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TRANSPORTATION

OVERVIEW

During the survey period,[1] four opinions by the Tenth Circuit Court of Appeals highlight the power wielded by government agencies in transportation law — from controlling motor carrier routes to shielding the government and private parties from tort liability.[2] First, in *Sullivan v. Scoular Grain Co.*,[3] the Tenth Circuit ruled a venture, which moved and stored grain by rail, was not a common carrier, thus frustrating plaintiff's attempt to bring suit under the Federal Employers' Liability Act (FELA).[4] In another case, *Redmon v. United States*,[5] the Tenth Circuit deferred to an agency safety inspector's discretionary decision to grant a pilot license, which may have resulted in a fatal plane crash, thus shielding the FAA from liability under the Federal Torts Claims Act (FTCA).[6] In a third case, *State Corp. Commission of Kansas v. Interstate Commerce Commission*,[7] the Tenth Circuit deferred to the Interstate Commerce Commission's decision, thus overriding an earlier state agency's refusal to allow Greyhound Bus Carrier to drop three existing routes which were necessary due to public need. Finally, in a fourth case, *Pilots Against Illegal Dues (PAID) v. Air Line Pilots Association (ALPA)*[8], the Tenth Circuit held an airline union appropriately charged nonunion members negotiating and administrative expenses incurred outside of the bargaining unit. All four reported cases demonstrate the substantial judicial deference given agency interpretations of statutes and discretionary functions, often over legitimate state concerns. In transportation law, the Tenth Circuit highly regards the expertise of the agencies and thus, rarely overturns their decisions.

I. *SULLIVAN V. SCOULAR GRAIN CO. OF UTAH*[9]

A. *Facts*

Defendant, Scoular Grain Company of Utah (Scoular Venture) is a joint venture formed by agreement between Freeport Center Associates (Freeport), a commercial warehouse lessor, and Scoular Grain Company (Scoular Grain), which unloads and stores grain adjacent to railroad

1. The cases surveyed include all Tenth Circuit cases decided in 1991 that relate to transportation.
2. In a fifth case, Polys v. Trans-Colorado Airlines, Inc., 941 F.2d 1404 (10th Cir. 1991), the issue on appeal was procedural, and thus beyond the scope of this article.
3. 930 F.2d 798 (10th Cir. 1991).
4. 45 U.S.C. § 51 (1988).
5. 934 F.2d 1151 (10th Cir. 1991).
6. *See* 28 U.S.C. § 1346(b) (1988).
7. 933 F.2d 827 (10th Cir. 1991).
8. 938 F.2d 1123 (10th Cir. 1991).
9. 930 F.2d 798 (10th Cir. 1991).

tracks owned and maintained by several commercial railroads.[10] The joint venture agreement provided that each venturer participate in the control and management of the venture. Further, profits and losses are shared according to an agreed formula.[11]

While unloading grain, plaintiff Sullivan was severely injured, resulting in the amputation of his left arm and left leg. Scoular Venture paid Sullivan $200,000 in workman's compensation for these injuries, but Sullivan sought court awarded damages and filed suit against Scoular Venture, Scoular Grain, Freeport, and several other parties, under FELA.[12] FELA establishes a cause of action against a "common carrier by railroad" for "any person suffering injury" while employed by the carrier.[13] The lower court granted summary judgment for the defendants on this issue and Sullivan appealed.[14]

B. *Tenth Circuit Decision*

The Tenth Circuit ruled Scoular Venture was not a common carrier under FELA. Sullivan based his argument on the four-part test set forth by the Fifth Circuit in *Lone Star Steel Co. v. McGee*.[15] Sullivan contended there was a genuine issue of material fact remaining as to whether Scoular Venture was a common carrier.

Although other circuits adopted the *Lone Star* test,[16] the Tenth Circuit held that the test merely provides a list of factors for courts to keep consider when deciding whether a carrier is a "common carrier."[17] The Tenth Circuit instead followed the self-defining test of the Supreme Court established in *Wells Fargo & Co. v. Taylor*,[18] which defines a common carrier as one who operates a railroad as a means of carrying for the public — that is to say a railroad company acting as a common carrier.[19] The Tenth Circuit also followed a later Supreme Court case, which clarifies the self-defining test by stressing the requirement that an entity subject to FELA liability must operate a "going railroad."[20] Consequently, Scoular Venture, which owned or leased miles of railroad track, hundreds of railroad cars and several switch engines, was primar-

