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Labor and Employment Law

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INTRODUCTION

It was an important, although not monumental, year in the development of labor and employment law in the Sixth Circuit. This survey looks at some of the more significant cases decided in the past year. Specifically, the article reviews eleven decisions arising under the National Labor Relations Act ("NLRA"),[1] and two decisions involving arbitrations interpreting the meaning of collective bargaining agreements.

Several of the NLRA cases, especially *Johnson & Hardin Co. v. NLRB*,[2] *NLRB v. Hub Plastics, Inc.*,[3] and *NLRB v. Great Scot, Inc.*,[4] altered or further refined the law in controversial areas. As to each of these cases, the author has taken the liberty of offering commentary as to their implications. The arbitration cases, in contrast, predominantly followed established doctrine.

Interestingly, in the NLRA cases, the National Labor Relations Board had a singular lack of success, being reversed in eight of the eleven cases. Indeed, in the remaining three cases surveyed here, the Board's approach was affirmed only in part. In the arbitration cases, the arbitral process drew broad support from the court.

I. CASES AND ANALYSIS

A. *Johnson & Hardin Co. v. NLRB*[5]

This case addressed the rights of nonemployee union organizers to distribute materials on property subject to a company's easement. As such, it constituted a further refinement of the teachings of *NLRB v. Babcock & Wilcox Co.*[6] and *Lechmere, Inc. v. NLRB*.[7]

The facts of the case can be easily described. The sole access to the respondent's plant, a 22 foot wide driveway, extended 100 feet from the property line of the plant over land owned by the State of Ohio to a public road. The company maintained the driveway and

1. 28 U.S.C. § 158 (1994).
2. 49 F.3d 237 (6th Cir. 1995).
3. 52 F.3d 608 (6th Cir. 1995).
4. 39 F.3d 678 (6th Cir. 1994).
5. 49 F.3d 237 (6th Cir. 1995).
6. 351 U.S. 105 (1956).
7. 502 U.S. 527 (1992).

purchased insurance to cover liability for events occurring on its easement. It also posted "no trespassing" signs on the driveway.

Organizers from the Graphic Communications International Union, Local 508, distributed materials to employees while stationed along the driveway. After being asked twice to leave, the organizers complied. The union then filed unfair labor practice charges complaining that the company's actions violated section 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act"). The company, in turn, filed complaints against the union for criminal trespass.

The Administrative Law Judge ("ALJ") determined that the company held only an easement over the property and that, consequently, the exclusion of the union organizers violated the Act. The National Labor Relations Board ("NLRB" or "the Board") affirmed, declaring its holding in *Jean Country*[8] inapplicable because the company in this instance had only easement rights, not full property rights. Relying on state law,[9] the Board concluded that an owner of an easement could not prevent even a trespasser from using land if it did not impede his use as a right of way. In the Board's view, an easement is an interest in the land of another, carrying only a right to use the land. The Board also found the filing of the criminal trespass complaint to have been a violation of the Act.

1. *Sixth Circuit Analysis*

The Sixth Circuit affirmed the Board's decision in part and reversed in part. With regard to the rights of union organizers to handbill on property subject to an easement, the court found that the Board's determination - that the company lacked a property right entitling it to exclude the organizers - was rational and deserving of enforcement. With respect to the second issue in the case - whether the company's instigation of the criminal trespass lawsuit likewise violated section 8(a)(1) of the Act - the court reversed the Board. In *Bill Johnson's Restaurants, Inc. v. NLRB*[10] the United States Supreme Court held that where an employer uses a lawsuit as a tool of coercion or retaliation, it may have a chilling effect on the willingness of employees to engage in protected activities. In this instance, however, countervailing considerations such as the First Amendment right to petition the government for redress of grievances militated

8. 291 N.L.R.B. 11 (1988).
9. Wolf v. Roberts, 30 Ohio Op. 499 (C.P. 1945).
10. 461 U.S. 731 (1983).

against the condemnation of the lawsuit as an unfair labor practice. Thus, the court held, where the suit has a reasonable basis in law or fact and is not frivolous, then such action cannot constitute a violation of the Act even if filed with the intent of retaliating against the union.

