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LABOR LAW

Among the labor law cases decided last term by the Court of Appeals for the Tenth Circuit was that of *Satterwhite v. United Parcel Service, Inc.*[1] In that case the plaintiff employees, after losing in arbitration, brought an action under section 16(b) of the Fair Labor Standards Act[2] for overtime compensation. The Tenth Circuit decided against the employees, holding that when a wage dispute is submitted to arbitration in accordance with the provisions of a collective bargaining agreement, the employees may not thereafter maintain a Fair Labor Standards Act suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator. In other words, resolution of this kind of wage claim by an arbitrator is dispositive of a statutory claim under section 16(b) of the Act. The *Satterwhite* case is commented on more extensively below.

In the second comment of this section the Tenth Circuit's decision in *NLRB v. Serv-All Co.*[3] is analyzed. In that case the affected union had filed an 8(a)(5) refusal to bargain charge[4] against the employer for its alleged refusal to execute a contract with that union. The National Labor Relations Board found an 8(a)(5) violation in terms of repeated occurrences of the employer's refusal to execute a contract with the union. The Tenth Circuit reversed the Board, holding that the unfair labor practice complaint was barred by the Labor-Management Relations Act section 10(b) statute of limitations.[5]

Two additional labor law cases are noted here briefly. In *Bill's Coal Co. v. NLRB*,[6] the employer had made extreme anti-union statements in an attempt to oppose the unionization of his plant, and, at about the same time, had laid off nine employees who had signed union cards. The Tenth Circuit upheld the Board's finding of an 8(a)(1) interference violation[7] by the employer, but reversed the finding of an 8(a)(3) discrimination to discourage membership violation.[8] The Tenth Circuit's reversal

[1] 496 F.2d 448 (10th Cir. 1974).
[2] 29 U.S.C. § 216(b) (1970).
[3] 491 F.2d 1273 (10th Cir. 1974).
[4] 29 U.S.C. § 158(a)(5) (1970).
[5] *Id.* § 160(b).
[6] 493 F.2d 243 (10th Cir. 1974).
[7] 29 U.S.C. § 158(a)(1) (1970).
[8] *Id.* § 158(a)(3).

of the finding of an 8(a)(3) violation was based on the ground that the Board's finding of a discriminatory layoff did not find substantial support in the record.

Gordon v. Laborers' International Union of North America[9] presented the Tenth Circuit with a consolidated appeal from several lower court suits. In the facts of the case the International Union had imposed a trusteeship upon one of its locals because of the local's independent action in bargaining on its own and signing an agreement with the employer group in violation of the constitution of the International. The local's independent action was due to its discontent with the representation scheme for the District Counsel which had been set up as the unitary bargaining committee to negotiate with the designated employer association. The Tenth Circuit here upheld the imposition of a trusteeship by the International on the grounds that it was proper under the provisions of Title III of the Labor-Management Reporting and Disclosure Act.[10] In addition, the court held that section 101 of that Act,[11] which gives every member of a labor organization equal rights and privileges of participation was inapplicable to international or intermediate bodies such as the District Counsel. Therefore, the court concluded that the imposition of a proportional representation system upon the District Counsel, as requested by the local, was not mandated by the Act.

I. ARBITRATION AND THE STATUTORY RIGHT TO SUE: ALTERNATIVE OR PARALLEL REMEDIES

Satterwhite v. United Parcel Service, Inc., 496 F.2d 448 (10th Cir. 1974)

Following the arbitrator's decision that the employee's discharge was for cause, the employee sued under Title VII of the Civil Rights Act in *Alexander v. Gardner-Denver Co.*[1] In a per curiam opinion, the Court of Appeals for the Tenth Circuit affirmed the district court's holding that an employee who voluntarily submitted a grievance based on racial discrimination to final and binding arbitration under a collective bargaining agreement was precluded from maintaining a court action on the same

[9] 490 F.2d 133 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3209 (U.S. Dec. 15, 1974) (No. 73-1821).

[10] 29 U.S.C. §§ 461-66 (1970).

[11] *Id.* § 411.

