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Labor Law

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LABOR LAW

OVERVIEW

The labor cases treated by the Tenth Circuit during the 1977-78 survey period were of varied importance. Cases of factual interest only will be merely reported. Those of greater legal impact have received comment to highlight new trends or novel use of existing principles. The most significant decisions in the labor law area involved employee benefit trust funds discussed below in section I(G).

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

A. Concerted Activity

In *NLRB v. Empire Gas, Inc.*,[2] a driver-salesman, in protest of a unilateral change in the company bonus payment program, wrote a letter to his fellow drivers soliciting group support for a collective refusal to pump gas on certain days.[3] The National Labor Relations Board (NLRB) held that because this was concerted activity protected by section 7 of the National Labor Relations Act,[4] the discharge of the employee also violated the statute. The Tenth Circuit deferred to the decision of the Board that the letterwriting itself came within the protection of section 7,[5] but felt constrained to consider whether the partial strike activity, if carried out, would be unprotected, thereby depriving the employee of the specific protection of section 8(a)(1) and the remedy of reinstatement.[6]

Guided by the recent Supreme Court mandate to determine protected partial strike activities on a case-by-case basis,[7] the

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

[2] 566 F.2d 681 (10th Cir. 1977).

[3] The letter described seeming deficiencies in the modified plan and advocated that the drivers demonstrate solidarity by refusing to pump gas on a given day. If no company response was forthcoming, the letter proposed the same action be taken on two additional days. *Id.* at 682.

[4] 29 U.S.C. § 157 (1976).

[5] 566 F.2d at 684. In addition to the NLRB determination, the court observed that several circuits hold that individual action in soliciting group activity is concerted activity within the purview of the Act. *See, e.g.*, Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969).

[6] 29 U.S.C. § 158(a)(1) (1976).

[7] 566 F.2d at 685, 686. In Local 76, Int'l Ass'n of Machinists v. Wis. Employment

court addressed the instant case in light of the consideration that work stoppages, unless of a "far-reaching and serious kind," are generally protected.[8] After a comprehensive review of court decisions defining protected partial strike activities, the Tenth Circuit concluded that "[i]n the context of partial strikes, violence may well be the dividing line between protected and non-protected activity."[9] The court held that the activity, considered alone or in conjunction with the proposed action, was protected and granted enforcement of the Board's order.

B. Unfair Labor Practices

In *M.S.P. Industries, Inc. v. NLRB*,[10] the Board found unfair labor practices where an employer, immediately following an election in which the union prevailed, laid off several employees and reduced the working hours of others. Prior to the election, the company had followed a consistent "no-layoff policy." The employer asserted that the change in working conditions was justified by economic necessity. However, the administrative law judge weighed conflicting testimony and found that the conduct of the employer was motivated, in whole or material part, by the purpose to retaliate against its employees for organizational activities. The Board ordered reinstatement of two discharged employees and awarded those employees, as well as three others, back pay.

The court of appeals honored the fact findings, except as to a single employee, and approved the standard used by the Board. In a lengthy opinion, the Tenth Circuit stated that business justification does not immunize an employer where there is substantial evidence on the record to support an inference of discrimination.[11] Further, the court found the employer guilty of retaliatory

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Relations Comm'n, 427 U.S. 132 (1976), the Supreme Court held that states may not regulate partial strike activity, thereby overruling UAW Local 232 v. Wis. Employment Relations Bd., 336 U.S. 245 (1949).

[8] 566 F.2d at 686 (citing NLRB v. Leprino Cheese Co., 424 F.2d 184 (10th Cir.), *cert. denied*, 400 U.S. 915 (1970)).

[9] 566 F.2d at 686.

[10] 568 F.2d 166 (10th Cir. 1977).

