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LABOR LAW

OVERVIEW

The decisions made by the Tenth Circuit Court of Appeals in the area of labor law followed precedent and were basically unsurprising. This article presents a digest of the decisions in the field during the past year for the use of Tenth Circuit practitioners.

I. NATIONAL LABOR RELATIONS ACT—LABOR MANAGEMENT RELATIONS ACT[1]

A. *Jurisdiction*

In a case involving joint employers, *Board of Trustees of Memorial Hospital v. NLRB*,[2] one employer, a five-member Board of Trustees (Trustees) was appointed pursuant to statute[3] by the Fremont County Commissioners.[4] Under a lease agreement, the Trustees agreed to lease the grounds, building and equipment of the Memorial Hospital of Fremont County in return for a nominal consideration and the management services of the Lutheran Hospitals and Homes Society of America (Society), the second employer involved in the case.[5]

The American Nurses' Association (Association) was certified by the National Labor Relations Board (the Board or the NLRB) as the bargaining representative of the registered nurses at the hospital. The certification followed a finding by the Board that the Society, not the Board of Trustees, was the employer of the nurses.[6] After the election, however, the Trustees adopted a resolution directing the Society to refrain from entering into a collective bargaining posture with the Association.[7] The Association responded by filing an unfair labor practice charge alleging failure to bargain in good faith under section 8(a)(5)[8] of the National Labor Relations Act (the NLRA or the Act). The Administrative Law Judge found that the Society "controlled" the operation of the hospital[9] and was the sole employer of the hospital's registered nurses within the meaning of section 2(2)[10] of the Act. The Board adopted his findings.

In reversing, the Tenth Circuit Court found that although the Society

1. 29 U.S.C. §§ 141-144, 151-169, 171-188 (1976).
2. 624 F.2d 177 (10th Cir. 1980).
3. WYO. STAT. ANN. § 18-8-102 (Michie 1977).
4. 624 F.2d at 179.
5. *Id.*
6. *Id.* at 180.
7. *Id.* at 181.
8. *Id.* 29 U.S.C. § 158(a)(5) (1976) provides that it shall be an unfair labor practice to refuse to bargain collectively with the employees' representative.
9. 624 F.2d at 183.
10. 29 U.S.C. § 152(2) (1976) defines an "employer" for purposes of the Act as a person *other than* a governmental agency, person subject to the Railway Labor Act, or any labor organization not acting as an employer.

was a private employer, it did not retain sufficient control over the employment relationship to enter into fruitful collective bargaining because the Trustees retained the right to approve or disapprove staffing, wage rates and fringe benefits, employment of particular individuals, and changes in room rates.[11] The Society would be unable to bargain effectively in these circumstances, and it could not be considered the sole employer of the nurses in the bargaining unit.[12] The real employer, the Trustees, as a political subdivision of the state, was not required to bargain. Therefore, the Board's order was set aside for lack of jurisdiction.[13]

B. *Election Bar*

In *American Safety Equipment Corp. v. NLRB*,[14] the propriety of the Board's setting aside an election was at issue. The International Association of Machinists and Aerospace Workers (Workers) sought to organize production and maintenance employees at one of the company's facilities.[15] An NLRB election was held in which the Workers lost. The election was set aside by the Regional Director[16] because of two rules in the employee handbook that prohibited distribution of literature during working hours and allowed only company-approved solicitations during working hours.[17] After a second election was held in which the Workers won, the company objected to the election based on the "election bar" rule of section 9(c)(3)[18] of the Act and refused to respond to communication from the union. This, according to the Board, was an unfair labor practice in violation of sections 8(a)(1)[19] and 8(a)(5)[20] of the Act.

The Tenth Circuit Court found no evidence showing that the handbook rules were not applied properly and held that the Board had erroneously set

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11. 624 F.2d at 185-86.

12. *Id.* at 186-88.

13. *Id.* at 188.

14. 643 F.2d 693 (10th Cir. 1981).

15. *Id.* at 694.

16. *Id.*

17. One rule banned "distribution of unauthorized leaflets, papers, or other materials during working hours on Company property." The second stated that "only the recognized solicitations for charitable organizations and similar activities specifically approved by the Company will be permitted during working hours." *Id.*

A disparate application of no-solicitation rules to various groups may violate the employees right to self-organization. *See, e.g.*, Oak Apparel, Inc., 218 N.L.R.B. 701 (1975).

18. 29 U.S.C. § 159(c)(3) (1976) provides that no representation election shall be held if a valid election has been held within the preceding twelve-month period.

19. 29 U.S.C. § 158(a)(1) (1976) provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their § 7 rights. Section 7, the heart of the Act, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (1976). Section 8(a)(3) is described in note 33 *infra*.

