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Case Notes

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CASE NOTES

AGRICULTURAL LABOR RELATIONS—THE ALRB MAY NOT AUTOMATICALLY IMPOSE MAKE-WHOLE RELIEF AGAINST AN EMPLOYER WHO COMMITS A "TECHNICAL" REFUSAL TO BARGAIN IN ORDER TO OBTAIN JUDICIAL REVIEW OF AN ELECTION CERTIFICATION—*J.R. Norton Co. v. Agricultural Labor Relations Board*, 26 Cal. 3d 1, 603 P.2d 1306, 160 Cal. Rptr. 710 (1979).

J. R. Norton Company (Norton) filed a petition with the Agricultural Labor Relations Board (ALRB or Board) setting forth seventeen objections which allegedly warranted setting aside a union election held among Norton's employees. The Board's executive secretary reviewed the objections and accompanying declarations and determined that, with respect to fifteen objections, Norton had failed to establish a prima facie case as required by the Board's administrative regulations.[1] Accordingly, the executive secretary summarily dismissed the fifteen objections and scheduled the remaining two for hearing. Norton requested a review by the Board of the executive secretary's decision,[2] and after examining the objections and supporting declarations, the Board affirmed the action of the executive secretary. A hearing was held on the two remaining objections,[3] and the Board affirmed the decision of the investigative hearing examiner that those objections should also be dismissed. The Board then certified the United Farm Workers of America (UFW) as the exclusive collective bargaining representative of Norton's employees.[4]

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1. CAL. ADMIN. CODE tit. 8, § 20365(c) (1979) states:
   Where the objection alleges that the election was not conducted properly or that misconduct occurred affecting the results of the election . . . the petition shall be accompanied by a declaration or declarations setting forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election.
2. CAL. LAB. CODE § 1156.3(c) (West Supp. 1980) and the applicable ALRB regulations, CAL. ADMIN. CODE tit. 8, § 20393 (1979), provide for Board review of the executive secretary's summary decisions.
3. CAL. ADMIN. CODE tit. 8, § 20370 (1979).
4. J.R. Norton Co., 3 A.L.R.B. No. 66, at 13 (May 23, 1977).

Retaining "good faith" doubts as to the validity of the election certification, Norton sought judicial review of the Board's decision by deliberately refusing to bargain.[5] The UFW filed an unfair labor practice charge. The ALRB found Norton guilty of an unfair labor practice,[6] and ordered it to take affirmative action that included an order to make its employees whole for all losses of pay and other economic benefits sustained as a result of the employer's refusal to bargain.[7]

Norton then filed a petition for writ of review[8] urging the Court of Appeal to set aside the decision on two separate grounds: First, that by summarily dismissing eight of its objections,[9] the Board denied the employer its right to a full evidentiary hearing as provided for in Labor Code section 1156.3(c);[10] and, second, that even if the validity of the election certification were assumed, the Board abused its discretion in applying the make-whole remedy. The petition was summarily denied by the appellate court.

The California Supreme Court granted a hearing and is-

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5. Under the Agricultural Labor Relations Act (ALRA or Act), as with the National Labor Relations Act (NLRA), the refusal to bargain by the employer, with the expected filing of an unfair labor practice charge by a union, is the only procedure by which an employer can obtain court review of a Board certification of a union. Only after an employer is judged guilty of an unfair labor practice may it then appeal and obtain court review of both the unfair labor practice and the Board's certification decision. Such a course of action is referred to as a "technical" refusal to bargain. *See, e.g.*, Nishikawa Farms, Inc. v. Mahony, 66 Cal. App. 3d 781, 136 Cal. Rptr. 233 (1977); AFL v. Labor Board, 308 U.S. 401 (1940); Boire v. Greyhound Corp., 376 U.S. 473 (1964).

6. J.R. Norton Co., 4 A.L.R.B. No. 39, at 2 (June 22, 1978).

7. CAL. LAB. CODE § 1160.3 (West Supp. 1980) provides that when the Board finds an employer guilty of an unfair labor practice for refusal to bargain in good faith, it may enter an order "requiring such person . . . to take affirmative action, including . . . *making employees whole,* when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain." (emphasis added).

8. CAL. LAB. CODE § 1160.8 (West Supp. 1980) provides in part:

> Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain review of such order in the court of appeal having jurisdiction . . . by filing . . . a written petition requesting that the order of the board be modified or set aside.

9. Norton apparently conceded that seven of its objections were properly rejected by summary dismissal.

10. CAL. LAB. CODE § 1156.3(c) (West Supp. 1980) states: "Within five days after an election, any person may file with the board a signed petition . . . objecting to the conduct of the election. . . . Upon receipt of a petition . . . the board, upon due notice, *shall conduct a hearing* to determine whether the election shall be certified." (emphasis added).

sued a decree setting aside and remanding to the Board the make-whole portion of the order, and enforcing the remainder.[11] The court held that the ALRB's regulation, which conditions a full evidentiary hearing on the presentation of objections and factual declarations that establish a prima facie case, is a reasonable exercise of the Board's rule-making authority,[12] and that under the applicable administrative regulations, the executive secretary and the Board properly dismissed Norton's eight objections without a hearing.[13] The court, however, held that the Board lacked authority to impose the make-whole remedy in an unqualified fashion when the employer has committed a "technical" refusal to bargain for the sole purpose of obtaining judicial review.[14] The court instructed the Board, on remand, to look at the totality of the employer's conduct to determine whether Norton had gone through the motions of contesting the election results as a mere pretense to avoid bargaining, or whether it litigated the election certification based on a good faith belief that the alleged violations would have affected the outcome of the election.[15]