[11] 568 F.2d at 174 (relying on NLRB v. Montgomery Ward & Co., 554 F.2d 996 (10th Cir. 1977) and Bill's Coal Co. v. NLRB, 493 F.2d 243 (10th Cir. 1974) for the proposition that economic justification is not a per se defense). The Tenth Circuit rejected a stricter test requiring that discriminatory motive "predominates." 568 F.2d at 174 n.12. *See* Stone & Webster Eng'r Corp. v. NLRB, 536 F.2d 461 (1st Cir. 1976).

conduct toward the two discharged employees of whose union activity the company was unaware. In the opinion of the court, this specific knowledge is not requisite where the circumstances demonstrate that pervasive anti-union animus motivated the conduct of the employer.[12]

In *NLRB v. MFY Industries, Inc.*,[13] the Board applied for an enforcement order after finding the employer had committed unfair labor practices[14] and had refused to bargain with a certified bargaining representative.[15] Although decided within long-established principles of labor law, the case was not without its points of interest. Following a valid recognition strike by five boiler engineers, the union won an NLRB supervised election and was certified as the bargaining agent. The employer rehired one engineer, whom it designated as a supervisor, and then asserted that under the provisions of the National Labor Relations Board Act the employer was under no obligation to bargain with a unit of only one employee, and certainly not with a unit consisting of none.[16] The administrative law judge, in an opinion adopted by the Board, held that the evidence supported finding that the refusal to reinstate the striking engineers lacked the required legitimate business explanation and thus violated the Act.[17]

The Tenth Circuit inquiry found substantial evidence on the record to support the findings of the Board.[18] The court called attention to evidence that the employer had employed other engineers on a part-time basis in the absence of the striking engineers. Further, the court observed that compliance with the city mechanical code would require a licensed engineer on duty approximately ninety-three hours a week, a requirement that could hardly be filled by a single engineer. The court granted enforcement of the Board's order to include reinstatement with make whole relief and an order to bargain in good faith.

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[12] 568 F.2d at 176. *See* Majestic Molded Prods., Inc. v. NLRB, 330 F.2d 603 (2d Cir. 1964); *see also* NLRB v. Brown-Dunkin Co., 287 F.2d 17 (10th Cir. 1961).

[13] 573 F.2d 673 (10th Cir. 1978).

[14] 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1976).

[15] 29 U.S.C. § 158(a)(5) (1976).

[16] 573 F.2d at 675. *See* NLRB v. Crispo Cake Cone Co., 464 F.2d 233 (8th Cir. 1972).

[17] 573 F.2d at 675 (citing NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967)).

[18] 29 U.S.C. §§ 160(e), 160(f) (1976).

C. *Interference with Union Activities: The No-Solicitation Rule*

In *NLRB v. National Jewish Hospital & Research Center,*[19] the Tenth Circuit granted enforcement of the Board's orders arising from the discharge of an employee for violating the employer's no-solicitation rule. The Board found that the employer's rule, confining solicitation to "non-work and non-public areas during non-working time,"[20] was overly-broad in violation of the Act.[21] Thus, the discharge of the employee for soliciting union support in public areas of the hospital also violated the Act.[22]

The Tenth Circuit, observing that it was required to alter a previously announced view[23] which had stressed the public policy of maintaining a tranquil atmosphere for hospital patients, adhered to the ruling of the Supreme Court recently announced in *NLRB v. Beth Israel Hospital.*[24] In order to strike the necessary balance between organizational rights guaranteed in the Act and the medical necessity of controlling solicitation in immediate patient care areas, the Supreme Court now supports the position of the NLRB that rigid rules prohibiting solicitation in public areas of a hospital are illegal. The effect of this decision is that strict rules against solicitation apply only to patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy rooms.

D. *Excluded Class: Agricultural Laborers*

In *NLRB v. Karl's Farm Dairy, Inc.,*[25] the Tenth Circuit rejected the Board's definition of an agricultural worker, and thus denied protection of the Act[26] to a dairy farm employee discharged for his union activities. The employer owned and operated a dairy farm and an adjacent retail outlet. The operation also processed and sold milk from at least one other dairy. The

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[19] No. 77-1061 (10th Cir. 1978).

[20] *Id.* Prior to Dec. 1975, the hospital rule permitted no solicitation without approval of the hospital administrator. The revised rule precluded solicitation except in employee only lunchrooms and cafeterias, locker rooms, restrooms and parking areas.

[21] 29 U.S.C. § 158(a)(1) (1976).