B. *Nestle Ice Cream Co. v. NLRB*[11]

In this case, two unions petitioned to represent the production and maintenance employees at the respondent's ice cream plant, and the parties agreed to hold a representation election. On the day before the election, however, the president of the union announced that the union had just filed a lawsuit against the company seeking back pay for employees. The president also announced that employees were each due an estimated $35,000 and presented a union member with a check for $18,000, ostensibly representing a back pay award. The union won the election by a vote of 192 to 126.

The respondent filed objections to the union's preelection conduct. The Regional Director refused to overturn the results of the election, however, and the NLRB affirmed the Regional Director's determination. Thereafter, the company refused to bargain with the union for the purpose of obtaining judicial review of the Regional Director's decision. The Board then found the company in violation of section 8(a)(5) of the Act.

1. *Sixth Circuit Analysis*

On petition for review, the Sixth Circuit held that the union's conduct interfered with employee free choice and materially affected the results of the election. Citing *NLRB v. Savair Manufacturing Co.*,[12] the court wrote that bargaining orders have not been enforced where a union paid employees for votes, where a union paid an employee's traffic fine and costs, and where a union offered hats and T-shirts to employees as an inducement.

Here, the court concluded that the union had, in essence, conferred free legal services to employees during the preelection campaign. If such items as hats and T-shirts are sufficiently valuable that their offer constitutes campaign misconduct, the court reasoned, then so must be the services of a lawyer in drafting and pursuing a federal lawsuit. The court concluded that the union's First Amendment rights

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11. 46 F.3d 578 (6th Cir. 1995).
12. 414 U.S. 270 (1973).

were not implicated and reversed the Board's findings that Nestle had committed an unfair labor practice by refusing to bargain with the union.

C. *UPS v. NLRB*[13]

This case involved the age-old conflict between employees' exercise of NLRA section 7 rights by wearing union insignias and an employer's interest in maintaining standards as to appearance and attire.

UPS maintains a "hub" in Memphis, Tennessee. All so-called "feeder" and package car drivers are required to wear brown uniforms supplied by UPS. The collective bargaining agreement gives the company the right to establish reasonable standards concerning appearance and uniforms.

In this instance, a feeder driver, who also served as chief steward, attended a union convention and returned with fifty lapel pins which he distributed to other union members. The company issued a written notice stating that the pins could not be worn. The driver continued to wear the pin, however, and was issued a written warning.

The ALJ dismissed the complaint, concluding that the dress code had been sanctioned by the contract which had been consistently and nondiscriminatorily enforced. The NLRB reversed the ALJ, however, observing that the pin was inconspicuous, free of any provocative message and did not interfere with the company's public image. The Board also noted that UPS had authorized drivers to wear safe driving pins, United Way pins, and pins in support of Operation Desert Storm. Thus, the Board concluded that the company had discriminatorily enforced its personal appearance guidelines and found it to have violated section 8(a)(1) of the Act in enforcing its dress code.

1. *Sixth Circuit Analysis*

The Sixth Circuit, citing *Burger King Corp. v. NLRB*,[14] held that section 8(a)(1) of the Act is not abridged where an employer consistently enforces a policy against wearing unauthorized buttons, at least where the employer is motivated by a desire to project to the public an image of cleanliness, uniformity, and efficiency.

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13. 41 F.3d 1068 (6th Cir. 1994).
14. 725 F.2d 1053 (6th Cir. 1984).

The Sixth Circuit set aside the Board's decision. In so doing, the court emphasized that the company had maintained a consistent effort to project an image of cleanliness, uniformity, and efficiency. The contract contained no limit or restriction on the company's right to promulgate appearance and uniform standards.

2. *Comment*

The wearing of pins and other insignia has given rise to many NLRA section 8(a)(1) cases. In such cases, the Board's approach has tended to weigh the impact of the prohibition on NLRA section 7 rights against the importance of uniformity to the business. In this case, then, the conclusion that the latter outweighed the former is not surprising. What is troublesome about the Sixth Circuit's decision is its virtual disregard of the fact that the company had, in the past, permitted and, indeed, occasionally issued pins for employees to wear. Traditionally, such discriminatory treatment against union insignia has triggered the finding of a violation.

D. *NLRB v. Hub Plastics, Inc.*[15]

The union won a representation election by a vote of thirty-two to twenty-eight. The company challenged the results on two grounds: First, throughout the campaign, the union had filed unfair labor practice charges against the company. Then, three days before the election, the NLRB notified the parties that it would issue a complaint against the company. The company then met with employees to inform them they had not acted unlawfully. Two days before the election, however, the union falsely stated that the NLRB had determined the company to be guilty of unfair labor practices. In addition, the NLRB sample ballot had been marked with an "x" in the "yes" box. Later, a second sample ballot was similarly defaced.

