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National Labor Relations Board

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ADMINISTRATIVE PROCEDURE: NATIONAL LABOR RELATIONS BOARD*

J. WARREN MADDEN**

The enforcement of legislation through administrative procedures has two primary aims. One is to place the initial enforcement proceedings in the hands of a body of experts sympathetic with the purposes of the statute and possessing the specialized knowledge essential to an adequate handling of the complex problems with which much of our present day legislation deals. The other is to achieve a more rapid and more efficient disposition of the numerous controversies bound to arise out of almost any piece of legislation dealing with our more serious problems. The administrative process has developed in response to the inevitable extension of government regulation designed to bring some order into the increasing complexities of modern economic society. I think it cannot be doubted that some such procedure is vital if the techniques of government are to keep pace with the development of our economic, social and political life.

The National Labor Relations Act well illustrates the field in which administrative procedures are essential to the successful operation of legislation. The problems of labor relations are delicate and complex. Prosecuting and judicial agencies in existence at the passage of the act were in general ill-equipped by training or experience to deal with problems arising in this field. At the same time the need for speed and dispatch is urgent. A labor situation does not remain in *statu quo* for long. It is likely either

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to develop rapidly into an explosion or to subside quickly into nothing. In short if the rights of workers to self-organization and collective bargaining are to be preserved, it must be done through machinery that is directed by experts and designed for swift and efficient disposition of controversies. The fate of Section 7(a) of the National Industrial Recovery Act — the enforcement of which was attempted through non-administrative procedure — adequately points the lesson in this respect.

At the same time there is much concern expressed today over the expansion of the administrative process in the field of governmental regulation. Without doubt a good deal of this concern is based upon opposition to the regulation itself rather than the method of its enforcement; and the propaganda of those with this point of view is unquestionably responsible for even more of the fears that have been expressed over the rapid development of the administrative process. Nevertheless it must be admitted that the establishment of general safeguards, to be administered by the judiciary where necessary, is vital to the preservation of the democratic process. These safeguards must not be so restrictive, or applied with such disregard for the problems to be solved, that they jeopardize legitimate methods or objectives of the administrative process. The unintelligent or unsympathetic application of general procedural restrictions could readily cripple and destroy the functioning of almost any administrative agency. On the other hand the safeguards should be sufficient to guarantee against abuse of the administrative process.

Fundamental to any such check upon the administrative process is the requirement of a "fair hearing." I agree with Professor Fuchs that the question whether general rules can be laid down to guarantee a fair hearing must be approached first through a consideration of the specific procedures of specific administrative agencies. I will endeavor, therefore, to outline briefly the procedure of the National Labor Relations Board and then to consider certain problems of fair hearing which have been raised by our experience in administration thus far.

Under the National Labor Relations Act the National Labor Relations Board has two general functions, the administration of each of which has a procedure somewhat different from the other. First the act guarantees to employees the right of freedom in self-organization and the right of collective bargaining with their employer. Interference with the right of self-organization by em-

ployers, and the refusal by an employer to bargain collectively with the representatives of his employees, are unfair labor practices. Where an employer has engaged or is engaging in unfair labor practices the Board is empowered to prevent their recurrence and to require affirmative action necessary to restore the *status quo*. Secondly, the act sets up machinery by which the Board may determine who has been selected as the representative of the employees in an appropriate bargaining unit and who, therefore, has exclusive rights of collective bargaining with the employer.

The Board administers the act through a staff at Washington and through twenty-two regional offices throughout the country. Each regional office consists of a regional director, with his assistants, and a regional attorney, with subordinate attorneys. I will consider first the Board's procedure with respect to its functions of preventing and remedying unfair labor practices.

Upon the filing of a charge that a violation of the act has occurred, the regional office sends an agent to investigate. If the charge seems justified, the regional director or his agent attempts to obtain an adjustment through voluntary compliance with the act. As in the case of most other statutes, the great majority of the cases are adjusted in this manner without resort to formal legal proceedings. Throughout the period of its existence thus far, a little over three years, the Board has handled a total of more than 18,000 cases. Of these, 14,000 cases, or over three-quarters, have been closed, and of the cases closed more than 95 per cent were closed by voluntary adjustment. Thus only 5 per cent involved the necessity of a hearing or other formal action under the act.