[22] *Id.* §§ 158(a)(1), 158(a)(3) (1976).

[23] In the past, the Tenth Circuit has denied enforcement of NLRB orders which permitted solicitation in areas of a hospital to which patients had access. *See* St. John's Hosp. and School of Nursing, Inc. v. NLRB, 557 F.2d 1368 (10th Cir. 1977).

[24] 554 F.2d 477 (1st Cir. 1977), *aff'd*, 98 S. Ct. 2463 (1978).

[25] 570 F.2d 903 (10th Cir. 1978).

[26] 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1976).

Board held that, although the employee worked on a dairy farm, he was not an exempt agricultural worker[27] within the meaning of the National Labor Relations Act[28] because the employee took part in processing on the farm of commodities produced by other dairy farms. Construing the exemption narrowly, in reliance on previous Tenth Circuit case law,[29] the Board maintained that processing any quantity of foreign milk was sufficient to constitute a "separate commercial operation" and the employee engaged therein nonagricultural.[30]

The court found insufficient evidence in the record before it that "foreign milk represented more than a de minimus portion of the company's operation."[31] In thus denying enforcement of the Board's order, the Tenth Circuit relied on a broader meaning of agriculture to draw the distinction between "separate commercial operation" and "farming" in a primary or secondary sense. When addressing hybrid operations in the future, the Tenth Circuit will require substantial evidence on the record that a dairy farm employee is more than incidentally involved in processing foreign milk to be characterized as a nonagricultural employee protected by the Act.[32]

E. Remedies

The sole issue addressed by the Tenth Circuit in *NLRB v. Fire Alert Co.*,[33] was the formula used by the Board for determining the amount of a backpay award. The facts were uncontested.

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[27] The NLRA exempts agricultural workers from its coverage, but contains no definition of an "agricultural laborer." Since 1960 Congress has directed, by an annual rider to the Board's appropriation, that Board determinations be guided by the Department of Labor's interpretation of "agriculture" at § 3(f) of the Fair Labor Standards Act, which provides definitions. 29 U.S.C. § 203(f) (1976).

[28] 29 U.S.C. § 152 (1976).

[29] 570 F.2d at 905 (citing NLRB v. Tepper, 297 F.2d 280 (10th Cir. 1961) for the proposition that certain dairy workers are nonagricultural employees where products handled by them were produced elsewhere than on employer's farm).

[30] Generally, the NLRB has concluded that workers who divide their time are covered by the Act if they regularly perform nonagricultural work, irrespective of the amount of time spent in the performance of each type of work.

[31] 570 F.2d at 905.

[32] *Id.* at 905, 906 (citing Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298 (1977) which held that truck drivers employed by a poultry farm are "employees" within the coverage of the NLRA). In the opinion, the Tenth Circuit distinguished the *Tepper* case, as one involving a large processing operation which received very substantial amounts of milk from other farms. *Id.*

[33] 566 F.2d 696 (10th Cir. 1977).

Following a lawful strike, the union made an unconditional offer, on behalf of all striking employees, to return to work. The employer began to recall strikers and to hire outsiders, but failed to offer reinstatement to two senior employees. The Board held the employer had discriminated between strikers in violation of the Act,[34] and ordered reinstatement and backpay to the two senior employees. The Board began to toll backpay from the point in time when the two senior employees would have been reinstated to jobs for which they were qualified had the strikers been taken back in order of seniority. In its challenge to the formula, the employer maintained that, having no seniority system, it could reinstate strikers in any order of recall. Further, the employer maintained that the backpay award predated the first act of discrimination, which the employer asserted was the hiring of outsiders.

Based on the premise that the discrimination relevant to the backpay formula was the discrimination between strikers, the Tenth Circuit upheld the Board's computation of backpay. The court observed that the employer is allowed to choose among qualified strikers so long as he acts in a nondiscriminatory manner, such as rehiring based on skill or ability.[35] Here, the court noted, the record contained the underlying suggestion that union activism was the reason for failure to reinstate. In any event, once Board proceedings have established that the employer has discriminated between strikers, the court stated the burden is then on the employer to establish any defenses it may have to the backpay formula used by the Board.

