NLRB Policymaking: The Rulemaking-Adjudication Dilemma Revisited in *NLRB V. Bell Aerospace Co.*

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I. Introduction

Policymaking is a vital function of an administrative agency. In general, administrative law is primarily a process of policymaking in the administration of legislative authority delegated to the agency in order to enable it to govern a particular sector of society which Congress has recognized as requiring regulation. The substantive law advanced by an administrative agency provides the contents of administrative policy. Persons who are subject to agency regulation manage their affairs and guide their conduct in society according to the agency's pronounced policy.1

The Administrative Procedure Act (APA)2 provides that an administrative agency may formulate policy either through rulemaking3 or through case-by-case adjudication.4 The APA, while it provides a

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Rulemaking procedures include publication in the Federal Register of general notice of the proposed rulemaking and hearing; an opportunity for interested persons to participate in the rulemaking through the submission of written data, views or arguments with or without an opportunity for oral presentation; a statement of the terms or substance of the proposed rule; and publication in the Federal Register of the rule as adopted. 5 U.S.C. § 553 (1970).

choice of procedures, offers no guidelines to the agency for determining how and under what conditions rulemaking should be used rather than adjudication or vice versa.\(^5\)

Recently, the Court of Appeals for the Second Circuit in *Bell Aerospace Co. v. NLRB*\(^6\) boldly asserted that in reviewing an agency's decision to formulate policy, courts are lodged with the power to make a procedural choice between rulemaking or adjudicatory procedures for the agency and may compel the agency to proceed by that choice in carrying out its policymaking responsibilities.

The assumption by the court of appeals of the power to direct an agency to conduct a rulemaking proceeding against the agency's decision to proceed by adjudicatory procedures has far-reaching implications. Central to the decision are the propositions that: (1) there are situations where the advantages of proceeding by rulemaking rather than by case-by-case adjudication are so substantial that a court should be allowed to substitute its judgment in place of the agency's exercise of discretion; (2) greater value should be placed on the advantages of rulemaking procedures than the agency's need for autonomy in deciding whether to announce rules in an adjudication or promulgate formal rules; and (3) given the advantages of rulemaking, there are standards a court can apply in determining when an agency should be compelled to use one procedure to the exclusion of the other.

Until Chief Judge Friendly's pioneer efforts in *Bell Aerospace*\(^7\) to require the National Labor Relations Board (NLRB) to make policy changes through the use of rulemaking, the settled response of the judiciary had been to let an agency exercise its informed discretion in choosing between rulemaking and adjudicatory procedures.\(^8\) *Bell Aerospace* is a frontier decision because it proposed to introduce a legal concept into the field of administrative procedure, thereby offering a broad scope for judicial activity in determining how an agency should choose among available procedures.

The decision of the court of appeals was reversed by the Supreme Court in *NLRB v. Bell Aerospace Co.*\(^9\) The court of appeals' attempted departure from settled law into an area whose limits were largely unknown came to a halt—at least temporarily. The decision of the Supreme Court does not completely rule out the possibility that an agency may be compelled to conduct a rulemaking proceeding in order to enunciate its policy. This article will examine the *Bell Aerospace* decisions and the

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\(^5\) The definitions of rulemaking and adjudication provided by the APA are not very helpful in this respect. See, e.g., Bernstein, *The NLRB's Adjudication—Rule Making Dilemma Under the Administrative Procedure Act*, 79 Yale L.J. 571, 610 (1970) [hereinafter cited as Bernstein]; Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 924 (1965) [hereinafter cited as Shapiro].

\(^6\) 475 F.2d 485 (2d Cir. 1973) [hereinafter referred to as *Bell Aerospace*].

\(^7\) Id.

\(^8\) See SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) [hereinafter referred to as *Chenery*].

\(^9\) 94 S. Ct. 1757 (1974) [hereinafter referred to as *NLRB v. Bell Aerospace Co.*].
ramifications of judicial interference with an agency's discretion to choose between rulemaking and adjudicatory procedures.

II. BACKGROUND TO THE COURT OF APPEALS' DECISION IN BELL AEROSPACE

Section 7 of the National Labor Relations Act (NLRA) establishes the "rights of employees" to join labor organizations and to engage in collective bargaining through their chosen representatives. These rights are protected by section 8(a) of the Act, which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Whether a particular employee is entitled to the benefit of section 7 rights and section 8(a) protections from unfair labor practices depends upon the statutory definition of an "employee." Since the definition of an "employee" determines which persons are included or excluded from the coverage of the National Labor Relations Act, the scope of the Act's coverage can be expanded or contracted by the way in which the definition is interpreted.

The National Labor Relations Act defines the term "employee" broadly to include "any employee." In 1947 the meaning of the term was narrowed by the Taft-Hartley amendments which excepted "supervisors" as defined by Congress. The term "managerial employee" is neither mentioned nor in any way defined by the National Labor Relations Act; rather, it is a concept created by the National Labor Relations Board for the primary purpose of deciding in representation cases "whether certain non-supervisory employees have a sufficient community of interest with the general group or class of employees constituting the bulk of a unit so that they may appropriately be considered a part thereof." The Board never clearly defined "managerial employee" because the concept only had utility as a functional tool by which the community of interest between different

13. The term "employee" does not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.
(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
categories of employees could be assessed in determining the appropriateness of a proposed bargaining unit. The concept was developed by the NLRB through case-by-case adjudications. For years the customary practice of the Board was to determine from the facts of each representation case whether a particular employee was more closely allied with management than with his fellow employees and therefore lacked a community of interest sufficient to warrant inclusion in a bargaining unit consisting of his fellow employees. A variety of loosely defined criteria evolved for the purpose of analyzing the facts of each case. The usual method employed in assessing community of interest was to determine whether the employee exercised managerial prerogatives in the formulation or effectuation of his employer's policies, and if so, the amount of discretion available to the employee in carrying out the employer's policies. These standards, although general in nature, were applied to specific factual questions in representation cases.

In Bell Aerospace Co., a representation case, the National Labor Relations Board found that 25 buyers employed in Bell Aerospace Company's purchasing and procurement department constituted an appropriate unit for bargaining and directed an election. The buyers voted in favor of union representation.

Relying upon prior Board decisions holding that buyers were managerial employees and, as such, not entitled to the section 7 rights of joining labor organizations and bargaining collectively through representatives, Bell (the company) refused to recognize the union.

Where the interests of certain employees seemed to lie more with those persons who formulate, determine, and oversee company policy than with those in the proposed unit who merely carry out the resultant policy, we have held them to be excluded [from the general group of employees], and have commonly referred to such excluded persons as "managerial employees," without ever having attempted a precise definition of that term.