The court first considered the propriety of the ALRB's administrative regulations for challenging an election, and held that such regulations, which condition a full evidentiary hearing on the presentation of objections and factual declarations establishing a prima facie case, are a reasonable exercise of the Board's rulemaking authority to adopt "such rules and regulations as may be necessary to carry out the provisions of the ALRA."[16] The Board is not required to hold a full hearing in every case in which a party merely files a petition objecting to the conduct of a representation election. The requirement that an objecting party present a prima facie case eliminates the necessity for a hearing on inconsequential, frivolous, or dilatory issues,[17] which the court noted appears particularly compelling in light of one of the policies underlying the

11. J.R. Norton Co. v. ALRB, 26 Cal. 3d 1, 40, 603 P.2d 1306, 1329, 160 Cal. Rptr. 710, 733 (1979).

12. *Id.* at 17, 603 P.2d at 1314, 160 Cal. Rptr. at 718.

13. *Id.* at 27, 603 P.2d at 1320, 160 Cal. Rptr. at 724.

14. *Id.* at 29, 603 P.2d at 1322, 160 Cal. Rptr. at 726. *See* note 5 *supra.*

15. 26 Cal. 3d at 39, 603 P.2d at 1328, 160 Cal. Rptr. at 732.

16. CAL. LAB. CODE § 1144 (West Supp. 1980).

17. Radovich v. Agricultural Labor Relations Bd., 72 Cal. App. 3d 36, 45, 140 Cal. Rptr. 24, 29 (1977).

ALRA. As the court explained, the need for a newly formed labor organization to obtain legitimacy as quickly as practicable is an important interest to be considered in evaluating administrative regulations for determining the validity of an election.[18]

The court cited the standards utilized by the National Labor Relations Board (NLRB) as further support for sustaining the ALRB regulation.[19] The NLRB does not hold a hearing on post-election objections unless the objecting party offers prima facie evidence showing substantial and material factual issues that would warrant setting aside the election. The reason for the NLRB's requirement is the same as that supporting the ALRB's regulation — to prevent dilatory actions by parties disappointed in the election returns.

Reasoning that both administrative and judicial processes provide adequate safeguards to prevent abuses of the ALRB's discretion to summarily dismiss objections to representation elections,[20] the court concluded that "the regulation serves a valid purpose in assuring that the ALRB will not dissipate its limited resources in holding meaningless hearings on claims that are, as a matter of law, insufficient."[21]

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18. 26 Cal. 3d at 15, 603 P.2d at 1312-13, 160 Cal. Rptr. at 716-17.

> The denial of recognition is an effective means of breaking up a struggling young union too weak for a successful strike. After the enthusiasm of organization and the high hopes of successful negotiations, it is a devastating psychological blow to have the employer shut the office door in the union's face. Imposing a legal duty to recognize the union would prevent such anti-union tactics and thereby contribute to the growth of strong labor organizations.

Id. (quoting Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1408 (1958)).

19. The California Legislature modeled the ALRA in large part after the comprehensive federal labor relations statutes, the NLRA, and the Taft-Hartley Act (29 U.S.C. §§ 141-144, 151-168, 171-183, 185-187, 191-197, 557 (1976)). CAL. LAB. CODE § 1148 (West Supp. 1980) provides: "The board shall follow applicable precedents of the National Labor Relations Act, as amended."

20. The executive secretary's dismissal is subject to review by the Board. CAL. ADMIN. CODE tit. 8, § 20365(e)(h) (1979). This entails an examination of the appealing party's arguments and evidentiary support in order to determine whether a prima facie case has been stated. CAL. ADMIN. CODE tit. 8, § 20393(a) (1979). Although an ALRB union certification is not normally subject to direct judicial review, a party seeking to obtain such review may do so before the Court of Appeal after the Board has found him guilty of an unfair labor practice. CAL. LAB. CODE § 1160.8 (West Supp. 1980). Nishikawa Farms, Inc. v. Mahony, 66 Cal. App. 3d 781, 788, 136 Cal. Rptr. 233, 237 (1977). *See* note 5 *supra*. *See also* CAL. LAB. CODE § 1158 (West Supp. 1980).

21. 26 Cal. 3d at 18, 603 P.2d at 1315, 160 Cal. Rptr. at 719.

The court then examined whether the executive secretary and the Board erred in concluding that the declarations accompanying eight of Norton's objections failed to set forth, as required by the ALRB's administrative regulation, "facts which, if uncontroverted or unexplained, would constitute sufficient ground for the Board to refuse to certify the election."[22] After reviewing the declarations and evidence offered by Norton in support of these objections, the court concluded that Norton had failed to present evidence establishing a prima facie case, and accordingly, the executive secretary and the Board properly dismissed the eight objections without a full investigative hearing.[23]

Having sustained the Board's summary dismissal of Norton's objections, the court turned to Norton's contention that even if the dismissals were proper, the imposition of the make-whole remedy was beyond the Board's discretion where, as Norton alleged, the refusal to bargain was merely a technical means of obtaining judicial review of the Board's election

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22. CAL. ADMIN. CODE tit. 8, § 20365(c) (1979).