Where it is impossible to secure an adjustment and the facts seem to point to a violation of the act the regional director issues and serves upon the employer a complaint setting forth the facts upon which the Board bases its jurisdiction and the alleged facts relating to the unfair labor practices. Accompanying the complaint is a notice of a hearing before a trial examiner designated by the Board. The trial examiner, it should be noted, is appointed by the chief trial examiner who is responsible to the secretary of the Board and who is not a part of the legal division.

At the hearing the Board's attorney presents the evidence in support of the complaint. An attorney for the labor organization involved is often present and may likewise participate. The respondent may of course appear through its attorney and offer evidence in its defense. Under the act the rules of evidence prevailing in

courts of law or equity are not controlling. Nevertheless the hearing in general is conducted in accordance with the usual rules of evidence and departures therefrom are permitted by the trial examiner only where adequate reason is shown.

At the conclusion of the hearing the trial examiner normally issues a so-called intermediate report containing his findings as to the facts and his recommendations as to relief. The intermediate report is served on the parties to the proceeding, who are notified that exceptions and requests for oral argument or briefs should be filed with the Board within a stated period. If exceptions to the intermediate report are filed or if the recommendations of the trial examiner are not complied with, the case comes before the Board for decision. In a few cases the Board transfers the case to itself immediately after hearing without an intermediate report from the trial examiner. In such instances the Board, prior to issuing a final decision, issues proposed findings of fact, proposed conclusions of law and a proposed order, to which the parties may file exceptions and request oral argument or briefs in the same manner as in the case of an intermediate report.

Oral argument is heard before the Board itself in Washington whenever requested by any of the parties or, occasionally, upon request of the Board itself. Briefs are always accepted and considered upon the request of any of the parties or likewise occasionally upon request of the Board.

The case is now ready for decision by the Board. Despite the relatively small number of cases which go to hearing, the absolute number of cases which come before the Board for decision is large. During the past three years the Board has issued some 1200 decisions. At the present time there are several hundred cases pending before the Board for decision. The average record in each case is well over 1,000 pages. It can readily be seen from these figures that the Board members themselves cannot expect to read the records. In making its decisions the Board therefore avails itself of assistants known as review attorneys who are under the direction of an assistant general counsel and a group of supervisors. The review attorneys analyze the evidence, inform the Board of the contentions of all parties and the testimony relating thereto, and make initial drafts of the Board's findings and order.

In every case the Board's decision contains findings of fact and an order either dismissing the complaint or requiring the respondent to cease and desist from its unfair labor practices and

to take certain affirmative action to restore the *status quo* and effectuate the purposes of the act. The order of the Board is not self-enforceable. If the respondent does not comply with the Board's order it is necessary for the Board to petition the appropriate circuit court of appeals for enforcement. The respondent may likewise petition a circuit court for review of the Board's order. On any review in the circuit court the Board's findings of fact, if supported by evidence, are conclusive. The court has of course full leeway to consider and decide questions of law. Among the questions of law properly before the court is the question whether the Board's procedure has been proper and whether a fair hearing has been accorded the respondent under the act and under the due process clause of the Constitution.

The procedure for the certification of representatives follows a somewhat similar pattern. Upon the filing of a petition for certification, the Board's agent investigates and, if it appears that a question concerning representation has arisen, attempts to secure adjustment through an informal check of union membership, through a consent election, or through other similar informal proceedings. Where such adjustment is impossible the Board, upon recommendation of its regional director, authorizes an investigation. The regional director issues a notice of hearing which is served upon the employer involved, upon the labor organization filing the petition and upon any other labor organizations known to the regional director to be claiming members among the employees involved. A hearing is held before a trial examiner. In these cases no complaint is issued and the role of the Board's attorney is one of an investigator rather than prosecutor. In general if the labor organizations involved are represented by counsel, the primary burden of establishing the case is left to such counsel.

Upon the conclusion of the hearing the trial examiner does not submit an intermediate report. He issues an informal report for the guidance of the Board alone. The Board then, with the assistance of a review attorney, makes its decision. It may either dismiss the petition, may certify representatives upon the basis of the record, or may direct an election. In the latter event the election is held under the supervision of the regional director.

The method of conducting elections cannot be considered in detail at this time. In general it may be said that the election is supervised directly by an agent of the Board but that representatives of interested labor organizations are entitled to participate

and under normal circumstances an agent of the employer is likewise permitted to participate.

