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Union Participation in OSHRC Hearings

UNION PARTICIPATION IN OSHRC HEARINGS

In response to government and industry's failure to reduce the number and severity of workplace injuries and illnesses, Congress in 1970 enacted the Occupational Safety and Health Act (OSH Act or the Act).[1] To effectuate the Act's purpose of ensuring workers a safe and healthy working environment,[2] Congress empowered the Secretary of Labor (the Secretary) to promulgate safety and health standards[3] to which all employers affecting interstate commerce must comply.[4] Under the authority of the Secretary, the Occupational Safety and Health Administration (OSHA) conducts on-site workplace inspections to monitor employer compliance with the promulgated standards.[5]

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1. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (1982)). Congress enacted the Occupational Safety and Health Act (OSH Act or the Act) in response to a congressional finding that occupational injuries and illnesses burdened substantially interstate commerce in terms of lost production and wages, medical expenses, and disability compensation payments. *See id.* § 651(a); *see also* S. REP. NO. 1282, 91st Cong., 2d Sess. 2-3 *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5178-81 (congressional finding that vast numbers of American workers suffer from exposure to wide variety of serious safety and health hazards). The Senate Committee on Labor and Public Welfare noted that workplace safety and health had deteriorated markedly during the years preceeding the Act's passage in 1970. *See* S. REP. NO. 1282, 91st Cong., 2d Sess. 2-3, *reprinted in* 1970 U.S CODE CONG. & AD. NEWS 5177, 5178-80. The Committee stated that the efforts of industry and state government had failed to prevent the increase in industrial injury and disease, resulting in the need for a comprehensive nationwide approach to occupational safety and health. *Id.* at 5180.

2. *See* 29 U.S.C. § 651(b)(1982) (purpose of Occupational Safety and Health Act is to assure workers safe and healthful working conditions); S. REP. NO. 1282, 91st Cong. 2d Sess. 2-3, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5177 (purpose of Occupational Safety and Health Act is to reduce number and severity of work-related injuries and illnesses).

3. 29 U.S.C. § 655(a)(1982) (Secretary shall promulgate occupational safety and health standards).

4. 29 U.S.C. 654(a)(1982). Section 654(a)(1) of the Act requires each employer to furnish his employees a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to the employees. *Id.* Section 654(a)(2) requires each employer to comply with the occupational safety and health standards promulgated under the OSH Act. 29 U.S.C. § 654(a)(2)(1982); *see id.* § 652(5) ("employer" means person engaged in interstate commerce who has employees, excluding United States, State, or Local governments).

5. 29 U.S.C. § 657(a)(1982) (Secretary of Labor has authority to inspect and investigate places of employment); 29 C.F.R. § 1903.3 (1983) (Compliance Safety and Health Officers of Department of Labor authorized to enter and inspect employers' premises); *see* 29 U.S.C. § 657(f)(1982) (employees may request inspections); W. CONNOLLY & D. CROWELL, A PRACTICAL GUIDE TO THE OCCUPATIONAL SAFETY AND HEALTH ACT, § 1.01, at 1-2 (Rev. ed. 1982) (inspections triggered either by complaint about unsafe working conditions or in accordance with routine schedule of inspections); *see also, e.g.*, Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918, 926 (2d Cir. 1983) (Secretary of Labor has broad enforcement powers under OSH Act); Marshall v. Occupational Safety & Health Review Comm'n, 635 F.2d 544, 550 (6th Cir. 1980) (Secretary of Labor is exclusive prosecutor of OSH Act); W. CONNOLLY & D. CROWELL, *supra*, § 1.01 at 1-2 (OSH Act vests Secretary of Labor with general responsibility to enforce Act while Occupational Safety and Health Administration (OSHA) functions as chief administrator of Act).

If OSHA's inspection discloses any health or safety violations, the Secretary will issue to the employer a citation which specifies the violations found and the period of time granted to abate the violation.[6] Under section 10(c) of the Act an employer may elect to contest a citation in a hearing before an administrative law judge appointed by the Occupational Safety and Health Review Commission (OSHRC or the Commission).[7] Section 10(c) also permits employees or their representative unions to initiate a hearing to contest a citation, but only on the ground that the period of abatement specified in the

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6. *See* 29 U.S.C. § 658(a)(1976). Section 9(a) of the Act states that if the Secretary or his authorized representative believes that an employer has committed a health or safety violation, the Secretary must issue promptly a citation to the employer. *Id.* Section 9(a) requires that each citation must be in writing, must describe with particularity the nature of the violation, and must include a reference to the provision of the chapter, standard, rule, regulation, or order allegedly violated. *Id.* Citations also must fix a reasonable time for the employer to abate the violation. *Id.*; *see also* W. CONNOLLY & D. CROWELL, *supra* note 5, § 1.01 at 1-2 to 1-3 (discussing OSHA citations for safety and health violations); Kamer, *Employee Participation in Settlement Negotiations and Proceedings before the OSHRC*, 31 LABOR L.J. 208, 210 (1980) (discussing OSHA citations). The Secretary of Labor also has the authority to impose monetary penalties against an employer. 29 U.S.C. § 666 (1982).

7. 29 U.S.C. § 659(c)(1982). Section 10(c) provides:

> If an employer notifies the Secretary that he intends to contest a citation . . . or if, within fifteen working days of the issuance of a citation . . . any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing. . . . The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

29 U.S.C. § 659(c)(1976).

Section 659(a) states that within a reasonable time after the termination of an OSHA inspection, the Secretary shall notify the inspected employer of any penalty imposed and inform the employer that he has 15 working days within which to notify the Secretary that the employer wishes to contest the citation or proposed penalty. *Id.* § 659(a). If within 15 days the employer fails to notify the Secretary that he intends to contest the citation or proposed penalty and no employee or employee representative files a notice to challenge the reasonableness of the abatement period specified in the citation, the citation will be deemed a final and unreviewable order of the Occupational Safety and Health Review Commission (OSHRC or the Commission). *Id.* Section 659(b) provides that if the Secretary has reason to believe that an employer has failed to correct a violation for which the Secretary has issued a citation, the Secretary shall notify the employer of his failure to correct the violation and inform the employer that he has 15 working days within which to notify the Secretary that the employer intends to contest the citation or proposed penalty. *Id.* § 659(b). If the employer fails to notify the Secretary within 15 days that the employer wishes to challenge the citation or penalty, the citation or penalty will become a final OSHRC order. *Id. See generally* 29 C.F.R. § 2200.60 to .76 (1983) (OSHRC hearing procedures); Kamer,

citation is unreasonable in length.[8] Additionally, section 10(c), allows employees or their unions to participate as parties to employer-initiated hearings.[9] Section 10 (c), however, is unclear regarding what objections unions may raise to a citation in a hearing initiated by an employer.[10] Circuit courts interpreting section 10(c) differ over whether unions in an employer-initiated hearing may challenge a citation on all matters relevant to the citation or merely on the ground that the period of abatement specified in the citation is unreasonably long.[11] The Department of Labor and OSHRC, the two agencies charged with administering the Act, also disagree on this point.[12]

The judicial and administrative disagreement concerning the scope of union participation in employer-initiated hearings turns on the uncertain relationship between two sentences in section 10(c).[13] In one sentence, section 10(c) provides that employees or their representatives may initiate a hearing only on the ground that "the period of time fixed in the citation for the abatement of a violation is unreasonable."[14] In reference to employer-initiated

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supra note 6, at 211-13 (OSHRC procedure); W. CONNOLLY & D. CROWELL, *supra* note 5, § 1.01 at 1-3 (OSHRC procedure).

OSHRC consists of a three member board appointed by the President, each for a term of six years. 29 U.S.C. §§ 661(a)-(b) (1982). Congress empowered the Chairman of OSHRC to appoint as many administrative law judges as the Chairman deems necessary to adjudicate contested citations. *Id.* § 661(d). An employer who disagrees with an administrative law judge's decision may petition the Commission for discretionary review. *See* 29 C.F.R. § 2200.91(a) (1983) (person aggrieved by decision of administrative law judge may petition OSHRC for review); *id.* § 2200.92(a) (1983) (OSHRC has discretion to review administrative law judge's decision). If still dissatisfied, an employer may appeal to a federal circuit court. 29 U.S.C. § 660 (1982).

8. *See* 29 U.S.C. § 659(c) (1982). Section 10(c) of the OSH Act states that OSHRC must grant employees or their representatives a hearing if the employees or union file a notice of contest alleging that the period for abatement of the violation fixed in the citation is unreasonable in length. *Id.*; *see supra* note 7 (text of § 10(c)); *see also, e.g.*, Donovan v. Oil, Chem. and Atomic Workers, 718 F.2d 1341, 1347-48 (5th Cir. 1983) (union may initiate hearing only to contest reasonableness of period of abatement); Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918, 926-27 (2d Cir. 1983) (union-initiated contests limited to reasonableness of abatement period); Marshall v. Sun Petroleum Products Co., 622 F.2d 1176, 1186 (3d Cir.) (employees may challenge citation only on ground that period of abatement is too long), *cert. denied*, 449 U.S. 1061 (1980).

9. 29 U.S.C. § 659(c) (1982); *see supra* note 7 (text of § 10(c)).

10. *See* 29 U.S.C. § 659(c) (1982). Section 10(c) does not make clear whether unions as parties to employer-initiated contests may object to citations only on the ground that the period of abatement specified in the citation is unreasonable or whether § 10(c) permits unions to participate fully in the litigation. *See id.*; *supra* note 7 (text of § 10(c)); *infra* text accompanying notes 13-16 (discussing ambiguity inherent in § 10(c)); *see also* Kamer, *supra* note 6, at 211-13 (§ 10(c) is ambiguous regarding degree of participation Act permits employees to enjoy in employer-initiated hearings).

11. *See infra* notes 30-37 and accompanying text (discussing split of authority between circuit courts concerning scope of employee participation in employer-initiated hearings).

12. *See* notes 19-23 and accompanying text (Secretary of Labor argues § 10(c) permits unions as parties to employer-initiated hearings to object only to reasonableness of abatement period). *But see* notes 24-29 and accompanying text (OSHRC maintains union may participate fully in employer-initiated contests under § 10(c)).

13. *See infra* note 16 and text accompanying notes 14-16 (discussing ambiguity inherent in § 10(c)).

14. 29 U.S.C. § 659(c) (1982); *see supra* note 7 (text of § 10(c)).

hearings, another sentence of section 10(c) states that "[t]he rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection."[15] Section 10(c) does not reveal whether the language in the former sentence that limits the range of objections upon which unions may initiate a hearing also qualifies the right to participate as parties to employer-initiated hearings conferred upon unions in the latter sentence.[16] Neither the legislative history of the Act[17] nor the rules promulgated under the Act[18] state expressly the degree of participation in OSHRC hearings Congress intended employees and their unions to enjoy.

The Secretary of Labor maintains that Congress intended employees and organized labor to play only a limited role in the enforcement of the Act.[19] The Secretary contends that the language in section 10(c) limiting unions to challenging only the reasonableness of an abatement period applies to union participatory rights in employer-initiated as well as employee-initiated hearings.[20] The Secretary asserts that because Congress vested the Secretary of Labor with the exclusive authority to prosecute the OSH Act, a broader interpretation of section 10(c) that permits unions to participate fully in OSHRC hearings would result in an impermissible infringement upon the Secretary's

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15. 29 U.S.C. § 659(c) (1982); *see supra* note 7 (text of § 10(c)).