[1] 415 U.S. 36 (1974).

issue.[2] In 1974, the U.S. Supreme Court reversed *Gardner-Denver*, finding the employee's statutory right to a trial de novo under Title VII not foreclosed by prior submission to arbitration.[3]

At the time of the Supreme Court's reversal of *Gardner-Denver*, *Satterwhite v. United Parcel Service, Inc.*[4] was pending before the Court of Appeals for the Tenth Circuit. The controversy in *Satterwhite* concerned elimination by the employer of two 15-minute coffee breaks a day. The collective bargaining agreement between the employer, United Parcel Service, Inc., and the union[5] did not specifically cover coffee breaks but did provide for a grievance procedure culminating in binding arbitration.[6] The employees grieved the elimination of coffee breaks, seeking compensation at one and one-half times the hourly wage for the extra half-hour a day worked in lieu of coffee breaks. On submission to arbitration, the arbitrator held that the company could not unilaterally eliminate the paid coffee breaks, awarded the extra half-hour a day compensation to the employees, and, in a supplemental decision, directed that the payment be at straight time rather than at time and one-half.[7]

Fifty-nine employees then brought suit under section 16(b) of the Fair Labor Standards Act (FLSA) for payment at time and one-half, in accordance with section 7(a)(1) of the FLSA which provides pay for work in excess of 40 hours a week at one and one-half times the straight rate.[8] Section 16(b) of the Fair Labor Standards Act provides employees with the statutory right to recover for violations by employers of the wages and hours provisions of the FLSA by bringing an action in any court of competent jurisdiction.[9] The district court dismissed the employee's action on the basis of the court of appeals' decision in *Gardner-Denver*. On appeal, the Tenth Circuit upheld the judgment against the employees, stating that prior submission of the wage claim to binding arbitration precluded a suit under section 16(b) of the FLSA.[10]

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[2] 466 F.2d 1209 (10th Cir. 1972), *rev'd*, 415 U.S. 36 (1974).

[3] 415 U.S. 36 (1974).

[4] 496 F.2d 448 (10th Cir. 1974).

[5] Delivery Drivers, Warehousemen and Helpers, Local Union No. 435.

[6] The agreement provided that the arbitrator's award would be binding and conclusive unless it was beyond the jurisdiction given the arbitrator by the agreement. No claim was made in this case that the award exceeded jurisdictional limits.

[7] 496 F.2d at 449.

[8] 29 U.S.C. § 207(a)(1) (1970).

[9] *Id.* § 216(b).

[10] 496 F.2d 448 (10th Cir. 1974).

I. FEDERAL POLICY FAVORING ARBITRATION

The appellants in *Satterwhite* argued that the Supreme Court's decision in *Gardner-Denver* secured their statutory right to bring suit in federal court irrespective of prior submission to arbitration.[11] This assertion raised the most controversial issue posed by the Supreme Court opinion: Did *Gardner-Denver* open the doors of the courts to independent adjudication of already arbitrated issues on the basis of statutory rights?[12]

The Tenth Circuit refused to attach a broad, inclusive reading to the Court's preservation of the statutory right to sue in Title VII actions. Instead, the court relied on *Gardner-Denver's* reaffirmation of the federal policy favoring arbitration as determinative in *Satterwhite*.[13] The federal policy favoring arbitration had been previously expressed in a number of decisions, most notably the *Steelworkers Trilogy* cases.[14] These cases emphasized arbitration as the vehicle to promote industrial stability and peace;[15] defined the role of the arbitrator as the dispenser of industrial justice; and, of major significance, restricted the role to be played by the court in labor disputes previously submitted to arbitration:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award.[16]

The court of appeals viewed the exclusion of Title VII rights from the general principle precluding a statutorily-based action after submission to arbitration as an exception. Thus the issue in *Satterwhite* was defined by the court to be whether rate of pay for overtime, statutorily protected in the FLSA, was subject to the general rule of election of remedies or was in the nature of an exception, such as afforded Title VII rights in *Gardner-Denver*.[17]

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[11] *Id.* at 450.

[12] *See* Getman, *Can Collyer and Gardner-Denver Co-Exist? A Postscript*, 49 IND. L.J. 285 (1974).

[13] Alexander v. Gardner-Denver Co., 415 U.S. 36, 59 (1974).

[14] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[15] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

[16] United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

[17] Satterwhite v. United Parcel Service, Inc., 496 F.2d 448, 450 (10th Cir. 1974).

