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OVERVIEW

The Tenth Circuit's survey period labor law decisions produced few surprises, although spawning two dissents by Judge Barrett. Three significant cases are reviewed below. These decisions gain their interest either from their clarification of existing law or their refusal to move from precedent despite convincing challenges. While the Tenth Circuit was not in the forefront of labor law reform during this edition of the survey, in two areas—threats which constitute strike misconduct and the use of presumptions in unfair labor practice hearings—the court addressed issues of national relevance.

I. THREATS AS STRIKE MISCONDUCT

A. *Existing Standards for Strike Misconduct*

In *Midwest Solvents, Inc. v. NLRB*,[1] a Tenth Circuit panel majority refused to join two sister circuits in rejecting the National Labor Relations Board's (NLRB or Board) standard for determining when threats are misconduct sufficient to justify an employer's refusal to reinstate a striking employee.[2] The First[3] and Third[4] Circuits have adopted an "objective" test, under which threats themselves will be deemed strike misconduct if, under the circumstances in which they were uttered, the threats could reasonably

1. 696 F.2d 763 (10th Cir. 1982).

2. 696 F.2d at 767. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), protects concerted employee activity, including strikes. *See id.* §§ 157-163. This protection, however, is not absolute.

An employer must rehire employees involved in an economic strike if positions are open following the strike. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967). Failure to reinstate striking employees to available positions constitutes an unfair labor practice, because without the reinstatement requirement an employer could chill the right to strike by penalizing those who exercise this right. *Id.* The employer, however, can refuse to reinstate striking employees if the refusal is not motivated by an anti-union purpose, but is instead based upon a legitimate and substantial business reason. NLRB v. Great Dane Trailers Co., 388 U.S. 26, 34 (1967). Individual strike misconduct, such as a coercive or threatening act directed at nonstriking workers, furnishes a legitimate basis for refusing to reinstate a striking employee because such misconduct does not involve the exercise of a protected right and because such misconduct can render an employee "unfit for further service." NLRB v. Illinois Tool Works, 153 F.2d 811, 815-16 (7th Cir. 1946). *See also* Associated Grocers of New England v. NLRB, 562 F.2d 1333 (1st Cir. 1977); NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977); NLRB v. Wichita Television Corp., 277 F.2d 579 (10th Cir. 1960); NLRB v. Cambria Clay Prod. Co., 215 F.2d 48 (6th Cir. 1954). *Cf.* NLRB v. Fansteel Meltallurgical Corp., 306 U.S. 240, 253 (1939) (employer not compelled to reinstate employees committing torts against the employer's property; to require reinstatement of such employees would hinder labor law's purpose of seeking peaceful solution to labor disputes). Not all misconduct is sufficiently serious to justify refusal to reinstate. *See, e.g.*, Montgomery Ward & Co. v. NLRB, 374 F.2d 606, 608 (10th Cir. 1967). The issue in strike misconduct cases is therefore determining which kinds of misconduct are sufficiently serious to justify refusal to reinstate. *See, e.g.*, *Midwest Solvents*, 696 F.2d at 766.

3. Associated Grocers of New England v. NLRB, 562 F.2d 1333 (1st Cir. 1977).

4. NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977).

"coerce or intimidate" non-striking employees.[5] The NLRB, however, applies an "animal exuberance" test, under which threats alone cannot justify refusal to reinstate.[6] In order to constitute strike misconduct under the NLRB standard a striker's threats must be "accompanied by . . . physical acts or gestures that would provide added emphasis or meaning to [the] words."[7] Interestingly, in *Midwest Solvents* the Tenth Circuit both refused to adopt the objective test and denied that it was applying the animal exuberance test.[8]

B. *Midwest Solvents*

The *Midwest Solvents* case arose out of a twenty-nine day economic strike.[9] Following the strike the employer, Midwest, refused to reinstate two strikers, Donald and Roy Lassen, accusing them of strike misconduct.[10] The Lassen's brought unfair labor practice charges against Midwest resulting in an administrative law judge's order of reinstatement.[11] Midwest appealed this order and the NLRB affirmed the administrative judge,[12] as did the Tenth Circuit.[13]

Donald Lassen was charged with two instances of misconduct.[14] The first involved a visit, accompanied by another striker, to the apartment of Bob Call, a non-striking worker.[15] Call refused to open the door, and therefore could not identify which of the two strikers told him he better "watch" himself because "some of the boys might get rowdy."[16] Midwest also charged Donald Lassen with threatening three college students temporarily working at its plant.[17] Only Lassen and a companion testified about what

5. *Associated Grocers*, 562 F.2d at 1336 (quoting *McQuaide*, 552 F.2d at 528); *McQuaide*, 552 F.2d at 528. The *McQuaide* court adopted the standard set out in Local 542, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964), wherein the court stated: "The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the existing circumstances, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 328 F.2d at 852-53 (*quoted in McQuaide*, 552 F.2d at 527-28). *Local 542* articulated the "objective" test for coercion in the context of an unfair labor charge brought against a union, not an employer. 328 F.2d at 852.