23. Norton's eight objections related to alleged improper union activity and disruption in the vicinity of one of the polling areas, to "access rule" violations allegedly committed by the union in the week preceding the election, and to misconduct by the Board agent in changing one of the polling sites at a time when it was impossible to inform the employees of the change.

The "polling area" objections were properly dismissed for Norton's failure to produce evidence suggesting that the alleged improper union activity or disruption had a potential for interfering with the employees' free choice. 26 Cal. 3d at 22, 603 P.2d at 1317, 160 Cal. Rptr. at 721.

CAL. ADMIN. CODE, tit. 8, § 209000 (1980) provides that the rights of employees under CAL. LAB. CODE § 1152 (West Supp. 1980) include the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support. "Access rule" violations will not constitute grounds for setting aside an election in the absence of proof that the "excess access" taken by the union was of such a character as to have had an intimidating impact on employees or in any other way affected the outcome of the election. *See* K.K. Ito Farms, 2 A.L.R.B. No. 51 (Oct. 29, 1976); Dessert Seed Co., 2 A.L.R.B. No. 53 (Oct. 29, 1976); Bruce Church, Inc., 3 A.L.R.B. No. 90 (Dec. 13, 1977); Martori Brothers Distributing, 4 A.L.R.B. No. 5 (Jan. 27, 1978). Norton's factual declarations relating to the alleged access violations contained no suggestion that the union's violations were of an intimidating or coercive nature. 26 Cal. 3d at 26, 603 P.2d at 1320, 160 Cal. Rptr. at 724.

A full investigative hearing was held on a separate, virtually identical "changed polling site" objection, which raised the issue in terms of "whether the board agent held the election at a time and place which prevented a substantial number of employees from voting." Because of the duplication of the two objections, the executive secretary committed no prejudicial error in dismissing one objection while setting a similar objection for hearing. *Id.*

certification and was motivated by good faith doubts about the validity of the election. The Board had applied a "blanket" rule, announced in *Perry Farms, Inc.*,[24] that required imposition of the make-whole remedy in *all* cases in which an employer is found to have refused to bargain.[25]

In *Perry*, the Board had justified the blanket rule by asserting that employees suffer the same loss — the deprivation of collective bargaining rights and derivative economic benefits — whether the employer's refusal to bargain is flagrant or willful[26] or is designed purely to procure judicial review of the underlying election issues. The Board used the same logic, which emphasizes the compensatory nature of the remedy, in imposing make-whole relief on Norton. The court, however, held that the Board lacks the authority to impose such relief in a categorical fashion when the employer has been found guilty of an unfair labor practice solely as a result of a technical refusal to bargain.[27]

The court observed that two competing considerations, both of which are fundamental to ALRA policy, arise whenever a representation election is attacked. The first is the need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle self-organization by employees. When used to that end, the court agreed that make-whole relief is appropriate.[28] The second consideration is the important interest in fostering judicial review as a check on arbitrary administrative action in cases in which the employer has raised a meritorious objection to an election but the objection has been rejected by the Board.[29] It is in serving this interest that a rule automatically imposing make-whole relief cannot be sustained. As the court observed, "such a rule places burdensome restraints on those who legitimately seek

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24. Perry Farms, Inc., 4 A.L.R.B. No. 25, *rev'd on other grounds*, 86 Cal. App. 3d 448, 150 Cal. Rptr. 495 (1978); *see also* Adam Dairy, 4 A.L.R.B. No. 24 (Apr. 26, 1978).

25. 4 A.L.R.B. No. 25, at 9.

26. *Id.* at 10.

27. 26 Cal. 3d at 29, 603 P.2d at 1322, 160 Cal. Rptr. at 726.

28. The make-whole remedy "compensates employees for losses incurred during the period when collective bargaining does not take place as a result of litigation attacking the propriety of a representation election; it thereby reduces the employer's financial incentive for refusing to bargain in order to avoid the expenses he would be required to pay if he had entered into a collective bargaining agreement." *Id.* at 31, 603 P.2d at 1323, 160 Cal. Rptr. at 727.

29. *Id.* at 30, 603 P.2d at 1322, 160 Cal. Rptr. at 726.

judicial resolution of close cases in which a potentially meritorious claim could be made that the NLRB or ALRB abused its discretion."[30]

Under the ALRA, employees are not only given the right to elect representatives of their own choosing, but are guaranteed the right "to refrain from any or all of such activities . . ." as well.[31] The court quoted observations of one commentator that the make-whole remedy

> place[s] greater restrictions on judicial review in general, and therefore will reduce the number of appeal-worthy refusal-to-bargain cases heard by the courts. . . . Since in many cases the employer might have won on appeal, the deterrence of good-faith review might interfere with the employees' right not to be represented by a union . . . .[32]

The court further observed that the make-whole remedy is "especially harmful to small employers, who . . . have neither the resources nor reserves to risk review of a representation decision if the [make-whole] remedy might be imposed upon them if they 'guessed wrong' and lost."[33] In the court's opinion, the Board had failed to acknowledge this serious deterrent impact when it announced its blanket rule in *Perry* and when it applied the rule to Norton.

