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LABOR LAW

OVERVIEW

During the 1978-1979 survey period, there was a significant increase in the number of labor cases handled by the Tenth Circuit. This overview will provide a brief summary of those cases which have been selected for official publication.

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

A. *Interference with Union Activities: The Organizational Campaign*

In *NLRB v. National Jewish Hospital & Research Center*,[2] the Tenth Circuit upheld an order of the National Labor Relations Board (NLRB) directing that the hospital cease and desist the promulgation of an overly broad no-solicitation rule.[3] The rule, which prohibited employee solicitation on behalf of labor organizations in areas of the hospital accessible to patients, was defended on the basis of the hospital's interest in patient tranquility.

In order to bring its view into harmony with a recent Supreme Court decision,[4] the court was compelled to substantially revise its own contrary precedent; in *St. John's Hospital & School of Nursing, Inc. v. NLRB*,[5] the Tenth Circuit had found that the Board lacked the expertise necessary to determine whether solicitation might have a disturbing effect upon patient health.

In *NLRB v. Beth Israel Hospital*,[6] the Supreme Court held that strict rules against solicitation could be applied only to immediate patient care areas. To determine whether solicitation would be permissable in other areas of the hospital, the Board was required to balance the likelihood of the disruption of patient care against the organizational rights of the employees.[7]

In light of *Beth Israel*, the Tenth Circuit reasoned that the mere possibility of patient disturbance was insufficient to justify the prohibition of solicitation. The court held that the burden was on the employer to show positive evidence of a disruptive effect, and that this burden had not been met.[8]

Again addressing a no-solicitation situation, the court of appeals in

1. 29 U.S.C. §§ 141-144, 151-169, 171-188 (1976).

2. 593 F.2d 911 (10th Cir. 1978).

3. Absent special circumstances, unreasonable interference with union solicitation is presumptively an unfair labor practice. NLRB v. Beth Israel Hospital, 437 U.S. 483, 493 (1978). However, the Board itself has recognized that hospitals have special needs which justify a modification of the general rule. *See* St. John's Hospital and School of Nursing, Inc. v. Laborers' Int'l Union of North America, 222 NLRB 1150 (1976).

4. NLRB v. Beth Israel Hosp., 437 U.S. 483 (1978).

5. 557 F.2d 1368 (10th Cir. 1977). In *St. John's*, the Tenth Circuit permitted a ban on solicitation in all areas of the hospital to which patients had access.

6. 437 U.S. 483 (1978).

7. *Id.* at 505-07.

8. 593 F.2d at 913.

NLRB v. St. Joseph Hospital[9] determined that there was no legitimate evidence of such special circumstances[10] as might justify a ban on union solicitation and distribution in the hospital cafeteria and parking lot. The court noted that the hospital relied solely on conclusory statements made by an administrator that the rule was necessary to prevent the disruption of patient care activities. Such general statements were held not to represent positive evidence of a harmful effect such as was required in *Beth Israel*.

The Tenth Circuit, however, refused to issue broad guidelines applying to union solicitation in hospitals generally. Instead, it remanded the cause to the Board to define the immediate patient care areas in which solicitation can be strictly prohibited.[11]

In *NLRB v. Presbyterian Medical Center*,[12] the Tenth Circuit applied *Beth Israel* to a no-access rule and found that it also violated employee rights. The rule in question prohibited employees from being on hospital premises except during working hours or while in attendance at authorized, hospital functions. As justification, the employer gave reasons of security, limited parking space, abuse of overtime, and interference with productivity.[13]

The appellate court emphasized that business-related factors were insufficient to justify a no-access rule (or a no-distribution, no-solicitation rule). Justifications must be based upon the necessity to "avoid disruption of health-care operations or disturbance of patients."[14] Inasmuch as the proffered justifications did not meet this test, the Board ruling was upheld.

At issue in *Head Division, AMF, Inc. v. NLRB*[15] was a charge of unlawful discrimination in the enforcement of a company no-distribution rule. Head maintained that where the rule was consistently enforced against every employee, no unlawful discrimination existed when the employer itself engaged in distribution.[16]

The Tenth Circuit cited *NLRB v. United Steelworkers of America*[17] for the narrow proposition that distribution by the company can be equated only with distribution by supervisory personnel.[18] Reasoning that a leadman was an employee rather than a supervisor,[19] the court upheld the Board determination that the rule had been unlawfully enforced against some employees but not against others. The fact that distribution was made at the request of an agent of the company was discounted as immaterial.

