Denver Law Review

Volume 57
Issue 2 *Tenth Circuit Surveys*

Article 5

January 1980

Administrative Law

Doris Truhlar

Robert J. Truhlar

Mariann Will

Administrative Law

ADMINISTRATIVE LAW

I. INTRODUCTION

A number of cases involving administrative law issues were decided by the United States Court of Appeals for the Tenth Circuit during its 1978-79 term. Of the twenty cases discussed in this section, all of which primarily involved administrative law, the government or administrative agency was upheld in fifteen.

A major case in the administrative law area dealt with warrantless searches. In *Savina Home Industries, Inc. v. Secretary of Labor*,[1] the court found that the rule of *Marshall v. Barlow's, Inc.*[2] prohibiting warrantless searches under the Occupational Safety and Health Act of 1970[3] did not apply retroactively.

Other administrative law topics considered during the term included procedural due process, jurisdiction, standing, and exhaustion of administrative remedies. Several federal agencies were represented in more than one case. The agencies which were litigants in several unrelated cases were the Interstate Commerce Commission, the Occupational Safety and Health Administration, and the Department of the Interior.

II. ABUSE OF DISCRETION

Seemingly petty assertions of bureaucratic authority resulted in decisions against the Department of the Interior and the Department of Health, Education and Welfare. Both agencies were overruled on the ground of abuse of discretion. A third case discussed in this section involved the Interstate Commerce Commission.

A. Winkler v. Andrus

In *Winkler v. Andrus*,[4] the plaintiff challenged a decision of the Interior Board of Land Appeals, which had upheld on a technicality, the Department of Interior's rejection of Winkler's bid for an oil and gas lease. Winkler had completed the department's required entry card to make his bid and had stamped it with the name of his insurance company, J.A. Winkler Agency. Subsequently, the Bureau of Land Management rejected the bid on the ground that the word "agency" implied that the bid was made by a corporation and the paperwork required for a corporate bid had not been completed.[5] The plaintiff maintained that he had inadvertently stamped the bid card with his insurance agency stamp but had signed the card as an

1. 594 F.2d 1358 (10th Cir. 1979).
2. 436 U.S. 307 (1978).
3. 29 U.S.C. §§ 651-678 (1976).
4. 594 F.2d 775 (10th Cir. 1979).
5. *Id.* at 776.

individual.[6] The trial court found for the Interior Board of Land Appeals.[7]

On appeal, the court distinguished two earlier Tenth Circuit opinions, *Ballard E. Spencer Trust, Inc. v. Morton*[8] and *Shearn v. Andrus*,[9] which were decided in favor of the Department. In both cases, the opinion stated, serious infractions of the regulations governing bid submissions were involved.[10] In contrast, the court found that *Winkler* involved no actual violation of a regulation, and the use of the word "agency" in the insurance company stamp would "not in the least degree bring to mind a corporation."[11]

In finding the board's decision to be arbitrary, Judge Doyle implied that what was really at the heart of the dispute was a determination by the government to uphold its initial finding, regardless of the facts. The opinion stated that after the Department of the Interior discovered Winkler's "agency" was not a corporation it tried to find an alternative ground for refusing to consider his bid, "and did so as if it was determined to deny [the bid] regardless of the facts."[12]

A possible explanation for the decision, Judge Doyle continued, was found in the department's brief: Upholding the denial would minimize challenges to rulings of the board in the future. The court stated that "[j]udicial decisions are not made so as to discourage assertion of rights in court. . . . It is not sound to assume that a citizen will accept as the last word an adverse ruling such as this; one which is founded on a trivial and inconsequential point."[13]

The court noted in *Winkler* that provisions of the Administrative Procedure Act (APA)[14] were the basis for the court's jurisdiction to determine the appeal.[15] The comment is interesting when compared to a discussion of a similar jurisdictional issue in *Vukonich v. Civil Service Commission*,[16] decided by the same court just a few months previously. The opinion in *Vukonich* stated in a footnote[17] that a 1977 Supreme Court opinion[18] had held that the APA no longer affords independent subject matter jurisdiction for judicial review of agency actions.[19] In comparison, the court in *Winkler* ignored the jurisdictional problem.

B. Health Systems Agency of Oklahoma, Inc. v. Norman

As in *Winkler*, an inflexible approach to an agency's rules provided the

6. *Id.* at 776-77.
7. *Id.* at 777.
8. 544 F.2d 1067 (10th Cir. 1976).
9. No. 77-1228 (10th Cir. Sept. 19, 1977).
10. 594 F.2d at 777.
11. *Id.*
12. *Id.*
13. *Id.* at 778.
14. 5 U.S.C. §§ 701-706 (1976).
15. 594 F.2d at 776.
16. 589 F.2d 494 (10th Cir. 1978). The jurisdictional issue in *Vukonich* is discussed in PART III: PROCEDURAL DUE PROCESS AND JURISDICTION.
17. *Id.* at 496 n.1.
18. Califano v. Sanders, 430 U.S. 99 (1977).
19. 589 F.2d at 496 n.1 (1978).

basis for overruling a government decision in *Health Systems Agency of Oklahoma, Inc. v. Norman.*[20]

The plaintiff, a nonprofit private corporation, sought to be designated as a planning, policymaking, and advisory body for Oklahoma health programs.[21] Under a federal law,[22] the designation was required to receive federal grants through the Department of Health, Education and Welfare (HEW). The plaintiff was required under HEW rules to submit an application for designation as the planning agency by January 19, 1976. Although the application was in final form by the required date, a printing delay made it virtually impossible to submit it to the HEW regional office in Dallas, Texas by the close of business on the deadline date.[23]

HEW approved an extension of the deadline until 8 a.m. the next day. An employee of the plaintiff flew to Dallas, arriving after midnight. He asked the hotel to awaken him at 6:30 a.m.; however, this was not done and the employee overslept. The failure to awaken on time caused a 55-minute delay in submission of the application. An HEW representative said the application would not be considered with those that had been submitted on time, but it might be considered later. HEW claimed it had no provision for waiving its own deadline.[24]

Citing a Supreme Court case,[25] Judge McKay stated the general rule is that a court or an administrative body always has the discretion to relax its own procedural rules.[26] The date fixed for the submission of the applications was "wholly arbitrary."[27] The court noted that HEW had directed its regional offices to interpret the deadline without undue rigidity so applications in final form by the deadline would be accepted, even though they were not turned in on time.[28]

Noting that there had been a "lengthy and troubled history on the matter," the court directed the HEW regional office to make detailed findings when it reconsidered the case.[29] The government argued that, if the court found for the plaintiff, the only appropriate measure of recovery would be the plaintiff's costs in preparing its application. The Tenth Circuit ruled instead that HEW was required to accept the application, process it, and consider the application of the plaintiff along with that of the successful agency. The applications were to be considered on remand on the basis of their merits in light of events at the time of the original consideration by HEW.[30]

The opinion conceded that recovery of preparation costs is ordinarily the proper measure of damages in an action based on agency noncompliance

20. 589 F.2d 486 (10th Cir. 1978).
21. *Id.* at 493.
22. 42 U.S.C. § 300(k) (1976).
23. 589 F.2d at 488.
24. *Id.* at 488-89.
25. American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532 (1970).
26. 589 F.2d at 489.
27. *Id.* at 490.
28. *Id.* at 491.
29. *Id.* at 492.
30. *Id.* at 492-93.

