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LABOR LAW

OVERVIEW

Few labor cases were presented to the Tenth Circuit during the 1976-1977 survey period. Those cases brought before the court were factually routine and afforded little opportunity for the court to set new trends or to refine existing principles. The treatment herein, therefore, is summary.[1]

I. NATIONAL LABOR RELATIONS ACT—LABOR MANAGEMENT RELATIONS ACT[2]

A. *Bargaining Orders*[3]

In *Ann Lee Sportswear, Inc. v. NLRB*,[4] the court of appeals held that there was substantial evidence[5] to support the Board's finding that the company's actions were proscribed under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[6] The Board had overruled the administrative law judge's recommendation for a new election and had ordered the company to bargain. In upholding the order, the court relied on its prior broad reading of the Board's authority to evaluate the necessity for a bargaining order to overcome the influence of unfair labor practices.[7] The court noted that, although the evidence as to the impact of the unfair labor practices on the election might appear sparce,[8] "[t]he same conduct in a small, closely knit unit, be-

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[1] Three unpublished cases are not discussed in this overview: Lanning v. Kramer, No. 75-1947 (10th Cir., July 2, 1977) (Not for Routine Publication) (Fair Labor Standards Act); NLRB v. Allied Meat, No. 76-1072 (10th Cir., Apr. 2, 1977) (Not for Routine Publication) (bargaining order); Diamond Crystal Salt v. NLRB, No. 76-1091 (10th Cir., Mar. 31, 1977) (Not for Routine Publication) (bargaining order).

[2] 29 U.S.C. §§ 141-144, 151-168, 171-182, 191-197, 557 (1970).

[3] 29 U.S.C. § 160(e) (1970).

[4] 543 F.2d 739 (10th Cir. 1976).

[5] *Id.* at 742 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)).

[6] 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1970).

[7] 543 F.2d at 743. The Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) affirmed the authority of the Board to go beyond the statutory cease-and-desist order when deemed necessary and to fashion the appropriate remedy, including a bargaining order, to overcome the effects of unfair labor practices. For Tenth Circuit interpretations of the authority conferred in *Gissel*, see NLRB v. Okla-Inn, 488 F.2d 498 (10th Cir. 1973); NLRB v. Wylie Mfg. Co., 417 F.2d 192 (10th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

[8] Thirteen out of twenty employees had signed authorization cards. The union lost the election five to twelve. 543 F.2d at 741.

cause of such smallness, might render a fair election unlikely."[9]

On much the same reasoning and case authority, the court, in *NLRB v. Montgomery Ward & Co.*,[10] upheld the Board's finding of unfair labor practices and enforced the bargaining order. Because the union held a majority by only one set of authorization cards, posing a danger of disenfranchising a majority of employees, the court modified the bargaining order to include notice to the employees of their statutory right[11] to petition for a new election.[12]

In *NLRB v. John Zink Co.*,[13] the Board petitioned the court to have the defendant company held in civil contempt for violating the court's 1973 order enforcing an NLRB order.[14] The matter was referred to a master from whose decision both parties appealed. The court held that the Board must establish a violation of a judicial enforcement order by clear and convincing evidence and that the master's findings of fact, unless clearly erroneous, were binding.[15] The court upheld the master's findings and adopted the master's recommendation for a cease-and-desist order because there was "a reasonable expectation that the wrong would be repeated."[16]

B. *Secondary Boycotts*[17]

Carpenters District Council of Southern Colorado v. NLRB[18] arose from an NLRB order holding that the recognition picketing of a primary construction contractor and the fining of two union employees of a neutral subcontractor for working behind the picket line evidenced an impermissible secondary objective. The administrative law judge had found that the picketing ostensibly met the criteria enunciated in *Moore Dry Dock*, thereby raising

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[9] *Id.* at 744 (citing NLRB v. Scoler's Inc., 466 F.2d 1289 (2d Cir. 1972)).

[10] 554 F.2d 996 (10th Cir. 1972).

[11] 29 U.S.C. § 159(c)(1)(A) (1970).

[12] 554 F.2d at 1003.

[13] 551 F.2d 799 (10th Cir. 1977).

[14] *See* NLRB v. John Zink Co., No. 74-1254 (10th Cir., June 22, 1973) (Not for Routine Publication).

[15] 551 F.2d at 801 (citing W.B. Johnston Grain Co. v. NLRB, 411 F.2d 1215 (10th Cir. 1969)).

[16] 551 F.2d at 804.

[17] 29 U.S.C. § 158(b)(4)(i)-(ii)(B) (1970).

[18] 560 F.2d 1015 (10th Cir. 1977).

an inference of primary activity.[19] He had concluded, however, that the total circumstances dispelled the inference and disclosed an intent to enmesh the neutral subcontractor and its employees in the primary dispute.[20] The Board had affirmed those findings and conclusions.

