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Administrative Law Making through Adjudication: The National Labor Relations Board

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In the performance of its primary function of administrative adjudication, the National Labor Relations Board has frequently announced decisional rules which it applies with varying degrees of prospective force. The author of this Note analyzes this administrative law making through adjudication, examining the source and extent of the Board's power and the extent to which that power is held in check by judicial review. Seeking some explanation of the limits which the courts have placed upon Board law making through adjudication, it is concluded that there is need for a more specific exposition of the bases upon which the courts will interfere with the application of Board-developed rules. However, the author further concludes that only a system which retains the basic flexibility of the present system can adequately resolve the conflict between the need for Board rule making as a guide to administrative policy and the need to provide a judicial check upon arbitrary application of rules by expert bodies.

INTRODUCTION

The progress of the last century has not only increased the need for government regulation but has made both the enactment and enforcement of regulatory legislation exceedingly complex. In creating administrative agencies to carry into effect the policies of a statute, Congress typically has delegated power in a manner that has required the specialized body to exercise considerable discretion in putting its experience to use. It is obvious that any attempt by Congress to delve into all the intricacies of transportation rates, broadcasting licenses and labor-management relations would be futile; it would impede the legislative process and defeat the effective administration of regulatory statutes governing complex industrial and economic problems. On the other hand, no one would contend that unchecked power should be vested in the agencies. In striking the proper balance, Congress has been compelled to use rather broad language in many creating statutes leaving details to the administrator.

The notion that Congress may not delegate legislative power has practically become an anachronism in legal thinking.[1] Nevertheless, the courts, apparently undesirous of giving congressional delegations carte blanche have occasionally required that Congress state an "intelligible principle"[2] or primary standard[3] by which the administrative body must abide. However, the "standards" which have been established by Congress in an effort to conform to the judicial requirement have consisted of such vague and general terminology that they have added little if anything to the administrator's understanding of legislative intent.[4] Thus, if a statute is of a prohibitory nature and proscribes activity which is "unreasonable," there arises the question of the extent to which an administrative agency should supplement the broad congressional standard by establishing a standard of its own that defines the types of activity which may be termed "unreasonable." A further question is how may such standards be developed most effectively? Should they be established through administrative adjudication? Should adjudication result in the development of *per se* rules under which certain fact situations are regarded as sufficient to establish illegality, foreclosing any obligation to inquire into accompanying circumstances? Or is the decision of each case at the administrative level to turn upon its particular facts?

Due to its great similarity to a court, a substantial part of the expressions of policy and substantive rules of the National Labor Relations Board emerge from its decisions in particular cases. In

1. This notion was predicated on the constitutional provision that "All legislative Power herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1. In United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932), the Supreme Court stated unequivocally that the legislative power of Congress cannot be delegated. But Professor Jaffe has stated what seems to be the proper approach to congressional delegation:

> We must not take lightly the objection to indiscriminate and ill-defined delegation. It expresses a fundamental democratic concern. But neither should we insist that "lawmaking" as such is the exclusive province of the legislature. The aim of government is to gain acceptance for objectives demonstrated as desirable and to realize them as fully as possible. We should recognize that legislation and administration are complementary rather than opposed processes; and that delegation is the formal term and method for their interplay. Finally we should demand no more than that in the total process we achieve government by consent.

Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 360 (1947).

2. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

3. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

4. *E.g.*, "public interest," New York Central Securities Corp. v. United States, 287 U.S. 12 (1932); "just and reasonable," Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); "unfair methods of competition," Federal Trade Commission v. Gratz, 253 U.S. 421 (1920).

fact, the Board has utilized its power to adjudicate more extensively than most other administrative agencies;[5] the very nature of labor-management relations necessarily involves the settlement of disputes of an adversary character which arise in the course of collective bargaining. In a number of its decisions the Board has attempted to establish standards, the violation of which are subsequently to be treated as *per se* violations of the National Labor Relations Act and the Labor Management Relations Act. It shall be the purpose of this Note to examine the sources and extent of the Board's power to formulate decisional rules—in particular those which declare certain conduct to be unlawful *per se*. Consideration then will be given to the manner in which that power is exercised, whether the establishment of such rules is desirable, and the extent to which the courts will substitute their judgment and provide the necessary "check"[6] upon the Board's adjudicative law making.

I. THE NATURE OF NLRB LAW MAKING

One means available to the Board for the formulation of law and policy is administrative rule making.[7] Section 6 of the National Labor Relations Act empowers the Board to make rules and regulations to effectuate the policies of the Act.[8] Although this broad provision has been interpreted as authorizing the Board to estab-

5. It has been pointed out that "during its history the Board has decided more cases than the Supreme Court of the United States or any other judicial tribunal. It has more litigation before the courts than any other independent agency or executive department of the Government." Jenkins, *What is the National Labor Relations Board?*, 12 U. FLA. L. REV. 354, 363 (1959).

6. The "principle of check" is discussed in 4 DAVIS § 28.21, at 113 where the author says: "A check upon administrative authority is desirable for the same reasons that an appellate court's check upon a trial court is desirable."

7. The rule making function of the administrative agency has been regarded as its legislative power. See 1 VON BAUR, FEDERAL ADMINISTRATIVE LAW § 8 (1942) and Note, *Stare Decisis in Quasi-Judicial Proceedings*, 35 GEO. L.J. 69, 72 (1946). The United States Supreme Court has drawn the distinction between adjudication and legislation as follows:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). Some doubt has been cast on the validity of this distinction. See note 21 *infra*.

