

February 2021

## Labor and Employment Law

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### Recommended Citation

Stewart Beyerle, Labor and Employment Law, 63 Denv. U. L. Rev. 395 (1986).

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## LABOR AND EMPLOYMENT LAW

### OVERVIEW

During the 1984-85 survey period, the Tenth Circuit resolved appeals concerning several areas of labor and employment law. In employment law, the court considered employment-at-will arguments based upon Colorado and New Mexico law.<sup>1</sup> In the traditional areas of labor law, the Tenth Circuit upheld the findings and conclusions of the National Labor Relations Board (NLRB or Board) and enforced the Board's order in each labor case. When certain employers refused to bargain with the certified employee representative, the court upheld the Boards use of presumptions, hearing criteria, and discretion in the determination of an appropriate bargaining unit.<sup>2</sup> The court applied the current standard for determining the existence of representation election misrepresentations, despite the Board's repeated changes of the standard in recent years. When the court considered the issue of entitlement to disability benefits while a strike is in progress, the court found the benefits to be an accrued obligation of the company — unlike wages.<sup>3</sup> The court's decision emphasized labor law (employer retaliation for union activity) rather than contract law. When faced with an organization that acted like a local labor organization the court did not hesitate to call it a local labor organization, subjecting it to the rigors of the Labor-Management Reporting and Disclosure Act.<sup>4</sup> The court focused on the purposes of the Act: to give union members a say in their union's affairs and to ensure union democracy.

In each labor decision the court attempted to construe labor-management rights, conduct, and rules in light of the purposes of the relevant statute. The Labor Management Relations Act is an enabling statute, recognizing collective bargaining and employee representation as in the public interest. Although the NLRB has wide discretion, the Tenth Circuit has decided in favor of employee rights and collective bargaining. The court does not seem willing to limit these objectives without a clear mandate.

The Tenth Circuit's approach to labor issues was traditional and straightforward. The court was unlikely to be swayed by arguments of contractual waiver, conduct beyond the agency's scope of authority, or artful statutory construction. The court's goal was to decide each case in conformance with the objectives of national labor policy. Each court should strive to do the same.

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1. *Garcia v. Aetna Finance Co.*, 752 F.2d 488 (10th Cir. 1984); *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884 (10th Cir. 1985).

2. *NLRB v. Foodland*, 744 F.2d 735 (10th Cir. 1984); *NLRB v. DPM of Kansas, Inc.*, 744 F.2d 83 (10th Cir. 1984).

3. *Conoco, Inc. v. NLRB*, 740 F.2d 8111 (10th Cir. 1984).

4. *Donovan v. National Transient Div.*, 736 F.2d 618 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 781 (1985).

## I. EMPLOYER'S REFUSAL TO BARGAIN

The Tenth Circuit decided two cases where employers refused to bargain with recently certified unions. In both cases the court upheld findings of the National Labor Relations Board, holding that the employers had committed unfair labor practices, that the representation election results were valid and ordering the employers to bargain with the unions.

A. *Election Misconduct: NLRB v. DPM of Kansas, Inc.*

In *NLRB v. DPM of Kansas, Inc.*,<sup>5</sup> the union lost an election to represent various DPM employees but filed objections to the election. The union alleged that DPM had interfered with the election by instituting a job attendance bonus just prior to the election, and by adjusting an employee's vacation time. After investigation, the Board adopted the regional director's recommendation that the election results be set aside and a new election be held. The union won the second election, but the employer objected, citing alleged union misrepresentations at the time of balloting. The Board overruled the objections, and certified the union.<sup>6</sup> The company refused to bargain with the union, causing the union to file an unfair labor practice (ULP) charge. The Board found the employer in violation of sections 8(a)(1) and (5) of the National Labor Relations Act,<sup>7</sup> and sought enforcement in the Tenth Circuit.

With respect to the initial action, the Tenth Circuit stated that when an employer provides an economic benefit to its employees, as DPM had, just before a representation election is held, such an action is "suspect" as an intentional attempt to influence the election's outcome.<sup>8</sup> The United States Supreme Court has termed well-timed benefits or inducements offered by an employer prior to an election "the suggestion of a fist inside the velvet glove."<sup>9</sup> Noting that the instant dispute concerned the Board's inferences and legal conclusions drawn from DPM's election time bonuses, rather than a factual dispute over what actually occurred, the Tenth Circuit found no abuse of discretion by the Board, and upheld its ruling.<sup>10</sup>

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5. 744 F.2d 83 (10th Cir. 1984).

6. *Id.* at 85.

7. 29 U.S.C. §§ 158(a)(1), (a)(5) (1982).

8. 744 F.2d at 85.

9. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) ("Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.")

10. 744 F.2d at 85. For similar Tenth Circuit holdings, see *Crown Cork & Seal Co., Inc. v. NLRB*, 659 F.2d 127, 130 (10th Cir. 1981) (The union made pre-election promises of benefits should it be elected, which the court refused to analogize to similar employer conduct — for if the union is defeated the union will be unable to retaliate. "When an employer promises to improve working conditions if [its] employees reject an organizing union, the employees' freedom of choice in the election is interfered with and the election will be set aside."), *cert. denied*, 454 U.S. 1150 (1982); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1000-01 (10th Cir. 1977) (pre-planned wage increases announced after union organizational effort underway violates section 8(a)(1)); *NLRB v. Tonkawa Ref. Co.*, 434 F.2d 1041 (10th Cir. 1970) (the employer violated section 8(a)(1) "by announcing and

DPM's objections to the second election regarding alleged union pre-election misrepresentations of fact involved an unclear area of the law in which the Board has vacillated between differing standards for election conduct. During implementation of the Wagner Act<sup>11</sup> and the early years of the Taft-Hartley amendments, the NLRB did not attempt to regulate campaign propaganda. The NLRB concentrated its efforts on coercive conduct, believing that employee-voters would recognize propaganda for what it was, and discount it.<sup>12</sup> Gradually, the Board developed the position that elections should be held as close to "laboratory conditions" as possible.<sup>13</sup> Later, the Board set aside elections on a case-by-case basis, such as when employees were deceived<sup>14</sup> or when there was a severe impairment of free and informed choice.<sup>15</sup>

In 1962, the election standard governing the truth or falsity of campaign propaganda was refined in *Hollywood Ceramics Co.*,<sup>16</sup> No longer did a party need to show an intent to mislead. Instead, the alleged misrepresentation need only have been a "substantial departure from the truth" preventing other parties from "making an effective reply," which could "reasonably be expected to have a significant impact on the election."<sup>17</sup>

The Board reversed this position in 1977, in *Shopping Kart Food Mar-*

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granting wage increases in order to induce employees to reject the designation of a union as a bargaining agent in a pending representation election."); *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 484-85 (10th Cir. 1967) (pre-election promise of wage increases if employees withdrew from union); *American Sanitary Prods. Co. v. NLRB*, 382 F.2d 53, 57-58 (10th Cir. 1967) (the employer changed pay periods, instituted an incentive pay program for efficient performance, and granted a paid holiday on employees' birthdays); *Betts Baking Co. v. NLRB*, 380 F.2d 199, 203 (10th Cir. 1967) (employer granted a wage increase and retirement benefits following the start of a union drive), *modified on other grounds*, 428 F.2d 156 (10th Cir. 1970); *NLRB v. Albuquerque Phoenix Express*, 368 F.2d 451, 454 (10th Cir. 1966) (employer unilaterally granted wage increases during a union organizational effort); *Crown Tar and Chem. Works, Inc. v. NLRB*, 365 F.2d 588, 589-90 (10th Cir. 1966) (Pre-planned pay raises were announced at the same time the union drive was underway. "The granting of economic benefits by the unilateral action of an employer while union organizational efforts are underway, or while a representation election is pending, is a violation of Sections 8(a)(1) and 8(a)(5) of the Act . . . . It follows that the employer must bargain with the union."); *NLRB v. Brown-Dunkin Co.*, 287 F.2d 17, 18-19 (10th Cir. 1961) (promise of pay raises and other benefits if unit employees rejected the union).

11. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

12. See also *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982); *N.P. Nelson Iron Works, Inc.*, 78 N.L.R.B. 1270, 1271 (1948); *Carrollton Furniture Mfg. Co.*, 75 N.L.R.B. 710, 712 (1948); *Corn Products Ref. Co.*, 58 N.L.R.B. 1441, 1442 (1944).

13. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

14. See, e.g., *United Aircraft Corp.*, 103 N.L.R.B. 102, 103-05 (One union, in a run-off representation election, distributed a "telegram" accusing the other union of "smearing" its reputation. "This conduct lowered the standards of campaigning to a level which impaired the free and informed atmosphere requisite to an untrammelled expression of choice by the employees.").

15. *The Gunned Products Co.*, 112 N.L.R.B. 1092, 1094 (1955) (The employer distributed a handbill to employees asking them to compare their wages to other companies' wages, but misquoted wage rates. "Petitioner's conduct exceeded the limits of legitimate propaganda and lowered the standards of campaigning to a level which impaired the free and untrammelled expression of choice by the employees herein.").

16. 140 N.L.R.B. 221 (1962).

17. *Id.* at 224.

ket, Inc.<sup>18</sup> Based on the Board's experience of fifteen years under the *Hollywood Ceramics* rule, and relying on the sophistication of voters, the Board refused to consider the truth or falsity of campaign propaganda. The Board said it would intervene only if there were "deceptive campaign practices . . . involving the Board or its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is."<sup>19</sup>

Twenty months after *Shopping Kart*, the Board returned to the *Hollywood Ceramics* rule in *General Knit of California, Inc.*<sup>20</sup> In order to carry out its responsibility of ensuring fair and free union elections, the Board believed that it should intervene where misrepresentations might have a material effect on the election outcome.<sup>21</sup>

Finally, four years later, the Board again reversed itself in *Midland National Life Insurance Co.*,<sup>22</sup> and returned to the *Shopping Kart* standard. The Board cited the need for speedy, final and uniform election results as well as the need to minimize dilatory objections to elections.<sup>23</sup> It believed that the *Hollywood Ceramics* rule confused parties, provoked needless litigation,<sup>24</sup> and eluded consistent and equitable adjudications.<sup>25</sup> After weighing the interests involved, the Board stated its belief that voters are able to recognize propaganda, and found that the protectionist *Hollywood Ceramics* rule was no longer warranted.<sup>26</sup> The new *Midland* rule was to be applied in future as well as pending cases.<sup>27</sup>

18. 228 N.L.R.B. 1311 (1977).

19. *Id.* at 1313.

20. 239 N.L.R.B. 619 (1978).

21. *Id.* at 620.

22. 263 N.L.R.B. 127 (1982).

23. *Id.* at 131.

24. *Id.* (quoting Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 85 (1964)).

25. 263 N.L.R.B. at 132.

26. *Id.*

[The *Shopping Kart* rule] is a clear, realistic rule of easy application which lends itself to definite, predictable election results. It removes impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections, and promotes uniformity in national labor law by minimizing the basis for disagreement between the Board and the courts of appeals.

*Id.* Noting its frequent changes in election standards, the Board stated: "[A]dministrative flexibility is . . . one of the principal reasons for the establishment of the regulatory agencies [because it] permits valuable experimentation and allows administrative policies to reflect changing policy views." *Id.* at 132 (citing *Leedom v. International Bhd. of Elec. Workers, Local 108*, 278 F.2d 237, 243 (D.C. Cir. 1960)). Further, the Board perceives its function as involving statutory responsibilities and actions based on its "cumulative experience" of trial and error. It repeatedly emphasized that, regarding election misrepresentations, reasonable minds can differ. *Id.* at 130, 132.

Board Members Jenkins and Fanning dissented. They criticized the Board for its many reversals, and denounced the abandonment of the flexible and balanced *Hollywood Ceramics* rule in favor of "an ultra-permissive standard that place[s] a premium on the well-timed use of deception, trickery, and fraud." *Id.* at 133. They further castigated the Board's emphasis on speed and a decreased workload, saying that the Board was "abandoning one of the most effective means . . . yet devised for assuring" a fair and free choice of bargaining representative. *Id.* at 134-35.

27. 263 N.L.R.B. at 133 n.24.

The Tenth Circuit had no difficulty in applying the *Midland* rule to *DPM*, finding no abuse of discretion.<sup>28</sup> The court noted that most other circuits have also applied *Midland* to pending cases.<sup>29</sup>

DPM's last objection was that it should have been granted an evidentiary hearing on its election objections, rather than simply an administrative investigation and decision by the regional director.<sup>30</sup> The Tenth Circuit stated that in order to be granted an evidentiary hearing concerning representation elections, the objecting party must make out a prima facie case with evidence showing substantial and material factual disputes which would merit setting the election aside if resolved in the objector's favor.<sup>31</sup> DPM did not make out such a prima facie case. This requirement is consistent with prior Tenth Circuit decisions,<sup>32</sup> as well as holdings by other circuits.<sup>33</sup> A hearing on representation objections is not a procedure mandated by statute, but instead was created by the Board.<sup>34</sup> The NLRB regional director is given discretion regarding whether to grant a hearing,<sup>35</sup> and in a consent election the Board also has discretion to direct that a hearing be held.<sup>36</sup>

#### B. *Appropriate Bargaining Units*: NLRB v. Foodland, Inc.

The companion refusal-to-bargain case decided by the Tenth Circuit was *NLRB v. Foodland, Inc.*<sup>37</sup> Foodland operated six retail grocery stores in northeastern Oklahoma. The United Food and Commercial Workers Retail Clerks union filed a representation petition with the Board seeking to represent all employees at Foodland's Owasso store, except the meat department employees. The United Food and Commercial Workers Meatcutters union filed a petition to represent the meat department employees of the Owasso store. Foodland argued that the

28. 744 F.2d at 86.

29. *Id.* at 86 n.2 (citing *NLRB v. Milwaukee Brush Mfg. Co.*, 705 F.2d 257 (7th Cir. 1983)).

30. 744 F.2d at 85.

31. *Id.* at 85-86.

32. *See, e.g.*, *Crown Cork & Seal Co., Inc. v. NLRB*, 659 F.2d at 129 (citing *NLRB v. Whitney Museum of Am. Art*, 636 F.2d 19, 23 (2d Cir. 1980)); *NLRB v. Gold Spot Dairy, Inc.*, 432 F.2d 125, 128 (10th Cir. 1970)).

33. *See, e.g.*, *NLRB v. Newly Weds Foods, Inc.*, 758 F.2d 4, 12 (1st Cir. 1985); *L.C. Cassidy & Son, Inc. v. NLRB*, 745 F.2d 1059, 1064 (7th Cir. 1984); *NLRB v. ARA Serv., Inc.*, 717 F.2d 57, 63-64 (3d Cir. 1983); *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1047-48 (11th Cir. 1983); *NLRB v. Yellow Transp. Co.*, 709 F.2d 1342, 1343 (9th Cir. 1983); *EDS-IDAB, Inc. v. NLRB*, 666 F.2d 917, 974 (5th Cir. 1982); *NLRB v. Pinkerton's, Inc.*, 621 F.2d 1322, 1325 (6th Cir. 1980); *NLRB v. Cambridge Wire Cloth Co., Inc.*, 622 F.2d 1195, 1199 (4th Cir. 1980).

34. "In issuing a report on objections or challenged ballots, or both . . . the regional director *may* act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer." 29 C.F.R. § 102.69(d) (1985) (emphasis added).

35. *Id.*

36. "In a case involving a consent election . . . , if exceptions are filed . . . and it appears to the Board that such exceptions . . . raise issues, the Board *may* direct the regional director . . . to issue . . . a notice of hearing on said exceptions before a hearing officer." 29 C.F.R. § 102.69(f) (1985) (emphasis added).

37. 744 F.2d 735 (10th Cir. 1984).

only appropriate bargaining unit would include all of its employees at all six stores.

The Board's regional director found that the single store units for both meat department employees and all other employees to be the appropriate bargaining unit. The Board declined to review the regional director's decision. Both unions won their respective elections, but Foodland objected on the basis of union electioneering (election interference). The objection was overruled by the regional director, and the Board did not review the decision. The unions were certified, but Foodland refused to bargain with them. At the unfair labor practice (ULP) hearing concerning the refusal to bargain, Foodland had no new evidence to present so the administrative law judge refused to relitigate Foodland's representation objections, a decision which the Board upheld.<sup>38</sup> The Tenth Circuit, Judge McWilliams writing, enforced the Board's order that Foodland must bargain with the unions.