The Regional Director recommended the objections be denied, and the Board adopted those recommendations and certified the union. The company refused to bargain for the purpose of challenging the Board's determination and, in the ensuing unfair labor practice proceeding, the Board found the company in violation of section 8(a)(5) of the Act. The Board, however, waited two and a half years before seeking enforcement of its order.

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15. 52 F.3d 608 (6th Cir. 1995).

1. *Sixth Circuit Analysis*

The Sixth Circuit set aside the Board's order, concluding that the union's preelection misconduct had sufficiently tainted the electoral process that the right to a fair election was affected. In so concluding, the court continued to take a very different view toward campaign misrepresentations than the NLRB.

In *Midland National Life Insurance Co.*,[16] the Board announced that it would no longer probe the truth or falsity of campaign statements, and that it would only intervene to judge campaign rhetoric if a party used forged documents rendering voters unable to recognize propaganda. The Sixth Circuit, however, has rejected this view. Thus, in *Van Dorn Plastic Machinery Co. v. NLRB*,[17] the court held that where misrepresentation is so pervasive and the deception so artful that employees will be unable to discern truth from fiction, their right to a fair choice is affected.

Here, the court found that a union official lied to employees and that this falsehood was supported by an altered Board sample ballot. In so doing, the union's actions may have rendered the election improper. Thus, the court remanded the case because the Board, in its view, failed to apply the proper legal standard for campaign misrepresentations.

With regard to the defaced sample ballot alone, the court endorsed the Board's determination that because the "x" was handwritten, it was sufficiently distinct from the Board's printed notice as to foreclose any suggestion the mark was endorsed by the Board.

2. *Comment*

The Sixth Circuit's rejection of the *Midland Life* standard is perplexing. There, the NLRB endorsed a hands-off approach to campaign rhetoric. By and large, that approach has been seen as one which envisions voters as sufficiently sophisticated that they will be able to discern truth from falsity in campaign statements. It was widely thought that the Board's distancing itself from evaluating campaign statements would diminish the number of rerun elections. Here, by examining the truth or falsity of the union's campaign statements, the court appears to endorse a return to the Board's now

16. 263 N.L.R.B. 127 (1982).

17. 736 F.2d 343 (6th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

rejected approach announced in *Hollywood Ceramics Co. v. United Brick & Clay Workers.*[18]

E. *DTR Industries, Inc. v. NLRB*[19]

This case involved an examination of the reach of protected speech under the NLRA and the use of the bargaining order to remedy unfair labor practices.

DTR, an automobile component manufacturer, petitioned to set aside the Board's imposition of a bargaining order. In September, 1989, the UAW began an organizing campaign and gathered authorization cards from fifty-nine of the approximately seventy-five production and maintenance employees of the company. Without demanding that the company bargain, the union filed an election petition.

Prior to the outset of the organizing campaign, the company began to implement a wage increase consisting of a five percent so-called short-term increase to be followed by a long-term wage policy to go into effect in October. After the filing of the union petition, the company continued to work on the wage policy and on November 14th, some three days before the election, it received a consultant's proposal calling for a wage increase over the ensuing twenty-four months.

During the campaign, two group leaders commented to employees that if the union prevailed, certain customers were likely to assign at least fifty percent of their business to another contractor. Other supervisors allegedly made similar statements as well as comments suggesting the petitioner would close its doors if the company were unionized.

On November 10, 1989, the company's president distributed a four page letter stating that because the petitioner "sole-sourced"[20] to its customers, "business would automatically be reduced if the union wins the election and our customers took away 50 percent of our sole source business."[21] The letter also noted that U.S. auto companies typically require a unionized supplier to build up a ninety day inventory prior to the expiration of the supplier's collective bargaining

18. 140 N.L.R.B. 221 (1962).

19. 39 F.3d 106 (6th Cir. 1994).