8. Section 6 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.

49 Stat. 452, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 156 (1958).

lish only procedural rules,[9] the legislative history of the section indicates that it may encompass authority for substantive rule-making.[10] A similar broad grant of power appears in section 7805 of the Internal Revenue Code, empowering the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement of this title . . . ."[11] This grant of power has been construed as enabling the Treasury to make interpretative rather than legislative regulations.[12] A legislative regulation may be defined as one promulgated pursuant to a specific or general grant of rule-making power to an administrative agency.[13] If such a regulation is valid,[14] it will have the force and effect of law, with the result

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> The National Labor Relations Board's power to "make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter" . . . has been assumed to extend only to matters of procedure, and the Board does not in fact attempt to define unfair labor practices by regulation.

U.S. Att'y. Gen. Comm. on Admin. Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 98 n.18 (1941).

10. The Board has itself stated that it could derive power to make substantive rules from § 6 of the Act. See STAFF OF HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE, AND PRACTICE IN THE FEDERAL AGENCIES—AGENCY RESPONSE TO QUESTIONNAIRE 1812 (Comm. Print 1957). As is pointed out in Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 730–33 n.20 (1961), the original version of the Taft-Hartley Act, H.R. 3020, 80th Cong., 1st Sess. (1947), provided that the Board had the authority to make "such regulations as may be necessary to carry out their respective functions under this Act." In view of the elimination of the word "rules," this version of the section was viewed by a minority of the House Committee on Labor Education as denying power to the Board to make substantive rules. Since the version of § 6 as finally enacted grants authority to make "such rules and regulations as may be necessary to carry out the provisions of this subchapter," see note 8 *supra*, the inference is strong, as Professor Peck suggests, that Congress sought to preserve the Board's substantive rule-making power.

11. INT. REV. CODE OF 1954, § 7805.

12. See 1 DAVIS § 5.03, at 300.

13. The action of the Federal Communications Commission in American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936), is a good example of a legislative regulation. In that case the Supreme Court upheld an order of the Commission prescribing a uniform system of accounts for telephone companies pursuant to a provision of the Communications Act of 1934 empowering the Commission to "prescribe the forms of any and all accounts, records, and memoranda . . . ." 48 Stat. 1078 (1934), 47 U.S.C. § 220(a) (1958). The Court said it was not free "to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers." 299 U.S. at 236.

14. Professor Davis has pointed out that the courts, in establishing the validity of a legislative rule, will determine whether it is within the delegated authority, reasonable, and issued pursuant to proper procedure. 1 DAVIS § 5.05, at 315.

that courts will refrain from substituting their judgment for that of the agency.[15]

The definition of an interpretative regulation is more difficult. It has been said that interpretative rules "only interpret the statute to guide the administrative agency in the performance of its duties until directed otherwise by decision of the courts"[16] and that they "do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question."[17] Thus, although it is generally recognized that courts are free to substitute judgment as to interpretative rules,[18] such rules often result in the creation of law and are frequently accorded great weight in judicial decisions.[19]

If section 6 were to be viewed as empowering the Board to establish substantive as well as procedural rules, the administrative rule-making power could be extended to many areas where Board policy has been developed through case-by-case adjudication. An outstanding example is the formulation of jurisdictional standards, which rest in something of a no-man's land between procedural and substantive law.[20] Rule-making, however, is typically designed to have a general effect rather than an application limited to individual parties.[21] Thus, for determination of specific controversies, the agency must turn to the function of adjudication.

The Board's adjudicative function is derived from section 10(a) of the National Labor Relations Act, which empowers the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce,"[22] and outlines the procedures by which the Board may issue an appropriate order based on its independent opinion. With the passing of time and the accumula-

15. *Id.* § 5.03, at 299.

16. Comptroller of Treasury v. M. E. Rockhill, Inc., 205 Md. 226, 234, 107 A.2d 93, 98 (1954).

17. U.S. Att'y. Gen. Comm. on Admin. Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 100 (1941).

18. In Skidmore v. Swift & Co., 323 U.S. 134 (1944), the Supreme Court, although expressing deference for the rulings of the Wage & Hour Administrator, said that such rulings were "not controlling upon the courts by reason of their authority . . . ." *Id.* at 140.

19. See 1 DAVIS § 5.05, at 314.

20. See discussion of jurisdictional standards in text accompanying notes 148–52 *infra*.

21. Rule-making has been described as "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations . . . ." Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 265 (1938). However, Professor Davis has pointed out that the generalization thus made may be too broad in view of the fact that rules may be designed to affect individuals while adjudication may involve thousands of unnamed parties. 1 DAVIS § 5.01, at 287.

22. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1958).

tion of cases, certain categories of decisions on similar facts inevitably fall into a pattern which constitutes the basis for administrative law and policy formulation. And these rules are formulated with varying degrees of inflexibility. The same process takes place in the courts, which in the course of decision, formulate rules of law for future application.[23] Indeed it is on this foundation of the constant reapplication of precedent and judge-made law that the common law is built.[24]

The Board, because it states its position in a decision, is adjudicating in the sense of making an administrative order directed at the employer charged with violation. But often the practical effect is the establishment of a rule.[25] To illustrate: An employer is charged with violation of the rights guaranteed to employees by section 7 of the National Labor Relations Act[26] as a result of interrogating them as to their union affiliations or sentiments. The Board decides against the employer stating, for example, "all interrogation by an employer of employees as to union affiliation is unlawful *per se*."