6. *E.g.*, *McQuaide*, 552 F.2d at 527. The phrase "animal exuberance" is taken from Milk Wagon Drivers Union, Local 752 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941). *Meadowmoor* held that picketing could not be suppressed merely because the pickets engaged in "a trivial rough incident or a moment of animal exuberance." *Id.* at 293.

7. *McQuaide*, 552 F.2d at 527.

8. 696 F.2d at 767.

9. An economic strike is a strike to secure union demands, rather than a protest against an employer's unfair labor practices. *See* NLRB v. Juniata Packing Co., 464 F.2d 153, 155 (3d Cir. 1972).

10. 696 F.2d at 765. Midwest originally refused to reinstate six striking workers. After further investigation Midwest allowed one of the six to return to work. Two others did not challenge Midwest's action. The remaining three, Donald, Roy and Harold Lassen, filed unfair labor practice charges against Midwest based on the failure to reinstate. *Id.*

11. *Id.*

12. Midwest Solvents, Inc., 251 N.L.R.B. 1282, 1282 (1980), *enforced*, 696 F.2d 763 (10th Cir. 1982).

13. *See* 696 F.2d at 767.

14. *Id.* at 766.

15. *Id.*

16. *Id.*

17. *Id.*

was said to the three; they denied threatening the students although Lassen admitted asking them not to be "scabs."[18]

At the preliminary hearing, the administrative law judge (ALJ) determined that Donald Lassen had threatened both Call and the three college students.[19] The ALJ found, however, that both threats were isolated incidents insufficient to warrant denial of reinstatement.[20] The NLRB affirmed this decision, noting that there was no evidence that the threats were anything more than "the type of impulsive, trivial misdeed which we have found, in the past, to be insufficient to warrant a denial of reinstatement to a protected striker."[21]

The Tenth Circuit affirmed the Board's order, holding that "[absent] other threatening statements or . . . some coercive action, [Lassen's statements were] too ambiguous to be considered a threat."[22] In support of this conclusion the court cited *NLRB v. W.C. McQuaide, Inc.*,[23] yet refused to adopt *McQuaide's* objective test.[24] Apparently, therefore, the presence of two strikers outside the apartment door of a non-striker is not a coercive action sufficient to raise a threat to the level of strike misconduct.

Roy Lassen was denied reinstatement because, while picketing, he threatened Donald Caudle, a farmer making deliveries across the picket line to Midwest's plant.[25] Roy said that he would blow up or burn up Caudle's combine if Caudle continued making deliveries.[26] Caudle subsequently crossed the picket line several times without further interference from the strikers.[27]

The NLRB characterized Roy's threat as minor misconduct and ordered reinstatement.[28] The court of appeals enforced the Board's order for several reasons: 1) there was a question as to whether Roy Lassen made the threat;[29] 2) Caudle apparently was not frightened by the threat;[30] and 3) Caudle was free from subsequent interference.[31] The court characterized Roy Lassen's statement as "animal exuberance, the result of high emotions

18. *Id.* at 767.
19. 251 N.L.R.B. at 1291.
20. *Id.* at 1292.
21. *Id.* at 1282.
22. 696 F.2d at 766 (citing *McQuaide*, 552 F.2d at 766).
23. 552 F.2d 519 (3d Cir. 1977).
24. 696 F.2d at 767. The court's supporting citation to *McQuaide* is problematic because *McQuaide* adopted the "objective test" which the Tenth Circuit conspicuously avoided. *Id.* Apparently the court was only attempting to show that Donald Lassen's conduct did not constitute strike misconduct by *any* standard. The citation may also have been an indication that the court is willing to find misconduct through threats alone in the proper case. *Cf. id.* at 766 (no strike misconduct "in absence of other threatening statements *or* of some coercive action") (emphasis supplied).
25. *Id.* at 767.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 767 n.4. The opinion had previously noted that an employer's determination not to reinstate for strike misconduct must be based on evidence that the striker personally engaged in the alleged misconduct. *Id.* at 765 (citing NLRB v. Wichita Television Corp., 277 F.2d 579 (10th Cir. 1960)).
30. 696 F.2d at 767.
31. *Id.*

and frustration on the picket line," and therefore protected conduct.[32]

The majority appears to have been content to defer to the expertise of the Board in determining the misconduct issue. The court found the Board's decisions supported by substantial evidence and declined to rule on Midwest's contention that the Board had applied an improper test. Instead, the court held that "[t]he refusal to reinstate would not be proper under any of the standards suggested by Midwest. Accordingly, we need not decide the merits of the objective test."[33]

Judge Barrett, the sole dissenter, disagreed with the majority and would have adopted the objective test.[34] By this test, Judge Barrett reasoned, the actions of Roy and Donald Lassen would "clearly constitute such misconduct which amounts to coercion and intimidation" warranting denial of reinstatement.[35]

