4-1-1952

Judicial Review of NLRB Orders: The Role of Inarticulate Policy Considerations

Keith W. Blinn

JUDICIAL REVIEW OF NLRB ORDERS: THE ROLE OF INARTICULATE POLICY CONSIDERATIONS*

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One of the most fascinating branches of administrative law is judicial review of administrative determinations. In this area one is able to observe the pressures and pulls between the divisions of government. Frequently, one feels a sense of battle.[1] The judiciary is not unmindful that, due in part to its own shortcomings, areas over which it had exclusive jurisdiction are controlled now by administrative agencies. It is aware that new techniques have been developed and these have not always been patterned after judicial procedures. When legislative judgments have been translated into terms of administrative orders, they have not always been cheerfully accepted; sometimes, they have been dissipated or nullified, and this under the guise of some traditional legal doctrine. This attitude has been not uncommonly reflected in the intemperate language of the reviewing court in reversing an administrative agency in the language of broad constitutional principles as contrasted with a far more conciliatory tone of "reversible error" when upsetting the judgment of a lower judicial body because of similar errors.[2] In epithetical jurisprudence a similar approach is represented by such phrases as "administrative absolutism."

For one interested in policy and the implementation to the fullest extent of the basic values of the community, the practice of exercising judicial scrutiny over administrative determinations raises a number of questions. For what objectives, by what methods and under what conditions should the reviewing court substitute its judgment for that of the administrative tribunal? To appraise rationally the achievements or shortcomings of judicial review of administrative determinations in terms of community policy objectives, one must seek to clarify in general terms the basic community objectives of such judicial review. Intervention by the judiciary should be designed to give litigants access to formal authority

*This article reflects solely the opinion of the author and not those of any government agency with which he has been or is presently connected.

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1. A clear statement of this philosophy appears in Freund's admonishment, "Discretionary administrative power over individual rights . . . is undesirable *per se* and should be avoided as far as may be, for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the 'Rule of Law'." FREUND, HISTORICAL SURVEY IN GROWTH OF AMERICAN ADMINISTRATIVE LAW 22-23 (1923).

2. GELLHORN, CASES AND MATERIALS ON ADMINISTRATIVE LAW 545 (1st ed. (1940).

to test the behavior of the administrative tribunal officials for their conformance to prescribed standards and to secure the application of community coercion for maintaining such conformance. More expressly, judicial review should serve to guarantee that administrative decisions are made according to the prescribed substantive policies of the community; that they are formulated through fair procedures but with as much economy to all parties as is consistent with other procedural values, such respect for human dignity and maximization of the enlightenment process; and that they make the greatest possible use of administrative expertness, including full use of scientific "know how" for the ascertainment of facts.

While various administrative agencies, involving the whole range of community values and all institutional contexts, present related problems, this article will consider some of the inarticulate policy considerations of judicial review in the context of industrial relations within the framework of the Natonal Labor Relations Board.

Realizing that orders of the National Labor Relations Board are not self-executing and depend almost wholly upon the court of appeals to bring effective community coercion to bear upon the non-complying respondent through the court's contempt powers, one recognizes immediately a distinction between review of this administrative determination and the review of an ordinary judicial determination by a lower court. The court of appeals may receive the case either through the device of a petition for a decree to enforce the Board's order or through a petition by the respondent to modify or set aside the order. Thus, it is apparent that the usual dichotomy, which is characteristic of the judicial review of lower court determinations where the petitioning party seeks to upset the decision below, does not pertain in the case of judicial review of NLRB decisions since usually the Board, as petitioner, will be seeking approval of its own determination.