20. *See* note 8 *supra*. 643 F.2d at 696.

aside the first election.[21] The employees had been free to engage in union activities during nonwork time at the plant and had distributed union materials as well.[22]

In a lengthy dissent, Judge Doyle commented that the rules said "working hours" not "working time" and were therefore presumptively invalid.[23] In addition, he deemed the evidence given by four employees, three supervisors and a personal secretary, not persuasive enough to set aside the Board's findings.[24]

C. *Discharge*

In *NLRB v. First National Bank of Pueblo*,[25] the Board sought enforcement of an order issued against the Bank after holding that the Bank had violated the Act by interfering with the union's solicitation of employees and by discharging an employee involved in union activity.[26] The sole issue on appeal was whether the Board's conclusion was supported by substantial evidence.[27]

The court held that the Board could not use an isolated incident in which the union was precluded from distributing leaflets to form an important backdrop to the discharge of an employee.[28] It was uncontested that the Bank terminated the employee for an unexcused absence. The evidence also showed that her termination occurred two and one-half months after her union activity and that she had received a good evaluation and a merit raise during that period of time.[29] The finding that the Bank harbored the union animus necessary to make the discharge unlawful was not supported by the evidence, and enforcement of the Board's order was denied.[30]

In *NLRB v. Schlegel Oklahoma, Inc.*,[31] the Tenth Circuit Court of Appeals unanimously agreed that the Board's findings of section 8(a)(1)[32] and 8(a)(3)[33] violations were supported by substantial evidence. In an effort to organize Schlegel employees, two Schlegel workers were passing out notices of an organizational meeting on public property near the plant. The company president advised the employees to leave the "company property" and threatened to call the police.[34] There was substantial evidence that the

21. A representation election should be conducted under "laboratory conditions." General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). If an employer can show that the no-solicitation or no-access rules did not interfere with the employees' right to organize, the election can be upheld. Essex Int'l, Inc., 211 N.L.R.B. 749 (1974).

22. 643 F.2d at 696.

23. *Id.* at 697.

24. *Id.* at 699.

25. 623 F.2d 686 (10th Cir. 1980).

26. *Id.* at 687.

27. *Id.* at 691.

28. *Id.* at 692.

29. *Id.* at 689-90.

30. *Id.* at 691, 694.

31. 644 F.2d 842 (10th Cir. 1981).

32. *See* note 19 *supra*.

33. 29 U.S.C. § 158(a)(3) (1976) provides that it shall be an unfair labor practice for an employer to discriminate in regard to hiring, tenure, or any other condition of employment, in order to encourage or discourage membership in a labor organization.

34. 644 F.2d at 843.

handbilling took place on a *public* thoroughfare and that the president had indeed threatened to call the police.[35] "Threatening to summon law enforcement authorities for the purpose of inhibiting lawful union activities has long been held violative of section 8(a)(1) of the Act."[36] Thus, the order was enforced.[37]

In *NLRB v. Dillon Stores*,[38] the anti-union activities of an employee found not to be a supervisor for purposes of voting in Board-conducted elections were imputed to the company when, during unfair labor practice proceedings, the employee was found to be a supervisor after all.[39] Stating that "[t]he purpose of determining whether an individual is a supervisor is different in a representation proceeding than it is in an unfair labor practice proceeding involving interference with organizational rights . . . ,"[40] the court held that the discharge of the employee was unlawfully motivated and a violation of sections 8(a)(1)[41] and 8(a)(3)[42] of the Act.

In *Hasten v. Phillips Petroleum Co.*,[43] a truckdriver, subject to the provisions of a collective bargaining agreement between his employer and the Teamsters' Union, brought a libel suit following grievance proceedings for statements made in a letter of discharge.[44] Article nine of the collective bargaining agreement stated that an employee's discharge "must be by proper written notice to the employee and the union."[45]

Using the "absolute privilege" theory of *General Motors Corp. v. Mendicki*,[46] the district court granted the defendants' summary judgment motion.[47] The *Mendicki* doctrine bars libel suits based on termination or suspension notices specifically contemplated by a collective bargaining agreement.[48] The circuit court upheld the summary judgment ruling despite the plaintiff's argument that the allegedly libelous statements were made in a discharge letter and not during a grievance proceeding as in *Mendicki*. Agreeing with the district court that the "federal policy encouraging collective bargaining and frankness in labor disputes applies to termina-

35. *Id.*

36. *Id.* (citing NLRB v. Revlon Prod. Corp., 144 F.2d 88, 89 (2d Cir. 1944)).

37. *Id.* at 844. The Board's findings were supported by substantial evidence, the necessary standard for enforcement of the Board's order by an appeals court. Universal Camera Corp. v. NLRB, 340 U.S. 474, 496-97 (1951).

