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## Labor Law

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# LABOR LAW

## I. CALIFORNIA STATE COUNCIL *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA: NO LABOR MARKET PER SE EXEMPTION FROM THE ANTI-TRUST LAWS FOR EMPLOYERS

### A. INTRODUCTION

In *California State Council of Carpenters v. Associated General Contractors of California*,<sup>1</sup> the Ninth Circuit held that the union's allegations of an employers' boycott of unionized firms properly stated a cause of action under the Sherman Act<sup>2</sup> and that the employers' conspiracy was not immune from anti-trust liability by virtue of labor's antitrust exemptions.<sup>3</sup>

The California State Council of Carpenters (the union) represents carpenters and affiliated local unions in negotiating master bargaining agreements with the Associated General Contractors of California (AGCC), a multi-employer bargaining group.<sup>4</sup> The union sued the AGCC alleging the employer group and its individual members had violated the Sherman Antitrust Act by conspiring among themselves and with landowners and other employers to hire only nonunionized subcontractors,<sup>5</sup> with

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1. 648 F.2d 527 (9th Cir. 1980) (per Pregerson, J.; the other panel members were Alarcon, J. and Sneed, J., dissenting) (rehearing and rehearing En Banc denied).

2. 15 U.S.C. §§ 1-7 (1976). For relevant text of § 1, see text accompanying note 14 *infra*.

3. 648 F.2d at 540.

4. *Id.* at 529.

5. *Id.* at 529-30. The complaint alleged in paragraph XXIV that, *inter alia*, the defendants had conspired to, and had:

(3) Advocated, encouraged, induced and aided non-members of defendant Associated General Contractors of California, Inc., to refuse to enter into collective bargaining relationships with plaintiffs and each of them;

(4) Advocated, encouraged, induced, coerced, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;

the ultimate purpose of weakening and destroying the union.<sup>6</sup> The union alleged actual damages of \$25 million to be trebled to \$75 million.<sup>7</sup>

The district court granted the AGCC's motion to dismiss. It determined that the union's claim essentially was that the AGCC had "violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs."<sup>8</sup> The district court held the AGCC did not violate the antitrust laws and that the type of agreement the union sought was "precisely the type of agreement which subjected the union in *Connell* to antitrust liability."<sup>9</sup> The district court further held that a union could not state a cause of action under the antitrust laws against an employer "in the normal type of labor dispute" and dismissed the complaint.<sup>10</sup>

The Ninth Circuit reversed. It found that the district court mischaracterized the union's complaint which, when properly construed, did state a cause of action under the Sherman Act.<sup>11</sup> The court also found that the employers' conduct was not exempt from antitrust liability simply because it arose in a labor-management context.<sup>12</sup> The panel held that an employers' conspiracy which is ultimately aimed at weakening the union and also restrains competition among parties outside the collective bargaining relationship is actionable by the union under the Sherman Act.<sup>13</sup>

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(5) Advocated, induced, coerced, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors, Inc., and "memorandum contractors" to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with plaintiffs and each of them.

Complaint at 7.

6. *Id.* at 8.

7. *Id.* at 9. Section 4 of the Clayton Act provides that any person has the right to sue for treble damages "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1976).

8. 404 F. Supp. 1067, 1070 (N.D. Cal. 1975).

9. *Id.* (citing *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975)).

10. 404 F. Supp. at 1070.

11. 648 F.2d at 532.

12. *Id.* at 540.

13. *Id.*

The Ninth Circuit panel faced four main questions in *California State Council*:

- (1) Did the allegations contained in the union's complaint state a violation of the Sherman Act on the part of the AGCC?
- (2) Was this conduct exempt from the antitrust laws because of labor's statutory exemption?
- (3) Was this conduct exempt from the antitrust laws because of labor's nonstatutory exemption?
- (4) Did the union have standing to bring this action?

## B. BACKGROUND

### *The Sherman Act and the Statutory Labor Exemption*

The Sherman Act, passed in 1890, provides in part that "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce . . . is . . . illegal."<sup>14</sup> While the Sherman Act has been read broadly,<sup>15</sup> it does not reach every conspiracy restraining trade but is limited to those that affect commercial competition.<sup>16</sup> To restrict the courts from using the antitrust laws as a means of controlling union conduct,<sup>17</sup> Congress enacted the Clayton Act<sup>18</sup> in 1914. Section 6<sup>19</sup> of that Act provides that

14. 15 U.S.C. § 1 (1976).

15. "The Statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . [It protects] all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms v. American Crystal Sugar*, 334 U.S. 219, 236 (1948). See also *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (conspiracy against one merchant held illegal); *Fashion Originator's Guild v. FTC*, 312 U.S. 457 (1941) (coercive group boycott restricting commercial competition held illegal regardless of its reasonableness).

16. *Apex Hosiery v. Leader*, 310 U.S. 469 (1940). See also *Neeld v. National Hockey League*, 594 F.2d 442, 452 (9th Cir. 1979).

17. *Loewe v. Lawlor (Danbury Hatters)*, 208 U.S. 274 (1908) (secondary boycott of a manufacturer found to violate the Sherman Act). See D. LESLIE, *CASES AND MATERIALS ON LABOR LAW*, 430 (1979) ("The Sherman Act was passed . . . to curtail business monopolies . . . [but it was initially] applied . . . more often to union than to employer business activity.").

18. Act of Oct. 15, 1914, Pub. L. No. 212, 38 Stat. 730 (current version at 15 U.S.C. §§ 12-27, 44 (1976); 29 U.S.C. § 52 (1976)).

19. Section 6 of the Clayton Act provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members

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human labor is not a commodity or article of commerce and that the antitrust laws are not to be used to proscribe the lawful activities of a union. Section 20<sup>20</sup> restricts the use of the injunction by federal courts in labor disputes and lists certain labor activities which are not to be held violative of any federal statute.

The courts, however, continued to use the antitrust laws to control union activity;<sup>21</sup> Congress responded with the Norris-LaGuardia Act<sup>22</sup> in 1932. Declaring a public policy in favor of employee self-organization,<sup>23</sup> Norris-LaGuardia further limits the federal judiciary's power to enjoin activities in labor disputes.<sup>24</sup> The National Labor Relations Act (NLRA),<sup>25</sup> passed in 1935, es-

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thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1976).

20. Section 20 provides:

No restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees . . . involving . . . a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right . . .

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do . . . or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do;

. . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any laws of the United States.

29 U.S.C. § 52 (1976).

21. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (no antitrust immunity for union which departed from "legitimate" objectives). See also *Coronado Coal v. United Mine Workers*, 268 U.S. 295 (1925).

22. 29 U.S.C. §§ 101-115 (1976).

23. 29 U.S.C. § 102 (1976). *Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 40 (1957) ("The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to all collective bargaining.").

24. Section 13(c) defines a labor dispute as "any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating . . . conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c) (1976).

Section 4 provides in part: "No court of the United States shall have jurisdiction to issue any . . . injunction in any case growing out of any labor dispute . . ." 29 U.S.C. § 104 (1976).

25. 29 U.S.C. §§ 151-169 (1976).

tablished the national policy in favor of collective bargaining and set forth a statutory framework regulating the collective bargaining process. Thereafter, the Supreme Court was faced with the problem of resolving the fundamental conflict between the antitrust laws—designed to promote competition—and the labor laws—intended to promote unionization and collective bargaining, and to eliminate competition over wages and working conditions.<sup>26</sup>

In *Apex Hosiery v. Leader*,<sup>27</sup> the Supreme Court held the Sherman Act inapplicable to a union's strike. Although the strike did restrain trade, it did not have as its purpose the reduction of commercial competition in the product market.<sup>28</sup> The Court found that the Sherman Act did not prohibit the elimination of competition based on differing wages and working conditions.<sup>29</sup> The Court did not reach the question of whether the Clayton or Norris-LaGuardia Acts statutorily exempted the union's conduct.<sup>30</sup>

The Court first recognized a specific statutory exemption for union activity in *United States v. Hutcheson*.<sup>31</sup> According to *Hutcheson*, the Norris-LaGuardia Act and section 20 of the Clayton Act, read together with the Sherman Act, determine what type of union conduct is exempt.<sup>32</sup> As long as "a union acts

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26. *Allen Bradley Co. v. IBEW Local 3*, 325 U.S. 797, 806 (1945). Comment, *Antitrust Law in the Labor-Management Context: The Employer as Defendant and the Union as Plaintiff*, 32 *BAYLOR L. REV.* 385 (1980).

27. 310 U.S. 469 (1940).

28. *Id.* at 500-01.

29. *Id.* at 503-04.

30. One commentator noted that:

[Justice] Stone was careful to say, however, that his test did not vary depending on the nature of the alleged wrongdoer, whether union or management. The *Apex Hosiery* approach was not a matter of a statutory union exemption; the Sherman Act as written, would simply not apply to a certain class of restraints. Employers, or employers in combination with unions, would presumably be as free as unions acting alone to halt competition grounded in wage differentials. In short, the Sherman Act would be confined to restraints on the product market, and the labor market would be beyond its ken.

St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 *VA. L. REV.* 603, 606 (1976) (footnotes omitted).

31. 312 U.S. 219 (1941).

32. *Id.* at 231.

in its self-interest and does not combine with non-labor groups" its activities are exempt from antitrust scrutiny.<sup>33</sup>

### *The Nonstatutory Exemption*

The statutory exemption is limited to unilateral union conduct.<sup>34</sup> The Court has utilized a nonstatutory balancing approach to decide if anticompetitive provisions in collective bargaining agreements should be exempted.<sup>35</sup> The Court applied this nonstatutory balancing approach in *Connell Construction Co. v. Plumbers Local 100*,<sup>36</sup> a case that figures prominently in *California State Council*. Local 100 had picketed Connell, a general contractor, to force it to agree to subcontract its plumbing work only to subcontractors whose employees were represented by Local 100.<sup>37</sup> Connell signed the agreement under protest and then sued to block its enforcement, claiming it violated the Sherman Act. The Supreme Court held that no labor exemption applied to Local 100's conduct and remanded for a determination as to whether the agreement in fact violated the Sherman Act.<sup>38</sup>

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33. *Id.* at 232. In *Allen Bradley Co. v. IBEW Local 3*, 325 U.S. 797 (1945), the Court denied the statutory exemption to a union which combined with employers in fixing markets and prices. The Court found that a union loses its statutory exemption if it combines with business in carrying out activities which, if conducted by the business alone, would violate the antitrust laws. "We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.* at 811. See generally L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 724 (1977).

34. Employer conduct may be exempted if it is specifically covered by statute. See § 4(b) of the Norris-LaGuardia Act which exempts the act of becoming a member of an employer organization. 29 U.S.C. § 104 (1976).

35. *Meat Cutters and Butchers Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The *Jewel Tea* Court found that a collective bargaining agreement is exempt if it is: (1) intimately related to wages, hours or working conditions; (2) in the union's self interest; and (3) not intended to harm employers outside the collective bargaining relationship. When these conditions are met, the Court found national labor policy outweighs the antitrust interest in promoting competition and the provision will be exempt. The Court held a provision in a collective bargaining agreement with a multi-employer group limiting marketing hours of grocery stores exempt since it fit all three criteria. In *Pennington*, the union was found to have forfeited its antitrust exemption when it "agreed with one set of employers to impose a certain wage scale on other bargaining units." 381 U.S. at 665. The provision was intended to drive marginal coal operators out of business to the benefit of both the union and large coal operators.

36. 421 U.S. 616 (1975).

37. *Id.* at 619-21.

38. *Id.* at 635, 637.

*Connell* found labor's statutory exemption limited to unilateral union action.<sup>39</sup> However, *Connell* explicitly acknowledged that a "limited nonstatutory exemption from antitrust sanctions" existed to make a "proper accommodation between the Congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition."<sup>40</sup> "The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."<sup>41</sup>

The Court held the nonstatutory exemption inapplicable to Local 100's agreement because the agreement neither resulted from collective bargaining nor limited itself to eliminating competition over wages and working conditions.<sup>42</sup> It was not a collective bargaining agreement since Local 100 did not represent *Connell's* employees.<sup>43</sup> The agreement also restricted competition more than was necessary to simply eliminate differences in labor standards. The agreement required *Connell* to subcontract only to those firms which had signed collective bargaining agreements with Local 100, rather than just to those firms which met union standards in wages and working conditions.<sup>44</sup>

The *Connell* Court also held that the NLRA does not provide the exclusive remedies for this type of conduct since "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies including the antitrust laws."<sup>45</sup>

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39. *Id.* at 622-23. A union loses the statutory exemption when it combines with a non-labor group—even in the context of collective bargaining.

40. *Id.* at 622.

41. *Id.* One commentator noted:

Curiously, Justice Powell did not cite *Apex Hosiery* where the nonstatutory exemption apparently originated and where it received its fullest explication. Perhaps Justice Powell wished to limit the nonstatutory exemption to situations involving union activity, rather than embrace Justice Stone's more expansive concept that the Sherman Act simply does not reach a certain class of labor market restraints whether imposed by labor or management.

St. Antoine, *supra* note 30, at 618 n.64.

42. 421 U.S. at 622.

43. *Id.* at 619.

44. *Id.* at 620.

45. *Id.* at 626 (footnote omitted). One commentator argued that *Connell's* holding that the remedies provided in the labor statutes were not exclusive would make it much

*Connell's* significance is twofold. First, it explicitly recognizes a non-statutory exemption from the antitrust laws for collective bargaining over wages and working conditions.<sup>46</sup> Second, it does not limit the remedies available to unions and employers to those provided in the labor statutes but instead allows suits under other appropriate statutes including the antitrust laws.<sup>47</sup>

### *The Labor Exemption Applied to Employer Conduct*

The Ninth Circuit in *California State Council* faced the issue of when employer conduct should be exempted from the antitrust laws.

The Supreme Court held, in *Anderson v. Shipowners Association*,<sup>48</sup> that an employer combination directed against employees can violate the antitrust laws. The Court found an alleged employer conspiracy to control employment practices through the use of a hiring registry potentially violated the Sherman Act because it restrained competition among employers in their employment practices.<sup>49</sup>

In *Cordova v. Bache & Co.*,<sup>50</sup> the New York district court applied the antitrust laws to an alleged employer conspiracy directed against employees although the conspiracy did not otherwise affect commercial competition.<sup>51</sup> The court found an alleged conspiracy among stock brokerage firms to reduce the commissions paid to stockbrokers violates the antitrust laws in the same manner as a price-fixing agreement.<sup>52</sup> Section 6 of the Clayton Act<sup>53</sup> did not exempt the employer conspiracy because section 6 "was aimed at preserving labor's right to organize, not

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easier for unions to sue employers for antitrust violations. Goldberg, *Antitrust: The Union as Plaintiff*, SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS, PROCEEDINGS OF THE 26TH ANNUAL INSTITUTE ON LABOR LAW, 175, 177-82 (1980).

46. This distinction between statutory and non-statutory exemptions was described as "unfortunate" by two commentators who found all labor exemptions to be derived from statutes and felt the distinction could lead to mischievous results. 1 P. AREEDA & D. TURNER, ANTITRUST LAW 191-93 (1978).

47. L. SULLIVAN, *supra* note 33, at 729-31.

48. 272 U.S. 359 (1926).

49. *Id.* at 363.

50. 321 F. Supp. 600 (S.D.N.Y. 1970).

51. *Id.* at 606.

52. *Id.*

53. Section 6 provides: "The labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17 (1976).

that of capital."<sup>54</sup> The court found that only in the context of collective bargaining, or actions reasonably related to the collective bargaining process, are multi-employer combinations properly shielded from antitrust scrutiny.<sup>55</sup>

This exemption for collective bargaining extends beyond the contract itself. In *Clune v. Publishers' Association of New York City*,<sup>56</sup> a multi-employer group's lockout in response to a whip-saw strike was seen as reasonably incident to the collective bargaining process and thus immune from the antitrust laws.<sup>57</sup> The court interpreted the LaGuardia Act and section 20 of the Clayton Act<sup>58</sup> as shielding the employer lockout from the antitrust laws.<sup>59</sup>

The *Clune* court alternatively found no Sherman Act violation because the employer agreement did not restrain commercial competition.<sup>60</sup> For the same reason, other courts have held that the use of strike insurance by an employer group<sup>61</sup> or the refusal to bargain with a union<sup>62</sup> does not violate the Sherman Act.<sup>63</sup> Rather than interpreting federal labor policy as exempting the employer conduct, these courts have followed the approach

54. 321 F. Supp. at 607. The court argued that had Congress intended to exempt employer conduct as well it could have "provided that compensation offered or paid by employers to employees is not a commodity or article of commerce. This it did not do." *Id.* at 606. The court discussed in detail the purposes and legislative history of the Clayton Act.

55. *Id.* at 607. See also *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975). The *Mackey* court found no labor exemption for employers except in the context of collective bargaining and then only if the collective bargaining agreement provision restrains competition primarily among the parties to the agreement. According to *Robertson*, the statutory labor exemption applies only to union activities and the nonstatutory labor exemption applies to employers only in connection with collective bargaining agreements. But see *Clothing and Textile Workers v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979), vacated as moot, 638 F.2d 7 (2d Cir. 1980), discussed in text accompanying notes 66 and 67 *infra*.

56. 214 F. Supp. 520 (S.D.N.Y.), *aff'd per curiam*, 314 F.2d 243 (2d Cir. 1963).

57. *Id.* at 524.

58. Section 20 of the Clayton Act proscribes injunctions against any person for "ceasing . . . to employ any party . . . to [a labor] dispute." 29 U.S.C. § 52 (1976).

59. 214 F. Supp. at 528-29.