Interpretation of the statutory tone for judicial review under the Wagner Act was set at rest during the early days of the Board. Thus, ". . . findings of the Board with respect to questions of fact if supported by evidence shall be conclusive"[3] was held to mean substantial evidence and "more than a mere scintilla" but "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] It was also expressed in terms that ". . . [i]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[5] This is to be contrasted to the weight given to the findings of a judge without a jury, which findings may be overturned when they are "clearly erroneous."[6] Admittedly, "the

3. 49 STAT. 454 (1935).
4. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).
5. NLRB v. Columbia Enameling & Stamping Co., 306 U.S. 292, 300 (1939).
6. Columbia v. Pace, 320 U.S. 701, 702 (1944).

very smoothness of the 'substantial evidence' formula as a standard for reviewing the evidentiary validity of the Board's findings established its currency."[7]

Following passage of the Administrative Procedure Act providing that agency findings should be set aside by the reviewing court if ". . . unsupported by substantial evidence . . ." which determinations should be made upon ". . . the whole record or such portions thereof as may be cited by any party . . ."[8] and passage of the Taft-Hartley Act providing that "the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole shall be conclusive,"[9] the court of appeals differed as to whether judicial control over administrative determinations had been broadened.[10] Conceding that the Administrative Procedure Act and the Taft-Hartley Act provide for the same extent of judicial scrutiny, the particularly unique aspect of the *Universal Camera* case[11] is that the Supreme Court indicated that the law with respect to the scope of judicial review had been changed by the passage of the Administrative Procedure Act and the Taft-Hartley Act,[12] while government counsel were urging that no change had been wrought since the law had been what the Court now asserts is the correct "mood."[13] Admitting that at most its previous decisions when interpreted may have led to an assumption that the reviewing court would have discharged its duty when it found support in the record by viewing a portion of the evidence in isolation, the Court hastened to suggest that it had not approved or condoned such limited review by adding, "This is not to say that every member of this Court was consciously guided by this view or that the Court ever explicitly avowed this practice as doctrine."[14] Although Dean Stason believed that some reviewing courts had on occasion sustained the Board's findings while viewing in isolation the evidence favorable to such findings,[15] other able writers suggested that "[o]bviously responsible men would not exercise their judgment on only that part of the evidence that looks in one direction; the rationality or substantiality of a conclusion

7. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).
8. 60 STAT. 224, 5 U.S.C. § 1009(e) (1946).
9. 61 STAT. 148 (1947), 29 U.S.C. § 160(e) (Supp. 1950).
10. NLRB v. Universal Camera Corp., 179 F.2d 749 (2d Cir. 1950). *Contra:* NLRB v. Pittsburgh Steamship Co., 180 F.2d 731 (6th Cir. 1950).
11. Universal Camera Corp. v. NLRB, *supra* note 7.
12. Professor Davis suggests that the legislative history of the Taft-Hartley Act demonstrated a much clearer desire for change than did the legislative history of the Administrative Procedure Act. In fact, he argues that the Supreme Court ignored certain strong evidence that no change was envisioned by the Administrative Procedure Act. DAVIS, ADMINISTRATIVE LAW 871 n. 19 (1951). For a view that judicial review was broadened as to facts and law by the Administrative Procedure Act see Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A.J. 434 (1947).
13. Universal Camera Corp. v. NLRB, *supra* note 7, at 487.
14. *Id.* at 478.
15. Stason, *Substantial Evidence in Administrative Law*, 89 U. OF PA. L. REV. 1026, 1049-50 (1941).

can only be evaluated in the light of the whole fact situation or so much of it as appears."[16] At least one court of appeals which had interpreted the new statutes as not changing the scope of review expressed the view that no change in their approach to judicial review of NLRB orders was necessary despite the contrary view of the Supreme Court since "[i]n making pragmatic application of the substantial evidence rule, [they had] always recognized ultimate responsibility for the rationality of the Board's decision. . . ."[17]

In their broadest categorization, the problems presented to the court in reviewing NLRB orders are those of employer unfair labor practices and union unfair labor practices. These may be described in terms of the right of labor organizations to obtain statutory status as the collective bargaining representative, the right of the employees to be free from employer or labor organization restraint and coercion in connection with their right to form, join or assist labor organizations or to refrain from such activity, and the right of the employer to be free from certain detrimental union activity. In a lower level of abstraction the range of issues may include simply deciding who said what in disputed factual claims,[18] determination of the area of the employer's responsibility for the actions of supervisors and third persons,[19] deciding the reason which motivated the employer's discharge of an employee,[20] interpretation of statutory terms such as "employee,"[21] determination of the appropriate bargaining unit for the purposes of collective bargaining,[22] determination of substantive policy[23] and procedure[24] which will effectuate the policies of the Act and fashioning the scope of the particular remedy.[25] A relevant inquiry would be whether there are any discernible articulated policies in the tendency of the court to substitute judgment based upon such a categorization of issues.