10. *Id.*
11. *Id.*
12. *Id.*
13. FELA establishes a cause of action against a "common carrier by railroad" for an injury wholly or partly due to the carrier's negligence, while the individual was employed by the carrier. 45 U.S.C. § 51 (1988).
14. *Sullivan*, 930 F.2d at 800-01.
15. 380 F.2d 640, 647 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967). The four-part test requires that to be a common carrier, the service be (1) actual performance of rail service; (2) part of total service contracted for by a public member; (3) performed as part of a system of interstate rail transport with common ownership between itself and a railroad or contract with railroads holding itself out to the public; and (4) remuneration for services is received.
16. *See, e.g.*, Aho v. Erie Mining Co., 466 F.2d 539 (8th Cir. 1972); Pickney v. Oro Dam Constructors, 441 F.2d 806 (9th Cir. 1971).
17. *Sullivan*, 930 F.2d at 801.
18. 254 U.S. 175 (1920).
19. *Id.* at 187.
20. Edwards v. Pacific Fruit Express Co., 390 U.S. 538, 540 (1968).

ily a grain storage venture. Thus, Scoular Venture was not considered a common carrier under FELA because they were not a going railroad.[21]

The *Scoular* decision rests solely on the Tenth Circuit court's *primary* characterization of the company in determining whether it is a common carrier. Although the challenging plaintiff is left with little guidance as to how the Tenth Circuit will characterize a company, the court is standing by its test. For example, in a recent unreported case, a steel company, which maintained an in-plant rail system and shipped goods via a "short haul" common carrier owned by the same holding company, was not classified as a common carrier[22] and there was no liability under FELA. The district court, relying on the *Lone Star* test, granted summary judgement in favor of Sheffield Steel Company. The court stressed that *Wells Fargo* and *Pacific Fruit* provide the relevant test, not *Lone Star*, yet the decision was affirmed on appeal. The result is that Tenth Circuit plaintiffs will not collect damages under FELA from a company not defined as an interstate railroad company.

II. *REDMON V. UNITED STATES*[23]

A. *Facts*

Relatives of a pilot killed in a crash brought a wrongful death action against the Federal Aviation Administration (FAA). Dr. Charles Ewing, along with his wife and other passengers, was killed while he attempted to navigate a twin engine Piper Seneca II through a severe thunderstorm over the Ogden, Utah area.[24] Ewing was licensed by the FAA to operate a multi-engine airplane with passengers over land in instrument flight rules (IFR) conditions.[25] Such conditions exist when the pilot cannot successfully operate the airplane visually under normal visual flight rules (VFR) and must rely solely on the flight instrument panel.

One FAA flight inspector restricted Ewing to a VFR-only multiengine license and required Ewing to pass an IFR flight test for multiengined aircraft.[26] Ewing did not pass this test.[27] Later, another FAA inspector granted Ewing his IFR status upon discovering Ewing had been IFR rated for single engine planes because Ewing was within an FAA grace period permitting pilots to transfer their IFR rating when commencing multiengine training. Instead of requiring passing an IFR flight test, the inspector removed the VFR-only restriction.[28]

Ewing's relatives, based on the grace period rule, challenged the removal of the VFR-only restriction by the FAA inspector claiming negligence by the inspector proximately caused the crash. Additionally,

21. *Sullivan*, 930 F.2d at 800-01.
22. Keizor v. Sheffield Steel Co., No. 91-5043, 1992 U.S. App. LEXIS 240, *8 (N.D. Okla. Jan. 6, 1992).
23. 934 F.2d 1151 (10th Cir. 1991).
24. *Id.* at 1152-53.
25. *Id.* at 1152.
26. *Id.* at 1153.
27. *Id.*
28. *Id.*

they claimed the inspector's failure to initiate an enforcement action against Ewing proximately caused the crash.