The court of appeals culled from *Gardner-Denver* two factors essential to the creation of an exception: the nature of the right must be of a personal rather than collective character; and a relatively clear legislative intent to override a policy favoring election of remedies should exist. In analyzing the *Satterwhite* complaint, the court juxtaposed Title VII of the Civil Rights Act against the Fair Labor Standards Act, contract rights against statutory rights, and racial discrimination against rate of pay for overtime.

II. THE NATURE OF THE RIGHT

Status as an exception rests in part on the nature of the right being protected by the statutory privilege to sue. The Supreme Court recognized this aspect, stating "that a union may waive certain statutory rights related to collective activity, such as the right to strike."[18] The court of appeals focused on two interrelated factors in determining into which category the overtime wage provision of the FLSA fell. Was the right personal or collective in nature? Was the right primarily related to "shop" law or public law? The two appear to merge when addressing the degree to which the protected right has been traditionally a subject of collective bargaining as contrasted to a right basically peripheral to union activity.

In assessing the right involved in *Gardner-Denver*, the Supreme Court found that harmony between the union and the individual cannot be presumed where racial discrimination is involved.[19] However, in *Satterwhite*, the court of appeals found "[o]ne of the highest objectives of any union is to get all the money possible for all of its members."[20] In considering which rights could be waived, the Supreme Court noted that "rights . . . conferred on employees collectively to foster the processes of bargaining . . . properly may be exercised or relinquished by the union as collective-bargaining agent *to obtain economic benefits for unit members*."[21] Applying the Supreme Court's economic benefit test in *Satterwhite*, the court of appeals found "[w]ages and hours . . . at the heart of the collective-bargaining process . . . more akin to collective rights than to individual rights

[18] Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).
[19] *Id.* at 58 n.19.
[20] 496 F.2d at 451.
[21] Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

. . . ."[22] And, the court saw as evidentiary support for this conclusion the fact that 58 employees joined the initial complaint in *Satterwhite*, testifying to the "collective-shop" nature of the FLSA provision concerning rate of overtime pay.[23]

III. CONGRESSIONAL INTENT

While recognizing the federal policy favoring arbitration, the Supreme Court distinguished the statutory right involved under Title VII from an employee's contractual rights under a collective bargaining agreement, and decided that deferral to arbitration would not comport with the congressional objective that federal courts should be responsible for enforcing the rights granted the individual under Title VII.[24] In line with this portion of the Supreme Court's analysis in *Gardner-Denver*, the *Satterwhite* court differentiated the congressional intent with regard to statutory rights involving racial discrimination (Title VII) and those involving wages and hours (FLSA).

In the early years of the administration of the Fair Labor Standards Act,[25] numerous section 16(b) actions were litigated.[26] In these cases, the U.S. Supreme Court had occasion to analyze the policy behind the FLSA; of particular importance was the case of *Brooklyn Savings Bank v. O'Neil*.[27] In analyzing the congressional intent behind FLSA, the Court discovered a public policy of protecting certain groups of workers from substandard wages and excessive hours. This legislative protection was accorded in recognition of the unequal bargaining power between employees and employers. In particular the Act sought to aid the unprotected and unorganized workers—those who lacked sufficient bargaining power to secure sufficient wages. The growth of labor unions and the emphasis since afforded the collective bargaining process abrogated to a substantial extent the importance of the FLSA, in that employees now have the ability to organize and assert their interests through contract negotiations and to

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[22] 496 F.2d at 451.

[23] *Id.*

[24] Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974).

[25] FLSA was enacted in 1938.

[26] See City Serv. Cleaning Contractors v. Vanzo, 179 Misc. 2d 368, 39 N.Y.S. 2d 24 (Sup. Ct. 1942), *aff'd*, 266 App. Div. 660, 41 N.Y.S.2d 210 (1943), which held that the right of suit under FLSA section 16(b) is a "substantive" right; such a suit could not be restrained because of a collective bargaining agreement compelling arbitration, which is a remedial right. A similar conclusion was reached in Bailey v. Karolyna Co., 50 F. Supp. 142 (D.C.N.Y. 1943).

[27] 324 U.S. 697 (1945).

acquire new and expanded rights and privileges in labor agreements.

In a footnote, the Court in *Brooklyn Savings Bank* cited the legislative intent to give employees the means to assert a statutory right by maintaining a court action to recover wages due.[28] The legislative intent expressed in *Brooklyn Savings Bank* to allow individual suits by workers to recover wages, was aimed primarily at unprotected, unorganized workers. In *Satterwhite*, the workers were organized into a union, occupied a relatively strong position in relation to their employer, and could assert their right through the collective bargaining process and grievance procedure, with a final step of binding arbitration.