17. Hudson Motor Car Co., 55 N.L.R.B. 509, 512 (1944), appears to be the first representation case in which buyers were excluded from a unit of clerical employees because "their duties are closely allied to management, differing materially from those of the other clerical employees.

In Vulcan Corp., 58 N.L.R.B. 733 (1944), a buyer was excluded from a unit of production employees as a managerial employee.
Because of the responsibility of his position and his peculiar relationship to management, and in view of the fact that his interests are apparently different from those of the production and maintenance employees, we shall exclude him.

Id. at 736.


The facts in the representation case were not in dispute.

21. In Swift & Co., 115 N.L.R.B. 752 (1956), the Board held that procurement drivers, whose job responsibilities included buying supplies for their employer, could neither be included in a unit of production and maintenance employees nor in a separate unit consisting exclusively of procurement drivers. In excluding the drivers from exercising bargaining rights under the National Labor Relations Act, the Board concluded:

It was the clear intent of Congress to exclude from the coverage of the Act all
Spurred by a decision of the Court of Appeals for the Eighth Circuit in *NLRB v. North Arkansas Electric Cooperative, Inc.*, which was handed down contemporaneously with the Board's certification of the buyers at Bell Aerospace Company and which held that managerial employees are not entitled to the protections accorded to "employees" by the NLRA, Bell decided to challenge the authority of the Board to accord collective bargaining rights to the 25 buyers which the company employed.

The buyers employed by Bell Aerospace Company purchased all of the company's needs. They had full discretion without any dollar limit in selecting prospective vendors, preparing invitations to bids, assessing the bids which were submitted, and preparing purchase orders. The buyers had complete authority to make purchases on their own signature up to $5000 in any transaction; however, they had to obtain approval from management superiors in order to make commitments of Bell's funds in excess of $5000. In addition to negotiating the terms and prices of contracts, the buyers were responsible for monitoring the performance of the contracts and adjusting disputes which might arise between Bell Aerospace Company and the suppliers.

The dispute in the representation case concerned the legal standards to be applied to the facts by the Board in deciding whether the

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... individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act . . . .

*Id.* at 753-54.

The Board also refused to certify a separate unit of buyers in American Locomotive Co., 92 N.L.R.B. 115, 117 (1950), where it stated that "[a]s it appears that the buyers are authorized to make substantial purchases for the Employer, we find that they are representatives of management, and as such may not be accorded bargaining rights under the Act."

In numerous other representation cases the Board also excluded buyers from rank and file units of employees. Interstate Co., 125 N.L.R.B. 101, 106 (1959) ("In accordance with customary Board policy, we will exclude these employees as managerial employees because of their buying function."); Temco Aircraft Corp., 121 N.L.R.B. 1085, 1089 (1958) ("Buyer A: This [employee] purchases materials for the company and is often required to pledge the company's credit. We find that Buyer A is managerial, and exclude him from the unit."); Denton's Inc., 83 N.L.R.B. 35, 37 (1949) ("the interests of the buyers . . . are more closely identified with management than with the other employees . . . in accordance with our policy . . . we shall exclude all buyers . . .").

The rule of Swift & Co., 115 N.L.R.B. 752, 753-54 (1956), that "[i]t was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management," was described by the Board in its brief to the Supreme Court in *NLRB v. Bell Aerospace Co.* as a "sweeping and inaccurate statement" that was contrary to numerous Board decisions immediately after the enactment of the 1947 amendments which held that managerial employees, not presenting a conflict of interest problem, were to be excluded from rank-and-file bargaining units, but not from the coverage of the Act.

*Brief for the National Labor Relations Board at 27, NLRB v. Bell Aerospace Co., 94 S. Ct. 1757 (1974).*

22. 446 F.2d 602 (8th Cir. 1971) [hereinafter referred to as *North Arkansas*].

23. *Id.* at 610.


buyers were managerial employees, and if so, whether they were entitled to engage in collective bargaining under the NLRA. The Board never clearly ruled on the narrow issue of whether Bell's buyers were managerial employees; for the Board decided that even though the buyers might be managerial employees, they were entitled to be represented under the Act, thus relying upon its then recent decision in North Arkansas Electric Cooperative, Inc. In North Arkansas, the Board, reversing several long standing decisions, found that with certain limitations, managerial employees are employees within the meaning of the Act and are entitled to its protection. Under previous Board decisions, managerial employees had been excluded from the protections of the NLRA.

North Arkansas was an unfair labor practice case in which an employer was ordered to reinstate with back pay a managerial employee who had been discharged for failing to remain neutral as requested by his employer during a union campaign. The Board in North Arkansas had originally ordered reinstatement on the theory that the discharged employee was not a managerial employee. The Court of Appeals for the Eighth Circuit in its first decision in NLRB v. North Arkansas Electric Cooperative, Inc. held that the employee had managerial status and remanded the case to the Board "with specific instructions to it to determine whether or not the discharge of Lenox [the employee], as a 'managerial employee' under all the circumstances of the case, was or was not violative of the Act."

In a supplemental decision, the Board in North Arkansas Electric Cooperative, Inc. again ordered the reinstatement of the managerial employee and ruled for the first time that most managerial employees are entitled to the protections of the Act. Prior to this decision, the Board had applied two judicially discernible criteria in determining whether an employee was a managerial employee and, therefore, not entitled to the rights accorded to "employees" by section 7 of the National Labor Relations Act. These criteria had been created and applied by the Board in determining whether an employee was properly classifiable as a managerial employee and, as such, lacked the requisite community of interest necessary for inclusion in a unit of

29. Insofar as Swift & Company . . . and other cases have indicated, in a representation case context, that managerial employees might not be entitled to the protection of the Act, we hereby overrule them to the extent that they may be inconsistent with our decision herein.
30. See note 21 supra.
32. 412 F.2d 324 (8th Cir. 1969).
33. Id. at 328.
rank-and-file employees. The Board itself had never clearly defined these criteria.35 The various courts of appeals, however, in reviewing both representation cases36 and unfair labor practice cases37 had found that the following tests were customarily applied by the Board in defining managerial employees:

The first test is to determine whether an employee is so closely related to or aligned with management as to place the employee in a position of potential conflict of interest between his employer on the one hand and his fellow workers on the other. If an employee is found to be in such a position, he is not, under Board policy, entitled to be represented in the collective process.