Section 9(b) of the Labor Management Relations Act<sup>39</sup> (LMRA) confers wide discretion on the NLRB in deciding the appropriate unit of employees for collective bargaining purposes.<sup>40</sup> This discretion can be delegated to regional directors, and the unit need only be *an* appropriate unit, rather than *the* most appropriate unit.<sup>41</sup> Even if division-wide collective bargaining is desirable for the employer, the Board is empowered to decide that a lesser unit is appropriate.<sup>42</sup> Further, the NLRB may rely on presumptions it draws from its past experience in determining that a particular unit is appropriate.<sup>43</sup>

One of the presumptions utilized in the *Foodland* case was that a single store is an appropriate bargaining unit.<sup>44</sup> The court found that

38. *Id.* at 739.

39. Section 9(b) of the Labor Management Relations Act (LMRA) states:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof . . . .

29 U.S.C. § 159(b) (1982).

40. *See, e.g.*, *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 574 (1st Cir. 1983); *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450, 454 (10th Cir. 1981); *NLRB v. Gold Spot Dairy, Inc.*, 432 F.2d 125, 127 (10th Cir. 1970); *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 127 (10th Cir. 1970); *NLRB v. Groendyke Transp.*, 372 F.2d 137, 140 (10th Cir.), *cert. denied*, 387 U.S. 932 (1967); *NLRB v. Dewey Portland Cement Co.*, 336 F.2d 117, 119 (10th Cir. 1964); *Mountain States Tel. & Tel. Co. v. NLRB*, 310 F.2d 478, 479-80 (10th Cir. 1962). These decisions are consistent with *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947) ("Section 9(b) of the Act confers upon the Board a broad discretion to determine appropriate units . . . [s]o we have power only to determine whether there is substantial evidence to support the Board."); *see also NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 733 (9th Cir. 1985).

41. *See, e.g.*, *Beth Israel Hosp. & Geriatric Center v. NLRB*, 688 F.2d 697, 699-700 (10th Cir. 1982).

42. *See, e.g.*, *NLRB v. Pan Am. Petroleum Corp.* 444 F.2d 328, 331 (10th Cir. 1971); *NLRB v. Groendyke Transp., Inc.*, 417 F.2d 33, 35 (10th Cir. 1969).

43. *Beth Israel Hospital*, 688 F.2d at 699-700. Presumptions may be used in all industries, excluding health care. The court found that other circuits either approve of the NLRB's use of presumptions, or at least do not disapprove.

44. *Foodland*, 744 F.2d at 737. In *Haag Drug Co., Inc.*, 169 N.L.R.B. 877 (1968), the Board reiterated a policy it announced in *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032 (1962),

the Owasso store manager had a significant amount of supervisory authority, that there was a minimum of employee interchange between Foodland stores, there was no multi-store bargaining history, and that the union did not want to represent a larger bargaining unit. These factors, in addition to the Board's single-store presumption, provided substantial evidence justifying the Board's decision.<sup>45</sup>

The second presumption involved was that meat department employees are an appropriate bargaining unit.<sup>46</sup> This presumption has been established by the Board and accepted by the courts.<sup>47</sup> The Tenth Circuit rejected an attempt to apply the Board's decision in *Great Day, Inc.*,<sup>48</sup> where the Board stated that there were countervailing factors overcoming the meat department unit presumption. In *Great Day*, few employees had any training, much of the beef was already pre-cut and

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refusing to find that the appropriate unit "embraces all the employees within an employer's administrative or geographic area." The Board stated: "Our experience has led us to conclude that a single store in a retail chain, like single locations in multilocation enterprises in other industries, is presumptively an appropriate unit for bargaining." *Haag Drug*, 169 N.L.R.B. at 877. The Board went on to state:

Absent a bargaining history in a more comprehensive unit or functional integration of a sufficient degree to obliterate separate identity, the employees' "fullest freedom" is maximized . . . by treating the employees in a single store or restaurant of a retail chain operation as normally constituting an appropriate unit for collective bargaining purposes. The employees . . . form a homogeneous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own and not necessarily shared with employees in the other outlets.

*Id.* at 877-78.

The presumption may be rebutted by facts showing a stable multi-store bargaining relationship, centralization of management, extensive employee interchange, and close geographic proximity of the stores. *Id.* at 878-89. However, the paramount factor in determining an appropriate unit is assurance that the employees are able to exercise freedom of choice. "While an employer's interest in bargaining with the most convenient possible unit should be accommodated when feasible, the Board is free to grant greater weight to the employees' interest in being represented by a representative of their own choosing." *Friendly Ice Cream*, 705 F.2d at 575. See also *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1043-44 (9th Cir. 1978); *NLRB v. Western and Southern Life Ins. Co.*, 391 F.2d 119, 123 (3d Cir.), *cert. denied*, 393 U.S. 978 (1968). The single store has been found to be an inappropriate unit in a number of cases. See, e.g., *Kirlin's Inc.*, 227 N.L.R.B. 1220, 1221 (1977) (store manager's lack of autonomy); *Gray Drug Stores, Inc.*, 197 N.L.R.B. 924, 926 (1972) (community of interest of employees in stores in certain geographic proximity); *Twenty-First Century Restaurant of Nostrand Avenue Corp.*, 192 N.L.R.B. 881, 882 (1971) (close proximity of locations); *Waiakamilo Corp.*, 192 N.L.R.B. 878 (1971) (common working conditions and lack of autonomy of single stores).

45. 744 F.2d at 738.

46. *Id.*

47. See *Daylight Grocery Co., Inc. v. NLRB*, 678 F.2d 905, 907 (11th Cir. 1982) (unit excluding meat department employees); *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40, 45 (1st Cir. 1981); *Amalgamated Meat Cutters, Local 576 v. NLRB*, 663 F.2d 223, 225 (D.C. Cir. 1980) (employees represented by Meat Cutters and Retail Clerks, respectively); *NLRB v. Big Bear Supermarkets No. 3*, 640 F.2d 924 (9th Cir.) (two unions representing employees, Meatcutters and Retail Clerks), *cert. denied*, 449 U.S. 919 (1980); *NLRB v. Gerbes Super Mkts., Inc.*, 436 F.2d 19, 22 (8th Cir. 1971); *Schauffler v. Local 1357, Retail Clerks Int'l Ass'n*, 199 F. Supp. 357, 358 (E.D. Pa. 1961) (unit excluding the meat, seafood, and delicatessen employees).

48. 248 N.L.R.B. 527 (1980).



boxed, employees rotated among all departments, and seventy-five percent of their work did not involve traditional meatcutting skills.<sup>49</sup> In contrast, Foodland's Owasso store manager was relatively autonomous, the meat department employees received specialized training and higher wages, there was little employee interchange between the meat department and other departments, and the meat department manager supervised only meat department employees. In addition, the meat department employees spent most of their time performing tasks requiring special meatcutting skills.<sup>50</sup>

Foodland attempted to have the elections set aside, alleging impermissible union electioneering near the polls.<sup>51</sup> By pre-arrangement, certain employees favoring union representation donned "Vote Yes" buttons fifteen minutes before the polls opened.<sup>52</sup> In previous decisions, the Tenth Circuit has approved the section 7 right of an employee to wear union insignia while on the employer's premises during working hours.<sup>53</sup> Likewise, the Tenth Circuit found Foodland's objections of impermissible electioneering to be *de minimis*, and upheld the regional director's dismissal of the charge.<sup>54</sup>

Union insignia is a form of protected expression under section 7.<sup>55</sup> Standing alone, the displaying or wearing of union insignia by employees does not disrupt voting procedures, nor does it impair the exercise of free choice.<sup>56</sup> The Board has refused to set aside elections where the following activities took place: 1) employees wore "Vote No" paper hats before the election;<sup>57</sup> 2) employees wore "Vote Yes" buttons and "IUWA" T-shirts at the polling place;<sup>58</sup> and 3) employees displayed documents pinned on their backs entitled "My Reason for Voting No."<sup>59</sup>

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49. In *Great Day*, the Board found it "unnecessary to pass on the employer's contention that the merger of the retail Clerks International Union with the Amalgamated Meat Cutters and Butcher Workmen supports its position for inclusion of the meat department in a storewide unit." *Id.* at 528 n.6.