with bidding provisions. However, the court thought that the plaintiff was entitled to more consideration than would be given an ordinary bidder on a contract for profit. The opinion noted that the plaintiff was an "advisory body somewhat unique to our political system. . . . A Health Systems Agency is virtually quasi-governmental in function and is therefore vastly different from a government contractor or grant recipient."[31] In distinguishing the case from those in which the amounts of damages were found to be bidders' preparation costs, the court cited a 1971 District of Columbia Court of Appeals decision[32] in which the court found that injunctive relief was available to a disappointed bidder.[33]

In a footnote which may be of prospective significance to many agencies, the court placed an affirmative duty on the government in dealing with the public. "In this day of bureaucratic proliferation, . . . it would be virtually impossible for private individuals to find the information that would permit them reliably to deal with public officials. The government is in the best position to find such information and bring it forward."[34]

C. Cape Air Freight, Inc. v. United States

In *Cape Air Freight, Inc. v. United States*,[35] the Tenth Circuit set aside orders of the Interstate Commerce Commission (ICC), which had adopted an administrative law judge's (ALJ) findings without modification. The court found the orders erroneous, arbitrary, and unreasonable,[36] and found that the ICC had abused its discretion in refusing to accept an offer of settlement made by Cape and accepted by the ICC's Bureau of Enforcement.[37] After the agency's enforcement bureau had agreed to accept the settlement, the ALJ denied the offer and the ICC entered cease and desist orders as the ALJ had recommended.[38]

Proceedings before the agency began with a petition filed by nine motor carriers, all competitors of the plaintiff, seeking cancellation or modification of Cape certificates on the ground that Cape had not actually operated under them, but was a franchising operation.[39] After hearings, the ALJ rendered an initial decision which held that Cape had been operating unlawfully by utilizing "agents" in the performance of its transportation services without maintaining substantial responsibility and control in violation of the Interstate Commerce Act.[40] Cape was ordered to discontinue all use of agents, and directed to use only employees, terminals, and vehicles under its control and supervision. The ICC affirmed the initial decision and Cape appealed.[41]

---

31. *Id.* at 493.
32. M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971).
33. 589 F.2d at 493.
34. *Id.* at 491 n.7.
35. 586 F.2d 170 (10th Cir. 1978).
36. *Id.* at 181.
37. *Id.* at 182.
38. *Id.* at 172.
39. *Id.* at 176.
40. 49 U.S.C. §§ 303, 306, 309, 316 (1976).
41. 586 F.2d at 177.

Cape moved for dismissal of the complaint based on its settlement offer, which had included a provision for changing Cape's working arrangements with "agents" to give the company substantial control and responsibility. The changes related to banking, equipment identification, insurance, employee supervision, and document execution. A previous ICC order had dismissed other allegations against Cape. Among them was one alleging Cape's "willful failure" to comply with the Act. Only allegations of Cape's failure to exercise control and responsibility over its agents had been sustained.[42]

Intervening complainants refused Cape's offer of settlement and again requested revocation of Cape's certificates based on investigations by the Bureau of Enforcement. The ALJ's initial decision referred to changes proposed by Cape but concluded that they were insufficient to institute control and responsibility. The ALJ found Cape's use of agents to be in violation of the Act and ordered that all such operations cease.[43]

The Tenth Circuit reduced the issues to two: 1) Cape's alleged failure to exercise adequate control over its operations, and 2) the refusal of the ICC to accept the settlement offer.[44] The Tenth Circuit found the ICC requirements of control and responsibility valid and enforceable. In addition, it upheld ICC findings that Cape failed to exercise necessary control and ruled that the violations were supported by substantial evidence.[45]

Despite the finding that the control and responsibility requirements were valid, the Tenth Circuit found the ICC order upholding the ALJ's decision to be an abuse of discretion. The court based this finding on the rationale that the discretion exercised by the ICC in determining the proper remedy should have taken into account the entire record.[46] The court overruled the ICC's total prohibition against the use of agents. Judge Barrett found that the Interstate Commerce Act establishes the right of a carrier to augment its equipment and personnel through lease agreements.[47]

Citing *Gilbertville Trucking Co., Inc. v. United States*,[48] in which the Supreme Court observed the power of the ICC to be corrective, not punitive,[49] the Tenth Circuit expressed its belief that the agency's acceptance of the settlement offer would have accomplished the required remedial goal. The effect of the cease and desist order was to deny the plaintiff the use of agents under any circumstances. The ICC was directed to undertake proceedings to accept Cape's offer subject to directives deemed necessary to eliminate Cape's failure to exercise control and responsibility as required by

42. *Id.* at 173.
43. *Id.* at 177.
44. *Id.* at 178.
45. *Id.* at 180.
46. 586 F.2d at 180, 181-82. *See* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962).
47. 586 F.2d at 181 (citing 49 U.S.C. § 304(e) (1976)). *See generally* American Trucking Ass'ns, Inc. v. United States, 344 U.S. 298 (1953); Carolina Freight Carriers Corp. v. Pitt County Transp. Co., 492 F.2d 243 (4th Cir. 1974), *cert. denied*, 423 U.S. 983 (1975); Alford v. Major, 470 F.2d 132 (7th Cir. 1972); Allstate Ins. Co. v. Alterman Transp. Lines, Inc., 465 F.2d 710 (5th Cir. 1972).
48. 371 U.S. 115 (1962).
49. *Id.* at 129-30. *See also* Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944).

the Interstate Commerce Act.[50]

III. PROCEDURAL DUE PROCESS AND JURISDICTION

A government clerk whose promised promotion was snatched away only moments before a celebration party, lost her attempt to force the Civil Service Commission (CSC) to grant her a hearing[51] in *Vukonich v. Civil Service Commission.*[52] While noting that the employee's disappointment was caused by a "running dispute" between the CSC and the Environmental Protection Agency, the worker's employer,[53] the court found that the clerk was not entitled to a hearing before being denied the promotion. Judge McKay stated that, since Civil Service appointments take effect only after completion of a standard form that had not been filled out in the plaintiff's case, there had been no promotion. Therefore, the court did not reach the issue of whether a hearing was required.[54] In support of its ruling, the court cited a federal regulation that requires hearings only in cases in which there is removal, suspension, furlough without pay, or reduction in rank or pay of a federal worker.[55]

The plaintiff had alleged jurisdiction only under the Administrative Procedure Act (APA). The court dealt with this jurisdictional issue in a footnote.[56] After the plaintiff's case had been brought, the Supreme Court in *Califano v. Sanders*,[57] held that the APA does not provide a basis for independent subject matter jurisdiction. The Tenth Circuit found that the failure to allege another basis of jurisdiction was not fatal because jurisdiction could be based on the federal question statute,[58] even though it was not alleged in the complaint. In support of its independent finding of jurisdiction, the court cited a Second Circuit decision.[59]

---

50. 586 F.2d at 180-82.

51. *See* Sampson v. Murray, 415 U.S. 61, 83 (1974), in which the Supreme Court found the government is entitled to the "widest latitude" in matters involving its employees. For a discussion of the "watered down" due process required in government employee discharge cases, see Martin, *The Improper Discharge of a Federal Employee by a Constitutionally Permissible Process: The OEO Case*, 28 AD. L. REV. 27 (1976); Comment, *Constitutional Law: No Hearing Required Prior to Dismissal for Cause of Nonprobationary Federal Employee*, 59 MINN. L. REV. 421 (1974).