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16. Jaffe, *Administrative Procedure Re-examined: The Benjamin Report*, 56 HARV. L. REV. 704, 733 (1943).

17. NLRB v. Tri-State Casualty Ins. Co., 188 F.2d 50, 53 (10th Cir. 1951).

18. NLRB v. Continental Pipe Line Co., 161 F.2d 302 (5th Cir. 1947); NLRB v. Winona Knitting Mills, 163 F.2d 156 (8th Cir. 1947).

19. NLRB v. Link-Belt Co., 311 U.S. 584 (1941); NLRB v. American Furnace Co., 158 F.2d 376 (7th Cir. 1947); NLRB v. American Pearl Button Co., 149 F.2d 311 (8th Cir. 1945); NLRB v. Lettie Lee, Inc., 140 F.2d 243 (9th Cir. 1944).

20. NLRB v. Premier Worsted Mills, 183 F.2d 256 (4th Cir. 1950); NLRB v. May Dep't Stores Co., 162 F.2d 247 (8th Cir.), *cert. denied*, 332 U.S. 808 (1947).

21. NLRB v. E.C. Atkins Co., 331 U.S. 398, *rehearing denied*, 331 U.S. 868 (1947); NLRB v. Hearst Publications, 322 U.S. 111 (1944); NLRB v. Blount, 131 F.2d 585 (8th Cir.), *cert. denied*, 318 U.S. 791 (1943).

22. NLRB v. Falk Corp., 307 U.S. 453 (1940); NLRB v. West Kentucky Coal Co., 152 F.2d 198 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946); Note, 28 GEO. L. REV. 666 (1940).

23. Haleston Drug Stores, Inc. v. NLRB, 187 F.2d 418 (9th Cir. 1951).

24. NLRB v. A.J. Tower Co., 329 U.S. 324 (1947); NLRB v. Conlon Bros. Mfg. Co., 187 F.2d 329 (7th Cir. 1951); NLRB v. Andrew Jergens Co., 175 F.2d 130 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949); Semi-Steel Casting Co. of St. Louis v. NLRB, 160 F.2d 388 (8th Cir.), *cert. denied*, 322 U.S. 758 (1947).

25. NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1946); NLRB v. Express Publishing Co., 312 U.S. 426 (1941).

It has been commonly thought that in the absence of a statutory limitation on the time within which a petition for review could be filed, failure to seek review promptly did not preclude such a right.[26] The lapse of time between the issuance of the Board's order and the petition for enforcement may be explained by a good faith attempt to secure informal compliance with the Board's order and thus obtain conformance to community standards through volition, rather than resort to the formal authority of the court. Other equally acceptable and unnovel excuses might include simply a lack of legal personnel in the briefing section of the Board's enforcement staff. Under any circumstances, the respondent who has his own avenue for seeking review is in no position to urge a delayed enforcement as an element of unfairness. Standing almost alone is the *Eanet*[27] case which reiterates the obvious: that enforcement power was not given to the Board but was reposed as a judicial function in the court. The court refused to enforce an order requiring the company to bargain without some "reasonable recent indication that a decree was warranted," cautioning that, "law enforcement is an art and not a mere unthinkable application of mathematical absolutes."