50. *Foodland*, 744 F.2d at 737.

51. *Id.*

52. *Id.* at 739.

53. *NLRB v. Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1000 (10th Cir. 1977) (quoting *Serv-Air, Inc. v. NLRB*, 395 F.2d 557, 563 (10th Cir.)) (overturning the employer's no-solicitation ban which interfered with union organizing activities), *cert. denied*, 393 U.S. 840 (1968)). Section 7 of the LMRA states: "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." 29 U.S.C. § 157 (1982).

54. 744 F.2d at 739.

55. *Montgomery Ward*, 554 F.2d at 1000.

56. In *Worley Mills, Inc. v. NLRB*, 685 F.2d 362, 367 (10th Cir. 1982), the court stated that the test to be applied to employee or third party electioneering is whether there is an "atmosphere necessary to the free exercise of free choice." (quoting *EDS-IDAB, Inc.*, 666 F.2d at 975).

57. *Mar-Jac Poultry Co.*, 123 N.L.R.B. 1571, 1573 (1959).

58. *Sewanee Coal Operators Ass'n, Inc.*, 146 N.L.R.B. 1145, 1147 (1964); *R.H. Osbrin, Mfg. Co.*, 114 N.L.R.B. 940, 941-42 (1955), *enforced*, 218 F.2d 342 (9th Cir. 1954), *cert. denied*, 349 U.S. 928 (1955).

59. *Vegas Village Shopping Center Corp.*, 229 N.L.R.B. 279, 290 (1977) ("The Board has consistently held that wearing stickers, buttons, and similar campaign insignia by participants as well as observers at an election is, without more, not prejudicial.").

The Ninth Circuit has stated that the Board has regulated only electioneering while the polls are open,<sup>60</sup> while allowing electioneering prior to the election.<sup>61</sup>

Foodland attempted to relitigate its election objections, and allegations of unlawful union election interference, during the hearing on its alleged unfair labor practice. The court held that the Board was not to reconsider previously litigated representation issues in the ULP hearing since new or previously unavailable evidence was not presented.<sup>62</sup> The Tenth Circuit has previously dealt with this same issue, in line with United States Supreme Court guidelines.<sup>63</sup>

## II. LABOR ORGANIZATIONS UNDER THE LMRDA: *DONOVAN v. NATIONAL TRANSIENT DIVISION*

### A. *The Case*

In *Donovan v. National Transient Division*,<sup>64</sup> Secretary of Labor Donovan brought suit against the National Transient Division (NTD) of the International Brotherhood of Boilermakers, seeking compliance with the Labor-Management Reporting and Disclosure Act<sup>65</sup> (LMRDA) provision which requires labor organizations to hold periodic elections of union officials.<sup>66</sup>

NTD is one of five divisions of the International union,<sup>67</sup> but, unlike the other divisions, it represents workers in 41 states and has no subordinate local organizations. NTD represents 8,000 boilermaker craftsmen who travel across the nation in crews, erecting steel tanks and like structures. According to the International's constitution, NTD was established to give status to and serve employees who engage in mobile

60. *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 732-33 (9th Cir. 1985) (finding that electioneering during an election would be a greater threat to the "sober reflection and calm deliberation" needed for free choice in a representation election than would electioneering prior to any voting taking place).

61. *Id.*

62. 744 F.2d at 739.

63. In *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141-42 (1971), the United States Supreme Court held that: "Historically, the representation issue once fully litigated in the representation proceeding could not be relitigated in an unfair labor practice proceeding." The Tenth Circuit applied this precedent in *Beth Israel Hosp.*, 688 F.2d at 100-01. It held that "unit selection remains a matter of agency discretion and expertise, unlike factual questions that must be resolved at the unfair labor practice proceeding." Thus, "the employer could challenge the unit selection only through judicial review in the circuit court." *Id.* See also *Gold Spot Dairy, Inc.*, 432 F.2d at 129 ("The objections to the two elections were adjudicated in the representation hearings and are not relitigable in the absence of newly discovered or previously unavailable evidence.").

Should an employer object to representation determinations and later be charged with an unfair labor practice for refusing to bargain, then those representation challenges are preserved. *Id.* at 702 (Barrett, J., dissenting). See also *Leedom v. Kyne*, 358 U.S. 184, 191 (1958); *American Fed'n of Labor v. NLRB*, 308 U.S. 401, 406 (1940); *NLRB v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964).

64. 736 F.2d 618 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 781 (1985).

65. 29 U.S.C. §§ 401-531 (1982).

66. 29 U.S.C. § 481 (1982).

67. The complete name of the international union is International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.

employment and cannot maintain membership or participate in a fixed-location local.

The nine NTD officials were appointed by the International President, but there has never been an election of NTD officers. Several NTD members complained to the International President and the International Executive Council, and finally to the Secretary of Labor, that NTD had failed to hold elections. The Secretary brought suit in federal district court in 1979 to compel an election.<sup>68</sup>

The district court, finding that it had jurisdiction,<sup>69</sup> held that NTD was a "labor organization" within the meaning of the LMRDA.<sup>70</sup> The court believed that the nationwide character of NTD proved that it was a national, as opposed to a local, which meant that elections would be required every five years under the LMRDA.<sup>71</sup> The court ordered NTD to comply with the provisions of the LMRDA, rejecting arguments that such compliance would be difficult for, and have an adverse effect upon, NTD.<sup>72</sup>

The Tenth Circuit, in an opinion written by Judge Logan, affirmed the district court, holding that NTD is a labor organization and subject to coverage under the LMRDA. It also agreed that the lower court had subject matter jurisdiction, and that the Secretary of Labor had the statutory authority to investigate and sue to compel an election when none had previously been held. However, the circuit court found NTD to be a local labor organization, instead of a national labor organization, which the Act requires to hold elections once every three years.<sup>73</sup> The court, in establishing NTD as a local labor organization, emphasized NTD's functions and purposes (which are similar to those performed by a typical local) over and above its geographical form (a union without locals that transcends state boundaries). Finding congressional intent to focus on the relationship between a labor organization and its members, the court dismissed NTD's claims of inability and exceptions to compliance.<sup>74</sup>

### B. *History of the LMRDA*

In the late 1950's, responding to media allegations of corrupt practices in the labor-management field,<sup>75</sup> Congress designated a special committee to investigate racketeering and abuse in labor-management

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68. 736 F.2d at 619. See *Donovan v. National Transient Div.*, 542 F. Supp. 957, 958-59 (D. Kan. 1982).

69. 542 F. Supp. at 959.

70. 29 U.S.C. §§ 402(i)-(j) (1982).

71. 29 U.S.C. § 481(b) (1982).

72. 542 F. Supp. at 960.

73. 29 U.S.C. § 408(b) (1982).

74. 736 F.2d at 622-23.

75. E.g., R. KENNEDY, *THE ENEMY WITHIN* 7 (1960); Note, *Clarification of Title IV of the Labor-Management Reporting and Disclosure Act: Toward More Democratic Elections*, 2 HOFSTRA LAB. L.J. 157, 182 (1984).

relations.<sup>76</sup> The well-publicized hearings uncovered "shocking conditions."<sup>77</sup> The committee found that some union officers dictated the management of union affairs. Trusteeships were unjustifiably prolonged or established over locals in order to prevent local democratic power, to punish dissenters, to divert local funds, and to amass power for union officials.<sup>78</sup> Many rank-and-file union members told the committee that they wanted corrected the abuses present in their labor organizations.<sup>79</sup> Irrational Cold War fears, as well as public response to union corruption, spurred enactment of the LMRDA.<sup>80</sup> The Act was meant to redistribute power from autocratic labor bosses to the rank-and-file members.<sup>81</sup> This was because maintenance of free and democratic union elections was deemed to be in the public interest.<sup>82</sup>

### C. Powers of the Secretary

The LMRDA grants individual labor organizations the first opportunity to correct violations of the LMRDA,<sup>83</sup> requiring members to exhaust all union remedies or to wait at least three months for union corrective action before filing a complaint with the Secretary of Labor.<sup>84</sup> Once a complaint is filed, government intervention is mandatory and is the exclusive remedy.<sup>85</sup> The Secretary of Labor and the reviewing courts have broad equitable powers to remedy LMRDA violations.<sup>86</sup> The Act orders the Secretary to investigate alleged LMRDA violations based on a member's complaint, and to file suit if probable cause of a violation is found.<sup>87</sup> The Secretary's only explicit statutory remedies are to "set aside the invalid election, *if any*, . . . and to direct the conduct of

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76. DEPARTMENT OF LABOR, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 1-25 (1959).