The court ruled that the determination of intent was essentially factual and accepted the Board's findings as supported by substantial evidence.[21] The court concurred in the Board's ruling that, in this context, the fines imposed on the union members did not meet legitimate internal union interests.[22] It also declined to extend the related-work doctrine[23] to construction industry picketing.[24]

C. *Interference with Union Activities:*[25] *The No-Solicitation Rule*

The issue in *St. John's Hospital & School of Nursing v. NLRB*[26] was the extent to which the admittedly special circumstances inherent in a hospital environment permit modification

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[19] Sailors Union of the Pac. (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950). The criteria are:

> (a) The picketing is strictly confined to times when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business on the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Id. at 549 (emphasis added).

[20] 560 F.2d at 1018-19 (citing National Woodwork Mfrs. Ass'n. v. NLRB, 386 U.S. 612 (1967); Northeastern Washington-Northern Idaho Bldg. & Constr. Trades Council, 152 N.L.R.B. 975 (1965)). The administrative law judge found the following specifically indicative of secondary objectives: photographing the site and fining union members for working behind the picket on days when the primary employer was absent from the site; the hours of picketing; and the union's failure to approach the primary employer for an agreement prior to picketing. 560 F.2d at 1019 (citations omitted).

[21] 560 F.2d at 1019 (citing NLRB v. Pipefitters Local 638, 429 U.S. 507 (1977)).

[22] 560 F.2d at 1020 (citing Scofield v. NLRB, 394 U.S. 423 (1969)).

[23] The doctrine derives from IUE Local 761 v. NLRB, 366 U.S. 667 (1961), wherein the Supreme Court held that the distinction between primary and secondary picketing turned on the relationship between the normal operations of the primary employer and the work performed by the secondary employees. The issue arose over picketing of a reserved gate at a General Electric plant.

[24] 560 F.2d at 1020 (citing NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951)).

[25] 29 U.S.C. § 158(a)(1) (1970).

[26] 557 F.2d 1369 (10th Cir. 1977).

of established standards governing solicitation rules.[27] The hospital rule prohibited solicitation on work time in both patient and visitor access areas and in work areas. It also prohibited distribution of union material in those same areas. Solicitation and distribution were limited effectively to nonworking, employee-only areas, such as the employee cafeteria.

The NLRB agreed that legitimate hospital purposes permitted prohibition of distribution and of solicitation, even on nonwork time, in strictly patient care areas, such as patients' rooms, x-ray rooms and therapy rooms. The Board reasoned, however, that patients well enough to frequent hallways, lounges, and public areas of the hospital were well enough to withstand any "unsettling effects" of union publicity. The Board further decided that solicitation could not be restricted in employee-only working areas.

The court of appeals upheld the Board's ruling to the extent that the rule prohibited solicitation and distribution in work areas where there was "no commingling of patients and employees."[28] The Board's ruling as to patient access areas, however, turned upon an evaluation of the relative condition of each patient, which the Tenth Circuit stated was well outside the recognized expertise of the Board.[29] The court observed inconsistencies between the Board's rationale in this case and the recent *Mount Airy Foundation*[30] ruling.

The Tenth Circuit further ruled that the hospital's interest in purely commercial areas, such as public cafeterias and gift shops, was not affected by their location in a hospital, thereby permitting a prohibition on solicitation and distribution in these areas.[31] *NLRB v. Beth Israel Hospital*[32] was distinguished largely

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[27] Rules forbidding solicitation during nonworking time and distribution of union literature in nonworking areas during nonworking time are presumptively invalid. Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962).

[28] 557 F.2d at 1376.

[29] *Id.* at 1373.

[30] 217 N.L.R.B. 802 (1975). In that case the Board declined to distinguish between "direct" and "indirect" patient care for unit-determination purposes, as all employees were involved in patient care. The Tenth Circuit commented that this interrelation of operations applied equally to an attempt to distinguish patient-care and nonpatient-care areas. 557 F.2d at 1373 n.6.

[31] 557 F.2d at 1375 (citing Marriott Corp. (Children's Inn), 223 N.L.R.B. 978 (1976); McDonald's Corp., 205 N.L.R.B. 404 (1973)).

[32] 554 F.2d 477 (1st Cir. 1977).

on "the very substantial employee use" of the cafeteria and coffee shop and the apparent absence of comparable employee-only areas.[33]

D. *Jurisdictional Disputes*[34]

Sheet Metal Workers Local 49 v. Los Alamos Constructors, Inc.[35] involved a determination of the appropriate forum for settlement of a dispute over the company's division of work between sheet metal workers and ironworkers. Plaintiff union filed a grievance with the sheet metal industry dispute forum, the National Joint Adjustment Board [NJAB], as provided for in its collective bargaining agreement with the defendant. The company declined to participate in the hearing on jurisdictional grounds. The trial court refused to enforce the resulting award against the company on the grounds that the Impartial Jurisdictional Disputes Board [IJDB] of the Building and Trades Council, AFL-CIO, with whom all three parties had an agreement to submit jurisdictional disputes, was the appropriate forum. The Tenth Circuit affirmed.