B. *Tenth Circuit Decision*

The Tenth Circuit determined the FAA's decision to permit pilots rated IFR for single engine crafts to carry over their ratings to multiengined planes fell within the discretionary function exception to the FTCA.[29] The inspector's decision not to investigate and take enforcement action against Ewing fell within the discretionary function exception.[30] The Tenth Circuit noted that the aircraft certification process is inherently discretionary. In making its determination, the court quoted *United States v. Varig Airlines*[31] and reaffirmed the broad scope of the discretionary function exception.[32] Similarly, the inspector's decision not to investigate was consistent with the Federal Aviation Act[33] and properly claimed as a discretionary function. The court emphasized that the discretionary function exception applies regardless of whether the agency has abused its discretion.[34] In *Redmon*, the Tenth Circuit continued its tendency to broadly use the discretionary function exception to bar tort actions against the FAA and other government entities,[35] allowing FTCA tort actions only when purely operational functions are involved.[36]

III. STATE CORP. COMMISSION V. INTERSTATE COMMERCE COMMISSION[37]

A. *Facts*

Greyhound Bus Carrier applied to the Kansas Commerce Commission (KCC) for permission to abandon three existing routes. The KCC denied the application because it was inconsistent with the public inter-

29. *Id.* at 1155-56 (citing United States v. Varig Airlines, 467 U.S. 797, 820 (1984). (agency employees following agency directives are shielded from tort liability if agency directives stem from discretionary function)).

30. *Id.* at 1157.

31. *Id.* at 1154 (quoting *Varig*, 467 U.S. at 819).

32. *Redmon*, 934 F.2d at 1154 n.1.

33. "The Secretary of Transportation may, from time to time, . . . re-examine any civil airman." 49 U.S.C. App § 1429(a) *See also* 14 C.F.R. §§ 13.3 & 13.5 (1989) (investigations by the FAA are discretionary in nature).

34. *Redmon*, 834 F.2d at 1157.

35. *See* Weiss v. United States, 889 F.2d 937 (10th Cir. 1989) (Forest Service's decision to adopt an FAA provision regarding removal of obstructive objects was an exercise of discretionary regulatory authority); Wendler v. United States, 782 F.2d 853 (10th Cir. 1985) (FAA's decision to suspend an aerial crop duster's commercial pilot certificate was a discretionary function); Colorado Flying Academy, Inc. v. United States, 724 F.2d 871 (10th Cir. 1984) (trial court correctly applied the discretionary function exception despite negligent designing and maintaining of the Denver Traffic Control Area which was the proximate cause of a mid-air collision).

36. *See* United States v. Murray, 463 F.2d 208 (10th Cir. 1972) (FTCA tort action allowed because the flight runway operator's duty to hear airplanes and light the runway was an operational, not discretionary, function).

37. 933 F.2d 827 (10th Cir. 1991).

est.[38] After a full KCC investigation and four public hearings, the KCC determined that any benefit to Greyhound from abandoning the routes was outweighed by financial impairments suffered by communities along the routes.[39] Subsequently, Greyhound applied to the Interstate Commerce Commission (ICC) under the Bus Regulatory Reform Act of 1982 (Bus Act),[40] which gives the federal agency power to override a state's rejection of a carrier request. The ICC granted Greyhound's request because KCC failed to meet its burden of showing that suspension of the three routes was either inconsistent with the public interest or was an unreasonable burden on commerce.[41] In making this determination, the ICC accorded great weight to Greyhound's contention that current passenger revenues were less than the state's cost of providing transportation.[42]

B. *Tenth Circuit Decision*

The Tenth Circuit reviewed the history of the Bus Act, noting that ICC supremacy controls the ensuing conflicts when the state agency and ICC differ about route discontinuance.[43] Next, the court reviewed the ICC's criteria for deciding whether discontinuance is inconsistent with the public interest.[44] In determining the relation of revenues to variable costs for the routes under consideration, the ICC accepted Greyhound's approach of calculating variable costs by multiplying its system-wide per-mile variable cost by the number of miles traveled annually.[45] The KCC objected to this method of calculation and proposed instead that Greyhound's data should be adjusted to include "off-route revenues" generated by passengers entering and leaving the routes.[46] The KCC also claimed the ICC misapplied a standard of the Bus Act, which requires the ICC consider the availability of reasonable alternative transportation.[47]

The Tenth Circuit concluded the ICC's findings were not arbitrary and capricious or an abuse of discretion.[48] First, the court recognized and deferred to the ICC's expertise.[49] Next, it noted the ICC did not accept Greyhound's data without an appreciation of the underlying methodology.[50] The court also noted the ICC's observation that it must consider the policy of the Bus Act which favors exit from unprofitable