As statutory judicial review of administrative determinations developed, courts adopted convenient tags to indicate the degree of readiness or reluctance with which they would substitute their own judgments for those of the administrative tribunal. These tags, originally cast in terms of *questions of fact* or *questions of law,* indicated polar extremes of judicial readiness to substitute judgment but were soon expanded to include other terms of *mixed questions of law and fact,*[28] *jurisdictional fact,*[29] and *constitutional fact.*[30] The first indicated a middle ground of judicial intervention and the latter two were used to justify complete readiness to substitute judgment. This transposes the problem of judicial review into one of determining into which category the issue will fall. Certain issues may be clearly categorized upon purely logical analysis into fact or law, but many defy such clear determination. A learned writer suggested, "The judges, who have the last word, can confidently draw the line between law and fact; for the rest of us it is not so easy."[31] If the criteria of substituted judgment depends on whether the issue is one of fact or law, the real difficulty lies in the accuracy of this classification—especially in the shaded area between law and fact or what is often called mixed questions

26. NLRB v. Poor Mfg. Co., 339 U.S. 577 (1950); NLRB v. Todd Co., 173 F.2d 705 (2d Cir.), *cert. denied,* 340 U.S. 864 (1949); NLRB v. Suburban Lumber Co., 121 F.2d 829 (3d Cir. 1941).

27. NLRB v. Eanet, 179 F.2d 15 (D.C. Cir. 1949).

28. Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act,* 19 FORD. L. REV. 73 (1950).

29. Black, *The Jurisdictional Fact Theory and Administrative Finality,* 22 CORNELL L.Q. 349 (1937).

30. Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. of PA. L. REV. 1055 (1932).

31. CARR, ADMINISTRATIVE LAW 108 (1941).

of law and fact. Whether particular statements were made or particular acts were done is a question of fact but assuming that such facts are undisputed, the question as to whether or not they amount to an unfair labor practice is a question of law.[32] Yet few would advocate a complete de novo review of even the latter question. As Justice Jackson describes the dilemma, "Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing 'questions of law' from 'questions of fact'."[33] Approaching the problem by considering the relative competence of the administrative tribunal and the court to make the particular determination suggests the need for a more rational division of power than the artificiality of factual and legal issues. However, it is believed that various rather inarticulate policy considerations play a more important role in the scope of judicial review than is generally realized—more than do some of the conceptualistic categorizations. Such a suggestion was made by the Attorney General's Commission on Administrative Procedure in its final report after studying a number of federal administrative agencies.[34]

Since the passage of the Taft-Hartley amendments to the National Labor Relations Act, the organizational structure of the NLRB has been almost unique;[35] the amendments effected a more than usual separation between prosecuting and adjudicating functions by the establishment of an independent office of General Counsel. In addition, the utilization of a Review Division for reviewing the examiner's intermediate reports, which is not uncommon in the techniques of administrative procedures, was eliminated by Section 4(a) of the Taft-Hartley Act: "The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts." To further insulate the Board from the prosecuting functions, it was provided that the examiner's report could not be reviewed by any person other than a Board member or his legal assistant and that no trial examiner could consult with or advise the Board with respect to exceptions taken to his findings, rulings or recommendations. Likewise, the amendments strategically placed the agency in a more neutral position by creating a series of union unfair labor practices so that the Board stands as protector of

32. "Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts and the consequence . . . which the law attaches to those facts, so the former imports the existence of certain facts . . . and also the consequence which the law attaches to those facts." HOLMES, COMMON LAW 115 (1881).

33. Dobson v. Commissioner, 320 U.S. 489, 500 (1943) in which the Court described the lower court's error as ". . . treating as a rule of law what we think is only a question of proper tax accounting."

34. FINAL REP. ATT'Y GEN. COMM. AD. PROC. 91 (1941).

35. Comment, 46 ILL. L. REV. 465 (1951); Note, 34 IOWA L. REV. 667 (1949).

the employees' rights of self organization from both the employer and the union. The Supreme Court noted the importance of such factors in reviewing a decision of the Tax Court[36] as it commented that "[the tax court] is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected." However, the normally anticipated impact of this separation has not been discernible in the reported decisions reviewing Labor Board orders. On the contrary, the *Red Spot Electric Co.*[37] case indicates a restrictive interpretation of Section 10(e) of the NLRA, which limits court consideration of objections to those which have been urged before the Board, its member, agent or agency, by holding it sufficient that an objection was raised before the examiner during the hearing. In the court's opinion the whole structure of the law demanded judicial consideration when an enforcement order was sought regardless of whether any contention as to this issue was urged before the reviewing court.