The court of appeals dismissed the union's claim of limitation on the court's authority to overrule an arbitral decision[36] on the basis that the issue was not the arbitrability of the jurisdictional dispute, but the proper forum for a binding determination. In rejecting the jurisdiction of the NJAB, the court, relying heavily on the rationale in *Local 416 Sheet Metal Workers v. Helgesteel Corp.*,[37] stated that both prior case law[38] and the collective bargaining agreement itself[39] required inquiry into pertinent out-

[33] 554 F.2d at 1375-76 n.7. The Seventh Circuit recently ruled opposite to the Tenth Circuit on two major points. First, a hospital may prohibit organizational activities in immediate patient care areas, but not in other patient access areas. Second, the primary purpose of a hospital is patient care. As such, the more relaxed retail standards do not apply to purely commercial areas. Lutheran Hosp. of Milwaukee, Inc. v. NLRB, 82 LAB. CAS. (CCH) ¶ 10,165 (1977).

[34] 29 U.S.C. §§ 185(a), 185(c) (1970).

[35] 550 F.2d 1258 (10th Cir. 1977).

[36] The courts "have no business overruling [an arbitrator] because their interpretation of the contract is different from his" as long as the award "draws its essence from the collective bargaining agreement." United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599, 597 (1960).

[37] 507 F.2d 1053 (7th Cir. 1974).

[38] Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157 (1966), *rehearing denied*, 385 U.S. 1032 (1967); Sheet Metal Workers v. Aetna Steel Prods. Corp., 359 F.2d 1 (1st Cir.), *cert. denied*, 385 U.S. 839 (1966).

[39] "Agreements, national in scope between Sheet Metal Workers International Asso-

side agreements. In its examination of the documentary evidence, the court ruled that both unions, through affiliation, were bound by the Trades Council constitution to the exclusive jurisdiction of the IJDB.[40] All of the parties were further bound by their separate agreements with the Council.[41] As additional support for its position, the court noted the deference accorded IJDB decisions by the NLRB[42] and the conditions under which this deference is permissible.[43]

In response to the union's contention that section 10(k) of the National Management Relations Act[44] demonstrates congressional intent for voluntary jurisdictional-dispute settlement, the court cited case authority indicative of the need for a binding decision when voluntary attempts fail.[45] The court also dismissed the union's claim that the defendant's failure to petition the IJDB when the dispute arose estopped it from raising the jurisdictional claim at trial.[46]

II. LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT[47]

In a case of first impression, the Tenth Circuit in *Usery v. District 22, UMW*[48] ruled that the union's preliminary support requirements[49] for qualification as a candidate for district and subdistrict elections violated the "reasonable opportunity" standard established in the Labor-Management Reporting and Dis-

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ciation and other international unions, covering work jurisdiction . . . shall be respected and applied by the employer . . . . " 550 F.2d at 1262.

[40] Article X of the constitution provides: "All jurisdictional disputes between or among affiliated . . . unions . . . and employers shall be settled and adjusted according to the present plan established by the Building & Construction Trades Department . . . . Said present plan . . . shall be recognized as final and binding . . . . " *Id.* at 1264.

[41] *Id.*

[42] *Id.* (citing Don Cartage Co., 160 N.L.R.B. 1061 (1966)).

[43] 550 F.2d at 1264 (citing Collyer Insulated Wire, 192 N.L.R.B. 837 (1971)).

[44] 29 U.S.C. § 160(k) (1970).

[45] 550 F.2d at 1263 (citing NLRB v. Radio & TV Broadcast Engineers Local 1212, 364 U.S. 573 (1961)).

[46] 550 F.2d at 1265.

[47] 29 U.S.C. § 481 (1970).

[48] 543 F.2d 744 (10th Cir. 1976).

[49] Candidacy for a district office required nomination by five locals within the 16-local district. Candidacy for a subdistrict office required nomination by three locals within the subdistrict. Subdistrict One was composed of four locals in Wyoming. The 12 locals of Subdistrict Two were scattered throughout Utah and Arizona. Each local was permitted to nominate one person for each available position. It was, therefore, possible for a candidate representing a substantial number of employees to fail to qualify. There could be only one candidate for subdistrict offices in Wyoming. *Id.* at 747-48.

closure Act.[50] The court recognized the statutory intent of insuring a "free and democratic election"[51] and found that the statutory standard did not differ greatly from the standard enunciated in *Storer v. Brown*[52] and *Williams v. Rhodes*[53] which governs in political elections. Although the UMW constitution had been amended immediately after the 1973 elections at issue, so that the exact situation could not recur, the court reluctantly ordered new elections for the positions which carried four-year terms.