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9. 587 F.2d 1060 (10th Cir. 1978).

10. *See* note 3 *supra*.

11. 587 F.2d at 1065. The Board's order was deemed too vague and overbroad to be enforced.

12. 586 F.2d 165 (10th Cir. 1978).

13. *Id.* at 167.

14. *Id.* at 168.

15. 593 F.2d 972 (10th Cir. 1979). The rule provided against " 'circulation or distribution of written material in working areas or on working time.' " *Id.* at 976 (quoting the opinion of the Administrative Law Judge, 228 NLRB No. 180 (1977)).

16. 593 F.2d at 977 (citing NLRB v. United Steelworkers of America, 357 U.S. 357 (1958)).

17. 357 U.S. 357 (1958).

18. 593 F.2d at 978.

19. *Id.* at 977 (citing Midwest Regional Joint Board v. NLRB, 564 F.2d 434, 446 (D.C. Cir. 1977)).

In addition, the court of appeals found that this and other unfair labor practices constituted an "operative part" of an ensuing strike. Even though the union had not raised the unfair practices issue during negotiations, sufficient evidence supported the trial court determination that a contract dispute was not the sole cause of the strike.[20]

Plasticrafts, Inc. v. NLRB[21] is notable chiefly for a comprehensive discussion of the standards to be applied in determining whether there has been a violation of the National Labor Relations Act (NLRA) where wage increases have been granted or withheld during periods of critical union activity. The NLRB found that Plasticrafts had violated the neutrality of a union election when it suspended all wage increases for the duration of the campaign. Plasticrafts appealed, arguing that unlawful anti-union animus must be shown in order to establish a violation of section 8(a)(1) of the Act,[22] and protesting the fact that the Board had failed to hear proffered testimony.

The Tenth Circuit refused to follow those cases which might be construed to require a finding of anti-union motive in every 8(a)(1) case, and upheld the general rule: Where there exists a clearly apparent status quo with respect to wage increases, any change in that practice in response to protected union activity constitutes a violation, regardless of motive.[23] Since no anti-union animus need be shown, the court further held that it was not error that the Board refused to hear company testimony regarding motive. Were the status quo not "clearly apparent" to the employer, motive would become important. The Tenth Circuit also rejected Plasticrafts' contention that the Board must show some change in employee behavior attributable to the incident.[24]

The underlying question in *Kustom Electronics, Inc. v. NLRB*[25] was whether the Board had erred in finding that employees who had been laid off six months prior to a union election were nonetheless eligible to vote in that election. The case arose from an NLRB holding that the company had committed an unfair labor practice[26] when it refused to bargain with a recently certified union. Kustom, in defense of its action, argued that the union was improperly certified in that it did not represent a majority of employees eligible to vote.

The Tenth Circuit agreed with the Board that the proper test for a determination of eligibility to vote is whether laid off employees had, at the time of the election, a "reasonable expectation of replacement within a rea-

20. 593 F.2d at 981. "In determining whether a strike is an unfair labor practices strike, the NLRB is not limited to a consideration of what the Union stated at negotiation sessions or in public. The perspective of the striking employees may properly be deemed of controlling significance." *Id.* at 981 n.18.

21. 586 F.2d 185 (10th Cir. 1978).

22. 29 U.S.C. § 158(a)(1) (1976) provides that it shall be an unfair labor practice for an employer to restrain or coerce employees in the exercise of their rights to self-organization and other concerted activities.

23. 586 F.2d at 188. The court emphasized that the practice must not only be an established one, but must also be "clearly apparent to an objectively reasonable employer." *Id.*

24. 586 F.2d at 190. The violation occurs when employer conduct *tends* to be coercive, whether or not individual employees are successfully coerced.

25. 590 F.2d 817 (10th Cir. 1978).

26. 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1976).

sonable time in the future."[27] That employees may have been told when laid off that the dismissal would be permanent was held not determinative, since it was their understanding at the time of the election that counted. In particular, the court found that the Board's refusal to entertain the union's unfair labor practice charges stemming from the layoffs did not *ipso facto* establish that employees could not reasonably expect to be recalled. Rather, the issue was held to be but one of the many to be considered by the Board in making its factual determination.[28]

B. *Refusal to Bargain*[29]

In *NLRB v. Albion Corp.*,[30] the Tenth Circuit upheld a Board decision that the company had violated section 8(a)(5)[31] of the NLRA by refusing to recognize and bargain with the union. The court found that even though outright refusal to bargain had lasted but five days, the timing of the refusal being coincident with a threatened strike, combined with company conduct prior to that time, was sufficient to constitute a "continuous course of conduct"[32] in violation of the Act.