60. *Id.* at 524-25.

61. *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 373 (2d Cir. 1973).

62. *Prepmore Apparel, Inc. v. Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970).

63. See also *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158 (9th Cir. 1950) (alleged conspiracy to force other employers to hire members of a rival union did not violate the Sherman Act).

suggested in *Apex Hosiery* that the Sherman Act simply does not reach the labor market.<sup>64</sup> This idea of a *labor market per se* immunity<sup>65</sup> can lead to erroneous results if applied to employer conduct outside the collective bargaining process.

In *Clothing and Textile Workers v. J.P. Stevens & Co.*,<sup>66</sup> the court held an alleged employer conspiracy to fix wages as part of an anti-union campaign not violative of the antitrust laws because it only restrained competition in the labor market and not in the product market.<sup>67</sup> This holding was in error. The Supreme Court made it clear in *Anderson* that the antitrust laws apply to employer conspiracies restraining competition in the labor market as well as in the product market.<sup>68</sup>

A better approach than the mechanical labor market per se test is to balance the policies involved.<sup>69</sup> To determine whether employer conduct is exempt, the degree of interference with federal labor law policy that would result if the antitrust claim were allowed is balanced against the magnitude of the restraint of trade and whether competition is interfered with directly or indirectly.<sup>70</sup> Under this approach, employer combinations are immune from antitrust scrutiny if they have no anticompetitive effect unrelated to collective bargaining.<sup>71</sup> But employers who combine to restrict competition in the labor market outside the collective bargaining process should be found liable under the antitrust laws since protecting this conduct does not further federal labor law policies and frustrates the antitrust policy of promoting competition.

64. 310 U.S. 469 (1940). *But see id.* at 487.

65. "No one seriously suggests that antitrust policy should be concerned with the labor market per se." Cox, *Labor and the Antitrust Laws-A Preliminary Analysis*, 104 U. PA. L. REV., 252, 254 (1955). *See also* Comment, *supra* note 26, suggesting that the courts have created a quasi-statutory exemption for employers.

66. 475 F. Supp. 482 (S.D.N.Y. 1979), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980).

67. *Id.* at 488-90. *See* Carroll v. Protection Maritime Ins. Co., 512 F.2d 4, 9 (1st Cir. 1975) (antitrust laws do not apply to conspiracies aimed at labor market); National Constructors Ass'n v. National Electrical Contractors, 498 F. Supp. 510, 532 (D.C. Md. 1980) (dictum) (labor market excluded from antitrust regulation altogether).

68. 272 U.S. at 363.

69. *Meat Cutters Local 1576 v. Wetterau Foods*, 597 F.2d 133 (8th Cir. 1979).

70. *Id.* at 136.

71. *Id.* The court held a retail grocery store's use of strikebreaking employees loaned by a wholesale food supplier exempt from antitrust sanctions because it had no effect on competition outside the collective bargaining negotiations.

### *Standing*

The Ninth Circuit panel also had to determine whether the union had the requisite standing to bring an antitrust action. Section 4 of the Clayton Act states that anyone who is "injured in his business or property by reason of anything forbidden in the antitrust laws" may sue for treble damages.<sup>72</sup>

The courts, fearing endless litigation and unreasonable damage awards if section 4 was read literally, have developed various standing tests to limit who can bring antitrust suits.<sup>73</sup> The Ninth Circuit uses the "target area" test to determine standing.<sup>74</sup> A plaintiff in this circuit may sue if he is within that area of the economy threatened by a "breakdown of competitive conditions" as a result of the antitrust violation.<sup>75</sup> A plaintiff has standing if his injury was foreseeable.<sup>76</sup>

Unions generally have standing if they are the intended victims of a conspiracy to restrain trade.<sup>77</sup> Unions also have a suffi-

72. 15 U.S.C. § 15 (1976).

73. Courts have followed either the "direct injury," "target area" or "zone of interests" test. The most conservative is the direct injury test which requires an immediate connection between the plaintiff and the antitrust violator. Standing is denied if an intermediate victim stands between the parties. *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967) (franchisor denied standing); *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910) (shareholder denied standing). The zone of interests test is the most liberal. Followed in the Third and Sixth Circuits, this approach requires that each case be analyzed individually. "[T]he nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff" are all considered in determining whether allowing the particular plaintiff to bring suit will effectuate "the fundamental purpose of the antitrust laws." *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 506 (3d Cir. 1967) (quoting *In re Multidistrict Air Pollution*, 481 F.2d 122, 125 (9th Cir. 1973)). *Accord*, *Bravman v. Bassett Furniture Indus., Inc.*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975). *See generally*, 2 P. AREEDA & D. TURNER, *supra* note 46, at 160-62.

74. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955).

75. *Conference of Studio Unions v. Lowe's Inc.*, 198 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). *See also* *Contreras v. Grower Shipper Vegetable Ass'n of Cent. Cal.*, 484 F.2d 1346 (9th Cir. 1973) (farmworkers denied standing to sue growers because they were only incidental victims of alleged price fixing scheme); *accord*, *Gutierrez v. E. & J. Gallo Winery Co.*, 604 F.2d 645 (9th Cir. 1979).

76. *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

77. *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976); *International Ass'n of Heat and Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384 (3d Cir. 1973).

cient business interest in organizing and representing employees to meet the Clayton Act's requirement of an injury to the private litigant's "business or property."<sup>78</sup>

### C. COURT'S ANALYSIS

#### *The Sherman Act Claim*

The panel held that the union had properly alleged a violation of the Sherman Act.<sup>79</sup> The AGCC's alleged conspiracy with landowners and others to boycott unionized subcontractors and hire only nonunionized subcontractors potentially violated the Sherman Act's prohibition against restraints on commercial competition.<sup>80</sup> The panel found the union's allegations presented "the obverse of the situation described in *Connell*."<sup>81</sup> The AGCC's alleged conduct would have the effect of restraining competition among subcontractors and excluding unionized subcontractors from receiving bids even if they were more efficient than their nonunionized counterparts. Because the Supreme Court in *Connell* had found such conduct on the part of a union could violate the Sherman Act, the Ninth Circuit panel held that the AGCC's alleged conduct could also form the basis for an antitrust claim unless otherwise exempted.<sup>82</sup> The fact that the AGCC's alleged conduct might also violate the National Labor Relations Act did not preclude an antitrust suit.<sup>83</sup>

#### *The Statutory Exemption*

The panel next examined the Clayton and Norris-LaGuardia Acts to determine if they could be construed as exempting the alleged employer conduct. Section 20 of the Clayton Act exempts from antitrust scrutiny anyone who, in the course of a dispute over conditions of employment, ceases to employ another party or recommends that others do so.<sup>84</sup> The panel stated

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78. 15 U.S.C. § 15 (1976). See *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976); *International Ass'n of Heat and Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384, 394 (3d Cir. 1973).

79. 648 F.2d at 532.

80. *Id.* at 531.

81. *Id.* at 532.

82. *Id.*

83. *Id.* n.6.

84. 29 U.S.C. § 52 (1976). Section 20 of the Clayton Act does not define the phrase "dispute concerning terms or conditions of employment." Therefore, the definition of "labor dispute" found in § 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1976),

that section 20 could conceivably be interpreted as exempting the AGCC's alleged conduct. Under this view, the AGCC could be seen as simply recommending to others in the course of a labor dispute not to hire unionized subcontractors.<sup>85</sup>

However, the panel found that to interpret section 20 of the Clayton Act as exempting antiunion conduct by employers "would be totally inconsistent with the pro-labor purpose for which section 20 was enacted."<sup>86</sup> Section 20 was enacted primarily to protect unions from antitrust scrutiny.<sup>87</sup> However, unions can lose this exemption if they combine with business in anticompetitive conduct. Therefore, the panel found that "if the statutory exemption is inapplicable to business group conspiracies involving unions, the exemption cannot be read to immunize anticompetitive conduct on the part of employers acting alone."<sup>88</sup>

According to the panel, the Clayton Act's exemptions were rendered superfluous by the broader exemptions of Norris-LaGuardia.<sup>89</sup> Since the AGCC's conduct did not fall within any of the situations listed in Norris-LaGuardia, it could not be statutorily exempted from the antitrust laws.<sup>90</sup>

The panel concluded that it would be contrary to the purposes of the Clayton and Norris-LaGuardia Acts to exempt from the antitrust laws an employer conspiracy to boycott unionized subcontractors.<sup>91</sup>

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has been incorporated into § 20. *United States v. Hutcheson*, 312 U.S. 219, 231 (1941). The panel determined that the AGCC's conspiracy could arguably be seen as arising in the course of a labor dispute since it involved "terms or conditions of employment" or "the association or representation of persons" regarding employment. 648 F.2d at 534.

85. 648 F.2d at 533-34.

86. *Id.* at 533.

87. *Id.* at 533-36.

88. *Id.* at 534.

89. *Id.* at 534-35.

90. *Id.* at 535. Section 4 of the Norris-LaGuardia Act provides that no injunction shall issue in any labor dispute to prohibit any person from (a) ceasing to work or remain in any relation of employment, (b) becoming a member of any labor or employer organization, (c) paying or ceasing to pay benefits to anyone involved in a labor dispute, (d) aiding a person involved in a labor law suit, (3) publicizing a labor dispute, (f) peaceably assembling or (g) advising or agreeing with another person to do or not do any of the acts specified above. 29 U.S.C. § 104 (1976).

91. 648 F.2d at 536.

*The Nonstatutory Exemption*

The panel explained that *Connell*<sup>92</sup> had made clear that the nonstatutory exemption could apply only to cases concerning collective bargaining agreements between unions and employers on wages and working conditions. Because the AGCC's alleged conduct neither involved a collective bargaining agreement nor confined itself to wages or working conditions, the nonstatutory exemption could not apply.<sup>93</sup>

*Standing*

The panel stated that, to have standing to sue under section 4 of the Clayton Act, a private antitrust litigant must show the injury was both factually and legally caused by the antitrust violation.<sup>94</sup> The union met the factual causation requirement by alleging that the AGCC's conspiracy caused injury to its business interests in organizing employees, negotiating collective bargaining agreements and securing jobs for its members.<sup>95</sup>

The legal causation requirement limits standing to those whose injury is "of the type that the antitrust laws [are] intended to prevent."<sup>96</sup> The panel applied the target area test for legal causation and held the union's allegations met that requirement as well.<sup>97</sup> Not only was it foreseeable to the AGCC that the union would be damaged by its boycott of unionized subcontractors, that was the intended result. Because the union was "not only hit, but was aimed at,"<sup>98</sup> the target area test was met.<sup>99</sup>

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92. 421 U.S. 616 (1975). For a discussion of *Connell*, see notes 36-47 *supra* and accompanying text.

93. 648 F.2d at 536.

94. *Id.* at 536-37.

95. *Id.* at 537.

96. *Id.*

97. *Id.* at 538.

98. *Id.* at 537 (quoting *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955)).

99. The court stated in dictum that it might in the future use the more liberal zone of interests test for standing to better effectuate the policies of allowing a compensatory remedy to those harmed by antitrust violators and providing better enforcement of the antitrust laws by private parties. 648 F.2d at 538 n.18.

*The Dissent*

The dissent agreed with the district court's characterization of the complaint and insisted that this was properly a labor, not an antitrust case.<sup>100</sup> The district court had found that the plaintiffs actually alleged defendants violated the antitrust laws by refusing to deal only with unionized subcontractors.<sup>101</sup> The dissent stated that to allow this lawsuit would permit the union to achieve exactly what *Connell* sought to prohibit. Nonunionized subcontractors would be excluded from the market because general contractors would fear antitrust litigation if they dealt with anyone other than subcontractors who had signed collective bargaining agreements with the plaintiffs.<sup>102</sup>

The dissent argued that even if the district court's characterization of the complaint was too narrow, the union still had no antitrust claim because there was no restraint upon commercial competition in the marketing of goods or services. Injury to a union's organizational and representational efforts without more did not state a claim under the antitrust laws, but instead fell under the terms of the National Labor Relations Act.<sup>103</sup>

According to the dissent, the majority had tried to fit the complaint under the Sherman Act by finding an alleged injury to two groups of employers. First were those employers who would otherwise have entered into a collective bargaining agreement with the plaintiffs but for the conspiracy. The dissent argued there was no injury at all to these employers because they could make more profit by remaining nonunionized. Thus there was no restraint in commercial competition in violation of the antitrust laws and the union's only remedy lay under the labor laws.<sup>104</sup>

As to the second group of employers, those who were already unionized and were being denied contracts because of the alleged injury, a significant injury was cognizable under the antitrust laws. But this raised a standing problem. The dissent argued that the target area test should only give standing to those

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100. *Id.* at 543.

101. 404 F. Supp. at 1070.

102. 648 F.2d at 541.

103. *Id.* at 541-42.

104. *Id.* at 542.

directly harmed by the alleged boycott and not to the employees of the victim as well.<sup>105</sup>

The dissent concluded that even if the union had standing, this still was "a labor case wearing an antitrust costume . . . . It should remain a labor case."<sup>106</sup>

### *The Modified Opinion*

The AGCC's petition for a hearing and suggestion for a re-hearing en banc was denied. In response to the AGCC's suggestion that the panel's opinion "could be read as disapproving multi-employer bargaining entirely,"<sup>107</sup> the panel clarified its original opinion.

The panel noted that multi-employer bargaining had been sanctioned by both the National Labor Relations Board and the Supreme Court.<sup>108</sup> Further, the union had alleged injury not from the formation of a multi-employer group but from the AGCC's group boycott.<sup>109</sup>

The panel stated that only employer agreements with an anticompetitive purpose or effect violate the Sherman Act. Multi-employer unit bargaining with a union to eliminate competition over wages and working conditions cannot give rise to an antitrust claim.<sup>110</sup> And, even if the Sherman Act covered multi-employer bargaining units, section 4 of the Norris-La-Guardia Act,<sup>111</sup> read together with section 20 of the Clayton

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105. *Id.* at 543.

106. *Id.* The court in *Carpenters Local 1846 v. Pratt-Farmsworth*, 511 F. Supp. 509, 521 (E.D. La. 1981), found the dissent's opinion in *California State Council* "enlightening." The *Pratt-Farmsworth* court dismissed a union's complaint that an employer had violated the antitrust laws by setting up an alter ego corporation to avoid dealing with the union. The court found that an employer conspiracy to impair a union's representational efforts could only be remedied under the labor laws since it did not restrain commercial competition. It agreed with the dissent in *California State Council* that the antitrust laws should not be applied to employer conspiracies aimed at unions.

107. 648 F.2d at 543.

108. *Id.* at 543-44. Multi-employer bargaining units can only be formed if the employers agree to it, the union consents and the NLRB approves. 18-C T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW § 14.03(4)(b) (1979).

109. 648 F.2d at 544.

110. *Id.*

111. 29 U.S.C. § 104 (1976).

Act,<sup>112</sup> clearly exempts from the antitrust laws the act of “[b]ecoming or remaining a member . . . of an employer organization.”<sup>113</sup>

The panel concluded that an employer agreement violates the Sherman Act only if it has “an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions.”<sup>114</sup>

The dissent criticized the majority’s additional opinion, finding it did nothing to clarify what conduct by a multi-employer bargaining unit would violate the Sherman Act. The dissent thought the majority erred in allowing the antitrust laws to intrude into labor relations rather than confining the remedies to those provided in the labor laws.<sup>115</sup>

#### D. CRITIQUE

The result reached in *California State Council* seems correct. The district court mischaracterized the complaint by stating that the union was suing AGCC for refusing to deal exclusively with subcontractors which were signatories to contracts with the union.<sup>116</sup> The Ninth Circuit correctly characterized the complaint as alleging that the AGCC and its members had conspired with other employers and with each other to subcontract only with nonunion subcontractors.<sup>117</sup> If at trial the union cannot prove a group boycott of unionized subcontractors, its claim will fail on the merits. However, it would be improper to dismiss the complaint at the pleading stage by construing it too narrowly.<sup>118</sup>

The majority also correctly held that the union’s allegations stated a claim under the Sherman Act. The alleged conspiracy restrained commercial competition by excluding unionized subcontractors from the market. They would be excluded from con-

112. *Id.* § 52.

113. *Id.* § 104(b).

114. 648 F.2d at 544.

115. *Id.* at 545. The dissent listed a number of scenarios which he thought might subject multi-employer groups to antitrust liability as a result of the majority’s opinion. See text accompanying note 125 *infra* for one scenario discussed by the dissent.

116. 404 F. Supp. at 1070.

117. 648 F.2d at 531.

118. *Walling v. Beverly Enterprises*, 476 F.2d 393 (9th Cir. 1973).

tracts not because they were necessarily less efficient but because they were unionized. *Connell* had found that this type of restraint on competition could form the basis for an antitrust claim.<sup>119</sup> The purpose of the antitrust laws is to outlaw all conspiracies that unreasonably restrain commercial competition, regardless of motive.<sup>120</sup> A group boycott which has as its ultimate goal the weakening of a union is nevertheless covered by the antitrust laws if it restrains commercial competition. The district court stated that an antitrust cause of action alleged by a union against an employer in the normal type of labor dispute could not be recognized.<sup>121</sup> It erroneously determined that, in the labor-management context, the antitrust laws apply only to agreements between unions and employers which affect commercial competition among third parties.<sup>122</sup> Simply because the cases decided by the Supreme Court have involved union agreements with employers that affected competition among third parties<sup>123</sup> should not be interpreted to mean that employer combinations that are directed against unions and also affect commercial competition are somehow exempt. Employer combinations enjoy an immunity from the antitrust laws only when they are part of the collective bargaining process. But this was not an instance of employers combining as part of that process to counter a union's whipsaw strike or other pressure tactic.<sup>124</sup> The AGCC's alleged conspiracy arose outside the collective bargaining process and affected commerce among third parties, *i.e.*, the subcontractors. It could not be held immune from antitrust coverage simply because it arose in the labor-management context. To hold otherwise would allow employers to freely restrict commercial competition among themselves or others as long as their ultimate motive was to injure the union.