16. *See* 29 U.S.C. § 659(c) (1982); *see also supra* note 7 (text of § 10(c)). The relationship between the sentence in § 10(c) allowing employees to initiate a hearing on the ground that the period of abatement fixed in the citation is unreasonable and the sentence providing employees with the right to participate as parties in employer-initiated hearings is unclear. *See* 29 U.S.C. § 659(c) (1982).

One commentator believes that the latter sentence seems to suggest that employees enjoy a less restricted role in employer-initiated hearings than in hearings the employees initiate. Kamer, *supra* note 6, at 211. This commentator states that the question § 10(c) raises is whether the term "parties" means full parties able to contest all aspects of a citation or limited parties permitted to contest only the period of abatement specified in a citation. *See id.* Nowhere in the Act has Congress set the parameters of employee participation in OSHRC hearings. *See id.*

17. S. REP. No. 1982, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191; *see infra* notes 120-26 and accompanying text (legislative history unclear regarding whether OSH Act qualifies employees' right to participate in parties to employer-initiated hearings).

18. *See* 29 C.F.R. § 2200.20 (1983). The rules promulgated under § 10(c) contain two subsections that address employee participatory rights in OSHRC hearings. *See id.* In one subsection, the rules state that "affected employees may elect to participate as parties" in Commission hearings. *See id.* § 2200.20(a). This subsection does not state whether employees may participate as parties in employer-initiated hearings only on the issue of the reasonableness of the abatement period or on any issue relevant to the citation. *See id.* Only the subsection in the rules that addresses employee-initiated contests limits expressly the grounds upon which employees may challenge a citation, providing that employees or their representatives may file a notice of contest "with respect to the reasonableness of the period for abatement of a violation." *See id.* § 2200.20(b).

19. *See* Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d 1341, 1352 (5th Cir. 1983) (Secretary asserts employees' role in enforcement of Act limited to that of "gadfly"); Marshall v. Occupational Safety & Health Review Comm'n, 635 F.2d 544, 548 (6th Cir. 1980) (Secretary claims to be sole prosecutor under Act).

20. *See, e.g.*, Donovan v. United Steelworkers of America, AFL-CIO, 722 F.2d 1158 (4th

prosecutorial discretion.[21] Nothing in the Act or its legislative history justifies such an expansive view of union participatory rights, maintains the Secretary.[22] Additionally, the Secretary contends that his exclusive authority to prosecute violations of the Act necessarily includes the power to settle citations with an employer, without the need to entertain union objections to any element of the settlement agreement other than the reasonableness of the period of abatement.[23]

OSHRC, however, believes that section 10(c) entitles unions to plenary participation as parties to employer-initiated hearings.[24] The Commission reasons that Congress included the term "parties" in section 10(c) intending that OSHRC and the courts give "parties" its legal meaning, that of persons

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Cir. 1983) (Secretary asserts employees and unions may challenge only reasonableness of abatement period specified in citation in employer-initiated hearings); Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d 1341, 1347 (5th Cir. 1983) (Secretary contends employee participation in employer-initiated hearings limited to matters concerning reasonableness of abatement period); Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918, 925 (2d Cir. 1983) (Secretary maintains union in employer-initiated hearing limited to contesting reasonableness of period of abatement).

21. *See* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918, 925 (2d Cir. 1983) (Secretary asserts OSHRC's view that § 10(c) permits full union participation in Commission hearings infringes on Secretary's prosecutorial discretion); Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,026 (No. 4386, 1982) (Secretary argues § 10(c) must be read narrowly to accomodate Secretary's prosecutorial discretion), *rev'd sub. nom.* Donovan v. Occupational Safety & Health Review Comm'n 713 F.2d 918 (2d Cir. 1983).

22. *See* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918, 925 (2d Cir. 1983) (Secretary contends OSHRC's interpretation of § 10(c) allowing employees to participate fully in Commission hearings is contrary to language of Act and its legislative history).

23. *See* Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d 1341, 1352-53 (5th Cir. 1983) (Secretary contends employees and unions may not object to settlement agreement on grounds other than reasonableness of period of abatement); Marshall v. Oil, Chem. & Atomic Workers, 647 F.2d 383, 387 (3d Cir. 1981) (Secretary asserts OSHRC's refusal to approve settlement agreement over union's objection that abatement had not occurred infringed Secretary's prosecutorial discretion).

24. *See* Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,025 (No. 4386, 1982) (section 10(c) permits all parties to litigate fully contest initiated by Secretary's citation to employer), *rev'd sub. nom.* Donovan v. Occupational Safety & Health Review Comm'n 713 F.2d 918 (2d Cir. 1983). Prior to 1982, OSHRC maintained that § 10(c) limits a union's role as a party to an employer-initiated contest to objecting only to the reasonableness of the length of the abatement period. *See* United States Steel Corp., 1976-77 OSHD (CCH) ¶ 21,463, at 25,742 (No. 2975, 1977) (section 10(c) permits union to object to OSHA citation only on ground that length of abatement period specified in citation is unreasonable); United Auto Workers, Local 588 (Ford Motor Co.) 1976-77 OSHD (CCH) ¶ 20,737, at 24,865 (No. 2786, 1976) (employees' participation in employer-initiated hearings under § 10(c) limited to contesting only reasonableness of abatement period), *aff'd*, 557 F.2d 607 (7th Cir. 1977). In 1982, a reconstituted Commission reinterpreted § 10(c) and determined that Congress had granted employees and their unions plenary participation in employer-initiated hearings. *See* Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,029 (No. 4386, 1982) (Commission overruled *United States Steel* to extent it held employee party status is statutorily limited to contesting reasonableness of abatement period), *rev'd sub. nom.* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918 (2d Cir. 1982). The *Mobil Oil* Commission reasoned that the principal error of earlier OSHRC decisions was the Commission's failure to recognize the statutory distinction between contesting parties and intervening parties. *Id.* at 33,028. The *Mobil Oil* Commission determined that the language in § 10(c) limiting employee rights to initiate a hearing does not apply to the par-

entitled to participate fully in litigation.[25] The Commission notes that neither the Act nor the Commission rule enabling employees to elect party status qualifies the union right to participate as parties granted in the last sentence of section 10(c).[26] OSHRC also rejects the Secretary's argument that unfettered union participation in OSHRC hearings would constitute a usurpation of the Secretary's prosecutorial discretion.[27] The Secretary's prosecutorial discretion is not unlimited, contends the Commission, and must be balanced against the employees' interest in participating meaningfully in hearings OSHRC conducts primarily for the benefit of employees.[28] The Commission

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ticipatory rights employees enjoy under § 10(c) when intervening in employer-initiated contests. *Id.* at 33,029; *see infra* notes 25-29 and accompanying text (discussing Commission's interpretation of § 10(c) in *Mobil Oil*).

25. *See* Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,023 (No. 4386, 1982) (Congress employed legal term "parties" expecting that Commission would give term its legal meaning), *rev'd sub. nom.* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918 (2d Cir. 1982).

26. *Id.* at 33,022. The *Mobil Oil* Commission noted that employees have intimate knowledge of their working conditions and thus, may possess significant information to offer the Commission concerning the alleged violations and the most appropriate forms of relief. *Id.* at 33,025. Additionally, OSHRC stated that the Commission's order will determine the employees' interests in a safe and healthful workplace. *Id.* The Commission reasoned that if OSHRC's decision leaves the safety hazard unremedied, employees will be forced to file an entirely new complaint with the Secretary, in order to claim that the employer's premises are unsafe notwithstanding the Commission's determination. *Id.* This result, maintained the Commission, would generate needless and wasteful relitigation. *Id.* Even worse, speculated OSHRC, was the possibility that the doctrine of res judicata would bar a new action since the issues and parties in the new action would be identical to those in the old action. *Id.*

27. *See id.* at 33,026-028. The *Mobil Oil* Commission stated that the Secretary's argument that § 10(c) must be read narrowly to accomodate the Secretary's "prosecutorial discretion" overlooked the fundamental distinction between the initiation of enforcement proceedings and employee participation in adjudicatory hearings. *Id.* at 33,026. The Commission stated that the Secretary enjoys unqualified prosecutorial authority to initiate enforcement proceedings by issuing citations. *Id.*; *see* 29 U.S.C. § 658(a) (1982) (Secretary has authority to issue citations); *id.* § 657(f)(2) (employees not authorized to issue citations); *id.* § 653(b)(4) (OSH Act creates no independent cause of action for employees against employers who violate safety standards); *see also id.* § 657(a) (Secretary has discretion to investigate workplace hazards); *id.* § 655(e) (Secretary has discretion to mitigate penalties). The Commission noted that the Secretary's exercises of discretion in issuing citations, investigating workplace hazards, and mitigating penalties are not subject to direct administrative review. Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187 at 33,026 n.21. Once, however, an employer initiated a hearing to contest a citation, OSHRC maintained that the Act enters its adjudicatory phase and the Secretary's exercise of prosecutorial discretion in issuing the citation becomes the central issue before the Commission. *Id.* at 33,027. The *Mobil Oil* Commission stated that by allowing employees to intervene and participate as parties to an employer-initiated hearing, the OSH Act permits employees to protect any interests they may deem adverse to those of the Secretary as well as those of the employer. *See id.* OSHRC maintained that the mere existence of the Secretary's enforcement discretion does not limit the statutory status of intervening employees, but rather that the adverse interests of all the parties are to be adjudicated in a hearing independent of the Secretary's investigatory and enforcement discretion. *See id.*

28. *See* Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,028. (Secretary's discretion and statutory rights of employees co-exist without sacrificing employees' interests to Secretary's enforcement discretion).

further maintains that unions may challenge before OSHRC a settlement reached between the Secretary and an employer on any ground relevant to the settlement.[29]

A majority of circuit courts reject OSHRC's interpretaton of section 10(c) in favor of the Secretary's position.[30] The Second,[31] Third,[32]

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29. *See id.* at 33,029-033 (administrative law judge in employer-initiated hearing must consider intervening union's objections to all aspects of settlement agreement before approving settlement).

30. *See infra* notes 31-34 and notes 38-60 and accompanying text (discussing circuit court cases that follow Secretary's view that § 10(c) limits employee participation in employer-initiated hearings to matters concerning only reasonableness of abatement period).

31. Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918, 926, 929 (2d Cir. 1983) (court held that union may not use party status under § 10(c) to contest effectiveness of abatement plan); *see infra* notes 53-69 and accompanying text (discussion of *Donovan* court's interpretation of § 10(c)).