52. 589 F.2d 494 (10th Cir. 1978).

53. *Id.* at 495-96.

54. *Id.* at 496-97.

55. *Id.* at 497 (citing 5 C.F.R. §§ 752.101-.202 (1978)).

56. 589 F.2d at 496 n.1. Jurisdiction was alleged on the basis of the appeals provisions of the APA, 5 U.S.C. §§ 701-706 (1976).

57. 430 U.S. 99 (1977).

58. 28 U.S.C. § 1331 (1976). The statute provides that district courts have jurisdiction in cases arising under federal law. The statute states that there is no requirement that more than $10,000 be in controversy in cases involving federal officers or agencies acting in their official capacities.

59. 589 F.2d at 496 n.1 (citing Harary v. Blumenthal, 555 F.2d 1113, 1115 n.1 (2d Cir. 1977)). *See also* Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543, 549 (7th Cir. 1975); Paynes v. Lee, 377 F.2d 61, 63 (5th Cir. 1967); Quality Beverage Co. v. Sun-Drop Sales Corp. of America, 291 F. Supp. 92, 95 (E.D. Wis. 1968).

IV. FAA PILOT RULES

Two pilots were unsuccessful in their separate attempts to upset decisions of the Federal Aviation Administration (FAA).

A. Loomis v. McLucas

The 70-year-old plaintiff in *Loomis v. McLucas*,[60] whose application for a private pilot's license had been denied in 1975, had lost a previous appeal to the same court in 1977.[61] The Tenth Circuit, in the 1977 decision, affirmed the FAA's denial of a license on medical grounds after the plaintiff had undergone surgery and received an artificial heart valve.[62]

After repeated attempts to obtain a flying certificate, the plaintiff filed an action in federal district court, seeking a writ of mandamus[63] to force the FAA to reissue the license. The district court dimissed the action.[64]

Judge Logan stated that federal statutes require an appeal from an adverse determination of the FAA to be made directly to the Courts of Appeals.[65] Neither the former pilot's advanced age nor the delay cuased by a crowded Court of Appeals docket were found to be enough to permit the court to ignore the statutory appeals process.[66] The Tenth Circuit noted that there were no important constitutional issues raised that would justify the Tenth Circuit hearing the case prematurely. The court also found it could not excuse exhaustion of appropriate judicial remedies, since no irreparable harm was threatened.[67]

B. Gray v. FAA

In *Gray v. FAA*,[68] the court rejected arguments against an FAA rule requiring mandatory retirement for commercial airline pilots. The regulation, known as the Age-60 Rule,[69] was promulgated to safeguard the public from risks associated with diminished ability in older pilots.[70] Gray, who flew for Continental Airlines, had petitioned the FAA for an exemption from the rule. He contended his physical condition justified the exemption, which was denied by the agency. The plaintiff alleged that it was an abuse of discretion to deny the exemption,[71] and that the federal air surgeon had demonstrated bias against exempting pilots from the Age-60 Rule.[72]

Judge McKay noted that the Second and Seventh Circuits had found

60. 598 F.2d 1200 (10th Cir. 1979).
61. Loomis v. McLucas, 553 F.2d 634 (10th Cir. 1977).
62. 598 F.2d at 1201.
63. The plaintiff sought relief under 28 U.S.C. § 1361 (1976), which gives district courts original jurisdiction in actions "in the nature of mandamus to compel an officer or employee of the United States . . . to perform a duty owed to the plaintiff."
64. 598 F.2d at 1201.
65. 49 U.S.C. § 1486 (1976) provides that FAA appeals be made to the Courts of Appeals.
66. 598 F.2d at 1201.
67. *Id.* at 1202.
68. 594 F.2d 793 (10th Cir. 1979).
69. 14 C.F.R. § 121.383(c) (1979).
70. 24 Fed. Reg. 9767 (1959).
71. 594 F.2d at 794.
72. *Id.* at 795.

against pilots who had challenged the rule on exactly the same grounds as Gray.[73] However, while upholding the agency, Judge McKay noted that failure to grant exemptions could become an abuse of discretion in the future. "At some point, the state of the medical art may become so compellingly supportive of a capacity to determine functional age equivalents in individual cases that it would be an abuse of discretion not to grant an exemption."[74]

V. EXHAUSTION AND RIPENESS

The Tenth Circuit rejected a challenge to federal regulations prohibiting discrimination on the basis of gender when it found in *St. Regis Paper Co. v. Marshall*,[75] that the plaintiff, a private employer, had failed to exhaust administrative remedies.[76] St. Regis sought review of the regulations, policies and practices of the Secretary of Labor, the General Services Administration (GSA), and the Office of Federal Contract Compliance Programs (OFCCP).[77]

The GSA had ruled that St. Regis had deviated from its affirmative action program in the employment of women at its Libby, Montana plant, and advised the company that it could be passed over for future government contracts. However, the government had agreed not to pass over the plaintiff for any contract while the matter was pending before the agency. The plaintiff filed an action in the district court prior to the time that an administrative hearing was held.[78]

Citing *Myers v. Bethlehem Corp.*,[79] the Tenth Circuit affirmed dismissal of the action for failure to exhaust administrative remedies.[80] In resolution of the plaintiff's argument that the issues raised questions of statutory interpretation and the constitutionality of federal regulations,[81] Judge Lewis stated that agency review is desirable even when pure questions of law are involved in an appeal from an administrative decision. A Seventh Circuit decision, *Uniroyal, Inc. v. Marshall*,[82] was cited in support of this rationale. The court also stated that prior interpretation of a statute by an agency is necessary as an aid to the court on judicial review.[83] Such interpretation by the agency provides a better record for the court to review.[84]

The Tenth Circuit also rejected an argument that the plaintiff would be

73. *Id.* at 795 (citing Rombough v. FAA, 594 F.2d 893 (2d Cir. 1979), and Starr v. FAA, 589 F.2d 307 (7th Cir. 1978)).

74. 594 F.2d at 795.

75. 591 F.2d 612 (10th Cir. 1979).

76. For discussions of the doctrine of exhaustion of administrative remedies, *see* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 20.01-.08 (1976); B. SCHWARTZ, ADMINISTRATIVE LAW §§ 165-75 (1976).

77. 591 F.2d at 612.

78. *Id.* at 613.

79. 303 U.S. 41 (1938).

80. 591 F.2d at 614.

81. *Id.* at 614.

82. 579 F.2d 1060 (7th Cir. 1978).

83. 591 F.2d at 614.

84. *Id.* (citing McGrath v. Weinberger, 541 F.2d 249 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977)). *See also* McGee v. United States, 402 U.S. 479 (1971).

subjected to needless expense if required to pursue an administrative remedy. Referring to a Ninth Circuit decision,[85] the court stated that expense was no excuse for failure to exhaust administrative remedies.[86] In addition, the court found that the issue was not ripe for judicial decision, since "further and adequate administrative relief has been requested but not exhausted."[87]

St. Regis argued that it would be subjected to irreparable injury other than expense. The injury alleged was that some federal employees had stated to government contracting officers that St. Regis was not eligible for government contracts. The court found that assurances by the OFCCP director that the plaintiff would not be passed over were enough to assure that there would be no irreparable injury.[88]

VI. DEPARTMENT OF INTERIOR DECISIONS

The Department of the Interior was upheld in two unrelated decisions, and overruled on the grounds of abuse of discretion in a third case, *Winkler v. Andrus*,[89] discussed in PART II.