F. Arbitration

In *IBEW v. Professional Hole Drilling, Inc.*,[36] a building contractor appealed a district court judgment requiring specific performance of an arbitration award made under the terms of a collective bargaining agreement. The contractor asserted he was no longer under the jurisdiction of the arbitration committee after his company terminated operation as a sole contractor and entered a joint venture not signatory to the collective bargaining agreement. The Tenth Circuit, finding that the joint venture ob-

[34] 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1976).
[35] 566 F.2d at 698 (citing NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938)).
[36] 574 F.2d 497 (10th Cir. 1978).

tained the same subcontract held by the sole contractor, held that the employer was under a continuing duty to arbitrate as a successor employer,[37] in light of the continuity of its obligations and work force before and after the change of business identity. Further, under the facts of this case, there was an expectation created by the conduct of the employer.[38] At no time was the union notified of the change of business identity or the termination of the agreement, and, in fact, the contractor had continued to talk with the union regarding disputes arising under the collective bargaining agreement after entering the joint venture.

In deciding that the arbitration award was enforceable, the Tenth Circuit applied the two-part standard of review controlling in arbitration cases. Initially, judicial inquiry must determine whether, in fact, the parties did agree to arbitrate. If so, the decision of the arbitrator on the merits is final. Thereafter, review is strictly confined to whether the arbitrator interpreted and applied the collective bargaining agreement so that the award is rooted in the agreement.[39] The Tenth Circuit, stating that "it would be difficult to find a better example of an arbitrable dispute,"[40] granted the deference due a reasoned arbitration award. The court observed that although the award may have indirect

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[37] A successor employer may have continuing obligations under the collective bargaining agreement if there is substantial identity between the old company and the merged business. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). However, even in merger situations where the predecessor employer has sufficiently disappeared so as to relieve the successor of liability under the collective bargaining agreement, courts find the predecessor retains the duty to arbitrate. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974).

[38] "The actions of a party to a contract are to be accorded substantial weight in determining its rights and duties under the contract." 574 F.2d at 501 (citing Fanderlik-Locke Co. v. United States, 285 F.2d 939 (10th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

[39] The standard of review of arbitration cases and the deference accorded the arbitration award were enunciated in a series of cases known as the *Steelworkers Trilogy*. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). Essentially, these cases underline the federal policy to encourage collective bargaining and to foster the use of arbitration to settle labor disputes arising under the collective bargaining agreements. 574 F.2d at 503 (citing Campo Machinery Co. v. Local 1926, Int'l Ass'n of Machinists, 536 F.2d 330 (10th Cir. 1976). *See also* Butcher Workmen Local 641 v. Capitol Packing Co., 413 F.2d 668 (10th Cir. 1969)).

[40] 574 F.2d at 503.

consequences for the joint venture, "any tangential effect does not require interference with the arbitrator's award."[41]

G. *Employee Benefit Trust Funds*

In *Ader v. Hughes*,[42] the Tenth Circuit announced its view on an emerging controversy regarding the role of an impartial umpire in trust agreements established under the Labor Management Relations Act (LMRA).[43] The LMRA mandates that trust agreements must provide for a court-appointed umpire "in the event the employer and employee groups deadlock on the administration of such [trust] fund."[44] The issue confronting the court was whether proposed amendments to the trust agreement must be submitted to an impartial umpire under circumstances whereby the governing trustees are evenly divided for and against the amendments.[45] The Tenth Circuit adopted the position that amending of a trust agreement is not an act of trust fund "administration" as the word is used in the LMRA, and thus, a trust agreement may lawfully provide that disputes over proposed amendments to the trust are nonarbitrable.[46]

In the reasoning of the Tenth Circuit, analysis must begin with the recognition that the relationship between employer and employee trustees is quasi-adversarial in nature, thereby necessitating a strong employer presence on the board of trustees to

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[41] *Id.*

[42] 570 F.2d 303 (10th Cir. 1978).

[43] 29 U.S.C. § 186(c) (1976).

[44] 29 U.S.C. § 186(c)(5)(B) (1976).