Although evidence was sparse,[33] the court further upheld a Board determination that an ensuring strike was caused, at least in part, by Albion's refusal to bargain.[34] The Tenth Circuit thus concluded that unlawful terms had been imposed as a condition of reinstatement for striking employees. The company had presented a strong case to show that the conditions were the product of sound business judgment,[35] but the court held as controlling its decision in *NLRB v. Wichita Television Corp.*[36] that "[s]triking employees are upon request entitled to reinstatement if unfair labor practices are the cause or one of the operative causes of their strike."[37]

Because new evidence was proffered having bearing upon the question of Albion's good faith and financial plight, the order was partially remanded for further proceedings with respect to liability.

In *NLRB v. Ethan Allen, Inc.*,[38] the court of appeals was asked to enforce an order requiring that the employer recognize and bargain with a duly

27. 590 F.2d at 821 (citing Marlin-Rockwell Corp. v. NLRB, 116 F.2d 586, 588 (2d Cir.), *cert. denied*, 313 U.S. 594 (1941); NLRB v. Hondo Drilling Co., 428 F.2d 943, 946 (5th Cir. 1970); NLRB v. Jesse Jones Sausage Co., 309 F.2d 664, 666 (4th Cir. 1962)).

28. 590 F.2d at 822.

29. 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1976).

30. 593 F.2d 936 (10th Cir. 1979).

31. 29 U.S.C. § 158(a)(5) (1976).

32. *See* Machinists Local v. Labor Board, 362 U.S. 411, 416 (1959).

33. Evidence that the strike was motivated by the refusal to bargain consisted primarily of a statement by a union steward to employees shortly before the strike vote that "we have no new contract and none had been discussed." 593 F.2d at 940. From this, the Tenth Circuit inferred that employees were aware of the company refusal to bargain. *Id.*

34. There appears to be an inconsistency in the court's reasoning. It is difficult to see how a refusal to bargain can both cause a strike and be caused by it.

35. The employer gave the following reasons for restrictions on the employees' return to work: the company's financial plight, a show of potential violence on the picket line, and sabotage which had previously occurred. 593 F.2d at 943.

36. 277 F.2d 579 (10th Cir.), *cert. denied*, 364 U.S. 871 (1960).

37. *Id.* at 584.

38. 596 F.2d 936 (10th Cir. 1979).

certified union. Ethan Allen had based its refusal to bargain on allegations that the union election was invalid, having been tainted by pro-union conduct on the part of supervisory personnel. The Board, adopting the report of its director, had rejected the allegations and entered summary judgment for the union. The issue presented to the Tenth Circuit was whether the Board need hold an evidentiary hearing prior to the adoption of a regional director's report requiring an employer to recognize and bargain with a union.

In upholding the Board, the court observed that the only exception which had been timely filed was couched in such general terms as to raise no real issue of fact. Unless exceptions raise serious and substantial issues, no evidentiary hearing need be held.[39]

In *W & W Steel Co. v. NLRB*,[40] the Tenth Circuit refused to enforce a Board order which held that the company was a "successor employer"[41] for bargaining purposes, and which granted W & W's request for a decertification election. In its resolution of the issue, the court determined that the successor employer relationship did not exist where the employer could show a rational basis in fact for its doubts about union majority status.

Analyzing *NLRB v. Burns International Security Services, Inc.*[42] vis-a-vis the facts before it, the court found substantial evidence to support a doubt of union majority status at the time the plant was acquired. Special stress was laid upon the fact that the unit election had been held more than two and one half years prior to the takeover. Under such conditions, the court observed, the plant did not constitute an " 'unchanged bargaining unit' " represented by a " 'recently certified bargaining agent' " as was required in *Burns*.[43]

The court's analysis emphasized that a rational factual basis must exist in order to support a doubt of union majority status. There was no elaboration of the standards applicable to a determination that the doubt was in "good faith," but the Tenth Circuit seemed to imply that once the factual basis had been demonstrated, it would be up to the Board to show lack of a good faith doubt.