A. Johnson v. Kleppe

The Tenth Circuit ruled in *Johnson v. Kleppe*[90] that determinations made by the Secretary of the Interior concerning the legal heirs of Indians dying intestate are not subject to judicial review.[91] The plaintiffs, who were relatives determined to be ineligible to inherit by intestate succession, contended the secretary had misinterpreted Oklahoma intestacy laws relating to inheritance by relatives of the half blood. The court agreed with the Department of the Interior that a federal statute requires that the determination of the secretary be final.[92] Judge McWilliams cited a 1926 Supreme Court case[93] in finding the action should be dismissed because the court did not have jurisdiction.[94]

The plaintiffs argued that jurisdiction was appropriate under the Administrative Procedure Act (APA).[95] While recognizing that the modern view favors judicial review,[96] the court quoted from the APA to establish that the act does not apply where precluded by statute.[97]

---

85. California v. FTC, 549 F.2d 1321 (9th Cir. 1977).

86. *See* Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947).

87. 591 F.2d at 614-15.

88. *Id.* at 615.

89. 594 F.2d 775. *See* text accompanying notes 4-19 *supra*.

90. 596 F.2d 950 (10th Cir. 1979).

91. *Id.* at 951.

92. 25 U.S.C. § 372 (1976) provides that the secretary's decision "shall be final and conclusive."

93. First Moon v. White Tail, 270 U.S. 243 (1926).

94. 596 F.2d at 952.

95. 5 U.S.C. §§ 551-706 (1976).

96. 596 F.2d at 952. *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

97. 596 F.2d at 952 (citing 5 U.S.C. § 701(a) (1976)).

B. Colorado River Water Conservation District v. United States

A Colorado special district was unsuccessful in its attempt to require the Department of the Interior and other defendants[98] to include it in negotiations for a contract to transport water in *Colorado River Water Conservation District v. United States*.[99] The district had sought to be included in the negotiations by submitting an environmental impact statement.[100] The negotiations were for a contract under which the federal government would carry water from the Western Slope of Colorado to the Eastern Slope through the surplus capacity of a federal water project.[101]

In finding against the plaintiff, the court interpreted the National Environmental Policy Act of 1969[102] as requiring participation by interested parties only when a "major federal action" was involved.[103] Applying the rational basis test, the trial court appropriately granted summary judgment since there was a reasonable ground for the agency's determination that the action, which was not final, did not warrant participation by interested parties. However, had the action been a major one, the plaintiff would have been permitted to file a statement.[104]

Quoting from a District of Columbia Circuit Court decision,[105] Judge Barrett indicated that it would be burdensome to require agencies to permit public participation in all actions of the government, particularly where, as in the *Colorado River*, the agency action was preliminary, and participation could prove to be "more disruptive than beneficial."[106]

VII. Review of Military Decisions

Following precedent set by the Eighth and Second Circuits,[107] the court found that only limited judicial review is permitted in appeals from military decisions refusing to allow doctors to resign from the armed forces after receiving deferments to obtain post-graduate medical training.[108] In *Karlin v. Reed*, the plaintiff received a deferment under a voluntary medical military

98. Defendants also included the City and County of Denver, Colo., and the cities of Colorado Springs, Colo., and Aurora, Colo. 593 F.2d 907 (10th Cir. 1977).

99. *Id.* The case was decided in 1977. The court granted a motion to publish the opinion in 1979. Letter from Howard K. Phillips, clerk of the Tenth Circuit Court of Appeals, to recipients of the opinion (March 13, 1979).

100. On environmental impact statements, *see* Wright, *New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process*, 29 AD. L. REV. 59 (1977); Note, *Appropriate Scope of an Environmental Impact Statement: The Interrelationship of Impacts*, 1976 DUKE L.J. 623; Comment, *Four Years of Environmental Impact Statements: A Review of Agency Administration of NEPA*, 8 AKRON L. REV. 545 (1975); Comment, *Planning Level and Program Impact Statements Under the National Environmental Policy Act: A Definitional Approach*, 23 U.C.L.A. L. REV. 124 (1975).

101. 593 F.2d at 908.

102. 42 U.S.C. § 4332 (1976).

103. 593 F.2d at 909 (citing 42 U.S.C. § 4332(2)(C) (1976)).

104. *Id.*

105. Easton Util. Comm'n v. Atomic Energy Comm'n, 424 F.2d 847 (D.C. Cir. 1970).

106. 593 F.2d at 911.

107. West v. Chafee, 560 F.2d 942 (8th Cir. 1977); Applewick v. Hoffman, 540 F.2d 404 (8th Cir. 1976); Ornato v. Hoffman, 546 F.2d 10 (2d Cir. 1976); Roth v. Laird, 446 F.2d 855 (2d Cir. 1971).

108. Karlin v. Reed, 584 F.2d 365 (10th Cir. 1978).

program, the Berry Plan, which permitted him to complete his residency training before being ordered to active duty. After finishing his residency, he took a job as a clinical researcher in cancer chemotherapy in Chicago. Karlin's resignation from the military stated that his work was essential to the community. The military had refused his resignation on the ground that his services urgently were needed at an Air Force base in Texas.[109]

Karlin filed a petition seeking writs of habeas corpus and mandamus, and asserting jurisdiction under the Administrative Procedure Act. A preliminary injunction was issued by the trial court, which found that the military had acted arbitrarily and capriciously. The issue on appeal was the applicable standard of review in cases involving the military decision-making process.[110]

In finding that the military had acted properly, the court distinguished the Berry Plan cases from those in which review was sought regarding Selective Service Board refusals to grant to civilians classifications as conscientious objectors.[111] Quoting from a Second Circuit opinion,[112] Chief Judge Seth found that the decision was one that was purely within the purview of the military and, therefore, not subject to judicial scrutiny.[113] The court also cited, in support of its conclusion on the level of review, two Supreme Court cases dealing with judicial review of military personnel matters, *Parker v. Levy*[114] and *Orloff v. Willoughby*.[115] In conducting its own personnel matters, the military must state only adequate military reasons. The applicable guidelines are the Department of Defenses's own regulations, which were applied in considering Karlin's appeal through military channels.[116]

Although the opinion indicated there is a difference between the Berry Plan cases and those involving conscientious objectors, it did not explain the nature of that difference. In the conscientious objector cases, the distinguishing fact appears to be that there is no doubt of the inductee's civilian status since he has not enlisted in the armed forces in any manner. In contrast, in the Berry Plan cases, there is an agreement between the doctor and the military under which the physician has obligated himself to serve in the military.[117] This agreement would appear to give the Berry Plan doctor the status of a member of the military.