Curiously, Judge Barrett injected a strong element of subjectivity into the objective test when he observed that the ALJ found that the Lassens' conduct placed others in fear, and that it was his view that the Lassens' actions were *calculated* threats.[36] While Judge Barrett's observations may have been offered solely as evidentiary support of the objective unreasonableness of the Lassens' conduct, his comments do reflect the subjective basis upon which several circuits have decided strike threat cases. Although the standard is often not articulated, threats have been characterized on the basis of their effect on the non-striker,[37] or on the striker's subjective intent.[38]

C. *Evaluation of Standards for Characterizing Threats as Strike Misconduct*

1. Subjective Approach

Subjective tests have the obvious disadvantage of being difficult to apply. Intent and effect do not always admit of easy discovery. Although the effect of a threat may be manifest in the reaction of a non-striker, the lack of response may indicate no more than the non-striker's bold constitution or his desperate need of a job. Similarly, if the intent of the striker is the test, the court is placed in the dubious position of having to determine just how serious the striker is about carrying out the threat. Further, the striker is punished for his state of mind, not, as is more appropriate, for engaging in inexcusable conduct.

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32. *Id.*

33. *Id.*

34. *Id.* at 768 (Barrett, J., dissenting).

35. *Id.*

36. *Id.*

37. *See* NLRB v. Trumbull Asphalt Co., 327 F.2d 841, 846 (8th Cir. 1964) (threats were misconduct when they resulted in non-striker leaving work for five weeks); NLRB v. Efco Mfg., Inc., 227 F.2d 675 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956) (threats were misconduct when they placed employer in fear of imminent beating).

38. *See* NLRB v. Pepsi Cola Co., 496 F.2d 226, 228 (4th Cir. 1974) (line drawn at "conduct that is intended to threaten or intimidate non-strikers"). *See also* NLRB v. Hartmann Luggage Co., 453 F.2d 178 (6th Cir. 1971) (distinguishing picket line rhetoric from threats intended literally).

2. The "Animal Exuberance" Standard

The NLRB suggests use of the animal exuberance test, under which threats alone can never justify a refusal to reinstate.[39] The test ensures that strikers are not to suffer the harsh penalty of losing their jobs because of impulsive words spoken in the heat of the moment during the course of a protected activity. The test overlooks, however, an employee's right *not* to join in a concerted activity, guaranteed by section 7 of the National Labor Relations Act.[40] Section 8(b)(1) of the National Labor Relations Act[41] makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of section 7 rights. Although the strike misconduct of an individual is not an unfair labor practice, clearly a significant part of Congress' intent in enacting section 7 was to protect the employee's right of choice. To assert that words alone cannot intimidate is to shut one's eyes to the coercive power of language, and to subvert a worker's right of choice. The animal exuberance test therefore protects the striking worker's rights at the expense of the non-striking worker.

The First and Third Circuits criticize the "animal exuberance" test in other terms. In *Associated Grocers of New England v. NLRB*,[42] the First Circuit found the "animal exuberance" test "too inelastic to provide a reliable means for distinguishing serious misconduct or threats from protected activity."[43] A similar rationale pervaded the Third Circuit's *McQuaide* opinion; the *McQuaide* court framed the question as "whether a threat is sufficiently egregious not whether there is added emphasis."[44]

3. The "Objective" Test

Realizing that the problem presented by strike misconduct is to distinguish actions sufficiently egregious to justify refusal to reinstate while simultaneously preserving the vitality of collective action,[45] the objective test proposes a solution in the ubiquitous "reasonable person." The test is whether a threat reasonably tends to coerce or intimidate, ensuring that neither employer nor worker is penalized for engaging in arguably proper activity. The test does not require a physical gesture,[46] thereby recognizing the coercive potential of words and protecting an employee's right of choice.

The equitable nature of the objective test is further demonstrated by its

39. *Associated Grocers*, 562 F.2d at 1336; *McQuaide*, 552 F.2d at 528. The Eleventh Circuit has found that the animal exuberance test gives better protection to an employee's right to engage in concerted activity than does the objective test. Georgia Kraft Co. v. NLRB, 696 F.2d 931, 939 (11th Cir. 1983).

40. 29 U.S.C. § 157 (1982). This section provides, in relevant part, that "[e]mployees shall have the right . . . to engage in . . . concerted activities . . . and shall also have the right to refrain from any or all of such activities. . . ." *Id.*

41. 29 U.S.C. § 158(b)(1) (1982).

42. 562 F.2d 1333 (1st Cir. 1977).

43. *Id.* at 1336.

44. 552 F.2d at 527. The court observed that focusing on the presence of physical activity fails to concentrate the inquiry upon the actual nature of an employee's conduct. *See id.*

45. *See supra* note 2.