38. 643 F.2d 687 (10th Cir. 1981).

39. *Id.* at 689-90. The Board has inconsistently applied the term "supervisor," making it difficult to find a pattern in its decisions. *See* NLRB v. North Ark. Elec. Coop., 412 F.2d 324, 328 (8th Cir. 1969). *See generally* Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 HARV. L. REV. 1713 (1981).

40. 643 F.2d at 690.

41. *See* note 19 *supra*.

42. *See* note 33 *supra*.

43. 640 F.2d 274 (10th Cir. 1981).

44. Hasten brought suit against his employer, American Stevedoring Corp., and against the company for which he was assigned to drive, Phillips Petroleum Co. The discharge letter stated that Hasten was being discharged for dishonesty because he had said he could not drive for American, had filed a Workmen's Compensation claim, and had been driving for another company at the same time. *Id.* at 274-76.

45. *Id.* at 275 n.2.

46. 367 F.2d 66 (10th Cir. 1966).

47. 640 F.2d at 275.

48. 367 F.2d at 71-72.

tion notices as well as to bargaining sessions,"[49] the court also addressed the plaintiff's argument that state law should apply in this action.[50]

Because a state tort action in libel would necessarily resolve the merits of this labor dispute,[51] such an action would impermissibly interfere with the collective bargaining process according to the court. Noting the Supreme Court guidelines[52] for allowing preemption of state laws in favor of a uniform federal labor policy, the Tenth Circuit determined that frank statements made in the course of and demanded by the collective bargaining process should be able to be made without fear of retribution. Therefore, the statements were within the ambit of the "unqualified privilege" doctrine of *Mendicki*.[53]

D. *Duty to Bargain*

NLRB v. Bartlett-Collins Co.[54] dealt with the question of mandatory collective bargaining. The American Flint Glass Workers of North America (Glass Workers) had been certified in 1974 as the collective bargaining agent for the Bartlett-Collins Company (Bartlett-Collins) employees. Unfair labor practices filed against the company for refusal to bargain in good faith had been upheld by an Administrative Law Judge. Against this background, the parties met to negotiate in 1976.[55]

Because of the prior unfair labor practice proceeding "in which there was some question about the accuracy of testimony concerning what had transpired" at previous bargaining meetings, Bartlett-Collins employed a court reporter to provide an accurate transcript of the new meetings.[56] The Glass Workers objected, saying the court reporter was "unnecessary and costly and that his presence would create a courtroom atmosphere, induce unnecessary speech making, and frustrate negotiations."[57] As an alternative, the Glass Workers proposed that the sessions be tape-recorded and transcribed.[58] Bartlett-Collins refused to negotiate without a reporter present. The Board agreed with the Glass Workers and found that Bartlett-Collins had violated sections 8(a)(1)[59] and 8(a)(5)[60] of the Act.

The Tenth Circuit Court of Appeals, applying the *Borg-Warner* standard,[61] enforced the Board's order, accepting the Board's conclusion that the

49. 640 F.2d at 276.

50. The court identified and considered the following three factors: the potential for direct conflict between federal labor policy and the state cause of action, the state interest in the matter, and the similarity of issues to be decided in the federal labor case and the state action. *Id.* at 277-79.

51. *Id.* at 279.

52. *Id.* at 277. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

53. 640 F.2d at 279.

54. 639 F.2d 652 (10th Cir.), *cert. denied*, 101 S. Ct. 3109 (1981).

55. *Id.* at 653.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See* note 19 *supra*.

60. *See* note 8 *supra*.

61. 639 F.2d at 654-55. 29 U.S.C. § 158(d) (1976) defines collective bargaining as the duty of both parties to meet and confer at reasonable times and in good faith about wages, hours,

presence of a court reporter during collective bargaining sessions does not fall within the "wages, hours, and other terms and conditions of employment" category necessary for finding a subject mandatory for collective bargaining purposes.[62] Therefore, Bartlett-Collins could not legally bargain to impasse on the topic.

In *Lone Star Steel Co. v. NLRB*,[63] Lone Star Steel Company (Lone Star) appealed an unfair labor practice ruling involving two disputed clauses[64] in a union's national agreement. Lone Star had acquired the Starlight mine and initially operated it under a collective bargaining agreement governed by the Bituminous Coal Operator's Association (BCOA).[65] Prior to the time the national agreement expired, the union asked Lone Star and others to execute a memorandum agreement expressing their intent to be bound by the terms of any successor national agreement negotiated by the union and BCOA. Lone Star declined but offered to meet and negotiate a new contract separately.[66]

Lone Star, although not a member of BCOA, agreed to abide by the provisions of the contract, only insofar as they applied to the Starlight mine as a mine run by an independent coal operator.[67] Lone Star employees joined in a nationwide strike when a new agreement between BCOA and the union was not reached.[68] Several weeks later, a new national agreement was executed containing the two disputed provisions.[69]

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and other terms and conditions of employment. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958), established that the duty to bargain is limited to mandatory subjects, such as wages and hours, and that the parties are free not to negotiate about nonmandatory subjects.