In reviewing the legislative history of Title VII, the Supreme Court found that Congress had attached "highest priority" to the Civil Rights Act;[29] discovered a congressional intent that the statutory right to sue supplemented existing laws and institutions relating to discrimination;[30] and that "Congress gave private individuals a significant role in the enforcement process of Title VII."[31] In contrast, the Tenth Circuit concluded that private enforcement was not a major objective of FLSA;[32] and that FLSA did not, as Title VII, present an intent to accord parallel, overlapping relief apart from contractual remedies.[33]

In making this determination, the court of appeals examined the Portal-to-Portal Act of 1947,[34] which it discovered expressed a congressional policy favoring the collective bargaining process over judicial review.[35] In order to effectuate this intent, the Portal-to-Portal Act of 1947 established a good faith defense to FLSA actions.[36] The court of appeals noted that Congress provided neither a good faith defense in Title VII actions nor directly

[28] *Id.* at 705 n.16.

[29] Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

[30] *Id.* at 48-49.

[31] *Id.* at 45.

[32] 496 F.2d at 450.

[33] *Id.*

[34] 29 U.S.C. §§ 251-62 (1970).

[35] In its declaration of policy behind the Portal-to-Portal Act of 1947, Congress expressed dissatisfaction with judicial interpretation of FLSA in disregard of long-established customs and contracts between employers and employees, and with the liability imposed on employers as a result of strict interpretation. Congress thus declared a policy to protect the right of collective bargaining and limit the jurisdiction of the courts, by limiting the liability of employers in certain cases, and permitting a good faith defense to FLSA claims by employees. 29 U.S.C. §§ 251, 259 (1970).

[36] *Id.*

addressed the relationship between collective bargaining and judicial review.[37] The court concluded that the difference in approach as illustrated by the inclusion of a good faith defense and the emphasis on collective bargaining in the Fair Labor Standards Act "indicates that Congress intended that wage disputes and racial disputes should not receive the same treatment."[38]

Thus, to the extent that contract provisions paralleling FLSA statutory rights are included within the collective bargaining agreement, the statutory rights are placed within the province of the arbitrator, who, applying the law of the shop, decides the relative rights of the parties. Under these circumstances, prior submission to arbitration precludes the right to bring suit in federal court.

IV. THE BALANCING TEST IN *Satterwhite*

The Tenth Circuit inferred the necessity of a balancing test, wherein both the nature of the protected right and congressional intent were combined in weighing the federal policy favoring arbitration of industrial disputes against the statutory right to a court suit. In applying this balancing test to a wage claim under FLSA, the court found the scale tipped toward arbitration, concluding that wages and hours were better suited to the arbitral forum than a claim of racial discrimination under Title VII. While the law of the shop applied by arbitrators lends itself to pay issues, Title VII cases require consideration of public law concepts. The court stated that in *Gardner-Denver*

> [t]he conclusion that the anti-discrimination policy rated higher than that favoring arbitration of labor disputes was determinative. We find nothing in any pertinent legislative history or court decision to indicate that Congress, by the grant of a right to private suit under FLSA § 16(b), intended to establish a policy preference for the determination of a wage dispute in judicial rather than arbitral proceedings.[39]

V. CONCLUSION

Favoritism towards arbitration as a general principle is nothing more than the judicial policy of election of remedies. In effect,

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[37] 496 F.2d at 451. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the U.S. Supreme Court held that the absence of an intent to discriminate, or even a good intention, does not redeem discriminatory employment practices. According to that case, the intended thrust of Title VII was to the consequences of employment practices rather than simply the motivation behind them.

[38] 496 F.2d at 451.

[39] *Id.*

a union may elect for its members the remedy of compulsory, binding arbitration on issues relating to the shop, which have a collective impact, and on which harmony between the union and individual members can be presumed.

The finality accorded the arbitrator's decision on the merits is dependent upon whether the right is one whose adjudication can be properly waived by the union in a collective bargaining agreement in favor of arbitration. If the right is waivable, the courts will defer to the arbitrator's special competence in the law of the shop and deny judicial review on the merits. By refusing to entertain a suit under FLSA, the court of appeals in *Satterwhite* effectively defers to the arbitrator's decision, recognizing the Supreme Court's reaffirmation in *Gardner-Denver* of the deferral doctrine and placing Title VII in proper perspective as an exception to this doctrine.

