtime pay were guaranteed by a collective bargaining agreement did not mean the employee was not engaged in "concerted activity" within the meaning of section 7 of the NLRA.

Adams, a California trucking firm, hired Dennis Wilson in March, 1977. Under the collective bargaining agreement in force with the Teamsters Union Affiliate, Local No. 588, Adams was required to pay time and a half for all hours worked in excess of an eight hour day. Wilson's claims for overtime pay were consistently denied by the company and Wilson's immediate supervisor instructed him to cease reporting more than forty hours per week or the company would fire him. Wilson continued to press his claims and was fired. There were other controversies with the employer, but the administrative law judge found Wilson was discharged primarily because of the overtime controversy. The Board ordered reinstatement with back pay and no loss of seniority rights, and the Ninth Circuit enforced the Board's petition.

Earlier this term, in *NLRB v. Bighorn Beverage,* 614 F.2d 1238 (9th Cir. 1980), the Ninth Circuit adopted in principle the *Interboro* doctrine that the complaint of a single employee will be deemed concerted activity for purposes of a collective bargaining agreement or other mutual aid or protection under section 7 of the NLRA, if motivated by the intent to enforce a provision of an existing collective bargaining agreement. The court declined to apply the *Interboro* doctrine to these facts because the Board found that Wilson's discharge was precipitated by his appeal to the Union to look into the matter. In this circuit, consultation with the union for the purpose of resolving an employment controversy "is clearly something more than mere griping." 623 F.2d at 100. The holding that an employee need not know with certainty that a suspected grievance is covered by the collective bargaining agreement is in line with other Ninth Circuit decisions evincing a strong preference that established grievance

procedures be used to resolve employment disputes.

The limits of the *Interboro* doctrine in the Ninth Circuit are revealed in *NLRB v. Bighorn Beverage,* 614 F.2d 1238 (9th Cir. 1980). In *Bighorn,* the court of appeals enforced a bargaining order because of discriminatory discharges based on union organizing activity. In an important ancillary issue, the court found that, absent a collective bargaining agreement which could be claimed as the source of employees' claimed rights, a single employee who filed a safety complaint was not engaged in protected concerted activity for purposes of collective bargaining.

In *Bighorn,* the employer hired four drivers in November, 1977. In December, two of the men discussed the desirability of union representation, and one—Barry Mortensen—obtained union membership cards. The four new employees were temporarily assigned work on construction of a warehouse. Operation of cement trucks inside the warehouse caused an accumulation of carbon monoxide and many employees developed severe headaches. Three were sickened by fumes and left work early. That evening, Mortensen telephoned a complaint to the Montana Department of Health and Environmental Sciences. The next morning, after a safety inspector had visited the site, Mortensen was fired.

The Board found that Mortensen was fired because he (1) filed a safety complaint, and (2) had engaged in union organizing activities, and held both were protected concerted activities.

The Ninth Circuit affirmed the second ruling but disagreed that filing of the safety complaint constituted protected concerted activity. The court dismissed the Board determination in *Alleluiah Cushion Co. Inc.,* 221 NLRB 999 (1975), as legal fiction presenting an unwarranted expansion of the definition of concerted action. In *Alleluiah,* the Board faced the idential problem and concluded that safe working conditions are matters of great and continuing concern for all workers. In *Alleluiah,* an employee who was not represented by a union, was discharged the day following an OSHA inspection. The Board accurately observed that permitting the discharge would indicate to other employees the danger of seeking assistance from federal or state agencies in order to obtain their statutorily guaranteed working conditions.

In *Bighorn,* the Ninth Circuit ignored the statutory basis of state and federal employee health and safety legislation and

found that a collective bargaining agreement was essential to the *Interboro* fiction because it was the only source of the claimed section 7 rights under the NLRA.

Mortensen was ordered reinstated because of his organizing activities. The determination that health and safety activities were not concerted activities was both misguided and unnecessary to the holding. Hopefully, the Ninth Circuit in the future will reexamine the implications in *Bighorn* for the health and safety of employees and construe that language as dictum.

In *NLRB v. Hotel and Restaurant Employees and Bartenders' Union Local 531,* 623 F.2d 61 (9th Cir., 1980), a bowling alley and the lessee of its on-premises coffee shop were held to be doing business within the meaning of the NLRA section 8(b)(4) ban on secondary pressures.

Verdigo Hills Bowl operates a bowling alley in Los Angeles. The Bowl belongs to a multi-employer bargaining group which entered a collective bargaining agreement with the Union. The source of the conflict was article 2B of the agreement which provided in part that:

> In the event that the Employer leases out or subcontracts out any operation or part of any operation which is covered by this Agreement and the lessee or subcontractor utilizes the services of employees performing work covered by this Agreement, then this Agreement shall be applicable to and binding upon said lessees or subcontractors; provided further, that in the event the lessee or subcontractor fails to comply with any provisions of this Agreement or fails to comply with with any provisions of this Agreement or fails to make any payment set forth herein . . . then the Employer shall remain liable for such failure and shall be obligated to make such payments.