VIII. ANTITRUST IMPLICATIONS OF A REGULATORY SCHEME

A ski instructor lost an attempt to reverse a Department of Agriculture decision denying him permission to operate a ski school on National Forest

109. *Id.* at 366.
110. *Id.* at 366-67.
111. *Id.* at 367. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970).
112. Roth v. Laird, 446 F.2d 885 (2d Cir. 1971).
113. 584 F.2d at 367.
114. 417 U.S. 733 (1974).
115. 345 U.S. 83 (1953).
116. 584 F.2d at 368. For a case in which a closer review was made of a military decision, *see* Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965).
117. *See* West v. Chafee, 560 F.2d 942 (8th Cir. 1977).

Service land near Aspen, Colorado in *Sabin v. Berglund*.[118] The case was before the Circuit for the second time.[119] Several of the plaintiff's arguments had been rejected on the first appeal;[120] however, the case had been remanded to the district court to ascertain whether there was a rational basis for the denial of the request for a special use permit. One issue which had not been considered in the 1975 appeal was whether there was a violation of the federal antitrust laws in denial of the permit.[121]

The plaintiff had sought a special permit for an area already under permit for winter sports. The Forest Service rejected the request on the ground that it would not authorize a ski school without the existing permitee's consent.[122]

Citing an 1871 Supreme Court case,[123] the court stated that Congress has plenary power over the federal public lands. And it has the ability to delegate that power to the executive branch.[124] Not only does the Secretary have "extremely broad powers," stated Judge Doyle, but the Administrative Procedure Act[125] "demands" only limited judicial review.[126]

The court indicated there was no violation of antitrust laws because ski areas compete with each other for the public's business.[127] However, even if such competition were not sufficient, there are cases upholding regulatory schemes when not operated competitively. Quoting from a treatise on antitrust law, the court found that a regulatory scheme generally supersedes the antitrust laws.[128]

The court was explicit in stating that it was not condoning the ski permit system as "the best that could be conceived had there been more intensive effort."[129] However, even though the court might not condone the system, it was not within the court's power to overturn the program on the ground that it was not the best that could be conceived, since the power to make such regulations had been delegated to the executive branch, not to

118. 585 F.2d 955 (10th Cir. 1978).

119. Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975), *aff'd sub nom.* Sabin v. Berglund, 585 F.2d 955 (10th Cir. 1978). (The name of the case changed because there was a different individual serving as Secretary of Agriculture.)

120. 585 F.2d at 957.

121. *Id.* The issue of whether antitrust laws or a regulatory scheme controls has arisen in federal cases in which there is alleged an antitrust violation involving a regulated company or industry. In such cases, the issue is whether primary jurisdiction to decide if there has been an antitrust violation rests with the federal courts or with the regulatory agency. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 19.06 (1976); Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867 (1976).

122. 585 F.2d at 955-56.

123. Gibson v. Chouteau, 80 U.S. 92, 99 (1871).

124. 585 F.2d at 957-58 (citing in support of the delegation doctrine Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963) and Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom.* Sierra Club v. Morton, 405 U.S. 727 (1972)).

125. 5 U.S.C. §§ 551-706 (1976).

126. 585 F.2d at 959. Judge Doyle found such narrow review to be mandated by 5 U.S.C. § 706(2)(A) (1976), which provides for a reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

127. 585 F.2d at 959.

128. *Id.* at 960 (quoting from L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977)).

129. 585 F.2d at 961.

the courts.[130]

IX. WARRANTLESS SEARCHES

The Tenth Circuit decided a significant case involving searches by administrative agencies.[131] In *Savina Home Industries, Inc. v. Secretary of Labor*,[132] the court found that the exclusionary rule[133] did not apply retroactively to a search[134] conducted under the Occupational Safety and Health Act (OSHA) of 1970.[135]

Several constitutional issues were raised in *Savina*,[136] an action brought by a contractor who had been cited for OSHA violations.[137] The most important of these were: 1) whether, considering the Supreme Court opinion in *Marshall v. Barlow's, Inc.*,[138] the exclusionary rule should be applied to evidence seized in a warrantless OSHA search; and 2) if so, whether it should be applied retroactively to a warrantless inspection that had occurred three years prior to the *Marshall* decision.[139] The Tenth Circuit found that the rule did apply, but that its application was prospective only.[140] The decision therefore marks a split of authority between the circuits, since the Ninth Circuit found that the exclusionary rule did not apply to warrantless OSHA searches.[141]

---

130. *Id.*

131. On the topic of administrative searches generally, see McManis & McManis, *Structuring Administrative Inspections: Is There any Warrant for a Search Warrant?*, 26 AM. U.L. REV. 942 (1977); Rothstein & Rothstein, *Administrative Searches and Seizures: Whatever Happened to Camara and See?*, 50 WASH. L. REV. 341 (1975).

132. 594 F.2d 1358 (10th Cir. 1979).

133. The exclusionary rule provides that evidence illegally seized may not be used in a subsequent criminal prosecution. The rule also has been applied in the context of administrative searches. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). The rule is based on the fourth amendment of the U.S. Constitution.

On the application of the rule in the criminal context, see LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Thompson, *Unconstitutional Search and Seizure and the Myth of Harmless Error*, 42 NOTRE DAME L. 457 (1967).

134. 594 F.2d at 1363-64.

135. 29 U.S.C. §§ 651-678 (1976).

136. 594 F.2d at 1358. In addition to the exclusionary rule issue, the court considered whether there had been constitutional violations under the sixth amendment rights to confrontation, cross-examination, and trial by jury; whether there had been an unlawful delegation of legislative and judicial authority; whether there had been a violation of due process; and whether the plaintiff had standing to challenge the OSHA scheme. All issues were decided against the plaintiff. *Id.* at 1365-67.

137. 29 U.S.C. §§ 651-678 (1976). *See* Dreusche, *Fourth Amendment Implications of Warrantless Occupational Safety and Health Act Inspections*, 82 DICK. L. REV. 773 (1978); Levin, *OSHA and the Sixth Amendment: When is a "Civil Penalty" Criminal in Effect?*, 5 HASTINGS CONST. L.Q. 1013 (1978); Note, *Warrantless Nonconsensual Searches Under the Occupational Safety and Health Act of 1970*, 46 GEO. WASH. L. REV. 93 (1977).

138. 436 U.S. 307 (1978). Although the Court found in *Marshall* that an OSHA inspection made without a warrant was a fourth amendment violation, it did not decide whether the warrant requirement would be applied retroactively. A decision on retroactivity was not necessary, since Barlow had refused to admit the OSHA inspector and, therefore, no evidence was seized. *Id.* at 310.

139. 594 F.2d at 1363.

140. *Id.* at 1363-65.

141. Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683 (9th Cir. 1978).