The second managerial employee test is to determine whether the employee is formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties. If an employer cloaks an individual with such authority or such discretion, that individual would be a managerial employee and would be deprived of the right of representation by a bargaining unit.38

Prior to North Arkansas, all employees classifiable as managerial employees had been denied section 7 rights and section 8(a) protections.39 In North Arkansas, the Board not only determined that some managerial employees should be afforded coverage under the Act, but also changed the applicable criteria in determining which managerial employees were to be covered by the Act and which were not. The first test was retained unchanged. The second test, which is much more functional than the first, was altered.40 Under the new North Arkansas

35. See note 16 supra and accompanying text.
36. A finding by the Board's Regional Director that district circulation managers, whose responsibilities included overseeing the distribution of newspapers, "were not supervisory or managerial employees and that they constituted a unit appropriate for the purposes of collective bargaining pursuant to Section 9(b) of the Act" was reviewed in Illinois State Journal Register, Inc. v. NLRB, 412 F.2d 37, 39 (7th Cir. 1969), under section 10(l) of the National Labor Relations Act in the context of sections 8(a)(1) and 8(a)(5). These sections concern unfair labor practices caused by the employer's refusal to bargain collectively with the representative chosen by the circulation managers. See also Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151 (7th Cir. 1970); International Ladies' Garment Workers' Union v. NLRB, 339 F.2d 116 (2nd Cir. 1964).
38. Illinois State Journal Register, Inc. v. NLRB, 412 F.2d 37, 41 (7th Cir. 1969). On several occasions the Board has been admonished for not having "developed clear standards for determining what is a managerial employee." Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, 644 (D.C. Cir. 1966). In International Ladies' Garment Workers' Union v. NLRB, 339 F.2d 116, 123 (2d Cir. 1964), the court noted that "the Board's rulings on the scope of this definition are not a model of clarity . . . ." The Board in North Arkansas Electric Cooperative, Inc., 185 N.L.R.B. 550 (1970), responded to the judicial criticism by explaining that "[t]his lack of definition may be inherent in the difficult process which we face constantly in evaluating 'community of interest' in many kinds of unit determinations."
40. The likelihood of a potential conflict of interest and the closeness of the relationship
test, the emphasis was no longer on the employee's discretion in carrying out the employer's general policies, but on the employee's participation "in the formulation, determination, or effectuation of policy with respect to employee relations matters."\(^{41}\)

If the managerial employee had such discretion, he would be excluded from the coverage of the Act because his duties would be likely to cause a conflict of interest between his job responsibilities and his responsibilities to a labor organization arising from his participation in a union. However, if no conflict of interest was likely to arise because the managerial employee was not involved in formulating or implementing labor relations policies, then even though the managerial employee had substantial discretion in formulating, determining and effectuating his employer's other policies and would have been excluded from the Act's protection under the original second test as a managerial employee, he was entitled to coverage under the new *North Arkansas* test.

Having overturned prior decisions holding that all managerial employees are excluded from the coverage of the Act\(^ {42}\) and deciding in *North Arkansas* that only those managerial employees who participate in the formulation or effectuation of management policy with respect to employee relations matters are to be excluded from the coverage of the Act, the Board then decided to apply the *North Arkansas* ruling to a representation proceeding. *Bell Aerospace Co.* was the first representation proceeding in which the Board held that managerial employees are entitled to representation rights under the National Labor Relations Act.\(^ {43}\) However, on the same day that the Board certified the 25 buyers at Bell as an appropriate unit for the purpose of engaging in collective bargaining,\(^ {44}\) a second decision was rendered by the Eighth Circuit in *North Arkansas Electric Cooperative, Inc.*\(^ {45}\) In that decision, the court refused to enforce the order directing the employer to reinstate the managerial employee who had been discharged for his union activities and held that managerial employees are not covered by the National Labor Relations Act and, therefore, are not entitled to its protections.\(^ {46}\)

Bell sought reconsideration of the Board's decision to certify the unit of buyers since the Eighth Circuit in its second decision in *North Arkansas* had rejected the Board's new approach in determining the

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\(^{44}\) *NLRB v. Bell Aerospace Co.*, 94 S. Ct. 1757, 1760 n.3 (1974).

\(^{45}\) 446 F.2d 602 (8th Cir. 1971).

\(^{46}\) *Id.* at 610.
coverage to be extended to managerial employees under the NLRA. Bell Aerospace Company's motion for reconsideration was denied by the Board\textsuperscript{47} and its next forum for relief was the Court of Appeals for the Second Circuit.

III. THE COURT OF APPEALS' DECISION IN BELL AEROSPACE

The court of appeals followed the Eighth Circuit's second decision in *NLRB v. North Arkansas Electric Cooperative, Inc.*\textsuperscript{48} and held that "true 'managerial employees' " are not covered by the NLRA.\textsuperscript{49} The court reached this conclusion based upon its reading of several Board decisions which bluntly stated that managerial employees could not be deemed employees for the purpose of the NLRA.\textsuperscript{50} The court of appeals was particularly alert to the reaction of Congress in overturning the holdings of the *Packard Motor Co.*\textsuperscript{51} decisions that supervisory employees constituted an appropriate unit for collective bargaining. The Taft-Hartley amendments expressly excluded supervisors from the definition of "employee" and, therefore, the protections afforded to employees.\textsuperscript{52} Although the definition of supervisors written into the NLRA by the Taft-Hartley amendments does not encompass managerial employees, the court of appeals reasoned that Congress nevertheless intended to impliedly exclude them from the coverage of the Act's protection.\textsuperscript{53} "Congress recognized there were other persons so much more clearly managerial [than supervisors] that it was inconceivable that the Board would treat them as employees."\textsuperscript{54} The court further reasoned that the Board's settled policy was to exclude managerial employees from units of rank-and-file employees. Therefore, a specific provision expressly excluding managerial employees was deemed unnecessary by Congress since presumably the Board would continue to exclude them from rank-and-file units and logically from separate units consisting exclusively of managerial employees.\textsuperscript{55} The court of appeals concluded that although the Board had consistently excluded buyers as managerial employees from rank-and-file units of employees and had in several instances refused to certify separate units consisting exclusively of buyers,

\begin{itemize}
  \item \textsuperscript{47} Bell Aerospace Co., 196 N.L.R.B. 827 (1972).
  \item \textsuperscript{48} 446 F.2d 602 (8th Cir. 1971).
  \item \textsuperscript{49} Bell Aerospace Co. v. NLRB, 475 F.2d 485, 494 (2d Cir. 1973).
  \item \textsuperscript{50} Id. at 492-94.
  \item \textsuperscript{51} Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), aff'd Packard Motor Car Co., 64 N.L.R.B. 1212 (1945). The *Packard* decisions raised the question of how far unionization should reach into the industrial hierarchy. In a dissenting opinion in *Packard*, Justice Douglas stated that "$[t]he present decision . . . tends to obliterate the line between management and labor." Packard Motor Car Co. v. NLRB, 330 U.S. 485, 493 (1947).
  \item \textsuperscript{52} See note 14 supra and accompanying text.
  \item \textsuperscript{53} Bell Aerospace Co. v. NLRB, 475 F.2d 485, 491 (2d Cir. 1973).
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} Id. at 492-94.
\end{itemize}
we do not think the Board would be precluded, on proper
proceedings, from determining that buyers, or some types of
buyers, are not true "managerial employees" and con-
sequently come within the protection of § 8(a)(5) and (1).56