32. *See* Marshall v. Oil, Chem. & Atomic Workers, 647 F.2d 383, 388 (3d Cir. 1981) (OSHRC has jurisdiction in employer-initiated hearing to consider union objections only to reasonableness of abatement period); Marshall v. Sun Petroleum Products Co., 622 F.2d 1176, 1186 (3d Cir.) (unions in employer-initiated hearings may contest only reasonableness of abatement period), *cert. denied*, 449 U.S. 1061 (1980). In *Marshall v. Oil, Chem. & Atomic Workers (OCAW)*, the Secretary cited the employer for certain safety violations. 647 F.2d at 385. The employer filed a notice of contest and OSHRC instituted a hearing in which the union elected party status. *Id.* Thereafter, the Secretary submitted a proposed settlement to the employer and the union. *Id.* Only the employer signed the settlement agreement, which provided in principal part that the condition which led to the citation had already abated. *Id.* The Secretary forwarded the agreement to the administrative law judge in charge of the enforcement hearing, who approved the settlement as submitted. *Id.* The union objected to the administrative law judge's approval of the settlement, contending that, contrary to the settlement, the employer had not cured the alleged violation. *Id.* The Commission construed the union's written objection as a petition for discretionary review and acceded to the union's petition. *Id.* The Commission determined that under § 10(c), the union possessed the right to challenge the settlement's assertion that the employer had abated the hazard and remanded the case to the administrative law judge to determine whether in fact the employer had cured the violation. *Id.* at 386. The Secretary appealed to the Third Circuit the Commission's order to remand the case to the administrative law judge. *Id.*

On appeal, the Third Circuit in *Marshall v. OCAW* reversed the Commission's order, finding that OSHRC had erroneously refused to approve the Secretary's settlement agreement. *Id.* at 387-88. The Third Circuit determined that the Secretary, as exclusive prosecutor of the OSH Act, possessed the unfettered discretion to settle cases. *Id.* at 388. Otherwise, reasoned the Third Circuit, if settlements approved by administrative law judges were subject to Commission review and rejection, settlement agreements would have no finality, thus discouraging employers from settling contested citations. *Id.* at 387. Moreover, the Third Circuit determined that the language in § 10(c) limiting employees to initiating a hearing only to contest the reasonableness of the abatement period similarly qualifies the union's right to participate as parties in employer-initiated hearings. *See id.* at 387-88. The *Marshall v. OCAW* court followed the Third Circuit's earlier holding in *Marshall v. Sun Petroleum Products Co.* that employees under § 10(c) possess no right to be heard on matters other than the reasonableness of the abatement period in employer initiated hearings as well as in settlement hearings. *See id.* at 388; *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176, 1186 (3d Cir.) (employees as parties to employer-initiated hearings may contest only reasonableness of abatement period), *cert. denied*, 449 U.S. 1061 (1980). The *Marshall v. OCAW* court therefore, held that because the union had objected not to the reasonableness of the period of abatement fixed in the citation, but rather to the fact

Fourth[33] and Sixth[34] Circuits agree with the Secretary of Labor that under sec-

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of abatement itself, the Commission lacked jurisdiction to entertain the union's challenge to the settlement. 647 F.2d at 388.

In *Sun Petroleum*, the union, as a party to an employer-initiated contest, objected to a settlement reached between the Secretary and the employer on the ground that the methods of abatement specified in the settlement would not correct the safety hazard that was the subject of the original citation. *See* 622 F.2d at 1178. In a prehearing conference, the administrative law judge assigned to the case determined that the union lacked standing to contest the settlement on any matters beyond the reasonableness of the abatement period fixed in the settlement. *Id.* at 1178-79. Only two of the three OSHRC members reviewed the administrative law judge's decision. *Id.* at 1179. The two OSHRC members disagreed on whether the union under § 10(c) could object to the substantive elements of the settlement agreement. *Id.* OSHRC therefore affirmed the administrative law judge's approval of the settlement, but accorded the judge's order only the precedential value of an unreviewed administrative law judge decision. *See id.* Both the Secretary and the union appealed the Commission's inconclusive decision to the Third Circuit. *Id.*

On appeal, the *Sun Petroleum* court rejected the union's petition for review, agreeing with the Secretary that § 10(c) does not permit unions to contest the substantive merits of a settlement agreement. *Id.* at 1186, 1188. The Third Circuit rejected the union's contention that § 10(c) allows employees or their unions to participate fully in OSHRC hearings, as well as to challenge settlement agreements on any relevant grounds. *See id.* at 1186. The *Sun Petroleum* court found that the Act's legislative history establishes clearly that § 10(c) permits unions in all OSHRC hearings to object to a citation only on the ground that the abatement period specified in a citation is unreasonably long. *See id.* (citing legislative history of OSH Act); *see also* S. REP. NO. 1282, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191 (congressional discussion of § 10(c)); *infra* notes 120-29 and accompanying text (discussing legislative history of § 10(c)). *But see* Sun Petroleum Products, 622 F.2d at 1188-93 (Pollak, J., concurring in part and dissenting in part).

The dissent in *Sun Petroleum* disagreed with the majority that under § 10(c) unions have no right to participate in employer-initiated hearings on matters other than the reasonableness of the abatement period. *Id.* at 1188. The dissent noted that § 10(c) creates two types of hearings, those an employer initiates and those employees initiate. *Id.* at 1189; *see* 29 U.S.C. § 659(c) (1982) (§ 10(c)); *see also supra* note 7 (text of § 10(c)); *supra* notes 14-18 and accompanying text (section 10(c) is ambiguous concerning scope of employee participation in employer-initiated hearings). The *Sun Petroleum* dissent stated that § 10(c) limits contesting the reasonableness of abatement periods only in employee-initiated hearings. 622 F.2d at 1189 (Pollak, J., concurring in part and dissenting in part). The dissent determined that the last line in § 10(c) grants employees the unqualified right to intervene and "participate as parties" in employer-initiated hearings. *Id.*; *see* 29 U.S.C. § 659(c) (1982) (section 10(c)); *see also supra* note 7 (text of § 10(c)). The dissent rejected the majority's assertion that the legislative history suggests that Congress intended to limit employee participation in all OSHRC hearings, finding that the legislative history indicates that Congress created a two-tiered adjudicatory structure in which employee participation is limited to matters concerning the length of the period of abatement only in employee-initiated contests. *See* 622 F.2d at 1190 (Pollak, J., concurring in part and dissenting in part) (citing Act's legislative history); *see also* S. REP. NO. 1282, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191 (legislative history of § 10(c)); *infra* notes 120-29 and accompanying text (discussing legislative history of § 10(c)). Moreover, the *Sun Petroleum* dissent maintained that employees possess standing to object to settlements reached in employer-initiated hearings on all matters relevant to the settlements. 622 F.2d at 1191 (Pollak, J., concurring in part and dissenting in part).

33. *See* Donovan v. United Steelworkers of America, Local 12610, 722 F.2d 1158 (4th Cir. 1983) (court upheld Secretary's view that union may not object to substantive merits of settlement agreement). In *Donovan v. United Steelworkers*, the employer, after contesting a citation, reached a settlement agreement with the Secretary. *Id.* at 2-3. The union, which had elected party status in the hearing, objected to the settlement on grounds other than the reasonableness of the

10(c), unions as parties to employer-initiated hearings may contest a citation only on the ground that the period of abatement specified in the citation is unreasonably long. The Fifth[35] and District of Columbia[36] Circuits, on the other hand, follow the Commission's view that employees and their unions

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abatement period fixed in the settlement. *Id.* The administrative law judge assigned to the case ordered a hearing to entertain the union's objections to the settlement. *Id.* at 3. The Commission affirmed the administrative law judge's order and the Secretary appealed to the Fourth Circuit. *Id.*

On appeal, the Fourth Circuit vacated OSHRC's order to the administrative law judge to hear the union's objections, agreeing with the Secretary that under § 10(c), the Commission lacks jurisdiction to entertain union objections to settlements on grounds beyond the reasonableness of the abatement period specified in the settlement. *Id.* at 5. Without engaging in lengthy analysis, the *United Steelworkers* court followed the Second Circuit's conclusion in *Donovan v. Occupational Safety & Health Review Comm'n* that § 10(c) restricts union participation in employer-initiated hearings as well as objections to settlement agreements to matters concerning the reasonableness of the period of abatement. *See id.* (adopting Second Circuit's rationale and conclusions in *Donovan v. Occupational Safety & Health Review Comm'n*); Donovan v. Occupational Safety and Health Review Commission, 713 F.2d 918, 927-28 (2d Cir. 1983) (last line in § 10(c) granting employees party status in employer-initiated hearings does not confer right to object to citations on grounds other than reasonableness of length of period of abatement); *see also infra* notes 52-69 and accompanying text (discussing Second Circuit's narrow interpretation of § 10(c) in *Donovan*).

34. *See* Marshall v. Occupational Safety & Health Review Comm'n, 635 F.2d 544, 551 (6th Cir. 1980) (court concluded that § 10(c) permits employees to contest only reasonableness of abatement period specified in citations). In *Marshall v. Occupational Safety & Health Review Comm'n* the Secretary issued a ctiation to an employer alleging several OSH Act violations. *Id.* at 546. The employer filed a notice to contest the citation. *Id.* Subsequently, the Secretary determined that the citation was unwarranted and filed a motion with the administrative law judge assigned to the hearing to vacate the citation. *Id.* Over the union's objection, the administrative law judge granted the Secretary's motion. *Id.* The Commission vacated the administrative law judge's decision and remanded the case to him for further proceedings, holding that when the Secretary decides not to prosecute a citation, affected employees may proceed to prosecute the citation if the employees elect party status in the original hearing. *Id.* The Secretary and the employer appealed to the Sixth Circuit. *Id.*

On appeal, the Sixth Circuit reversed the Commission's decision, holding that once the Secretary withdraws a contested OSHA citation, affected employees or their union may not proceed to prosecute the citation. *Id.* The Sixth Circuit construed § 10(c) to limit employees in employer as well as employee-initiated hearings to contesting only the reasonableness of the abatement period specified in citations. *See id.* at 551. The Sixth Circuit found that the length of the abatement period is the only matter upon which employees may infringe upon the Secretary's prosecutorial discretion in OSHRC hearings. *Id.* Only the employer, stated the Sixth Circuit, may contest other elements of a citation. *Id.* The Sixth Circuit concluded that, therefore, employees have no standing to object to the Secretary's withdrawal of a citation. *Id.*

35. *See* Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d 1341, 1351 (5th Cir. 1983) (employees who elect party status in employer-initiated hearings may litigate fully merits of citation); *see infra* notes 70-114 and accompanying text (discussion of Fifth Circuit's interpretation of § 10(c) in *Donovan v. Oil, Chem. & Atomic Workers*).