20. *DTR Industries*, 39 F.3d at 109. This term referred to a relationship in which the company was the sole source of parts to a purchaser. *Id.*

21. *Id.*

contract. Then, if a contract is reached without a strike, employee layoffs are required to reduce the inventory. The letter concluded:

> Having a union will hurt our business and our chances for success. We will lose some or all of our sole source business and create the danger of losing the confidence of our customers. Let us show what DTR and its associates can do together as a team without the union. You have our attention and our commitment. We will listen and . . . respond and we will have a mutual commitment to each other.[22]

Lastly, the company installed suggestion boxes and a toll-free telephone number for processing employee comments after the advent of the campaign and undertook improvements based on the information received through those sources.

The union lost the election by a single vote and, shortly thereafter, the company implemented the wage increase. The union lodged NLRA section 8(a)(1) and section 8(a)(5) charges, alleging that the wage increase, threats of plant closures or layoffs, the new grievance procedure, and the interrogation of at least one employee warranted the imposition of a bargaining order.

The ALJ rejected NLRA section 8(a)(5) allegation finding that union agents had misrepresented the purpose of the authorization cards to at least thirty-one of the fifty-nine card signers. The ALJ did find, however, that the petitioner had violated section 8(a)(1) of the Act and issued a cease and desist order, but not a bargaining order. On appeal, the Board determined that the union had not misrepresented the purpose of the authorization cards and, consequently, issued a bargaining order.

1. *Sixth Circuit Analysis*

The Sixth Circuit recited the three elements necessary to support a bargaining order: First, that the union has obtained authorization cards from a majority of unit employees free from misrepresentation; second, that the employer has dissipated significantly the union's majority by unfair labor practices; and, third, that a fair election cannot be held.[23] The Sixth Circuit also cited with approval the Seventh Circuit's decision in *Montgomery Ward & Co. v. NLRB*,[24] which required a showing that the illegalities will have a lingering

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22. *Id.*

23. *Id.* at 112 (quoting M.P.C. Plating, Inc. v. NLRB, 912 F.2d 883, 888 (6th Cir. 1990)).

24. 904 F.2d 1156 (7th Cir. 1990).

and pervasive effect and that "less drastic remedies are insufficient to warm the chill."[25] A less rigorous showing is required where the Board has demonstrated so-called "hallmark" violations including discriminatory discharges or threatened plant closures.

In the instant matter, the court found that the Board's finding of a threatened plant closure was not supported by the evidence. Instead, the court found that the company president's statement - that companies that sole-sourced with the petitioner were likely to split their business in order to have an alternative supply source in the event of a strike - was a prediction based on his belief as to the probable consequences of unionization. In the court's view, these comments were based upon factors beyond his control and were not threats of economic reprisal. In addition, the court found the other violations to fall short of the "hallmark" variety necessary to support a bargaining order.[26] Consequently, the court found a bargaining order inappropriate.

F. *NLRB v. Great Scot, Inc.*[27]

Employees at two of the company's three stores in northern Ohio were represented by the United Food and Commercial Workers Union, Local 954; employees at the third store were unrepresented. Nonemployee union organizers began picketing on a public easement at store number three. When the store manager asked the agents to leave and they refused, he called the police. The police, in turn, told the store manager he would need a court order to remove the picketers.

Great Scot filed a civil trespass action and the court issued a temporary restraining order prohibiting union trespass and restricting union activity to the easement. The union subsequently lodged a NLRA section 8(a)(1) charge alleging the company had unlawfully interfered with its picketing and handbilling activities which it characterized as area-standards activity designed to demonstrate that the company's wages and benefits were substandard. The staff organizer testified he relied on information supplied by his predecessor in concluding that the company's wages and benefits were

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25. *DTR Industries*, 39 F.3d at 112 (citing *Montgomery Ward*, 904 F.2d at 1159).

26. *Id.* at 115. Also relevant to the court's determination was its observation that in the 4 years following the election, the bargaining unit increased from approximately 75 to nearly 250 employees and that only 53 of the original 75 employees were still employed. *Id.*

27. 39 F.3d 678 (6th Cir. 1994).

"substandard." He did not, he said, undertake any independent investigation of the wages and benefits.

The ALJ observed that the picketing would be unprotected if, in fact, the company's wages and benefits were not substandard. His decision, however, placed the burden upon the company to show that the activity was unprotected. The NLRB affirmed.