The "proper proceeding" which the court of appeals was referring to
was a rulemaking proceeding which the NLRA specifically authorizes
the Board to conduct.57 The court decided that if the Board were to
reverse its policy and hold that buyers are not managerial employees,
then in so doing, it could no longer disregard, as it had done for a
quarter century, the Supreme Court's admonition to the Securities and
Exchange Commission in the second SEC v. Chenery Corp. decision:
"The function of filling in the interstices of the Act should be per-
formed, as much as possible, through this quasi-legislative promulga-
tion of rules to be applied in the future."58 In support of his position,
Judge Friendly also referred to dicta in NLRB v. Wyman-Gordon Co.:

Either the rule-making provisions are to be enforced or they
are not. Before the Board may be permitted to adopt a rule
that so significantly alters pre-existing labor-management un-
derstandings, it must be required to conduct a satisfactory
rule-making proceeding, so that it will have the benefit of
wide-ranging argument before it enacts its proposed solution
to an important problem.59

IV. THE SUPREME COURT'S RESPONSE

The decision of the court of appeals was affirmed in part and
reversed in part by the Supreme Court in NLRB v. Bell Aerospace
Co.60 The Supreme Court in a five to four decision agreed with the
Second Circuit that all employees who are properly classified as "man-
agerial" must be excluded from the coverage of the NLRA.61 In
rejecting the position of the Board that managerial employees should
be excluded from the Act's protection only in those situations where
their duties to their employer include formulating or implementing
labor relations policies, the majority opinion determined that the
Board had applied an improper legal standard in defining who is a
managerial employee.62 The Court remanded to "permit the Board to

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56. Id. at 494.
57. Section 6 of the NLRA, 29 U.S.C. § 156 (1970), provides:
The Board shall have authority from time to time to make, amend, and rescind, in the
manner prescribed by the Administrative Procedure Act, such rules and regulations as
may be necessary to carry out the provisions of this subchapter.
See Bernstein, supra note 5, at 598 et seq.
60. 94 S. Ct. 1757 (1974).
61. Id. at 1762. Justice White, who wrote the dissenting opinion, argued that "managerial
employees" are literally within the NLRA's definition of an "employee" as provided in 29 U.S.C.
§ 152(3) (1970). For an analysis of Justice White's dissenting opinion, see The Supreme Court,
apply the proper legal standard in determining the status” of the buyers at Bell. The Court noted that the question whether the buyers are managerial employees “must be answered in terms of the employees' actual job responsibilities, authority and relationship to management,” although the Board could also consider the possibility that the participation of buyers in a labor organization would lead to a conflict of interest with their job responsibilities.

The Supreme Court further held that “the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.” All nine Justices agreed on this point. In deciding that the National Labor Relations Board could not judicially be compelled to proceed by rulemaking rather than by adjudication in announcing a policy change, the Court reaffirmed its holding in SEC v. Chenery Corp. Chenery established the cardinal principle of administrative procedure that “the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”

The discretion to choose between rulemaking and adjudication was returned to the Board after the aggressive initiative of the court of appeals to confine the Board's freedom of choice. The Board however, may not have recovered all that it would have lost had the Supreme Court fully sustained the Second Circuit's decision in Bell Aerospace. The Supreme Court's decision plainly gives warning that “there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act . . . .” An exception to the Board's free exercise of its discretion in choosing to adjudicate rather than proceed by rulemaking may arise: (1) where industry reliance on past decisions of the Board results in substantial “adverse consequences,” (2) where the Board seeks to impose new liability on individuals “for past actions which were taken in good faith reliance on Board pronouncements,” or (3) where fines or damages are imposed for the violation of Board policy newly announced in an adjudication. Provided that the agency does not run

63. 94 S. Ct. at 1769.
64. Id. at n.19.
65. Id. at n.20.
66. Id. at 1771.
68. Id. at 203.
69. 94 S. Ct. at 1771.
70. Id. at 1772. The Supreme Court is not breaking new ground in stating that the use of adjudicatory procedures may amount to an abuse of discretion.

In NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952), the employer entered into a closed shop agreement with a union at a time when the Board had refused to take jurisdiction in cases involving the construction industry. The Board reversed its policy in taking jurisdiction over the construction industry and retroactively determined that the employer was guilty of an unfair labor practice for dismissing an employee who had been discharged from the union for
afoul of the narrow instances in which the Court, by way of dictum, indicated that the use of the adjudicatory procedures may amount to an abuse of discretion, its freedom to choose between proceeding by rulemaking or by adjudication remains untrammeled.

V. Conceptual Framework for Analysis of the Bell Aerospace Decisions

At the outset of this article the suggestion was made that there are at least three premises inherent in the court of appeals decision in Bell Aerospace. These postulates are suggested in order to explain the practical meaning and potential precedential value of the Bell decisions. First, there may be situations where the perceived advantages of proceeding by rulemaking are so substantial that the process of judicial review of agency action should be expanded to allow a court to substitute its judgment in place of the agency's exercise of discretion in choosing among available procedures. Second, it can be inferred that greater value should be placed on the advantages of rulemaking procedures than the agency's need for autonomy in deciding whether to announce rules in an adjudication or promulgate formal rules. Third, judicial compulsion and interference with an agency's discretion to choose between rulemaking and adjudication implies, and possibly assumes, that there are clearly definable standards which a court can apply to the determination. The three premises can serve as useful analytical tools in explaining how the court of appeals reached the conclusion that the Board could determine that buyers are not managerial employees only by invoking its rulemaking procedures. They are equally helpful in explaining why the Supreme Court reversed and held that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."71

A. The Advantages of Rulemaking

In formulating policy, choices must be made among alternative and competing courses of action. If the agency is to choose the best alternative among competing policies, it must be equipped with procedures which will enable it to marshal all of the relevant information upon which its decision must be based.72 In recent years attention has

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failing to pay his dues. The Board awarded the employee back pay. The Court of Appeals refused enforcement because the Board abused its discretion in retroactively changing its policy in an adjudication.

We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors.

*Id.* at 149. See also *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 861 (2d Cir. 1966).

71. 94 S. Ct. at 1771.

72. Professor Davis describes rulemaking as
been focused on the manner in which an agency proceeds to exercise its authority to make policy. This focus on procedure is due to an increasing demand for greater participation in the process of policymaking.