The majority's holding that the alleged employer conspiracy potentially violated the Sherman Act will not lead to multi-em-

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119. 421 U.S. at 635.

120. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

121. 404 F. Supp. at 1070.

122. *Id.* at 1070-71.

123. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975); *Meat Cutters and Butchers Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. IBEW Local 3*, 325 U.S. 797 (1945).

124. *See, e.g., Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520 (S.D.N.Y. 1963).

ployer groups being unduly restricted in their choice of bargaining tactics, as the dissent feared. The dissent questioned whether a multi-employer unit's decision to bargain aggressively with a weak union in order to provoke a strike and ultimately cause the union to lose its representative status through loss of employee support could result in antitrust liability for the employers.<sup>125</sup> It clearly would not for the same reason that employer agreements to purchase strike insurance or engage in a lockout are not covered. Such employer agreements are immune from the antitrust laws because they are part of the collective bargaining process and do not affect outside parties.<sup>126</sup> Only multi-employer agreements that are made outside the collective bargaining process or unduly affect third parties are subject to antitrust sanctions.

The panel also correctly determined that labor's statutory exemption did not protect the AGCC's alleged conduct. The Clayton and Norris-LaGuardia Acts were passed primarily to benefit labor; any language found in them arguably exempting employer conduct should be narrowly construed.

While the result reached by the panel on the statutory labor exemption is correct, its analysis is questionable in part. The panel first found that the alleged employer conduct arguably fell within the language of section 20 of the Clayton Act which exempts from antitrust liability a recommendation by one person to another to cease to employ any other party.<sup>127</sup> Because the exemptions in the Norris-LaGuardia Act are broader than those in the Clayton Act, the panel found the Clayton Act's exemptions superfluous; thus only the language of Norris-LaGuardia need be examined.<sup>128</sup> The panel then concluded that the AGCC's conduct was not statutorily exempt because none of Norris-LaGuardia's exempt categories applied.<sup>129</sup> It is an odd result to state that Norris-LaGuardia is broader than the Clayton Act but then find that Norris-LaGuardia does not exempt conduct which

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125. 648 F.2d at 545.

126. See *Plumbers Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981) holding that an employer lockout is not subject to the antitrust laws. It distinguished *California State Council* on its facts. *Id.* at 1311-12.

127. 648 F.2d at 533-34.

128. *Id.* at 534-35.

129. *Id.* at 535.

the Clayton Act arguably does. Furthermore, Norris-LaGuardia provides that no injunction shall issue to prohibit any person from "ceasing . . . to remain in any relation of employment . . . or advising, urging or otherwise causing or inducing" anyone else to do so.<sup>130</sup> This language seems as broad as that in the Clayton Act. While the court properly concluded that in light of the purpose of this statute this exemption could not apply to the AGCC's alleged conduct, it was improper to read the Norris-LaGuardia Act as exempting less than the Clayton Act.

The court correctly found that the union had standing to bring the claim. A union's business is organizing and representing employees. It should be able to sue under the Clayton Act to protect this interest just as any other business can sue to protect its interests when endangered by a conspiracy violating the antitrust laws. Because the union was the intended victim, it clearly fell within the target area of the employers' alleged conspiracy. Congress created a private antitrust damage remedy to better compensate the antitrust victim and provide better enforcement against antitrust violators.<sup>131</sup> To deny standing to the intended victim of an antitrust conspiracy would frustrate both of these goals.

#### E. IMPACT

*California State Council* establishes that the Ninth Circuit will not recognize any "labor market per se" exemption to the antitrust laws if an employer combination made outside the collective bargaining process affects commercial competition among third parties. The Ninth Circuit will hold such a combination potentially liable to antitrust sanctions unless either the Clayton or Norris-LaGuardia Acts clearly exempts the conduct or unless it is a necessary part of collective bargaining over wages or working conditions.

However, it is not clear how the Ninth Circuit would rule in a case such as *Clothing and Textile Workers v. J.P. Stevens & Co.*,<sup>132</sup> where the alleged employer combination restrained com-

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130. 29 U.S.C. § 104 (1976).

131. Berger & Berstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 845-58 (1977).

132. 475 F. Supp. 482 (S.D.N.Y. 1979).

petition over wages but did not otherwise affect third parties. Such a combination directly restrains competition among employers and should be held to violate the antitrust laws.<sup>133</sup> To exempt such conduct frustrates the antitrust laws' purpose of promoting competition and contravenes the labor law policies of protecting employee self-organizing and promoting collective bargaining.

However, the Ninth Circuit might find that the antitrust laws do not apply to such employer combinations because they do not affect competition among third parties: "[A]n employer agreement falls within the prohibitions of the Sherman Act only if it has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions."<sup>134</sup> This statement was made in the context of a discussion of antitrust liability for multi-employer bargaining units which were consented to by a union and approved by the NLRB. But, standing alone, it could be interpreted as exempting all employer agreements regarding wages or working conditions regardless of whether they arise in a collective bargaining context. This would lead to an anomalous result: A union could bring antitrust claims against employers only when they conspire to injure the union indirectly by restraining competition among third parties; such claims would be barred against employers who agree, outside the collective bargaining process, to restrain competition over wages or working conditions and thereby injure the union directly.

Employer immunity to antitrust sanctions is properly limited to the exceptions spelled out in the Clayton and Norris-LaGuardia Acts and actions which relate to the collective bargaining process. All other employer restraints on competition in the labor market should be found potentially violative of the antitrust laws.

*Richard Slizeski*

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133. *Anderson v. Shipowners Ass'n*, 272 U.S. 359, 364 (1926); *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606 (S.D.N.Y. 1970).

134. 648 F.2d at 544.

## II. NO DEFERRAL TO ARBITRATOR AWARDS IN SECTION 8(a)(3) CASES

### A. INTRODUCTION

In *NLRB v. Max Factor and Co.*,<sup>1</sup> the Ninth Circuit reviewed the application of the *Spielberg* doctrine<sup>2</sup> favoring deferral by the National Labor Relations Board (the Board) to arbitrators' awards in cases involving charges of unfair labor practices.<sup>3</sup> The court held that the Board had discretion to refuse deferral to an arbitrator's award which had denied reinstatement of a discharged union steward,<sup>4</sup> and affirmed the Board's order of reinstatement.<sup>5</sup> Substantial evidence supported the Board's finding that the employer discharged its employee primarily because of her union activities,<sup>6</sup> and that the employee's conduct was not so flagrantly improper as to deprive her of protection under the National Labor Relations Act (the Act).<sup>7</sup> Allegations of discord between the employer and the employee did not overcome the Board's discretion to order reinstatement.<sup>8</sup>

1. 640 F.2d 197 (9th Cir. 1980) (per Schwarzer, D.J. sitting by designation; the other panel members were Goodwin and Pregerson, J.J.), *cert. denied*, 101 S. Ct. 2314 (1981).

2. The doctrine draws its name from the Board decision in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). For a discussion of the doctrine, see notes 31 and 37 *infra* and accompanying text.

3. National Labor Relations Act § 7 reads in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157 (1976).

National Labor Relations Act §§ 8(a)(1) and 8(a)(3), provide in part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. §§ 158(a)(1) and 158(a)(3) (1976).

4. 640 F.2d at 203.

5. *Id.* at 205.

6. *Id.* at 204.

7. *Id.* at 205.

8. *Id.*

In *Max Factor*, the Ninth Circuit has apparently declined the invitation implicit in *Douglas Aircraft Co. v. NLRB*<sup>9</sup> to extend the *Spielberg* doctrine into areas of arguably unprotected employee activity.

## B. FACTS OF THE CASE

Luisa Gratz was the chief union steward<sup>10</sup> for production employees in Max Factor's Los Angeles plant. In late 1976 and early 1977, she became embroiled in a series of conflicts with management related to her conduct of union business on company time. Finally, after an explosive confrontation with Max Factor's Personnel Manager, Gratz was discharged,<sup>11</sup> allegedly

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9. 609 F.2d 352 (9th Cir. 1979). The court, in *Douglas Aircraft Co.*, ordered the Board to defer to the arbitrator's award. For further discussion of the implications of *Douglas Aircraft* see notes 65-70 *infra* and accompanying text.

10. Employees were represented by Warehouse, Processing and Distribution Workers Union, Local 26, International Longshoremen and Warehousemen's Union. *Max Factor & Co.*, 239 N.L.R.B. 804, 805 (1978).

11. Gratz's discharge was not a sudden, isolated event but the final act in a series of incidents, which showed a severe deterioration in the working relationship between Gratz, representing the union, and company management—specifically Bill Piercy, Director of Industrial Relations, and James Bryant, Personnel Manager. A brief list of the more unpleasant disputes between Gratz and Bryant and/or Piercy during the six month period prior to Gratz's discharge illustrates the extent of conflict.

On August 11, 1976, Gratz called Bryant a "racist" in front of other employees during a discussion about the promotion of a black employee. John Lee, the union business representative, later reprimanded Gratz. On November 10, Bryant had a heated discussion with Gratz in the company cafeteria, accusing her of upsetting the company nurse so severely that the nurse experienced a heart attack. Gratz filed a grievance against Bryant, and Bryant later apologized. Piercy sent Gratz a warning letter on December 9, advising her that she was devoting too much time on the job to chief steward duties and not enough on production work.

During the morning of December 27, Bryant refused to give Gratz information relative to a pending arbitration matter even though the company had previously agreed to furnish this material. Two hours later, Bryant issued Gratz an "Employee Warning Notice," signed by Piercy, again indicating Gratz was spending too little time on production work. Gratz refused to sign the warning as requested and called Bryant a "big phoney" and a "little twerp." At 4 p.m. the same day, Gratz was given another "Employee Warning Notice" signed by Bryant informing her she was suspended for "violation of plant rule #39—uwe [sic] of profane and abusive language." The following day, December 28, the union filed a grievance against the company.

On February 1, 1977, Gratz and Bryant disagreed on the amount of time Gratz could take to discuss pending grievances with another union steward during working hours. At the end of her shift, Gratz remained in the plant cafeteria eating with several employees. Bryant observed this on his way out of the building. The following day, February 2, Bryant and Gratz had an explosive confrontation. Bryant accused Gratz of conducting an illegal union meeting the previous evening. The problem about the pending grievances was again brought up. During the conversation, Gratz called Bryant a "liar." On February 3, Bryant discharged Gratz. *Max Factor & Co.*, 239 N.L.R.B. at 807-13.

for use of abusive language, insubordination and lack of production.<sup>12</sup> Gratz immediately filed unfair labor practice charges against Max Factor with the Board.<sup>13</sup>

The Administrative Law Judge (ALJ) concluded that the reasons given by Max Factor for Gratz's discharge were actually pretextual; the real motive was Gratz's pursuit of protected activities as chief steward.<sup>14</sup> He further found that Max Factor violated section 8(a)(1) of the Act<sup>15</sup> when it offered Gratz economic benefits if she would give up her union involvement.<sup>16</sup> The ALJ also determined that Gratz's abusive conduct in the course of her duties was not so flagrant as to forfeit the protection of the Act.<sup>17</sup> The Board subsequently adopted the findings of the ALJ and ordered reinstatement and back pay.<sup>18</sup>

Shortly after Gratz filed the unfair labor practice charges, the union grieved the discharge under the contract, and took its protest to arbitration.<sup>19</sup> The arbitrator issued an opinion and award while the findings of the ALJ were pending on exceptions

12. According to the "Employee Warning Notice," Gratz was discharged "for violation of plant rule 39 (uwe [sic] of abusive language) plant rule 19 (insubordination) and failure to perform a reasonable amount of work." Max Factor & Co., 239 N.L.R.B. at 813.

13. *Id.*

14. The ALJ said the reasons given by Max Factor were

[N]ot the real reason for Gratz' [sic] discharge but was a pretext used to cloak a discriminatory motive, hence, the discharge violated Section 8(a)(3) and (1) of the Act. Assuming that I have erred in evaluating the record in this respect . . . , I would still be constrained to conclude that Gratz' [sic] discharge violated Section 8(a)(1) of the Act.

*Id.* at 818.

15. 29 U.S.C. § 158(a)(1) (1976).

16. The offer of economic benefits took place during October or November 1976 and occurred during a conversation between Gratz, Piercy and Bryant. According to Gratz's testimony before the ALJ, Piercy asked if she would consider working for the company in a management position or returning to law school if Max Factor paid her expenses. Gratz refused both suggestions. Max Factor & Co., 239 N.L.R.B. at 814.

17. The ALJ found Gratz's conduct to be spontaneous, and not a product of a conscious decision to undermine management's authority. Also, the conduct took place while Gratz was engaged in protected activity, *i.e.*, her duties as union steward. *Id.* at 819.

18. *Id.* at 820.

19. Normally, the grievance procedure delineated in the collective bargaining agreement would require that the grievance be settled at one of three levels with the company organization in discussions between the grievant and the foreman (step 1), the grievant's steward and the personnel manager (step 2), or the Union's grievance committee and the Company's Director of Industrial Relations (step 3). If the dispute was not resolved by the weekly "third step" meeting, step 4 provided for binding arbitration. *Id.* at 806.

before the Board.<sup>20</sup> The arbitrator found in favor of the company because Gratz's conduct and abusive language constituted just cause for discipline and Gratz herself had contributed unnecessarily to the conflicts with management by her unjustified and superior attitude.<sup>21</sup> In addition, the testimony of other chief stewards as to the amount of time they used for union activities convinced the arbitrator that Gratz had indeed spent an excessive amount of time on union business.<sup>22</sup> The arbitrator sustained Max Factor's contention that Gratz should have spent more time on production work and found that her failure to do so was a valid cause for discipline and discharge.<sup>23</sup>

Max Factor then unsuccessfully petitioned the Board to defer to the arbitrator's decision.<sup>24</sup> In turn, the Board and intervenor Gratz petitioned the Ninth Circuit for enforcement of the Board's Order.<sup>25</sup>

### C. BACKGROUND

#### *Policies in Conflict*

The problem facing the Ninth Circuit in *Max Factor* was the continuing tension and resulting debate which has developed from the attempt to reconcile two apparently conflicting policies. On the one hand, Congress has directed the Board to prevent persons or organizations from engaging in unfair labor practices.<sup>26</sup> On the other, the grievance and arbitration process has won judicial and statutory favor as a desirable method for settling employment-related grievance disputes.<sup>27</sup> In those cases

20. *Id.* at 804.

21. 640 F.2d at 201.

22. *Id.* However, the ALJ noted that while Max Factor had always paid the chief steward for time spent on union business during working hours, the amount of time necessary and appropriate had become the source of a continuing dispute since at least 1970. *Max Factor & Co.*, 239 N.L.R.B. at 806.

The ALJ also found that various factors outside Gratz's control (massive lay-offs, changes in the bargaining agreement increasing the number of forms and reports, and a change in Max Factor's management personnel) added to her workload during this period and made it necessary for her to spend more time on union activities. *Id.* at 816.

23. 640 F.2d at 201.

24. 239 N.L.R.B. at 804.

25. 640 F.2d at 199.

26. See 29 U.S.C. §§ 151, 158 (1976).

27. For a general discussion of the duty of the parties to a collective bargaining agreement to arbitrate, see R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING*, 540-74 (1976).

where a party turns to the Board for redress, and at the same time has access to a private solution through the grievance machinery available pursuant to a collective bargaining agreement, the Board must decide whether a remedy can only be found under the Act, or whether the Board will defer to arbitration.

### *Evolution of the Spielberg Doctrine*

Arbitration has long been recognized as the method whereby employers and the representatives of their employees meet and resolve differences.<sup>28</sup> Arbitration has been approved by Congress,<sup>29</sup> and granted judicial favor by the Supreme Court in the "Steelworkers' Trilogy."<sup>30</sup>

The Board also recognizes the role of the arbitrator in the grievance process and, in some instances, will defer to arbitrators' awards even though one of the antagonists in the labor dispute seeks a resolution of the grievance with the federal agency itself. In *Spielberg Manufacturing Co.*,<sup>31</sup> the Board enumerated the criteria it uses to determine whether to retain jurisdiction or defer to the arbitrator's award as: (1) the fairness and regularity of the arbitration proceeding; (2) the presence or absence of an agreement between all parties to be bound by the arbitrator's award; and (3) whether the arbitrator's award is clearly repugnant to the Act.<sup>32</sup> The Board added that this newly created policy of deference to arbitration awards would produce "the desirable objective of encouraging the voluntary settlement of labor disputes."<sup>33</sup>

The trend toward deference to arbitration was given added impetus by the Board in *Collyer Insulated Wire*.<sup>34</sup> In *Collyer*,

28. Professor Gorman believes that "our society ordinarily places a premium on the resolution of disputes through private machinery freely created by the parties rather than by the intervention of government." *Id.* at 729-30.

29. 9 U.S.C. § 2 (1976), reads in part: "[A] contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . , or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . , shall be valid, irrevocable, and enforceable . . . ."

30. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

31. 112 N.L.R.B. 1080 (1955).

32. *Id.* at 1082.