In assessing the weight to be given to the Board's determination, the court will scrutinize the record with greater care where the Board has failed to adopt or has overruled the examiner's findings and recommendations. In the *Ohio Associated Telephone Co.*[38] case, the respondent contended that the strikers were discharged because of misconduct. This reason was accepted by the examiner. The Board reversed the examiner, basing its decision on the fact that the evidence relied on by the examiner was hearsay. The court refused to enforce the Board's order holding that the evidence was not hearsay and commenting, " 'Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of the testimony. . . .' In giving consideration to the whole record as now we are obliged to do, we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertainment of the truth." Related to this factor may be the lack of unanimity of the Board or a disagreement among the members as to their findings or recommendations. The reviewing court's determination that the order has a rational basis in the record is not an abstract determination which is unaffected by the certitude with which the Board resolved conflicting issues. Thus, while the reported decisions fail to specify this as a concrete element of their decision, its relevancy as a factor playing a role in judicial consideration seems probable since such facts are reflected in the court's

36. Dobson v. Commissioner, 320 U.S. 489, 498 (1943).
37. NLRB v. Red Spot Electric Co., 191 F.2d 697 (9th Cir. 1951).
38. Ohio Associated Tel. Co. v. NLRB, 192 F.2d 664 (6th Cir. 1951).

statement of the case where there has been a disagreement among the Board members.[39]

Another factor is the degree of confidence that the court has in the impartiality of the examiners and the agency. This will be a close index to the inclination of the court to accept the agency's judgment rather than substituting its own judgment. The Supreme Court recognized this as an ingredient of the total process when it observed, "[S]ince the court below had originally found that the Board's order was vitiated by the examiner's bias, we must take care that the court has not been influenced by that feeling, however unconsciously, on reconsidering the record now legally freed from such imputation."[40] Throughout the entire history of the Board's operations, the question as to the fairness and impartiality of the examiners and the Board members has been a matter of some dispute.[41] In the *Ray Smith Transport*[42] case the Court of Appeals for the Seventh Circuit refused to enforce a reinstatement order and expressed a serious lack of confidence in the agency judgment because of the unjudicial attitude of the examiner which was critically described as follows: "[I]t was this attitude, so evident in the long and argumentative report of the examiner, couched in the language not of adjudication, but of advocacy. . . ."[43] The court did not find the examiner's conduct sufficiently bad to remand the case to the Board but rather decided the case on the merits using the examiner's conduct as a part of the whole record and holding that the findings were without reasonable support in the record. With respect to the evidence the court concluded, ". . . it is at once evident that to the mind of the examiner, the burden was not on the Board to prove that . . . [the discharges] . . . were for union activity, but on the Respondent to prove that they were for cause, and also, that to his eager credulity, straws in the wind, offered in support of the Board's case, became hoops of steel, and trifles light as air were confirmations strong as proofs from Holy Writ."[44] In a case[45] before the Court of Appeals for the Fifth Circuit, enforcement of a reinstatement order was denied because the findings were "based merely on hearsay, inference and suspicion . . . not

39. NLRB v. John Deere Plow Co., 187 F.2d 26 (5th Cir. 1951).

40. NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 501 (1951).

41. Gellhorn and Linfield, *Politics and Labor Relations*, 39 COL. L. REV. 339, 394 (1939); Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1950); particularly interesting are the cartoons in BROOKS, UNIONS OF THEIR OWN CHOOSING c.1, *The Board at Work* (1939).

42. NLRB v. Ray Smith Transport Co., 193 F.2d 143 (5th Cir. 1951).

43. What may appear to be argumentative to one court may be to another court a careful description of the reasoning process which was the basis of the determination. Thus, the Court of Appeals for the Second Circuit enforcing a reinstatement order based upon the examiner's findings, accepting the version given by the Board's witness and rejecting the version given by the company witness, states, "The Examiner's report explains why he thought Mr. Jones' testimony unreliable. . . . When an issue turns on credibility of witnesses, the Examiner's findings are especially entitled to respect." NLRB v. Chautauqua Hardware Corp., 192 F.2d 492, 493 (2d Cir. 1951).