1. *Sixth Circuit Analysis*

The Sixth Circuit noted that the core activity protected by section 7 of the Act is the right of employees, as opposed to nonemployee union organizers, to form and organize labor organizations. Even further removed from NLRA section 7 protection, the court said, are the activities of nonemployees, who seek not to organize but to communicate with the public. That is, the court observed, nonemployee area-standards picketing warrants even less protection than nonemployee organizational activity.

To support area-standards picketing, the court said, the union bears the "heavy burden" of showing that the claims of substandard wages and benefits are made in good faith, based on actual knowledge gleaned from investigation of conditions existing at the time picketing is initiated.

Because the union bears a duty to investigate wages alleged to be substandard before area-standards picketing will be lawful, it has the burden of investigating the prevailing standards in the area as well as the claimed disparity. Here, the court concluded, the union failed to offer sufficient proof that this burden had been met. Consequently, the court concluded, inasmuch as the evidence did not support a finding that NLRA section 7 activity had been implicated, the unfair labor practice charges were insupportable.

2. *Discussion*

The primary focus in this decision, interestingly, was the nature of the investigation conducted by the union into alleged substandard wages and benefits. There was little discussion in the case about the standards themselves and whether they were, in fact, substandard. Instead, the decision appears to concentrate on the procedure used by the union to determine whether such "standards" were met, and underscores the court's view that there is a procedural prerequisite to lawful area-standards picketing.

G. *NLRB v. Cook Family Foods, Ltd.*[28]

This case was a straightforward NLRA section 8(a)(3) case susceptible to plain analysis under *NLRB v. Transportation Management Corp.*[29] Four employees of the company were hired and subjected to a "trial period" during which the company evaluated job performance.[30] The employees in question were trained to bag hams proceeding along a conveyor belt. Over a period of time, the employees were observed slowing production down by letting hams pass by without bagging them. Although production would improve when the employees were counselled, the misconduct would later recur. After an investigation, the employees were fired.

The evidence showed that a company representative had observed the employees distributing handbills and that they circulated union organizing petitions. In addition, the evidence also showed that one employee had complained to supervision about the temperature in the production room and the speed at which the line progressed.

As to the ensuing NLRA section 8(a)(3) allegation, the ALJ found that the employees' NLRA section 7 activity had been a substantial or motivating factor in their termination. The ALJ further found that the company had failed to show that but for the employees' union activity, they would nevertheless have been terminated. Consequently, the ALJ determined that the company had breached section 8(a)(3) of the Act. The NLRB affirmed.

1. *Sixth Circuit Analysis*

The Sixth Circuit reversed the NLRB, essentially upon the grounds that, in their view, the evidence demonstrated that the employees would have been terminated whether or not they had been active in the union. The group leader had spoken to the employees repeatedly about their performance problems. Moreover, other baggers were conscientious in their work, and the delays caused by the discharged employees had created additional work for their co-workers. Indeed, one worker had asked for a transfer.

Having found substantial evidence that the employees were fired for poor performance, and that but for their union activity they would have been fired nonetheless, the charges were dismissed.

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28. 47 F.3d 809 (6th Cir. 1995).
29. 462 U.S. 393 (1983).
30. *Cook*, 47 F.3d at 811.

H. *Manor West, Inc. v. NLRB*[31]

This matter involved the definition of "supervisor" under section 2(11) of the Act. Here, a licensed practical nurse ("LPN") was terminated after "rumors" circulated that she had encouraged aides to stage a walk-out to protest working conditions. The ALJ found that the employee was not a supervisor and, consequently, that she was subject to the statute. The NLRB affirmed the ALJ's finding that the employee's termination offended section 8(a)(3) of the Act.

1. *Sixth Circuit Analysis*

The Sixth Circuit reversed the decision of the ALJ and the Board, concluding that the LPN was a supervisor under the Act and, therefore, outside its protection. Under the Act, supervisors are defined as:

> [I]ndividual[s] having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[32]

The court characterized the Board as having ruled that the LPN was not a supervisor because her authority to direct the work of aides and orderlies was in the interest of patient care and not in the employer's interest. The court criticized this approach as being inconsistent with the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America*.[33]

Inasmuch as the ALJ and the Board based their decisions upon a "false dichotomy," the court reasoned, the evidence did not support the Board's determination that the LPN was not a supervisor. Consequently, the Board's petition to enforce its order was denied and its decision reversed.