Examples of mandatory subjects are pay scales, incentive pay, severance pay, insurance, and pension plans. Examples of permissive or nonmandatory subjects are performance bonds, internal union affairs, and interests of retired employees. J. ATLESON, R. RABIN, G. SCHATZKI, H. SHERMAN, E. SILVERSTEIN, LABOR RELATIONS AND SOCIAL PROBLEMS: COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT 429 (1978).

62. "The Board candidly admits that in prior cases it has, in effect, treated the issue of the presence of a court reporter as a mandatory subject of bargaining." 639 F.2d at 657. The NLRB has traditionally relied on adjudication, rather than rulemaking, to develop its policy. In this instance, if the Board had had a written rule about court reporters, Bartlett-Collins Company would have understood more clearly what the agency's policies were and would have experienced greater procedural fairness. *See generally* Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982 (1980).

63. 639 F.2d 545 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).

64. The "successorship clause" stated:

> In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.

The "application of contract" clause stated:

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use.

Id. at 548.

65. *Id.* at 547.

66. *Id.* at 547-48.

67. *Id.* at 547 n.1.

68. *Id.* at 548.

69. *Id.* *See* note 64 *supra*.

Lone Star refused to accept the conditions of the new national agreement, and its Starlight mine employees continued to strike.[70] After negotiations, a cooling-off period, and a resumption of the strike, Lone Star filed unfair labor practice charges against the union alleging a violation of the "hot cargo" provision of the Act, section 8(e),[71] and a failure to bargain under sections 8(b)(4)(A)[72] and 8(b)(3).[73]

The Board found that the successorship clause was not proscribed by section 8(e) and that it would "effectively assure the survival of the Starlight mine employees' previously negotiated wages and working conditions" and "vitally affected the miners' terms and conditions of employment."[74] The clause was therefore a mandatory subject of bargaining, and striking was a legal weapon.

The contract clause as applied, however, was found to be overly broad[75] and nonmandatory. Mindful of the need for deference to the Board's judgment as to what constitutes a mandatory subject of bargaining, the court nonetheless found the subject permissive because it could only affect unit jobs if the company opened another mine; it was not a direct attack on a problem threatening the maintenance of the basic wage structure established by the collective bargaining agreement.[76] By striking to achieve agreement on a nonmandatory subject, the union refused to bargain within the meaning of section 8(b)(3) of the Act.[77] Judge Barrett, in a partial dissent, disagreed with the majority that the successorship clause was a mandatory subject of bargaining.[78]

E. *Unilateral Change in Working Conditions; No Deferral to Arbitration*

In *NLRB v. Northeast Oklahoma City Manufacturing Co.*,[79] the Tenth Circuit Court of Appeals granted enforcement of the Board's order after concluding that the company's unilateral delays in paying bonuses amounted to a serious unfair labor practice.[80] The company had argued that the Board's refusal to direct deferral of the contract interpretation dispute to arbitration constituted an abuse of discretion in view of the Board's own precedent.[81]

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70. *Id.*

71. 29 U.S.C. § 158(e) (1976) provides that it shall be an unfair labor practice for a union and an employer to agree that the employer will stop doing business with any other employer. "[T]he purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." Drivers Local 695 v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966).

72. 29 U.S.C. § 158(b)(4)(A) (1976) provides that it shall be an unfair labor practice to attempt to force an employer to enter into any agreement prohibited by § 8(e) with a labor organization. *See* note 71 *supra*.

73. 29 U.S.C. § 158 (b)(3) (1976) provides that it shall be an unfair labor practice for a labor organization to refuse to bargain collectively with an employer.

74. 639 F.2d at 549.

75. *Id.* at 558.

76. *Id.* at 559.

77. *Id.*

78. 639 F.2d at 559 (Barrett, J., dissenting).

79. 631 F.2d 669 (10th Cir. 1980).

80. *Id.* at 677.

81. *Id.* at 673.

