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OVERVIEW

From September 1977 through August 1978 the Tenth Circuit decided many cases which directly or indirectly contained administrative law issues. *In re Carlson,*[1] dealing with probable cause standards for an administrative search and seizure, is the subject of a case comment which follows this overview. Seven cases will be discussed briefly in this section.

A. *Agency Access to Private Information*

The FAA by regulation[2] requires flight recorders on some airplanes, primarily for the purpose of accident investigation. In *United States v. Frontier Airlines, Inc.,*[3] the FAA sought to obtain a flight recording tape for the purpose of investigating a supposed violation of its rules during an otherwise normal flight. After deciding that a general inspection regulation promulgated by the FAA did not apply,[4] the Tenth Circuit determined that the agency had not exercised its rulemaking authority to allow use of the tapes for purposes other than accident investigation. The attempt to gain access to the information was therefore beyond the scope of the FAA's authority.[5]

B. *Private Access to Agency Information*

In *Poss v. NLRB*[6] the National Labor Relations Board unsuccessfully claimed exemption from several provisions of the Freedom of Information Act (FOIA).[7] The plaintiff, who had been terminated from her employment, filed an unfair labor practice charge against her employer which the NLRB declined

[1] 580 F.2d 1365 (10th Cir. 1978).
[2] 14 C.F.R. § 121.343 (1978).
[3] 563 F.2d 1008 (10th Cir 1977).
[4] *Id.* at 1012.
[5] *Id.* at 1013.
[6] 565 F.2d 654 (10th Cir. 1977)
[7] 5 U.S.C. §§ 551-559 (1976).

to pursue. Plaintiff's attempt to obtain information from the investigative file relating to her charge was rebuffed by the agency.

The Tenth Circuit rejected the NLRB's contention that material in the file was exempt from disclosure under several provisions of the FOIA.[8] It therefore affirmed the trial court's order for disclosure.[9]

C. *Scope of Review*

In *Hurley v. United States*[10] and *Squaw Transit Co. v. United States*,[11] the Tenth Circuit set aside decisions of the Civil Service Commission Board of Appeals and Review and the Interstate Commerce Commission, respectively, as being arbitrary and capricious. Although a reviewing court is limited in its scope of review of agency decisions, it clearly has the authority to "require the agency to adhere to its own pronouncements, or explain its departure from them."[12]

In *Rutherford v. United States*,[13] the court seemed to be applying the "arbitrary and capricious" standard to the FDA's attempts to regulate the use of Laetrile. Although new drugs must be established as safe and effective before approval, the court concluded "that the 'safety' and 'effectiveness' requirements . . . have no application to terminally ill cancer patients who desire to take the drug intravenously."[14]

D. *Black Lung Act*[15]

The Tenth Circuit addressed the merits of the appeal in

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[8] The NLRB relied primarily upon § 552(b)(7) which provides that the disclosure provisions do not apply to matters that are: "(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . . ."

[9] 565 F.2d at 659.

[10] 575 F.2d 792 (10th Cir. 1978).

[11] 574 F.2d 492 (10th Cir. 1978).

[12] *Id.* at 496.

[13] 582 F.2d 1234 (10th Cir. 1978), *cert. granted* 99 S. Ct. 1042 (1979). *Rutherford* was previously before the court in 1976. *See* Rutherford v. United States, 542 F.2d 1137 (10th Cir. 1976), and *Administrative Law Overview*, 55 DEN. L.J. 391, 392-95 (1978).

[14] 582 F.2d at 1237. The court acknowledged the concern that some patients may be victimized by "unscrupulous persons who will seek to profit by offering Laetrile as a 'cure.'" Judge Seth noted that the FDA could address the problem through regulation.

[15] The Black Lung Act, 30 U.S.C. §§ 901-941 (1976), is part of the Federal Coal Mine Health and Safety Act, 30 U.S.C. §§ 801-960 (1976).

Paluso v. Mathews[16]—whether HEW has jurisdiction to grant black lung benefits to claimants who timely filed their applications, overcoming the procedural hurdle where proof of total disability was by evidence obtained and presented after the filing deadline.

Recognizing the progressive nature of the disease and the diagnostic difficulties involved, the court held that medical evidence obtained at any time would be acceptable as proof of disability if it could be shown to relate back and indicate the presence of the disease on June 30, 1973, the filing deadline.[17] Further, a miner meeting this filing deadline would be regarded as a good faith claimant; if medical evidence tended to prove that the presence of black lung disease was *probable* on June 30, 1973, all reasonable doubts would be resolved in his favor.[18]

One could infer from its opinion in *Whitley v. Marshall*[19] that the Tenth Circuit thought that it might be unnecessarily imperialistic for an administrative law judge to hold hearings on the Island of Crete concerning a Greek citizen's claim[20] under the Black Lung Act.[21] Absent an express statutory provision to the contrary, an agency's authority may be exercised only within the territorial limits of the United States.[22] Furthermore, to the court it was "not at all clear that the Greek officials would permit such a proceeding by foreigners."[23] Thus it was quickly decided that the judge be permanently enjoined from holding the hearing on Crete.[24]

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[16] 562 F.2d 33 (10th Cir. 1977), *aff'd on rehearing*, 573 F.2d 4 (10th Cir. 1978). Judge Barrett acknowledged that a district court order remanding a case to an agency has often been held to be an interlocutory order and thus nonappealable. 573 F.2d at 8. He found the instant case distinguishable for it presented "an important issue of federalism" which involved "the interests of many potential claimants for black lung benefits." *Id.*

[17] 573 F.2d at 10.

[18] *Id.* at 11.

[19] No. 77-1583 (10th Cir. Jan. 30, 1978)(Not for Routine Publication).

[20] The claimant had worked for an American coal company in the 1930's. *Id.* at 2.

[21] *See* note 15 *supra*.

[22] No. 77-1583 at 2.

[23] *Id.* at 3.

[24] *Id.*