I. *NLRB v. Spring Arbor Distribution Co.*[34]

In this matter, the NLRB sought to enforce its order against the company, a distributor of religious books. The UAW lost an initial

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31. 60 F.3d 1195 (6th Cir. 1995).
32. 29 U.S.C. § 152(11) (1994).
33. 511 U.S. 571 (1994).
34. 59 F.3d 600 (6th Cir. 1995).

election by a margin of seventy-one votes in support of the union and seventy-six opposed. The UAW then filed objections as to the employer's preelection misconduct. The hearing officer recommended the election be set aside and the company appealed that determination.

While the Board was reviewing the appeal, the company announced it would convert its warehouse into a distribution center, and that employees would be laid off in the near future. The Board upheld the hearing officer's recommendation that the election be set aside, and a second election was conducted. Of the 119 employees voting, some 86 were challenged as ineligible. The Board ordered the ballots counted and the union prevailed by a vote of seventy-two to forty-seven. The UAW was then certified as the collective bargaining representative.

The company refused to bargain with the union. After the ALJ and the Board found the company in breach of section 8(a)(5) of the Act, the Board sought enforcement of its order in the Sixth Circuit.

1. *Sixth Circuit Analysis*

The Sixth Circuit reversed the Board. The court concluded that the Regional Director had erroneously found the layoffs to be speculative, and his decision did not address the company's argument that the unit was contracting at the time of the election.

In support of its petition, the Board argued that it was not unreasonable for the Regional Director to have concluded that the date of the layoffs was indefinite. For two reasons, however, the court found the Regional Director's reasoning in dismissing the objections to have been flawed. First, the court said, the appropriate standard is not whether the decision was reasonable, but rather, whether it was based on substantial evidence. Second, the Regional Director never conducted the analysis necessary to determine the appropriateness of the unit in the contracting unit situation.

The court found the record devoid of any evidence to support the conclusion that the layoffs were speculative. The company had distributed a monthly newsletter detailing the reasons for the layoff as well as a booklet dealing with the issues involved in relocating their warehouse. Lastly, all employees received letters detailing when the layoffs would begin. Having concluded that the Board erred by declining to engage in the balancing analysis appropriate to a petition for election in a contracting unit, the Board's petition was denied.

J. *Gratiot Community Hospital v. NLRB*[35]

This case involved unilateral changes in two policies and whether those changes constituted violations of the Act.

In the spring of 1991, the hospital, after undergoing severe financial losses, met with the union to discuss cost-cutting measures. When these discussions were not fruitful, the hospital unilaterally initiated two changes: First, despite a long-standing practice of providing laundered scrub uniforms, the hospital informed unit employees that it would no longer do so; and second, the hospital eliminated a program under which registered nurses could work seventy hours for eighty hours pay. The ALJ and the Board concluded that the hospital violated section 8(a)(5) of the Act by refusing to bargain with the union prior to implementing these changes.

1. *Sixth Circuit Analysis*

The Sixth Circuit affirmed the Board in part and reversed in part. With regard to the scrub uniform policy, the court observed that "scrub" suits are a mandatory subject of bargaining under the Act and that, consequently, any change in the policy would be subject to obligatory negotiation. In this matter, the court concluded that the hospital gave actual notice to the union of the impending change and announced it in such definite terms so as to leave the impression that the hospital was not willing to enter into good-faith negotiations. Moreover, the court determined that the hospital bypassed the union and communicated directly with the employees, also in violation of its duty to bargain under section 8(a)(5) of the Act.

With respect to the elimination of the special shift policy, however, the court concluded that it was within the hospital's contractual authority to determine the number of shifts. Consequently, its decision to eliminate the special shift program was within its contractual rights and not in violation of the NLRA.

K. *Calatrello v. Automatic Sprinkler Corp. of America*[36]

The company, during a period of economic decline, decided to lay off all sprinkler installation, maintenance and service employees and

35. 51 F.3d 1255 (6th Cir. 1995).
36. 55 F.3d 208 (6th Cir. 1995).

subcontract that work to outside vendors. The company's plan specifically stated that its purpose was to control labor costs, eliminate labor negotiations, avoid union contracts and costs associated with grievances. By April 1, 1994, the company had subcontracted all of its sprinkler installation operations and laid off all its fitter employees. It also liquidated all construction vehicles, tools, and equipment.