The ALRB unsuccessfully argued that because the make-whole remedy is compensatory in nature,[34] a rule of blanket imposition should be sustained because it ensures that em-

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30. *Id.* at 32, 603 P.2d at 1324, 160 Cal. Rptr. at 728. The court went on to say that

> the need to avoid placing undue restraints on judicial review in the context of proceedings concerning representation elections must be recognized as especially compelling when one considers that the NLRA and ALRA purpose is not exclusively to promote collective bargaining, but to promote such bargaining by the employees' *freely chosen* representatives. The imposition of make-whole relief undermines this purpose to the extent that it discourages employers from exercising their right to judicial review in cases in which the NLRB or ALRB has rejected their meritorious challenges to the integrity of an election.

Id. at 34, 603 P.2d at 1325, 160 Cal. Rptr. at 729 (emphasis in original).

31. CAL. LAB. CODE § 1152 (West Supp. 1980).

32. 26 Cal. 3d at 34-35, 603 P.2d at 1325-26, 160 Cal. Rptr. at 729 (quoting Comment, *Employee Reimbursement for an Employer's Refusal to Bargain: The Ex-Cell-O Doctrine*, 46 TEX. L. REV. 758, 774 (1968)).

33. 26 Cal. 3d at 35, 603 P.2d at 1326, 160 Cal. Rptr. at 729 (quoting McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with National Labor Policy?*, 14 WAYNE L. REV. 1086, 1102 n.89 (1968)).

34. *See* note 28 *supra*.

ployees will be compensated for their losses when an employer's objections to an election ultimately do not prove to be meritorious. The court simply reiterated its position and said that blanket imposition unduly emphasizes compensation while ignoring the important competing interest in ensuring pursual of legitimate objections to election misconduct.[35]

The Board also argued that because Labor Code section 1160.3 authorizes it to order make-whole relief when it "deems such relief appropriate," the ALRA should be interpreted as granting the Board authority to impose make-whole damages on the employer without first examining the facts and equities of the particular case. The court rejected this argument, however, as unsupported by either the language or the legislative history of the make-whole provision[36] and concluded that a per se rule requiring make-whole relief whenever an employer ultimately does not prevail in its election challenge is an impermissible abuse of the Board's discretion.[37] Accordingly, the make-whole portion of the Board's order was remanded for a determination of whether Norton sought judicial review by refusing to bargain based on a reasonable good faith belief that the alleged violations would have affected the outcome of the election.

The court may have been too broad in its holding despite its effort to narrow the *Perry* blanket rule by imposing the make-whole remedy only in those cases where the employer's conduct can be shown to be a clear and flagrant refusal to bar-

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35. 26 Cal. 3d at 36, 603 P.2d at 1326, 160 Cal. Rptr. at 739.

36. The Board's interpretation of § 1160.3 contravenes principles of statutory construction by treating the words "when the Board deems such relief appropriate" as surplusage, thus failing to accord them adequate significance, and because the ALRB's interpretation of the provision is inconsistent with ALRA policy. *Id.* at 37, 603 P.2d at 1327, 160 Cal. Rptr. at 731.

> The hearings before the Senate committee reviewing the bill make it clear that the language explicitly permitting the Board to order make-whole relief was intended by the Legislature to resolve the question of the Board's power to issue such an order, not to grant the Board unfettered discretion to do so in all cases in which an employer ultimately does not prevail in his election challenge.

Id. "[T]he provision authorizes the Board to award make-whole damages only when the Board has determined that an employer refused to bargain and acted in bad faith." *Id.* at 38, 603 P.2d at 1328, 160 Cal. Rptr. at 731 (paraphrasing testimony of then-Secretary of Agriculture and Services (now Chief Justice) Rose Elizabeth Bird *transcribed in Sen. Bill No. 1 Before Senate Industrial Relations Comm.*, Third Ex. Sess. 1975 (May 21, 1975)).

37. 26 Cal. 3d at 39, 603 P.2d at 1329, 160 Cal. Rptr. at 732.

gain for patently frivolous reasons. Even with this qualification, the remedy may still be imposed at any stage where the employer's refusal to bargain has met the court's standard, including, as is the case here, where the employer has refused to bargain in order to challenge an election certification decision.

As amicus curiae pointed out, this rule fails to take into account that when the Board imposes make-whole relief on an employer at this early stage, the parties have not bargained or reached any type of agreement concerning wages and other benefits. The Board, in such a situation, is to base its award of damages on the rule set forth in *Adam Dairy*.[38] The make-whole remedy as created by the Board in *Adam Dairy*, amicus argued, imposes on the employer economic provisions of a contract to which it was not a party, under what could have been totally different economic circumstances. The employer has no opportunity to assent to or to rebut the terms of the remedy forced upon it by the Board. The Board, however, in fashioning its make-whole remedy, has ignored the limitation set forth in Labor Code section 1155.2(a) that it is without the power to impose a contract on an employer.[39]

For these reasons, then, it appears that the remedy *itself* may be valid, but its legality may be *limited* only to those situations where an appropriate measure of damages exists. In this respect, the remedy is invalid in the context of election challenges because an appropriate measure of damages does not exist. The language in Labor Code section 1160.3 that grants the Board the power to order make-whole relief "when it deems such relief appropriate" should, therefore, be construed even more narrowly than the court has done here. The remedy is "appropriate" only where an employer's conduct is a clear and flagrant refusal to bargain *and* only where an ap-

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38. 4 A.L.R.B. No. 24, at 18-29 (1978). In that case, the Board had calculated the make-whole award by using an appropriate number of UFW contracts to determine the average negotiated wage rate for the relevant period. The Board determined the value of fringe benefits from data collected by the Federal Bureau of Statistics.