Citing *NLRB v. Strong*[82] and *Carey v. Westinghouse Corp.*,[83] the court stated that where the jurisdiction of the Board is invoked to adjudicate unfair labor practice allegations arising from a violation of the collective bargaining agreement, "the Board's jurisdiction to proceed is unaffected by the existence of an arbitration clause in the parties' contract."[84]

F. *Protected Concerted Activity*

In *Coors Container Co. v. NLRB*,[85] the court resolved the question of whether Coors Container Company (Coors Container) interfered with the section 7 rights[86] of its employees by prohibiting display of a boycott sign, by interrogating two employees about their reasons for displaying the sign, and by disciplining the two employees.[87] Although Coors Container employees were not unionized and were not on strike, they had to cross the picket line of Coors Brewery strikers in order to report to work.[88] A security guard, acting pursuant to instructions, stopped two Coors Container employees for displaying in their pickup truck a sign which read "Boycott Coors—Scab Beer."[89] After refusing to remove the sign, the two employees were asked about their union sympathies, and a heated conversation ensued. The two employees were again quizzed by company officials the next day; one was discharged and the other was given a verbal warning.

The court pointed out that its "function is limited to determining whether the findings of violations are supported by substantial evidence on the record as a whole."[90] Although section 7 of the Act protects concerted activity,[91] Coors Container contended that special circumstances at the plant allowed the company to prohibit distribution of union literature such as the sign in the pickup.[92] The boycott sign, however, neither disparaged the quality of Coors beer nor was its display connected with a labor controversy between these two employees and their employer, Coors Container.[93] The display was therefore not "indefensible" and punishable under the standard set by *NLRB v. International Brotherhood of Electrical Workers*.[94]

By disciplining an employee for engaging in such protected activity, Coors Container violated section 8(a)(3)[95] of the Act. Recognizing that an employer has the right to discharge or discipline an employee for "a good reason, a bad reason or no reason at all,"[96] the court emphasized that such a

82. 393 U.S. 357, 360-61 (1969).
83. 375 U.S. 261, 271 (1964).
84. 631 F.2d at 673.
85. 628 F.2d 1283 (10th Cir. 1980).
86. *See* note 19 *supra*.
87. 628 F.2d at 1285.
88. *Id.*
89. *Id.* at 1285-86.
90. *Id.* at 1286 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951)).
91. *See* note 19 *supra*.
92. Coors Container maintained that the rule was necessary for security. 628 F.2d at 1286.
93. *Id.*
94. 346 U.S. 464 (1953).
95. 628 F.2d at 1287. *See* note 33 *supra*.
96. 628 F.2d at 1288.

right is restricted when union animus is present.[97]

In *NLRB v. Gould, Inc.*,[98] the Board's disputed findings were that Gould, Inc. (Gould) had violated sections 7[99] and 8(a)(1)[100] of the Act by discharging two union officials for participating in a sympathy walkout.[101] At the time of the walkout, Gould and the union were bound by a collective bargaining agreement that included a grievance procedure leading to arbitration. The contract also contained a general "no-strike" clause.[102]

An informational picket set up by the union on behalf of its construction division triggered the walkout. It was directed against a nonunion contractor performing remodeling work on Gould's premises.[103] Employees represented by the manufacturing division of the union inquired as to whether to cross the picket line. Union officials told them to make their own decisions, and most of the morning shift employees walked out.[104] The next day, all employees returned to work, but two were suspended pending an investigation into their roles in what the company termed an "illegal wildcat strike."[105]

The Tenth Circuit Court of Appeals agreed that the refusal to cross the picket line was protected concerted activity under section 7[106] of the Act, and it thus enforced the Board's order.[107] No-strike clauses are the "quid pro quo" for arbitration clauses,[108] and if the underlying dispute is arbitrable, the no-strike clause is triggered.[109] Because the sympathy strike had nothing to do with the collective bargaining agreement in effect between

97. *Id. See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). In *Pugh*, the plaintiff was fired without explanation after 32 years of employment. The appeals court held that See's motion for nonsuit was erroneously granted by the trial court because the plaintiff "has demonstrated a prima facie case of wrongful termination in violation of his contract of employment." *Id.* at 329, 171 Cal. Rptr. at 927. For an argument in favor of passage of state statutes articulating the right of employees not to be disciplined or discharged except for just cause, see Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 521-22, 523 (1976).

98. 638 F.2d 159 (10th Cir. 1981).

99. *See* note 19 *supra*.

100. *See* note 19 *supra*.

101. 638 F.2d at 161.

102. *Id.*

103. *Id.* at 161-62.

104. *Id.*

105. *Id.* at 162.

106. *See* note 19 *supra*.

107. 638 F.2d at 163.

108. Even in the absence of an express no-strike clause, a collective bargaining agreement containing an arbitration clause will be read to prohibit strikes. Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970). In Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962), Justice Stewart, writing for the majority, stated:

> It is argued that there could be no violation [of the collective bargaining agreement by striking] in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.
>
> The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement.

Id. at 104-05 (footnote omitted).

109. 638 F.2d at 164.

Gould and the manufacturing division of the union, the no-strike clause was not in effect.