C. *Interference with Union Activities*

Timpte, Inc. v. NLRB[44] involved a distribution problem of a different type. Timpte had dismissed an employee for his refusal to abide by company directives that he refrain from using profanity and indecent language in the literature he handed out as part of his campaign for union office. The NLRB directed that the employee be reinstated, and held that where the matter concerned legitimate union-related business, the company had no right to control even " 'vulgar language, insults directed against manage-

39. 29 C.F.R. § 102.69(f) (1978).

40. 599 F.2d 934 (10th Cir. 1979).

41. Where the successor employee relationship exists, there are continuing obligations under the collective bargaining agreement so long as the certification remains valid. NLRB v. Geronimo Services Co., 467 F.2d 903 (10th Cir. 1972).

42. 406 U.S. 272 (1972).

43. 599 F.2d at 939.

44. 590 F.2d 871 (10th Cir. 1979).

ment and inflammatory appeals.' "[45]

Section 7 of the NLRA states that employees shall have the right to engage in "concerted activities for the purpose of . . . mutual aid or protection."[46] Section 8(a)(1) makes it a violation for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . ."[47] Discussing concerted activities in general, the court characterized all concerted activities as " 'protected unless unlawful, violent, in breach of contract, or indefensible.' "[48] The Tenth Circuit found generous support in the opinions of other federal district courts for its charactrization of the employee's activities as "indefensible."[49] Since the activity was not protected under the NLRA, the court denied enforcement of the Board order.

In *Climax Molybdenum Co. v. NLRB*,[50] the employer petitioned for review of a Board decision that it had violated the Act[51] by refusing to allow a union representative to consult with an employee on company time prior to an investigatory interview which might culminate in discipline of the employee. Both Climax and the NLRB relied on *NLRB v. J. Weingarten, Inc.*,[52] a recent Supreme Court decision holding that denial of representation during such an investigatory interview was a violation of an employee's right to engage in concerted activities.

The Tenth Circuit, maintaining that investigation should not be adversary in nature, refused to enlarge the *Weingarten* decision. The court concluded that prior consultation might interfere with legitimate company interests. The evidence presented conclusively demonstrated that union officials had urged employees not to provide needed information.[53] Such a policy could be particularly devastating where safety is a major concern, as it is at Climax.

In addition, the court noted that none of the employees had requested representation during the investigation. To insist that an employer donate company time when employees chose not to consult representatives on their own time was adjudged to place an unfair burden on the employer. Of course, the court added, the company must set the interview date so as to allow sufficient time for prior consultation on the employee's own time should he so desire.[54]

NLRB v. Process & Pollution Control Co.[55] involved a Board order di-

45. *Id.* at 873 (quoting the opinion of the Administrative Law Judge).
46. 29 U.S.C. § 157 (1976).
47. *Id.* § 158(a)(1).
48. 590 F.2d at 874 (quoting NLRB v. Empire Gas, Inc., 566 F.2d 681 (10th Cir. 1977)).
49. NLRB v. Garner Tool & Die Mfg., Inc., 493 F.2d 263 (8th Cir. 1974); NLRB v. Fibers Int'l Corp., 439 F.2d 1311 (1st Cir. 1971); Boaz Spinning Co. v. NLRB, 395 F.2d 512 (5th Cir. 1968); NLRB v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965); Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir. 1950).
50. 584 F.2d 360 (10th Cir. 1978).
51. 29 U.S.C. §§ 157, 158(a)(1) (1976).
52. 420 U.S. 251 (1975).
53. 584 F.2d at 363-64.
54. In dicta, the court observed that the right to union representation at the interview itself exists only if the involved employee requests representation. *Id.* at 365.
55. 588 F.2d 786 (10th Cir. 1978).

recting that the company hire, with back pay, a job applicant allegedly refused employment because of union activities. The Board further directed the company to cease from interfering with the exercise of the self-organizational rights of its employees. On appeal, the Tenth Circuit rejected company allegations that the decision was not supported by substantial evidence and limited itself to a consideration of evidentiary matters.