Following the ballot the regional director issues his intermediate report containing his conclusions as to the results of the election. Any of the parties, including the employer, has the opportunity to file objections to this intermediate report. If no objections are filed, the regional director submits the report to the Board and the Board thereupon certifies representatives, or if no representative has been chosen, dismisses the proceeding. If objections are filed to the report of the regional director but the objections do not raise any substantial or material issue the Board proceeds in the same manner as if no objections were filed. If the regional director considers that the objections do raise a substantial or material issue, he serves further notice on the parties to appear before a trial examiner in support of their objections. In such cases the trial examiner takes testimony but again does not render any intermediate report. The record of the testimony is transferred to the Board for decision and the Board, on the basis of the record of the hearing and the regional director's intermediate report, makes its decision either dismissing the petition or certifying representatives or taking such other action as seems necessary.

A certification of representatives has no enforceable effect. It is merely evidence of a right to representation. The employer is not bound by the decision nor is any order issued against the employer. Consequently there is no direct review in the courts of the Board's certification of representatives. If, however, the employer refuses to bargain collectively with the representatives certified by the Board, and the Board thereupon brings an unfair labor practice proceeding against the employer based upon such refusal, the employer may obtain a review in the courts, not only of the record in the unfair labor practice proceeding but also of the record in the prior certification proceeding.

It will be seen from the foregoing that the Board is not endowed with law-making functions. Under the act the Board's powers are limited to the initial adjudication of controversies involving individual employers charged with violation of law, and to the investigation and certification of facts relating to the representation of employees. The problems of fair hearing with which the Board is concerned have therefore been confined to these two types of administrative action.

During the three years of its existence the Board has had

ample opportunity to consider certain major problems of fair hearing. It need hardly be said that counsel for employers have not been reticent in urging upon the Board and upon the courts alleged deficiencies in the Board's procedure. Consequently it may be assumed that in the three years of operation thus far our attention has been directed to most of the important questions of fair hearing which are likely to affect employers appearing before the Board. The same applies, perhaps to a somewhat lesser degree, to our procedure as it affects the rights of labor organizations.

First to be noted are various matters which relate to questions of pleading. To what extent must the complaint recite in detail the alleged unfair labor practices? Under what circumstances is the respondent entitled to a bill of particulars? To what degree can the Board's attorney amend the complaint during the course of the hearing? If such an amendment is made what notice is the respondent entitled to for the purpose of answering and preparing its defense? To what extent is a variance between pleadings and proof fatal to the validity of the Board's order? To what extent may the Board adopt a differing theory of the case from that alleged in the complaint or pursued by the Board's attorney at the hearing.

Problems of this sort have been particularly acute during the first few years of the Board's operations. The legislation is new. That body of specific interpretation and application of the more general provisions of the act — which grows up around every statute — takes years to work out. As time goes on, and as the scope and implications of the act become clear, there will undoubtedly be less difficulty with pleading questions of this sort.

However, even at the initial stages of the Board's operations, it seems to me feasible to set up general rules of guidance which, if intelligently and sympathetically applied by the courts, should assure the respondent in each case adequate protection on issues of pleading. A good illustration of such general principles is furnished by the decision of the Supreme Court of the United States in *National Labor Relations Board v. Mackay Radio & Telegraph Company.*[1] The facts in the case were these:

After a period of unsuccessful negotiation between a labor organization known as the American Radio Telegraphists Association and the Mackay Radio & Telegraph Company, the union ordered a strike of its members for the purpose of enforcing its de-

[1] 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938).

mands on the company. The strike was nation-wide but the facts before the Board pertained only to the company's San Francisco office. There the strike soon proved unsuccessful and after several days the employees reported back for work. The company put most of the strikers back to work but refused to take back certain of the more active union leaders. The Board issued a complaint alleging that the respondent had "discharged and refused to employ" the five men who were not reinstated for the reason that they had joined and assisted a labor organization, and that by such discharge the respondent had discriminated in regard to the hire and tenure of employment of such employees contrary to Section 8(1) and (3) of the act. After completion of its testimony the Board's attorney filed an amended complaint to conform with the evidence in which it was alleged that the respondent had "refused to reemploy" the five men in question for the reason that they had joined and assisted a labor organization, and that such refusal of reemployment constituted discrimination in regard to hire and tenure of employment contrary to Section 8(1) and (3) of the act. The respondent entered a general denial of the amended complaint and then presented its evidence. The Board found that the respondent refused to reinstate to employment the five men, "thereby discharging said employees," and by such acts discriminated in regard to tenure of employment contrary to Section 8(1) and (3) of the act. In the circuit court of appeals and in the Supreme Court the respondent contended that the original complaint had alleged a discrimination by discharging five men; that after all the evidence was in, this complaint was withdrawn and a new one presented alleging that the respondent had refused to reemploy the five men; that the Board in its findings had reverted to the original position that the respondent had not failed to employ but had discharged the employees; and that thus the respondent was found guilty of an unfair labor practice which was not within the issues upon which the case was tried. The Supreme Court rejected the respondent's contention and laid down the applicable general principle in the following terms:

> "A review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence, pro and con, was directed to the question whether, when the strike failed and the men desired to come back and were told that the strike would be forgotten and that they might come back

> in a body save for eleven men who were singled out for different treatment, six of whom, however, were treated like everyone else, the respondent did in fact discriminate against the remaining five because of union activity. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory."[2]

A somewhat similar question arose in *Consolidated Edison Company v. National Labor Relations Board.*[3] In that case the Board had ordered the respondent not to give effect to certain contracts which the Board found had been entered into as part of the respondent's unfair labor practices. The respondent and the labor organization adversely affected contended that the validity of the contracts was not in issue in the Board's proceeding and that the Board's order on this point was therefore void. Although the members of the court disagreed upon the application of the rule there was no disagreement that the governing principle in the case was whether or not the issue of the validity of the contracts had been "actually litigated."

In general it may be said that the foregoing problems of pleading with which the Board has been concerned are not materially different from those which confront most other administrative agencies having functions similar to those exercised by the National Labor Relations Board. And, on the whole, it can be said that general principles, such as those enunciated by the Supreme Court in the *Mackay* and *Consolidated Edison* decisions, are equally applicable to the proceedings of such other administrative agencies and can give full protection, on matters of pleading, to the rights of parties appearing before them.

A second series of questions with which the Board has been concerned relates to matters of evidence. As I have stated, the National Labor Relations Act provides that in proceedings before the Board "the rules of evidence prevailing in the courts of law or equity shall not be controlling." This provision is similar to that appearing in other laws creating administrative agencies to handle the initial enforcement of legislation. From the point of view of swift and efficient enforcement, in a proceeding where the issues

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[2] National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 350, 58 S. Ct. 904, 912, 82 L. Ed. 1381, 1392 (1938).

[3] 59 S. Ct. 206, 83 L. Ed. 131 (1938).

are presented not to a jury but to a trained body of experts, there can be no doubt of the wisdom of dispensing with the requirement that the strict rules of evidence be followed. Nevertheless, such freedom in the acceptance of testimony, especially when coupled with the provision that the Board's findings of fact if supported by evidence are conclusive, may well give rise to serious problems of fair hearing.

To what extent can the Board ignore the hearsay rule? Should the Board adhere to the best evidence rule? Is it proper for the Board's trial examiners to permit leading questions on direct examination? May counsel impeach his own witnesses? To what extent and under what circumstances are employers entitled to subpoena the records of a labor organization? To what extent may the trial examiner cut short examination or participate in examination himself? These are some of the questions which frequently arise. It is impossible to consider all of them in detail at this time, but it may be worth while to discuss briefly what is probably the most important of them, — the hearsay rule.

It will readily be acknowledged that most hearsay testimony has little or no probative value. Nevertheless the Board has not found it wise to exclude hearsay evidence altogether. For one thing, many of the witnesses before the Board have not had the benefit of formal education and are quite unaware of the significance of various facts which may be relevant to the proceeding. Consequently it is often advisable for the trial examiner to allow considerable leeway with respect to hearsay upon the theory that it may introduce or point the way to important leads hitherto undeveloped. Again, testimony which, though hearsay, is within the power of the respondent to deny or explain, but which is left uncontradicted on the record, may under certain circumstances be reasonably relied upon as having probative value. In general, as I have said, the Board adheres to the hearsay rule unless good reason appears for making an exception thereto. And in no case that I recall has the Board relied solely upon hearsay to support an essential finding of fact.