The most accurate and descriptive term for this fusion of adjudication and formulation of rules of law in the course of decision is *administrative law-making through adjudication*. This may seem to be nothing more than the attachment of a label; but it serves to make it clear that neither the procedure by which the Board sets standards in its decisions, nor the power by which it proceeds, are directly derived from its statutory rule-making function. It is adjudication from which rules of general application emerge.

It may be argued that while the Board can apply its expertise in understanding and dealing with individual fact situations, it may have neither the power nor the qualifications to establish in the

23. For a discussion of the law-making function of the courts and its relation to the separation of powers doctrine, see Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449, 473 (1958).

24. A discussion of the development of the common law in the courts is beyond the scope of this Note. For the most recent work on this subject, see LLEWELLYN, THE COMMON LAW TRADITION (1960).

25. The Administrative Procedure Act § 2(c), 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1958) defines "rule" as "the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." With reference to this definition it has been said that "an order requiring specified affirmative action in the future, such as an order of the NLRB requiring the employer to reinstate employees with back pay, fits perfectly the Act's definition of 'rule.' " 1 DAVIS § 5.02, at 295. In an article on the question of Board law-making through adjudication, the apt statement was made that "particular cases are used merely as vehicles for the statement of new general rules which are to govern future cases. Adjudication is used as a clumsy substitute for rule-making." Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 106 (1954).

26. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958).

course of adjudication an express rule of law designed to operate prospectively.[27] Because of alleged excesses of administrative zeal, bias and political pressure,[28] the application of agency-formulated criteria may often prove arbitrary; an agency may follow precedent to the extent of disregarding factors in specific cases which would make previously established rules or policy inapplicable. The extent to which administrative determinations are subjected to judicial scrutiny upon review is significant as a means of providing redress against agency abuses of discretion. Consequently, the following sections will deal with the manner and specific instances in which the Board's decisional rules are established, the extent to which Board determinations rest on precedent evolved through stare decisis and the scope and nature of judicial review of administrative law-making through adjudication.[29]

II. EXAMPLES OF NLRB FORMULATION OF DECISIONAL RULES

A. Secondary Pressures and the Common Situs Doctrine

It is unlawful for a labor union to exert pressure upon a neutral employer in order to compel him to cease dealing with a primary employer involved in a labor dispute, where the object of such pressure is to exact certain concessions from the primary employer.[30] At the same time, the right of employees to exert direct

27. It is to be noted, however, that "the courts often refrain from substituting judgment on . . . questions [of what the law 'should be'] whether or not they happen to label such questions as questions of fact." 4 Davis § 30.04, at 209 citing NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

28. For an excellent discussion of the possible effect of changes in political administration upon Board policy see Note, *The NLRB under Republican Administration: Recent Trends and their Political Implications*, 55 Colum. L. Rev. 852 (1955).

29. In the following discussion no attempt will be made to consider all labor-management problems which may be relevant to the central theme. The focus is primarily on cases involving unfair labor practices. The rule of decision, however, also becomes evident in the area of craft severance, see Note, *NLRB Rules for Determining the Appropriate Bargaining Unit in Craft and Departmental Severance Cases*, 45 Minn. L. Rev. 391 (1961), and attention is directed to the establishment by the Board of contract bar rules dealing with the time and manner of a union's filing of a representation petition while there exists a collective bargaining agreement with a rival union. See Freidin, *The Board, The "Bar," and the Bargain*, 59 Colum. L. Rev. 61 (1959).

30. Section 8(b)(4)(A) of the National Labor Relations Act, as amended, reads:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . .
>
> (4) (i) to engage in, or to induce or encourage [the employees of any employer] *any individual employed by any person engaged in*

economic pressure on the primary employer is to be safeguarded.[31] Consequently it is necessary to distinguish between protected primary activity and prohibited "secondary boycotts."[32] The distinction becomes extremely difficult to draw where two employers are doing business on the same premises and picketing at the "common situs" influences the neutral employer directly or through his employees. The language of section 8(b)(4)(A) does not make it clear whether Congress intended "a sweeping prohibition against secondary boycotts."[33] As a result, a considerable amount of administrative interpretation and rule-making has been necessary in this area.

One type of "common situs" case arises where the activities of the primary employer are intermittently conducted at neutral premises.[34] *Moore Dry Dock Co.*[35] presented such a "roving" or "ambulatory" situs problem and gave rise to the establishment by the Board of definite criteria for the decision of cases of this type. In that case, the picketing union had attempted to organize the employees of the primary employer. Having previously established

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commerce or in an industry affecting commerce to engage in a strike or a [concerted] refusal in the course of [their] *his* employment to use, manufacture, process, transport, or otherwise handle or work on any goods . . . or to perform any services; or (ii) *to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,* where *in either case* an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization *or to enter into any agreement which is prohibited by subsection 8(e)* . . . .

Labor Management Relations Act, as amended, 73 Stat. 542 (1959), 29 U.S.C.A. § 158(b)(4)(A) (Supp. 1960).

The bracketed words are those deleted from the Act by the 1959 Landrum-Griffin amendments. The italicized portions of the quoted statute are those which have been added by the 1959 amendments.