Although *Satterwhite* leaves unresolved whether a statutory right to sue will be precluded by prior resort to arbitration under statutes similar to the Fair Labor Standards Act, the method of analysis utilized in *Satterwhite*, in terms of balancing the policy favoring arbitration against the statutory right involved, could readily be applied. *Gardner-Denver* will undoubtedly control when individual civil rights are involved, but *Satterwhite* correctly construes the scope and impact of *Gardner-Denver*: in the usual areas of industrial disputes and interpretation of collective bargaining provisions arbitration will remain the favored forum.

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II. LABOR LAW—LIMITATION OF ACTIONS—THE LMRA 10(b) STATUTE OF LIMITATIONS AND THE DEMANDS UPON THE DEFENSE

NLRB v. Serv-All Co., 491 F.2d 1273 (10th Cir. 1974)

In the early part of last year the Court of Appeals for the Tenth Circuit decided the case of *NLRB v. Serv-All Co.*[1] in which the court addressed the issue of the proper application of the statute of limitations under section 10(b) of the Labor-Management Relations Act.[2] This 10(b) statute of limitations provides that a complaint will not issue upon any unfair labor practice occurring more than 6 months before the filing of the

[1] 491 F.2d 1273 (10th Cir. 1974).

[2] 29 U.S.C. 160(b) (1970).

charge with the National Labor Relations Board and service of a copy upon the party charged.[3] Because this 10(b) limitations period is relatively short, interesting situations have arisen when an unfair labor practice is repeatedly committed. If the aggrieved party neglects to file an unfair labor practice charge within 6 months of the initial instance of the unfair labor practice but does file a charge within 6 months of a later recurrence of the same unfair labor practice, is the charge barred by section 10(b)? That is, does the limitation period begin to run from the first incident of an unfair labor practice, so that the charge is barred by the running of the initial 6-month limitation period; or does the statute begin to run anew upon each recurrence of the unfair labor practice, so that the charge is not barred by 10(b) since it fell within 6 months of a repeated occurrence?

The wording of the 10(b) statute of limitations suggests that this kind of recurrence of the same unfair labor practice within the 6-month period immediately preceeding the charge would not result in the barring of the charge, because the charge could be based entirely upon the unfair labor practice within the period. The language of the statute merely proscribes a complaint issued on the basis of an unfair labor practice occurring more than 6 months prior to the charge,[4] and in true recurrence situations the basis of the charge would be the later unfair labor practice that took place within the period. When confronted with this issue, however, courts have gone both ways depending upon the type of unfair labor practice and the circumstances of the particular case. In many instances the courts have found that the charge is not barred, frequently applying the continuing violation and continuing obligation doctrines.[5] But in other cases, like that of *Serv-All*, courts have gone the other way and have found that the charge is barred by the running of the 10(b) statute of limitations.

In this comment the decision of the Court of Appeals for the Tenth Circuit in the *Serv-All* case will be carefully examined, together with a comparison of that case with decisions on similar facts in other jurisdictions. In this treatment special emphasis

[3] *Id.* The statute makes an exception for persons who are prevented from filing their charge because of service in the armed forces—for them the 6-month period begins to run from the date of their discharge.

[4] *Id.*

[5] *See* Melville Confections, Inc. v. NLRB, 327 F.2d 689 (7th Cir. 1964); NLRB v. White Constr. & Eng'r Co., 204 F.2d 950 (5th Cir. 1953).

will be placed on an analysis of the rationale offered by the court for barring the complaint.