623 F.2d at 64.

The Bowl employed 11 union members in a coffee shop it operated on its premises. In 1976, the Bowl leased the coffee shop to three successive lessees. The third lease contained a provision that the lessee agreed that all employees shall be members of the local culinary union. The lessee failed to meet this condition and also failed to remain open during certain specified hours. The Bowl served eviction notice and subsequently initi-

ated an unlawful detainer action.

The union argued unsuccessfully that section 8(e) of the NLRA was not violated because (1) the Bowl was not doing business with its lessees within the meaning of that provision and (2) Article 2B was a valid work preservation clause.

Outright sale of assets does not create a "doing business" relationship under section 8(e) and the Union contended that the lease was essentially a disposition of capital. The court relied on the Bowl's retention of an interest in the property and conditions the Bowl placed on its use to distinguish the lease from a sale. It found the "doing business" requirement in the landlord-tenant relationship, the location of both businesses on the same premises, and the catering to each other's clientele so that the success of one business impacted on the success of the other. The power of the Bowl to terminate the lease meant that the Bowl was susceptible to pressure from the Union. This in turn was used to justify invalidating Article 2B.

That provision was held not a valid work preservation clause because it went beyond setting economic standards and attempted to require specific Union affiliation.

The court never satisfactorily explained why, if the lease was not a sufficient divestment of capital to constitute a sale, and if the Bowl retained control over the hours and prices of the coffee shop, the lease should not be seen as the subcontracting out of an operation. The court was apparently convinced that the Union's objective was the unionization of the Bowl's lessees rather than influencing the labor policy of the Bowl itself. That argument overlooks the fact that, prior to the time the leases were entered into, the coffee shop was run by the Bowl and staffed with union employees. There is nothing in the record to indicate that there was any significant change in the hours, operation products or prices after the coffee shop was leased. The only discernible difference was the tendency of lessees to hire nonunion employees. In short, this decision simply encourages limited divestment of specific operations—while retaining overall control—for the purpose of undermining union majority status or circumvention of recognition of certified representatives.

In *Allied Concrete Inc. v. NLRB*, 607 F.2d 827 (9th Cir. 1979), the Ninth Circuit held that picketing a concrete subcontractor at the job site was an illegal secondary boycott under sections 8(b)(4)(i) and 8(b)(4)(ii)(B) of the NLRA because the

striking employees could have limited their picketing to the one gate at the construction project which was reserved solely for the struck employer.

Allied is an Arizona corporation engaged in the ready mix concrete business. In 1976, Allied was a subcontractor to Ashton Co., Inc., the general contractor for construction of highway overpasses on Interstate 10, outside of Phoenix. Allied's collective bargaining agreement with Teamster's Local No. 83 expired on May 31, 1976. The union struck against Allied on June 27, 1976. In July 1976, one day before Allied was scheduled to make a delivery of concrete to the Ashton job site, Allied posted signs at the three entrances to the construction site. One sign reserved one gate which was 300 yards east of, but visible from the pour site, exclusively for Allied. On two occasions, vehicles containing picketers accompanied the Allied truck and followed it through the gate. At the pour site, five striking employees got out of their vehicles and picketed the truck. On both occasions all Ashton employees walked off the job and the Allied truck left without unloading. Ashton subsequently cancelled its contract with Allied.

Picketing in the construction industry has been subject to special, restrictive rules since *Building and Construction Trades Council of New Orleans,* 155 NLRB 319 (1965), *aff'd sub nom., Markwell and Hartz v. NLRB,* 387 F.2d 79 (5th Cir. 1967), *cert. denied,* 391 U.S. 914 (1968). The picketing against Allied fell within the guidelines for common situs construction projects as set down in *Sailors Union of the Pacific (Moore Dry Dock),* 92 NLRB 547 (1950). *Moore Dry Dock* established a four-part test to judge the legality of common situs picketing. The two relevant considerations where (a) whether the picketing takes place reasonably close to the situs, and (b) whether the picketing clearly discloses that the dispute is only with the primary employer.

The Ninth Circuit acknowledged that the picketing did not exceed the *Moore Dry Dock* test. This circuit, however, views the *Moore Dry Dock* rule as only an evidentiary tool, and focuses its inquiry on the object of the picketing. Pressure directed only at the primary employer may be lawful even though neutral secondary employers are involved; conversely, where the object is to involve neutral or secondary employers to pressure the primary, that activity is unlawful.

In *Allied,* the only way for the picketers to effectively pres-

sure the primary employer was to follow his trucks and picket those trucks at the roving job site. The court was unpersuaded of the necessity for that because of the reserved gate 300 yards from the pour site. The court buttressed its position with the Fifth Circuit rule that the picketing union do everything reasonably necessary to insure that secondary employees are not misled or coerced into observing the picket line.

It is commonly understood that all picketing involves secondary employees to some extent; that does not by itself make the activity illegal. The court's reliance on the presence of the reserve gate as providing a reasonable alternative is a further restriction on the economic power of construction unions. The case has potentially greater significance. The requirement of limiting picketing to the reserve gates will probably be restricted to construction projects. The Fifth Circuit rule, apparently adopted, will place a heavy burden on picketing unions in general to convince the trier of fact that the picketing was conducted in a manner least likely to encourage secondary effects.