[45] The trust agreements had been amended in the past. Here, two proposed amendments to the trust agreements were supported by all union trustees, and opposed by all employer trustees. One amendment would require that one employer trustee be appointed by a particular employer association, where presently that appointment is made by another employer association. The other amendment would require an employer to continue making contributions to the fund after a labor contract expires. 570 F.2d at 305.

[46] 570 F.2d at 307-09. The trial court found that the trustees had come to an LMRA deadlock on the amendments. Further, the trial court determined that appointment of an umpire was required by interpretation of the specific terms of the trust agreement, providing for appointment of an impartial umpire whenever the trustees come to a deadlock on "any question" except those "in connection with the interpretation or enforcement of any collective bargaining agreement." On appeal, the Tenth Circuit affirmed the determination of the trial court based solely on contract interpretation. Although rejecting the minority view that the court had broad equity jurisdiction over all aspects of LMRA § 302(c) trusts, the Tenth Circuit retained jurisdiction to consider the state contract interpretation claim together with the federal claim based on the doctrine of pendent jurisdiction. *Id.*

safeguard against possible abuses of power by union trustees.[47] In this adversarial setting, the court observed that an impartial umpire cannot assume the role of a trustee with the power to alter the relationship of the parties, nor can his impartial judgment serve as a substitute for the veto of a vigilant employer representative.

The court noted that the union position, urging a broad meaning of the word "administration," had been impliedly rejected by the Tenth Circuit in *Bath v. Pixler*,[48] which distinguished "legal controversy" from the "practical administration of the trust." In the opinion of the court, permitting an umpire to decide the legal effect of a particular provision would upset the balance of rights and duties struck between the employer and employees, and rewrite the agreement of the parties despite united protests of employer trustees.[49] The court expressed the view that, under the mandates of the LMRA, an impartial person must be allowed to assume a trusteelike role only for the limited purpose of breaking a deadlock on matters of practical trust administration so as to permit the trust to go forward through impasse on ordinary matters.[50]

In *Carpenters and Millwrights Health Benefit Trust Fund v. Gardineer Dry Walling Co.*,[51] the Tenth Circuit held that union membership was immaterial to an employer's contractual obliga-

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[47] *Id.* at 308 (citing Associated Contractors of Essex County v. Laborers Int'l Union of N. America, 559 F.2d 222 (3d Cir. 1977)). The NLRB takes the contrary position that the trustees, unlike collective bargaining agents, are bound to exercise their independent judgment and act solely in the interests of the fund beneficiaries, not the parties who have appointed them. Central Fla. Sheetmetal Contractors Ass'n, NLRB LAB. L. REP. (CCH) ¶ 19,107 (March 31, 1978). *See* Toensing v. Brown, 528 F.2d 69 (9th Cir. 1975) (holding that trustees of pension fund have a duty to exercise their independent judgment as fiduciaries in administering trust funds. The standard for review of decisions made by trustees then becomes whether decisions can be described as arbitrary and capricious).

[48] 283 F.Supp. 632 (D. Colo. 1968).

[49] 570 F.2d at 307.

[50] The question remains: Will this opinion affect the decision of the impartial umpire? In dicta, the court noted that, while the legality of the amendments was not an issue in this case, the amendment dealing with employer-trustee appointments is an attempt at union participation in the choice of an employer-representative, participation which has been forbidden elsewhere as contrary to the scheme of the LMRA. *Id.* at 309. *See* Associated Contractors, Inc. of Essex County v. Laborers Int'l Union of N. America, 559 F.2d 222 (3d Cir. 1977); Quad City Builders Ass'n v. Tri City Bricklayers Union 7, 431 F.2d 999 (8th Cir. 1970).