For a consideration of the impact of the 1959 changes on the materials that follow, see note 52 *infra.*

31. Section 8(b)(4)(A) has been interpreted as evidencing legislative intent "to accommodate the conflicting interests of employees in exerting effective economic pressures on an employer and the interests of neutral employers in freedom from involvement in disputes not their own." Cushman, *Secondary Boycotts and the Taft-Hartley Law,* 6 SYRACUSE L. REV. 109, 114 (1954).

32. Congress did not use this term in the Act. This interpretation was placed on it in Oil Workers Int'l Union, Local 346 (The Pure Oil Co.), 84 N.L.R.B. 315 (1949).

33. Local 1976, United Bhd. of Carpenters, AFL v. NLRB, 357 U.S. 93, 98 (1958).

34. Another type of "common situs" case arises where the employees of a neutral employer work on the primary employer's premises. In Oil Workers Int'l Union, Local 346 (The Pure Oil Co.), 84 N.L.R.B. 315 (1949), the union picketed such primary premises and indicated by signs that the activity was directed against the primary employer. This was held lawful primary pressure despite the evident effect on neutral employees.

35. Sailors' Union (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950).

the legality of picketing a primary situs,[36] the Board considered the question of whether the right to picket would continue when the situs was moved to the premises of a neutral employer. The picketing, conducted on neutral premises, was upheld because in the Board's opinion it was "primary activity" despite the effect it might have had on the employees of the neutral employer.[37] The Board concluded that in such a situation, where the only place at which picketing could be effective was at the secondary employer's premises, the activity would be lawful providing the following conditions were met:

> (a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; (d) the picketing discloses clearly that the dispute is with the primary employer.[38]

The corollary to these rules, however, appeared to be that failure to comply with the standards set would result in a finding that section 8(b)(4)(A) had been violated as a matter of law.[39]

Subsequently, the Board added another condition to those already established in *Moore Dry Dock. Washington Coca Cola Bottling Works, Inc.*[40] raised the problem of whether secondary picketing should be allowed when the primary employer has a plant in the area which the union can picket. The Board held that

36. Oil Workers Int'l Union, Local 346 (The Pure Oil Co.), 84 N.L.R.B. 315 (1949).

37. The distinction has been pointed out between "organizational" picketing and that conducted by a union which represents the employees of the primary employer:

> This much, at least, can be said for the *Ryan* case [Ryan Constr. Corp., 85 N.L.R.B. 417 (1949)]—the picketing union did represent the employees of the company at which the economic pressure was directed. However, in *Moore Drydock Co.*, the Board eventually extended the situs doctrine to cases where the picketing union represented none of the employees of the primary employer, although it was obvious that there was here no primary strike at all in the ordinary sense of employees quitting the employ of the primary employer in concert. Thus the situs doctrine legalized a secondary boycott if the pickets confined their activities to the premises of the employer whose employees they were attempting to unionize against their will, even though another employer occupied the same premises and it was *his* employees who were induced to strike.

Reilly, *A Return to Legislative Intent*, 43 GEO. L.J. 372, 384–85 (1955).

38. 92 N.L.R.B. 547, 549.

39. The Board said that § 8(b)(4)(A) was "aimed at secondary boycotts and secondary strike activities," 92 N.L.R.B. at 547, contrasting this to lawful primary activity. In announcing the four criteria for legality, the Board said the "picketing of the premises of a secondary employer is primary *if* it meets the following conditions . . . ." 92 N.L.R.B. at 549. (Emphasis added.)

40. 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955).

where such a primary plant was available, picketing at the secondary situs would not be permissible. This was stated in the form of a rule and although the words *per se* were not used, if such a plant had been available, it is not likely that the Board would have inquired further to find special circumstances legalizing the picketing. It is significant, however, that in approving the *Washington Coca Cola* doctrine,[41] the court of appeals did not approve the Board's decision as a standard or rule for future application. Instead the court stated in a very brief opinion that the Board's decision was "based on factual findings which we think were sustained by substantial evidence and so are binding on us."[42]

The view that the Board may not apply its rules without considering individual fact situations was again propounded by the Court of Appeals for the Fifth Circuit in *NLRB v. General Drivers, AFL* (Otis Massey).[43] The court reversed the Board's decision that, under the rule of *Washington Coca Cola*, section 8(b)(4)(A) had been violated, pointing out that approval of Board-formulated criteria such as those in *Moore Dry Dock* had been based on substantial evidence in the particular case; it gave no judicial support to the Board's standard as such. The court concluded that such a finding would "elevate the Board-formulated 'criteria' by judicial fiat to a vantage point from which it could . . . circumvent the statute."[44]

When the Board applied the *Washington Coca Cola* rule in *Sales Drivers Union*,[45] the Court of Appeals for the District of Columbia refused to enforce its order enjoining the picketing, saying in part:

> The existence of a common site . . . and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive.[46]

Sales Drivers has been cited for the proposition that while the courts were willing to accept the factual basis of the *Washington Coca Cola* decision as sufficient evidence to support a finding based on the entire record, they have declined to regard its doctrine as established.[47] This view is supported by the court's state-

41. Local 67, Brewery & Beverage Drivers v. NLRB, 220 F.2d 380 (D.C. Cir. 1955).
42. *Id.* at 381.
43. 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955).
44. 225 F.2d at 209.
45. Sales Drivers Union (Campbell Coal Co.), 110 N.L.R.B. 2192 (1954), *enforcement denied*, Sales Drivers Union v. NLRB, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956).
46. Sales Drivers Union v. NLRB, 229 F.2d 514, 517 (D.C. Cir. 1955).
47. See Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 134 (1959).