77. W. OBERER, K. HANSLOWE & J. ANDERSEN, LABOR LAW 172, 174 (1979).

78. DEPARTMENT OF LABOR, *supra* note 76, at 8.

79. U.S. SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR-MANAGEMENT FIELD, FINAL REPORT, S. REP. NO. 187, 86th Cong., 1st Sess. 2328-38 (1959), *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2322-2423 [hereinafter referred to as FINAL REPORT, S. REP. NO. 187].

80. J. RAYBACK, A HISTORY OF AMERICAN LABOR 437 (1966). The LMRDA is the first law not protective of labor, and not concerned with the regulation of labor-management relations. *Id.* at 436. "The passage of the act was appropriately symbolic of labor's fall from grace." T. BROOKS, TOIL AND TROUBLE 228 (1980). The LMRDA is also "the first substantial effort by the Federal Government to control internal union affairs." W. OBERER, K. HANSLOWE & J. ANDERSEN, LABOR LAW 172 (1979).

81. 105 CONG. REC. 17,915 (1959).

82. *See* DEPARTMENT OF LABOR, *supra* note 76, at 24.

83. *Wirtz v. Local 1622, United Bhd. of Carpenters*, 285 F. Supp. 455, 462 (N.D. Cal. 1968); *Goldberg v. Amalgamated Local 1355*, 202 F. Supp. 844, 846 (E.D.N.Y. 1962).

84. 29 U.S.C. § 482(a) (1982); *Hodgson v. Union de Empleados de los Supermercado Pueblo*, 388 F. Supp. 1026, 1028 (D.P.R. 1974).

85. *Hodgson*, 388 F. Supp. at 1028.

86. *Id.* at 1028-29 (upholding the Secretary's right to "the statutory remedy of a [Labor Department] supervised election" and disallowing an election supervised by a private firm following a member's complaint to the Secretary). *See, e.g., Brennan v. United Mine Workers*, 475 F.2d 1293, 1295-96 (D.C. Cir. 1973) (The court allowed the district court "far-ranging relief to restore union democracy" such as an order to convene meetings and adopt a democratic constitution. It further upheld "the court's broad equitable powers to fashion a suitable remedy for the . . . atrophy of democratic principles and procedures.").

87. 29 U.S.C. §§ 482(a), (b) (1982).

an election."<sup>88</sup>

In order to guarantee free and democratic elections, it is necessary to ensure that elections are initially held and to remedy abuses in scheduled elections. The wording of the LMRDA is directed at abuses in elections, and also reflects Congress' broad concern that elections might never be held.<sup>89</sup> Thus the Tenth Circuit's decision correctly read the LMRDA as empowering the Secretary to sue to compel an election where none has previously been held.

#### D. *Definition of a Labor Organization*

Subsections 3(i) and 3(j) of the LMRDA define a "labor organization" for purposes of coverage under the Act.<sup>90</sup> The definition is to be broadly construed,<sup>91</sup> and an organization can exist wholly or partially for the statutory purposes of dealing with employers concerning grievances, labor disputes, wage rates, hours, and other terms and conditions of employment.<sup>92</sup> A particular organization's constitution and by laws will be considered along with its actual functions and practices in determining whether the Act applies.<sup>93</sup> The definition is meant to encompass "any labor organization irrespective of size or formal attributes."<sup>94</sup> The courts have consistently analyzed organizations by utilizing functional criteria in order to determine whether they are included within the statutory definition.<sup>95</sup>

In *National Transient Division*, although NTD negotiated incomplete collective bargaining agreements with employers, leaving wages and em-

88. *National Transient Division*, 736 F.2d at 620 (quoting 29 U.S.C. §§ 482(a), (b) (1982) (emphasis added)). The court dismissed cases holding that the Secretary cannot sue to postpone a scheduled election as inapposite. See *Dunlop v. Bachowski*, 421 U.S. 560, 568-70 (1975); *Calhoun v. Harvey*, 379 U.S. 134, 140 (1964).

89. 29 U.S.C. § 401(a) (1982) mandates that a national or international labor organization "shall elect its officers" at least once every five years, while section 481(b) states that a local labor organization "shall elect its officers" a minimum of once in three years (emphasis added). See generally *Marshall v. Local 1374, Int'l Ass'n of Machinists*, 558 F.2d 1354, 1358 (9th Cir. 1977) (statutory purposes include assurance of free and democratic elections, and prompt resolution of election disputes); *Goldberg v. Amalgamated Local 1355*, 202 F. Supp. at 846 (the Act requires free, frequent, and periodic elections to ensure that union officials are responsive to members' desires); Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 407, 410-13 (1972) (the LMRDA furthered the national labor policy of labor peace through industrial democracy).

90. 29 C.F.R. § 451.3(a)(2) (1985).

91. *Id.*

92. *Id.*

93. 29 C.F.R. § 451.3(a)(1) (1985). See also FINAL REPORT, S. REP. NO. 187, *supra* note 79, at 2318, 2322-2323.

The definition [of labor organization] includes all forms and levels of labor organization and combinations of labor organizations which exist for or carry on collective bargaining with employers, from internationals through locals . . . . This definition . . . is intended to provide comprehensive coverage of labor organizations engaged in any degree in the representation of employees or administration of collective bargaining agreements.

*Id.*

94. See, e.g., *National Educ. Ass'n v. Marshall*, 100 L.R.R.M. 2565 (D.D.C. 1979) (organizations dealt with employers regarding terms and conditions of employment).

95. *National Transient Division*, 542 F. Supp. at 960.

ployee benefits to local or international supplements, the contracts did cover the statutory purposes.<sup>96</sup> The district court noted little resistance to the issue of whether NTD was an LMRDA labor organization. Instead, arguments centered on whether NTD was a local or a national labor organization — an issue of first impression.

#### E. *Local Versus National Labor Organization*

The district court found that NTD was a national labor organization because the typical local organization is based on geographic boundaries.<sup>97</sup> The Tenth Circuit reversed, holding that NTD is a local organization because of its functional and structural characteristics.<sup>98</sup> The lower court was correct when it stated that typically local unions follow geographic boundaries.<sup>99</sup> However, NTD is in essence a nationwide local, serving those employees that are unable to maintain an active membership in fixed-location locals. A local union has primary responsibility for labor relations with employers, including contract negotiation, contract administration, and grievance handling.<sup>100</sup> In addition to contract negotiation, NTD representatives engage in grievance handling and dues collection.<sup>101</sup> In order to effectuate the purposes of the Act,<sup>102</sup> and maximize rank-and-file control and participation in union management, NTD must be a local labor organization within the meaning of the Act.

### III. DISABILITY BENEFITS DURING A STRIKE: *CONOCO, INC. v. NLRB*

#### A. *Background*

*Conoco, Inc. v. NLRB*<sup>103</sup> involved the denial of disability benefits to an employee while the company was being struck by the union representing its employees. Ms. Fransen, a Conoco employee and union member, became temporarily unable to work due to medical reasons on January 3, 1980. She began receiving disability benefits pursuant to the Comprehensive Disability Income Plan included in the collective bargaining agreement between Conoco and the union. On January 8, 1980, the union instituted a lawful economic strike. On the first day of the strike, Ms. Fransen's disability benefits were terminated. The Disability

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96. 736 F.2d at 622.

97. 542 F. Supp. at 960.

98. 736 F.2d at 622-23.

99. The "reasonably typical" union structure consists of locals representing employees of a plant or an employer in "a defined geographic area," that are affiliated with the international or national. D. BOK & J. DUNLOP, *LABOR IN THE AMERICAN COMMUNITY* 150-51 (1970). The "structure of the typical American labor union" involves a national or international, which charters local unions. The locals' jurisdiction is defined on plant, employer, or geographic basis. W. OBERER, K. HANSLOWE & J. ANDERSEN, *LABOR LAW* 180 (1979).