I. THE *Serv-All* CASE

In *Serv-All*, an employer association composed of plumbing and piping contractors had entered into a collective bargaining agreement with the designated union.[6] That agreement allowed non-association members to become parties by separately signing the association agreement, and Serv-All Co., Inc. chose to do so. The association agreement further provided that employers would be bound by succeeding collective bargaining agreements, including amendments, extensions, and renewals, unless the employer gave 60-days written notice. At no time did Serv-All give this kind of written notice. Through later negotiations the termination date of the collective bargaining agreement was extended, and toward the end of that extended period the employer association and the union began negotiations for a new collective bargaining agreement. When the negotiations failed to produce an agreement, the union struck the employer association and in July 1970 those parties signed a formal contract.[7]

In June 1970, at a point in time prior to the 10(b) 6-month statute of limitations period, Serv-All filed a representation petition with the Board claiming that the union no longer represented a majority of its employees. In September, Serv-All ceased paying fringe benefits to the union and did not give its employees the wage increases provided for in the new collective bargaining agreement.[8] At a later time within the 10(b) limitations period a hearing was held on the representation petition. At that hearing the president of Serv-All, in replying to a question put by union counsel, stated that he would not sign the agreement reached between the union and the employer association.[9] Also, on several occasions within 6 months of the filing of the charge the union's

[6] 491 F.2d at 1273. The employer association was named the Mechanical Contractors Association, and the union was the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada.

[7] *Id.* at 1274.

[8] *Id.*

[9] The pertinent part of the transcript contained the following:

Q. If I handed it [the agreement] to you now, would you sign it?
A. No, sir.
Q. Why not?
A. That's my purpose for being here.

Id. at 1275.

business manager tried to reach the employer concerning this matter, but was unable to do so.[10]

The union filed a refusal to bargain charge[11] on March 18, 1971. In considering the charge, the Board held that although the employer's initial refusal to sign or abide by the contract occurred outside the 10(b) 6-month limitations period, other instances within the 6-month period were sufficient to indicate that the initial refusal to bargain recurred, specifically the colloquy between the union counsel and the company president at the representation hearing. Therefore, the Board concluded that the charge was not barred.[12]

The Court of Appeals for the Tenth Circuit reversed the Board, however, holding first that whether the conduct of the employer several months preceeding the limitations period constituted an unfair labor practice was a stale issue, because that conduct came within the scope of the 10(b) bar. Secondly, the court held that there was not sufficient conduct by the employer within the limitations period to amount to recurrence of the possible initial refusal to bargain. What would have been needed in this regard would have been a specific request by the union to sign or negotiate, followed by a specific refusal by the employer. The Tenth Circuit could not accept that the president's statement at the representation hearing constituted a refusal to bargain. Finally, the court also held that the Board's decision was faulty as a matter of law "and not dependent on the fact issue of whether [Serv-All] refused to sign [the agreement] during the six month period preceding the complaint."[13] That is, under these particular circumstances, even if the employer had committed an unfair labor practice outside the 6-month period by refusing to sign or abide by the contract and that refusal had been repeated within the 6-month period, the charge still would have been barred by section 10(b).

II. CASES DECIDED IN OTHER JURISDICTIONS ON SIMILAR FACTS

The Tenth Circuit decision in *Serv-All* follows decisions on similar facts in two other circuits. In the important case of *NLRB v. McCready & Sons, Inc.*,[14] decided by the Sixth Circuit in 1973,

[10] 199 NLRB No. 159 (1973).
[11] 29 U.S.C. § 158(a)(5) (1970).
[12] 491 F.2d at 1274-75.
[13] *Id.* at 1275.
[14] 482 F.2d 872 (6th Cir. 1973).

the employers had negotiated with the designated union on a multi-employer basis, with the agreement reached in those negotiations calling for execution of individual agreements by each employer at a later time. The union initially presented contracts to the employers for their signature at a point in time outside the limitations period, at which time the employers unequivocally refused to sign. Subsequently these same employers again refused to sign when given another opportunity within the 6-month limitations period. The union filed a refusal to bargain charge more than 6 months after the initial refusal to sign the contract, but within 6 months of subsequent refusals.[15] In spite of the definite repetition of the unfair labor practice within the limitations period, the Sixth Circuit held that the charge was barred by section 10(b).

In finding the charge barred, the *McCready* court carefully examined the purpose behind the section 10(b) statute of limitations and concluded that its purpose was to protect against stale claims and to give alleged violators an opportunity to prepare defenses.[16] In the court's analysis the employer would defend the refusal to bargain charge by denying that a contract binding upon him had in fact been formed. Such a defense would involve references to facts surrounding the contract negotiations. With the passage of time, however, these facts would become harder and harder to prove, and therefore the defense would bear an ever-increasing burden.[17] In this way the *McCready* court looked to the needs of the defense and found the unfair labor practice charge barred by section 10(b) because of burdens upon the defense in going outside the 6-month period to make out its case.