44. NLRB v. Ray Smith Transport Co., *supra* note 42, at 144 (5th Cir. 1951).

45. NLRB v. Russell Mfg. Co., 191 F.2d 358 (5th Cir. 1951).

on substantial and legal evidence." On the other hand, an earlier case[46] before this court enforcing a reinstatement order against respondent's contention that the findings were not supported by substantial evidence, the court in a per curiam decision described the report of the trial examiner as exhibiting ". . . throughout not only a thorough understanding and appreciation of the effect of the evidence but a most commendable judicial approach to and handling of the issues presented."[47]

Closely connected with the court's confidence in the agency is the matter of procedural safeguards falling short of those considered desirable by the reviewing court. In the *Bradley Washfountain*[48] case, the Board's order reinstating certain strikers was based on the theory that the strike was an unfair labor practice strike since it was caused by the employer's refusal to bargain with the union and was prolonged through its unlawful back-to-work movement. The court denied enforcement and found that the company had not refused to bargain by granting part of a wage increase requested by the union without consulting the union after having been unwilling to agree to its demand for a wage increase and that, viewing the record as a whole, the back-to-work movement was made in good faith. The substituted judgments were not redeterminations of what was said but of the effect of what was said. It is worthy to note that the court had found the Board's complaint wanting in "procedural due process"[49] since it failed to apprise the respondent of the issues; however, the court preferred not to dispose of the case on this ground because of its conclusions on the merits of the case.

The area in which the National Labor Relations Board operates is highly charged with emotions and deep prejudices. Whether it is an area requiring special training, skill and knowledge is disputed.[50] While answers to problems posed in the field of industrial relations may appear to be less complex and to submit to easier solutions than problems in the fields of taxation and physics, the truly workable solution to industrial relations problems frequently calls for the amalgamation of such disciplines as economics, psychology, and sociology. That industrial relations problems are not just "legal problems" was carefully pointed out by Professor Wirtz in a critique of present methods of teaching labor law as he cautioned that there are ". . . too many practicing LL.B.'s contributing more to labor management dissension than accord, too many black-robed alumni forcing three cornered social problems into the round holes of hand-me-down

46. NLRB v. Augusta Chemical Co., 187 F.2d 63 (5th Cir. 1951).

47. *Id.* at 64.

48. NLRB v. Bradley Washfountain Co., 192 F.2d 144 (7th Cir. 1951).

49. *Id.* at 148.

50. Asher, *The Lawyer in the Field of Labor*, 20 MISS. L.J. 454 (1949); Howlett, *The Lawyer's Function in the Field of Labor Relations*, 20 TENN. L. REV. 137 (1948); Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in Public Interest*, 52 YALE L.J. 203 (1943).

common law. . . ."[51] Although the pattern is inconsistent, there is a thread running through the decisions acknowledging, in part, a special competency through experience on the part of the Board to make determinations within the area of industrial relations.[52] In a case raising the question whether a union was a tainted successor to an admittedly company-dominated union, Judge Learned Hand observed that this issue was distinguishable from a mere determination as to what actuated an employer to discharge an employee, on which issue the court was equally as competent as the Board to make a determination, but that ". . . the question of how deeply an employer's relations with his employees will overbear their will, and how long that influence will last, is, or at least it may be thought to be, of another sort, to decide which a Board, or tribunal chosen from those who have had long acquaintance with labor relations, may acquire a competence beyond that of any court."[53] The Board's experience and knowledge within the field of industrial relations was sufficient to justify the adoption of a presumption of interference based upon a company's promulgation and enforcement of a non-solicitation rule on company property during non-working hours.[54] Particularly in the determination of the appropriate bargaining unit for the purposes of collective bargaining, the courts have attributed great weight to the Board's administrative determination. Judicial reference to the Board's competence, based upon its long experience in this area, is usually cast in terms of the broad discretion given the Board by the NLRA. In reviewing unit determinations, the court will substitute its judgment only where the administrative determination has been arbitrary and capricious.[55] The courts are well aware that a large number of administrative unit problems are the result of consent determinations and that a readiness on the part of the court to substitute judgment in this area would open the flood gates for a vast number of cases and consequently throw a heavy burden on the courts.[56] Thus, the courts have been willing for the Board to develop criteria for these unit questions based upon other collective bargaining experience and industrial patterns. A similar reputation for competence might have been developed in the area of fashioning remedies. However, the stereotyping

51. Wirtz, *On Teaching Labor Law*, 42 ILL. L. REV. 1 (1947).

52. Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944).