What I have said is, I think, sufficient to show the advisability of leaving the Board free to admit hearsay evidence, and to rely upon it where reasonable to do. The question before us is whether there can be laid down any general rule, applicable by way of judicial review, which would check the Board in the event of extravagant use of hearsay evidence. Necessarily such a rule would

have to be stated in broad terms, and its application would have to vary with the circumstances. Yet the guiding principles which, again if intelligently and sympathetically applied, should afford adequate protection against real abuse can probably be stated. In *National Labor Relations Board v. Remington Rand, Inc.*,[4] the Circuit Court of Appeals for the Second Circuit has already attempted the statement of such a principle:

> " . . . [The Trial Examiner] did indeed admit much that would have been excluded at common law, but the act specifically so provides, section 10(b), 29 U.S.C.A. § 160(b); no doubt, that does not mean that mere rumor will serve to 'support' a finding, but hearsay may do so, at least if more is not conveniently available, and *if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.*"[5]

In the *Consolidated Edison* case the Supreme Court stated a similar principle, coupling it with the rule that the Board's findings of fact must be supported not merely "by evidence" but by "substantial" evidence:

> "The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by 'substantial' evidence, merely considered whether the record was 'wholly barren of evidence' to support them. We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive', section 10(e), 29 U.S.C.A. § 160(e), means supported by substantial evidence. Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142, 147. . . . Substantial evidence is more than a mere scintilla. *It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.* Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir., 93 F. 2d 985, 989; National Labor Relations Board v. Thompson Products, 6 Cir., 97 F. 2d 13, 15; Ballston-Stillwater Knitting Co. v. National Labor Relations Board, 2 Cir., 98 F. 2d 758, 760. We do not think that the Circuit Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the court referred to substantial evidence. Ballston-Stillwater Knitting Co. v. National Labor Relations Board, supra.

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[4] 94 F. (2d) 862 (C. C. A. 2d, 1938).
[5] *Id.* at 873. Italics supplied.

> "The companies urge that the Board received 'remote hearsay' and 'mere rumor'. The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. Interstate Commerce Commission v. Baird, 194 U. S. 25, 44 . . .; Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88, 93 . . . ; United States v. Abilene & Southern Ry. Co., 265 U. S. 274, 288 . . . ; Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 442 . . . But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence *having rational probative force.* Mere uncorroborated hearsay or rumor does not constitute substantial evidence."[6]

In certain important respects the problems of evidence with which the National Labor Relations Board deals are peculiar to the field of labor relations and the application of the foregoing principles must be made with these peculiarities in mind. Thus, as I have said, the absence of formal education on the part of most witnesses appearing in Board proceedings has an important bearing upon the application of the hearsay rule and upon the advisability of permitting leading questions. So, too, to mention but one more example, the need of a labor organization to keep its membership and activity concealed from a hostile employer is of extreme significance in determining the extent to which an employer may be permitted to inspect union books and records. I think it may safely be said, however, that the foregoing rule, which necessarily must be stated in general language, can serve equally well as the guiding principle for other administrative agencies making determinations of fact. Variances between agencies, such as have been pointed out above, can be normally taken care of in the application of the rule to the circumstances of the particular case.

A third problem of importance has been the question whether a fair hearing requires the issuance of an intermediate report by the trial examiner or, in lieu thereof, the issuance of proposed findings of fact by the Board, with the opportunity to file exceptions thereto and argue orally before the Board. After the decision of the Supreme Court in the second *Morgan* case,[7] it was contended

[6] Consolidated Edison Co. v. National Labor Relations Board, 59 S. Ct. 206, 216, 83 L. Ed. 131, 140 (1938).

[7] Morgan v. United States, 304 U. S. 23, 58 S. Ct. 999, 82 L. Ed. 1135 (1938).

that the Board's procedure was fatally defective in a few cases where it had dispensed with the trial examiner's report and had not issued proposed findings of fact. This contention was answered by the Supreme Court in the *Mackay* case and again in the *Consolidated Edison* case. In the *Mackay* case the Court said:

> "At the conclusion of the testimony, and prior to oral argument before the examiner, the Board transferred the proceeding to Washington to be further heard before the Board. It denied respondent's motion to resubmit the cause to the trial examiner with directions to prepare and file an intermediate report. In the Circuit Court of Appeals the respondent assigned error to this ruling. It appears that oral argument was had and a brief was filed with the Board after which it made its findings of fact and conclusions of law. The respondent now asserts that the failure of the Board to follow its usual practice of the submission of a tentative report by the trial examiner and a hearing on exceptions to that report deprived the respondent of opportunity to call to the Board's attention the alleged fatal variance between the allegations of the complaint and the Board's findings. What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare Morgan v. United States, 298 U. S. 468, 478 . . . The contention that the respondent was denied a full and adequate hearing must be rejected."[8]

In the *Consolidated Edison* case, in response to a similar contention that the lack of an intermediate report or proposed findings constituted a denial of a fair hearing, the Supreme Court stated:

> "It cannot be said that the Board did not consider the evidence or the petitioners' brief or failed to make its own findings in the light of that evidence and argument. It would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. But, aside from the question of the Brotherhood contracts, we find no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully ad-

[8] National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 350, 58 S. Ct. 904, 913, 82 L. Ed. 1381, 1392 (1938).