This reasoning in *NLRB v. McCready & Sons, Inc.* in looking to the demands upon the defense was explicitly adopted by the Court of Appeals for the Tenth Circuit in *Serv-All*.[18] Therefore, two circuits on similar facts have found a refusal to bargain charge barred because of the burden upon the defense to go outside the period to make its case. The First Circuit, in *NLRB v. Field & Sons, Inc.*,[19] also held that the charge was barred on

[15] *Id.* at 873.

[16] *Id.* at 875. For a similar statement of the purposes behind section 10(b), see NLRB v. Waterfront Employers, 211 F.2d 946 (9th Cir. 1954).

[17] NLRB v. McCready & Sons, Inc., 482 F.2d 872, 875 (6th Cir. 1973).

[18] 491 F.2d at 1275.

[19] 462 F.2d 748 (1st Cir. 1972).

similar facts, but did so on a quite different rationale[20] which was not embraced by either the *McCready*[21] or *Serv-All*[22] courts. The circuits are split on this issue of a section 10(b) bar, however, in that in the case of *NLRB v. Strong*[23] the Court of Appeals for the Ninth Circuit held on similar facts that the charge would not be barred by section 10(b). The Ninth Circuit there found that refusals by the employer to sign the collective bargaining agreement within the 6-month limitation period in and of themselves constituted unfair labor practices,[24] and so concluded that the charge would not be barred. This older case did not even consider the *McCready/Serv-All* rationale of looking to the demands upon the defense to go outside the 6-month period.

III. THE REFUSAL TO APPLY THE CONTINUING OBLIGATION DOCTRINE

In earlier failure to bargain cases, the Board and the courts have sometimes applied the continuing obligation doctrine, thereby finding the charge not barred by section 10(b). In the case of *NLRB v. White Construction Co.*,[25] for example, the petitioning union had been selected as the employees' collective bargaining representative in a representation election, and later the Board certified the union as the exclusive bargaining representative. The employer originally declined to recognize the union immediately after the election, more than 6 months prior to the filing of the charge, and then persisted in that refusal down to within 11 days of the filing of the complaint.[26] In this regard the court found that the employer expressly refused to bargain with the designated union on two definite dates well within the section 10(b) period. Then the court held:

> Respondent's duty to deal with the certified union was a continuing

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[20] *Id.* at 751. In giving a rationale for its decision to find the charge barred, the First Circuit here distinguishes between breach of a general duty, as to which each refusal may be a new unfair labor practice, and failure to perform a particular act, such as to execute an agreement. In the former situation a charge based upon repetition of the same unfair labor practice within the period would not be barred, whereas it would be barred with the latter.

[21] See 482 F.2d at 874, where the Court of Appeals for the Sixth Circuit states that it does not embrace the distinction made in this regard by the First Circuit in the *Field & Sons* case.

[22] See 491 F.2d at 1275, where the Tenth Circuit agreed with the result reached in *Field & Sons*, but remained silent as to the merits of the rationale offered there.

[23] 386 F.2d 929 (9th Cir. 1967).

[24] *Id.* at 931.

[25] 204 F.2d 950 (5th Cir. 1953). *See also* International Union, UAW v. NLRB, 363 F.2d 702 (D.C. Cir. 1966).

[26] 204 F.2d at 952.

> one. Since its refusal continued well into the six month period immediately preceding the filing of the charge, the Board correctly held that the complaint was timely filed.[27]

Thus, the continuing obligation doctrine was applied and no 10(b) statute of limitations bar was found in that context. The Court of Appeals for the Sixth Circuit refused to apply the continuing obligation doctrine in *McCready* however, reasoning that application of that doctrine to a charge of refusal to execute a contract would be inconsistent with the purposes of section 10(b).[28] The Tenth Circuit in *Serv-All* also implicitly refused to apply the continuing obligation doctrine through its adoption of both the result and rationale of the *McCready* case.[29]