[51] 573 F.2d 1172 (10th Cir. 1978).

tion to make contributions to several employee benefit trust funds.[52] The employer's construction agreements governed the "Building Construction Industry" and did not differentiate between residential and commercial construction employees. The employer sought to establish that industry practice dictated the use of separate agreements for residential as compared to commercial building construction employees, with only the latter covered by the agreements negotiated between the union and the employer. The appellate court determined that the unsigned trust instruments referred to in the collective bargaining agreements[53] were designed to benefit all employees of all employers that contributed to the fund. Thus, the Tenth Circuit held the comprehensive agreements, fixing the employer's obligation to contribute fully and unconditionally, applied to residential and commercial construction employees, irrespective of union membership.[54] Further, the court held that the trustees have no duty to prove damages to the trust. The formula for damages is the sum of contributions the employer should have made for all its employees during the period in question.[55]

United Steel Workers Local 2098 v. International Systems & Controls Corp.,[56] involved the rights of employees following plant closure to a pension trust fund created under a collective bargaining agreement.[57] Language in the pension agreement provided that employees who had not met the eligibility requirements for retirement[58] had no right or interest in the pension fund. The Tenth Circuit held that this specific language defeated any claim asserted by employees to a present vested interest in the fund prior to actual retirement. The court recognized that the pension fund was not a mere gratuity but a type of deferred compensa-

[52] Jurisdiction over this matter was granted by 29 U.S.C. §§ 185, 301 (1976).

[53] 573 F.2d at 1175-76 (citing Local Nine, IUOE v. Siegrist Constr. Co., 458 F.2d 1313 (10th Cir. 1972), which held that the obligation to contribute arises upon signing of the collective bargaining agreement and may continue beyond the expiration of the agreement).

[54] 573 F.2d at 1177 (citing Manning v. Wiscombe, 498 F.2d 1311 (10th Cir. 1974), which held that employer was obligated to make contributions to a trust fund for nonunion employees who performed work covered by the collective bargaining agreement).

[55] 573 F.2d at 1176 (citing A to Z Rental, Inc v. Wilson, 403 F.2d 899 (10th Cir. 1969)).

[56] 566 F.2d 1135 (10th Cir. 1977).

[57] Jurisdiction over this matter was granted by 29 U.S.C. §§ 185, 301 (1976).

[58] Eligibility requirements for the pension were attainment of the age of 65 years with 15 years continuous service. 566 F.2d at 1136.

tion,[59] despite the fact that employees made no contribution to the trust fund, nor did the employer fund the trust until such time as a given employee became eligible to retire. However, in the view of the appellate court, the extent of any compensation owed to employees is limited by the terms of the contract. Therefore, the court of appeals affirmed the granting of summary judgment to the employer, thereby holding that no employee, prior to actual retirement under the conditions of eligibility for pension benefits, had any vested interest in pension benefits or trust corpus either under the agreement, or pursuant to quasi-contract.[60]

H. Federal Preemption

In *Continental Oil Co. v. State of Oklahoma,*[61] the Tenth Circuit refrained from determining its position on an unsettled point of law soon to be addressed by the Supreme Court. An employer sought a ruling that the Oklahoma Employment Security Act,[62] to the extent that it provides for compensation benefits to employees "locked out" by the employer after a lawful strike, is in direct conflict with bargaining rights protected by the National Labor Relations Act[63] and therefore is void by the doctrines of federal preemption and the supremacy clause of the Constitution.[64] The Tenth Circuit declined to reach the merits, but observed that the claim of unconstitutionality falls within the issues addressed by the Second Circuit in *New York Telephone Co. v. New York State Department of Labor,*[65] currently before the Su-

[59] *Id.* at 1138 (citing Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975); Knoll v. Phoenix Steel Corp., 465 F.2d 1128 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973); and Schneider v. Electric Auto-Lite Co., 456 F.2d 366 (6th Cir. 1972)).

[60] 566 F.2d at 1139. *But see* Daniel v. International Bhd. of Teamsters, 561 F.2d 1223 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). In this recent Seventh Circuit case, the appellate court held that a union member's interest in a pension plan was a "security" for purposes of antifraud provisions of the Securities Act of 1933, § 17(a), 15 U.S.C. § 77(q)a (1976), and the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1976). The court determined that an employee's right to receive benefits, as a form of compensation, from an employer-funded pension plan was sufficient to constitute a "security" even though it would only mature upon the happening of certain events in the future.

[61] 574 F.2d 1016 (10th Cir. 1978).

[62] OKLA. STAT. TIT. 40, § 215(e)(3) (1971).