> vised of them. National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 350, 351 . . . The points raised as to the lack of procedural due process in this relation cannot be sustained."[9]

On this question of the intermediate report and proposed findings the considerations applicable to the Board's procedure would seem to apply generally to any administrative agency having comparable procedure. In other words, in any administrative proceeding where a specific complaint is issued which defines the issues and apprises the respondent of them, it would seem clear that a fair hearing does not require an intermediate report or proposed findings. It is to be noted, however, that the Chief Justice in the *Consolidated Edison* case expressed the opinion that the issuance of an intermediate report by the trial examiner, or presumably the issuance of proposed findings in lieu thereof, would be "better practice," and, in fact, the Board has, since the decision in the second *Morgan* case, adopted the policy in unfair labor practice cases of issuing proposed findings whenever the trial examiner, for whatever reason, does not prepare an intermediate report.

It does not follow from the foregoing, however, that an intermediate report is "better practice" in every type of administrative proceeding. Thus somewhat different considerations apply in proceedings before the Board for determination of representatives. There the factor of speed is more important than in the normal unfair labor practice case. It is vital, from the viewpoint both of averting industrial strife and of assuring to employees the full rights guaranteed by the act, that the determination of representatives proceed with dispatch. Furthermore, as stated above, the Board's representation proceedings result merely in a certification of fact and not in an order binding upon the employer or upon anyone else. Consequently the Board, in the interest of promptness, dispenses with the intermediate report in a representation case, both after the initial hearing and after the hearing upon objections to the ballot, if one is held. If the Board could be concerned only with giving the parties all possible procedural protection an intermediate report could be provided for in such situations. But to do so would afford the parties only a slight additional procedural benefit while at the same time materially impairing important substantive rights guaranteed under the act. Under such cir-

[9] Consolidated Edison Co. v. National Labor Relations Board, 59 S. Ct. 206, 216, 83 L. Ed. 131, 140 (1938).

cumstances it would not seem that the general principles of a fair hearing would recommend the procedure of an intermediate report or proposed findings.

Finally, there is another problem of fair hearing which has been raised in connection with the Board's procedure but which has thus far not been finally disposed of by the courts. Some of the respondents in cases decided by the Board, relying principally upon the second *Morgan* decision, have contended that they have the right, as a matter of determining the fair hearing issue, to inquire into the Board's internal operations with a view to discovering whether the Board itself has considered the evidence and made its own findings, or whether those functions were improperly delegated to subordinates. This question has normally been raised by pleadings before the circuit court of appeals alleging on information and belief that the Board members themselves did not consider or appraise the evidence or did not make the findings of fact which were issued as the Board's decision. Such pleading has usually been supplemented by a motion to require the Board members and others to answer interrogatories, or a motion to take depositions of the Board members and others, or both.

The considerations which should be determinative of this issue in so far as the National Labor Relations Board is concerned, seem to me equally applicable to all administrative agencies which have the function of adjudication, and in fact to the courts themselves. And it can scarcely be doubted that the issue is a vital one in judicial procedure. A somewhat similar inquiry into the functioning of the Secretary of Agriculture in the *Morgan* case occupied several days of trial. In the case of a court or board which makes hundreds of adjudications during a year, if a litigant in each case could, upon allegations based on information and belief, subject the court or board to an inquisition as to its methods, its work would be seriously impaired. Without going into the issues further it seems clear to me that if the procedure of an administrative agency makes provision for a complaint which defines the issues, for an intermediate report or proposed findings which redefine the issues after hearing, and for an oral argument, or opportunity for oral argument before the agency itself, the requirements of fair hearing do not permit an inquiry into the internal operations of the administrative agency, at least in the absence of specific allegations of fraud.

In conclusion, I may perhaps be permitted to repeat what I

have already stressed. With the expansion of administrative procedure into numerous fields of government operations, I conceive it to be of vital importance to develop general principles, such as rules implementing the requirement of fair hearing, which will serve to prevent abuse of the administrative process. On the whole I believe that satisfactory principles broadly applicable to the procedure of the various administrative agencies can be worked out. However, these principles will of necessity be general in nature, and their application to specific circumstances must depend upon the factors governing the particular situation. In the end they will serve their purpose only if they are applied with a sympathetic grasp of the functions of the administrative process and an intelligent understanding of the problems to be solved.