46. *E.g.*, *McQuaide*, 552 F.2d at 527.

application. The objective test does not find strike misconduct in words alone without the added weight of surrounding circumstances.[47] Misconduct through threats has been found in strikes marked by incidents of vandalism and harassment,[48] where non-strikers have been followed to delivery points,[49] or to their homes,[50] or when their egress has been blocked.[51] A threat in such circumstances has added coercive force, as it does when the threat is made with forty to fifty picketers nearby.[52]

The objective test, as applied, has also had a subjective element. For example, Judge Barrett's dissent relied on evidence that the Lassens' threats had placed other employees in fear.[53] Similarly, the *Associated Grocers* court noted that a threatened applicant left the premises of the plant without submitting an application;[54] evidently the court found the applicant's motive significant, even though motive is intrinsically subjective. While consideration of subjective reaction may be important in characterizing the reasonableness of strike-related conduct, it is important to strictly limit the weight given such evidence. To effectively separate reasonable and unreasonable conduct, the objective test must go beyond the reactions of individuals in a particular case.[55]

D. *Conclusion*

The refusal by the Tenth Circuit to apply the objective test may signify nothing more than that *Midwest Solvents* was the wrong case in which to disrupt precedent. Strike misconduct is an area in which the conscience of the court might be easily aroused. If, in another case, the animal exuberance test would require reinstatement, but the threats, given the surrounding circumstances, were clearly coercive, the Tenth Circuit might adopt the objective test. In doing so, the court would be reaching a result more consistent with the National Labor Relation Act's goal of facilitating industrial peace[56]

47. "The test is whether the misconduct is such that, *under the circumstances existing*, it may reasonably tend to coerce or intimidate. . . ." *Id.* at 528 (quoting Local 524, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850, 852-53 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964)) (emphasis supplied).

48. *McQuaide*, 552 F.2d at 528. *See also* Firestone Tire & Rubber Co. v. NLRB, 449 F.2d 511, 512 (5th Cir. 1971), in which the Fifth Circuit articulated no standard, but found strike misconduct in a vulgar invective and hand sign; it may have been significant that the striker involved had been engaged in other, more violent activity during the strike. *See id.* at 512-13.

49. *McQuaide*, 552 F.2d at 526-27.

50. *Associated Grocers*, 562 F.2d at 1337.

51. *Id.*

52. *Id.* at 1336.

53. *See supra* notes 34-36 and accompanying text.

54. *Associated Grocers*, 562 F.2d at 1336.

55. *Associated Grocers* demonstrates the proper approach to the use of evidence of subjective reaction. The *Associated Grocers* court remanded to the Board, with instructions to apply the objective test, the case of a striker ordered reinstated because his threats had not deterred a non-striker from applying for a position. The court rejected the notion that filing the job application proved the applicant had not been coerced, noting that while the applicant's subjective reaction was important, that reaction could not in itself satisfy an inquiry into the objective reasonableness of the striker's conduct. *Id.* at 1337.

56. *See, e.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-43 (1937).

and protecting an employee's freedom of choice.[57]

II. NLRB USE OF PRESUMPTIONS WHEN CERTIFYING HEALTH CARE BARGAINING UNITS

Beth Israel Hospital and Geriatric Center v. NLRB[58] (*Beth Israel II*) was an en banc rehearing of an employer challenge claiming that due process protections precluded use of a presumption of unit appropriateness at an unfair labor practice hearing seeking to force an employer to negotiate with a certified employee bargaining unit.[59] The Tenth Circuit rejected the challenge, holding that reliance on the presumption of unit appropriateness was permissible, even though the presumption relieved the Board's General Counsel[60] of the burden of persuasion on an element of an unfair practice charge.[61] Chief Judge Seth and Judge Barrett dissented from this holding.[62]

A. *Background*

The NLRB's General Counsel, as the moving party in an unfair labor practice hearing, has the burden of persuasion on the unfair practice charge.[63] The Board, however, had permitted the General Counsel to rely on a presumption which required the employer to prove the inappropriateness of a previously certified unit.[64] Employers appealed this action, contending that because the issue of appropriateness was central to the unfair practice charge, due process required that the General Counsel bear the bur-

57. *See supra* notes 38-40 and accompanying text.

58. 688 F.2d 697 (10th Cir.), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982).

59. The NLRB has the responsibility for determining which employee units are appropriate for collective bargaining purposes. 29 U.S.C. § 159(b) (1982). Certification of a bargaining unit as appropriate is made following a nonadversarial representation hearing. *See* 29 C.F.R. § 101.21 (1983). *Accord* Inland Empire District Council, Lumber & Sawmill Workers Union v. Millis, 325 U.S. 697, 706 (1945). The certification decision can be made either directly by the Board or by one of its regional directors. 29 U.S.C. §§ 153(b), 159(b) (1982); 29 C.F.R. § 101.21 (1983). This function is generally referred to as "determining unit appropriateness."

Once a bargaining unit has been certified, an employer is required to negotiate with that certified unit, *see* 29 U.S.C. § 158(a)(5) (1982); failure to do so constitutes an unfair labor practice. *Id.* There is no right to have a certification decision reviewed directly. A.F. of L. v. NLRB, 308 U.S. 401 (1940). *Accord* Magnesium Casting Co. v. NLRB, 401 U.S. 137, 139 (1971). To obtain judicial review of the determination the employer must refuse to bargain with the certified unit, be charged with an unfair labor practice, and raise the inappropriateness of the bargaining unit as a defense in the unfair labor practice proceeding. A.F. of L. v. NLRB, 308 U.S. 401 (1940). The circuit courts then have power to review the determination of unit appropriateness through the grant of jurisdiction to review the Board's unfair labor practice decisions. *See* 29 U.S.C. §§ 160(e)-(f) (1982). Because the unit certification reflects on exercise of the Board's discretion, however, the finding of unit appropriateness cannot be overturned unless the Board has abused its discretion. *Beth Israel II*, 688 F.2d at 699-700; *see* Packard Motor Co. v. NLRB, 330 U.S. 485, 491 (1947).