100. A. SLOANE & F. WHITNEY, *LABOR RELATIONS* 166-67 (1972).

101. *National Transient Division*, 736 F.2d at 618.

102. The purposes of the Act are to safeguard members' rights and ensure internal union democracy. Note, *supra* note 75, at 157-58.

103. 740 F.2d 811 (10th Cir. 1984).

Income Plan included a clause denying benefits during the period an employee is on strike or lay-off.<sup>104</sup> More than a month after termination of the benefits, Ms. Fransen began to picket for the union. She was medically certified as able to return to work on March 25, 1980. The strike ended on April 1, 1980. The NLRB then filed a charge alleging that termination of Ms. Fransen's benefits was an unfair labor practice, in violation of sections 8(a)(1) and 8(a)(3) of the Taft-Hartley Act.<sup>105</sup>

The administrative law judge (ALJ) awarded Ms. Fransen disability benefits from the date the strike began until the time she publicly participated in strike activities. The ALJ's decision relied upon the prior National Labor Relations Board decision of *Emerson Electric Co.*<sup>106</sup> which denied benefits to disabled employees who participated in and publicly supported the strike. The ALJ accepted Ms. Fransen's prima facie case of discriminatory treatment, and rejected Conoco's defense that Ms. Fransen was properly denied benefits under the Plan. Although the ALJ found the clause to be legal, he decided that the clause was ambiguous, and did not apply to disabled employees who were not actively on strike.

The Board agreed that an unfair labor practice had been committed, and ordered Conoco to pay the disability benefits for the entire period of the disability. This was consistent with the Third Circuit's modification of the *Emerson* decision in *E.L. Weigand Division v. NLRB*,<sup>107</sup> and with the Board's reversal of its previous position.<sup>108</sup> In *Weigand*, the Third Circuit ruled that an employer committed an unfair labor practice in terminating disability benefits during a strike, and declined to allow the employer to discontinue benefits if the disabled employee participated in the strike prior to being medically certified to return to work.<sup>109</sup> Agreeing that the disability benefits were accrued and based on work already performed, the Third Circuit stated that such benefits could not be denied by the employer during a strike under the guise of not being required to finance a strike against itself.<sup>110</sup> The court found that the employer had exhibited an anti-union motivation,<sup>111</sup> and ac-

104. *Id.* at 812. The Plan's clause stated: "If benefits are being paid prior to a strike or layoff, such benefits will cease for the duration of such strike or layoff. No benefits will be paid during the time you are on strike or layoff." *Id.*

105. 29 U.S.C. §§ 158(a)(1), (a)(3) (1982). Section 8(a) provides:

It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

106. 246 N.L.R.B. 1143 (1979), *modified*, 650 F.2d 463 (3d Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

107. 650 F.2d 463 (3d Cir. 1981).

108. *See* *Southwestern Electric Power Co.*, 216 N.L.R.B. 522 (1975).

109. *Weigand*, 650 F.2d at 463. However, "[a]ctive participation in strike activity may be telling, or even presumptive, evidence of cessation of disability." *Id.* at 473-74.

110. An employer need not pay wages to employees while the employer is being struck. *See* *Ace Tank and Heater Co.*, 167 N.L.R.B. 663, 665 (1967); *General Elec. Co.*, 80 N.L.R.B. 510, 511 (1948).

111. 650 F.2d at 470. The Board may infer the existence of discrimination, based on

cepted the Board's position that the denial of benefits was "inherently destructive" of the employees' section 7 rights.<sup>112</sup>

### B. *The Tenth Circuit Decision*

The Tenth Circuit, following the *Weigand* analysis, agreed that Conoco was guilty of anti-union activities in denying disability benefits to Ms. Fransen, and therefore upheld and enforced the Board's decision.<sup>113</sup> The Tenth Circuit's decision affirmed an employee's right to accrued benefits which have previously been earned, and held that denial of such benefits during a strike is "inherently destructive of the employee's section 7 rights."<sup>114</sup>

Since 1967,<sup>115</sup> the denial of vacation benefits during a lawful strike has been held to be an unfair labor practice, either because the benefits were previously earned, or because the employer had an improper motive.<sup>116</sup> The same has been true of insurance premiums<sup>117</sup> and sever-

its accumulated experience and factual enquiries. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-32 (1963).

In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Board found an unfair labor practice (discrimination and discouragement of union membership) when an employer refused to pay strikers accrued vacation benefits due under the expired labor contract, and announced that it intended to pay such benefits to strike replacements as well as non-striking or returning employees. The Supreme Court announced a test of unlawful anti-union motivation to be inferred from an employer's conduct. Conduct that is "inherently destructive of employee interests" needs no proof of motive (quoting *NLRB v. Brown*, 380 U.S. 278, 287 (1965)), and an unfair labor practice may be found even if the employer justifies or explains his actions. The conduct "carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended'" and thus bears "its own indicia of intent" (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. at 228, 231). However, when "the resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served," the employer's conduct must be proven to be improperly motivated (quoting *NLRB v. Brown*, 380 U.S. at 289). In *Great Dane*, the employer's conduct was said to be "inherently destructive" of employee rights.

112. The court did not describe the employer's actions as "inherently destructive" or "comparatively slight," but did not consider the employer's business justification an acceptable rebuttal. 650 F.2d at 467-71. See *supra* note 53 for the text of section 7 of the LMRA.

113. 740 F.2d at 815-16. The Tenth Circuit applied the *Great Dane* two-prong test for the inference of anti-union animus. See *supra* note 111.

114. 740 F.2d at 813. See *supra* note 111.

115. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

116. See, e.g., *Allied Indus. Workers, Local 287 v. NLRB*, 476 F.2d 868, 871-72, 876 (D.C. Cir. 1973) (company announcement that no vacation benefits could be scheduled or paid during a strike); *NLRB v. Jemco, Inc.*, 465 F.2d 1148, 1150-52 (6th Cir. 1972) (company denied vacation pay to all workers after collective bargaining agreement expired, but "unequal treatment of different classes of employees is [not] a prerequisite" for a section 8(a)(3) violation where concerted activity is involved), *cert. denied*, 409 U.S. 1109 (1973); *Local 186, United Packerhouse Food and Allied Workers v. Armour & Co.*, 446 F.2d 610, 611, 615 (6th Cir. 1971) (company refused to pay vacation benefits earned in prior year when plant closed), *cert. denied*, 405 U.S. 955 (1972); *NLRB v. Frick Co.*, 397 F.2d 956, 959-61 (3d Cir. 1968) (company removed strikers' names from payroll, making them ineligible for vacation benefits); *Indiana & Mich. Elec. Co.*, 236 N.L.R.B. 986 (1978) (the company threatened not to pay previously earned accumulated leave unless employees abandoned the strike), *enforced*, 89 Lab. Cas. (CCH) ¶ 12,157 (1979).

117. *Viggiano v. Anchor Hocking Corp.*, 574 F. Supp. 861, 863-64 (W.D. Pa. 1983) (threat to terminate insurance payments after collective bargaining agreement expired if employees went on strike, in spite of clause continuing benefits after contract ended), *va-*



ance pay.<sup>118</sup> However, other courts have not consistently followed the lead of the Board or the Supreme Court, finding that under the particular language of the collective bargaining agreement benefits were not accrued, or by failing to find an improper motivation by the employer in refusing to pay the benefits during a strike.<sup>119</sup> One circuit could not decide whether disability benefits were wages or accrued benefits.<sup>120</sup>

In its *Conoco* decision, the Tenth Circuit has stated that disability benefits are earned prior to the disability and therefore are accrued benefits. Further, an employer that discontinues disability benefits because of a strike will be assumed to be acting out of anti-union animus and be guilty of an unfair labor practice, despite an explicit collective bargaining agreement or Plan language denying benefits in the event of a strike. The message is clear, and consistent with the holdings of the Board and Third Circuit.