The court heavily relied on precedents in the criminal area in deciding against retroactive application of the rule. Judge McKay noted that the rule had never been applied retroactively by the Supreme Court.[142] He further noted that, considering the state of the law at the time of the inspection, the inspector could not have known that a warrantless search was unconstitutional. Citing *United States v. Peltier*,[143] the court found that "actual or constructive knowledge" of the unconstitutionality of a search was essential to a retroactive application of the exclusionary rule.[144]

A three-pronged test has been employed in determining the retroactive application of "new" constitutional rules. This test, as set out in *Stoval v. Denno*,[145] requires the reviewing court to consider the purpose served by the new rule, the extent of reliance on the prior standard, and the effect of a retroactive application on the administration of justice.[146] Since the court found that the *Marshall* rule did not apply retroactively, it did not reach the issue of whether the search in *Savina* had been, as the government contended, consensual.[147]

Another issue was whether the plaintiff had been given sufficient notice of the OSHA standards involved in the citation.[148] The court found that, because the standards were published in the Code of Federal Regulations, and therefore were "a matter of public record," there had been no due process violation. Furthermore, the plaintiff had received notice of the violations through the citation and complaint issued by the inspector.[149] The court noted that it had rejected the same due process contentions in *Clarkson Construction Co. v. Occupational Safety & Health Review Commission*,[150] and found that Savina did not have standing to ask the court to reconsider its position.[151]

In *Savina* the court also found that the plaintiff did not have standing to raise the issue of the legality of the penalty portion of the OSHA scheme, since Savina had not been assessed the penalty permitted by the statutory scheme.[152] The penalty provision permits the agency to increase an employer's fine when a citation is challenged. Citing *Sierra Club v. Morton*,[153] the court based its conclusion on the standing issue on the fact that Savina's first amendment free speech rights were not "chilled" by the provision enough to

142. 594 F.2d at 1364 (citing United States v. Peltier, 422 U.S. at 541).

143. 422 U.S. 531 (1975).

144. 594 F.2d at 1364. For a case in which the rule was not applied retroactively, *see* Linkletter v. Walker, 381 U.S. 618 (1965).

145. 388 U.S. 293 (1967).

146. *Id.* at 297. *See also* Michigan v. Tucker, 417 U.S. 433 (1974); Olmstead v. United States, 277 U.S. 438 (1928); United States v. Reda, 563 F.2d 510 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); United States v. Montgomery, 558 F.2d 311 (5th Cir. 1977).

147. 594 F.2d at 1361. The court stated in a footnote that the plaintiff had not been able to develop its fourth amendment contentions regarding the nonconsensual nature of the search because OHSRC had ruled that it did not have jurisdiction to resolve constitutional issues. *Id.* at 1361 n.3.

148. *Id.* at 1365.

149. *Id.*

150. 531 F.2d 451, 456 (10th Cir. 1976).

151. 594 F.2d at 1366.

152. *Id.* The penalty provision is at 29 U.S.C. § 666 (1976).

153. 405 U.S. 727 (1972).

discourage the petitioner from pursuing its appeal.[154]

The problem with this holding is that, if a petitioner who has not actually been assessed an increased fine is not allowed to challenge the statute, then there may be no one with standing to do so. The agency's statutory authority to assess the higher fine when an appeal is taken may indeed have a chilling effect on some employers, who simply choose not to contest citations. These chilled employers therefore are not involved in any appeal process. And, when citations are contested, the Commission may never invoke the penalty, which will mean that no "contesting" employers have standing either. If this were the case, then there would be no employer with standing to challenge the scheme. In finding that the petitioner lacked standing to contest the penalty statute, the court avoided having to resolve whether that portion of the Act was legal.

Savina also contended its sixth amendment rights of confrontation, cross-examination, and trial by jury[155] were infringed. In summarily disposing of the claims, Judge McKay noted that the plaintiff had cross-examined the sole government witness at an administrative hearing, and that the jury trial guarantee applies only in the criminal setting.[156] The plaintiff also had argued that the judicial and legislative branches' authority had been unlawfully delegated in the OSHA scheme. The court, again finding for the government, noted that the "federal courts have long recognized as constitutionally valid broad delegations of adjudicatory and rulemaking authority to administrative agencies."[157]

X. THE ICC CASES

The Tenth Circuit decided three unrelated cases in which the Interstate Commerce Commission (ICC) was the defendant. A fourth case involving the ICC, *Cape Air Freight, Inc. v. United States*,[158] is discussed in PART II.

A. Sterling Colorado Beef Co. v. United States

In *Sterling Colorado Beef Co. v. United States*,[159] the Tenth Circuit upheld the district court reversal of an ICC decision to deny damages from railroad companies to a Colorado meat packer for freight charges to the east coast. The basis for the claim was a comparison of the rates charged the plaintiff with those charged other shippers who were situated farther from Chicago and the east coast. While the ICC found the rate charged the plaintiff to

154. 594 F.2d at 1366.

155. U.S. CONST., amend. VI.

156. 594 F.2d at 1366.

157. *Id.* at 1367. On delegation of power, *see, e.g.*, FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Clarkson Constr. Co. v. OSHRC, 531 F.2d 451 (10th Cir. 1976); Frank Irey Jr., Inc. v. OSHRC, 519 F.2d 1200 (3rd Cir. 1975), *aff'd*, 430 U.S. 442 (1977). *See also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 2.00-.14 (1976); Fisher, *Delegating Power to the President*, 19 J. PUB. L. 251 (1970).

158. 586 F.2d 170 (10th Cir. 1978). The Tenth Circuit during its 1978-79 term decided two cases with the same name, *Cape Air Freight, Inc. v. United States*. Although the parties were the same, the issues were different and unrelated.

159. 599 F.2d 365 (10th Cir. 1979).

Chicago was unlawful and, therefore, warranted damages, it denied relief for rates to points east of Chicago, since Sterling did not show proof directed specifically to those rates. By the time the case reached the Tenth Circuit, the ICC had changed its position, indicating it agreed with the district court. The appeal was taken by the railroads.[160]

Chief Judge Seth noted that the issue was reduced to an application of a Supreme Court case, *Great Northern Railway Co. v. Sullivan.*[161] The Tenth Circuit agreed with the trial court that the *Great Northern* decision is a recognition of the principle that damages cannot be recovered in the absence of injury. However, in the instant case, there were damages that would justify recovery, because the plaintiff was charged the same rate as other shippers who were allowed to send shipments farther distances for the same rates, injuring Sterling's competitive position.[162] The court noted that its holding actually supported the ICC's position, since, by the time the case was heard on appeal, the Commission had acknowledged that the record at the agency level supported Sterling's claim.[163]

B. Rocky Mountain Motor Tariff Bureau, Inc. v. ICC

In *Rocky Mountain Motor Tariff Bureau, Inc. v. ICC*,[164] the court upheld an ICC order[165] restricting motor common carriers from applying pickup and delivery charges to certain non-commercial locations, and requiring delivery notification for shipments to such locations. Petitioners challenged the order on the ground that the ICC utilized its rulemaking authority in a ratemaking proceeding, rendering the rule invalid. Secondarily, the order's rational basis was attacked.[166]

The Commission claimed it had the authority under the Interstate Commerce Act[167] to investigate industry practices and make rules in the public interest.[168] Intervening motor tariff bureaus charged that the Administrative Procedure Act[169] required an evidentiary hearing because carriers' rates were challenged. They argued that an adjudicatory hearing was necessary to eliminate a rate already in effect.[170]

The court noted that the APA permits both rulemaking and adjudicatory proceedings before the ICC. Rulemaking is concerned with future and general policies, while adjudicatory proceedings deal with past and present rights of particular parties. Chief Judge Seth cited *United States v. Allegheny-Ludlum Steel Corp.*,[171] in which the Supreme Court held that section 556[172] of