38. *Id.* at 828-29.
39. *Id.* at 829.
40. 49 U.S.C. § 10935(a) (1988).
41. *State Corp. Comm'n*, 933 F.2d at 830.
42. *Id.* at 829. The Bus Act requires a revenue/cost analysis. 49 U.S.C. § 10935(g)(1) (1988).
43. *See State Corp. Comm'n.*, 933 F.2d at 828.
44. *Id.* at 828-29.
45. *Id.* at 830.
46. *Id.*
47. *Id.* at 832.
48. *Id.* at 833.
49. *Id.* at 832.
50. *Id.*

routes.[51]

This Tenth Circuit decision reveals how federal agency deregulation has negatively impacted the state's public interest. The KCC had made an informed and thorough investigation to determine that removal of these bus routes would result in several communities lacking alternative transportation, but this was insignificant when compared to a federal agency mandate to drop unprofitable routes. In overruling the KCC, the ICC cited as determining factors (1) no funding by the state to Greyhound, and (2) significant loss on each route canceled. Unless the state will subsidize routes that the carrier and the ICC deem unprofitable, the state citizens will be left without service. Although the ICC stated that a KCC subsidy offer might mitigate the unprofitability of the routes,[52] the standard for balancing the public need or public impact was left undefined. Under *State Corp. Commission*, deciding the public interest requirement of a transportation route is an agency discretionary function leaving states nearly powerless to enforce public policy considerations.

IV. *PILOTS AGAINST ILLEGAL DUES (PAID) v. AIR LINE PILOTS ASSOCIATION (ALPA)*[53]

A. *Facts*

In the last case reviewed, a labor dispute, involved pilots of United Airlines (PAID) who do not belong to Air Line Pilots Association (ALPA), the exclusive bargaining representative for all United Air Line pilots. PAID are required to either join ALPA or pay for expenses incurred in representing the pilots because ALPA and United entered into an agency shop arrangement.[54] PAID alleged ALPA violated both the Railway Labor Act and their constitutional rights by using the agency fees for purposes not akin to collective bargaining.[55] PAID also alleged ALPA impermissably charged nonunion pilots for expenses incurred in activities at other airlines.[56]

The district court held that ALPA may use fees for expenses at other airlines outside the immediate bargaining unit.[57] ALPA may divide litigation costs among all constituents, not just the pilot's own airline, because successful collective bargaining at one airline effects other airlines.[58]

51. *Id.* at 833. *See also* Pennsylvania Public Utility Comm'n v. United States, 749 F.2d 841 (D.C. Cir. 1984) (noting that when costs exceed revenues, the Bus Act creates a presumption in favor of discontinuing the route).

52. *Id.* at 830.

53. 938 F.2d 1123 (10th Cir. 1991).

54. *Id.* at 1125.

55. *Id.*

56. *Id.*

57. *See id.* at 1128.

58. *Id.* at 1128 & 1128 n.3.

B. *Tenth Circuit Decision*

The Tenth Circuit affirmed in part and reversed in part, holding that fees can be used for appropriate expenses outside the immediate bargaining unit, but not for litigation expenses involving airlines other than United.[59] The court held that under *Lehnert v. Ferris Faculty Association*[60] chargeable activities must be germane to collective bargaining. The court further held ALPA properly charged PAID members for negotiating and administrative expenses incurred outside United's bargaining unit. ALPA reasonably divided negotiation costs among all employees, because negotiation with one airline had positive effects upon the other airlines.

CONCLUSION

The Tenth Circuit deference to agency authority and statutory interpretation is a common thread through all the transportation cases surveyed. Although the judiciary played a significant role in determining what constituted a common carrier under both the Bus Act in *State Corp. Commission* and FELA in *Sullivan*, the Tenth Circuit demonstrated its deference to agency discretion and expertise in *Redmon* and *State Corp. Commission*. For example, in *Redmon*, the government was found exempt from liability under the Federal Tort Claims Act when the agency exercised a discretionary function. Furthermore, the court noted that the discretionary function, especially prevalent in FAA licensing,[61] applies whether or not the discretion involved is abused.[62]

Nevertheless, in *State Corp. Commission*, the Tenth Circuit deference to a federal agency can override even a state agency's determination of a public policy consideration under the Bus Act. Finally, in *PAID*, judicial deference to the Railway Labor Act defeated attempts by individual pilots to recover dues spent outside of their interest.

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59. *Id.* at 1134.
60. 111 S.Ct. 1950 (1991).
61. *Redmon*, 834 F.2d 1151 at 1154 (citing *Varig*, 467 U.S. 797).
62. *Id.* at 1157. *See* 28 U.S.C. § 2680(a).