The company charged that the Board had erred when it refused to consider evidence which showed previous hiring of persons believed to be union members. The court agreed since anti-union animus was a basic consideration in the decision and had been established only by circumstancial evidence. The Tenth Circuit reasoned that any evidence which might tend to show an employer's course of conduct with respect to unions would be useful to the assessment of intent. "Bona fide beliefs held by a person, as well as his actual knowledge, are relevant in determining his intentions and motiviation for his actions."[56]

In addition, the court upheld a company objection to the admission of certain hearsay. Although recognizing that the rules of hearsay are less rigorously imposed upon the NLRB than upon courts, the Tenth Circuit maintained that they must be applied unless circumstances make their observance "impracticable."[57]

D. *Union Hiring Halls*

Neither the law nor court decisions forbid hiring halls operated by the union, so long as they are not operated so as to discriminate against nonunion members.

In *NLRB v. International Brotherhood of Electrical Workers Local 322*,[58] the Board found unfair labor practices where the union and the employer operated a hiring hall in a manner which effectively denied access to nonunion job applicants. Through a contractual arrangement, job applicants were required to register at the hall in order to obtain employment. While the union-operated hall was not the exclusive method through which the company could get employees, applicants hired "at the gate" were employed only temporarily and were subject to discharge when qualified applicants became available through the referral system.

The Tenth Circuit found that substantial evidence supported the Board charge of discrimination. During a period in which the company was admittedly in need of employees, nonunion job applicants were turned away from the hiring hall with a statement that no work was available. The facts indicated that with few exceptions, all union members were referred for employment while only three out of a total of 175 nonmember applicants received

56. *Id.* at 790. The court further addressed the breadth and scope of the Board order, directing that should a violation be found on remand, the order should be modified so as to limit prohibitions to violations similar to the one found. *Id.*

57. *Id.* at 791. The court found no showing that it would have been difficult to have the witness appear in person rather than receive her testimony second-hand.

58. 597 F.2d 1326 (10th Cir. 1979).

referrals.[59] Finding the discriminatory acts of the union chargeable to the employer, the Tenth Circuit held that both were in violation of the Act.[60] Additionally, the court took note of a pattern of discrimination and required that the parties take affirmative action in order to provide equal access to the hiring hall.

In *Robertson v. NLRB*,[61] the court of appeals addressed the legality of a contractual provision which required, *inter alia*, that a job applicant previously have worked for a unionized employer in order to secure preference in employment opportunity. The primary issue in the case involved a statutory construction of section 8(f)(4)[62] of the NLRA, which the Board had read as permitting the contractual provision.

The Tenth Circuit rejected the Board's analysis. It pointed out that the precise language of the statute permits only the use of objective criteria in a job referral system. Thus, a hiring hall could condition referrals upon the training of applicants, or even upon length of service with the immediate employer. The court determined, however, that priority based upon prior employment with *any* company party to a union agreement was implicitly discriminatory.

The Tenth Circuit further recognized that while preference in referral could theoretically be secured without having been a union member,[63] the hiring hall provision could foreseeably exert pressure upon nonunion applicants to join. Section 7 of the NLRA gives employees the right not only to bargain collectively, but also to refrain from so doing.[64] The court concluded that upholding the contractual provision would penalize those applicants who chose to exercise that statutory right.

E. *Union Duty of Fair Representation*

In *Bell v. IML Freight, Inc.*,[65] the Tenth Circuit significantly relaxed the criteria which govern an individual union member's right to challenge the jurisdiction of a committee created by a collective bargaining agreement. The dispute arose out of a company decision to integrate a dual seniority system into a single list. In adherence to the terms of the collective bargaining agreement, the matter was submitted to a joint employer-union committee which then approved the proposed change. Bell, alleging a loss of seniority due to the change, filed suit under section 301[66] of the Labor-Management Relations Act, claiming that the committee had exceeded its authority under the collective agreement.

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59. *Id.* at 1328 n.4. The three nonmembers who received referrals were found to have specific qualifications which may have accounted for the exception made in their case.

60. 29 U.S.C. § 158(a)(1), (a)(3), (b)(1)(A), (b)(2) (1976).

61. 597 F.2d 1331 (10th Cir. 1979).

62. 29 U.S.C. § 158(f)(4) (1976).

63. The contract provision in question did not require that the employee, in order to have preference, have been a union member, but only that he have worked for an employer who had a collective agreement with the union.

64. 29 U.S.C. § 157 (1976).

65. 589 F.2d 502 (10th Cir. 1979).

66. 29 U.S.C. § 185 (1976).