36. *See* Oil, Chem. & Atomic Workers v. Occupational Safety & Health Review Comm'n, 671 F.2d 643, 648 (D.C. Cir. 1982) (OSHRC has jurisdiction in employer-initiated hearings to entertain employees' objections on all matters relating to citation in question), *cert. denied*, 103 S.Ct. 206 (1982); *see infra* note 87 (discussing District of Columbia Circuit's interpretation of § 10(c)).

enjoy unlimited participatory rights in employer-initiated hearings. These two circuits, however, stop short of adopting OSHRC's position in its entirety and hold that settlement agreements are subject to union objections concerning only the reasonableness of the abatement period.[37]

The Second Circuit case of *Donovan v. Occupational Safety & Health Review Commission*[38] perhaps best articulates the majority interpretation of section 10(c). In *Donovan*, a union member and employee of Mobil Oil Corporation died of asphyxiation while gauging the level of petroleum in a holding tank at a Mobil facility.[39] The union immediately notified OSHA, which inspected the facility.[40] As a result of the OSHA inspection, the Secretary issued a citation charging Mobil with a serious violation of section 5(a)(1) of the Act.[41] Section 5(a)(1), known as the "general duty" clause, requires employers to furnish their employees a place of employment free from recognized hazards likely to kill or seriously harm the employees.[42] The citation proposed that Mobil immediately abate the violation and assessed the company a $540 penalty.[43] Pursuant to section 10(c), Mobil filed a notification of its intent to contest the citation.[44] OSHRC assigned an administrative law judge to adjudicate an enforcement hearing and the union, as employee representative, elected to participate as a party in the proceeding.[45]

Before the hearing commenced, however, the Secretary and Mobil reached a proposed settlement which they submitted to the administrative law judge for approval.[46] The union filed an objection with the administratve law judge, claiming that the settlement would not abate the hazardous condition at the Mobil facility.[47] The administrative law judge approved the settlement

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37. *See* Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d 1341, 1352-53 (5th Cir. 1983) (court held employees have no standing to object to settlement agreements on grounds other than reasonableness of abatement period specified in settlement); Oil, Chem. & Atomic Workers v. Occupational Safety & Health Review Comm'n, 671 F.2d 643, 650 n.7 (D.C. Cir.) (when Secretary settles citation in exchange for employer's withdrawal of notice of contest employees may contest only reasonableness of period of abatement fixed in settlement), *cert. denied*, 103 S.Ct. 206 (1982); *infra* note 85 and accompanying text (discussing Fifth Circuit's refusal in *Donovan v. Oil, Chem. & Atomic Workers* to find that § 10(c) permits employees to contest substantive elements of settlement agreement).

38. 713 F.2d 918 (2d Cir. 1983).

39. *Id.* at 920.

40. *Id.*

41. *Id.*

42. 29 U.S.C. § 654(a)(1) (1982); *see* 713 F.2d at 920 n.2 (section 5(a)(1) known as Act's "general duty" clause).

43. 713 F.2d at 920. The citation the Secretary issued to Mobil alleged that Mobil required its workers to manually gauge and sample the petroleum in floating roof tanks without proper atmospheric testing, contact with other personnel, or adequate training. *Id.* at 920 n.1.

44. *Id.; see* 29 U.S.C. § 659(c) (1982); *supra* note 7 (text of § 10(c)).

45. 713 F.2d at 920.

46. *Id.* The rules promulgated under the OSH Act provide that the Secretary must submit settlement proposals to the administrative law judge assigned to adjudicate the enforcement hearing for approval. 29 C.F.R. § 2200.100 (1983). The administrative law judge shall approve the settlement if it is consistent with the provisions and policies of the Act. *Id.*

47. 713 F.2d at 920-21.

over the union's objection, holding that the union, under section 10(c), had standing to object to a settlement only on the reasonableness of the length of the abatement period specified in the settlement.[48] OSHRC granted the union's request for discretionary review and remanded the case to the administrative law judge with instructions to conduct a hearing to determine the merit of the union's objections to the proposed methods of abatement in the settlement agreement.[49] The Commission rejected the administrative law judge's interpretation of section 10(c) and held that the union, as a party to an employer-initiated hearing, could contest the proposed settlement on any grounds relevant to the settlement.[50] The Secretary appealed OSHRC's order to the Second Circuit.[51]

On appeal, the Second Circuit reversed OSHRC's holding and vacated the remand order.[52] In order to discern how to interpret section 10(c) properly, the Second Circuit first examined the scheme of the Act to determine the respective roles that Congress intended the Secretary and employees to play in policing employer compliance with OSHA standards.[53] The *Donovan* court found that Congress granted the Secretary broad rulemaking, investigatory and enforcement powers.[54] Although Congress endowed employees with special rights in the rulemaking and investigatory stages of the OSH Act, the Second Circuit found that Congress intended that employees exercise only a limited role in the Act's enforcement.[55] The *Donovan* court declared that the OSH Act's detailed statutory scheme led unmistakeably to the

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48. *Id.* at 922.

49. *Id.*; *see* 29 U.S.C. § 661(i) (1982) (Commission may review administrative law judge's findings).

50. 713 F.2d at 922. The Commission in *Donovan v. Occupational Safety & Health Review Comm'n* held that the administrative law judge wrongly determined that the language in § 10(c) limiting employee participatory rights in employee-initiated hearings also applied to employer-initiated hearings. *Id.*; *see* Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,021 (No. 4386, 1982) (Commission's rationale in *Donovan*), *rev'd sub. nom*, Donovan v. Occupation Safety & Health Review Comm'n, 713 F.2d 918 (2d Cir. 1983).

51. 713 F.2d at 919-20.

52. *Id.* at 931.

53. *See id.* at 926-27 (court examined legislative scheme of OSH Act).

54. *See id.* at 926. In *Donovan*, the Second Circuit noted that the Secretary's broad powers include the authority to promulgate occupational safety and health standards, modify or grant variances from standards, inspect and investigate workplaces, issue citations and propose penalties against employers, seek enforcement of OSHRC orders, seek injunctions to restrain imminent dangers, and prosecute contested citations before the Commission. *Id.*; *see supra* notes 3-6 (discussing Secretary's statutory powers under OSH Act).

55. *See* 713 F.2d at 926. In *Donovan*, the Second Circuit determined that the Act permits employees to participate in rulemaking proceedings. *Id.*; *see* 29 U.S.C. §§ 655(b)(2)-(3) (1982) ("interested persons" may comment upon or object to Secretary's proposed promulgation, modification, or revocation of safety or health standards). The *Donovan* court also noted that employees may request the Secretary to conduct a workplace inspection to examine a suspected hazard. *See* 713 F.2d at 926; 29 U.S.C. § 657(f)(1) (1982) (employees or representatives who believe physically threatening safety or health standard violation or imminent danger exists may request Secretary to inspect violation or danger). The *Donovan* court, however, stated that employees and their unions have only a limited role in the enforcement of the Act since the Act

conclusion that the Secretary possessed the sole authority to enforce the Act.[56] The Second Circuit reasoned that incident to the Secretary's prosecutorial authority was the Secretary's unfettered discretion to settle citations without the burden of having to entertain union objections to the substance of the settlement agreement.[57]

After examining the scheme of the Act in general, the *Donovan* court focused on the specific language of Section 10(c).[58] The Second Circuit concluded that the language in section 10(c) permitting employees to initiate a hearing to contest only the reasonableness of the period of abatement similarly limits the scope of the last sentece of section 10(c) which allows employees to participate as "parties" in employer-initiated hearings.[59] The *Donovan* court determined that the last sentence in section 10(c) confers upon employees merely the procedural right to participate in pre-hearing discovery and to present witnesses at OSHRC hearings,[60] not the substantive right to challenge proposed methods of abatement.[61] Had Congress intended to grant employees broad participatory rights in OSHRC proceedings, the Second Circuit reasoned that Congress would not have limited the grounds upon which

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does not provide the union and its employees any private right of action. 713 F.2d at 926. Moreover, the court maintained that the Act does not permit a union to prosecute a citation once the Secretary has withdrawn it, compel the Secretary to adopt a particular standard, nor appeal an OSHRC decision once the Secretary decides that he will not prosecute the citation regardless of the appellate court's decision. *Id.* Additionally, the Second Circuit noted that the Act permits employees to overcome the Secretary's prosecutorial discretion in only two situations. *Id.* First, the *Donovan* court stated that employees may challenge the period of abatement specified in a citation. *Id.*; *see* 29 U.S.C. § 659(c) (1982) (employee or representatives who file notice with Secretary alleging length of period of abatement specified in citation is unreasonable are entitled to OSHRC hearing). Second, the Second Circuit stated that employees may bring a mandamus action to compel the Secretary to enjoin an imminent danger at their workplace. 713 F.2d 926-27; *see* 29 U.S.C. § 662(d) (1982) (employees may seek writ of mandamus if Secretary arbitrarily or capriciously fails to seek relief of imminent danger).

56. 713 F.2d at 927.

57 *See id.* In determining that the Secretary possessed the sole prosecutorial authority to enforce the Act, the *Donovan* court reasoned that permitting the Secretary to settle citations without OSHRC hearings achieved the OSH Act's basic remedial purpose of bringing about the rapid abatement of unsafe or unhealthy working conditions. *Id.* Since the Act stays the employer's obligation to abate a hazard pending the entry of the Commission's final order, continuation of OSHRC proceedings after an employer has withdrawn its notice of contest in order to entertain employee objections to a settlement agreement delays the occurrence of abatement and prevents the Secretary from taking any steps to compel abatement. *Id.*; *see* 29 U.S.C. § 659(b) (1982) (period of time permitted to correct violation shall not begin to run until entry of Commission's final order if employer contests citation in good faith). Additionally, the Second Circuit noted that the possibility of further OSHRC hearings would discourage employers from negotiating settlements. 713 F.2d at 927.

58. *See infra* note 59 and text accompanying notes 59-61 (*Donovan* court's interpretation of § 10(c)).

59. *See* 713 F.2d at 928. The *Donovan* court stated that the only substantive right that § 10(c) confers upon employees in enforcement hearings is the limited right to challenge the period of time specified in a citation for the abatement of a violation. *Id.*; *see* 29 U.S.C. § 659(c) (1982) (§ 10(c)); *see also supra* note 7 (text of § 10(c)).

60. 713 F.2d at 927 n.13.

61. *Id.* at 927-28.

employees may challenge a citation.[62] The *Donovan* court concluded that by allowing employees to make only one express objection to citations, Congress implied an intent to prevent employees from objecting to citations on other grounds.[63] The Second Circuit found further indication in the Act's legislative history that Congress intended to limit employee participation in all OSHRC hearings to matters concerning the reasonableness of the abatement period.[64]

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62. *Id.*

63. *See id.* at 928. In concluding that employees may not participate fully in OSHRC hearings because § 10(c) does not allow them to do so expressly, the Second Circuit in *Donovan* stated that as a general proposition, Congress' express allowance of one specific objection suggests a congressional intent to foreclose at least some other objections. *Id.* The *Donovan* court found that § 6(b)(6)(A) of the Act indicated that when Congress intended to grant employees the right to a hearing to challenge an employer's abatement methods, Congress did so on the face of the statute. *Id.* at 929; *see* 29 U.S.C. § 655(b)(6)(A) (1982) (§ 6(b)(6)(A)). Section 6(b)(6)(A) permits an employer to obtain a temporary order from the Secretary granting a variance from a safety standard. 29 U.S.C. § 655(b)(6)(A) (1982). The temporary order must prescribe the methods by which the employer plans to comply with the standard and before the Secretary will grant the variance, employees must be given an opportunity for a hearing. *Id.* The Second Circuit did not explain the relationship between § 6(b)(6)(A) and § 10(c). *See* 713 F.2d at 929. Apparently, the *Donovan* court concluded that because under § 6(b)(6)(A), employees may contest the methods by which employers, in order to obtain a variance, intend to comply with the standard in question, § 10(c)'s silence concerning the scope of employee participation in employer-initiated hearings indicates that Congress intended to limit the party status of employees under § 10(c). *See id.*

The Second Circuit found that a comparison between § 10(c) and § 9(a) of the OSH Act offered further proof that Congress meant to limit employee participatory rights in all OSHRC hearings. *See id.* at 928-29; 29 U.S.C. § 658(a) (1982) (§ 9(a)). The Commission in *Donovan* contended that because § 9(a) requires the Secretary to specify only the time for abatement in a citation and not abatement requirements or methods, the only objection an employee would have reason to raise upon reading a citation would be that the period of abatement fixed in the citation was unreasonably long. 713 F.2d at 928; *see* 29 U.S.C. § 658(a) (1982) (citation must describe with particularity nature of violation including reference to provision of chapter, standard, rule, regulation of order allegedly violated, as well as fix reasonable time for abatement of violation). The Commission reasoned that, therefore, Congress' reference to abatement dates in § 10(c) cannot be interpreted as demonstrating a congressional intent to limit employee participatory rights as parties to employer-initiated hearings. 713 F.2d at 928.