Lisolette Mitz

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*cated on other grounds*, 750 F.2d 276 (3d Cir. 1984); *Ace Tank and Heater Co.*, 167 N.L.R.B. 663 (1967) (refusal to pay insurance premiums for strikers); *Cone Bros. Contracting Co.*, 158 N.L.R.B. 186, 188 (1966) ("[I]t is true that strikers may incur certain economic losses, such as wages whose sole aspect is monetary compensation for work performed during the employment relationship. But strike activity does not entail acceptance after the strike of a small quantum of vested job rights and privileges.").

118. *NLRB v. Darling & Co.*, 420 F.2d 63 (7th Cir. 1970).

119. *See, e.g.*, *District 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985) (denial of health benefits and life insurance coverage to retired and disabled employees after expiration of labor contract permitted, based on the intent of the parties that such benefits only be provided during the term of the agreement); *NLRB v. Sherwin-Williams Co.*, 714 F.2d 1095 (11th Cir. 1983) (withholding disability benefits during a strike allowed because Plan language granted benefits only to the extent that employees could reasonably have expected to work, and it was past practice to deny such benefits during a strike); *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1981) (company refused to pay strikers their vacation benefits earned while working without a contract because the company believed that without a new agreement it had no way to compute the benefits due); *Local 358, Bakery and Confectionary Workers Union v. Nolde Bros., Inc.*, 382 F. Supp. 1354 (E.D. Va. 1974) (denial of severance pay to strikers because they breached the contract in order to avoid its no-strike clause, and finding that severance pay is not a vested right), *rev'd on other grounds*, 530 F.2d 548 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977) (deciding the case based on federal labor policy regarding arbitration, not accrual of benefits).

120. *Texaco, Inc. v. NLRB*, 700 F.2d 1031, 1040-42, 1042 n.2 (5th Cir. 1983). In a case involving the denial for disability benefits, which were tied to employee seniority, for workers who were ill during a strike, the Fifth Circuit stated that the disability benefits resembled both accrued benefits and wages but supported the Board's finding that they were accrued benefits. None of the employees participated in the strike during the periods of disability and the court expressed "no opinion . . . on the availability of [disability] benefits once a still-disabled employee expresses support for a strike."

## IV. THE EMPLOYMENT-AT-WILL DOCTRINE

Two Tenth Circuit cases during the survey period dealt with the "at-will" doctrine in employment law. In accordance with *Erie v. Tompkins*,<sup>121</sup> the court applied the relevant state law in each of these diversity actions.

## A. Background

A general hiring for an indefinite period has been deemed in common law to create an at-will employment relationship in which an employer can discharge an employee for good reason, bad reason or no reason at all.<sup>122</sup> The employment-at-will doctrine applies to those workers not covered by a collective bargaining agreement<sup>123</sup> and not employed by the government.<sup>124</sup>

Employment-at-will has not always been the general rule. The English common law, as interpreted by Blackstone, contained a presumption that "[i]f the hiring be general without any particular time limited, the law construes it to be a hiring for a year."<sup>125</sup> This presumption was based on the status of the employment relationship and not a contract between employer and employee.<sup>126</sup> Under this status relationship the master was responsible for the general welfare of the servant.<sup>127</sup>

The American courts adopted and maintained this presumption of a one-year term of employment until the late nineteenth century.<sup>128</sup> At that time, American courts shifted the emphasis to the choice inherent in freedom of contracts,<sup>129</sup> and the employment-at-will doctrine was born.<sup>130</sup> Under this doctrine, the terms of the employment contract were to be voluntarily agreed upon and not presumed.<sup>131</sup> Thus, if employer and employee did not agree upon a set term of employment, the employee could be fired at any time.

121. 304 U.S. 64 (1938).

122. See *Spivey v. Watkins Motor Lines, Inc.*, 115 L.L.R.M. (BNA) 3407 (S.D. Ga. 1984); *Black v. Standard Oil Co.*, 115 L.L.R.M. (BNA) 3076 (N.D. Ohio 1983); *Maguire v. American Family Life Ass. Co.*, 442 So. 2d 321 (Fla. Dist. Ct. App. 1983).

123. See *Pleck, Unjust Discharge From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979) (approximately 95 percent of collective bargaining agreements contain grievance and arbitration provisions, and approximately 80 percent of the agreements require just cause for discharge).

124. See *Stieber & Murray, Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319, 320-21 (1983) (government employees are either covered by public sector collective bargaining or have access to civil service procedures).

125. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413 (1979 facsimile of the 1st ed.).

126. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 123 (1969) (An agreement might establish certain terms but "custom and public policy, not the will of the parties, defined the implicit framework of mutual rights or obligations.").

127. *Id.* at 128.

128. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1084 (1982).

129. SELZNICK, *supra* note 126, at 131.

130. H. G. WOOD, MASTER AND SERVANT § 134 (1877) (the first treatise writer to challenge the presumption of hiring for a term and proclaim the at-will rule).

131. SELZNICK, *supra* note 126, at 131.

The pendulum is now beginning to swing back toward a presumption of hiring for a term and away from employment-at-will. Within the last two decades the common law notion of employment-at-will has been judicially eroded by wrongful discharge exceptions which include breach of implied employment contract, commission of a tort, and discharge in violation of public policy.<sup>132</sup> These exceptions have created a just cause requirement for the termination of an employee, giving the employee the job security he once had under the presumption of hiring for a term.

To bring order to the state courts' varied approaches to the re-emerging employment-at-will issue, commentators have advocated the introduction of a uniform statute<sup>133</sup> or the use of an arbitration clause in the employment contract covering wrongful discharge claims.<sup>134</sup> Until uniform standards are established, federal courts will be forced to interpret state common law in this area, since many of these cases will be diversity actions tried in federal courts. The federal courts' interpretation of state law will necessarily be subjective and thus the federal courts ruling may either expand, limit, or maintain the status quo of the state common law.<sup>135</sup> Attorneys should be aware of how a federal court interprets state law in order to make better strategic choices as to where to bring suit and what to argue.

## B. *Garcia v. Aetna Finance Company*

### 1. Facts

In *Garcia v. Aetna Finance Company*,<sup>136</sup> the plaintiff, Garcia, had been employed from 1956 to 1975 by GAC Finance.<sup>137</sup> In 1975, the defendant acquired the branch offices of GAC and assigned Garcia to those offices in a position that was substantially similar to his previous position with GAC. Shortly thereafter, the defendant disseminated an employment policy manual which implemented new policies and procedures, including a procedure for termination.<sup>138</sup> Garcia was terminated on September 21, 1979, after performance appraisals revealed certain deficiencies in the management of his area of responsibility.

### 2. The Tenth Circuit Opinion

On appeal, Garcia argued that the employment relationship be-

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132. Tobias, "Can You Help Me? I've Been Fired," 70 A.B.A.J. April, 1984, at 68.

133. See Stieber & Murray, *supra* note 124; Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); cf. Steiber, *Protection Against Unfair Dismissal, A Comparative View*, 169 SCH. LAB. INDUS. REL. RESEARCH REPRINT SERIES 231-32 (Mich. St. Univ. 1979-1980) (The following European countries have a statute requiring just cause for discharge: Denmark, Sweden, West Germany, Great Britain, Norway, France, Italy and Ireland.).

134. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 MICH. J.L. REF. 249 (1983).

135. See Comment, *The Role of Federal Courts in Changing State Law: The Employment At Will Doctrine in Pennsylvania*, 137 U. PA. L. REV. 277 (1984).

136. 752 F.2d 488 (10th Cir. 1984).

137. *Id.* at 489.