60. The NLRB's General Counsel represents the agency in unfair practice proceeding. *See* 29 U.S.C. § 153(d) (1982).

61. *Beth Israel II*, 688 F.2d at 701.

62. *See id.* at 701 (Barrett, J., dissenting); *id.* at 704 (Seth, C.J., dissenting).

63. Presbyterian/St. Luke's Medical Center v. NLRB, 653 F.2d 450, 456 (10th Cir. 1981), *overruled in part*, Beth Israel Hosp. and Geriatric Center v. NLRB, 688 F.2d 697 (10th Cir.), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982).

64. *See* Beth Israel Hosp. and Geriatric Center v. NLRB, 677 F.2d 1343, 1345 (10th Cir. 1981) (*Beth Israel I*), *rev'd in part*, 688 F.2d 697 (10th Cir.) (en banc rehearing), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982).

den of persuasion on this issue.[65] This argument was supported by citation to Federal Rule of Evidence 301,[66] which Congress had expressly made applicable to unfair labor practice hearings "so far as practicable."[67] Because Rule 301 bars presumptions shifting the burden of persuasion, the Board's approval of a burden-shifting presumption allegedly vitiated the due process protection provided by allocating the burden of proof to the General Counsel,[68] thereby violating the employers' rights.

The challenge outlined above was first considered by a Tenth Circuit panel in *Presbyterian/St. Luke's Medical Center v. NLRB*.[69] *Presbyterian/St. Luke's* held that the Board could not permit the use of a presumption which required the employer to bear the burden of persuasion on its contention that a certified bargaining unit was inappropriate.[70] Proof that a certified bargaining unit is appropriate is necessary to establish that the asserted unfair practice (refusal to bargain)[71] has occurred.[72] Because the Federal Rules of Evidence, including Rule 301, were applicable to the unfair practice hearing,[73] it was impermissible to use a presumption which shifted the burden of proof on any element of the unfair practice charge.[74] Two panel decisions following this holding were the subject of the en banc rehearing in *Beth Israel II*.[75]

B. *The Majority Opinion*

The majority in *Beth Israel II* overruled the *Presbyterian/St. Luke's* restriction on the use of presumptions of unit appropriateness at unfair labor prac-

65. *See generally Beth Israel II*, 688 F.2d at 702-704 (Barrett, J., dissenting). The majority opinion does not address the employers' challenge in due process terms, which may be a central flaw in the opinion. *See infra* notes 96-99 and accompanying text.

66. FED. R. EVID. 301 provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence, to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

67. *See* 29 U.S.C. § 160(b) (1982).

68. *Cf.* Addington v. Texas, 441 U.S. 418 (1979) (recognizing that burden of proof acts as due process procedural mechanism).

69. 653 F.2d 450 (10th Cir. 1981), *overruled in part*, Beth Israel Hosp. & Geriatric Center v. NLRB, 688 F.2d 697 (10th Cir.) (en banc), *cert. dismissed per stipulation*, 103 C. St. 433 (1982).

70. 653 F.2d at 456. *Presbyterian/St. Luke's* also held that the Board could not rely on its traditional "community of interests" test when certifying health care bargaining units, but must apply a "disparity of interests" test. *Id.* at 457. Further, the Board was required to include a specific statement explaining why the certified unit did not result in an undue proliferation of bargaining units in the health care industry. *Id.* This holding, although not before the Tenth Circuit in *Beth Israel II*, *see* 688 F.2d at 698, was expressly approved by the circuit en banc. *Id.* at 700.

71. *See* 29 U.S.C. § 158(a)(5) (1982).

72. *See* 653 F.2d at 456. For a fuller explanation of the refusal-to-bargain unfair labor practice, see *supra* note 59.

73. 653 F.2d at 456.

74. *Id.*

75. Beth Israel Hosp. & Geriatric Center v. NLRB, 677 F.2d 1343 (10th Cir. 1981) (*Beth Israel I*), *rev'd in part*, 682 F.2d 697 (10th Cir.) (en banc), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982); St. Anthony Hosp. System v. NLRB, 655 F.2d 1028 (10th Cir. 1981), *rev'd in part*, 688 F.2d 697 (10th Cir.) (en banc), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982).

tice hearings.[76] The first step in reaching this decision was an examination of the nature of the decision to certify a bargaining unit as appropriate. Certification of unit appropriateness is initially made at a representation hearing.[77] Congress intended that the determination of unit appropriateness be made primarily through the Board's exercise of its expertise and experience with the labor relations problems existing in a particular economic sphere.[78] Thus, the process of unit determination at the representation hearing was not subject to strict rules of evidence; the Board was entitled to make its initial determination of appropriateness through the use of any procedural devices—including presumptions creating a burden of persuasion—which were justified by experience and which were not arbitrary.[79]