This *McCready/Serv-All* approach of not applying the continuing obligation doctrine, and instead finding the charge barred by looking to the demands upon the defense, marks a significant change from that of previous section 10(b) cases. In earlier 10(b) statute of limitations cases, the courts did not even consider the issue of the possible demands upon the defense, and certainly did not answer that issue along the *McCready/Serv-All* lines. In the case of *NLRB v. White Construction Co.*,[30] for instance, the Fifth Circuit did not consider possible demands upon the defense in going outside the period to make its case. If it had done so the result might have been quite different. In that case the employer might well have wished to defend against the charge of failure to bargain by claiming that he did not have a continuing obligation to bargain with the complaining union. In making that defense, however, the employer might have looked back to the representation election that took place outside of the limitations period. Thus, if courts in earlier continuing obligation cases had looked to the demands upon the defense, the results might have been different, and in this respect the *McCready/Serv-All* approach amounts to a significant departure. In any case, *explicitly* looking to the demands upon the defense is a novel approach in the section 10(b) statute of limitations area.[31]

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[27] *Id.* at 952-53.

[28] 482 F.2d at 875. *See* text accompanying notes 15-17 *supra*.

[29] *See* 491 F.2d at 1275.

[30] 204 F.2d 950 (5th Cir. 1953). *See* text accompanying notes 25-27 *supra*.

[31] An alternative analysis suggests that although the *McCready/Serv-All* approach appears, on its face, to be a radical departure from that used in previous recurrence cases, the "burden on the defense" doctrine may only be a new label for an old theory. In Local 1424, IAM v. NLRB, 362 U.S. 711 (1960), the Supreme Court stated what has become the traditional rationale used in recurrence cases. This rationale reasons that in a true recur-

IV. CONCLUSION

In *NLRB v. Serv-All Co.*, the Court of Appeals for the Tenth Circuit has held, in line with decisions in two other circuits, that an unfair labor practice charge based upon alleged refusals of an employer signatory member of a multi-employer association to execute a contract with the designated union both within and without the 6-month limitations period would be barred by the section 10(b) statute of limitations. In finding the charge barred, the court looked to the burden upon the defense and the staleness of the operative facts which the defense would need to look to in making their case.

In support of this approach of looking to the demands upon the defense, it can be effectively argued that this approach is in accord with the policies underlying the 10(b) statute of limitations. In this regard the policies underlying section 10(b) have been discussed by the U.S. Supreme Court in the case of *Local 1424, IAM v. NLRB*,[32] in which the Court stated that those policies were:

> to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of events in question have become dim and confused," H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships.[33]

In pointing here to the effects of the passage of time upon records, witnesses and their recollections, the Supreme Court did not distinguish these factors in terms of the charging and charged parties respectively in an unfair labor practice action. In line with the analysis in the *Serv-All* and *McCready* cases, the passage of time has these same undesirable effects with regard to both parties, namely the charging party in presenting his charge, and the party charged in presenting defenses. In light of this analysis, looking to the burden upon the defense seems to be a reasonable

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rence situation, the latter unfair labor practice must be one in and of itself without reference to any earlier acts. In other words, if a latter act is an unfair labor practice only because an earlier one is an unfair labor practice, there is no recurrence and the statute of limitations begins to run at the time of the first act. *Id.* at 423. Under this rationale, it can be seen that in both *McCready* and *Serv-All*, the legality of the alleged recurrence could be assessed only upon a determination of the legality of the initial refusal to bargain. Such a determination would require going back to the facts surrounding the initial refusal to sign the agreement, and this leads to what the Sixth and Tenth Circuits call an unreasonable burden on the defense. When viewed in this light, the new label is unnecessary and may be overly broad.

[32] 362 U.S. 411 (1960).

[33] *Id.* at 419.

requirement. In addition, the Court in the quotation given above also pointed to the purpose of stabilizing existing bargaining relationships. This looking to stability in the bargaining process emphasizes the fact that the parties involved in that process, the union and the employer, have an on-going relationship. Given this two-sided, on-going relationship, it seems reasonable to look to the demands and burdens upon both sides and to pay special attention to the possible burdens upon the defense.

Looking to the burdens upon the defense, on the other hand, can have strikingly undesirable results, in that when the charge is thereby found to be barred, the offending party is given the option of engaging in continuing, permanent unfair labor practices of that same type with impunity. To give the *Serv-All* case as an example, the court's finding that the unfair labor practice charge is barred allows the employer the possibility of continually persisting with that particular unfair labor practice with impunity. In other words, the employer could continue in his refusal to sign the agreement involved with that case; and given that opportunity to so flagrantly thumb his nose at the union, the employer might find that possibility irresistible.

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