39. CAL. LAB. CODE § 1155.2(a) (West Supp. 1980) provides in part:

> [T]o bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, . . . but such obligation *does not compel either party to agree to a proposal or require the making of a concession.*

(emphasis added).

propriate measure of damages exists.

The issue left unadressed by the court here appears significant enough to ensure its resurfacing in later cases. Continued litigation, therefore, appears to be a certainty, at least within this particular context.

Mary Lynne Thaxter

EMPLOYMENT DISCRIMINATION—A PROVISION NECESSARY TO THE OPERATION OF A SENIORITY SYSTEM IS A COMPONENT OF THAT SYSTEM AND THEREFORE EXEMPT FROM TITLE VII RESTRICTIONS, EVEN THOUGH IT MAY PERPETRATE RESIDUAL EMPLOYMENT DISCRIMINATION—*California Brewers Association v. Bryant*, 444 U.S. 598 (1980).

Under Title VII of the Civil Rights Act of 1964[1] employers[2] and unions[3] are prohibited from discriminating against individuals on the basis of race, color, religion, sex, or national origin. An exception to the Title VII provisions set forth in section 703(h) of the Civil Rights Act, immunizes "bona fide" seniority systems that are not the "result of an intention to discriminate" even though they perpetrate pre-Title VII[4] discrimination.[5] The interpretation and application of this excep-

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1. 78 Stat. 241 (1964) (codified in scattered sections of 28, 42 U.S.C.).

2. Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(a) (1976) makes it unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. *Id.* § 703(c), 42 U.S.C. § 2000e-2(c) (1976) forbids a union:

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race . . .
>
> (2) to limit, segregate, or classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
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> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

4. Title VII became effective on July 2, 1965. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 266 (1964).

5. Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1976) provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not

tion has engendered substantial judicial controversy.

In *California Brewers Association v. Bryant*,[6] Abram Bryant, a black brewery worker, filed a class action suit[7] against the California Brewers Association, several brewing companies and several unions. Bryant alleged that the statewide multiemployer collective-bargaining agreement[8] (Agreement) that governed the industrial relations between and within the defendant organizations discriminated against himself and other black workers in violation of Title VII. Bryant specifically challenged[9] the seniority provision of the Agreement that requires employees to work at least forty-five weeks in one calendar year to progress from "temporary" to "permanent" employee classification.[10] Permanent status accorded employees greater benefits[11] and job security.[12]

Respondent contended that the 45-week requirement in effect preserved an all white class of permanent workers and

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be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ., provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

6. 444 U.S. 598 (1980).

7. When the action was heard by the United States Court of Appeals for the Ninth Circuit, it had not been certified as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure. Bryant v. California Brewers Ass'n, 585 F.2d 421, 424 n.3 (9th Cir. 1978). The United States Supreme Court did not comment on the status of the class action other than to refer to the respondent and his "putative class." 444 U.S. at 602.

8. The challenged agreement was negotiated on behalf of the breweries by the petitioner, California Brewers Association, and on behalf of the worker's unions by petitioner, Teamsters Brewery and Soft Drink Workers Joint Board. 444 U.S. at 602.

9. The complaint also alleged violation of 42 U.S.C. § 1981 (1976) which provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . ., and to the full and equal benefit of all laws . . . as is enjoyed by white citizens . . .," and, under 29 U.S.C. §§ 159, 185 (1976), that the union defendants had breached their duty of fair representation by bargaining for greater rights for some represented employees than others. *Id.* at 601.

10. The Agreement provides that a permanent employee is "any employee . . . who . . . has completed forty-five weeks of employment under this Agreement in one classification in one calendar year as an employee of the brewing industry in [the State of California]." *Id.* at 602 (footnote omitted).

11. Permanent employees receive preference over temporary employees with respect to wages, vacation pay, choice of vacation times, and the right to collect supplemental unemployment benefits upon lay-off. *Id.* at 603 n.7.

12. The Agreement provides that lay-offs be effectuated in reverse order of plant seniority, beginning with new employees, then temporary employees and finally, permanent employees. Furthermore, once laid off the employees are hired back in the reverse order from which they were laid off. *Id.* at 603.

denied black workers the opportunity to achieve permanent status.[13] Despite six years as a brewery worker, respondent was still classified as a temporary employee. As defendants and petitioners, California Brewer Association argued that the seniority provision challenged by Bryant was a "bona fide" seniority system and therefore immune from prosecution under section 703(h).