The Tenth Circuit places great reliance upon the rule governing arbitration awards as providing a guideline to determine standing in actions which challenge the jurisdiction of contract-created committees.[67] "The general rule is that a fairly represented employee may not attack an arbitration decision made in the context of a collective bargaining agreement."[68]

The court of appeals, however, rejected unfairness of representation as a prerequisite to judicial review in situations where the union is placed in a position of having to support the rights of one group of employees over those of another. In so doing, it called attention to a Third Circuit decision[69] which had recognized, in a different context, the inadequacy of union representation of two groups with conflicting interests. The court there had granted standing because of inadequate representation. The Tenth Circuit agreed with this view. Reasoning that the affected employees would otherwise be left without a remedy, the court granted them the right to present their position.

Fizer v. Safeway Stores, Inc.[70] arose as an appeal under the Labor-Management Relations Act[71] from an arbitration decision. Fizer challenged the validity of the decision, claiming that Safeway had wrongfully discharged him in violation of the collective bargaining agreement. He further claimed that the union had breached its duty to fairly represent him during the arbitration proceedings. The district court granted summary judgment for both defendants.

In upholding summary judgment for the union, the court of appeals reaffirmed its policy against interference in internal union affairs[72] and noted that the plaintiff had failed to exhaust internal remedies as required by the union constitution. Indeed, the plaintiff had made no official approach at all to the union.[73] Vague allegations of union indifference were held insufficient to show that such efforts would have been useless. The Tenth Circuit stated that the plaintiff's claims failed to meet the " 'clear and positive showing of futility' " standard[74] which governs in attempts to circumvent exhaustion requirements.

On the other hand, the court rejected summary judgment for Safeway, maintaining that failure to exhaust union remedies could not be urged by the employer as a defense in a suit for wrongful discharge.[75]

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67. 589 F.2d at 504.

68. *Id.* (citing Andrus v. Convoy Co., 480 F.2d 604, 606 (9th Cir.), *cert. denied*, 414 U.S. 989 (1973)).

69. Bieski v. Eastern Automobile Forwarding Co., 396 F.2d 32 (3d Cir. 1968).

70. 586 F.2d 182 (10th Cir. 1978).

71. 29 U.S.C. § 185 (1976).

72. 586 F.2d at 184 (citing Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir.), *cert. denied*, 415 U.S. 915 (1973)).

73. 586 F.2d at 184.

74. *Id.* at 183 (quoting Imel v. Zohn Mfg. Co., 481 F.2d 181, 184 (10th Cir.), *cert. denied*, 415 U.S. 915 (1973).

75. Exhaustion of union remedy can be used by the employer as a defense in some situations. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

F. *Arbitration*

Fabricut, Inc. v. Tulsa General Drivers[76] involved a company appeal from the district court's affirmation of an arbitration award. Pursuant to a collective bargaining agreement, a dispute involving an employee's discharge for refusal to work overtime was submitted to arbitration. Finding that the company did not have just cause for the dismissal, the arbitrator reduced the penalty to a one month suspension, and directed reinstatement of the employee. Fabricut then sued to set aside the award, asserting that the arbitrator had exceeded his contractual authority.

Although the merits of an arbitration award are generally beyond judicial review,[77] courts will not uphold an arbitration decision where it can be shown that the arbitrator has exceeded his authority under the collective bargaining agreement.[78] The question faced by the Tenth Circuit was whether that authority had been abused where, in considering a contract violation with no stated penalty, the arbitrator substituted his own penalty for the one previously imposed by the employer.

In deciding that the arbitrator acted within the bounds of his authority, the Tenth Circuit applied principles which it had earlier adopted.[79] In particular, the award may not be contrary to the express language of the agreement and must have rational support.[80] The court felt that this test had been met. An analysis of the various contract provisions showed none which mandated discharge as a penalty. Nor was the contract found to give the employer discretion to choose a penalty when none was authorized. Rational support for the decision was inferred from "the entire agreement, its context, and intent."[81] In the opinion of the court, the arbitrator, rather than changing the contract, was making it workable.

G. *Board Remedies*

Dayton Tire & Rubber Co. v. NLRB[82] arose as a challenge to a Board decision finding that the company had discharged an employee in violation of the Act[83] and requiring that the employee be reinstated with back pay. Dayton did not deny the violation, but argued that the remedy was not supported by substantial evidence. In particular, the employer charged that findings of 27.5% permanent partial disability in the employee by the State Industrial Court relieved it of any obligation to reinstate.[84]

The court ruled that Board findings control on issues before it, even

76. 597 F.2d 227 (10th Cir. 1979).