The Second Circuit rejected the Commission's argument, noting that § 9(a) does not require the Secretary to specify in a citation merely the abatement period, but also provides that the citation must describe the nature of the violation and the standard or rule allegedly violated. *Id.*; *see* 29 U.S.C. § 658(a) (1982) (§ 9(a)). The *Donovan* court determined that upon reading a citation, employees could wish to contest the appropriateness of the cited standard or perhaps the accuracy of the Secretary's description of the worksite violation. 713 F.2d at 928. The Second Circuit, therefore, concluded that by limiting the scope of employee contests in § 10(c), Congress implied its intent to limit the participatory rights of employees in all OSHRC hearings. *Id.* Furthermore, the *Donovan* court noted that the absence of any reference to abatement plans or methods in either § 9(a) or § 10(c) reinforced the conclusion that Congress did not intend to permit employees to litigate these matters before the Commission. *Id.* at 929; *see* 29 U.S.C. § 658(a) (1982) (§ 9(a)); *id.* § 659(c) (§ 10(c)).

64. *See* 713 F.2d at 929 (court discussing legislative history of § 10(c)); S. REP. NO. 1282, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191 (legislative history of § 10(c)). *But see infra* notes 120-29 and accompanying text (legislative history supports broad view of employee participatory rights).

The *Donovan* court cited a paragraph in the Senate Labor and Public Welfare Committee Report in which the Committee stated that section 10(c) gives employees or their representatives the right to challenge a citation on the ground that the period of time provided in the citation for the abatement of a violation is unreasonably long.[65] The Second Circuit read this paragraph to mean that employees may challenge a citation only on grounds relating to the reasonableness of the period of abatement in both employer and employee-initiated hearings.[66]

The *Donovan* court concluded its review of section 10(c) and its legislative history by noting that the union's interpretation of section 10(c) produced an anomalous result.[67] The Second Circuit stated that under the union's interpretation, employees would enjoy greater participatory rights in employer-initiated hearings than in hearings the employees themselves initiated.[68] The *Donovan* court found that the legislative plan of the Act provided no justification for such an anomaly and accordingly, held that unions possessed no standing to contest the substantive merits of a settlement agreement.[69]

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65. 713 F.2d at 929; *supra* S. REP. No. 1282, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191 (section 10(c) gives employees right to challenge citation on ground that period of abatement fixed in citation is unreasonably long).

66. *See* 713 F.2d at 919 (*Donovan* court stated that legislative history of § 10(c) suggests Congress intended to limit rights of employees in enforcement of Act). The Second Circuit maintained that in addition to the Act's legislative history, a House-Senate compromise concerning § 10(c) also indicated congressional intent to restrict employee participation in OSHRC hearings. *Id.* at 929 n.16; *see* CONF. REP. NO. 1765, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5235 (congressional discussion of House-Senate compromise concerning § 10(c)). *But see infra* note 133 (House-Senate compromise supports broad view of employee participatory rights under § 10(c)). The *Donovan* court noted that the House version of § 10(c) contained no provision for employee challenges in OSHRC enforcement proceedings. 713 F.2d 929 n.16, *see* CONF. REP. NO. 1765, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5235 (House amendment to S.2193 did not provide for employee challenges to citations). The Second Circuit stated that the House withdrew its amendment in favor of the Senate version of § 10(c), which permitted employees to challenge the reasonableness of the period for abatement of a hazard, in exchange for Senate acquiescence to an amendment giving employers the right to a rehearing if an employer were unable to abate the hazard within the abatement period specified in a citation. 713 F.2d at 929 n.16; *see* CONF. REP. NO. 1765, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5235 (House withdrew amendment to § 10(c) in favor of Senate bill). The nature of the House-Senate compromise, determined the Second Circuit, indicated that Congress intended to limit the participatory rights of employees in all Commission enforcement hearings. 713 F.2d at 929 n.16.

67. 713 F.2d at 919.

68. *Id.*

69. *Id.* at 929-30. The *Donovan* court determined that the union's interpretation of § 10(c) would produce a result Congress did not likely intend. *Id.* at 929 n.17. The Second Circuit reasoned that if unions possessed the right to object to all the terms of a citation or proposed settlement, unions would enjoy unwarranted bargaining leverage against management. *Id.* The *Donovan* court speculated that unions would use OSHA regulations and citations as bargaining chips to obtain work concessions from employers in OSH Act litigation otherwise unattainable at collective bargaining sessions. *See id.* All evidence of congressional intent, found the Second Circuit, indicated that Congress did not mean to strengthen labor at the expense of management in this manner. *Id.*

The Fifth Circuit in *Donovan v. Oil, Chemical and Atomic Workers (OCAW)*[70] reviewed the *Donovan* holding and rejected the Second Circuit's interpretation of section 10(c).[71] In *OCAW*, OSHA inspected an American Petrofina Company plant and found several safety violations.[72] As a result of the inspection, the Secretary issued to the employer four citations alleging that American Petrofina seriously violated section 5(a)(1) of the Act by removing asbestos insulation in an unsafe manner.[73] The Secretary also proposed penalties against the employer.[74] American Petrofina responded by filing notices of contest to the four citations.[75] OSHRC consolidated the citations into two cases, assigning an adminstrative law judge to adjudicate each of the hearings.[76] The union elected party status to each of the two hearings.[77] Before either hearing began, however, the Secretary and American Petrofina agreed to a settlement in which the Secretary reduced the citations from "serious" to "non-serious" in exchange for the employer's agreement to withdraw its notices of contest.[78] Although the union participated in the settlement negotiations, the union refused to join the agreement, objecting to the reclassification of the violations.[79] Both administrative law judges subsequently approved the settlement agreements over the union's objections to the reclassification of the violations and to the employer's alleged failure to take appropriate corrective measures when removing the asbestos.[80] The union petitioned the Commission to review the administrative law judges' rulings.[81] OSHRC granted the union's petition, provoking the Secretary to file with OSHRC a motion to vacate the review order.[82] The Commission denied the Secretary's motion and the Secretary appealed to the Fifth Circuit.[83]

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70. 718 F.2d 1341 (5th Cir. 1983).

71. *See id.* at 1348-51 (Fifth Circuit held employees in employer-initiated hearings may litigate fully merits of citation).

72. *Id.* at 1343.

73. *Id.* In *Donovan v. OCAW* the Secretary issued to American Petrofina four citations alleging failure to clear debris, protect employees against falls, guard an abrasive disk, store oxygen cylinders properly, guard open-sided platforms, and use of defective welding cable. *Id.* at n.5. The citations also alleged that the employer endangered employees by hoisting materials over their heads, failing to guard electrical equipment, and using defective ladders. *Id.* In two asbestos-related citations, the Secretary alleged that the employer seriously violated an asbestos standard by failing to monitor employees who were removing asbestos insulation or working in areas where asbestos was being removed, as well as by failing to collect representative samples of asbestos, failing to label asbestos-containing materials, and failing to dispose of asbestos waste. *Id.*; *see* 29 U.S.C. § 654(a)(1) (1982) (employers must furnish employees a safe workplace).

74. 718 F.2d at 1343.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1344.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

On appeal, the Fifth Circuit vacated the Commission's denial of the Secretary's motion to vacate the review order,[84] holding that employees have no standing to contest settlement agreements on grounds other than the reasonableness of the abatement period.[85] The *OCAW* court, however, determined that section 10(c) entitles employees to plenary participation as parties to employer-initiated hearings until the employer withdraws his notice of contest.[86] The Fifth Circuit in *OCAW* reviewed the conflicting circuit court cases and adopted the minority view that section 10(c) does not restrict employees in employer-initiated hearings to contesting merely the reasonableness of the abatement period.[87] The *OCAW* court reasoned that Congress intended the term "parties" in the last sentence of section 10(c) to mean what "parties"

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84. *Id.* at 1353.

85. *Id.* at 1352-53. The Fifth Circuit in *Donovan v. OCAW* stated that because employees are full parties to employer-initiated OSHRC hearings, employees ought to have the ability to contest settlement agreements between the Secretary and employers, for settlement agreements affect employee interests in occupational safety just as significantly as do litigated citations. *Id.* at 1352. In the interest of administrative uniformity, however, the *OCAW* court refused to interpret § 10(c) as entitling employees to contest settlements on grounds other than the reasonableness of the abatement period. *See id.* at 1352-53. The Fifth Circuit noted that the circuits unanimously follow the Secretary's view that employees may object only to the reasonableness of abatement periods specified in settlement agreements. *Id.* The *OCAW* court, therefore, did not wish to create administrative confusion by striking out on its own on this issue. *See id.*; *supra* notes 30-37 and accompanying text (circuits unanimously agree with Secretary's position that unions may only contest reasonableness of abatement periods in settlements).

86. 718 F.2d at 1353.

87. *See id.* at 1348-49. The *OCAW* court adopted the District of Columbia Circuit's holding in *Oil, Chem. & Atomic Workers v. Occupational Safety & Health Review Comm'n (OCAW v. OSHRC)* that § 10(c) permits employees as parties to employer-initiated hearings to litigate all matters relating to the citation in question. *Id.*; *see* OCAW v. OSHRC, 671 F.2d 643, 648 (D.C. Cir. 1982) (Commission has jurisdiction in employer-initiated hearings to entertain employees' objections on all matters relating to citation), *cert. denied*, 103 S. Ct. 206 (1982).

In *OCAW v. OSHRC*, the Commission dismissed a citation the Secretary has issued to an employer. 671 F.2d at 645. The union, which had elected party status in the employer-initated hearing, petitioned the District of Columbia Circuit to review OSHRC's dismissal of the citation. *Id.* The Secretary took no part in the appeal. *Id.* at 646. The employer moved to intervene, arguing that unions have no standing to appeal OSHRC decisions. *Id.* at 645-47.