The majority's second step was to examine Supreme Court precedent concerning the Board's obligation to make an independent review of a unit certification when that certification is challenged through an unfair practice proceeding. Citing *Magnesium Casting Co. v. NLRB*,[80] the majority stated that the Supreme Court had established that the Board was not required to reconsider the issue of unit appropriateness during the unfair practice proceeding.[81] Rather, the Board had discretion to require rehearing on the issue, adopt the conclusion entered following the representation hearing, or make an independent decision.[82]

In light of the two principles of law discussed above, the majority concluded that the question of unit appropriateness was not a factual question to be resolved during the unfair practice hearing.[83] Accordingly, the General Counsel had no burden of persuasion on the issue of unit appropriateness, and the Federal Rules of Evidence did not provide a procedural framework for determining whether the bargaining unit had been properly certified.[84] Essentially, because the determination of unit appropriateness was committed to Board discretion, Rule 301 could not control the Board's use of presumptions.[85] Hence, the Board's use of a presumption "violating" Rule 301 did not, in the context of a determination of unit appropriateness, constitute a denial of due process.[86] Additionally, because judicial review existed to ensure that the Board's discretion was not exercised arbitrarily, excluding the issue of unit appropriateness from the unfair practice hearing's adver-

76. *See Beth Israel II*, 688 F.2d at 698, 700-01.

77. *See supra* note 59.

78. *See* 688 F.2d at 699.

79. *Id.*

80. 401 U.S. 137 (1971).

81. 688 F.2d at 700-01 (citing Magnesium Casting Co. v. NLRB, 401 U.S. 137, 141 (1971)). *Accord* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 161 (1941).

82. 688 F.2d at 700-01.

83. *Id.* at 701.

84. *Id.* at 700-01.

85. *Id.*

86. The majority does not address the question on rehearing in terms of the denial vel non of due process. The question presented to the court, however, was whether due process protection permitted use of a presumption relieving the General Counsel of the burden of persuasion on any element of the unfair practice charge. *Id.* at 702 (Barrett, J., dissenting). Thus, the majority's reasoning and conclusion have been presented in terms of their due process implications.

sarial environment did not deny an employer's due process rights.[87]

C. *The Dissents*

1. Judge Barrett

Judge Barrett's dissent was premised on his perception that due process required that an employer be accorded a full adversarial hearing on every element of the unfair practice charge.[88] There was no indication in the National Labor Relations Act that the issue of unit appropriateness was entitled to unique treatment; rather, the Act stated that the Federal Rules of Evidence were applicable to *all* unfair practice proceedings.[89] Further, the Rules were made applicable to unfair practice proceedings in order to provide protection against arbitrary action by the Board.[90] The majority's holding was therefore directly and indirectly[91] contrary to the statutorily mandated restrictions of Rule 301. Additionally, the majority's holding subverted the judiciary's power to provide a meaningful guarantee against arbitrary Board decisions. Judge Barrett would have upheld *Presbyterian/St. Luke's* and held that due process bars the use, in an unfair practice proceeding,[92] of a presumption which relieves the General Counsel of the burden of persuasion on any element of an unfair practice charge.[93]

2. Chief Judge Seth's Dissent

Chief Judge Seth's dissent was grounded in his concern that the majority's holding would render judicial review of this class of unfair practice charges virtually useless. By permitting the Board to use a presumption which relieved it of the burden of producing *any* evidence, the court would not have a meaningful basis for determining whether the Board had acted arbitrarily.[94] Excusing the Board from producing evidence by characterizing unit appropriateness as a nonfactual, discretionary determination would eliminate the check on arbitary action provided by a record setting forth all facts constituting a basis for agency action.[95] Because application of Rule

87. *See id.* at 701.

88. Judge Barrett succinctly captured the essence of his dissent in summing up his opinion:

> In any unfair labor practice proceeding, there must be a full and complete adversarial hearing. The hospitals were not accorded such a proceeding. The Board was obligated to present evidence in the unfair labor practice proceedings (through its General Counsel) which effectively met the burden of persuasion. This and this only could meet the measure of a "full and adequate" hearing . . . .

Id. at 704 (Barrett, J., dissenting).

89. *Id.* at 703 (citing 29 U.S.C. § 160(b) (1982)).

90. *See* 688 F.2d at 703-04 (Barrett, J., dissenting).

91. In addition to finding a direct contravention of Rule 301 in the majority holding, Judge Barrett characterized the majority's approach as permitting the Board to treat a presumption as evidence, and stated that this was an impermissible use of presumption under Rule 301. *Id.* at 702 (citing J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 301-4 to 301-7 (1982)).

92. Judge Barrett limited his analysis to the use of presumptions at unfair practice proceedings. 688 F.2d at 701 (Barrett, J., dissenting).

93. *Id.* at 704.

94. *Id.* at 705 (Seth, C.J., dissenting).

95. *Id.* at 706.