33. *Id.*

34. 192 N.L.R.B. 837 (1971).

the collective bargaining agreement provided for arbitration, and, because the issues were contractual in nature, the Board held arbitration to be the appropriate remedy.<sup>35</sup> However, no attempt at that option had been made by the parties. The Board ruled it would nevertheless defer to arbitration, even without a final arbitrator's award.<sup>36</sup>

The *Collyer* ruling expanded the *Spielberg* position considerably. In *Spielberg*, the arbitration proceeding took place prior to the hearing before the ALJ;<sup>37</sup> in *Collyer*, arbitration had not yet occurred.<sup>38</sup> The Board retained jurisdiction over the dispute in *Collyer*, but only to entertain a motion that arbitration did not proceed as required under the *Spielberg* guidelines.<sup>39</sup>

In *National Radio Co.*,<sup>40</sup> the Board, in a three-to-two decision,<sup>41</sup> extended the pre-arbitration deferral doctrine of *Collyer* to section 8(a)(3) cases.<sup>42</sup> The company in *National Radio* was charged with anti-union animus when it discharged a union representative for refusing to comply with a unilaterally imposed reporting condition required of him and other union stewards.<sup>43</sup>

Following a change in Board membership,<sup>44</sup> *National Radio*

35. *Id.* at 837.

36. *Id.* at 842.

37. In *Spielberg*, four employees pressed unfair labor practice charges against the company when it failed to reinstate them at the direction of an arbitrator. The parties had previously agreed to arbitrate the question and be bound by the arbitrator's decision. 112 N.L.R.B. at 1081. In *Cary v. Westinghouse Corp.*, 375 U.S. 261, 272 (1964), the Supreme Court found no barrier to the use of arbitration, even though the dispute might eventually go to the Board.

38. 192 N.L.R.B. at 842.

39. *Id.* at 843.

40. 198 N.L.R.B. 527 (1972).

41. Chairman Miller was joined by Board members Kennedy and Penello to form the majority. Members Jenkins and Fanning dissented, as they did in *Collyer*. *Id.* at 532.

See Simon-Rose, *Deferral Under Collyer by the NLRB of Section 8(a)(3) Cases*, 27 LAB. L.J. 201 (1976) for additional discussion of the expansion of *Collyer* in *National Radio*.

42. 198 N.L.R.B. at 531.

43. *Id.* at 527.

44. By 1977, the three *Collyer* advocates, Miller, Kennedy and Brown had left the Board, and were replaced by Murphy, Penello and Walther. Members Penello and Walther continued to hold the *Collyer* viewpoint. Now, however, Chairman Murphy joined Jenkins and Fanning in support of a new approach to deferral to arbitration awards. Jenkins and Fanning had previously dissented in *Collyer* and *National Radio*. *Id.* at 810 n.7. See also Novack, *Cutting Back On Collyer: The First Step in the Right Direction*, 28 LAB. L.J. 785 (1977).

was overruled by *General American Transportation Co.*<sup>45</sup> The Board now appears to limit the occasions when it will defer to an arbitrator's award to those situations analogous to *Spielberg*:<sup>46</sup> the award has already been issued by an arbitrator and meets the *Spielberg* criteria.

Significantly, while the Board has deferred to arbitration, it has never abdicated its statutory authority to those nonadministrative platforms.<sup>47</sup> The Board has always maintained that deference to arbitration awards would be granted at its discretion and only when the clearly enumerated criteria of *Spielberg* were present. Even after the expansion of the deferral policy under *Collyer*, the Board has retained jurisdiction in order to assure the *Spielberg* standards were met. Consequently, any arbitration award under *Collyer* could still be reviewed.<sup>48</sup>

#### D. THE HOLDING OF *Max Factor*

##### *Deferral to Arbitration Denied under Spielberg*

The Board, in its decision, ruled that the arbitration proceedings appeared to be fair and regular;<sup>49</sup> thus, they met the first *Spielberg* standard.<sup>50</sup> The reason given by the Board, however, for not deferring was that such deferral "*would engender a result repugnant to the purposes and policies of the Act.*"<sup>51</sup>

Writing for the Ninth Circuit panel, Judge Schwarzer ob-

45. 228 N.L.R.B. 808 (1977). Union steward Perry Soape, Jr., was laid off by the company. He claimed that General American was motivated by anti-union animus; the company alleged its action was necessary because of lack of work. *Id.* at 813. In a three-to-two decision, the Board refused to defer to arbitration as requested by the company. *Id.* at 808.

46. The majority opinion in *General American* criticized *Collyer* and its progeny, but did not specifically denounce *Spielberg*. *Id.* at 809.

47. See, e.g., *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1081 (1955) ("[T]he Board is not bound, as a matter of law, by an arbitration award."); *NLRB v. Walt Disney Prod.*, 146 F.2d 44, 48 (9th Cir.) ("Clearly agreements between private parties cannot restrict the jurisdiction of the Board."), *cert. denied*, 324 U.S. 877 (1944).

48. *Collyer Insulated Wire*, 192 N.L.R.B. at 843.

49. *Max Factor & Co.*, 239 N.L.R.B. at 804.

50. The Ninth Circuit panel stated that the Board found the proceedings were fair and regular, and that the parties had agreed to be bound by the arbitrator's award. *NLRB v. Max Factor and Co.*, 640 F.2d at 202. But no similar claim was made by the Board. In addition, intervenor Gratz protested vigorously that she had not agreed to be bound by the arbitrator's decision; she believed her best remedy lay with the Board. Brief for Intervenor at 3-5.

51. 239 N.L.R.B. at 804 (emphasis added).

served that the Board's decision failed to provide supporting analysis for the potentially repugnant outcome of the arbitrator's award.<sup>52</sup> However, the court relied on the Board's "considerable discretion" in this area and the findings amassed by the ALJ which were reasonable and consistent with the preponderance of the evidence.<sup>53</sup> Consequently, the court believed that the Board could reasonably conclude that Max Factor had engaged in unfair labor practices, and that the Board's duty to prevent interference with the employee's protected activities overrode the desirability of encouraging arbitration.<sup>54</sup>

### *Employee's Conduct Protected by the Act*

Gratz's conduct, while probably improper, in the court's view was still sheltered by the Act because it occurred while she was engaged in protected activity<sup>55</sup> and "was not so flagrantly improper as to deprive her union activities of protection under Section 8(a)(1) and (3)."<sup>56</sup> The court compared Gratz's confrontation with her employer to an earlier Ninth Circuit case in which an employee called his general manager a liar at a grievance meeting.<sup>57</sup> The court recognized that passionate, verbal explosions are not uncommon in labor disputes.<sup>58</sup> Gratz called Max Factor's Personnel Manager a "liar," a "racist," a "big phoney" and a "little twerp" on separate occasions, all in the context of her union activities.<sup>59</sup> Although her language was extreme, abusive and discourteous, the court found her manner not so totally shocking to the sensitivities of those with whom she dealt so as to forfeit the protection of the Act.<sup>60</sup>

## E. DISCUSSION AND CRITIQUE

### *An Emerging Trend in the Ninth Circuit*

In *Max Factor*, the Ninth Circuit appears to be solidifying a trend in this Circuit to uphold refusals by the Board to defer to

52. 640 F.2d at 204.

53. *Id.*

54. *Id.* n.7.

55. *Id.* at 205.

56. *Id.*

57. *Id.* (citing *Hawaiian Hauling Serv. Ltd. v. NLRB*, 545 F.2d 674 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977)).

58. *E.g.*, *Hawaiian Hauling Serv. Ltd. v. NLRB*, 545 F.2d at 676 n.8.

59. For a detailed discussion of these incidents, see note 11 *supra*.

60. 640 F.2d at 205.

arbitration, particularly in section 8(a)(3) cases.

The Ninth Circuit recognized the Board's continuing jurisdiction over section 8(a)(3) disputes as early as 1945 in *NLRB v. Walt Disney*.<sup>61</sup> More recently, it held that the Board would not abuse its discretion in refusing to defer, and that the Board's decisions should be enforced, as long as the Board followed its own standards.<sup>62</sup>

In *Stephenson v. NLRB*,<sup>63</sup> the court ruled that the Board should not defer if the arbitrator has not decided the statutory issues. Under those circumstances, the Board must review. The Board may not presume that the arbitrator resolved the statutory issues; the record must clearly show that those questions have been considered and answered.<sup>64</sup>

*Douglas Aircraft Co. v. NLRB*,<sup>65</sup> the Ninth Circuit decision holding for deferral to the arbitrator's award, and the most recent decision by the Ninth Circuit in this line of cases, was distinguished in *Max Factor*.<sup>66</sup> In *Douglas Aircraft*, the court held that the arbitrator's award must not be set aside where the arbitrator has based his decision on two independent grounds, one of which is permissible, even though the alternative basis may be impermissible. Under those circumstances, the award would not be clearly repugnant to the Act.<sup>67</sup> The ambiguity in *Douglas Aircraft* stemmed from the language of the arbitrator's award, not from the conduct of the parties.<sup>68</sup> Accordingly, the Ninth Circuit

61. 146 F.2d 44 (9th Cir.), cert. denied, 324 U.S. 877 (1944).

62. *Hawaiian Hauling Serv. Ltd. v. NLRB*, 545 F.2d 674, 676 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977) ("In reviewing the Board, we must insure that it adheres to its own standards until they are properly changed by the Board.")

63. 550 F.2d 535 (9th Cir. 1977).

64. *Id.* at 538. In *Max Factor*, the Ninth Circuit questioned whether the insistence that statutory issues be clearly resolved as specified by *Stephenson* was misplaced. The court described the issue as a "matter of deep controversy in the [arbitration] profession." 640 F.2d at 203 n.6.

65. 609 F.2d 352 (9th Cir. 1979).

66. 640 F.2d at 203.

67. *Id.* (citing *Douglas Aircraft Co. v. NLRB*, 609 F.2d at 355).

68. *McMurphy*, a discharged employee, filed unfair labor practice charges against Douglas Aircraft Company, and a grievance with his union on the same day. The charge was deferred to arbitration under the then-controlling *Collyer* policy. The union and the company attempted to settle their dispute with *McMurphy*, one condition being his withdrawal of the § 8(a)(3) charges pending before the NLRB. *McMurphy* refused. The arbitrator's award granted reinstatement without back-pay. 609 F.2d at 353.

chose not to impose the same standard on the Board in *Max Factor*.<sup>69</sup>

*Douglas Aircraft* arguably may be read as a very narrow holding, applicable only in that situation where the arbitrator's award is based on an ambiguous decision containing two or more grounds which may be read either independently or cumulatively. The *Max Factor* court makes clear that similar ambiguity is not present in the arbitrator's opinion here.<sup>70</sup> The Board's refusal to defer is not based on any lack of clarity but on the repugnance of the arbitrator's award to the Act.

### *Results Repugnant to the Act*

The Ninth Circuit accepted the Board's finding that deferral to the arbitrator's award would result in an outcome repugnant to the purposes and policies of the Act, and would not afford the protection necessary for section 7 rights. This finding alone is adequate to invalidate the award under the *Spielberg* criteria, even if both additional standards are met. The major problem with *Max Factor*, however, is that the court does not elaborate with any specificity what test it has applied to define results repugnant to the Act.<sup>71</sup> The court accepted at face value the Board's determination that the arbitrator's award would cre-

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At the request of the union and the company, the arbitrator clarified his reasons for the award. One reason for the refusal to order back-pay was the employee's pattern of abusive conduct at work. The other was the employee's refusal to withdraw the unfair labor practice charges. The court held that the Board must defer to the original award, even though ambiguous, since clarification of that award revealed a permissible reason. The impermissible reason was described by the court as "harmless error." *Id.* at 354.

69. At least one circuit has split with the Ninth over the implication of *Douglas Aircraft*. See *NLRB v. Pincus Bros. Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980) (citing *Douglas Aircraft* in ordering deferral to an arbitrator's award which ruled on arguably impermissible employee conduct). The discharged employee in *Pincus* abused work time to write and distribute leaflets critical of her employer. The Third Circuit found that permissible and impermissible reasons for an award would not render the award clearly repugnant to the Act. In addition, the actions of the employee in *Pincus* were arguably unprotected in nature. The Ninth Circuit refused to follow *Pincus* for several reasons, the most compelling of which was the importance of relying on the protected status of the employee's conduct. The employee in *Max Factor* was engaged in protected activity which must not be interfered with. 640 F.2d at 204 n.7. In *Ad Art, Inc. v. NLRB*, 645 F.2d 669 (9th Cir. 1980) (as amended Jan. 1981), the court again declined to follow *Pincus*. Here the court followed *Max Factor* in finding the Board properly refused to defer to the arbitrator's award; the court ordered reinstatement and back pay to the employee in enforcement of the Board's order.

70. 640 F.2d at 203.

71. *Id.* at 204.

ate a repugnant result. The Board, unfortunately, gave no reasons and cited no facts in support of its position.<sup>72</sup> The Board merely stated that the arbitrator failed to pass on the unfair labor practice considerations which the ALJ found to be significant.<sup>73</sup>

The dissenting panel member noted that the Board failed to discuss the reasons for its findings and recommended the case be remanded for clarification by the Board.<sup>74</sup> The majority accepted the brief statement by the Board as sufficient. Nonetheless, future litigants in similar circumstances would have been aided by a more specific discussion by the Board as to what conduct it finds worthy of protection in this difficult area.

#### F. CONCLUSION

The outcome of this case hinges on the specific facts surrounding the discipline and discharge of Max Factor's union steward. Max Factor pursued both permissible and impermissible purposes;<sup>75</sup> the court believed the impermissible motives dominated. Gratz, for her part, committed arguably improper actions during the course of protected activity.<sup>76</sup> The court found that her actions were not so blatantly improper as to forfeit all protection afforded her union activities by sections 8(a)(1) and 8(a)(3). The conduct of discharged employees and the motives of their employers often fall into similar twilight areas of arguable impropriety. The Ninth Circuit weighed the motives and actions of both parties and found that a determination in favor of the employee promotes, to the greater degree, the purposes and policies of the Act.

The *Max Factor* court appears to be correct in its holding. It has distinguished *Douglas Aircraft* in its opinion, thereby effectively limiting an expansion of *Douglas* in this circuit.<sup>77</sup> In

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72. 239 N.L.R.B. at 805.

73. *Id.*

74. 640 F.2d at 205.

75. *Id.*

76. *Id.*

77. This was in spite of the opening made available by the Third Circuit in *Pincus*. See note 69 *supra*.

addition, it has reinforced the Board's attempt to protect the employee's rights under the National Labor Relations Act. It did that, using the standards set by the Board itself under the *Spielberg* doctrine. The real problem for the Ninth Circuit in this area may yet occur, should a change in Board membership alter those standards once again.

*Alice Guckeen*

### III. *PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. v. NLRB: THE NINTH CIRCUIT BROADLY INTERPRETS SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT*

#### A. INTRODUCTION

In *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. v. NLRB*,<sup>1</sup> the Ninth Circuit enlarged the scope of the construction industry proviso to section 8(e) of the National Labor Relations Act by holding, *inter alia*, that, as a matter of law, union signatory subcontracting agreements are protected from secondary boycott proscriptions when obtained in a collective bargaining context. Rejecting a narrower interpretation of section 8(e), the Ninth Circuit upheld such agreements—even if they embrace job sites at which no members of the signatory union are employed.<sup>2</sup> The court stressed legislative history and practical considerations in reaching its result.

#### *The Union Signatory Subcontracting Agreements*

The Ninth Circuit consolidated for rehearing before a limited en banc panel two separate orders of the National Labor Relations Board (the Board).<sup>3</sup> The court enforced both orders in their entirety, reversing the decision of a three-judge panel.<sup>4</sup> The first order concerned a collective bargaining agreement between Local 701 of the International Union of Operating Engineers

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1. 654 F.2d 1301 (9th Cir. 1981) (per Canby, C.J.), *rev'g* 609 F.2d 1341 (9th Cir. 1979), *cert. granted*, 50 U.S.L.W. 3245 (1981) (No. 80-1808).

2. 654 F.2d at 1320. Union signatory subcontracting agreements prevent a general contractor from subcontracting work to another employer unless the subcontractor has a collective bargaining agreement with the signatory union.

3. *Id.* at 1304.

4. *Id.* at 1324.

(the Engineers) and the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC), a bargaining agent representing about 200 construction employers from Oregon and Washington.<sup>5</sup> The collective bargaining agreement contained a clause prohibiting AGC from contracting "any work covered by the Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the [Engineers'] Union covering such work."<sup>6</sup> A self-help clause allowed either party to "take such action as they deem necessary"—including strikes and lockouts—when one party failed to comply with the decision of a grievance and arbitration proceeding.<sup>7</sup>

The Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. complained that the collective bargaining agreement violated section 8(e) of the National Labor Relations Act (NLRA).<sup>8</sup> The Board disagreed, finding that the questioned clause fell within the construction industry proviso to section 8(e).<sup>9</sup> However, the Board also determined that the self-help clause violated section 8(b)(4)(ii)(B)<sup>10</sup> which condemns the use of economic pressure to enforce such a clause,<sup>11</sup> except in the

5. *Id.* at 1304.

6. *Id.*

7. *Id.* at 1305.

8. *Id.* Section 8(e) provides:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of another employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work. . . .*

29 U.S.C. § 158(e) (1976) (emphasis added). A further proviso exempting the apparel industry from such agreements and from 29 U.S.C. § 158(b)(4)(B) is omitted.

9. 654 F.2d at 1305.