The District of Columbia Circuit sustained the union's petition for review and denied the company's motion to dismiss, holding that a union indeed has the right to appeal an OSHRC decision when the union has participated as a party in the Commission hearing. *Id.* at 645. The District of Columbia Circuit determined that, contrary to the employer's contention, § 10(c) does not limit the employees' right to participate in employer-initiated OSHRC hearing or to appeal OSHRC decisions to matters concerning the reasonableness of the abatement period. *Id.* at 646-47; *see* 29 U.S.C. § 659(e) (1982) (§ 10(c)); *id.* § 660 (any person aggrieved by OSHRC order may seek judicial review). The *OCAW v. OSHRC* court found that § 10(c) provides for two kinds of hearings in which employees enjoy different degrees of participation. *See* 671 F.2d at 647. The District of Columbia Circuit noted that only in employee-initiated hearings are employees limited to contesting the reasonableness of the abatement period. *Id.* The court stated that the abatement period language in § 10(c) refers only to the grounds upon which employees may initiate a hearing, not to the employees' participation as parties to employer-initiated hearings addressed in the last sentence of § 10(c). *See id.*; 29 U.S.C. § 659(c) (1982) (§ 10(c)); *supra* note 7 (text of § 10(c)).

ordinarily means, persons entitled to participate fully in litigation.[88] Section 10(c), stated the Fifth Circuit, creates a two-tiered enforcement scheme consisting of employee and employer-initiated hearings.[89] Although section 10(c) permits employees to initiate a hearing solely to challenge the reasonableness of the abatement period, the *OCAW* court noted that section 10(c) contains no language that limits similarly employee participation in employer-initiated hearings.[90] The Fifth Circuit found that its view of the Act's general purposes, as well as all evidence of congressional intent, supported the court's interpretation of section 10(c).[91]

The *OCAW* court conceded that the Act vests the Labor Secretary with exclusive prosecutorial authority, but noted that employee participatory rights arise at the adjudicatory stage of the process, which the Commission and not the Secretary controls.[92] The Fifth Circuit declared that Congress sought to enact a comprehensive statutory structure that would provide workers, the persons most concerned with occupational safety, with meaningful participation in the effort to reduce workplace injury and disease.[93] Accordingly, the *OCAW* court found that Congress limited labor's role in the investigatory and citation stages but provided unions with plenary participation at the adjudicatory stage.[94] The Fifth Circuit explained that extensive employee participation at the investigatory and citation stages is inappropriate because the identification of safety violations is peculiarly within the Secretary's expertise.[95] The *OCAW* court, however, stated, that once the Secretary has determined that the employer has violated a standard, deference to the Secretary's expertise becomes less compelling.[96]

The *OCAW* court acknowledged that its interpretation of section 10(c) produced the anomalous result of according employees greater participatory rights in employer-initiated hearings than in hearings the employees themselves initiated.[97] The Fifth Circuit, however, found this result entirely rational.[98] Unless an employer chooses to litigate a citation, reasoned the *OCAW* court, the Act restricts employees to challenging the only aspect of

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88. 718 F.2d at 1349.

89. *Id.* at 1347; *see also supra* note 87 (District of Columbia Circuit in *OCAW v. OSHRC* finds § 10(c) creates two types of hearings).

90. 718 F.2d at 1349; *see* 29 U.S.C. § 659(c) (1982) (§ 10(c)); *see also supra* note 7 (text of § 10(c)); *supra* note 87 (District of Columbia Circuit in *OCAW v. OSHRC* finds § 10(c) does not limit employee participation in employer-initiated hearings).

91. *Cf.* 718 F.2d at 1349 (*OCAW* court found Act's general purpose and legislative history of Act outweigh maxim that Congress' express allowance of one specific objection suggests legislative intent to foreclose other objections).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1349-50.

97. *Id.* at 1350.

98. *Id.*

immediate concern to employees, the period of time within which the employer must correct the hazard.[99] The Fifth Circuit noted that if, however, an employer chooses to dispute a citation, the Act ensures that employees will enjoy an equal voice in the proceedings in order to meet the employer's attempts to revoke or modify the citation.[100]

The *OCAW* court found that the same legislative history that the Second Circuit in *Donovan* interpreted as supporting its holding that section 10(c) limits employee participation[101] actually suggested that Congress intended to give employees broad participatory rights in employer-initiated hearings.[102] The Fifth Circuit cited two paragraphs in the Senate Labor Committee report concerning section 10(c).[103] The first, which deals with employer-initiated hearings, states that employees and their representatives may "participate as parties."[104] The second paragraph provides that employees may initiate a hearing on the ground that the period of abatement specified in a citation is unreasonably long.[105] The *OCAW* court interpreted these two paragraphs to imply that Congress intended to create two types of hearings, one employer-initiated and the other initiated by employees.[106] The Fifth Circuit determined that Congress meant to limit employee rights only in employee-initiated hearings, because only the paragraph in the legislative history that addresses employee-initiated hearings contains language limiting employee contests to the reasonableness of the abatement period.[107]

The *OCAW* court found additional support for its interpretation of section 10(c) in section 12(g) of the Act.[108] Section 10(c) states that OSHRC will

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99. *Id.*

100. *Id.*

101. *See supra* notes 64-66 and accompanying text (Second Circuit's finding in *Donovan* that legislative history indicates § 10(c) limits employee participation in all OSHRC hearings to matters concerning reasonableness of abatement period).

102. 718 F.2d at 1349.

103. *See id.* (citing S. REP. NO. 1281, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191). The *OCAW* court adopted the District of Columbia Circuit's finding in *OCAW v. OSHRC* that the OSH Act's legislative history suggests that Congress intended to limit employee participatory rights only in employee-initiated hearings, *Id.*; *see* OCAW v. OSHRC, 671 F.2d 643, 648 (D.C. Cir. 1982) (court contends that legislative history indicates Congress did not intend to limit union participation in employer-initiated hearings to matters concerning length of abatement period), *cert. denied*, 103 S. Ct. 206 (1982).

104. *See* S. REP. NO. 1282, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191 (employees or employee representative may "particiate as parties" in employer-initiated hearings).

105. *See id.* (section 10(c) gives employees right to initiate hearing on ground that period of abatement specified in citation is unreasonably long).

106. 718 F.2d at 1349.

107. *Cf. id.* at 1348-49 (*OCAW* court adopts District of Columbia Circuit's finding in *OCAW v. OSHRC* that OSH Act's legislative history suggests Congress intended to permit employees to participate fully in employer-initiated hearings); *see supra* note 103 (discussing *OCAW v. OSHRC* court's interpretation of OSH Act's legislative history); *see also infra* notes 120-29 and accompanying text (OSH Act's legislative history indicates Congress intended to limit employee participatory rights only in employee-initiated hearings).

108. *See* 718 F.2d at 1350-51 (discussing § 12(g) of Act); 29 U.S.C. § 661(f) (1976) (§ 12(g));

conduct hearings in accordance with the rules of procedure OSHRC has prescribed.[109] Section 12(g) provides that in the event the Commission has adopted no contrary rules of procedure, the Federal Rules of Civil Procedure will apply in OSHRC hearings.[110] The Fifth Circuit determined that because the Commission has adopted no rules specifically governing the extent of employee participation as parties to employer-initiated hearings, section 12(g) directs courts to look to the Federal Rules.[111] The *OCAW* court reasoned that employee election of party status is a process analagous to intervention as of right, thus the applicable Federal Rule of Procedure is rule 24(a), which governs intervention.[112] The Fifth Circuit noted that under rule 24(a), an intervenor as of right possesses standing equal to that of the original parties.[113] Therefore, determined the Fifth Circuit, employees who have elected party status in employer-initiated hearings may, like intervenors, participate fully in the litigation.[114]

Both the Second and Fifth Circuits found that Congress sought to strike a balance between the Secretary's prosecutorial discretion and the right of employees to participate in the adjudication of an act that Congress designed primarily to protect employee safety.[115] The two circuits, however, disagreed on where Congress intended to strike that balance.[116] The *Donovan* court determined that in deference to the Secretary's exclusive prosecutorial authority, Congress created an enforcement scheme in which employees and their unions enjoy the same limited participatory rights in all OSHRC hearings, regardless of which party initiates the hearing.[117] Alternatively, the Fifth Circuit in *OCAW* found that Congress enacted a two-tiered adjudicatory structure in

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infra text accompanying notes 111-14 (Fifth Circuit's discussion of § 12(g)).

109. 29 U.S.C. § 659(c) (1982).

110. 29 U.S.C. § 661(f) (1982); *see* 29 C.F.R. § 2200.2 (1983) (in absence of specific provision, OSHRC procedure shall be in accord with Federal Rules of Civil Procedure).

111. 718 F.2d at 1350. *But see* Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,026 n.19 (No. 4386, 1982) (Commission found Federal Rules of Civil Procedure inapplicable to consideration of § 10(c) because Department of Labor Rules 20 and 21 exist) *rev'd sub. nom* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918 (2d Cir. 1983); *see* 29 C.F.R. § 2200.20 (1983) (employees may elect party status in employer-initiated hearings); 29 C.F.R. § 2200.21 (1983) (nonparties may intervene in enforcement proceedings at Commission's discretion).

112. 29 C.F.R. § 2200.21 (1983); FED. R. CIV. P. 24(a) (anyone may intervene in action either under statute or to protect interest relating to subject of action).

113. *See* 718 F.2d at 1350 (citing C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1920, at 611 (1972)) (courts treat intervenor as of right as if intervenor were original party with standing equal to that of original parties).

115. *Compare* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d at 927 (Second Circuit found that legislative scheme of Act suggests no congressional intent to subordinate Secretary's prosecutorial discretion in reaching settlement agreements to right of employees) *with* Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d at 1349-50 (Fifth Circuit found that Congress vested prosecutional authority in Secretary but allowed for meaningful employee participation in adjudicatory stage of Act).

116. *See supra* note 115 (comparing Second and Fifth Circuit views on balance Act strikes between Secretary's prosecutorial discretion and rights of employees).

117. *See* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d at 925-26

which the scope of rights that employees enjoy differs depending on whether the employees or their employer initiate the contest.[118]

Although the Second and Fifth Circuits each determined that the OSH Act's legislative history supported their conflicting interpretations of section 10(c),[119] the legislative history in fact does not support conclusively either circuit's position.[120] The Senate Labor and Public Welfare Committee report contains two relevant paragraphs.[121] The first provides that employees or their representatives have the right to "participate as parties" to employer-initiated hearings.[122] The second states that employees or their representatives also may initiate a hearing on the ground that the period of abatement specified in the citation is unreasonably long.[123] The committee report does not reveal whether the language in the latter paragraph restricting employee-initiated contests to the reasonableness of the period of abatement contained in a citation similarly limits the employee rights to participate as parties described in the former paragraph.[124] Thus, the question the legislative history raises is the same as that inherent in the structure of section 10(c) itself.[125] Whether examining section 10(c) or its legislative history, courts must determine what effect limiting employee rights to initiate contests has on the right of employees to participate as parties to employer-initiated hearings.[126]

(union incorrect that § 10(c) grants employees greater participatory rights at employer-initiated hearings then at employee-initiated hearings); *see also supra* notes 58-63 and accompanying text (Second Circuit in *Donovan* found Act limits employee participation in all OSHRC hearings to matters concerning abatement period).

118. *See* Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d at 1349-51 (OSH Act limits employee objections to reasonableness of abatement period only in employee- initiated hearings); *see also supra* notes 89-100 and accompanying text (Fifth Circuit in *OCAW* found OSH Act grants employees full participation in employer-initiated hearings).

119. *Compare* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d at 929 (Second Circuit found that legislative history indicates Congress intended to limit employee participatory rights in all OSHRC hearings) *with* Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d at 1349 (Fifth Circuit found that legislative history suggests Congress intended to limit employee participatory rights only in employee-initiated hearings).

120. *See infra* notes 121-26 and accompanying text (discussing OSH Act's legislative history).