[63] 29 U.S.C. § 141 (1976).

[64] U.S. CONST. art. VI. Although federal preemption is a strong doctrine, state regulation of industrial practices is allowable if related to local health and safety. The protection afforded this species of state legislation may shelter the payments to strikers, as it has other legislation regulating conditions of employment, such as wage and hour regulations.

[65] 566 F.2d 388 (2d Cir. 1977), *cert. granted*, 435 U.S. 941 (1978).

preme Court on *certiorari*. In that case, the court of appeals upheld a New York statute which provided for unemployment benefits to striking workers.[66]

In the Tenth Circuit case, the trial court, noting the employer's concurrent action in the state court, had dismissed with prejudice the employer's claim based on the abstention doctrine.[67] The appellate court found nothing in the record to warrant this severe action by the lower court. Thus, the Tenth Circuit ordered a remand to consider whether the doctrine of abstention has present application, and if so, to consider the alternative suggested by the employer that the federal action be held in abeyance pending determination of the state law question by the state tribunal. In light of the consideration that two years had lapsed since the action by the trial court and that both parties had fully argued the question of constitutionality, the remand encompassed directions to consider the merits of this claim in light of current circumstances.[68]

II. LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT[69]

In *Usery v. District 22, UMW*,[70] the Tenth Circuit denied a union member's motion to intervene in election certification pro-

[66] After a lengthy review of legislative history, the Second Circuit concluded that Congress did not intend to preempt state regulation of genuine employment compensation to strikers as a form of legitimate social policy. The public policy underlying the New York statute is declared to be as follows:

"Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state." 566 F.2d at 393 n.5 (citing N.Y. LAB. LAW § 501 (1977)). The Director of the Unemployment Insurance Division of the New York Department of Labor testified at trial that the three most important objectives of the statute were: (1) to "cushion the economy" by keeping in circulation money which the strikers would ordinarily spend on food, housing and the like; (2) to aid the strikers to pay essential expenses; and (3) to maintain a labor force for the struck employer until the strike is over. 566 F.2d at 363 n.5.

The First Circuit, which considered the point of law in two cases but found the record inadequate to decide the issue, considered the critical questions to be: (1) whether the payments reflect a "deeply rooted state interest;" and (2) assuming such a state interest, is there too great a frustration of federal purpose to leave the parties as it finds them to permit the free play of economic forces. Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973); ITT Lamp Div. v Minter, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971).

[67] 574 F.2d 1019 (citing England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964)).

[68] 574 F.2d at 1019.

[69] 29 U.S.C. § 481 (1976).

[70] 567 F.2d 972 (10th Cir. 1978).

ceedings initiated by the Secretary of Labor pursuant to provisions of the Labor-Management Reporting and Disclosure Act (LMRDA).[71] Seeking to challenge the certification of a supervised election for union officers,[72] the deposed incumbent asserted grounds previously investigated by the Secretary and determined to be without merit.[73] The Tenth Circuit concluded that certification of election results is encompassed within the principle of limited intervention enunciated in *Trbovich v. United Mine Workers*,[74] which governs in election challenges. Thus, the court ruled, the LMRDA,[75] by granting "exclusive" post-election remedies to the Secretary, bars individual union members from initiating by intervention grounds already screened and eliminated by the Secretary.[76] The court observed that the provision for exclusive enforcement by the Secretary is an important device for eliminating frivolous complaints and consolidating meritorious ones, thereby "avoiding continuous challenges and their attendant delays."[77] The screening mechanisms established in the LMRDA cannot be circumvented by a deposed candidate seeking to vindicate his own personal interest, the court of appeals stated.

III. Fair Labor Standards Act[78]

In *Marshall v. Security Bank and Trust Co.*,[79] the Tenth Circuit rejected the standard used by the lower court to determine whether a bank's pay disparity between sexes violated the

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[71] 29 U.S.C. § 482(c) (1976). The LMRDA, known as the Landrum-Griffith Act of 1959, regulates the internal affairs of labor unions.

[72] A prior election was set aside as invalid. *See* Usery v. Local 22, UMW, 543 F.2d 744 (10th Cir. 1976).