The Regional Director issued a complaint against the company for failing to bargain in good faith with respect to these changes and sought injunctive relief in district court. The district court denied the injunction, however, on the grounds that the Board had failed to show reasonable cause to believe that the company had committed an unfair labor practice and that injunctive relief was just and proper.

1. *Sixth Circuit Analysis*

The Sixth Circuit determined that the district court had erred by finding that the Board had not carried its burden of establishing reasonable cause to believe the subcontracting plan was in violation of section 8(a)(3) of the Act. First, the court observed, the stated purpose of the plan was to "avoid being a signatory to any union contract, pay its demands and work rules."[37] This, the court found, was direct evidence that the subcontracting decision was discriminatorily motivated. Moreover, the court ruled, probative evidence indicated that the chairman of the board of directors and the chief executive officer had repeatedly expressed a desire to convert the company into a nonunion enterprise. Finally, the evidence showed that the company did not bargain in good faith inasmuch as it presented the local unions with a *fait accompli*. Indeed, some local unions were not notified until after the changes had been completed.

Despite these findings, the court nevertheless affirmed the lower court's denial of injunctive relief, finding that such relief was not just and proper. To return the parties to the status quo, the court found, would impose a substantial financial burden which might cause the company's demise for which there would be no remedy. In this regard, the company produced evidence that it had suffered financial losses by using its own employees in certain operations. In addition, the company had already subcontracted all its labor work and had sold its tools, equipment, and materials. A return to the status quo would obligate the company to buy back tools, equipment and materials, to

37. *Calatrello*, 55 F.3d at 213.

lease vehicles for work and to hire employees. These actions would cost the company more than six million dollars. Thus, the court affirmed the judgment of the district court, without prejudice to the Board, to seek a narrower injunction.

L. *Armco Employees Independent Federation, Inc. v. Armco Steel Co.*[38]

In this matter, the plaintiff, a union, sued the company under section 301 of the Labor Management Relations Act of 1947,[39] to enforce an arbitration award rendered under the parties' collective bargaining agreement. The district court granted the company's motion for summary judgment on the grounds that it lacked jurisdiction because the union sought relief beyond the scope of the arbitrator's award.

In 1991 and 1992, the union filed grievances alleging that the company had failed to maintain workforce levels guaranteed in the contract. In November 1992, an arbitrator ruled that the company had breached the contract and ordered it to maintain a specific number of craft employees under certain circumstances and to post sufficient openings to comply with this requirement. In this instance, the union contended that two months after the arbitrator's decision, the company twice violated the order by failing to maintain proper staffing levels.

1. *Sixth Circuit Analysis*

The Sixth Circuit, citing *United Paperworkers International Union v. Misco, Inc.*,[40] observed that where parties to a collective bargaining agreement have elected to have their disputes resolved by arbitration, "'[c]ourts . . . have no business weighing the merits of the grievance'"[41] and, instead, must defer to the arbitration process. The court wrote that "'[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a

38. 65 F.3d 492 (6th Cir. 1995).

39. 29 U.S.C. § 185 (1994) (originally enacted as Act of June 23, 1947, ch. 120, tit. III, § 301, 61 Stat. 156).

40. 484 U.S. 29 (1987).

41. *Armco*, 65 F.3d at 496 (quoting United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 567-68 (1960)).

judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept.'"[42]

In this matter the court determined that an arbitrator, not the district court, was the proper entity to determine whether the company breached the contract after the arbitrator's award. Until an arbitrator examined the parties' positions on that allegation, the court ruled, it could not supplant the parties' agreed-upon method of dispute resolution.

Having found that the parties elected to have disputes over the meaning of their contract arbitrated, the district court's decision dismissing the union's suit for lack of jurisdiction was affirmed.

M. *Local 58, International Brotherhood of Electrical Workers v. National Electrical Contractors Ass'n*[43]

The parties' collective bargaining agreement contained an interest arbitration clause which provided that "[u]nresolved issues in negotiations that remain on the 20th of the month preceding the next regular meeting of the Council on Industrial Relations, may be submitted jointly or unilaterally by the parties to this Agreement to the Council for adjudication prior to the anniversary date of the Agreement."[44] In exchange, the parties agreed to forgo the use of a strike or lockout.

In this matter, the employer timely notified the union that it sought certain changes in the contract, including the creation of a "material handlers" job classification. The union objected, claiming that the introduction of this classification would threaten the wages, benefits, working conditions and standard of living of its members. Instead, the union demanded that all bargaining unit work remain with journeymen and apprentices, regardless of the skill level necessary for the task.