ment in *Sales Drivers* that "a violation of section 8(b)(4)(A) is not to be found by a rule of decision based upon findings which are inadequate to support the conclusion reached."[48] The court further stated that a rule as rigid as that established in *Washington Coca Cola* was not deducible from the language of section 8(b)(4)(A) and to read it into the statute by implication would unduly limit the right to strike guaranteed by section 13.[49]

It is doubtful that the words of caution expressed by the court in *Sales Drivers* were really necessary, for the Board had already modified the strict application of the *Washington Coca Cola* rule before *Sales Drivers* was decided. The Board indicated in *Pittsburgh Plate Glass Co.*[50] that it would not arbitrarily apply a standard previously set where particular facts would make such application unreasonable. In *Pittsburgh Plate Glass*, picketing was being conducted by the union at two different construction sites. As to one site the Board found a violation of section 8(b)(4)(A) because the picketing was not strictly confined to the primary employer involved in the dispute but was also directed to the employees of neutrals. With respect to the picketing at the other site, however, the Board refused to find a *per se* violation merely because one of the primary employer's plants was in the area and could have been picketed. The Board explained its position by distinguishing the *Washington Coca Cola* case as follows:

> In our *Washington Coca Cola* decision, we endeavored to make clear that the doctrine therein enunciated was being applied with due regard for the right of the Respondent Union to picket effectively . . . . It will be noted that the union in that case picketed the main plant of Coca Cola . . . from the first day of the strike, and that the drivers involved entered and left the plant at least four times each day. *Accordingly, it was clear that the application of the Washington Coca Cola doctrine to the facts in that case would not unduly circumscribe the union in its right to picket effectively.* In the instant matter, however, we do not have such assurance.[51]

The Board also pointed out that the *Washington Coca Cola* rule would not be applied where the premises of the secondary em-

48. 229 F.2d at 519.

49. 229 F.2d at 517. Section 13 of the National Labor Relations Act provides:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

49 Stat. 457 (1935), as amended, 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958).

50. 110 N.L.R.B. 455 (1954).

51. *Id.* at 457. (Emphasis added.)

ployer harbored the situs of the dispute between the union and the primary employer.[52]

Self-limitation of the type demonstrated by the Board in *Pittsburgh Plate Glass* indicates that its decisional rules, even its *per se* rules, are not inflexible. The judicial approach to the problem adopted by the court of appeals in *Sales Drivers* indicates that the primary concern of the courts is whether the evidence found by the Board is sufficient to sustain its conclusion in a particular case—the "substantial evidence" test.[53] Apparently, then, the Board as well as the courts understand that in order to avoid arbitrary results under a rigidly defined rule, each case must be capable of determination on its particular facts. It is somewhat less clear whether the courts have fully recognized that development of Board policy into rules by means of adjudication provides a desirable means of formulating guides for future conduct.

The court in *Sales Drivers,* having disapproved of the Board's failure to base its decision on adequate findings of fact, remanded the case to the Board. On remand, the Board arrived at the same decision[54] supported by some additional facts and the court affirmed.[55] It may be inferred that the Board appeased the court by finding additional facts. On the other hand, this result indicates the manner in which judicial review acts as a check on administrative action in that it causes the Board to re-examine its own findings and base its decision on a firm foundation of evidence.

B. Coercion Through Speech

The degree to which an employer may express his views respecting unionism to his employees involves a balancing of the employer's right of free speech against the rights of employees to

52. Section 8(b)(4)(A), as amended by the 1959 Labor-Management Reporting and Disclosure Act, 73 Stat. 542 (1959), 29 U.S.C.A. § 158(b)(4)(A) (Supp. 1960), changes some aspects of the prior law in this area. However, it has been concluded that neither § 8(b)(4)(A) as it now stands, nor the proviso in § 8(b)(4)(B) that "nothing contained in this clause shall be construed to make unlawful, any primary strike or primary picketing," has any effect on the cases establishing rules for distinguishing primary from secondary activity, *e.g.,* Sailors' Union (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950); Brewery Drivers, AFL (Washington Coca Cola Bottling Works, Inc.), 107 N.L.R.B. 299 (1953); Pittsburgh Plate Glass Co., 110 N.L.R.B. 455 (1954). See Farmer, *The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions,* 48 Geo. L.J. 327 (1960).

53. See discussion of the substantial evidence test as applied to Board decisions in note 167 *infra.*

54. Sales Drivers Union (Campbell Coal Co.), 116 N.L.R.B. 1020 (1956).

55. Truck Drivers Union v. NLRB, 249 F.2d 512 (D.C. Cir. 1957), *cert. denied,* 355 U.S. 958 (1958).

be free from coercion in the exercise of their rights of self-organization and collective bargaining.[56] The time at which an employer's speech can most effectively influence employees is when made directly preceding a representation election.[57] The Act, however, provides no specific limitations upon the time which an employer may choose to speak to his employees; no unfair labor practice will be found unless the expressions of the employer contain some "threat of reprisal or promise of benefit."[58]

The Board pronounced its broadest rule in this area in *Bonwit Teller, Inc.*,[59] where it held that a speech on company time and premises on the eve of a Board representation election, was an unfair labor practice unless the union was permitted to make a rebuttal speech under identical conditions. The Board continued to apply and elaborate upon this rule until recognition of the rule's undue rigidity caused a change of policy. In *Livingston Shirt Corp.*[60] the Board determined that the Act specifically prohibited

56. Section 7 of the National Labor Relations Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958). This section is to be considered in conjunction with § 8(a)(1) 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." 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1958).