[73] 567 F.2d at 973. The court of appeals noted that the challenges by the deposed incumbent were considered very carefully by the Secretary, and thereafter reviewed by the district court. The reasons given for the Secretary's determination were held to be sufficient in light of the controlling criteria (citing Dunlop v. Bachowski, 421 U.S. 560 (1975)).

[74] 404 U.S. 528 (1972). In *Trbovich*, the Supreme Court held that the LMRDA does not bar a union member from intervening in an election challenge to the extent that the intervention seeks to present evidence and arguments in support of the Secretary's complaint.

[75] 29 U.S.C. § 483 (1976).

[76] 567 F.2d at 975, 976.

[77] *Id.* (citing Brennan v. Silvergate Dist. Lodge 50, IAM, 503 F.2d 800 (9th Cir. 1974), and the dissenting opinion of Judge Kalodner in Hodgson v. Carpenters Resilient Flooring Local 2212, 457 F.2d 1364, 1371-72 (3d Cir. 1972).

[78] 29 U.S.C. §§ 201-219 (1976).

[79] 572 F.2d 276 (10th Cir. 1978).

equal pay for equal work provisions of the Fair Labor Standards Act (FLSA).[80] The trial court found that, although the employer had no formal training program, the pay differential was appropriate as to certain male tellers and supervisors who had extra and different duties and were being trained in all aspects of the banking business for future placement in managerial positions.[81]

The Tenth Circuit acknowledged that a training program, if bona fide, constitutes an exception to the FLSA.[82] However, the court noted promotional opportunities and subjective employer evaluations, standing alone, are not equivalent to a "bona fide training program," and indeed, are immaterial factors in an equal pay suit.[83] In the absence of a "bona fide training program," the Tenth Circuit held that the sole issue presented was whether, in fact, there was unequal pay for essentially equal work. The court of appeals termed the trial court's findings inadequate and remanded with directions to limit the issue as prescribed in the opinion.

In *Usery v. Fisher*,[84] the Secretary of Labor sought to enforce a consent decree by means of civil contempt proceedings. By the terms of the consent decree, Fisher had agreed to pay his employees sums due for past violations of the minimum wage and overtime compensation provisions of the FLSA.[85] The trial court had denied the Secretary's petition for enforcement, reasoning that the consent decree was in effect a "money judgment," and that, by virtue of the federal statute[86] and the provisions of the Colorado Constitution proscribing imprisonment for debt,[87] the trial

[80] 29 U.S.C. §§ 206(d)(1), 215(a)(2) (1976).

[81] 572 F.2d at 278.

[82] 29 U.S.C. § 213 provides that definitions will be found in regulations promulgated by the Secretary of Labor. In the Secretary's interpretation of the provisions relating to training programs, a "bona fide training program" constitutes an exception to the FLSA. 29 C.F.R. § 800.148 (1978).

[83] 572 F.2d at 279 (citing Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974)).

[84] 565 F.2d 137 (10th Cir. 1977).

[85] 29 U.S.C. § 207 (1976).

[86] 28 U.S.C. § 2007(a) provides, in pertinent part: "A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished."

[87] COLO. CONST., art. II, § 12, provides as follows: "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases of tort or where there is a strong presumption of fraud."

court had no authority to adjudge Fisher in contempt of court for his default on installments due under the consent decree. The trial court alternatively concluded that, even if it had discretionary authority to hold Fisher in contempt, it would not do so because the Secretary had not resorted to execution or garnishment to enforce its money judgment.

The Tenth Circuit reversed, holding that a consent decree, entered into to resolve violations of the FLSA, is purely equitable in nature, in light of its dual purpose to remedy economic injury to employees and to correct an offense against the public interest. "Should Fisher be held in civil contempt and imprisoned," the court stated, "it would not be imprisonment for debt, but rather for his failure to comply with an order of court."[88] Thus, the Tenth Circuit adopted the majority view that district courts not only have the power but the duty to compel back pay orders in civil contempt proceedings, the "proper means for ensuring compliance"[89] with the FLSA.

Jan Bernstein

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[88] 565 F.2d at 139.

[89] *Id.*