The issue in *Gould*, as differentiated from that in *Buffalo Forge v. United Steelworkers*,[110] was whether "an employee has the right to honor the lawful picket line of his own union which is set up at his employer's place of business but is directed at a stranger employer doing work on the premises."[111] To deny this right, in the court's opinion, would be to hold that "although Congress protected the fundamental right of labor organizations to engage in primary picketing, it withheld this protection from the normal employee response which makes this right effective."[112]

G. *Successor Employer; Alter Ego*

The Tenth Circuit Court of Appeals upheld the Board's orders in *NLRB v. Tricor Products, Inc.*[113] and *Sturdevant Sheet Metal & Roofing Co. v. NLRB*.[114] The two businesses, found to be alter egos of predecessor employers, were ordered by the Board to adhere to and work under the collective bargaining agreements of their predecessor employers. In both cases, the same individuals were involved in the management of new companies in which the work force was substantially identical.[115] Even if the old and the new companies are separate legal entities and such a change is economically motivated, if the new business is the *alter ego* of the old, the former collective bargaining commitments must be upheld.[116]

H. *Union's Duty of Fair Representation*

At issue in *Denver Stereotypers & Electrotypers Local 13 v. NLRB*[117] was whether the Board was entitled to infer bad faith from the union's interpretation of its constitution and bylaws. In 1973, the Denver Stereotypers and Electrotypers Union (Stereotypers Union) had negotiated a multiemployer agreement governing stereotypers of the Denver Post, Inc. (Post) and the Rocky Mountain News (News).[118] The grievant, Paul Simonette, was assigned a position in the street circulation department of the News after its stereotyping department was discontinued. The Denver Newspaper Guild (Guild) represented the street circulation department employees, and Simonette applied for union membership. After a discharge due to physical injuries, Simonette contacted the Guild, but since he had not become a per-

110. 428 U.S. 397 (1976).
111. 638 F.2d at 163.
112. *Id.* (quoting *West Coast Casket Co.*, 97 N.L.R.B. 820, 823 (1951), *enforced*, 205 F.2d 902 (4th Cir. 1953)). The Tenth Circuit also upheld the Board's decision not to defer to the arbitrator's award. The arbitrator had not addressed the legality of the walkout, and "where an arbitrator's award clearly ignores a long line of Board and court precedent, the Board's refusal to defer under *Spielberg* [Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955)] is proper." 638 F.2d at 166-67.
113. 636 F.2d 266 (10th Cir. 1980).
114. 636 F.2d 271 (10th Cir. 1980).
115. *Id.* at 274; 636 F.2d at 269.
116. 636 F.2d at 269-70; 636 F.2d at 273-74.
117. 623 F.2d 134 (10th Cir. 1980).
118. *Id.* at 134.

manent employee in the bargaining unit, that union could not aid him in his employment problem.[119] He contacted the Stereotypers Union and requested that his name be put on a list as a substitute stereotyper for the Post.[120]

Since Simonette had first worked within Stereotypers Union jurisdiction in 1971, his name could have been placed in the second highest position on the substitute list.[121] His name was placed at the bottom of the priority list, however, and he filed a charge with the NLRB against the Stereotypers Union.[122]

The Administrative Law Judge concluded that the Stereotypers Union had violated section 8(b)(1)(A)[123] of the Act because its decision was tainted with "dual unionism."[124] The Board overturned this ruling because the issue of "dual unionism" had never been raised.[125] Nevertheless, the Board concluded that the Stereotypers Union had violated its duty of fair representation[126] because Simonette's placement on the list was directly contrary to his contractual rights under the collective bargaining agreement.[127]

The Tenth Circuit Court of Appeals held that holding union officials to a "standard of skill in interpreting legal documents akin to that possessed by the Board" was error.[128] The officers believed the local constitution and bylaws did not apply to the situation at hand;[129] the court did not find evidence that the union's interpretation of its rules was influenced by animus toward Simonette, and it denied enforcement of the Board's order.[130] Judge McKay dissented, expressing his dissatisfaction with the process of having so many tribunals review administrative disputes. He stated that the proper procedure would be to return the case to the factfinders to determine if the post-interpretation conduct of the Stereotypers Union officers was sufficient to support the inference that the officers acted in bad faith toward Simonette.[131]

In an unpublished opinion, *Vick v. United Transportation Union*,[132] the Tenth Circuit considered a union's breach of its duty of fair representation. Characterizing the action as a tort, the court found that the New Mexico

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119. *Id.*

120. *Id.* at 135.

121. *Id.* at 134-36.

122. *Id.* at 136.

123. 29 U.S.C. § 158(b)(1)(A) (1976) provides that it shall be an unfair labor practice for a labor organization to restrain or coerce employees in their exercise of § 7 rights. *See* note 19 *supra*.

124. 623 F.2d at 136.