121. *See* S. REP. NO. 1281, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191. The report of the Senate Committee on Labor and Public Welfare (the Committee) on Senate bill S.2193 contains two relevant paragraphs. *See id.* The first states as follows: "if the employer decides to contest a citation . . . the Secretary must afford an opportunity for a formal hearing under the Administrative Procedure Act . . . [and] must make provision for affected employees or their representatives to participate as parties." *Id.* The second paragraph begins as follows: "Section 10(c) also gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on the ground." *Id.*

122. *Id.*

123. *Id.*

124. *See id.*

125. *See id.*; 29 U.S.C. § 659(c) (1982) (§ 10(c)); *supra* notes 13-16 and accompanying text (section 10(c) does not reveal whether language limiting employee contests to reasonableness of abatement period similarly limits employee participation as parties to employer-initiated contests).

126. *Cf. supra* notes 13-16 and accompanying text (language of § 10(c) is ambiguous con-

Although congressional intent regarding employee participatory rights is unclear, the Fifth Circuit's interpretation of the legislative history of section 10(c) is more plausible and certainly more complete than the Second Circuit's reading of the committee report.[127] The Fifth Circuit in *OCAW* cited both relevant paragraphs of the legislative history and correctly determined that only the latter, which refers to employee-initiated hearings, contains language limiting employee participatory rights.[128] The fact that Congress addressed employee rights to "participate as parties" in a second paragraph of the legislative history containing no qualifying language suggests that Congress meant not to restrict the right of employees and their unions to take part in employer-initiated hearings.[129]

Unlike the Fifth Circuit in *OCAW*, the *Donovan* court examined only the paragraph of the Senate Labor and Public Welfare Committee report that addresses employee-initiated hearings.[130] The Second Circuit disregarded completely the paragraph in the legistive history that provides that employees may

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cerning scope of employee participation as "parties" to employer-initiated hearings); *supra* notes 121-24 and accompanying text (two relevant paragraphs of legislative history unclear concerning scope of employees' right to "participate as parties" addressed in former paragraph).

127. *Compare* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d at 929 (Second Circuit in *Donovan* found second paragraph in legislative history suggests that Congress intended to limit employee participation in all OSHRC hearings) *with* Donovan v. Oil, Chem. & Atomic Workers, 718 F.2d at 1349 (Fifth Circuit in *OCAW* found two paragraphs of legislative history suggest Congress intended to limit employee participation only in employee-initiated hearings); *see infra* notes 128-33 and accompanying text (comparing Fifth and Second Circuit's interpretation of legislative history of § 10(c)).

128. *See* 718 F.2d at 1349 (Fifth Circuit citing S. REP. No. 1282, 91st Cong., 2d Sess., ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191). The Fifth Circuit in *OCAW* found that the two relevant paragraphs of the Act's legislative history indicated that Congress contemplated two different applications of the "parties" provision in § 10(c). *Id.*; *see supra* note 121 (First paragraph of legislative history does not qualify employee right to participate as parties to employer-initiated hearings).

129. *See infra* notes 140-45 and accompanying text (similarity of treatment of employee participatory rights in § 10(c), § 10(c)'s legislative history, and rules promulgated under § 10(c) indicates Congress intended to permit employees full participation in employer-initiated hearings).

130. *See* 713 F.2d at 929. In *Donovan*, the Second Circuit cited only that portion of the legislative history that addresses employee-initiated hearings and limits employee contests to the reasonableness of the abatement period specified in a citation. *See id.* The *Donovan* court assumed that that portion of the legislative history explains the substantive rights the Act grants to employees in all OSHRC enforcement hearings, including those an employer initiates. *See id.* The incompleteness of the Second Circuit's treatment of the legislative history of § 10(c) is evident in the first sentence of the paragraph the *Donovan* court cites, which states that § 10(c) "also" gives employees the right to challenge a citation on the ground that the specified period of abatement is unreasonably long. *See id.* The "also" in the first sentence refers to the preceeding paragraph in the Senate Labor committee report which addresses the right of employees to "participate as parties" to employer-initiated hearings. *See* S. REP. No. 1282, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191; *see also* 718 F.2d at 1349 (*OCAW* court citing full text of relevant legislative history); OCAW v. OSHRC, 671 F.2d 643, 648 (D.C. Cir. 1982) (citing two paragraphs of legislative history), *cert. denied*, 103 S. Ct. 206 (1982); *supra* note 121 (text of legislative history).

participate as parties to employer-initiated contests.[131] The *Donovan* court inferred from the portion of the legislative history that permits employees to initiate a hearing to challenge only the reasonableness of the period of abatement that Congress intended to similarly limit the participatory rights of employees in all OSHRC hearings.[132] The *Donovan* court, therefore, failed to address the crucial question of what effect the limiting language in the paragraph in the Senate Committee report concerning employee-initiated hearings has on the employees' right to "participate as parties" conferred in the paragraph addressing employer-initiated hearings.[133]

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131. *See* 713 F.2d at 929.

132. *See id.* In reference to the language of § 10(c), the *Donovan* court stated that if Congress had intended to give employees broader rights in OSHRC enforcement proceedings, Congress would not have limited the grounds upon which employees may challenge a citation. *Id.* at 928-29. This assumption fails entirely to address the possibility that Congress intended to grant employees greater rights in employer-initiated hearings than in hearings the employees initiate. *See id.* The OSH Act creates two types of hearings in which employees may or may not enjoy different degrees of participation. *See supra* notes 13-16 and accompanying text (section 10(c) does not define scope of employee participation in employer-initiated hearings). The limitations Congress imposed on employee rights to initiate a hearing may be relevant, but certainly are not dispositive to a determination of what substantive rights Congress intended for employees in employer-initiated hearings. *See id.*

133. *See* 713 F.2d at 929. The *Donovan* court found that, in addition to the Act's legislative history, a House-Senate compromise concerning § 10(c) indicated that Congress intended to afford employees limited participatory rights in all OSHRC hearings. *Id.* at 929 n.16; *see* CONF. REP No. 1765, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5235 (congressional discussion of House-Senate compromise concerning § 10(c)); *see also supra* note 66 (*Donovan* court's finding that House-Senate compromise suggests Congress intended to limit employee role in enforcement of Act). The implications of the compromise, however, are unclear. *See* CONF. REP. NO. 1765, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG.; & AD. NEWS 5177, 5235. The Conference Report states that the Senate bill provided that employees had "the right to appeal" the period of abatement and the "opportunity to participate as parties" in OSHRC hearings. *Id.* The House version, on the other hand, granted the "right of appeal" only to employers and the Secretary. *Id.* The Conference Report makes no reference to any treatment in the House bill of employee rights to participate as parties. *See id.* The Conference Report does not mention whether the House version of the bill limited employee rights to participate as parties in employer-initiated hearings and thus does not reveal whether the House and Senate differed on this point. *See id.* The Conference Report states only that the House withdrew its amendment that denied employees the "right to appeal." *Id.* The Conference Report, however, refers to both the employees' "right to appeal" and "opportunity to participate as parties," not to employee "challenges" in enforcement proceedings, as the Second Circuit paraphrases the compromise. *Compare* CONF. REP. NO. 1765, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5235 (Conference Report of House-Senate compromise) *with* 713 F.2d at 929 n.16 (Second Circuit's version of Conference Report of House-Senate Compromise). Additionally, the Second Circuit failed to cite the language in the Senate bill addressing employee rights to "participate as parties". *See* 713 F.2d at 929 n.16. By stating that the House and Senate compromised on a bill that allowed employees to "challenge" the reasonableness of the period of abatement without distinguishing the language in the Senate bill permitting employees to participate as parties, the Second Circuit implied that the House and Senate agreed to limit employee participation in employer-initiated as well as employee-initiated hearings to matters concerning the length of the abatement period. *See id.* Nothing in the Conference Report supports this assumption. *See* CONF. REP. NO. 1765, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5235.

The Department of Labor rules promulgated under the OSH Act provide further evidence that employees enjoy the right to participate fully in employer-initiated hearings under section 10(c).[134] The interim rules established under section 10(c) provided that in all proceedings brought pursuant to section 10(c), the Secretary, the cited employer and the affected employees or their unions "shall be deemed parties."[135] The interim rules did not distinguish between the party rights employees enjoyed and those the Secretary and employers possessed.[136] The Department of Labor codified in the permanent rule concerning employee election of party status the apparently equal status the interim rules afforded employees and employers.[137] The permanent rule permits employees to elect party status in employer-initiated hearings and similarly grants employers party status in hearings the employees initiate.[138] The permanent rule qualifies neither the employer's nor the employees' party status, thus suggesting that Congress intended to accord employees unlimited participation in employer-initiated hearings.[139]

When examined together, a pattern may be seen in the manner in which Congress in section 10(c) and its legislative history and the Department of Labor in the rules promulgated under section 10(c) treat employer and employee-initiated hearings.[140] Section 10(c), its legislative history, and the rules enacted under section 10(c) each address employer and employee-initiated hearings separately and each states, without express qualification, that employees or their unions enjoy the right to "participate as parties" in employer-initiated hearings.[141] In each legislative and administrative discussion

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134. *See infra* notes 135-39 and accompanying text (interim and permanent rules promulgated under § 10(c) grant employers and employees equal status).

135. 29 C.F.R. § 2200.5(a) (1971).

136. *See id.*

137. *See id.* § 2200.20(a) (1983) (affected employees may participate as parties to employer-initiated hearings); *id.* § 2200.20(b) (employers may elect party status in employee-initiated hearings).

138. *Id.* § 2200.20(a), (b).

139. *See id.*; Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,026 (No. 4386, 1982) (interim and permanent rules afford both employees and employers equal party status in OSHRC hearings), *rev'd sub. nom* Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918 (2d Cir. 1983).

140. *See infra* notes 141-42 and accompanying text (discussing similarity between § 10(c), legislative history, and rules promulgated under § 10(c)).