160. *Id.* at 366.
161. 294 U.S. 458 (1935).
162. 599 F.2d at 367.
163. *Id.* at 368.
164. 590 F.2d 865 (10th Cir. 1979).
165. Ex Parte No. MC-97, *Investigation into Practices of Motor Common Carriers of Property on Residential and Redelivered Shipments*, now codified at 49 C.F.R § 1307.35(d) (1978).
166. 590 F.2d at 868-69.
167. 49 U.S.C. §§ 304(a)(1), (6), (b), and 308(a) (1976).
168. 590 F.2d at 868.
169. 5 U.S.C. § 556(c)(7) (1976).
170. 590 F.2d at 868.
171. 406 U.S. 742 (1972).
172. 5 U.S.C. § 556(c)(2) (1976).

the APA demands an evidentiary hearing only when section 553[173] triggers it, which was not the case here.[174] The choice between rulemaking and adjudicatory proceedings is primarily within the agency's discretion, the court ruled, citing *SEC v. Chenery Corp.*[175] In the case at hand, the ICC was not considering the lawfulness of the plaintiff's particular rates, but only considering generally whether any charges were permissible,[176] so the proceedings chosen were proper and within its authority.[177]

The court applied the substantial evidence rule, finding the agency's holding clearly based on substantial evidence. The orders were reviewed under the standard of *Allegheny-Ludlum Steel*[178] and affirmed.[179]

C. Cape Air Freight, Inc. v. United States

In *Cape Air Freight, Inc. v. United States*,[180] the court affirmed an ICC interpretation of a freight motor carrier certificate held by the plaintiff.[181] The issue was whether the operations of Cape were within the authority granted with respect to routes.[182] The court settled the question of whether Cape was authorized radial or nonradial operations,[183] which determined the area where transportation was authorized. The court upheld ICC cease and desist orders[184] which indicated Cape had only radial authority.

Cape's argument for nonradial operations hinged on the placement of a comma in a clause of its certificate that described its territory. The court was unimpressed. Describing the result of the petitioner's argument as illogical because it would place a radial grant between two nonradial grants, the court upheld the plain meaning interpretation of the ICC Review Board.[185] Cape argued that the decision was inconsistent with past interpretations,

173. 5 U.S.C. § 553 (1976).
174. 590 F.2d at 868.
175. 332 U.S. 194 (1947).
176. 590 F.2d at 868.
177. *Id.* at 869. For a discussion of APA requirements for agency rulemaking, *see Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750 (1975).
178. 406 U.S. 742, 749. The standard of review on appeal is: "We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported."
179. 590 F.2d at 871.
180. 589 F.2d 478 (10th Cir. 1978).
181. *Id.* at 481.
182. *Id.* at 478.
183. The court distinguished radial from nonradial authority:
> Radial authority permits the transportation of freight between points in two or more geographically described areas but does not permit the transportation of freight between points located wholly within one of the described areas. This latter transportation is called cross-haul. For example, a grant of radial authority between points in state A on the one hand, and, on the other hand, points in states B and C would permit transportation between states A and B, and between states A and C. It would not permit transportation between states B and C. A nonradial grant of authority would permit cross-haul between states B and C. As can readily be seen, nonradial authority is broader than radial authority.

589 F.2d at 479.
184. *Id.* at 478.
185. *Id.* at 480.

and was arbitrary. It relied on *T.I. McCormack Trucking Co. v. United States*,[186] in which the absence of a comma determined the limited interpretation of a phrase in a certificate and a district court held territorial descriptions to be non-technical.[187] The Tenth Circuit designated the words in Cape's certificate to be words of art and the normal ICC practice.[188]

Judge Breitenstein wrote, "An administrative interpretation must be accepted unless there are compelling indications that it is wrong." Since the Commission's decision was not "clearly erroneous," the court was required to accept it.[189]

XI. THE OSHA CASES

The Tenth Circuit decided five cases involving violations of the Occupational Safety and Health Act (OSHA) of 1970.[190] Decisions of the Occupational Safety and Health Review Commission (OSHRC) were upheld in two cases. The Commission was reversed in one case, and upheld in part and reversed in part in another. The fifth case, involving a warrantless inspection to search for OSHA violations,[191] is discussed in PART IX.

A. H-30, Inc. v. Marshall

In *H-30, Inc. v. Marshall*,[192] the Tenth Circuit, setting aside an OSHRC order, held that the drilling industry practice of allowing employees to ride an "elevator" attached to a traveling block used to lift pipe was not a recognized hazard in the industry and therefore did not constitute a "serious violation"[193] under the "general duty"[194] clause of the Act.

An OSHA inspector issued H-30, Inc. a citation on the basis that construction crane standards in the building industry were applicable to drilling rig operations in the oil well industry.[195] The inspector's reasoning was that machinery used in both industries was mechanically or functionally similar.[196]

Chief Judge Seth found that mere similarity in purpose of certain devices used by two industries did not justify applying one industry's acceptance of a hazard to another. The court also based its vacating order on evidence, substantiated by an administrative law judge's findings, that the

186. 251 F. Supp. 526 (D.N.J. 1966), *explained on review*, 298 F. Supp. 39 (D.N.J. 1969).

187. 251 F. Supp. at 531; 298 F. Supp. at 41.

188. 589 F.2d at 481. The Tenth Circuit found that the "words of art" interpretation had been upheld, citing Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (D.N.J. 1964); King Van Lines, Inc. v. United States, 220 F. Supp. 551 (D. Kan. 1963); ICC v. Southwest Freight Lines, Inc., 86 F. Supp. 587 (W.D. Mo. 1949), *aff'd*, 184 F.2d 149 (8th Cir. 1950).

189. 589 F.2d at 581.

190. 29 U.S.C. §§ 651-678 (1976).

191. Savina Home Indus., Inc. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979).

192. 597 F.2d 234 (10th Cir. 1979).

193. A serious violation exists "if there is a substantial probability that death or serious physical harm could result," provided the employer knew or should have known that the practice in question was a violation. 29 U.S.C. § 666(j) (1976).

194. 29 U.S.C. § 654 (1976). The general duty clause is applied to situations in which an accepted standard in the industry concerned is present. 597 F.2d at 235.

195. 597 F.2d at 235.

196. *Id.*

agency did not have a uniform policy regarding such riding practices; in some areas the practice was not considered hazardous, whereas in others citations were issued.[197]

B. Kent Nowlin Construction Co. v. Occupational Safety & Health Review Commission

The OSHRC was reversed in part in *Kent Nowlin Construction Co. v. Occupational Safety & Health Review Commission*,[198] which dealt with the interpretation of certain OSHA regulations. While overturning the Commission's order for a minor violation of one regulation, the Circuit affirmed the order for willful violation of another.[199]

The petitioner was laying a sewer line in a cavity it had excavated along a highway. Excavated materials were stored within two feet of the cavity's edge. Although a ladder was provided, it was not positioned within a 25-foot walking distance of all employees in the working areas of the cavity.[200]

The issue raised with regard to the minor citation was whether the cavity was considered an "excavation,"[201] for which the regulations do not require a ladder, or a "trench,"[202] for which the regulations require that a ladder be placed "so as to require no more than 25 feet of lateral travel."[203]

Basing its holding on the fact that there was disagreement among the Department of Labor's compliance officers, the administrative law judge, and OSHRC as to which definition was applicable to the cavity,[204] the Circuit reversed the Commission's finding that there had been a serious violation. The court recognized that deference should be accorded to the Secretary of Labor's interpretation of his own regulations,[205] but, citing *Usury v. Kennecott Copper Corp.*,[206] indicated that employers should not have to guess what is intended by a safety regulation. The court further stated that a penalty should not be imposed for deviation from a standard "the interpretation of which cannot be agreed upon by those responsible for compelling compliance with it . . . ."[207]