10. 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

11. 654 F.2d at 1324.

apparel industry.<sup>12</sup>

The second Board order involved picketing and work stoppages by a union seeking a successor collective bargaining agreement. The union sought a contract provision limiting subcontracting at any construction jobsite to "a person, firm, or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement."<sup>13</sup> When negotiations floundered over this proposed provision,<sup>14</sup> Locals 235 and 944 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters) picketed worksites of the employer, Woelke and Romero Framing, Inc. (Woelke).<sup>15</sup> Woelke charged the Carpenters with violating sections 8(b)(4)(i) and 8(b)(4)(ii)(A),<sup>16</sup> by pressuring the employer "to enter into any agreement which is prohibited by section 8(e)."<sup>17</sup> The Board decided instead that the construction industry proviso to section 8(e) rather than section 8(b)(4)<sup>18</sup> covered the proposed agreement.<sup>19</sup> Again, the Ninth Circuit enforced the Board's order.<sup>20</sup>

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12. 29 U.S.C. § 158(e) (1976). See note 8 *supra* for text of § 158(e).

13. 654 F.2d at 1306.

14. The parties did not agree on several other issues not before the Ninth Circuit. *Id.* at 1305 n.3.

15. *Id.* at 1306.

16. Subsections 158(b)(4)(i) and 158(b)(4)(ii)(A) provide:

It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section. . . .

29 U.S.C. § 158(b)(4)(i) (1976); 29 U.S.C. § 158(b)(4)(ii)(A) (1976). For the text of § 158(e), see note 8 *supra*.

17. 654 F.2d at 1306.

18. *Id.*

19. *Id.*

20. *Id.* at 1304.

Analyzing the AGC agreement and the proposed Woelke provision, the Ninth Circuit court addressed four issues<sup>21</sup> central to both subcontracting agreements: (1) whether the subcontracting agreements contravened section 8(e) by being secondary in nature; (2) whether the construction industry proviso to section 8(e) exempted these clauses from its proscription; (3) whether picketing or striking to secure agreement to lawful subcontracting clauses violated section 8(b)(4); and (4) whether picketing or striking to enforce such subcontracting clauses violated section 8(b)(4).

The Ninth Circuit rejected two arguments made by the Engineers, and concluded that these subcontracting clauses reflected secondary purposes.<sup>22</sup> Having found the union signatory subcontracting clauses within the scope and proscription of section 8(e), the court then turned to an analysis of the construction industry proviso.<sup>23</sup> After reviewing the legislative history of section 8(e), and the labor background of the construction industry in general, the court focused on *Connell Construction Co. v. Plumbers Local 100*.<sup>24</sup> Though *Connell* is inapposite on several main points, the Ninth Circuit court drew support from it in holding that union signatory subcontracting clauses are ex-

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21. *Id.* at 1307. The majority actually addressed at least one other issue. AGC contended that even if § 8(e) allowed subcontracting agreements, it did not permit a "particular-union" subcontracting agreement. *Id.* at 1323. The Ninth Circuit refused to so limit the construction industry proviso, noting that nothing in the language of § 8(e) supported such a limitation.

22. The Supreme Court articulated a test for primary and secondary agreements in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967). Primary agreements, lawful under § 8(e), are those in which "the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *Id.* at 645. Secondary agreements, on the other hand, are generally prohibited by § 8(e). A secondary agreement is "tactically calculated to satisfy union objectives elsewhere." *Id.* at 644. A popular description of a secondary boycott is that of Judge Learned Hand:

The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employee's demands.

*IBEW Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir.), *aff'd*, 341 U.S. 694 (1950).

23. 654 F.2d at 1308. See note 8 *supra* for the text of the proviso. The great weight of the court's opinion is devoted to this issue. Subsequent discussion of the Ninth Circuit's analysis and the legislative and judicial background of § 8(e) is directed toward the holding on this matter.

24. 421 U.S. 616 (1975).

cepted from the coverage of section 8(e) by the construction industry proviso.<sup>25</sup>

The Ninth Circuit found the third and fourth issues raised to be capable of quick disposition. Both elementary statutory construction and Ninth Circuit and NLRB precedent defeated Woelke's claim that picketing to coerce acceptance of a subcontracting provision violates section 8(b)(4)(ii)(A).<sup>26</sup> However, picketing or striking to enforce a union signatory subcontracting agreement is not contemplated by section 8(e).<sup>27</sup> Thus the self-help enforcement clause in the AGC-Engineers agreement is void absent arbitration or judicial action.<sup>28</sup>

## B. A BRIEF BACKGROUND

### *The Landrum-Griffin Act: An Inconclusive Legislative History*

Secondary pressure and union signatory subcontracting clauses did not violate the letter of the original National Labor Relations Act (NLRA).<sup>29</sup> The dramatic rise in unionization, labor union abuses, and the end of World War II contributed to

25. 654 F.2d at 1320.

26. *Id.* at 1323. 29 U.S.C. § 158(b)(4)(ii)(A) (1976). See note 16 *supra* for the text of § 8(b)(4), which prohibits coercion to achieve agreements outlawed in § 8(e). The Ninth Circuit, having found no § 8(e) violation, could see no violation under § 8(b)(4)(ii)(A). Such agreements need not be reached voluntarily. *Construction, Laborers, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Northeastern Ind. Bldg. & Constr. Council*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965).

27. 654 F.2d at 1324. See note 8 *supra* for the text of § 8(e). The construction industry proviso, unlike the companion proviso for the apparel industry, does not exempt such agreements from the reach of § 8(b)(4)(ii)(B). *NLRB v. IBEW*, 405 F.2d 159, 163-64 (9th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969).

28. 654 F.2d at 1324.

29. Until the Taft-Hartley Amendments, Labor-Management Relations (Taft-Hartley) Act, ch. 120, §§ 1-507, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-197 (1976)), Congress had effectively exempted labor from secondary boycott liability under the Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)), and the Clayton Act, ch. 323 § 16, 38 Stat. 730, 737 (1914) (current version at 15 U.S.C. § 13 (1976)), except for conduct in furtherance of a conspiracy with a nonlabor group. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 640 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 616, 623 (1967). See *Allen Bradley Co. v. IBEW, Local 3*, 325 U.S. 797 (1945); *United States v. Hutcheson*, 312 U.S. 219 (1941). Prior to the Norris-LaGuardia Act, 47 Stat. 70 (1932), unions had no exemption from antitrust laws for secondary strikes and boycotts. *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n*, 247 U.S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1920). Discussion of the Norris-LaGuardia Act is beyond the scope of this Note.

the passage,<sup>30</sup> over President Truman's veto, of the Taft-Hartley Act in 1947.<sup>31</sup> The Taft-Hartley Act introduced significant changes in the NLRA, directed mainly at achieving federal regulation of certain union activities.<sup>32</sup> Congress subdivided section 8 into sections 8(a), which retained the unfair employer labor practices enumerated in the original NLRA, 8(b), which added six unfair union labor practices, and 8(c), which introduced a free speech provision.<sup>33</sup> Section 8(b)(4) prohibited an inducement not to handle goods or perform services with the object of advancing a secondary boycott.<sup>34</sup>

Though the terms of section 8(b)(4) seemed to prevent secondary boycotts, Congress perceived that the Board and the courts had created substantial loopholes.<sup>35</sup> Therefore, Congress enacted the Landrum-Griffin Act.<sup>36</sup> In addition to closing other perceived loopholes in section 8(b),<sup>37</sup> Congress attacked a potent Teamsters Union secondary boycott weapon—the “hot cargo” clause.<sup>38</sup> Section 8(e) directly foreclosed the use of the “hot cargo” clause,<sup>39</sup> unless the clause satisfied a primary objective, such as work preservation,<sup>40</sup> or came under one of the two provisos.

### The legislative history of the Landrum-Griffin amendments

30. D. WOLLERT & B. AARON, *LABOR RELATIONS AND THE LAW* 109 (2d ed. 1960).

31. Labor-Management Relations (Taft-Hartley) Act, ch. 120, §§ 1-507, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-197 (1976)).

32. 1 J. JENKINS, *LABOR LAW* § 2.25 (1968).

33. 61 Stat. 140-2 (1947), 29 U.S.C. §§ 158(a)-(c) (1976).

34. 29 U.S.C. § 158(b)(4) (1976).

35. Goldberg & Meiklejohn, *Title VII: Taft-Hartley Amendments with Emphasis on the Legislative History*, 54 *Nw. U.L. REV.* 747, 760 (1960).

36. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 543 (1959) (codified at 29 U.S.C. §§ 151-169 (1976)).

37. One such closure extended the prohibitions of § 8(b)(4)(A) to any individual. The original version had used the plural “employees,” which as defined by the statute excluded railway, airline, public employees and supervisors. The plural term meant that inducements to a single employee could not be reached. *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 671 (1951).

38. Goldberg & Meiklejohn, *supra* note 35, at 759. The “hot cargo” clause essentially established a secondary boycott in advance. Under these clauses, signatory employers agreed not to require employees to handle goods from certain other employers, not to do business with those other employers, or both. A union signatory subcontracting clause is merely a variant of the “hot cargo” clause. *Pacific Northwest Chapter v. NLRB*, 654 F.2d 1301, 1310 (9th Cir. 1981).

39. 29 U.S.C. § 158(e) (1976). The text appears at note 8, *supra*.

40. *National Woodwork Mfrs. v. NLRB*, 386 U.S. 612, 620 (1967).

does not lend great insight into the scope and meaning of section 8(e). Both the Ninth Circuit<sup>41</sup> and the Supreme Court<sup>42</sup> have reviewed this history on several occasions. At least four competing bills emerged from various congressional committees.<sup>43</sup> In the House, the Landrum-Griffin bill narrowly defeated a bill reported by the Labor Committee.<sup>44</sup> The Landrum-Griffin bill<sup>45</sup> contained the forerunner of the present section 8(e) as support for the section 8(b) prohibitions against secondary boycotts.<sup>46</sup> The Senate version outlawed "hot cargo" agreements only for the interstate trucking industry.<sup>47</sup> The Conference Committee compromise embraced the sweeping prohibition of the House bill with the addition of provisos excepting the construction and garment industries.<sup>48</sup>

### *The Connell Decision*

In addition to the legislative history, the interpretation given by the Supreme Court to section 8(e) in *Connell*<sup>49</sup> is central to both the majority and the dissenters in *Pacific Northwest Construction Co. (Connell)*, a building contractor, drew picketing from Local 100 because it refused to agree to subcontract work only to firms with a current contract with the union.<sup>50</sup> Various other unions represented Connell's employees; Local 100 never attempted to represent them or bargain on their behalf.<sup>51</sup> The union sought the agreement for only one reason—to require subcontractors to recognize it as the representative of their employees.<sup>52</sup> The union posted a sole picket at one of Connell's construction sites, work halted, and Connell signed

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41. *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. v. NLRB*, 654 F.2d 1301 (9th Cir. 1981) *rev'g* 609 F.2d 1341 (9th Cir. 1979); *ACCO Constr. Equip., Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975).

42. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

43. *Goldberg & Meiklejohn*, *supra* note 35, at 759-60.

44. H.R. 8342, 86th Cong., 1st Sess. (1959). *Goldberg & Meiklejohn*, *supra* note 35, at 760.

45. H.R. 8400, 86th Cong., 1st Sess. (1959).

46. *Goldberg & Meiklejohn*, *supra* note 35, at 773.

47. S. 1555, 86th Cong., 1st Sess. § 707 (1959).

48. 29 U.S.C. § 158(e) (1976).

49. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975).

50. *Id.* at 619.

51. *Id.*

52. *Id.* at 631.

the subcontracting agreement under protest.<sup>53</sup> Connell had previously filed a state antitrust complaint against Local 100, and the union removed the action to federal court.<sup>54</sup> Connell then amended its complaint to allege federal antitrust violations. The union defended, claiming the protection of section 8(e).<sup>55</sup>

The Supreme Court held that the construction industry proviso of section 8(e) afforded Local 100 no antitrust immunity.<sup>56</sup> The Court based its decision on three elements: (1) a reluctance by Congress to permit such unlimited "top-down" organizing; (2) the absence of a collective bargaining agreement; and (3) the absence of a common jobsite restriction in the subcontracting agreement directed toward limiting friction between union and nonunion employees.<sup>57</sup> Therefore, the *Connell* subcontracting agreement violated section 8(e) and could be the foundation of a federal antitrust suit.<sup>58</sup>

The *Connell* Court reasoned that "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns," and buttressed this proposition with the section 8(b) restriction on primary recognitional picketing and further additions to the prohibition on secondary boycotts.<sup>59</sup> The Court acknowledged the garment industry's exemption from section 8(b) and hinted that Congress felt less need for the use of subcontracting agreements as an organizational weapon in the construction industry.<sup>60</sup>

Because the union had no collective bargaining agreement with Connell, "[t]he federal policy favoring collective bargaining . . . can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market."<sup>61</sup> Thus, Local 100 became subject to anti-

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53. *Id.* at 620.

54. *Id.*

55. *Id.* at 621.

56. *Id.* at 633.

57. *Id.* at 631-33.

58. *Id.* at 634-35. In summary, the Supreme Court stated: "[W]e think [the proviso's] authorization extends only to agreements in the context of collective bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well." *Id.* at 633.

59. *Id.* at 632.

60. *Id.* at 633 n.13.

61. *Id.* at 626.

trust law as pleaded by Connell. Finally, the union's subcontracting agreement failed—in at least two regards—to associate itself with the labor tranquility rationale for section 8(e). First, the agreement covered only the work of Local 100 members, but otherwise did not attempt to regulate subcontracting.<sup>62</sup> Thus, union members could find themselves working shoulder-to-shoulder with nonunion employees. Second, the agreement went beyond protection of Local 100 members, since it would apply to jobsites where no Local 100 people worked.<sup>63</sup> The *Connell* Court believed that to uphold this agreement would create an unlimited organizational weapon.<sup>64</sup>

### C. THE NINTH CIRCUIT'S ANALYSIS: POLICY OVER PRECEDENT?

#### *The Majority*

The Engineers contended that their subcontracting clause represented an attempt to preserve work for Local 701 members within the multi-employer bargaining unit of AGC—a goal viewed as primary by the Supreme Court in *National Woodwork Manufacturers Association v. NLRB*<sup>65</sup>—and therefore not subject to section 8(e).<sup>66</sup> The Ninth Circuit rejected this interpretation because, by its language, the clause did not limit subcontracting to members of AGC.<sup>67</sup> More importantly, however, the Ninth Circuit noted that any work preservation subcontracting clause which attempts to preserve work for a multi-employer bargaining unit is inevitably secondary in nature,<sup>68</sup> because it would require one employer to boycott another unless both

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62. *Id.* at 631.

63. *Id.*

64. *Id.* Justices Douglas, Stewart, Brennan and Marshall dissented. A brief dissent by Justice Douglas, who joined Justice Stewart's exhaustive dissent, emphasized his feeling that "the union's conduct is regulated solely by the labor laws." *Id.* at 638. Justice Stewart presented a detailed review of legislative history in support of the conclusion that "Congress did not intend to restore antitrust sanctions for secondary boycott activity such as that engaged in by Local 100 in this case, but rather intended to subject such activity only to regulation under the National Labor Relations Act and § 303 of the Labor Management Relations Act." *Id.* at 654-55. By introducing an antitrust remedy, the Court altered the balance of power between labor and management that Congress codified. *Id.* at 655.

65. 386 U.S. 612 (1967). See note 22 *supra*. *National Woodwork* concerned a single employer; *Pacific Northwest* involves a multi-employer bargaining group.

66. 654 F.2d at 1307.

67. *Id.*

68. *Id.* at 1308.

agreed to the union contract.<sup>69</sup> The Engineers also argued that one of the goals was preserving work for each contractor's employees and this removed the subcontracting clauses from section 8(e).<sup>70</sup> However, mixed objectives do not cure the infirmities of the clauses, the Ninth Circuit held.<sup>71</sup>

The quandary facing the Ninth Circuit in reviewing the legislative background can be stated as: (1) does the background indicate a congressional intent to allow union signatory subcontracting clauses, and if so, (2) are they meant to be confined to jobsites where union members are present? The Ninth Circuit limited en banc majority found two sources persuasive. First the court cited a Conference Committee statement expressing a desire not to change the then present state of the law "with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements."<sup>72</sup> The majority also relied on remarks by Senator Kennedy, the Senate sponsor: "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under § 8(e) . . . ."<sup>73</sup> For the Ninth Circuit majority then, section 8(e) did not proscribe union signatory subcontracting clauses per se.

The Ninth Circuit majority then scrutinized the legislative background to determine if Congress intended union signatory subcontracting clauses to be valid only at jobsites where union members worked. Here the majority viewed legislative intent in light of the contemporaneous decision, *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door)*:<sup>74</sup>

The *Sand Door* decision . . . , which supplied much of the impetus for § 8(e), had legitimized secondary boycotts the objectives of which clearly went beyond the mere avoidance of shoulder-to-

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69. *Id.* (quoting *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (9th Cir. 1964)). *Accord*, *NLRB v. National Maritime Union*, 486 F.2d 907, 914 (2d Cir.), *cert. denied*, 416 U.S. 970 (1973).

70. 654 F.2d at 1308.

71. *Id.*

72. *Id.* at 1312.

73. *Id.*

74. 357 U.S. 93 (1958).

shoulder friction between workers. It is true that the construction industry proviso narrowed the geographical scope of the *Sand Door* rule by introducing the jobsite limitation, but we do not interpret the words of the proviso as indicating an intent to narrow the substantive scope of the *Sand Door* rule on the jobsite.<sup>76</sup>

In support of the conclusion that Congress intended no restriction requiring union members' presence, the Ninth Circuit cited a 1959 District of Columbia Court of Appeals case<sup>76</sup> upholding subcontracting agreements similar to those in *Pacific Northwest*, and the testimony of one of the litigants before Congress.<sup>77</sup>

After elaborating on the legislative and historical background of section 8(e), the Ninth Circuit distinguished *Connell*. The employers argued that *Connell* required the presence of union members at the jobsite before the disputed subcontracting agreements could apply.<sup>78</sup> The Ninth Circuit majority rejected that argument as too narrow.<sup>79</sup> However, it conceded that "the *Connell* opinion contains considerable emphasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to 'top-down' organizing that is one of the effects of subcontractor agreements."<sup>80</sup> After acknowledging the Congressional hostility to "top-down" organizing emphasized in *Connell*, the Ninth Circuit reasoned that, within the context of a collective bargaining agreement, such an organizing weapon is limited by the employer's ability to assert countervailing demands at the negotiating table.<sup>81</sup>

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75. 654 F.2d at 1313.