57. Representation elections are held pursuant to § 9(c) of the National Labor Relations Act, as amended, 61 Stat. 144 (1947), 29 U.S.C. § 159(c) (1958), which provides:

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative . . ., or (ii) assert that the individual or labor organization, which has been certified . . . is no longer a representative . . .
> . . . .
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing . . . . *If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof* . . . . (Emphasis added.)

58. 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958).

59. 96 N.L.R.B. 608 (1951), *aff'd*, Bonwit Teller, Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953).

60. Livingston Shirt Corp., 107 N.L.R.B. 400, 405 (1953). For instances where the Board applied the *Bonwit Teller* doctrine prior to 1953, see Higgins, Inc., 100 N.L.R.B. 829, 101 N.L.R.B. 911 (1952); Onondaga Pottery Co., 100 N.L.R.B. 1143 (1952); National Screw & Mfg. Co. of Calif., 101 N.L.R.B. 1360 (1952); Biltmore Manufacturing Co., 97 N.L.R.B. 905 (1951).

it from finding that an *uncoercive* speech, *whenever delivered* by the employer, constitutes an unfair labor practice. The Board asserted that an employer could not be held to have violated the Act on the sole ground that the employees had been refused an equal opportunity to reply.

Peerless Plywood Co.,[61] decided on the same day as *Livingston Shirt*, did not involve an unfair labor practice charge but rather the setting aside of a representation election. In that case, the Board laid down the rule that such election would be set aside if a representative of either the employer or the union made a speech to the employees within twenty-four hours prior to the election. The rule-making character of this decision was clearly indicated by the Board's statement that it was establishing "an election rule which will be applied in all election cases . . . . Violation of the rule will cause the election to be set aside whenever valid objections are filed."[62] This rule was cited with approval in *NLRB v. Shirlington Supermarket*,[63] where the Court of Appeals for the Fourth Circuit stated that whether a representation election has been conducted under conditions compatible with the exercise of a free choice by the employees "is a matter which Congress has committed to the discretion of the Board."[64]

A related area is that of employer interrogation of employees as to union membership, a practice which the Board consistently held to be unlawful *per se* prior to 1954.[65] In that year, as a result of judicial disapproval of this broad condemnation,[66] the Board reversed its established doctrine. It held in *Blue Flash Express, Inc.*,[67] that the proper test was whether "under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act."[68]

The *Blue Flash* opinion sheds considerable light on the Board's view respecting the effect of a *per se* standard. The majority pointed out that a finding that all interrogation is unlawful *per se*

61. Peerless Plywood Co., 107 N.L.R.B. 427 (1953).
62. *Id.* at 429.
63. 224 F.2d 649 (4th Cir. 1955).
64. *Id.* at 651.
65. *E.g.*, Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949).
66. *E.g.*, NLRB v. Associated Dry Goods Corp., 209 F.2d 593 (2d Cir. 1954); Wayside Press, Inc. v. NLRB, 206 F.2d 862 (9th Cir. 1953); NLRB v. England Bros., Inc., 201 F.2d 395 (1st Cir. 1953); NLRB v. Arthur Winer, Inc., 194 F.2d 370 (7th Cir. 1952); NLRB v. Montgomery Ward & Co., 192 F.2d 160 (2d Cir. 1951); NLRB v. Tennessee Coach Co., 191 F.2d 546 (6th Cir. 1951); Sax v. NLRB, 171 F.2d 769 (7th Cir. 1948); Jacksonville Paper Co. v. NLRB, 137 F.2d 148 (5th Cir. 1943).
67. 109 N.L.R.B. 591 (1954).
68. *Id.* at 593.

> would mean that a casual, friendly, isolated instance of interrogation by a minor supervisor would subject the employer to a finding that he had committed an unfair labor practice . . . . [T]he Board is required to determine the significance of particular acts of interrogation in the light of the entire record in the case . . . .[69]

The Board's positions in *Blue Flash* and in *Livingston Shirt* are indicative of its willingness to engage in self-limitation when its experience demonstrates that a rigid rule would work hardship on either unions or management. There is also a clear demonstration in *Blue Flash* of deference to judicial opinion shown by the majority's statement that the dissenting Board members "appear to overlook cases . . . in which the courts of at least six circuits have explicitly or by necessary implication condemned the rationale of [the *per se* cases]."[70]

If this regard for court decisions and declination to act arbitrarily prevailed in the Board's handling of all labor problems, it would be possible to view the establishment of a *per se* rule as the result of considered administrative and judicial judgment. However, a consideration of other Board determinations may prove such a generalization inaccurate.

C. UNION SECURITY—HIRING HALLS

According to sections 8(a)(1), (3) and 8(b)(2) of the National Labor Relations Act as amended by the Taft-Hartley Act, it is unlawful for an employer to require membership in a labor organization as a condition of employment, or for a union to cause an employer to discriminate in hiring on the basis of union membership.[71] In view of these provisions, a major problem is presented by the making of "hiring-hall agreements" under which the union operates as an employment agency from which the employer is to take all replacements unless he can give the union a valid reason for rejection.