One of the advantages of rulemaking is that it provides an agency with procedures which free it from having to mold a rule of law only in the context of the adversarial interests which are likely to be represented in an adjudicative proceeding. In rulemaking, the agency is acting more like a legislature than a court. As a quasi-legislative body, it can, under section 553 of the APA, look beyond the confines of a record in making policy. The informal notice and comment provisions allow any interested person an opportunity to participate in the rulemaking proceeding by submitting information in written form, with an opportunity for oral presentations at the agency's discretion.

In the Bell Aerospace decision, the court of appeals, in what has been called "probably the most innovative decision of late," determined that the National Labor Relations Board must engage in a

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footnotes:


74. "Adjudication procedure is undemocratic to the extent that it allows creation of policy affecting many unrepresented parties." DAVIS, supra note 72, at 142.

75. See Bernstein, supra note 5, at 596; Shapiro, supra note 5, at 930-32.

76. See generally DAVIS, supra note 72, at 139-43; Shapiro, supra note 5, at 932.


rulemaking proceeding when it proposes to reverse "a long-standing and oft-repeated policy on which industry and labor have relied." 81 The decision, written by Chief Judge Friendly, was based upon two imperatives of policymaking: (1) the requirement that an opportunity to participate in the change of agency policy be afforded to industry and labor organizations; and (2) and obligation that the agency have "all available information" before changing its policy. 82 Judge Friendly focused his concern on the substantial impact that a change in Board policy would have on those regulated by agency policy. "There must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." 83

There is widespread agreement among courts and commentators that greater participation of regulated constituents and increased informational inputs will greatly enhance an agency's process of promulgating policy. 84 Rulemaking procedures can provide the vehicle to achieve these goals. The Supreme Court in NLRB v. Bell Aerospace Co. recognized that reasons do exist for greater use of rulemaking by the Board. "[R]ulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course." 85

The opportunity for widespread participation and the superior information gathering likely to result from increased participation are not the only advantages of rulemaking procedures. Rulemaking operates prospectively only. 86 Therefore, prior to the enactment of the rule, the procedures give fair warning to the constituents of an agency as to how they shall be governed in the future.

In contrast to rulemaking, the usual pattern in an adjudication where new policy is announced is for the agency to apply its new policy retroactively to the parties to the adjudication. 87 A retroactive change in policy can cause hardship to the parties before the agency in a particular proceeding if they have relied upon a prior agency position or the absence of any statement of agency policy in governing their conduct. 88 There is always a possibility of hardship because in an adjudication the agency may adopt a rule for the first time and then,

81. 475 F.2d at 497.
82. Id.
83. Id. at 496.
84. See note 75 supra.
85. 94 S. Ct. at 1772.
86. With few exceptions, an agency must publish a substantive rule in the Federal Register 30 days before its effective date. 5 U.S.C. § 553(d) (1970).
88. See NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952), discussed at note 70 supra. Presumably an agency has the power to act prospectively in either rulemaking or adjudication. NLRB v. Majestic Weaving Co., 355 F.2d 854, 861 (2d Cir. 1966). However, in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), the Supreme Court admonished the Board for laying down a rule in an adjudicatory proceeding (Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966)) which was not applied to the parties to the adjudication, but was to have prospective effect only.
by applying it retroactively, decide that it has been violated by the very parties who have been singled out by the agency for the application of a policymaking change. 89

Both the court of appeals 90 and the Supreme Court agreed that the Board's change of policy in certifying a unit consisting exclusively of buyers did not cause any hardship by exposing the employer to unexpected liability.

[T]his is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. Nor are fines or damages involved here. In any event, concern about such consequences is largely speculative, for the Board has not yet finally determined whether these buyers are "managerial." 91

The court of appeals and the Supreme Court were also in harmony regarding the advantages which rulemaking offers an agency in performing its policymaking function; however, they differed as to the weight which should be accorded to them in compelling the Board to invoke its rulemaking procedures. The Supreme Court resisted acceding to the attractiveness of the position which the decision of the court of appeals would have established; namely, that the advantages likely to result from the opportunity which rulemaking provides for greater participation of affected participants and from the superior information gathering technique provided by informal rulemaking procedures are so substantial that a court should be allowed to substitute its judgment when called upon to review the agency's procedural choice.

Judge Friendly noted the fact that the Board in Bell Aerospace was attempting to change a "long-standing and oft-repeated policy." 92 His insistence on affording greater participation to the agency's constituents when a major policy change is contemplated by the agency strongly suggests that he believes that by requiring the Board to proceed by rulemaking, a measure of predictability and accountability can be achieved in the agency's process of making policy. 93

It would seem that compulsory rulemaking would provide the constituents of an agency with greater certainty of agency policy than would adjudicatory procedures. When an agency announces a rule of law in a formal rulemaking proceeding, it is bound by it unless the rule

89. See Berger, supra note 73; FTC Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8367-68 (1964).
90. 475 F.2d at 497.
92. 475 F.2d at 497.
93. Judge Friendly informed the Board of his growing concern over its failure to use rulemaking in several cases prior to the Bell Aerospace decision. See NLRB v. Penn Cork & Closures, Inc., 376 F.2d 52, 57 (2d Cir. 1967); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966); NLRB v. Lorben Corp., 345 F.2d 346, 350 (2d Cir. 1965) (dissenting opinion); NLRB v. A.P.W. Prods. Co., 316 F.2d 899, 905 (2d Cir. 1963).
is rescinded in a subsequent rulemaking proceeding. The agency can therefore be held accountable to its published rules until formally repealed; and even then, interested persons can participate in the rulemaking proceeding in which the agency proposes to change a prior rule. When an adjudication is the setting for the announcement of a new agency policy, the agency can rescind or modify the rule in any subsequent adjudication of its own choosing. The accountability factor is thus lost. Moreover, the opportunities for widespread participation of potentially affected parties in the adjudication may be limited to the agency’s willingness to invite amicus curiae briefs.

However, since an agency has both quasi-legislative and quasi-judicial powers, the accountability factor present when an agency engages in rulemaking may be more imaginary than real. There is nothing to prevent an agency from modifying a formal rule through the process of construction or interpretation. Therefore, even if a formal rule can be rescinded only in a subsequent rulemaking proceeding, if the agency can, through quasi-judicial interpretation, sidestep the rule or significantly alter its intended purpose when applying it to a particular controversy, a formal rule might provide no greater certainty and accountability than an adjudicatory rule.

Although the Supreme Court and the court of appeals were in substantial agreement that rulemaking procedures do provide advantages not present in an adjudication, they differed as to the weight which a court should place on the advantages of rulemaking in making a decision to curb an agency’s discretion to choose freely between rulemaking and adjudication. The reason for the difference may be found in the value which the Supreme Court placed on the importance of agency discretion in the functioning of the administrative process of policymaking.