125. *Id.*

126. Section 7 says nothing about an employee's right to be represented fairly. *See* note 19 *supra*. By judicial fiat, however, a duty has been imposed on a union to represent the employees in its bargaining unit in a fair, non-arbitrary, and non-discriminatory fashion. *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976); Vaca v. Sipes, 386 U.S. 171, 177 (1967).

127. 623 F.2d at 136.

128. *Id.* at 137.

129. *Id.* at 138.

130. *Id.*

131. *Id.* at 138 (McKay, J., dissenting).

132. No. 79-2234 (10th Cir. Aug. 22, 1980) (not for routine publication).

three-year statute of limitations for torts barred the suit.[133] The plaintiff-appellant, Jennings Vick, had been employed by the Santa Fe Railroad as a brakeman. The collective bargaining agreement in effect at the time set a deadline for contesting grievances regarding seniority.[134] Since Vick did not bring his claim before the Railroad Adjustment Board, as he was entitled to do, the doctrine of laches also applied.[135]

II. WORKMEN'S COMPENSATION ACT

In an action arising under the Railway Labor Act,[136] *Eason v. Frontier Air Lines, Inc.*,[137] the plaintiff, after suffering a back injury, filed for compensation under the Colorado Workmen's Compensation Act.[138] Subsequently, the plaintiff brought suit against his union because his grievance was not processed and against his employer because he had not been assigned to do "light duty" after an earlier back injury.[139] The Tenth Circuit Court of Appeals sustained the defendant's motion to dismiss based on the exclusivity of remedy provided by the Workmen's Compensation Act.[140] The union's processing of the grievance would have been useless because recovery against the employer was barred by the statute.[141]

Another workmen's compensation case, *Davidson v. Hobart Corp.*,[142] presented the issue of whether individual members of a corporation's board of directors are "employees" under the Workmen's Compensation Act[143] and therefore immune from liability. In determining the issue, the Tenth Circuit Court of Appeals stated that "[i]t would be an anomalous contravention of the workmen's compensation scheme to remove personal liability from executive officers, supervisors, and all other workers, while leaving the directors personally liable for damages arising from an employee's injury."[144] The court found language in the statute treating the employer and those performing work for the employer as a "single economic unit,"[145] and held that the exclusive remedy provision of the Kansas Workmen's Compensation Act barred a common-law negligence suit against members of the employer corporation's board of directors.[146]

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133. *Id.* at 5.
134. *Id.*
135. *Id.* at 4.
136. 45 U.S.C. §§ 151-188 (1976).
137. 636 F.2d 293 (10th Cir. 1981).
138. *Id.* at 294. COLO. REV. STAT. §§ 8-40-101 to -54-127 (1973 & Supp. 1980).
139. 636 F.2d at 294.
140. *Id.*
141. *Id.* at 294-95.
142. 643 F.2d 1386 (10th Cir. 1981).
143. In this case, the Kansas Workmen's Compensation Act was at issue. KAN. STAT. ANN. §§ 44-501 to -573 (1973). Section 44-501 provides that "no employer, or other employee of such employee, shall be liable for any injury for which compensation is recoverable under this act . . . ."
144. 643 F.2d at 1388.
145. *Id.*
146. *Id.*

III. SOCIAL SECURITY ACT[147]

Walter Kelbach, an inmate of the Utah State Penitentiary, filed an application for social security disability benefits under sections 416(i)(1)(A) and 423(d)(1)(A) of the Social Security Act.[148] He claimed that he had become disabled and unable to work as a result of a "mental disorder" and that he had "earned" less than $100 in 1976 and less than $100 in 1977.[149]

In affirming the trial court's denial of the claim, the Tenth Circuit Court of Appeals stated that even if Kelbach could prove the requisite disability that would qualify him for benefits, he was not entitled to the benefits of the Social Security Act because he was not "in need."[150] The eighth amendment to the United States Constitution protects against cruel and unusual punishment and has been interpreted to obligate the states to furnish their prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety.[151] Nothing in the record indicated Kelbach lacked any of these provisions.[152] Thus, the denial was proper.

IV. FAIR LABOR STANDARDS ACT[153]

In *Schoenhals v. Cockrum*,[154] the court of appeals reversed a finding by the lower court that the defendant, Cockrum, was a retail or service establishment and therefore exempt from the Fair Labor Standards Act of 1938 (FLSA).[155] The court noted that Cockrum's business of providing an inventory service to other commercial wholesale and retail businesses was "by its very nature one which the consuming public would never use in the course of its daily living . . ." and therefore could not qualify for the retail business exemption of the FLSA.[156]

In *Harding v. Kurco, Inc.*,[157] ten former employees of Kurco, Inc.'s (Kurco) dance studio sought backpay under the FLSA based on Kurco's failure to pay the minimum wage and overtime. Kurco claimed its business was not in interstate commerce, a requirement for FLSA jurisdiction. However, Kurco, as a franchisee of Fred Astaire Dance Studios, encouraged participation in national dance competitions and pleasure trips by the instructors and students. This participation, according to the court, provided the necessary interstate commerce activities.[158] Thus, the requirement for FLSA jurisdiction was met.