138. *Garcia*, 752 F.2d at 490 (10th Cir. 1984) (citing Brief for Appellant at 4-5).

tween Aetna and himself was for a definite term.<sup>139</sup> Garcia based this argument on Aetna's employment policy manual, which required annual appraisals, and the fact that Aetna's rehiring was based on a yearly salary.<sup>140</sup>

The Tenth Circuit affirmed the lower court's grant of summary judgment for Aetna. It agreed that the policy manual did not constitute an employment contract for a definite term.<sup>141</sup> Because the plaintiff had not negotiated the content of the policy manual, the policy manual was only a unilateral expression of policy by Aetna.<sup>142</sup> Furthermore, the court found that the evidence did not "establish that both parties understood that an employment contract existed between plaintiff and defendant that was for a definite term."<sup>143</sup> The court also found that rehiring based on an annual salary did not imply a fixed term of employment.<sup>144</sup> The Tenth Circuit found that Colorado had decided this precise issue in *Justice v. Stanley Aviation Corporation*.<sup>145</sup> Because there was no fixed term of employment, the court found that either party could terminate their employment relationship at any time without incurring liability.<sup>146</sup>

Garcia's second argument was based on the modern view that employment contracts for an indefinite period of time are not terminable at will by the employer.<sup>147</sup> The Tenth Circuit equated this implied duty of fair dealing<sup>148</sup> with the broad and general statutory statements of public policy which the Colorado courts had found inadequate to justify an exception to the at-will rule in *Lampe v. Presbyterian Medical Center*<sup>149</sup> and *Corbin v. Sinclair Marketing, Inc.*<sup>150</sup> Accordingly, the Tenth Circuit found no public-policy exception to the at-will rule.<sup>151</sup>

### 3. Alternative Strategies in the Colorado At-Will Arena

In *Corbin*, the Colorado Court of Appeals acknowledged that other courts have held that an employee manual can provide a good-cause exception to the at-will doctrine, but distinguished those cases from the facts before it since a safety manual, not an employee manual, was at issue.<sup>152</sup> In *Salimi v. Farmers Insurance Group*,<sup>153</sup> however, the Colorado

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139. 752 F.2d at 490. If an employment contract is for a definite term, just cause is usually required to terminate an employee before the term has expired. See, e.g., *Alpern v. Hurwitz*, 644 F.2d 943 (2d Cir. 1981); *Chapin v. Klein*, 128 Ariz. 94, 623 P.2d 1250 (Ariz. Ct. App. 1981); *Rosecrans v. Intermountain Soap & Chem. Co.*, 100 Idaho 785, 605 P.2d 963 (1980).

140. 752 F.2d at 490.

141. FOOTNOTE ADDED TO BALANCE WITH TEXT.

142. *Id.* at 490-91.

143. *Id.* at 490.

144. *Id.*

145. 35 Colo. App. 1, 530 P.2d 984 (1974).

146. *Garcia*, 752 F.2d at 491.

147. *Id.* (citing *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974)).

148. See *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

149. 42 Colo. App. 465, 590 P.2d 513 (1979).

150. 684 P.2d 265 (Colo. Ct. App. 1984).

151. *Garcia*, 752 F.2d at 491.

152. *Corbin*, 684 P.2d at 267.

153. 684 P.2d 264 (Colo. Ct. App. 1984).

Court of Appeals found that such a claim would survive a motion to dismiss. The plaintiff in *Corbin*, like the plaintiff in *Garcia*, never alleged the good-cause exception. Plaintiffs would be well advised to cover all bases by alleging such a claim in federal court since Colorado has left this door open.

One other avenue may be available to plaintiffs, depending on the specific facts of their claims. In *Lampe*, the Colorado Court of Appeals stated in dicta that a public policy exception to the at-will doctrine could be found if an employee is discharged for exercising a specifically enacted right or duty; such as the right to file for workmen's compensation or the duty to serve on a jury.<sup>154</sup> The public policy exception should not be alleged in all cases, however. In *Corbin*, the Colorado Court of Appeals ruled that the public-policy exception "is not available when . . . the statute at issue provides to the employee a wrongful discharge remedy."<sup>155</sup> It is recommended that future plaintiffs in Colorado determine if there is a statutory remedy which may preclude the public policy at-will exception.

### C. *Ellis v. El Paso Natural Gas Company*

#### 1. Facts

In *Ellis v. El Paso Natural Gas Company*,<sup>156</sup> the Tenth Circuit applied New Mexico law to the at-will employment issue. The plaintiff, Ellis, had been employed by the defendant for almost thirty years.<sup>157</sup> Following a dispute with his supervisor, Ellis used the problem solving procedures set out in the defendant's personnel manual to appeal the supervisor's decisions. El Paso retaliated against Ellis by denying him promotions and pay increases, demoting him, and allegedly forcing his constructive discharge.<sup>158</sup>

#### 2. The Tenth Circuit Opinion

On appeal, Ellis made two claims: (1) a claim in tort for retaliatory discharge; and (2) a claim of breach of implied contract based on the defendant's personnel manual.<sup>159</sup> The trial court had ruled that the claim for retaliatory discharge was barred by the New Mexico Court of Appeals ruling in *Bottijliso v. Hutchison Fruit Company*.<sup>160</sup> The Tenth Circuit noted that *Vigil v. Arzola*,<sup>161</sup> a New Mexico Court of Appeals decision handed down after the trial court's decision, had held that a cause of action for retaliatory discharge exists "when the discharge of an em-

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154. *Lampe v. Presbyterian Medical Center*, 41 Colo App. 465, 590 P.2d 513, 515 (1978).

155. 684 P.2d at 267.

156. 754 F.2d 884 (10th Cir. 1985).

157. *Id.* at 885.

158. *Id.*

159. *Id.*

160. 96 N.M. 789, 635 P.2d 992 (N.M. Ct. App. 1981).

161. *Vigil v. Arzola*, No. 5921 (N.M. Ct. App.) (cited in *Ellis*, 754 F.2d at 885).

ployee contravenes some clear mandate of public policy.”<sup>162</sup>

In *Ellis*, Ellis admitted that his discharge did not involve public policy considerations, but argued that New Mexico courts would recognize the tort of retaliatory discharge in a situation involving a non-public policy discharge if presented with the facts of his case.<sup>163</sup> The court disagreed, stating that *Vigil* had thoroughly reviewed the existing authority and legal commentary and had limited its holding to cases involving discharges which contravene public policy.<sup>164</sup> Therefore, the Tenth Circuit refused to expand the ruling of *Vigil* to include Ellis' retaliatory discharge claim.<sup>165</sup>

Regarding the breach of implied contract claim, Ellis argued that the defendant assured him that it would continue to supply him with wage increases and promotions if he performed his work satisfactorily.<sup>166</sup> He relied on the personnel manual to support this argument. The personnel manual stated that the company “will sever the employment relationship in a fair and consistent manner” and “will establish a fair and consistent method” to resolve employee disputes.<sup>167</sup>

The Tenth Circuit noted that New Mexico does recognize implied employment contracts,<sup>168</sup> but agreed with the trial court's finding that the provisions of the personnel manual “are too indefinite to constitute a contract. . . . The language is of a non-promissory nature and merely a declaration of defendant's general approach to the subject matter discussed.”<sup>169</sup> Thus, the court did not find an implied contract requiring just cause for termination.

### 3. Alternative Strategies in the New Mexico At-Will Arena

As in *Garcia*,<sup>170</sup> the Tenth Circuit took a conservative approach in *Ellis* in refusing to expand New Mexico's public policy exception to the at-will rule. Future plaintiffs arguing before the federal courts would be well advised to couch retaliation claims in public policy language. In *Ellis*, the plaintiff could have argued that he was exercising a right under the personnel manual, and that firing an employee for doing so leads to animosity between employer and employees, and results in lower economic production.

For implied contract claims, it is recommended that future plaintiffs develop a full evidentiary record of specific intent manifested by the em-

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162. 754 F.2d at 885 (quoting from Brief for Appellee at 33).

163. *Id.* at 885-86.

164. *Id.* (citing *Vigil* (from Brief for Appellee at 28): “We do not abrogate the at will rule; we only limit its application to those situations where the employee's discharge results from the employer's violation of a clear public policy.”).

165. 754 F.2d at 886.

166. *Id.*

167. *Id.*

168. *Id.* (citing *Forrester v. Parker*, 93 N.M. 781, 606 P.2d 191 (1980) and *Hernandez v. Home Educ. Livelihood Program, Inc.*, 98 N.M. 125, 645 P.2d 1381 (N.M. Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (N.M. 1982)).

169. 754 F.2d at 886 (quoting the trial court).

170. 752 F.2d 488 (10th Cir. 1984); *See supra* notes 136-151 and accompanying text.

ployer, in addition to introduction of the personnel manual. As a question of fact, plaintiffs will find it difficult to win such a claim on appeal in federal court unless the trial court's interpretation of facts is clearly erroneous.<sup>171</sup>

*Stewart Beyerle*

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171. See FED. R. CIV. P. 52(a).