B. The Agency’s Need for Autonomy

A second premise underlying the court of appeals’ decision in *Bell Aerospace* is that greater value should be placed on the advantages of rulemaking procedures than on an agency’s need for autonomy in deciding whether to formulate policy through rulemaking or adjudication. Judge Friendly never discussed the possible effects which judicial scrutiny of the type he proposed would have on the administrative process in general and on the exercise of agency discretion in particular. By establishing that a reviewing court can compel an agency to

94. See Berger, supra note 73, at 377-78.
95. Shapiro, supra note 5, at 947-52. There is always the possibility that the agency’s departure from an adjudicatory rule will be found to be an abuse of discretion. See note 70 supra and accompanying text.
96. The Board used this technique to solicit the views of “certain interested parties” prior to its decision in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1238 (1966), which laid down the rule requiring the employer to furnish a list of eligible voters to be made available to all parties to a representation election. See generally Shapiro, supra note 5, at 931.
conduct a rulemaking proceeding to announce a change in policy, the agency's procedural autonomy may be severely restricted. It follows that to the extent that an agency's choice of proceeding by adjudication or by rulemaking is subjected to judicial review, the agency's authority to control and manage the functioning of the administrative process is diminished.

Limitations may be desirable, however, if fundamental improvements in the operation of an administrative agency can be achieved only by confining the discretion of an agency. The issue which the decision of the court of appeals in Bell Aerospace raises is whether the advantages of rulemaking, likely to accrue from greater participation and from the availability of increased information to the agency, offset the cost of limiting the Board's discretion and flexibility in announcing policy through case-by-case adjudications.

The court of appeals neglected to examine the agency's need for autonomy in deciding whether to develop policy through the adoption of general rule or through ad hoc adjudications, presumably because the Board has very rarely, and then only recently, exercised its rulemaking powers.

The Supreme Court, however, was attentive to the necessity of preserving agency autonomy. Underlying the Court's decision in NLRB v. Bell Aerospace Co. is the concern that the administrative process, if it is to be effective in carrying out a statutory design, must be flexible. Adjudication may be necessary to resolve complex problems which require the special attention of the agency and whose solution cannot be captured within the prescriptions of a rule of general effect.

Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

While the decision of the Supreme Court purports to restore agency discretion, it does not rule out the possibility of judicially imposed

Professor Jaffe suggests "that in the absence of a clear legal prescription, a reasonable procedural decision should withstand judicial interference." Id. at 567.

98. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.


limitations in some circumstances. The Court's dictum that "there may be situations where the Board’s reliance on adjudication would amount to an abuse of discretion" suggests such a possibility. Therefore, the second premise inherent in the court of appeals' decision to require rulemaking—that greater value should be placed on the advantages of rulemaking procedures than on an agency's need for procedural autonomy—was not totally rejected by the Supreme Court. What the Court rejected was the Second Circuit's contention that the potential for greater participation and information achievable through rulemaking is sufficiently substantial to tip the balance in favor of requiring rulemaking. The Supreme Court placed equal or greater weight on the agency's interest in preserving the flexibility of the administrative process, which includes the power to act quasi-judicially as well as quasi-legislatively in making policy.

However, when the use of adjudicatory procedures causes hardship by exposing a participant in an agency adjudication to new and unforeseen liability, greater importance will be placed on the availability of rulemaking procedures, with its attendant advantages, than on the agency's interest in preserving its procedural autonomy. The Supreme Court may very well be broadening the meaning of "abuse of discretion" and strengthening the reviewing court's hand when the agency's choice to proceed by ad hoc adjudication causes substantial adverse consequences. This would seem to be the case if in instances where a participant in an adjudicatory proceeding can demonstrate resulting hardship, the agency may be judicially compelled to resort to

101. 94 S. Ct. at 1771.
102. Arguing that "[t]he Board must conduct a rule-making proceeding before discarding its numerous precedents which hold that buyers are managerial employees," Bell Aerospace Company seriously questioned whether the flexibility of adjudicatory procedures is now necessary to determine case-by-case which buyers are managerial employees. Brief for Bell Aerospace Co. at 16-17, NLRB v. Bell Aerospace Co., 94 S. Ct. 1757 (1974):

The classification of buyers as managerial employees, and their resultant exclusion from coverage under the Act, is not a problem which the NLRB could not reasonably foresee. It is a fundamental issue that has arisen in numerous representation cases. Nor can the Board be heard to say that it lacked sufficient experience with the issue to warrant finalization into a formal rule. As the many Board decisions . . . demonstrate, the NLRB has, on numerous occasions, analyzed the functions of buyers and has consistently found them to be a part of management. Similarly, the problem is not so specialized "as to be impossible of capture into a general rule." In fact, the Board's numerous precedents for more than a quarter of a century have distilled into a rule relied upon by both labor and management—buyers, as managerial employees, are excluded from the coverage of the Act. It is precisely this fact which makes the Board's present, unilateral effort to drastically alter coverage under the Act so inappropriate.

The Board may need the flexibility to vary the application of a rule in particular factual settings, but not its substantive content. There is a sequence of decisions which demonstrate that for nearly three decades the Board applied rules of general applicability rather consistently in representation cases to determine whether buyers were managerial employees. See Bell Aerospace Co. v. NLRB, 475 F.2d 485 (2d Cir. 1973), and the Board's decisions in American Locomotive Co., 92 N.L.R.B. 115 (1950), and Swift & Co., 115 N.L.R.B. 752 (1956), discussed in note 21 supra. See also note 17 supra. Hence, administrative flexibility need not be sacrificed if the application of judicial power to compel an agency to conduct a rulemaking proceeding is carefully limited to those situations in which an agency has demonstrated little need for flexibility.
a rulemaking proceeding to announce a change in policy. Since the Board's decision to accord representational rights to managerial employees for the first time in Bell Aerospace Co. did not subject the company to potential hardship, there was no need to require rulemaking, even though such a proceeding would have provided more information and an opportunity for greater participation in the policymaking process.

There is an important distinction in the Bell Aerospace decisions between the approach of the Supreme Court and that of the court of appeals in determining when a rulemaking proceeding is to be required of an administrative agency. The Supreme Court's decision indicates that it will sanction judicially enforced compulsory rulemaking only when an agency has abused its discretion in proceeding by adjudication. A determination of such an abuse depends upon a finding that the action of the agency was in some manner or fashion arbitrary, capricious or in excess of the agency's legal authority and, thus, has inflicted harm on persons adversely affected by the agency's action.

The decision of the court of appeals, on the other hand, purports to allow a reviewing court the authority to compel an agency to conduct a rulemaking proceeding not merely when there has been an abuse of discretion because the use of adjudicatory procedures threatens to inflict harm upon the parties to the proposed adjudication, but also whenever rulemaking is found to be more convenient than adjudication, given the advantages of rulemaking. The court of appeals in Bell Aerospace held that an adjudicatory proceeding could not be used to determine that buyers are not managerial employees and, therefore, are covered by the NLRA because thousands of companies and buyers would be affected by a change in policy and because their participation in the process of announcing new policy was deemed to be advantageous to an informed decision by the Board. Only a rulemaking proceeding could provide a channel for the views of the numerous persons likely to be affected by a change of policy.