301 to the unfair practice proceeding would ensure the necessary record while the majority's approach would not, Chief Judge Seth dissented.

D. *Analysis*

There are two significant shortcomings in the majority opinion. The first is its failure to examine the legislative intent behind the statutory requirement to apply the Federal Rules of Evidence to unfair practice proceedings. The statute only requires that the Rules be used so far as practicable.[96] The majority's recognition of an exception to this mandate would have been more convincing if the opinion had demonstrated that the statutory requirement was not intended to affect the characterization of a particular issue as factual, or if the opinion had demonstrated that it was not "practicable" to apply the Rules to the issue of unit certification.

The second, more serious flaw is the failure to demonstrate that the rule of *Magnesium Casting*[97] was applicable when the Board reviewed certification decisions based primarily upon a Board-created presumption. *Magnesium Casting* and *Pittsburgh Plate Glass Co. v. NLRB*,[98] its progenitor, both involved review of unfair labor practice proceedings following certification hearings which had resulted in fully developed records. It was in that context that the Court held that the two procedurally distinct proceedings were essentially two parts of a unitary proceeding, and that it was therefore unnecessary, at the unfair practice proceeding, for the Board to reconsider its decision entered following the representation hearing.[99] The majority opinion in *Beth Israel II* would clearly have been a more valuable precedent had it explicitly considered the extent to which due process concerns are satisfied by a unitary proceeding in which the government relies throughout on a presumption. Similarly, the opinion would have gained persuasiveness had it engaged in the interest balancing methodology the Supreme Court has adopted for due process challenges to the adequacy of a particular agency proceeding.[100]

Although the majority opinion might have been strengthened by including either or both of the above analyses, it does appear to adequately respond to the due process concerns raised by the dissenters. Determination of an appropriate bargaining unit *is* a function which is primarily committed to the NLRB and which requires a significant degree of expertise. The majority's approach would prevent arbitrary action by retaining judicial review of the rationality of a particular presumption.[101] Additionally, the em-

96. *See* 29 U.S.C. § 160(b) (1982).

97. *See supra* notes 80-82 and accompanying text.

98. 313 U.S. 146 (1941).

99. *Id.* at 158-62.

100. *E.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976). A Tenth Circuit panel recently recognized that it should not dispose of due process challenges on the basis of Supreme Court precedent which did not address the exact challenge before the court and which was decided before the era of interest-balancing jurisprudence. *See* United States v. Schell, 692 F.2d 672 (10th Cir. 1982). Although *Schell* was a criminal case, no compelling reason exists not to apply its cautious approach to due process challenges when considering civil cases.

101. *Cf.* 688 F.2d at 699 (courts should defer to NLRB discretion and expertise, including presumptions drawn from past experience, subject to showing of reasonableness).

ployer always has the chance to meet the burden of persuasion imposed by the presumption of appropriateness.[102]

One final point deserves mention. NLRB regulations state that the purpose of a representation hearing is to develop "as full a statement of the pertinent facts as may be necessary for determination of the case."[103] Neither the majority or dissenting opinions examine whether use of a presumption eliminating the obligation of *any* party to introduce evidence of appropriateness is consistent with existing regulations.

III. "BENCHING" AS INTERNAL UNION DISCIPLINE

The dispute in *Hackenburg v. International Brotherhood of Boilermakers*[104] had its roots in a wildcat strike by the ten plaintiffs.[105] The Union imposed, as a penalty for the strike, a ninety day "benching," that is, deprivation of assignment to jobs through the Union-controlled hiring hall.[106] The sanction was imposed pursuant to a provision in the collective bargaining agreement with the employer which required the Union to "bench" members fired for misconduct.[107]

Suit was brought in federal district court by the plaintiffs, alleging that the benching violated Colorado labor law, that the Union breached its duty to fairly represent its members (through entering into a collective bargaining provision calling for benching of fired employees), and that the summary benching violated section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959[108] (Landrum-Griffin Act), which provides procedural protections for Union members upon whom a union is imposing sanctions. On cross motions for summary judgment the district court found that federal law preempted Colorado labor law, that there was no breach of the duty to fairly represent in negotiating the collective bargaining agreement, and that application of the sanction to seven voluntary strikers did not violate the Landrum-Griffin Act.[109] The trial court held, however, that application of the sanctions to three claimed involuntary strikers violated the protection of section 101(a)(5), and rejected the Union's motion for summary judgment as to these three plaintiffs.[110]

The Tenth Circuit upheld the trial court's determination on all issues except the holding in favor of the involuntary strikers.[111] The court recognized that the union's duty to fairly represent created no obligation to refrain from accepting a collective bargaining agreement not entirely

102. Note, however, that one reason Rule 301 rejected the "presumption-as-evidence" approach was the difficulty in determining the proper evidentiary weight to give a presumption. J. WEINSTEIN & M. BERGER, *supra* note 91, at 301-4 to 301-7.

103. 29 C.F.R. § 101.20(c) (1983).

104. 694 F.2d 1237 (10th Cir. 1982).

105. *Id.* at 1238.