76. *Operating Eng'rs Local 3 v. NLRB*, 266 F.2d 905 (D.C. Cir.), cert. denied, 361 U.S. 834 (1959).

77. 654 F.2d at 1313 and 1313 n.22. The majority also mentioned a survey suggesting that a number of similar subcontracting agreements existed in 1959 and that Congress did not intend to alter those arrangements. *Id.* at 1314. Interestingly, Professor Cox, adviser to Senator Kennedy on the amendments, has stated that "Congress had no information about the prevalence or use of similar [hot cargo] clauses in other industries [than the apparel industry]." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 273-74 (1959).

78. 654 F.2d at 1314.

79. *Id.*

80. *Id.*

81. *Id.* at 1321.

But, at the least, the absence of a collective bargaining agreement and the resultant antitrust focus of *Connell* allowed the Ninth Circuit to infuse additional factors into its decision. These factors included: (1) conditions of the construction industry, and the various considerations affecting it; (2) limits on "top-down" organizing imposed by the collective bargaining context; and (3) certain practical matters.

The Ninth Circuit believed that, when pursued in the course of collective bargaining, union signatory subcontracting clauses reflect a variety of both primary and secondary interests beyond jobsite friction.<sup>82</sup> Unlike the union's purely secondary objective in *Connell*, Local 701 faced the task of protecting wage levels and benefits in a situation where "the work force of any given employer—contractor or subcontractor—is highly flexible and grows or diminishes or even disappears depending on the temporary contracting or subcontracting arrangements at any particular jobsite."<sup>83</sup> Through subcontracting, multiple employers may hire a few workers for short periods of time, and the fluidity of such arrangements raises union interests beyond the avoidance of union-nonunion friction. Because "working conditions applicable to one set of workers may very well affect others working on the same project,"<sup>84</sup> a subcontracting agreement pursued by a union representing employees of the prime contractor can reflect several primary objectives.

The court maintained that the *Connell* opinion, particularly its discussion of section 8(e)'s legislative history, "is sensitive both to the interconnection of interests between employees of the various contractors and subcontractors and the broad manner in which any or all of these factors may be exhibited at the jobsite."<sup>85</sup> As authority, the Ninth Circuit quoted extensively from a Senator's statement—referred to only by way of footnote citation in *Connell*—describing the integral nature of construction projects and lack of neutrality among such employers.<sup>86</sup> The Supreme Court's bare citation attempted to support the contention that section 8(e) may have been intended to overrule a case

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82. *Id.* at 1317.

83. *Id.* at 1316.

84. *Id.* at 1317-18.

85. *Id.* at 1318.

86. *Id.* at 1318-19.

which prohibited jobsite picketing of a contractor whose nonunion subcontractor was working at the jobsite.<sup>87</sup> The Ninth Circuit found in other sources cited by the *Connell* opinion similar references to the community of interests at the jobsite.<sup>88</sup>

The presence of a collective bargaining agreement<sup>89</sup> is critical to the Ninth Circuit's holding that the present provisions may lawfully extend beyond a single jobsite to other sites where union members may not even be employed.<sup>90</sup> The Ninth Circuit theorized that the collective bargaining context imposes limits on the "top-down" organizing effect of subcontracting agreements.<sup>91</sup> Despite the fact that "[t]here is some 'top-down organizing' effect in any subcontracting agreement, including those which all parties must admit would be valid and within the proviso,"<sup>92</sup> the Ninth Circuit majority argued that Congress intended to legitimize these effects out of recognition for the community of jobsite interests.<sup>93</sup> Because the union in *Connell* avoided section 8(b) limits on coercive secondary pressure by its avowed disinterest in organizing or representing *Connell* employees, the subcontracting agreement could not be upheld in light of congressional hostility to "top-down" organizing.<sup>94</sup> But the Ninth Circuit felt that the unions in *Pacific Northwest* possessed no such unlimited weapon. If the agreements are sought

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87. *Id.* (citing *Connell*). The case referred to by the *Connell* Court is *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). The Supreme Court's statement is curious in light of the Conference Committee report on § 8(e) which stated: "Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the Denver Building Trades case would remain in full force and effect." 105 CONG. REC. 17,900 (1959), reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2512.

88. 654 F.2d at 1319. The Ninth Circuit frequently derived these sources from footnotes in the *Connell* opinion. See *id.* n.34, particularly Comment, *The Impact of the Taft-Hartley Act on the Building and Construction Industry*, 60 YALE L.J. 673, 684-89 (1951) discussing "numerous other interests that a union representing a primary group of employees may have in the employment arrangements of other employees at the jobsite."

89. The AGC agreement appeared in their contract with the Engineers. The Woelke-Carpenters provision entered into negotiations to renew their collective bargaining agreement. 654 F.2d at 1316 n.29. For a discussion of the contract provisions, see text accompanying notes 5-14 *supra*.

90. 654 F.2d at 1316. The court further noted a theoretical possibility supporting such union signatory subcontracting clauses in the absence of a collective bargaining relationship. *Id.* at 1321 n.37.

91. *Id.* at 1321.

92. *Id.* at 1320.

93. *Id.*

94. *Id.* at 1321.

during organizational or recognitional picketing, the union is subject to the strictures of section 8(b).<sup>95</sup> If sought by a union already representing the contractor's employees, the employer may counter with other demands as part of the negotiating calculus. Therefore, "the existence of a collective bargaining relationship *clearly* brings a union signatory subcontracting agreement within the proviso of § 8(e)."<sup>96</sup> The Ninth Circuit went on to state that such an agreement may be valid absent a collective bargaining relationship if the potential for jobsite friction between represented workers and another employer's workers actually exists.<sup>97</sup>

Practical considerations also contributed to the Ninth Circuit holding. For example, "[j]obsite by jobsite negotiation of subcontract agreements would seem burdensome to the point of impossibility."<sup>98</sup> The alternative—permitting the subcontracting agreements to be triggered when union members appeared at the jobsite—poses severe enforcement problems.<sup>99</sup> Such an alternative could also foster anti-union discrimination by employers.

### *The Dissents*

The dissenters emphasized the antitrust and "top-down" organizing effects of union signatory subcontracting agreements rather than the special conditions of the construction industry. Using the *Connell* opinion as a starting point, the dissenters condemned the majority holding for three reasons. First, a signa-

95. *Id.*

96. *Id.* (emphasis in original).

97. *Id.* n.37. This hypothetical possibility is based on the *Connell* opinion's language quoted at note 75 *supra*.

98. *Id.* at 1322. This practical concern is strongly reflected in § 8(f), which authorizes "pre-hire" agreements. Construction industry unions may represent and obtain collective bargaining agreements for workers not yet hired and before the majority status of the union has been determined. 29 U.S.C. § 158(f) (1976). The District of Columbia Circuit, in an important decision, has held that § 8(f) agreements are sufficient to trigger § 8(e) protection for union signatory subcontracting clauses. *Donald Shriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980). Thus a construction union representing workers under either § 9(a) (exclusive bargaining representative elected by a majority of a proper unit) or § 8(f) satisfies the collective bargaining context required by *Connell*, at least in the District of Columbia Circuit.

99. 654 F.2d at 1322. The limited en banc majority emphasized "the difficulty of defining the applicable time span during which jobsite conflict is threatened" and the temporary quality of employment arrangements at construction jobsites. *Id.* Responding to the dissenters, the majority reasoned that compliance with subcontracting agreements is easier to monitor than the presence of a union worker at any particular time. *Id.* n.38.

tory employer sacrifices the "right to choose the more efficient subcontractor. Preservation of this opportunity would be more consistent with the primary concern of *Connell* than is the position of the en banc court."<sup>100</sup> Even a more efficient nonsignatory subcontracting firm that adheres to union standards of wages and conditions is foreclosed from the jobsite.<sup>101</sup> Second, the dissenters stated that *Connell*—and pre-*Connell* Ninth Circuit investigations into the legislative history of section 8(e)<sup>102</sup>—found jobsite friction to be the main congressional concern.<sup>103</sup> Therefore, the extension of subcontracting agreements to jobsites where the signatory union had no members employed flouted congressional intent. Finally, the majority holding's assertion that Congress intended to preserve construction industry collective bargaining patterns as they existed in 1959 contained fallacies. The proviso partially overruled the *Sand Door*<sup>104</sup> case of 1958 and "[f]urthermore, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959."<sup>105</sup> The dissenters also suggested that the unions could obtain comparable results by a primary method—the union standards clause.<sup>106</sup>

The dissenters<sup>107</sup> claimed that Congress mainly intended to alleviate jobsite friction, thereby limiting subcontracting agreements to jobsites with union members present.<sup>108</sup> The dissenters were swayed by pervasive references in the legislative record to the proximity of union and nonunion workers as well as by a

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100. *Id.* at 1326. (Sneed, J., dissenting). Judge Farris, author of the other dissenting opinion voiced a similar criticism: "In *Connell* . . . , the Supreme Court concluded that the construction industry proviso did not authorize a construction industry employer and a union not representing its employees to agree to limit the employer's right to subcontract." *Id.* at 1327 (citations omitted).

101. *Id.* at 1325 (Sneed, J., dissenting).

102. *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. v. NLRB*, 609 F.2d 1341 (9th Cir. 1979), *rev'd*, 654 F.2d 1301 (9th Cir. 1981); *ACCO Constr. Equip., Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975).

103. 654 F.2d at 1326.

104. *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958).

105. 654 F.2d at 1327.

106. *Id.*

107. Though two dissents appeared in *Pacific Northwest*, the author of one, Judge Farris, joined Judge Sneed's dissent "in all respects" and merely added "some comments regarding the scope of the construction industry proviso." *Id.* Therefore, this Note treats the two dissents as one.

108. *Id.* at 1326.

previous Ninth Circuit opinion<sup>109</sup> by a dissenter in *Pacific Northwestern* that surveyed the legislative history of section 8(e). In that earlier opinion, *ACCO Construction Equipment, Inc. v. NLRB*, the Ninth Circuit panel focused on the peculiar nature of the construction industry, which involves a variety of crafts, and numerous subcontractors working continuously alongside one another, as the source of congressional concern.<sup>110</sup>

The Ninth Circuit dissenters also relied on legislative comment to the effect that section 8(e) addressed the jobsite handling of materials fabricated by nonunion members.<sup>111</sup> The author of the overturned three-judge panel decision had pointedly stated: "[T]he broad assertion that the construction industry proviso was designed to leave the law unchanged is inaccurate."<sup>112</sup> The opinion further maintained that union signatory subcontracting clauses had not been adjudged lawful at the time of the proviso's passage.<sup>113</sup> In the three-judge panel's estimation, at least two changes occurred as a result of the interaction between *Sand Door*<sup>114</sup> and the proviso. First, Congress added a jobsite restriction, an element not addressed in *Sand Door*.<sup>115</sup> Second, Congress stated that the proviso did not protect agreements concerning jobsite handling of non-union materials, whereas *Sand Door* had found such agreements lawful.<sup>116</sup>

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109. *ACCO Constr. Equip., Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975) (per Choy, C.J.).

110. *Id.* at 851. Judge Sneed's excerpt from *ACCO* appears at 609 F.2d at 1349. Soon after the events surrounding the enactment of § 8(e), Professor Cox remarked:

The fact that Congress rejected the attacks upon the secondary boycott provisions of the Landrum-Griffin bill which alleged that the bill unwisely threw doubt upon the validity of bona fide restrictions upon subcontracting, may be attributed to disbelief in the allegation just as easily as to congressional opposition to contractual restrictions upon managerial freedom to subcontract, although there are undoubtedly individuals who hoped also to resolve the subcontracting issue in favor of management.

Cox, *supra* note 77, at 273. See also Goldberg & Meiklejohn, *supra* note 35, at 771-72.

111. 654 F.2d at 1326.

112. *Pacific Northwest Chapter v. NLRB*, 609 F.2d 1341, 1349 (9th Cir. 1979). The opinion is by Judge Sneed, who dissented from the limited en banc decision.

113. *Id.*

114. *Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door)*, 357 U.S. 93 (1958).

115. 609 F.2d at 1349.

116. *Id.*

#### D. SIGNIFICANCE: AN IMPORTANT LABOR PRACTICE TAMED RATHER THAN OUTLAWED

National labor policy considerations and the historical context underlying section 8(e) mandated the Ninth Circuit's reversal of the three-judge panel. Though the *Connell* opinion stated that, with the enactment of section 8(e), Congress did not intend to preserve a pattern of bargaining practices,<sup>117</sup> the question of what manner of union signatory subcontracting clauses are lawful remained unanswered. With *Pacific Northwest*, the Ninth Circuit fashioned a reasonable accommodation between the concerns outlined in *Connell* and congressional recognition of the unique conditions of the construction industry. The Landrum-Griffin Act reflects congressional concessions to the construction industry beyond the labor tranquility rationale, acknowledging economic realities at construction jobsites.

Unlike the purely secondary goals of the union in *Connell*, these subcontracting agreements seek to standardize working conditions of a signatory contractor's employees.<sup>118</sup> By recognizing this primary union concern, the Ninth Circuit joins the District of Columbia and Third Circuits.<sup>119</sup> The overturned three-judge panel opinion failed due to its singular preoccupation with jobsite friction and "top-down" organizing, overlooking legislative concern for construction industry unions.<sup>120</sup> The limited en

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117. 421 U.S. at 628.

118. See text accompanying notes 93-99 *supra*.

119. *Donald Shriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980); *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368 (3d Cir. 1979). The holding in *Donald Shriver* firmly supports the Ninth Circuit decision. Cited frequently in *Pacific Northwest*, it contains a forceful exposition of analysis similar to the Ninth Circuit's. The District of Columbia Circuit held: (1) a § 8(f) prehire agreement is a sufficient collective bargaining relationship to invoke the construction industry proviso, 635 F.2d at 875; (2) union signatory subcontracting provisions may extend to jobsites where union members are not present, *id.* at 881; and, (3) such provisions may designate particular unions, *id.* at 885. The *Donald Shriver* court, as did the Ninth Circuit, recognized the primary union goal of standardized working conditions in addition to the avoidance of common jobsite labor friction. *Id.* at 873. For a comparison of *Donald Shriver* and the overturned panel opinion in *Pacific Northwest*, see Note, *Hot Cargo Agreements in the Construction Industry: Restraints on Subcontracting Under the Proviso to Section 8(e)*, 1981 DUKE L.J. 141 (1981).

120. See Note, *Hot Cargo Contracts in the Construction Industry: Pacific Northwest Chapter, Associated Builders & Contractors, Inc. v. NLRB*, 17 WILLAMETTE L. REV. 741 (1981) (describing the opinion as "strained").

banc opinion defines limits to "top-down" organizing while adequately providing for the community of interests displayed at the jobsite.

*Tom C. Clark*

#### IV. THE PICKET AND THE PROPERTY OWNER

##### A. INTRODUCTION

In *Seattle-First National Bank v. NLRB*,<sup>1</sup> the Ninth Circuit held that a union may picket on private property in order to effectively communicate its message in support of an economic strike.<sup>2</sup> Since economic strike activity is central to section 7 rights under the National Labor Relations Act (the Act),<sup>3</sup> picketing related to that activity is restricted less than is organizational or area standards picketing. Consequently, this court would not hold a union involved in economic activity picketing to the same high burden of proof applicable to other picketing activities.<sup>4</sup> However, even though a union may picket on private property, the property owner's rights must be protected by properly restricting the number of pickets and their conduct.<sup>5</sup>

##### B. FACTS

Seattle-First National Bank (the Bank) owns a fifty-story office building in Seattle, Washington. The Bank occupies approximately one-third of the building, and leases the remainder to commercial, professional and retail-trade tenants. During 1978, the Mirabeau Restaurant (the Restaurant) leased space on

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1. 651 F.2d 1272 (9th Cir. 1980) (per Sneed, J.; the other panel members were Fletcher, J. and Jameson, D.J., sitting by designation).

2. *Id.* at 1275.

3. Section 7 of the National Labor Relations Act reads in part: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1976).

4. 651 F.2d at 1276. For organizational or area standards picketing unions must prove that no other reasonable means of communication exists. *Id.* An economic strike, such as that engaged in here, is defined as "a work stoppage . . . , typically in support of bargaining demands regarding wages and working conditions . . . ." R. GORHAM, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING, 339 (1976).

5. 651 F.2d at 1277.

the forty-sixth floor of the building, along with a stock brokerage firm. The Bank retained exclusive control of the foyer on that floor which was open to the public. The foyer, in addition to providing access to the businesses located on that floor, was used by persons changing elevators to continue to the forty-seventh floor and above.<sup>6</sup>

In April 1978, the Restaurant began negotiations with the Hotel, Motel, Restaurant Employees and Bartenders Union Local 8, AFL-CIO (the Union) for a new collective-bargaining agreement. On July 14, two days after discontinuing negotiations, and after having failed to reach a new agreement, the Union began an economic strike against the Restaurant.<sup>7</sup>

The Union stationed pickets, who carried placards and distributed leaflets and information to the public, at all entrances to the building. In addition, the union assigned one or two persons to distribute leaflets in front of the Restaurant in the forty-sixth floor foyer during lunch and dinner hours.<sup>8</sup>

On the first day of the strike, the Bank demanded that the pickets leave the foyer and threatened them with arrest for trespass. The pickets refused to leave and the Bank sought an injunction in state court barring access to the forty-sixth floor. The state court stayed its proceedings, holding that its jurisdiction had been pre-empted when the Union filed unfair labor practice charges against the Bank with the National Labor Relations Board (the NLRB).<sup>9</sup>

Based on the Union's charge, the NLRB General Counsel issued a complaint against the Bank on August 25, 1978. The

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6. *Id.* at 1273.