Failing to obtain consensus on this and other issues, the parties submitted several issues to arbitration in accordance with the interest arbitration clause of the contract. The Council on Industrial Relation's ("CIR") first decision resolved all issues presented except the material handlers question. The CIR remanded that issue to the parties for further negotiation.

The parties continued to negotiate, but failed to resolve their disagreement. Consequently, they returned to the CIR. In its second

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42. *Id.* (quoting *Misco*, 484 U.S. at 37-38).
43. 43 F.3d 1026 (6th Cir. 1995).
44. *Local 58*, 43 F.3d at 1029.

decision, the CIR ordered the parties to sign a material handlers agreement which defined the scope of work involved, the wages, hours, and benefits for material handlers. It was this order to which the union objected.

The district court upheld the CIR's award finding that it did not exceed its authority under the parties' agreement. As a result, the union's action was dismissed.

1. *Sixth Circuit Analysis*

The Sixth Circuit affirmed the lower court. Citing *Misco*, the Sixth Circuit emphasized the principle that a court must defer to an arbitrator's decision that "draws its essence" from the contract and must enforce an arbitration award that is not contrary to public policy. Indeed, the court held that even greater deference was called for when an arbitrator is engaged in interest arbitration, as opposed to grievance arbitration. The court reasoned:

> Interest arbitration, unlike grievance arbitration, focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement. Thus, the arbitrator is not acting as a judicial officer, construing the terms of an existing agreement and applying them to a particular set of facts. Rather, he is acting as a legislator, fashioning new contractual obligations. Consequently we recognize that even greater deference must be paid to the arbitrator's decision, once it is established that he had the authority to resolve the issue.[45]

The parties' contract limited the authority of the CIR to proposed "changes" to the agreement. Here, the union argued that the creation of a separate agreement governing the "material handlers" classification could not be considered a "change" in the contract because it established an entirely separate contractual relationship.

The Sixth Circuit rejected the union's argument. It held that the underlying agreement contained no clear prohibition as to the creation of a material handlers classification and, indeed, concluded that the CIR's decision was rationally derived from the terms of the underlying contract.

In addition to its contractual argument, the union contended that the material handlers agreement was unenforceable for statutory reasons. In essence, the union contended that the CIR's decision improperly included two nonmandatory subjects of bargaining - interest arbitration and the scope of the unit. As to these arguments,

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45. *Id.* at 1030 (citing *Misco*, 484 U.S. at 37-38).

the court concluded that the interest arbitration clause was, indeed, a nonmandatory subject of bargaining[46] and, hence, not within the arbitrator's authority to order. Consequently, the court determined that the interest arbitration provision in the material handlers agreement should be excised from the arbitrator's award.

With respect to the impact of the arbitrator's decision on the scope of the unit, however, the court concluded that the award affected work assignments and did not, as the union claimed, alter the scope of the bargaining unit. The court wrote that "[t]here is no basis for deciding that a regrouping of work tasks with an accompanying pay decrease impacts the scope of the bargaining unit."[47] Finding the creation of the material handlers classification to have been a mandatory subject of bargaining, the court concluded that the CIR had the authority to resolve the dispute under the contract.

CONCLUSION

In the author's opinion, three of the court's labor and employment cases described here were significant in terms of furthering doctrinal development. In *Johnson & Hardin Co. v. NLRB*,[48] the court found broadly in favor of the right of nonemployee union organizers to solicit on public easements. In *NLRB v. Hub Plastics, Inc.*,[49] the court suggested it would exercise far greater supervision over campaign rhetoric than the National Labor Relations Board. Finally, in *NLRB v. Great Scot, Inc.*,[50] the court established a procedural prerequisite to lawful area-standards picketing, requiring that the union undertake an investigation of prevailing wages and benefits as well as those of the employer under scrutiny. In the remaining cases, the court appeared primarily to solidify well established doctrine.

46. *See* Electrical Workers IBEW Local 135, 271 N.L.R.B. 250 (1984).
47. *Local 58*, 43 F.3d at 1033.
48. 49 F.3d 237 (6th Cir. 1995).
49. 52 F.3d 608 (6th Cir. 1995).
50. 39 F.3d 678 (6th Cir. 1994).