The United States District Court for the Northern District of California concluded that the provisions and procedures outlined in the Agreement were analogous to the "last-hired, first-fired" formula permitted under Title VII[14] and therefore granted the California Brewers Association motion to dismiss the complaint for failure to state a claim upon which relief could be granted.[15]

The Ninth Circuit reversed the order, holding that the 45-week provision lacked the basic component of a seniority system "that employment rights should increase with length of employment."[16] The case was ordered remanded to the district court to allow Bryant to prove "that the 45-week provision had a discriminatory impact on Black workers in violation of Title VII."[17] Defendants then petitioned for a writ of certiorari to the United States Supreme Court.[18]

In a plurality opinion written by Justice Stewart and joined by Chief Justice Burger and Justices White and Rehnquist,[19] the United States Supreme Court vacated the Ninth

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13. The Ninth Circuit observed that "no Black has ever attained permanent employment status in a California brewery." Bryant v. California Brewers Ass'n, 585 F.2d 421, 424 (9th Cir. 1978).

14. *See* Watkins v. United States Steel Workers Local 2369, 516 F.2d 41, 43-44 (5th Cir. 1975), for an explanation of the "last-hired, first-fired" formula.

15. The dismissal was entered pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure. No published opinion accompanied the dismissal. 444 U.S. at 604.

16. Bryant v. California Brewers Ass'n, 585 F.2d 421, 426 (9th Cir. 1978). The court made the further observation that:

> The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line.

Id. at 427 n.11.

17. *Id.* at 428.

18. The Supreme Court granted certiorari in California Brewers Ass'n v. Bryant, 442 U.S. 916 (1979).

19. Justice Marshall wrote a dissenting opinion in which Justices Brennan and

Circuit ruling and remanded the action to the district court.[20] The Court held that requiring a "temporary" employee to work at least forty-five weeks in one calendar year in order to attain "permanent" status and to be accorded greater job security was a component of a seniority system and therefore exempt from the provisions of Title VII.[21]

The scope and purpose of Title VII was first defined by the Supreme Court in *Griggs v. Duke Power Company.*[22] In *Griggs,* a group of black employees challenged their employer's requirement of a high school diploma or the passing of an intelligence test as a condition of employment or transfer to a superior position in the company.[23] Neither requirement was intended to measure the employee's ability to perform or learn a particular job.[24]

Chief Justice Burger, writing for a unanimous court,[25] rejected the defendant employer's contention that the tests used were sanctioned by section 703(h) because they were not "designed, intended, or used to discriminate because of race . . . ."[26] In often cited language, the Supreme Court stated that: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[27] The Court further stated that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[28]

Blackmun joined. 444 U.S. at 611 (Marshall, J., dissenting). Justices Powell and Stevens took no part in the consideration or decision of the case. *Id.* The final decision, then, was joined by only four Justices.

20. In the words of the Court:

> In the District Court the respondent will remain free to show that, in respect to the 45-week rule or in other respects, the seniority system established by the Agreement is not "bona fide," or that the differences in employment conditions that it has produced are "the result of an intention to discriminate because of race."

Id. 610-11.

21. *Id.* at 610.

22. 401 U.S. 424 (1971).

23. *Id.* at 427-28.

24. *Id.* at 428.

25. *Id.* at 425. Justice Brennan took no part in the consideration or decision of the case.

26. *Id.* at 433.

27. *Id.* at 430.

28. *Id.* at 431. The opinion, however, was not without restrictions. Chief Justice

Several lower courts have adopted the language of *Griggs*, and, although the ruling was not directed at the propriety of seniority systems per se, it has been used to fortify and support narrow applications of the seniority system exception to Title VII.[29] The reasoning, first stated in *Quarles v. Philip Morris, Inc.*,[30] was that Congress could not have intended to legalize seniority systems which in effect locked minorities into inferior employment positions to which they had been assigned as a result of discrimination. Consequently, section 703(h) was held not to protect systems that perpetrated pre-act discrimination or which had their "genesis in racial discrimination."[31]

Burger made clear that "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications." Congress required only "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 430-31.

29. *See* United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 587-88 (4th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2nd Cir. 1971); Local 189, United Papermakers v. United States, 416 F.2d 980, 987 (5th Cir. 1969) *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516-18 (E.D. Va. 1968).

30. 279 F. Supp. 505 (E.D. Va. 1968).

31. *Id.* at 517. In *Quarles* a minority employee sought to transfer to a different position within the Philip Morris tobacco company. Such a change in position involved the forfeiture of past seniority, future seniority being based solely on the amount of time served in the new department. Quarles alleged that this de facto discrimination deprived him of the opportunity to attain greater job security, higher pay, and a better job because minorities were categorically assigned to lower positions in the company when originally hired. Philip Morris claimed an exemption for the system under section 703(h).

The court in *Quarles* examined the legislative history of the Act. During the Senate debate over H.R. 7152, which was to become the Civil Rights Act of 1964, concern was expressed that major and costly changes would have to be made in the existing seniority systems, and also that senior white workers would, as a result of the bill, lose their jobs to minority workers. In answer to these objections, Senators Clark and Case, the major proponents of the bill, submitted the following frequently cited memorandum:

> *Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective.* Thus, for example, if a business had been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Id. at 516 (quoting Interpretative Memorandum of Title VII of H.R. 7152, *reprinted in* 110 CONG. REC. 7213 (1964)) (emphasis added).