7. Although the Restaurant was the primary employer, it was not a party to this dispute. The Bank entered this action as the property owner, but was also recognized by the NLRB as an employer under the Act. *Id.* n.2. The Bank also had an interest in the outcome of the original conflict between the Restaurant and the Union because the rent paid by the Restaurant was based on a percentage of monthly gross sales. Consequently, the Bank lost rental income during the strike. Brief for Respondent at 7 n.4.

8. Seattle-First Nat'l Bank, 243 N.L.R.B. 898 (1979).

9. 651 F.2d at 1273. Since the Union did not file an unfair labor practice charge until after the Bank sought injunctive relief in state court, the state court may not have been pre-empted from proceeding. *See* Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1980). However, since this issue was not under review in this case, the court offered no opinion.

complaint alleged unfair labor practices under section 8(a)(1) of the Act,<sup>10</sup> based solely on the Bank's threat to arrest the pickets on the forty-sixth floor of its building.<sup>11</sup>

A three-member panel of the NLRB considered the issues<sup>12</sup> and found in favor of the Union, holding that the Bank's threat of arrest violated section 8(a)(1) of the Act.<sup>13</sup> The NLRB found that the Bank's property rights must yield to the Union's section 7 rights and that the Union had the right to issue leaflets and discuss its dispute with the public in the foyer of the forty-sixth floor of the Bank's building.

The NLRB ordered the Bank to allow the picketing to continue and to post in the foyer a notice of intent not to interfere with those strike activities.<sup>14</sup> The Bank petitioned the circuit court of appeals for review of the NLRB's order; the NLRB concurrently filed for enforcement.<sup>15</sup>

### C. BACKGROUND

The activity of pickets on private property has exposed the conflict between the picketer's right to engage in protected activity as defined by the Act<sup>16</sup> and the property owner's right to the free and unencumbered use and enjoyment of his property.<sup>17</sup> However, when that property owner has used his property in a public manner, transforming it into "quasi-public" property, labor activists have argued, and the courts have agreed, that the

10. Section 8(a)(1) provides in part: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ." 29 U.S.C. § 158(a)(1)(1976).

11. 651 F.2d at 1274.

12. Both parties stipulated to the facts, waived a hearing before an Administrative Law Judge, and waived all oral testimony. The proceedings were transferred directly to the NLRB, where they were reviewed by Chairman Fanning, and Board members Jenkins and Murphy. 243 N.L.R.B. at 898.

13. *Id.* at 899.

14. *Id.* at 900.

15. 651 F.2d at 1274.

16. For the activities defined in the Act as being protected, see note 3 *supra*.

17. In contrast, the right to picket on *public* property has been the subject of extensive litigation and has evolved from a constitutionally protected right based on the first and fourteenth amendments, *Thornhill v. Alabama*, 310 U.S. 88 (1940), to a statutorily regulated and protected activity under the Act. Picketing on public property is also generally considered immune from state regulation by virtue of federal preemption. See note 9 *supra*. For a further discussion of the judicial review of picketing, see R. GORMAN, *supra* note 4, at 211-13.

property owner has relinquished his right to sole control of that property.<sup>18</sup>

Using precedent established in cases related to soliciting as well as to picketing, employees originally relied on first amendment principles to protect their right to picket on private property.<sup>19</sup> A balancing approach emerged in *NLRB v. Babcock & Wilcox, Co.*<sup>20</sup> Although decided a quarter of a century ago, *Babcock & Wilcox* still controls conflicts arising from union activities on private property. In *Babcock & Wilcox*, non-employee union organizers attempted to distribute leaflets in a company-owned parking lot. The Court held that because both property rights and employees' organizational rights are protected, both must be accommodated. But, in the final analysis, the property owner's right to exclude must yield to the employees' rights, should no other reasonable alternative exist.<sup>21</sup>

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18. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (Black, J.).

19. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court extended first amendment protection to a religious leafleter in a company town which had all the characteristics of any other town and was indistinguishable from public property. In *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), the Court found the "functional equivalent of the business district in *Marsh*" in a shopping center. *Id.* at 318. Consequently, first amendment protection was extended to labor unions picketing there.

The first amendment protection began to shrink, however, in *Lloyd v. Tanner*, 407 U.S. 551 (1972). The *Lloyd* Court distinguished *Logan Valley* on the facts, claiming that the picketing in *Logan Valley* was protected by the first amendment because the activity of the pickets was related to the center's operation. The activity of the anti-war leafleters in *Lloyd* was totally unrelated to that center's operation; no first amendment protection was applicable. The Court also held that *Lloyd Center's* open-to-the-public policy did not destroy the private character of the center or equate it to a municipal business district. *Id.* at 569. In *Central Hardware Co. v. NLRB*, 407 U.S. 538 (1972), announced the same day as *Lloyd*, the Court again questioned the "functional equivalent" test of *Marsh* and *Logan Valley*. The Court held that, unlike shopping centers, single unit stores could not be described as a community business block. First amendment principles do not apply to this case because the property did not "assume, to some significant degree, the functional attributes of public property devoted to public use." *Id.* at 547. The issues in *Central Hardware* must be resolved as directed by § 7 of the Act.

20. 351 U.S. 105 (1956).

21. Organizational rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other . . . . The right to exclude from property has been required to yield to the extent needed to permit com-

The accommodation requirement of *Babcock & Wilcox* was quoted with favor by the Court in *Hudgens v. NLRB*.<sup>22</sup> In *Hudgens*, striking warehouse employees of the Butler Shoe Company began to picket the company's retail outlets. One store was located within the North DeKalb Shopping Center, in Atlanta, Georgia, a shopping center containing sixty stores housed in one large building with an enclosed mall. Since the shoe store could only be entered from the mall, the pickets stationed themselves outside the store, but inside the mall. They left after being threatened with arrest, and the union filed unfair labor practice charges against the shopping center.<sup>23</sup>

With *Hudgens*, the Supreme court eliminated the claim of first amendment protection for picketing, remanded to the NLRB for consideration under sections 7 and 8(a)(1) of the Act, and directed that the accommodation required by *Babcock & Wilcox* be applied.<sup>24</sup>

#### D. HOLDING OF THE COURT

The Ninth Circuit in *Seattle-First National Bank v. NLRB* relied on the Supreme Court decision in *Hudgens* and its instruction that the NLRB must apply the standards of the Act to the facts of cases of this genre and not rely on first amendment principles.<sup>25</sup> Additionally, the rights guaranteed the union under the Act, when in conflict with the rights of the property owner, must be resolved under the *Babcock & Wilcox* standard.<sup>26</sup>

The significant fact situation found by the NLRB in its review of *Hudgens* on remand was also found by the Ninth Circuit in *Seattle-First National Bank*. In both cases, it was asserted that the picketers were only able to identify their intended audience at the time the public actually entered the specific business

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munication on the right to organize.

*Id.* at 112.

22. 424 U.S. 507, 521 (1976).

23. *Id.* at 509-10.

24. *Id.* at 522. The Court also concluded that *Lloyd v. Tanner* had overruled *Logan Valley*. See note 19 *supra*. The Court stated that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." 424 U.S. at 521.

25. 651 F.2d at 1274.

26. *Id.* at 1276. For a discussion of the *Babcock & Wilcox* standard, see note 21 *supra* and accompanying text.

being picketed, not at the time potential customers entered the mall (*Hudgens*) or the bank building (*Seattle-First National Bank*).<sup>27</sup> Picketing on the street outside the bank building, while informing all persons entering the building of the labor dispute with the Restaurant, did not adequately reach those persons who, after having been in the building on other business, decided to eat at the Restaurant. The court noted this was particularly true of workers in the building who entered the premises early in the day, and had forgotten the pickets' message by the lunch hour. The court concluded that to deny pickets access to the forty-sixth floor foyer substantially damaged their rights under section 7 since this location was the only effective site for the union to convey its message to its intended audience.<sup>28</sup>

The court noted that the Bank had opened the foyer to the public as part of its invitation to patronize the Restaurant. In addition, there was no evidence that the presence of the pickets on the forty-sixth floor had been intrusive in any way or had denied the public or other tenants their expected use of this property. Therefore, the property rights of the Bank had to yield to accommodate the free exercise of the union's section 7 rights.<sup>29</sup>

The court was also swayed by the finding that the union was picketing in support of an economic strike.<sup>30</sup> The court recognized that organizational and area standards picketing are subject to greater restrictions,<sup>31</sup> but that since "[t]he right to picket

27. *Scott Hudgens and Local 315*, 230 N.L.R.B. 414, 416 (1977); *Seattle-First Nat'l Bank v. NLRB*, 651 F.2d at 1275.

28. 651 F.2d at 1275-76.

29. All evidence indicated that the pickets on the forty-sixth floor had been minimally intrusive. The Union had stationed no more than two pickets in the area at a time. They had not carried banners or placards, but had distributed handbills which they also held in front of themselves to form a picket line. *Id.* at 1277.

30. *Id.* at 1273.

31. Section 8(b)(7) of the Act restricts certain types of organizational picketing. 29 U.S.C. § 158(b)(7) (1976). Organizational picketing involves non-employees as well as employees. In addition, the audience toward whom organizational picketing is directed (the employees of the targeted company) is different from that of an economic picket line (the customers and the employees of the targeted company). For a discussion of the distinction between organizational and economic picketing and the intended audience, see *Scott Hudgens*, 230 N.L.R.B. 414, 416 (1977). See also Note, *Focusing on Labor Pickets' Rights In Shopping Centers With A Section 7 Lens*—*Scott Hudgens*, 27 D. PAUL L. REV. 1287 (1978). Area standards picketing is conducted by non-employees and is directed at employees and customers. For a recent examination of area standard pick-

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in support of an economic strike is at the core of section 7,"<sup>32</sup> a greater accommodation of the property owner's rights would have to be made.

The court did agree with the Bank that the foyer of the forty-sixth floor could not be properly compared to a shopping center mall, like the one in *Hudgens*.<sup>33</sup> The NLRB's order as issued was judged too broadly written to properly protect Bank property from damage or unnecessary abuse.<sup>34</sup> Consequently, the court remanded to the NLRB in order to place appropriate limits on the union's activity within the Bank's building.<sup>35</sup>

### E. CRITIQUE

In *Seattle-First National Bank*, the Ninth Circuit has supported the NLRB in expanding the application of section 7 rights available to labor organizations by allowing picketing within an office building. This is a logical response to the socio-economic trends which have produced shopping centers, industrial parks and multi-tenant, high-rise office buildings. Indeed, the Board has no choice but to insist that those persons whose employment is located in leased space on private property be granted the same rights as those whose employer is the owner and single occupant of a free-standing building. To do otherwise would "render section 7 meaningless."<sup>36</sup>

The ramifications of this development, however, could create some unpleasant problems for private property owners who until now have not faced these situations. For example, the long standing practice of the NLRB has been that pickets may not demonstrate within a store.<sup>37</sup> However, modern retailers, in many cases, stand in shoes similar to those of shopping center developers or office building owners since they are not always the primary employers of persons working in their buildings. It

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eting, see *Giant Foot Mkts. v. NLRB*, 633 F.2d 18 (6th Cir. 1981).

32. 651 F.2d at 1276.

33. "The mall in *Hudgens* was apparently quite long . . . The foyer is both smaller and normally quieter." *Id.* at 1277.

34. *Id.*

35. *Id.*

36. *Scott Hudgens*, 230 N.L.R.B. at 418.

37. *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (1953). See also *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951); *J.L. Hudson Co.*, 67 N.L.R.B. 1403 (1946); *May Dep't Stores Co.*, 59 N.L.R.B. 976 (1944).

is not unusual for department store owners, who attempt to reach a wide variety of customers, to distribute some of their operation, such as beauty salons or restaurants, to specialists who provide these unique services which the store is unable or unwilling to undertake. These leased departments rent space within the landlord store, often on a rate determined as a percent of sales.<sup>38</sup> The lessee or tenant benefits by sharing in the customer traffic provided by the landlord store, as well as various other services, which may include security, utilities, credit service and sales promotion. The landlord store benefits from the direct rental income and from the additional services offered by the tenant which enhances the landlord's customer relations.

In this situation, the landlord store is not the employer of the lessee's employees. The lessee pays its employees directly, provides all benefits and negotiations with any unions involved in its operation. However, if the lessee is unable to bargain satisfactorily with its employees' representatives, then based on *Seattle-First National Bank*, the store can expect pickets to patrol both the exterior and interior public areas of its building.<sup>39</sup> If the tenant is renting space in the basement of the store for use as a restaurant, the union representing its employees could station pickets outside the entrance to the restaurant, in the landlord's basement. Should the landlord object, and threaten the pickets with arrest for trespass, the union can file an unfair labor practice charge against the landlord and, as in *Seattle-First National Bank*, the state courts are likely to dismiss the issue on the basis of federal pre-emption.<sup>40</sup> The store could find itself in an unpleasant labor relations conflict even though it may have been very successful in negotiating with the union representing its own employees.

The store might argue that it is unjustified to treat one small department within its building as one would treat an independent store within a shopping center. In addition, one cannot compare the basement of a department store with the mall or a modern shopping center. This argument had some impact on the

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38. Such an agreement existed between the Bank and the Restaurant in *Seattle-First National Bank*. See Brief for Respondent at 7, n.4.

39. See notes 28 and 29 *supra* and accompanying text.

40. See note 9 *supra* and accompanying text.

court in *Seattle-First National Bank*.<sup>41</sup>

The Ninth Circuit recognized the differences between the Bank's forty-sixth floor foyer and a shopping center mall; consequently, it instructed the NLRB to limit its order to the Bank accordingly.<sup>42</sup> The court noted that the Union had not damaged the Bank's property or disturbed other businesses in the building and in fact had acted with moderation and restraint. However, the court insisted that the NLRB set proper limits on union activity. The court's warning is clear: It will enforce the NLRB's orders when the NLRB finds that section 7 rights have been infringed upon by employers. However, at the same time, the NLRB must make the necessary accommodation to the private property owner's rights as required by *Babcock & Wilcox* and *Hudgens*. That accommodation cannot be assumed, but must be specifically expressed in the NLRB's order as to the number of pickets acceptable and the range of activity allowed.<sup>43</sup>

This is the one safeguard that the property owner can rely upon. His building, be it shopping center, office building or department store, can be invaded by union activists who can picket under his own roof. The NLRB must limit that union activity to the extent necessary to prevent property loss or damage.

## F. CONCLUSION

High-rise, and multi-tenant office buildings, like shopping centers, are modern developments which encouraged employers to band together in lease agreements for mutual convenience and profit. The Ninth Circuit has held that employees' rights under the National Labor Relations Act may not be circumvented by a lessor-employer's reliance on a third-party owner's private property interests.<sup>44</sup>

The Ninth Circuit has extended the employees' right to picket to the interior of the building in which the employer has leased space, and is willing to allow that activity forty-six floors

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41. 651 F.2d at 1277. See comparison made by the court in note 33 *supra*.

42. 651 F.2d at 1277.

43. It was on this issue that Judge Fletcher based his dissent, claiming that the court's restriction here, absent any evidence of illegal picketing, is outside the court's jurisdiction. *Id.* at 1278.

44. *Id.* at 1276.

above the street. This activity is justified to enable the union to reach its intended audience on the employers' actual doorstep. The court insists, however, that the NLRB, while protecting the employees' rights, also accommodate the property owner's rights to the fullest extent necessary.<sup>45</sup>

*Alice Guckeen*

## V. OTHER DEVELOPMENTS IN LABOR LAW

In other significant decisions last term, the court devised new "willfulness" tests for two statutes, expressed a rather expansive view of federal statutory jurisdiction and adopted a *per se* rule regarding employer requests for employee statements given in conjunction with unfair labor practice investigations.

### A. WILLFULNESS STANDARD

In *Marshall v. Union Pacific Motor Freight Co.*,<sup>1</sup> the court in a *per curiam* opinion adopted a willfulness standard for violations of the Fair Labor Standards Act. As a consequence, neither a good faith belief by the employer in the lawfulness of the employer's wage and overtime policies nor complete ignorance of the Act's provisions will shield the employer with immunity. In *Kelly v. American Standard, Inc.*,<sup>2</sup> the court required only a knowing and voluntary violation to find willfulness under the Age Discrimination in Employment Act.

#### 1. *Marshall v. Union Pacific Motor Freight Co.*

In *Union Pacific*, the Secretary of Labor sought to enjoin the Union Pacific Motor Freight Company (the Company) from failing to pay past and future overtime compensation to its dispatchers. The Secretary contended that the Company's failure to pay overtime violated section 7 of the Fair Labor Standards Act (FLSA),<sup>3</sup> and that the violation was willful, so that the

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45. *Id.* at 1277.

1. 650 F.2d 1085 (9th Cir. 1981) (*per curiam*).

2. 640 F.2d 974 (9th Cir. 1981) (*per Boochever, J.*).