77. *Id.* at 229.

78. The standards of review applicable to arbitration decisions were set out by the Supreme Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). "[The arbitrator] does not sit to dispense his own brand of industrial justice . . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.* at 597.

79. Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977).

80. *Id.* at 694.

81. 597 F.2d at 230.

82. 591 F.2d 566 (10th Cir. 1979).

83. 29 U.S.C. § 158(a)(1), (a)(3) (1976).

84. 591 F.2d at 569.

where the findings of a state agency are inconsistent.[85] It observed, however, that in the instant case the issues before the Board differed from those presented to the State Industrial Court. Ample evidence supported the Board in its determination that, despite the findings of the Industrial Court, the employee was capable of performing his job. Citing a strong policy favoring limited review of Board decisions, the court upheld the remedy imposed.

In addition, the Tenth Circuit examined the procedures used by the Board to determine an award of back pay. The court commended the usual NLRB practice which utilizes a two-step process in unlawful discharge cases. Initially, the Board determines whether an unfair practice has been committed, and if it has, whether reinstatement with back pay is an appropriate remedy. The second step involves a hearing on the amount to be awarded, preceded by notice to the affected parties. Such notice provides the employer with an opportunity to present evidence which might affect his liability. Finding that these safeguards had not been observed in the hearing being reviewed, the court refused to honor the award.

H. *Employee Benefit Trust Funds*

In *Denver Metropolitan Association v. Journeyman Plumbers*,[86] the Tenth Circuit decided several issues which will have a significant bearing upon the future development of industry-wide employee benefit trusts. An employers' association brought an action challenging contributions made to various funds by employers who were not members of the association. In its action, the association alleged that the union and fund trustees had violated the collective agreement as well as certain statutory provisions[87] in their administration of the trust funds. The district court entered summary judgment for the defendants on the issue of contract violation and held that the association lacked standing to challenge alleged statutory violations.

Examining first the contractual claim, the court of appeals applied the usual principles of contract interpretation to determine the intent of the parties. The court found that the language of the various agreements clearly and unequivocally demonstrated a contemplation that nonassociation members be allowed to adopt the agreement.[88] Prior bargaining history, past practices, and the nature of the industry were cited as further support for the court's determination.

After deciding that the association had standing,[89] the Tenth Circuit

85. *Id.* at 570 (citing NLRB v. Western Meat Packers, Inc., 368 F.2d 65 (10th Cir. 1966); NLRB v. Stafford Trucking, Inc., 371 F.2d 244 (7th Cir. 1966); 29 U.S.C. § 160(a) (1976)).

86. 586 F.2d 1367 (10th Cir. 1978).

87. 29 U.S.C. § 186(c)(5)(B) (1976).

88. 586 F.2d at 1370. The association had argued that a third party cannot be added to a contract without the agreement of both original parties. The Tenth Circuit agreed, but reminded the association that consent can be given in advance.

89. The Tenth Circuit overruled the district court's contention that the association was not within the "zone of interest to be protected by the statute." Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970). The court reasoned that since the association was a party to the trust agreements involved and had the ability to name the employer trustees, it had sufficient interest to meet the test. 586 F.2d at 1372.

considered association arguments that nonmember employer contributions violated statutory requirements that nonmember employer contributions violated statutory requirements that "payments are to be made as specified in a written agreement," and that "employees and employers [be] equally represented" in fund administration.[90] The court called attention to the written provisions in collective agreements between the unions and outsiders which require contribution to the trusts and held that these, through incorporation, met the written agreement test. The Tenth Circuit disposed of the equal representation argument with comparable facility. Rejecting employer interpretation that the statute requires equal representation by *each* employer, the court construed it to mean only that representation of employees equal that of employers.[91]

The Tenth Circuit noted a remote possibility of abuse of the arrangement by a strong union, but concluded that this possibility was outweighed by the benefits of the industry-wide trust.

II. AGE DISCRIMINATION IN EMPLOYMENT ACT[92]

In *Schwager v. Sun Oil Co. of Pennsylvania*,[93] the Tenth Circuit provided a comprehensive discussion of the guidelines and standards to be used in establishing a prima facie case under the Age Discrimination in Employment Act (ADEA).[94] The plaintiff, a former employee of the defendant, brought an action alleging unlawful discharge because of his age. The company defended its action on the basis of economic considerations which necessitated an overall company reorganization.