Addressing the seniority system issue for the first time the Supreme Court, in *International Brotherhood of Teamsters v. United States*,[32] refused to accept the *Quarles* rule, thereby overturning nearly ten years of judicial precedent. *Teamsters* involved a fact pattern similar to that of *Bryant*. In *Teamsters*, pursuant to a collective-bargaining agreement negotiated with defendant union, the employer maintained parallel seniority ladders for different job classifications. A transfer from one classification to another meant forfeiture of past seniority, placing the transferee at the bottom of the seniority scale in the new position.[33] As a result, seniority was administered according to length of time served in a specific position rather than length of time served in the company in general.

The Supreme Court found that this system of seniority disproportionately distributed benefits to the detriment of minority workers.[34] However, the Court concluded that "both the literal terms of section 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them."[35] The Court concluded that section 703(h) was designed to protect vested seniority rights even when an employer had initially discriminated in hiring. According to Justice Stewart, a seniority system would violate Title VII only if it were either 1) not "bona fide," or 2) if the difference caused by the system were the result of an "intention to discriminate,"[36] irrespective of the "locking-in" effect it may

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The court in *Quarles* concluded that the mandate against retrospective application of Title VII applied only to the practice of "bumping" white workers to provide jobs for minorities. In contrast, granting minorities full *company* seniority for the years they worked for the company was not retrospective application of Title VII. Ruling in favor of plaintiff Quarles, the court stated that "[t]he plain language of the act condemns as an unfair employment practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the effective date of the act." *Id.* at 515.

32. 431 U.S. 324 (1977).

33. *Id.* at 342-44. The company divided its workers into three classifications: line driver, city driver, and serviceman. For various reasons positions as line drivers were preferable over the other positions. *Id.* at 338 n.18. Furthermore, some long-distance runs were more desireable than others. Line drivers most senior on the "ladder" had first pick of these runs. *Id.* at 344 n.25.

34. *Id.* at 350.

35. *Id.* *See* note 31 *supra* for a discussion of the legislative history of section 703(h).

36. *Id.* at 353 n.38.

have on minorities. Furthermore, the Court held that a pre-act seniority system could be considered "bona fide" within the meaning of section 703(h) even though it caused residual discrimination or operated to "freeze" the status quo.[37]

Justice Stewart addressed the apparent departure from the language of the *Griggs* case, indicating that, "[w]ere it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale."[38] In so stating, Justice Stewart limited the *Griggs* ruling to discriminatory employment practices such as intelligence tests and placed the issue of seniority systems firmly outside its purview.

The probable effect of the *Teamsters* decision on the effort to eradicate employment discrimination has been the subject of lengthy commentary and speculation.[39] Supporters of the Civil Rights Act expressed the hope that the *Teamsters* case would be systematically distinguished and given only half-hearted force in the lower courts.[40] In the aftermath of *Bryant*, however, the perspective of the Supreme Court could not be more clear. Title VII's exemption clause for bona fide seniority systems has now been given a broad interpretation in two major Supreme Court cases and the mandate can not be ignored.

Since the term "seniority system" had not been defined in either the wording of Title VII or its legislative history, Justice Stewart began his opinion in *Bryant* with a discussion of the concepts of seniority generally accepted by the industrial sector. Conclusively defining the term "seniority system," he asserted that, "the principle feature of any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in employment."[41] Thus, although the Supreme Court and the Ninth Circuit came to adverse decisions, the definition of "seniority system" employed by each was not fundamentally different. The divergence in opinion occurred over how seniority time was to ac-

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37. *Id.* The Court made this finding despite the government's argument that a system which supports residual discrimination cannot be deemed "bona fide."

38. *Id.* at 349.

39. *See, e.g.*, Waller, *Teamsters and Seniority System Violations Under Title VII: A Requirement of Discriminatory Intent*, 42 ALB. L. REV. 279 (1978); Carton, *The Seniority System Exemption in Title VII: International Brotherhood of Teamsters v. United States*, 6 HOFSTRA L. REV. 585 (1978).

40. *See* note 39 *supra*.

41. 444 U.S. at 606.

crue for purposes of bestowing greater benefits and employment rights. While the Ninth Circuit concluded that rights should accrue *automatically* and *continually* with length of employment,[42] the Supreme Court required only that the passage of time *play some part* in the seniority framework.[43] Accordingly, since the Agreement challenged by Bryant did provide for increased seniority with the passage of time, albeit not cumulatively, it conformed to the concept and definition of "seniority system" accepted by the Supreme Court.[44]

The Court emphasized that the Agreement was a product of the collective-bargaining process vital to the governance of industrial relations. Justice Stewart expressed strong concern over judicial interference in the collective-bargaining process, stating: "It does not behoove a court to second-guess either that process or its products."[45] The argument, simply stated, is that workers, employers, and unions should be free to develop conditions of employment and seniority systems which are best suited to particular enterprises.