3. Section 7 of the Act provides that:

Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer

three-year rather than the two-year statute of limitations applied.<sup>4</sup> The Company countered that its dispatchers were exempt from the overtime provisions of the FLSA because their duties "affect the safety of operations of vehicles used in interstate commerce" and were, therefore, regulated by the Secretary of Transportation.<sup>5</sup>

The district court accepted the Company's arguments, finding that the dispatchers were exempt from the FLSA overtime provisions, and, alternatively, that the Company's failure to pay was not "willful." The Ninth Circuit reversed on both grounds.

### *No exemption*

The Company operates as a motor carrier in interstate commerce and handles freight which moves in part by rail. The dispatchers perform both inside and outside duties. The job of outside dispatcher was created to control unsafe and congested conditions in the terminal. Dispatchers also are responsible in part for implementing federal regulations on the transportation of hazardous materials and ensuring that containers and vehicles transporting hazardous materials are properly placarded. Based on these limited dispatcher duties, the Company contended that it, as an employer, was exempt from the FLSA's overtime regulations,<sup>6</sup> because implementing regulations "necessarily involves the performance of duties that directly affect safety of operation."<sup>7</sup> The panel rejected that argument because of a long-standing determination by the Interstate Commerce Commission that the primary duties of dispatchers do not bring them within the exemption.<sup>8</sup> The court explained that, were the com-

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than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (1976).

4. *Id.* § 255(a).

5. 650 F.2d at 1087. The Secretary's authority is found in 49 U.S.C. § 304 (1976).

6. The jurisdiction of the Secretary of Transportation under the Motor Carriers Act extends only to "those employees [of common carriers] whose activities *affect* the safety of operation." 650 F.2d at 1089 (quoting *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 553 (1940) (emphasis added)).

7. 650 F.2d at 1090.

8. The Commission applies a proximate cause test. While judgments in error by dispatchers may be contributing factors to subsequent accidents, they are never the proximate cause of the accidents. 650 F.2d at 1090 n.9.

pany's view accepted, any employer could be exempted from the overtime provisions of the FLSA simply by dividing among his employees those safety inspection and enforcement duties imposed by governmental regulations.

### *Willfulness*

Under the FLSA, an action for overtime pay must be brought within two years of the time the cause of action accrues—unless the violation is “willful”;<sup>9</sup> a willful action may be commenced within three years.<sup>10</sup> The Ninth Circuit had not previously adopted a standard for determining whether violations of the Act are willful. The court expanded the views taken by the District of Columbia<sup>11</sup> and Fifth<sup>12</sup> Circuits. Both those circuits hold that an employer is not relieved of its obligation to comply with the FLSA merely because of the employer's own error.<sup>13</sup> The Fifth Circuit holds further that reliance on the advice of counsel is no shield.<sup>14</sup> The Ninth Circuit standard is somewhat stricter. In this circuit,

[a] violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions. Reliance on erroneous advice is no bar to a finding of a “willful” violation, except for good faith reliance upon ad-

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9. 29 U.S.C. § 255(a) (1976).

10. *Id.*

11. In the District of Columbia Circuit, noncompliance is willful when the employer “is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt . . . [or] when an equally aware employer consciously and voluntarily charts a course which turns out to be wrong.” *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 462 (D.C. Cir. 1976), *quoted in* *Marshall v. Union Pac. Motor Freight Co.*, 650 F.2d at 1092.

12. The Fifth Circuit test is similar: “[A]n employer acts willfully and subjects himself to the three-year liability provision if he knows or has reason to know, that his conduct is governed by the Fair Labor Standards Act.” *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974) (emphasis in original), *quoted in* *Marshall v. Union Pac. Motor Freight Co.*, 650 F.2d at 1092.

13. In *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), the employer was familiar with the statutory provisions but erroneously concluded that they did not apply. *See* 650 F.2d at 1092. In *Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974), the employer had reason to suspect the statute applied to him. The employer's unwillingness to determine the statutory obligation did not protect him from the extra year of liability. *See* *Marshall v. Union Pac. Motor Freight Co.*, 650 F.2d at 1092.

14. *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1141-42 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

vice rendered by an appropriate government agency.<sup>15</sup>

The court has put employers on notice that neither the employer's own error, its assertion of ignorance of the Act's requirements, nor reliance on the advice of counsel will shield the employer from a finding of willfulness. Good faith reliance on the erroneous advice of an appropriate government agency, however, would not make a violation willful.

The opinion seems correct. The three-year statute of limitations of the FLSA serves to prevent an employer from forestalling a lawsuit by misleading its employees of rights available under the FLSA. Accordingly, neither ignorance, erroneous interpretation, nor reliance on the advice of its own counsel should be a bar when the employer has reason to mislead the employee.

## 2. *Kelley v. American Standard, Inc.*

In *Kelley v. American Standard, Inc.*,<sup>16</sup> the Ninth Circuit adopted a somewhat different willfulness standard for violations of the Age Discrimination in Employment Act (ADEA)<sup>17</sup> and remanded to the district court for redetermination of the willfulness of the employer's actions.

Kelley, the employee, was a territorial sales representative for defendant-employer American Standard, Incorporated of Seattle from 1954 to 1975. American reduced its sales force by forty employees in 1975, including one employee in the Seattle district. Kelley was the Seattle employee terminated. Plaintiff, fifty-seven years old, contended he was discharged because of his age—an allegation the employer denied.

The case was tried to a jury which found in favor of Kelley and awarded \$48,500 in damages. The court then awarded \$14,000 attorneys fees but denied Kelley's request for liquidated damages under the ADEA, finding that American had not acted "willfully,"<sup>18</sup> and that the "good faith" defense<sup>19</sup> under ADEA

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15. *Marshall v. Union Pac. Motor Freight Co.*, 650 F.2d at 1092-93.

16. 640 F.2d 974 (9th Cir. 1981) (per Boochever, J.).

17. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634 (1976)).

18. 29 U.S.C. § 626(b) (1976). Section 626(b) limits liquidated damages to willful violations.

19. *Id.* § 260.

applied.

The willfulness test adopted by the Ninth Circuit for discrimination requires only a knowing and voluntary violation of the Act to entitle the plaintiff to liquidated damages.<sup>20</sup> The panel rejected the test employed by the district court which required specific intent and knowledge of ADEA implications. The court reasoned that to require knowledge of implications under the Act could have the anomalous effect of encouraging employers to know as little as possible about the ADEA so that they would not be liable for liquidated damages.

The defendant objected to the adoption of the lower standard, and argued that such an approach would make liquidated damages automatic.<sup>21</sup> In a footnote, the panel declined to extend the provisions of double damages to reckless violations, an approach urged by the Third Circuit.<sup>22</sup> The panel then dismissed the defendant's argument on the grounds that an employer's act could violate the ADEA, without being knowing and voluntary.<sup>23</sup> However, defendant's contention remains unanswered. For example, a plaintiff need not present evidence of the defendant's state of mind to establish a basis for liability.<sup>24</sup> Statistical evidence can be used to establish a prima facie case, and, in fact, is often the only evidence available to a discharged employee.<sup>25</sup> Statistical evidence can now also be used to establish willfulness under the "knowing and voluntary" standard.<sup>26</sup> Kelly introduced statistical evidence and testified to discriminatory statements made by American's employees.<sup>27</sup> The panel held that either type of evidence might establish willfulness under a "knowing and voluntary" standard entitling the plaintiff to liquidated damages.<sup>28</sup> The panel recognized that the discrimination might be inadvertent, however; hence it remanded for a redetermination by the district court, but without any guidance on how to

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20. 640 F.2d at 980.

21. *Id.*

22. *Id.* n.7 (citing *Wehr v. Burrough Corp.*, 619 F.2d 276, 280 (3d Cir. 1980) (dictum)).

23. *Id.* at 980.

24. *Id.*

25. *Id.* n.9.

26. *Id.* at 981.

27. *Id.*

28. *Id.*

distinguish between inadvertent and knowing violations.

### *Good faith defense*

The court found further that the good faith defense of the Fair Labor Standards Act<sup>29</sup> did not apply to ADEA actions because it was not specifically incorporated by reference in the section dealing with willfulness.<sup>30</sup> Under the FLSA there is no requisite of a showing of willfulness.<sup>31</sup> Because the willfulness requirement was added to the ADEA, the court believed the good faith defense was not necessary and held that the good faith defense to liquidated damages was not applicable to ADEA actions.

## B. FEDERAL STATUTORY JURISDICTION

### 1. *Usery v. Lacy*

The Ninth Circuit issued two decisions this term evincing a very expansive view of federal statutory jurisdiction. In *Usery v. Lacy (Aqua View)*,<sup>32</sup> the court held that all who employ construction workers<sup>33</sup> are subject to regulation by the Occupational Safety and Health Act (the Act)<sup>34</sup> as embracing the full range of congressional power under the commerce clause. The opinion raises the question whether any employer is exempt from regulation by the Occupational Safety and Health Administration (OSHA).<sup>35</sup>

Defendant Lacy did not engage in a business directly affecting commerce. Lacy owned, operated and maintained a small apartment building. He hired approximately forty workers, mostly students on a part-time basis, to construct a fifteen-unit apartment addition. The Secretary of Labor was unable to show that any materials Lacy used had been in interstate commerce.<sup>36</sup>

29. 29 U.S.C. § 260 (1976).

30. *Id.* § 626(b).

31. 640 F.2d at 981.

32. 628 F.2d 1226 (9th Cir. 1980) (per Kennedy J.).

33. *Id.* at 1228 n.1.

34. 29 U.S.C. §§ 651-678 (1976).

35. 29 U.S.C. § 652(5) (1976) defines as an employer any "person engaged in a business affecting commerce who has employees . . ." Domestic activity is excluded. 29 C.F.R. § 1975.6 (1980).

36. Some of the lumber came from Weyerhaeuser, the defendant's saw was made by Craftsman, and he drove a Ford station wagon. The Secretary failed to show that any of

The Administrative Law Judge (ALJ) declined to take judicial notice that Weyerhaeuser and Sears are engaged in interstate commerce and that the possession of a single "Craftsman" drill and a piece of plywood with the name "Weyerhaeuser" on it meant defendant Lacy was "engaged in a business affecting commerce."<sup>37</sup> Accordingly, the ALJ dismissed the complaint. The Occupational Safety and Health Review Commission (OSHRC) affirmed.

Reversing the OSHRC, the Ninth Circuit distinguished two types of statutory jurisdiction in the employment relations area. When a statute concerns businesses " 'in commerce,' a fairly specific showing must be made";<sup>38</sup> but when a statute only requires that a particular business "affects" commerce, statutory jurisdiction is much broader and exists "so long as the business is in a class of activity that as a whole affects commerce."<sup>39</sup> OSHA jurisdiction falls in the latter category.

The court reasoned that OSHA regulations cover all employers, with some specific inapplicable exceptions, and that the opinion was consistent with OSHA regulations and congressional intent to reach as broadly as possible because non-uniform coverage would give unsafe employers a competitive advantage.<sup>40</sup> Because the construction business normally affects commerce, and construction of an apartment building is an activity of the same type, the court concluded that hiring forty workers to construct a fifteen-unit apartment building was a business that affects commerce as a matter of law.

In a footnote, the panel took judicial notice of the position unsuccessfully argued by OSHA's counsel before the ALJ:

Respondent Lacy testified that he used material and tools manufactured by Weyerhaeuser and Craftsman (Sears Roebuck). The use of material that has at any point moved in commerce is enough to establish that a business affects commerce, and it is appropriate to take judicial notice

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these were manufactured out of state. See 628 F.2d at 1233.

37. *Id.* at 1234.

38. *Id.* at 1228.

39. *Id.*

40. *Id.* at 1229.

of the fact that Lacy's ultimate suppliers, Weyerhaeuser and Sears, are engaged in the production and distribution of goods for commerce.<sup>41</sup>

### *Dissent*

In a lengthy dissent, District Judge Kelleher objected to the panel's broad reading of a statutory jurisdiction. Much of the dissent is given over to a reiteration of the facts and testimony before the ALJ, and the proper scope of appellate review. The dissent relied heavily on two earlier opinions of this circuit—*Hiatt v. Schlecht*,<sup>42</sup> and *E.B. Weber v. Hiatt*.<sup>43</sup> *Schlecht* held that where a plumbing contractor's business was totally intrastate, a showing that plumbing fixtures used by the contractor were manufactured out of state was insufficient to establish jurisdiction over the business as one "affecting commerce."<sup>44</sup>

The dissent also relied on another Ninth Circuit opinion, *Godwin v. OSHRC*,<sup>45</sup> which involved safety citations for farm machinery used to clear land upon which grapes were grown. Wine was produced from the grapes and the wine entered interstate commerce. *Godwin* in turn relied on *Wickard v. Filburn*,<sup>46</sup> the landmark constitutional law case in which the Supreme Court applied the Agricultural Assistance Act of 1938 to wheat grown purely for home consumption. The dissent argued that because apartment buildings are neither raw materials nor goods which move in interstate commerce, Lacy's construction of an apartment did not lend itself to a *Wickard* analogy to the effect that production for home use "can skew the interstate flow of the product."<sup>47</sup>

The decision in *Aqua View* seems correct. The fact that Lacy added fifteen units under his own supervision rather than hire a building contractor does not change the nature of the work and the seriousness of the hazards at the worksite. Furthermore, *Wickard* can be read to support the panel's opinion

41. *Id.* n.3.

42. 400 F.2d 875 (9th Cir. 1968).

43. 424 F.2d 1366 (9th Cir. 1970).

44. 400 F.2d at 877, cited in *Usery v. Lacy*, 628 F.2d at 1231 (Kelleher, D.J., dissenting).

45. 540 F.2d 1013 (9th Cir. 1973).

46. 317 U.S. 111 (1942).

47. 628 F.2d at 1232.

because non-uniform standards place employers who comply with safety regulations at a competitive disadvantage and adversely affect the job market.

*Aqua View* has apparently overruled *Schlecht* and *Weber*, although the precise reach of the opinion is unclear. The court hinted that even one part-time construction worker would be enough for the court to find statutory jurisdiction although it refused to speculate as to the applicability of the Act to the case of a handyman employed in the home.<sup>48</sup> The panel explained that to the extent the employment looks less like a business in the conventional sense and more like domestic activity, which is specifically excluded from the act's coverage,<sup>49</sup> the Secretary might be obligated to prove the nexus with commerce.<sup>50</sup>

## 2. *NLRB v. Maxwell*

In *NLRB v. Maxwell*,<sup>51</sup> the court further eroded the significance of *Schlecht* and held that Maxwell's purchase of goods, materials and supplies in excess of \$6,000 from out of state had a sufficient effect on interstate commerce for the court to find statutory jurisdiction. The panel relied on *NLRB v. Inglewood Park Cemetery Association*<sup>52</sup> which held that \$3,000 worth of interstate purchases was not de minimis and was adequate to support jurisdiction. The panel made no mention of *Aqua View*.

### *Per se rule*

The court also adopted a per se rule regarding employer requests of employee statements given in conjunction with unfair labor practice investigations. The per se rule related to an unfair labor practice. The Administrative Law Judge and the National Labor Relations Board found that the employer (Maxwell) violated section 8(a)(1) of the National Labor Relations Act by discharging one employee and requesting another employee to deliver a copy of the written statement submitted by the second employee to the board during its investigation of the discharge.

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48. *Id.* at 1228 n.1.

49. 29 C.F.R. § 1975.6 (1980).

50. 628 F.2d at 1228 n.1.

51. 637 F.2d 698 (9th Cir. 1981) (per Canby, J.).

52. 355 F.2d 448 (9th Cir.), *cert. denied*, 384 U.S. 951 (1966).

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Maxwell is a sole proprietor, producing and selling ready mixed concrete and employing five drivers. One driver was fired in a dispute over a contract provision governing overtime pay. The ALJ found the driver was fired for insisting on compliance with terms of the collective bargaining agreement, and not, as the employer alleged, because of acrimonious shouting matches.<sup>53</sup>

After the unfair labor practice charge was filed, Maxwell asked Bower, another employee, for a copy of the statement Bower gave to the Board. Maxwell gave no reassurance that no reprisals would be taken and did not show that he needed the statement for trial preparation. Bower complied with Maxwell's request and furnished the copy. The ALJ found Bower could not have refused the request and that Maxwell's actions violated section 8(a)(1). The Board concurred.

The Ninth Circuit panel ruled that an employer request for an employee's statement is a *per se* violation of section 8(a)(1) when made (1) without reassurance that no reprisals will follow from refusal, and (2) without a showing that the requested statement is needed for trial preparation, and that the employer is seeking only what is necessary for that purpose.<sup>54</sup> The court chose not to impose a balancing test, weighing coercion against the employer's need for information.<sup>55</sup> An analogous rule is employed in this circuit in the context of interrogation of employees with regard to union activities.<sup>56</sup>

The panel reasoned that a lesser standard than the one adopted would have a chilling, coercive effect on witness testimony—particularly in the case of current, rank and file and supervisory employees over whom the employer can exert intense, if subtle, pressures concerning promotions, salary increases, job assignments and hours. Employers are not likely to be seriously

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53. 637 F.2d at 701.

54. *Id.* at 702.

55. *Id.*

56. *Id.* The permissibility of interrogation of employees about union activities depends on whether the circumstances as a whole indicate restraint or coercion of employees exercising § 7 rights. *NLRB v. Silver Spur Casino*, 623 F.2d 571, 584-85 (9th Cir. 1980); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977); *but see NLRB v. Port Vancouver Plywood Co.*, 604 F.2d 596, 599 n.1 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980).

prejudiced by the new rule because it permits access to the statements, to the extent they are necessary for the employer to prepare a trial defense. Further, the Board itself permits access to statements of employees who will be witnesses against the employer.<sup>57</sup>

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57. 29 C.F.R. § 102.118(b) (1981).