Mountain Pacific Chapter of the Associated Gen. Contractors[72] and subsequent decisions are particularly interesting from the standpoint of the Board's development of *per se* rules respecting certain hiring hall arrangements and the treatment which the courts have accorded the Board's applications of those rules.

In 1951 the Board had held that an agreement that hiring be done only through a particular union's offices did not violate the

69. *Id.* at 595.
70. *Id.* at 593.
71. National Labor Relations Act, 61 Stat. 140–41 (1947), as amended, 29 U.S.C. § 158(a)(3), 158(b)(2) (1958).
72. 119 N.L.R.B. 883 (1958), *enforcement denied*, NLRB v. Mountain Pacific Chapter of the Associated Gen. Contractors, Inc., 270 F.2d 425 (9th Cir. 1959).

Act absent evidence that the union unlawfully discriminated in supplying the company with personnel.[73] Then, in *Mountain Pacific* the Board held that because an exclusive union hiring hall agreement "encourages union membership" regardless of the manner in which it is enforced, such an agreement was *per se* discriminatory within the meaning of section 8(a)(3) in the absence of provisions also requiring: (1) that selection of applicants be on a nondiscriminatory basis, and not affected in any way by union membership; (2) that the employer retains the right to reject any applicant referred by the union; and (3) that the parties to the agreement post notices advising applicants for employment of the manner in which the hiring hall will select replacements.[74] The impact of this *per se* rule may be discerned from the Board's language:

> We hold the hiring hall provisions of this contract to be unlawful. For purposes of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegation of discriminatory practices in hiring.[75]

In effect, the Board did not find a violation because of any particular discriminatory practice or because of the provisions of the hiring hall contract. Rather it based the decision on its evaluation of the discriminatory effects inherent in the operation of hiring halls and on the fact that the contract did not include the antidiscrimination provisions enunciated by it for the first time in this case and applied retroactively. The establishment of such *per se* rules raises the question of whether the Board is effectuating the policies of the section of the act directed against discriminatory practices when it establishes a rule making hiring hall contracts unlawful regardless of the existence of discrimination.

The Court of Appeals for the Ninth Circuit seems to have answered this question in the negative in its opinion denying enforcement of the Board's order.[76] The court pointed out that a hiring hall is generally legal; and while a contract containing discriminatory provisions is illegal *per se,* the court held that one which is not discriminatory on its face cannot be declared unlawful merely because of the absence of the suggested clauses and without any findings of discrimination. Unfortunately, however, the opinion is rather unclear as to the court's exact position.

The court said:

> As we understand the Board, the contract would be legal if it contain-

73. Hunkin-Conkey Const. Co., 95 N.L.R.B. 433 (1951).
74. 119 N.L.R.B. at 897.
75. *Id.* at 894.
76. NLRB v. Mountain Pacific Chapter of the Associated Gen. Contractors, Inc., 270 F.2d 425 (9th Cir. 1959).

> ed the required provisions, although it might be found *as a fact* that there was encouragement of union membership by such a combination through illegal discrimination.[77]

And further:

> The Board held that, *as a matter of law*, a labor contract containing provisions permitting the maintenance of a hiring hall which omitted certain prohibitory stipulations was per se invalid and contrary to law.[78]

Because the court felt that this rule of *per se* illegality was too "extreme" to be maintained,[79] the case was remanded to the Board for further findings. However, in the same opinion, the court also said:

> It must be remarked that the Board had . . . [previously] held a provision permitting a Union to settle seniority was legal, but reversed its position as a matter of law, and the Court of Appeals for the Eighth Circuit therefore required its order to operate prospectively only. *But here the Board does not intimate that the hiring hall is per se illegal.*[80]

Does this mean that the court would have approved a rule of *per se* illegality if it had been given only prospective force even though it remanded the case because the rule was too extreme?

Further language of the court indicates that it may have intended to assert a third position—approval of the rule if used by the Board merely to create a presumption of discrimination:

> The Board is qualified by its specialized knowledge and experience in the field, to say that it will give peculiar weight to certain evidence. The common law courts have built up such rules and enforce them. There seems to be no valid reason why an administrative body cannot progress from precedent to precedent. . . . [S]uch a rule of evidence should operate prospectively . . . . [T]his Court sees no reason why the doctrine once announced could not be applied in future cases.[81]

This case typifies the uncertainty that often exists as to the scope of judicial review of administrative decisions in which rules are established. Was the court demanding further evidence to support the Board's order? Did the court disapprove of the rule as such or was it only seeking to avoid retroactive application of the rule?

Despite several recent decisions in the courts of appeals and a very recent decision by the United States Supreme Court,[82] no

77. *Id.* at 431. (Emphasis added.)
78. *Id.* at 432.
79. *Ibid.*
80. *Id.* at 429. (Emphasis added.)
81. *Id.* at 432.
82. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).

adequate criteria have yet been developed defining the proper scope of administrative adjudications or the extent of administrative discretion in adjudicative rule-making.