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147. 42 U.S.C. §§ 301-306, 401-433, 501-504, 601-676, 701-716, 901-909, 1101-1108, 1201-1206, 1301-1324, 1351-1355, 1381-1383, 1391-1397 (1976 & Supp. III 1980).

148. Kelbach v. Harris, 634 F.2d 1304, 1306 (10th Cir. 1980).

149. *Id.* at 1306-07.

150. *Id.* at 1311.

151. *Id.*

152. *Id.*

153. 29 U.S.C. §§ 201-219 (1976).

154. 647 F.2d 1080 (10th Cir. 1981).

155. 29 U.S.C. § 216 (1976) exempts retail or service establishments from the requirements of FLSA.

156. 647 F.2d at 1081.

157. 650 F.2d 228 (10th Cir. 1981).

158. Kurco contended it did not have the interstate contacts required for application of the FLSA. The FLSA, as amended, applies to any business which has employees engaged in interstate commerce. *Id.* at 229.

V. OCCUPATIONAL SAFETY AND HEALTH ACT[159]

Two cases were brought before the Tenth Circuit Court of Appeals during the past year seeking review of orders of the Occupational Safety and Health Review Commission (OSHRC), *Austin Building Co. v. OSHRC*[160] and *Kent Nowlin Construction Co. v. OSHRC*.[161] Both were decided based on the *Universal Camera Corp. v. NLRB*[162] standard of whether the Commission's findings of fact were supported by substantial evidence in the record when considered as a whole. After a careful examination of the contentions of the companies which the Commission had found to be in violation of Occupational Safety and Health Act regulations, the court held in both cases that the Commission's finding of facts were conclusive. The trial courts' decisions were upheld.[163]

VI. EMPLOYMENT RETIREMENT INCOME SECURITY ACT (ERISA)[164]

The eligibility of employers, who contributed on their own behalf to a pension fund covered by ERISA, to receive pension benefits from that fund was the issue addressed in *Peckham v. Board of Trustees of the International Brotherhood of Painters*.[165] Two employers were denied their claims for pension benefits by their pension fund administrator because they were not "employees."[166] The claimants brought suit in federal district court and were awarded pension benefits and attorneys' fees following a jury verdict in their favor.[167]

The Tenth Circuit Court of Appeals, relying on *Paris v. Profit Sharing Plan*[168] and *Aitken v. IP & GCU-Employee Retirement Fund*,[169] stated that the fund administrator's denial of claims must be upheld unless "(1) arbitrary or capricious, (2) not supported by substantial evidence, or (3) erroneous on a question of law."[170] The administrator's decision was upheld.

Both claimants, Peckham and Woolum, were signatories to a collective bargaining agreement, and the pension fund in question was set up to benefit employees represented by the collective bargaining representative. Peckham and Woolum, as self-employed sole proprietors, were excluded specifically by terms of the pension fund.[171]

The appeals court disagreed that the appellees were "dual status em-

159. 29 U.S.C. §§ 651-678 (1976).
160. 647 F.2d 1063 (10th Cir. 1981).
161. 648 F.2d 1278 (10th Cir. 1981).
162. 340 U.S. 474, 491 (1951).
163. 648 F.2d at 1282; 647 F.2d at 1069.
164. 29 U.S.C. §§ 1001-1086, 1101-1144, 1201-1242, 1301-1381 (1976).
165. 653 F.2d 424 (10th Cir. 1981).
166. *Id.* at 425-26.
167. *Id.* at 426.
168. 637 F.2d 357 (5th Cir. 1981).
169. 604 F.2d 1261 (9th Cir. 1979).
170. 653 F.2d at 426.
171. *Id.* at 426-27. Self-employed individuals were specifically excluded. *Id.* at 427.

ployer-employees." Based on specific language in ERISA[172] and its legislative history,[173] and on rules and regulations of the Secretary of Labor,[174] the court held that the claimants were ineligible to receive pension benefits.[175] The case was remanded with directions to the district court to decide whether the claimants should be repaid their fund contributions and whether an award of attorneys' fees would be proper.[176]

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172. *See* 29 U.S.C. § 1103(c)(1) (1976).

173. *See* H.R. REP. NO. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4698; S. REP. NO. 127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4838, 4851.

174. 29 C.F.R. § 2510.3 to .3(c)(1) (1980).

175. *Id.* at 427-28.

176. *Id.* at 428.