The willful violation with which petitioner was charged resulted from

197. *Id.*
198. 593 F.2d 368 (10th Cir. 1979).
199. *Id.* at 369.
200. *Id.*
201. The term excavation is defined as: "Any manmade cavity or depression in the earth's surface, including its sides, walls, or faces, formed by earth removal and producing unsupported earth conditions by reasons of the excavation. If installed forms or similar structures reduce the depth-to-width relationship, an excavation may become a trench." 29 C.F.R. § 1926.653(f) (1978).
202. The term trench is defined as: "A narrow excavation made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench is not greater than 15 feet." 29 C.F.R. § 1926.653(n) (1978).
203. 29 C.F.R. § 1926.652 (h) (1978).
204. 593 F.2d at 370.
205. *Id.* at 371. In support of this principle, the court cited Volkswagenwerk v. Fed. Maritime Comm'n, 390 U.S. 261 (1968) and Marathon Oil Co. v. Kleppe, 556 F.2d 982 (10th Cir. 1977).
206. 577 F.2d 1113 (10th Cir. 1977).
207. 593 F.2d at 371.

excavated materials being left within two feet of the excavation's edge. A rule required that all excavated matter be stored beyond two feet of the edge of the excavation.[208] The plaintiff asserted that its noncompliance was not willful nor was it a deliberate, knowing, or conscious abuse of the Act.[209] The petitioner contended that the two-foot requirement was both unsafe and impractical, considering the traveled highway which remained open during the laying of the sewer.[210]

The court agreed with the Commission that, although the petitioner acted without malice and demonstrated concern for its employees' safety, willfulness may be found absent malicious intent, and upheld the Commission's finding that the petitioner, aware of the requirement, consciously and deliberately failed to comply, which warranted a willful violation order.[211]

In a dissent, Judge Doyle concurred in the court's affirmance of the Commission's willful violation order, but dissented from the court's reversal of the non-serious violation.[212]

C. Jensen Construction Co. of Oklahoma, Inc. v. Occupational Safety & Health Review Commission

In *Jensen Construction Co. of Oklahoma, Inc. v. Occupational Safety & Health Review Commission*,[213] the petitioner had been found guilty of two serious violations of safety standards. Jensen argued two bases for setting aside OSHRC's order: 1) the procedural ground that the Secretary of Labor failed to comply with the requirement that a formal complaint be filed with the Commission within twenty days of notice of contest,[214] and 2) the substantive ground that the provisions of the safety regulation were too vague.[215]

Jensen was issued the citations for not providing protective fall equipment to its employees, who were working 17 to 23 feet above an expressway building an overpass bridge. Jensen's policy was to furnish safety equipment only for fall distances in excess of 25 feet or under exceptional circumstances. Jensen contested the citations, and the Secretary failed to file a formal complaint with the Commission until 48 days after the receipt of contest. The Secretary blamed the delay on a heavy caseload.[216]

The Circuit held that, absent a showing of actual prejudice, dismissal was too severe a sanction,[217] especially where safety hazards were of considerable magnitude. The court, distinguishing *Cornell & Co. v. Occupational*

208. In excavations which employees may be required to enter, excavated or other material shall be effectively stored and retained at least 2 feet or more from the edge of the excavation. 29 C.F.R. § 1926.651(i)(1) (1978).
209. 593 F.2d at 372.
210. *Id.*
211. *Id.*
212. *Id.*
213. 597 F.2d 246 (10th Cir. 1979).
214. 29 C.F.R. § 2200.33(a) (1978).
215. 597 F.2d at 247.
216. *Id.*
217. *Id.*

Safety & Health Review Commission,[218] in which a four-month delay caused considerable prejudice, agreed with the administrative law judge that Jensen failed to show any harm caused by the 28-day delay.[219]

With regard to the vagueness question, the petitioner alleged that the regulation requiring employees to wear appropriate safety equipment[220] was so uncertain that unrestricted discretion was given the agency.[221] The court stated that, since the words "near proximity" were upheld in a regulation contested in *Brennan v. Occupational Safety & Health Review Commission*,[222] the language in the present regulation should be upheld. Also, applying the language in light of the petitioner's conduct, Judge McWilliams stated that, since *no* protective equipment of any kind was furnished, the question of equipment was irrelevant.[223]

D. Southern Colorado Prestress Co. v. Occupational Safety & Health Review Commission

The Tenth Circuit in *Southern Colorado Prestress Co. v. Occupational Safety & Health Review Commission*,[224] again upheld an order of the OSHRC for a serious violation of a regulation concerning safety nets.

Prestress began with a citation issued by an OSHA inspector who observed one of petitioner's employees working more than 25 feet above the ground without a safety net below, and without other protective equipment.[225] Numerous issues were brought on appeal; the two procedural issues involving the propriety of amending the citation and permitting the testimony of an agency area director were resolved in favor of the government. Judge Holloway stated that allowing amendment by the Commission was not an abuse of discretion because the amended pleading was part of the occurrence enumerated in the original pleading.[226] With regard to the allowance of the testimony of the issuing officer, attacked on the grounds of surprise and bias, the court determined that the Commission's rule prohibiting investigating officers from participating in or advising with respect to OSHRC reports only barred *ex parte* communication, not testimony in open hearings.[227]

Another issue raised was whether safety nets were required when any non-net protective equipment was available, whether it was used or not.[228] The court held that the Fifth Circuit ruling in *Brennan v. Southern Contractors Service*[229] controlled. In *Brennan*, the court held, contrary to Commission precedent, that the OSHA standard required the use of safety nets without

218. 573 F.2d 820 (3d Cir. 1978).
219. 597 F.2d at 248.
220. 29 C.F.R. § 1926.28(a) (1978).
221. 597 F.2d at 248.
222. 505 F.2d 869 (10th Cir. 1974).
223. 597 F.2d at 249.
224. 586 F.2d 1342 (1978).
225. *Id.* at 1344.
226. *Id.* at 1347 (quoting from FED. R. CIV. P. 15(c) (1977)).
227. *Id.* at 1349.
228. *Id.* at 1345.
229. 492 F.2d 498 (5th Cir. 1974).

regard to the practicality or impracticality of other equipment.[230] The Tenth Circuit adopted this reasoning, stating that only the defenses of "impossibility" or "greater hazard" could negate the violation.[231] The defense of "impossibility" includes both technological and economic infeasibility, but financial burdensomeness alone is not enough to establish impossibility.[232] The defense of "greater hazard" is maintained by proof that an existing work practice is safer than compliance with the regulation.[233] The Commission found that safety nets could be erected by the workers, which, albeit expensive, would not double the time required to erect the building.[234] The Commission found that the danger to which the employees were exposed in erecting the nets was slight compared to the hazards of working with no nets.[235] The Circuit, determining that the agency's fact findings were supported by substantial evidence, affirmed the Commission's order.[236]

Doris B. Truhlar
Robert J. Truhlar
Mariann Will

230. *Id.*
231. 586 F.2d at 1350.
232. *Id.* at 1351.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 1352.