The decision of the Supreme Court in NLRB v. Bell Aerospace Co. allows an agency substantially greater procedural autonomy than does the decision of the court of appeals. Under the court of appeals' formulation, where the perceived advantages of proceeding by

103. Heretofore, if the Board was found to have abused its discretion in formulating an order in an adjudication, the proper remedy was merely to refuse to enforce the order without compelling it to conduct a rulemaking proceeding as an additional sanction. NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952), discussed in note 70 supra.
105. The APA requires a court of review to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1970).
106. 475 F.2d at 496-97.
rulemaking are deemed to be substantial, a reviewing court may substitute its judgment in place of the agency's exercise of discretion in choosing between rulemaking and adjudication. Rulemaking may be required when the court determines that the number of affected persons is large enough to raise the complexity of the policymaking process beyond an adjudication's capacity to account for the variant factors which should be considered. Whenever an agency is engaged in formulating policy over matters having widespread effects, direct or indirect, on numerous persons, a court of review may expand the opportunity for participation beyond the immediate parties to the proposed adjudication. Abuse of discretion as the standard for review restricts the scope of review from the court of appeals' requirement of a finding of comparative advantage between rulemaking and adjudication resulting from the opportunity in a rulemaking proceeding for the participation of any interested person, to a specific finding of harm to the parties to the adjudication resulting from the use of adjudicatory procedures.

C. Standards for Judicial Review of an Agency's Choice Between Rulemaking and Adjudication

The choice between rulemaking and adjudication cannot be easily made by attempting to differentiate between the types of policy issues which should be resolved through the articulation of a rule of general applicability and those which are best suited to formulation through ad hoc adjudication. [T]here is the difficulty and importance of drawing a workable distinction between rulemaking and adjudication, for analysis cannot proceed very far if the point of departure itself lacks validity. The language of the Administrative Procedure Act is not much help; it first defines "rule" broadly enough to cover virtually all agency action having future effect and then defines "adjudication" as the process leading up to everything else, "but including licensing." One possible approach is not to affix a label to a proceeding as a whole but to identify any aspect of it that declares generally applicable policy as "rulemaking" and any aspect applying that policy to identified persons as "adjudication." But this is to define away the problem, for then all declarations of policy in any form of proceeding become "rulemaking." For purposes of deciding on what occasions a particular method of policy formulation is suitable it is helpful to rely primarily on the distinction that "rulemaking"—the process leading to the issuance of regulations—is typically a proceeding that is entirely open ended in form, specifying only the class of persons or practices that will come within its scope, while "adjudication" is a proceeding directed at least in part at determining the legal status of persons who are named as parties, or of the
acts or practices of those persons. Such an approach may be unsatisfactory in many contexts, for by stressing one factor to the exclusion of others it leaves some of the hardest questions unresolved, may occasionally be inaccurate, and may permit some formal agency actions to escape identification entirely.\textsuperscript{107}

As long as the choice between proceeding by rulemaking or by adjudication is left to the informed discretion of the administrative agency, defining rulemaking and distinguishing it from adjudication is a question for administrative solution. However, when the judiciary begins to interfere with the agency's discretion to choose between proceeding by rulemaking or by adjudication, the unsettled matter of classifying policy issues as more appropriate for resolution through rulemaking rather than adjudication may require judicial attention.

One reason that the Supreme Court refused in \textit{NLRB v. Bell Aerospace Co.} to countenance compulsory rulemaking in the absence of an abuse of discretion is the lack of clearly definable standards which a court can apply in order to determine whether policy should be enunciated by formal rule or by ad hoc adjudication. A comparison of the decisions of the court of appeals and the Supreme Court in \textit{Bell Aerospace} reveals the dilemma in attempting to determine whether rulemaking rather than adjudication is more appropriate for the resolution of a particular policy issue.

A determination can be made in an adjudication or in a rulemaking proceeding that buyers are not managerial employees and, accordingly, are within the coverage of the National Labor Relations Act. How should a court determine whether the classification of buyers is an issue better handled through the promulgation of a general rule than through an adjudication of the facts of a particular representation case? Judge Friendly did not find that the problem of classifying buyers would require an adjudication in each instance in order to determine their status as managerial employees. Rather, any representation case in which the Board reverses years of precedents in which buyers have been classified as managerial employees, even though binding only on the parties to the adjudication, takes on the character of a general rule which is likely to have a broad radial effect on future labor-management relations. Thus, Judge Friendly saw the policy choice of whether buyers are to be treated as managerial employees as being an issue which could only be resolved adequately with sufficient information and inputs from all potentially affected parties seeking to participate in a change of agency policy.

The Board was prescribing a new policy, not just with respect to 25 buyers in Wheatfield, N.Y., but in substance, to use Mr. Justice Douglas' phrase, "to fit all cases at all times."

\textsuperscript{107} Shapiro, \textit{supra} note 5, at 924.
wholesale and retail units which employ buyers, and hun-
dreds of thousands of the latter. Yet the Board did not even
attempt to inform industry and labor organizations, by means
providing some notice though not in conformity with section
4, of its proposed new policy and to invite comment thereon,
as it has sometimes done in the past . . . .

The issue is not in itself complex, but the policymaking choice is, given
the numerous interests likely to be affected by the Board's decision. In an adjudication, the Board would be establishing a precedent
without an opportunity for participation by the thousands of com-
panies and buyers whose interests in future adjudications might ulti-
mately depend on the policy enunciated in the prior one.

The same language which the court of appeals used to de-
monstrate the broad impact of one adjudication involving a significant
policymaking component affecting thousands of persons was quoted by
the Board to demonstrate the myriad factual situations in which
buyers are employed, thus calling for the particularized treatment
provided by adjudicatory procedures in the development of legal stan-
dards to be applied in any determination of the representational rights
of buyers.

In view of this large number of buyers in American Industry
and the fact that their duties vary from industry to industry,
company to company, and even among employees within the
same company, a proceeding which attempted to formulate
criteria to govern the entire class would be likely to produce
only broad general standards of little utility. It is doubtful
that a rule could be framed with sufficient particularity to
make clear which of the many thousands of buyers are
excluded from the coverage of the Act. Application in con-
crete cases would still necessitate recourse to the Board's
settled practice of deciding the applicability of the Act to
particular types of employees on a case-by-case basis.