Justice Stewart likened the temporary and permanent classifications used in the California brewing industry to the line driver, serviceman, and city driver classifications maintained by the employer in the *Teamsters* case.[46] Both systems allocated benefits according to these classifications, thereby operating parallel, but separate, seniority ladders. In language reminiscent of the *Teamsters* decision, the Court state that the fact that two or more seniority "tracks" were set up under the collective-bargaining agreement "did not derogate from the identification of the provisions as a 'seniority system' under § 703(h)."[47]

The Supreme Court, relying on the same legislative history as the Ninth Circuit,[48] determined that Congress "intended to exempt from the normal operation of Title VII more than simply those components of any particular seniority scheme that, *viewed in isolation,* embody or effectuate the

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42. Bryant v. California Brewers Ass'n, 585 F.2d 421, 427 (1978).

43. 444 U.S. at 606.

44. Under the Agreement, a temporary worker's accrued seniority (and his or her chance of becoming a permanent employee) terminated at the end of each year, unless he or she had worked at least 45 weeks in that year. *Id.* at 608.

45. *Id.*

46. *Id.* at 609.

47. *Id.*

48. *See* note 31 *supra.*

principle that length of employment will be rewarded."[49] The Court thus went beyond the reasoning in the *Teamsters* case, and shifted the focus of section 703(h) from the propriety of particular seniority provisions to the seniority system "as a whole."[50] Viewed in that sense, rules which are ancillary to the seniority system and which "accomplish certain necessary functions, but which may not themselves be directly related to length of employment" are protected under section 703(h).[51]

As examples of those types of provisions which can be termed as "ancillary" to a seniority system, the Court cited rules which establish when and by what actions an employee forfeits accrued seniority, and rules which indicate when the accrual of seniority begins.[52] The forty-five week provision in the *Bryant* collective-bargaining agreement was classified by the Court as just such an ancillary rule because it "serves the needed function of establishing the threshold requirement for entry into the permanent employee seniority track."[53]

In a dissenting opinion joined by Justices Brennan and Blackmun, Justice Marshall approved the reasoning and holding of the Ninth Circuit.[54] He contended that to qualify as a seniority system under the definition accepted by the Court, employment provisions should award seniority on the basis of total length of employment "not length of service within a calendar year."[55] He thereby rejected the Court's conclusion that parallel seniority tracks are permissible and qualify as seniority systems within the meaning of section 703(h), as long as an employee is able to advance in status in a specific job classification and seniority ladder, in accordance with some measure of time.[56] "The mere fact that the 45-week rule is in some sense a measure of time does not demonstrate a valid relation to concepts of seniority."[57]

Justice Marshall noted that because the brewing industry is a seasonal one the attainment of seniority by fulfilling the 45-week requirement is a fortuitous circumstance beyond the

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49. 444 U.S. at 607 (emphasis added).
50. *Id.* at 606.
51. *Id.* at 607.
52. *Id.*
53. *Id.* at 609.
54. *See* text accompanying note 42 *supra.*
55. 444 U.S. at 616-17 (Marshall J., dissenting).
56. *Id. See* text accompanying notes 41-43 *supra.*
57. 444 U.S. at 617 (Marshall, J., dissenting).

control of the individual employee.[58] This characteristic of the industry made the 45-week rule a "virtually impassable barrier to advancement"[59] from temporary to permanent status. In Justice Marshall's opinion, the uncertainty and unfairness fostered by the rule indicated that it "has very little to do with seniority . . . ."[60]

Justice Marshall's most significant criticism of the majority opinion is that it departs from basic statutory interpretation principles. He maintained that exemptions to remedial measures should be construed narrowly to avoid undermining the spirit and practical effects of the curative legislation. According to Marshall, to do otherwise is an abuse of the interpretive process.[61]

In effect, the Supreme Court in *Bryant* broadened the scope of section 703(h), if not in terms of original Congressional intent, then certainly in terms of prior interpretative law. Seniority systems which are "bona fide" and devoid of intentional discrimination, and now those rules which support and are "necessary" to the operation of these systems, are all exempt from Title VII prosecution. The Court has not, however, indicated what facts a plaintiff must establish in future litigation to prove that a seniority system is *not* "bona fide" and therefore not entitled to protection under section 703(h). How this question will be resolved, and whether the *Bryant*

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58. *Id.* at 615 (Marshall, J., dissenting).

59. *Id.* at 615-16 n.6 (Marshall, J., dissenting). The Ninth Circuit also emphasized this point, stating that:

> The rub is that changed circumstances in the brewery industry, including greater automation, improved brewing methods, and consolidation of breweries, have lessened the demand for labor, so that now it is virtually impossible for any temporary employee, Black or White, to work 45 weeks in one calendar year.

Bryant v. California Brewers Ass'n, 585 F.2d 421, 424 (1978). The Supreme Court addressed the same issue in a footnote, stating that:

> There are indications in the record of this case that a long-term decline in the California brewing industry's demand for labor is a reason why the accrual of seniority as a temporary employee has not led more automatically to the acquisition of permanent status. But surely, what would be part of a "seniority system" in an expanding labor market does not become something else in a declining labor market.

444 U.S. at 610 n.22.

60. 444 U.S. at 616 (Marshall, J., dissenting).

61. *Id.* at 618 (citing Phillip Co. v. Walling, 324 U.S. 490, 493 (1945)).

opinion has vitiated the effect of Title VII on discriminatory employment practices, remains to be seen.

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