53. NLRB v. Standard Oil Co., 138 F.2d 885, 887 (2d Cir. 1943).

54. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 804 (1945).

55. NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, *rehearing denied*, 331 U.S. 868, *motion denied*, 332 U.S. 823 (1947); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947); NLRB v. Conlon Bros. Mfg. Co., 187 F.2d 329 (7th Cir. 1951); NLRB v. Underwood Machinery Co., 179 F.2d 118 (1st Cir. 1950).

56. Something of the potential vastness of the work is indicated by the Board's Annual Report: "During the 1950 fiscal year, 9,279 petitions for representation elections were filed in the Board's offices. During this period, the Board conducted 5,731 representation elections in which 899,848 employees were eligible to vote. . . . More than 72 per cent of the elections was conducted by agreement of the parties. . . . The Board Members, however, were called upon to make decisions in 2,483 representation cases during the year." 15 N.L.R.B. ANN. REP. 30 (1951).

of remedial action, together with the judicial awareness that it was the violation of their decree which was the subject of contempt action, caused the courts to substitute judgment to circumscribe the area which must be policed to one which has been the subject of a finding on past conduct.[57] An early tendency to extend the Board's discretion in this area was rationalized on the grounds that the NLRA commanded the Board "to effectuate the policies of the Act" and thus it was ". . . for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged."[58] But the distinction between *how* and *what* was not always clear since the former frequently merged into the latter.

The above discussion serves to illustrate not in an exhaustive research but in a suggestive approach that judicial review rationally appraised must be considered in the realistic light of but a segment of the total decisional process. The end function of the total decisional process is intelligible only when it is realized that it is a means by which the decision maker starts not with answers and seeks to demonstrate their truth but with conflicting claims of the parties, and that it is the procedure for ascertaining the best possible answers. These best possible answers sought by the decision maker involve a composite ascertainment of truth from the conflicting claims, to which is applied the community standard to effectuate community substantive policy through procedures which meet community standards of "fair play." It appears that the withholding of substituted judgment by the reviewing court is not solely based upon the ambiguous law-fact dichotomy but rather is conditioned to a large degree by vague abstractions which may be oriented into variables of more concrete statement. These rather inarticulate policy considerations may be categorized as the organizational structure of the administrative agency with reference to the separation of its prosecuting and decisional functions; the complexity of the issue and the relative competence of the court and the agency to decide the question; the confidence which the agency enjoys in the eyes of the reviewing court; the nature of the sanction and its impact upon the sanctioned party; the extent to which failure to impose self-limitation will throw an undue burden of the agency's responsibility on the reviewing courts;[59] and the agency's failure to observe what is considered "fair play," particularly where there is a marked departure from a semblance of "judicial process." Such a frank recognition of these factors in the reviewing process may seek to assist in the problem which Justice Frankfurter described in the follow-

57. NLRB v. Express Publishing Co., 321 U.S. 426 (1941); NLRB v. Montgomery Ward Co., 192 F.2d 160 (2d Cir. 1951).

58. International Assoc. of Machinists v. NLRB, 311 U.S. 72, 82 (1940).

59. Compare enforcement of Wage Stabilization Board regulations through administrative enforcement commissions which apply sanctions through other executive branches of government such as Bureau of Internal Revenue, Office of Price Stabilization and National Production Authority. WSB Resolution No. 35, 16 FED. REG. 7284 (July 25, 1951).

ing words: "There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining words."[60]

60. Universal Camera Corp. v. NLRB, *supra* note 7, at 489.