141. *See* 29 U.S.C. § 659(c) (1982); S. REP. No. 1282, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191; 29 C.F.R. § 2200.20(a), (b) (1983). The various statutory references to § 10(c) each treat employee participatory rights in a similar fashion. The first sentence of § 10(c) states that employees may initiate a hearing to contest the reasonableness of the period of abatement specified in a citation. 29 U.S.C. § 659(c) (1982). The last sentence of § 10(c) provides without qualification that employees may "participate as parties" to employer-initiated hearings. *Id.*, *see supra* note 7 (text of § 10(c)). Similarly, one paragraph in the legislative history of § 10(c) states without qualification that employees may "participate as parties" to employer-initiated hearings, while the next provides that § 10(c) "also" allows unions to initiate a hearing on the ground that the period of abatement fixed in a citation is unreasonably long. S. REP. No. 1282, 91st Cong., 2d Sess. ____, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5191; *see supra* note 121 (text of legislative history); *supra*

of OSHRC hearings, only the language which addresses employee-initiated hearings expressly limits employee participation to matters concerning the reasonableness of the abatement period.[142] While the Second Circuit in *Donovan* reasoned that Congress' allowance to employees of one express objection suggested a congressional intent to foreclose other objections,[143] the more persuasive conclusion seems to be to the contrary.[144] Had Congress intended to qualify employee participatory rights in employer-initiated hearings, Congress and the Department of Labor would not likely have treated employee and employer-initiated hearings separately in each statutory reference to employee participatory rights, nor failed to qualify in any text the legally signficant term "parties."[145]

In the face of Congress and the Department of Labor's unqualified treatment of employees' rights to participate in employer-initiated hearings, the *Donovan* court nevertheless determined that the Secretary's prosecutorial discretion precludes union input in OSHRC hearings on matters beyond the reasonableness of the abatement period.[146] Although Congress indeed conferred upon the Secretary the exclusive authority to prosecute the OSH Act,[147] the Second Circuit's position overlooks the distinction between the enforcement and adjudicatory stages of the Act.[148] The Secretary enjoys the unfettered prosecutorial discretion to initiate enforcement proceedings by issuing a citation to an employer after investigating a workplace safety hazard.[149] Once the employer initiates a hearing to contest the citation, however, the Act enters its adjudicatory phase and the Secretary's exercise of prosecutorial discretion in issuing the citation is placed at issue before the Commission.[150] In

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text accompanying notes 121-26 (two relevant paragraphs in legislative history treat employee rights in employer and employee-initiated hearings differently). Like § 10(c) and its legislative history, the rules promulgated under § 10(c) also distinguish the rights employees enjoy in employer-initiated hearings and the grounds upon which employees may themselves initiate a hearing. *See* 29 C.F.R. § 2200.20(a), (b) (1983). Subsection (a) of § 2200.20 states, again without qualification, that affected employees may elect to "participate as parties" in employer-initiated hearings. *Id.* § 2200.20(a). Subsection (b) provides that employees may file a notice of contest to challenge the reasonableness of the period for abatement of a violation. *Id.* § 2200.20(b).

142. *See supra* note 141 (comparing § 10(c), legislative history of § 10(c), and rules promulgated under § 10(c)).

143. Donovan v. OSHRC, 713 F.2d at 928.

144. *See* United States v. Pritchett, 470 F.2d 455, 459 (D.C. Cir. 1972) (courts ordinarily should apply qualifying words in the statutes to words or phrases immediately preceeding and not to more remote words or phrases).

145. *See id.*

146. Donovan v. OSHRC, 713 F.2d at 929.

147. *See supra* note 27 (*Mobil Oil* Commission conceded Secretary has exclusive authority to prosecute OSH Act).

148. *Cf. id.* (*Mobil Oil* Commission argued that Secretary's insistence that his prosecutorial discretion limits employees' participatory rights of OSHRC hearings ignores distinction between enforcement and adjudicatory stages of Act).

149. *See id.* (*Mobil Oil* Commission asserted Secretary possesses exclusive prosecutorial authority only in enforcement stage of Act).

150. *See id.* (*Mobil Oil* Commission stated Act enters adjudicatory stage when employer initiates hearing to contest citation); Donovan v. OCAW, 718 F.2d at 1349 (union's rights arise in Act's adjudicatory stage which is within OSHRC's control).

order to determine whether or not to enforce the Secretary's citation, the Commission must adjudicate the various interests of the parties before it.[151] Had the Act provided only for traditional two party litigation, the contesting employer and the Secretary would constitue the only principal parties because of their adverse interests.[152] By allowing employees or their unions to intervene and "participate as parties" in the proceedings as well, Congress recognized that OSH Act litigation often involves three parties, each with interests potentially adverse to those of the other two.[153] Thus, in view of section 10(c)'s unqualified provision that employees may participate as parties in employer-initiated hearings, the Secretary's prosecutorial discretion merely to initiate enforcement proceedings can not alone be interpreted to restrict the employees' status as intervening parties.[154]

A comparison between the status of employees under section 10(c) of the OSH Act and that of charging parties under the National Labor Relations Act (NLRA)[155] further suggests that Congress did not intend to qualify the right of employees to intervene in employer-initiated hearings.[156] Charging parties under the NLRA are employees who file with the National Labor Relations Board (NLRB) unfair labor practice charges against an employer.[157] As a result of the employees' unfair labor practice petition, the NLRB may issue a complaint against the employer which the employer may contest in litigation.[158] Although the NLRA does not provide so expressly, the NLRB rules allow charging parties to participate as full parties in such proceedings.[159] Employees who bring a safety hazard to the Secretary's attention and then elect party status in employer-initiate hearings under section 10(c) of the

151. *See id. (Mobil Oil* Commission argued OSHRC is responsible for adjudicating various adverse interests of parties independent of Secretary's enforcement authority).

152. *See* Mobil Oil Corp., 1982 OSHD (CCH) ¶ 26,187, at 33,024 n.13 (No. 4386, 1982) (OSHRC stated that in context of traditional two party litigation employer and Secretary would be principal parties), *rev'd sub. nom.,* Donovan v. OSHRC, 713 F.2d 918 (2d Cir. 1983).

153. *See id.* (Commission stated that litigation before OSHRC often involves 3 parties each with interests adverse to others).

154. *See supra* note 27 (*Mobil Oil* Commission stated that mere existence of Secretary's enforcement discretion does not limit statutory status of intervening employees).

155. 29 U.S.C. §§ 151-69 (1982).

156. *See infra* notes 157-62 and accompanying text (comparing rights of employees under OSH Act and National Labor Relations Act (NLRA)).

157. *See* 29 C.F.R. § 102.8 (1983) (term "party" includes any person filing a charge or petition under NLRA); International Union v. Scofield, 382 U.S. 205, 219 (1965) ("charging party" is employee who files unfair labor practice charge against employer).

158. *See* 29 U.S.C. § 160(b) (1982). Section 160(b) of the NLRA provides that whenever an individual charges that any person has engaged in an unfair labor practice, the NLRB may serve upon that person a complaint stating the allegations and containing a notice of hearing before the NLRB. *Id.* The person against whom the complaint is served has the right to file an answer to the complaint and appear at the hearing. *Id.*

159. *Cf. id.* Section 160(b) states that the NLRB has the discretion to permit "any other person" to intervene in an unfair labor practice hearing and to present testimony, without specifying the extent to which such other person may participate in the hearing on the grounds upon which such person may present testimony. *See id.* The rules promulgated under the NLRA, however, provide that charging parties may participate in NLRB hearings as parties, may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a

OSH Act are therefore analagous to charging parties under the NLRA.[160] Given the fact that the employee interests at stake under the OSH Act are at least as compelling as the interests the NLRA protects,[161] Congress likely did not intend a lesser role for employees under the OSH Act when Congress provided expressly in the statute that employees possess the right to "participate as parties" to employer-initiated hearings.[162]

The Second Circuit's holding in *Donovan* that employees enjoy only a limited role in employer-initiated OSHRC hearings not only contradicts all indications of congressional intent,[163] but also produces a significant anomaly.[164] Ordinarily, an employer contests a citation because the employer

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petition for reconsideration of a NLRB order. 29 C.F.R. § 102.48 (1983); *see id* § 102.8 ("party" includes any individual filing a charge in petition); International Union v. Scofield, 382 U.S. 205, 219 (1965) (NLRB rules accord charging party formal recognition to participate as party to NLRB hearing with rights of full party).

160. *See supra* note 55; notes 157-59 and accompanying text (discussing employee participatory rights under OSH Act and NLRA respectively). The dissent in *Sun Petroleum* stated that although the role of intervening employees under the OSH Act and that of charging parties under the NLRA appear to be similar, OSH Act and NLRA procedures are not strictly analagous. *See* Marshall v. Sun Petroleum Products, 662 F.2d at 1191 n.5 (Pollak, J., concurring in part and dissenting in part). The *Sun Petroleum* dissent noted that, unlike the OSH Act, the NLRA does not expressly provide that charging parties may participate as parties to NLRB proceedings. *Id.* Additionally, the *Sun Petroleum* dissent stated that the NLRA does not provide charging parties with the elaborate protections afforded employees under the OSH Act. *Id.* Even more significant, determined the *Sun Petroleum* dissent, was the fact that unlike the Secretary under the OSH Act, the NLRB under the NLRA has the statutory discretion not to issue a complaint to an employer even if the NLRB finds that the employer has in fact violated the NLRA. *Id. Compare* 29 U.S.C. § 658(a) (1982) (Secretary "shall" issue citation to employer if Secretary believes that employer has violated OSH Act safety standard) *with* 29 U.S.C. § 160(b) (1982) (NLRB "shall have power" to serve complaint upon employer and discretion to amend such complaint prior to issuance of order). The *Sun Petroleum* dissent maintained that while each of the distinctions between the OSH Act and the NLRA suggested that employees enjoy greater rights under the OSH Act than under the NLRA, NLRB rules provide that charging parties may participate fully in unfair labor practice hearings. *See* 622 F.2d at 1191 n.5 (Pollak, J., concurring in part and dissenting in part) (citing *International Union v. Scofield* for proposition that charging parties under NLRA may intervene in NLRB hearings and participate fully). The *Sun Petroleum* dissent, therefore, found it improbable that Congress could have intended a lesser role for employees under the OSH Act than under the NLRA by providing expressly in § 10(c) of the OSH Act that employees could "participate as parties". *Id.*; *see also 29 U.S.C.* § 659(c) (1982) (employees may "participate as parties" in employer-initiated OSHRC hearings).

161. *Compare* 29 U.S.C. § 651(b) (1982) (purpose of OSH Act is to provide employees with safe and healthful workplace) *with* 29 U.S.C. § 151 (1982 (purpose of NLRA is to ensure free flow of commerce by encouraging practice of collective bargaining and by protecting employee freedom of association and self-organization). Arguably, protecting employee safety and well being is an interest at least as compelling as safeguarding interstate commerce, if not more so.

162. *Cf. supra* note 160 (*Sun Petroleum* dissent's finding that Congress probably did not intend lesser role for employees under OSH Act than under NLRA).

163. *See supra* notes 134-62 and accompanying text (evidence of legislative intent indicates Congress did not intend to limit employee participation in employer-initiated hearings to matters concerning abatement period).

164. *See infra* text accompanying text notes 165-68 (discussing anomaly inherent in Second Circuit's interpretation of § 10(c)).

disputes the Secretary's finding that a safety violation exists on his premises.[165] The Secretary's finding often flows from an employee complaint which the Act encourages employees to initiate and requires the Secretary to investigate.[166] It would certainly be peculiar if section 10(c) precluded employees from pursuing at the Act's adjudicative phase, where the employees' interests are ultimately determined, the interests the OSH Act encourages employees to monitor at the investigative phase of the Act.[167] Although section 10(c) is ambigious concerning the scope of employee participatory rights in employer-initiated OSHRC hearings, all evidence of congressional intent on this matter suggests that Congress did not intend to produce such an anomalous result.[168]

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165. *See* Marshall v. Sun Petroleum Products, 622 F.2d at 1189 (Pollak, J., concurring in part and dissenting in part) (dissent found employer often contests citation because employer disputes Secretary's finding of violation).

166. *See id.* (dissent found Secretary's finding often flows from employee complaint which Secretary must investigate); *see also supra* note 55 (employees enjoy rights in investigative and enforcement stages of Act).

167. *See* 622 F.2d at 1189 (Pollak, J., concurring in part and dissenting in part) (dissent found unlikely that Congress would limit in adjudicatory stage interests Act encourages employees to monitor at investigative stage).

168. *See supra* notes 134-62 and accompanying text (evidence of congressional intent indicates Congress intended employees to enjoy full participation at employer-initiated hearings).