106. *Id.* at 1237-38.

107. *Id.* at 1238.

108. 29 U.S.C. § 411(a)(5) (1982).

109. 694 F.2d at 1238.

110. *Id.*

111. *Id.* at 1239-40.

beneficial to its members.[112] Similarly, the court found there was no breach in the Union's operation of a hiring hall which, on balance, benefited Union members.[113] The preemption ruling was upheld without discussion.[114]

As noted, however, the court of appeals reversed the trial court's grant of summary judgment in favor of the three plaintiffs who claimed they had not willingly joined the strike.[115] The Tenth Circuit held that the benching had not affected the three plaintiffs' rights as union members, and that therefore the trial court incorrectly held that these plaintiffs had been wrongly denied the due process protections of the Landrum-Griffin Act.[116]

Section 101(a)(5) of the Landrum-Griffin Act provides:

> No member of any labor organization may be fired, suspended, expelled or *otherwise disciplined* except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.[117]

The plaintiffs had been afforded none of these procedural protections.[118] The trial court determined that benching fell within the "otherwise disciplined" language, and that therefore the plaintiffs' rights had been violated.[119] The Union argued on appeal that section 101(a)(5) was intended to protect workers only against union related disciplinary action, and that because the discipline imposed on the plaintiffs was not internal Union discipline, the Landrum-Griffin Act's procedural protections were inapplicable.[120] The court of appeals agreed[121] on the basis of the recent United States Supreme Court decision *Finnegan v. Leu*.[122]

In *Finnegan* the petitioners were Union members who were also employed as business agents by the Union.[123] Petitioners were fired by Leu, the Union's president, after he had won an election defeating Brown, the union's former president.[124] Leu felt that petitioners' open support of Brown during the election cast doubt on their ability to implement the policies and pro-

112. *Id.* at 1240.

113. *Id.*

114. *See id.* at 1238.

115. *Id.* at 1239.

116. *Id.* at 1239. The district court decision is unreported, but apparently the court ruled that protection of the Landrum-Griffin Act extended to unwilling participants in a wildcat strike, perhaps because of the opportunity the Act provides for a hearing before the imposition of a penalty. If the collective bargaining agreement contained a grievance procedure, the three unwilling participants in the strike could have filed a grievance against the employer for unfair discharge and had a hearing in that context. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975).

117. 29 U.S.C. § 411(a)(5) (1976) (emphasis supplied).

118. 694 F.2d at 1238.

119. *Id.*

120. *Id.*

121. *Id.* at 1239.

122. 456 U.S. 431 (1982).

123. *Id.* at 434. As business agents, petitioners performed confidential, policymaking tasks for their local. *Id.*

124. *Id.* at 433-34.

grams of the new administration.[125] Leu's right to discharge business agents was granted by the Union's by-laws.[126]

Petitioners in *Finnegan* claimed protection from dismissal in section 609 of the Labor-Management Reporting and Disclosure Act of 1959[127] (Landrum-Griffin Act), which makes it unlawful for a union official "to fire, suspend, expel or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act."[128] Among the Landrum-Griffin Act's guarantees is the right "to express any views, arguments, or opinions."[129] The Supreme Court held that "the term 'discipline,' as used in section 609, refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union" not as its employee.[130]

In construing section 609 the Supreme Court cited the "otherwise disciplined" language from section 101(a)(5)[131] and its accompanying conference report to lend force to the distinction it found between union action affecting a union member's rights as a member and action affecting his rights as an employee.[132] The intent of Congress in enacting these sections of the Landrum-Griffin Act was to protect union members against discipline arbitrarily denying members the rights incident to union membership.[133] Actions which did not affect those rights—such as loss of an employment position with the Union—were therefore not discipline within the meaning of section 609,[134] and, by implication, section 101(a)(5).

The Tenth Circuit found the analysis in *Leu* controlling in *Hackenburg*.[135] The court held that because the benching imposed by the Union did not affect the disciplined members' rights qua members, the employees were not disciplined within the meaning of section 101(a)(5). Hence, the procedural protections of that section were inapplicable, and the trial court had improperly granted summary judgment in favor of the involuntary strikers.[136]

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125. *Id.* at 434.
126. *Id.*
127. 29 U.S.C. § 529 (1982).
128. *Id.*
129. 29 U.S.C. § 102(a)(2) (1982).
130. 456 U.S. at 437 (emphasis in original).
131. *See supra* text accompanying note 116.
132. 456 U.S. at 436.
133. *Id.* at 438.
134. *Id.* at 439. *Finnegan* also analyzed whether the firing violated the petitioners' speech rights within the meaning of section 102 of the Act, 29 U.S.C. § 412 (1982), which provides an independent action for deprivations of rights secured by the Act. *Id.* This analysis does not affect the holding with respect to the scope of the "otherwise disciplined" language, as the two sections were intended to address different problems. *See* 456 U.S. at 439 & n.10.
135. 694 F.2d at 1239.
136. *Id.*

* Sections I & III. Section II was prepared by the Denver Law Journal Editors in conjunction with Ms. Lindsay.