Stating that the purpose and structure of the ADEA is similar to that of Title VII of the Civil Rights Act,[95] the Tenth Circuit applied the guidelines laid down in *McDonnell Douglas Corp. v. Green*.[96] It determined that under the Supreme Court standards, the plaintiff had established a prima facie case, thus shifting the burden of proof to the defendant to show a nondiscriminatory reason for the dismissal. In the court's opinion, this burden had been met. The court found ample evidence to support district court findings that the discharge was motivated by legitimate factors other than age.

In *Kentroti v. Frontier Airlines, Inc.*,[97] the court again addressed itself to the procedure to be used in establishing age discrimination under the ADEA. The plaintiff appealed from a trial court dismissal of his suit for

90. 29 U.S.C. § 186(c)(5)(B) (1976).
91. 586 F.2d at 1374-75.
92. 29 U.S.C. §§ 621-634 (1976).
93. 591 F.2d 58 (10th Cir. 1979).
94. 29 U.S.C. §§ 621-634 (1976).
95. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976).
96. 411 U.S. 792 (1973). To establish a prima facie case, the plaintiff must show that "(1) he or she is within the protected age group; (2) he or she was doing satisfactory work; (3) he or she was discharged despite the adequacy of his or her work; and (4) the position was filled by employees younger than the age of the plaintiff." 591 F.2d at 61.
97. 585 F.2d 967 (10th Cir. 1978).

wrongful discharge because of age. He claimed procedural error in that the trial judge, granting a defense motion to dismiss for failure to establish a prima facie case, considered evidence presented by the defense.

The Tenth Circuit sensibly refused to find prejudice, even though in so doing it was forced to modify its own contrary precedent.[98] "We do not," stated the court, "believe it critical here to determine which process of reasoning the trial court followed—rejecting the plaintiff's case because of [sic] *prima facie* showing had not been made, or holding that the defendant prevailed because the evidence demonstrated legitimate, non-discriminatory reasons for the defendant's actions."[99]

In *Marshall v. Sun Oil Co. v. Pennsylvania*,[100] the court focused its attention on the statutory requirement that, whenever possible, the ADEA be enforced through a process of conciliation and voluntary compliance.[101] The Secretary of Labor had filed an enforcement suit, alleging age discrimination against seven former employees of Sun Oil. The district court dismissed, holding that the plaintiff's insistence on a waiver of the statute of limitations as a condition to further efforts at negotiation violated the intent of the ADEA.

The court of appeals, agreeing that the defendant was under no obligation to waive the statute of limitations, recognized that the Act mandated a complete exploration of all avenues of informal compliance before the institution of court action.[102] In the opinion of the court, however, outright dismissal conflicted with the humanitarian purposes of the Act. The Tenth Circuit ordered the matter stayed pending further conciliation efforts.

III. EMPLOYEE RETIREMENT INCOME SECURITY ACT[103]

The sole question addressed by the Tenth Circuit in *Trippet v. Smith*[104] was whether an employee benefit plan, which was terminated prior to the effective dates of the Act, was covered by the Employee Retirement Income Security Act (ERISA).[105] The plaintiff argued that while termination of the plan occurred prior to the effective dates, distribution proceedings undertaken by the trustees subsequent to that time brought the plan within ERISA.

The Tenth Circuit could not agree with the plaintiff's broad construction of the Act. In the court's opinion, neither congressional intent nor the wording of ERISA made it applicable to a plan which has not continued in

98. Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975). In *Rich*, it was held that only after a preliminary determination that a prima facie case existed should the trial court admit the defendant's evidence.

99. 585 F.2d at 970.

100. 592 F.2d 563 (10th Cir. 1979).

101. 29 U.S.C. § 626(b) (1976).

102. Comparing age discrimination to racial discrimination, the court cited EEOC v. Zia Co., 582 F.2d 527 (10th Cir. 1978) for the proposition that a good faith effort on the part of the Secretary to effect compliance is a prerequisite to a stay order.

103. 29 U.S.C. §§ 1001-1381 (1976).

104. 592 F.2d 1112 (10th Cir. 1979).

105. 29 U.S.C. §§ 1001-1381 (1976).

existence as an "operating" plan. The court held that a "terminated plan the corpus of which is in the process of liquidation before the effective dates in ERISA is not a 'plan' as contemplated in the Act."[106]

Lynne McGowan

106. 592 F.2d at 1113.