The Supreme Court in *NLRB v. Bell Aerospace Co.* agreed with the
Board and held that the evidentiary types of issues likely to arise in a
representation case are so complex that the Board needs the flexibility
of adjudicatory procedures. Justice Powell placed special emphasis
upon the "specialized and varying" nature of the problems which the
NLRB confronts in determining whether one is a managerial
employee. The factual makeup of the problem would not lend itself

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108. 475 F.2d at 496.
109. For an analysis of the "polycentric" issue which is "characterized by a large number of
possible results and by the fact that many interests or groups will be affected by any solution
adopted," see Boyer, supra note 73, at 116-17.
111. 94 S. Ct. at 1771-72.
to solution in a rulemaking proceeding. Whether a buyer is a manage-
rial employee depends upon his actual job responsibilities, the amount
of discretion available in carrying out the employer's policies and the
buyer's relationship to management.\footnote{94} The Board thus has reason to proceed with caution, develop-
ing its standards in a case-by-case manner with attention to
the specific character of the buyers' authority and duties in
each company.\footnote{114}

According to the Supreme Court, the status of buyers cannot be
determined en masse in a rulemaking proceeding.

The ease with which the subject matter complexity can be used as
the theoretical underpinning for either adjudicatory or rulemaking
procedures demonstrates that the distinction between rulemaking and
adjudication is not at all clear.\footnote{115} It is possible to argue, on the one
hand, that rulemaking is required when the parameters of a policy
choice in which a rule is to be enunciated extend beyond the context of
the particular factual situation in which a case arises. Alternatively,
when the agency must not only enunciate a rule but also apply the rule
by making findings of fact in a particular case, an argument can be
made that the complexity of the questions of fact precludes the formul-
lation of a rule which purports to be applicable to all cases. Adjudicat-
ory procedures may be necessary when an agency must engage in
detailed factfinding and also vary the rule as the facts change from
case to case. A general rule announced in a rulemaking proceeding
may provide less guidance than an adjudicatory decision if the rule has
numerous exceptions built into it. On the other side of the coin is the
possibility that a narrow rule promulgated in an adjudication can give
as much guidance to the agency and its constituency as a formal rule.
Moreover, if the rule is carefully drawn, it can be applied consistently.

Judge Friendly did not dispute that the possibility of requiring an
agency to conduct a rulemaking proceeding when it changes a long-
standing rule or policy pronouncement having far-reaching effects on
the agency's constituency will invite judicial oversight of the use of
administrative procedures. Judge Friendly was in favor of watching
over an agency's use of procedures by expanding judicial review of
agency action to include the power to make a procedural choice
between rulemaking and adjudication for the agency when the advan-
tages of proceeding by rulemaking rather than adjudication are per-
ceived to be substantial.

There is an innovative aspect to Judge Friendly's approach in
reviewing an agency's choice of procedures. The dilemma in attempt-
ing to formulate concrete guidelines to be applied by courts in review-

\footnote{94} 94 S. Ct. at 1769 n.19.
\footnote{114} Id. at 1772.
\footnote{115} See Bernstein, \textit{supra} note 5, at 610-20.
ing an agency's choice of procedures can be overlooked. However, attention must not be centered on attempting to draw a definite distinction between rulemaking and adjudicatory procedures to determine which set of procedures is right for the situation at hand. Instead, the relevant inquiry must focus on the advantages of proceeding by rulemaking.

The decision of the Supreme Court in *NLRB v. Bell Aerospace Co.* stands for the proposition that as long as the agency does not use its choice of procedures in a manner unfair to those whose justifiable reliance upon past agency policy pronouncements subjects them to potential harm, the methods used to promulgate rules of conduct should not be given greater countenance than the substantive content of the rule. Beyond the very narrow criteria for determining when the use of adjudicatory procedures would be an abuse of discretion, the Supreme Court questions whether there can be rules or standards to determine judicially when an agency should be compelled to use one procedure to the exclusion of the other. If Congress in enacting the Administrative Procedure Act was not able to reach the degree of specificity which would enable an agency clearly to delineate the types of policymaking which call for either rulemaking or adjudication, courts should not interfere, since to do so would merely replace administrative discretion in choosing procedures with judicial discretion untempered by clearly enunciated standards of choice.

VI. CONCLUSION

The National Labor Relations Board has regained the authority to choose between rulemaking and adjudication without close judicial supervision. No doubt the Board will continue to dispose of most of its business through ad hoc adjudication. Adjudication may indeed be the better solution to many labor relations problems arising in the context of an unfair labor practice or representation case. However, there is a strong likelihood that rulemaking will be used more extensively by

116. See note 97 supra.
117. Judge Friendly was careful to note in *Bell Aerospace* that “policy making by adjudication often cannot be avoided in unfair labor practice cases, since the parties have already acted and the Board must decide one way or the other,” although he did not believe the same considerations were applicable to representation cases. 475 F.2d at 496.

One commentator has put forth another reason that “adjudication will remain as the overwhelmingly predominant procedure” for the Board:

[Labor relations problems are better handled in an adjudicatory frame of reference, as they have been for 34 years. Neither accident, nor the comfort of old ways, nor fear of the unknown, accounts for this practice. In my judgment, while these factors may have played some part, there are many good reasons for proceeding via case by case adjudication. Perhaps the best one is the “feel” for a problem, the understanding that comes, when it is dealt with in the ambience of a live dispute between contesting parties in an industrial community, even though the answer that emerges, directly attributable to their controversy, transcends them and encompasses employees and employers in many—perhaps all—other industrial communities. Is this not traditional adjudication in which the judiciary has been long engaged? Is it not wise?

the Board in the future. And, if the use of rulemaking procedures has the pleasing effect of broadening the Board's perception of its policy choices, the agency will have a more effective hand in charting the direction of labor-management relations.

118. In a recent rulemaking proceeding in which the Board proposed to reverse "existing case precedent" by declining jurisdiction over private secondary and elementary schools, 39 Fed. Reg. 34081 (1974), Board Member Fanning, who expressed doubts about the correctness of the proposed rule, requested interested parties to "address themselves to the question of the authority of the Board to take the proposed action as well as to the question of the wisdom of such course of action." 39 Fed. Reg. 34081-82 (1974). Subsequently, the Board issued the following statement concerning the termination of the rulemaking proceeding:

On September 23, 1974, the Board published in the Federal Register ... a notice of proposed rulemaking which solicited the views of educational institutions and associations, of labor organizations, and of the public as to whether or not to implement a proposed rule ... declining, contrary to existing policies (see, e.g., The Windsor School, Inc., 200 NLRB No. 163, Shattuck School, 189 NLRB 886), to assert jurisdiction over private secondary, elementary, and preschool educational institutions. There were 39 responses to the notice. After careful consideration of all the responses, the Board has decided not to adopt the proposed rule.