III. NORRIS-LA GUARDIA ACT[54]

Utilities Services Engineering v. Colorado Building & Construction Trades Council[55] involved an allegation of conspiracy in violation of the Sherman Antitrust Act and a petition to enjoin picketing. Utilities Services was a non-union contractor which employed no one the union wished to represent. Utilities Services refused to sign an agreement which was not limited to a particular site and which would have required their subcontractors to honor area wage standards. The defendant picketed Utilities' worksite on Johns-Manville property. The picketing caused plaintiff Blackington & Decker's 450 union employees to walk off the job at another Johns-Manville site located over one mile away. At the hearing for a temporary restraining order, the trial court made no express ruling on the legality of the agreement.[56] Without admitting evidence, the court dismissed the petition for a temporary restraining order on the grounds that provisions of the Norris-La Guardia Act prohibited such relief. Plaintiffs appealed the denial of both the temporary restraining order and a hearing for a preliminary injunction.[57]

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[50] "A reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) . . . . " 29 U.S.C. § 481(e) (1970).

[51] 543 F.2d at 749 (citing Wirtz v. Local 153, GBBA, 389 U.S. 463 (1968); Wirtz v. Motel & Club Employees Local 6, 391 U.S. 492 (1968)).

[52] 415 U.S. 724 (1974).

[53] 393 U.S. 23 (1968).

[54] 29 U.S.C. §§ 101-115 (1932).

[55] 549 F.2d 173 (10th Cir. 1977).

[56] The Sherman antitrust action is pending in district court. Utilities Servs. Eng'r v. Colorado Bldg. & Constr. Trades Council, No. 76-M-447 (D. Colo., filed May 23, 1976).

[57] Plaintiffs simultaneously filed a secondary boycott charge with the NLRB. The administrative law judge ruled that the agreement, which exempted employees in a collective bargaining relationship and which was not limited to the jobsite, was not designed to

After reviewing relevant case authority,[58] the Tenth Circuit concluded that the controversy arose from a labor dispute within the meaning of the statute.[59] Since admittedly no fraud or violence marred the publicity picketing and, inasmuch as the pickets had been removed, obviating any immediate threat of harm, the court found no grounds for interference under 29 U.S.C. section 104.[60]

The court also dismissed plaintiff's claim that an injunction should issue on the allegation of an unlawful agreement. Mere allegation of a statutory violation has repeatedly been held insufficient to overcome the Norris-La Guardia proscription on injunctions.[61] The court distinguished *Allen Bradley Co. v. IBEW* on its facts.[62] Although the Supreme Court recently ruled that a union is subject to antitrust laws in negotiating agreements with contractors relative to subcontractors,[63] the Court did not address the propriety of an injunction where the agreement is found to be illegal.[64] The Tenth Circuit, therefore, declined to anticipate that

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preserve unit work or to maintain area standards. The thrust, instead, was to foster "top-down" organizing in violation of sections 8(3) and 8(b)(4) of the NLRA. The administrative law judge relied heavily on Connell Constr. Co. v. Plumbers and Pipefitters Local 100, 421 U.S. 616 (1975); *see* n.63, *infra*.

[58] 549 F.2d at 175, 176 (citing New Negro Alliance v. Sanitary Grocery Co., 202 U.S. 552 (1938); Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960)).

[59] 29 U.S.C. §§ 113(a), 113(c) (1970).

[60] 549 F.2d at 177 (citing Taxi-Cab Drivers Local 889 v. Yellow Cab Operating Co., 123 F.2d 262 (10th Cir. 1941)).

[61] Railroad Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960) (Sherman Act); Railroad Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957) (Sherman Act); Milk Wagon Drivers' Local 753 v. Lake Valley Farm Prods., 311 U.S. 91 (1940) (Sherman Act); Lee Way Motor Freight Lines v. Keystone Freight Lines, 126 F.2d 931 (10th Cir. 1942) (Motor Carrier Act).

[62] 325 U.S. 797 (1945). The Supreme Court ruled that an injunction could issue where the union, with a view to increasing members' wages, combined with electrical contractors and manufacturers to restrain competition in the marketing of electrical goods. The effect of the agreement was to bar the sale within New York City of electrical equipment manufactured elsewhere.

[63] Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975). *Connell* arose out of facts nearly identical to those in *Utilities Services*. In a five-to-four decision, the Court ruled that the agreement "indiscriminately excluded non-union subcontractors from a portion of the market" irrespective of the source of their competitive advantage, if any. *Id.* at 623. The Court remanded for a determination of whether the agreement violated the Sherman Act.

[64] *Id.* at 637 n.19.

the Supreme Court would retreat from prior rulings holding allegations alone insufficient to justify interference.[65]

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[65] 549 F.2d at 178.