In *Local 176, United Bhd. of Carpenters,*[83] the Board found that the union maintained an oral agreement with the company requiring job clearance from the union as a prerequisite to employment, and that this practice constituted a *per se* violation of the Act for the reasons set forth in *Mountain Pacific*. The Court of Appeals for the First Circuit affirmed,[84] but denied that the Board in *Mountain Pacific* had held that union hiring halls are presumptively operated in a discriminatory manner. The court explained that the basis for the Board's *Mountain Pacific* decision was that a job applicant would *believe* that the hall was so operated and this belief would induce him to join the union unless a notice to the effect that there would be no discrimination was posted at the hiring hall. The first circuit's opinion does not allow the conclusion that the Board can dispose of the hiring hall through the application of a rule of *per se* illegality. The court said that there was "ample evidence warranting the Board's finding . . . that all employees would have to obtain job clearance from the union,"[85] thereby at least implying that absent such specific factual evidence, a violation could not be found.

It seems clear that the Board in *Mountain Pacific* held that a hiring hall agreement which failed to meet the prescribed standards *was unlawful per se,* a holding which was undoubtedly based upon its expert understanding of the coercive effect that the hiring hall system has upon an applicant for employment who fears that his livelihood may depend upon membership in the union. Certainly the Board's opinion in *Mountain Pacific* provided sufficient reason to believe that the hiring hall system may be inherently coercive.[86] The courts should have considered whether the broad

83. 122 N.L.R.B. 980 (1959).

84. NLRB v. Local 176, United Bhd. of Carpenters and Joiners, AFL-CIO, 276 F.2d 583 (1st Cir. 1960).

85. *Id.* at 586.

86. The Board said:

> Here the very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over the employment status.
>
> . . . .
>
> We believe, however, that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be nondiscriminatory on its face, only if the agreement explicitly provided that: [listing the three criteria.]
>
> . . . .
>
> We would draw a . . . line between the type of unfettered arbitrary hiring hall present here and one including the safeguards set forth above.

terms of the statute could effectively prevent discrimination without the implementation of administratively-developed standards. The courts, viewing the problems of labor and management from the high plateau of a general overlooking the battlefield, may lack the experience and information to deal with the intricacies of a single maneuver, which can best be dealt with by those who have been intensively engaged in the field. Consideration of the need to use administrative expertise effectively might have resulted in a more thorough and explicit definition of the scope of the Board's power to make rules by adjudication. Although current decisions by the United States Supreme Court and by the Court of Appeals for the Sixth Circuit give somewhat greater consideration to the scope of the Board's adjudicatory rule-making power, it is questionable whether those courts gave sufficient weight to the need for authoritative rule making founded upon specialized knowledge.

The opinion of the Court of Appeals for the Sixth Circuit, in *NLRB v. E. & B. Brewing Co.*,[87] was handed down a few days after the First Circuit's *Local 176* decision and is interesting in its treatment of the entire area of Board law-making through adjudication. In this case, the court of appeals denied enforcement of a Board order[88] directing reinstatement with back pay of an employee who, according to the Board, had been discriminatorily discharged. The petition against the employer and the union did not put in issue the legality of the hiring hall agreement; nevertheless, the Board used the case as a vehicle for declaring the hiring hall contract unlawful because of failure to include the *Mountain Pacific* safeguards. The court rejected the Board's well-reasoned argument that its case-by-case method was no longer effective to deal with the hiring hall problem because "the undeniably discriminatory result of the exclusive hiring hall flows as much from

119 N.L.R.B. at 896, 897 & 898.

It should be noted, however, that after the *Mountain Pacific* decision, Congress added § 8(f) to the Taft-Hartley Act, 73 Stat. 545 (1959), 29 U.S.C.A. § 158(f) (Supp. 1960):

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement . . . with a labor organization of which building and construction employees are members . . . because . . . (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later . . . .

This is quite consistent with the Board's rule as may be inferred from the statement that "nothing in such provision is intended to restrict the applicability of the hiring hall provisions enunciated in the Mountain Pacific case . . . ." H.R. REP. No. 1147, 86th Cong., 1st Sess. 42 (1959).

87. 276 F.2d 594 (6th Cir. 1960).

88. E & B Brewing Co., 122 N.L.R.B. 354 (1958).

the agreement itself as from the illegal operation of the halls of some unions."[89] The court stated its disapproval of the *per se* rule as follows:

> As we understand the Board's position, it is that its experience proves that its effort to pick off the sour fruit frequently appearing on the hiring hall tree has been ineffective and altogether frustrating, so now it proposes to chop down the whole tree whenever it is not propped up by the Board's three "protective clauses."[90]

Other language of the court indicates that it did not deny that the Board may make rules through adjudication, but merely held that it was improper to do so in this particular case:

> There is no doubt that the Board has power, in appropriate cases, and in furtherance of its delegated function of making the National Labor Relations Act work, to establish new rules. What may be called new rules may stem from two sources or theories of power. One is the broad grant of power in § 6 of the Act . . . *Perhaps the Board might have saved itself a lot of trouble by utilizing this method of making a rule.* . . . A second mode by which new rules sometimes come into being is through the process of administrative adjudication. Just as courts generally do not hesitate to announce new rules to govern novel or changed conditions, so administrative boards often lay down new so-called 'interpretative' rules. . . . [W]hile we have no occasion here to doubt that an administrative board, may, as the courts have always done, declare new rules through the process of case to case adjudications, yet we think this Board has not properly done so in this particular case.[91]

The court's reasons for taking this position were that the Board could not determine the legality of the hiring hall agreement where that question had not been put in issue by the petition and that the retroactive application of the *Mountain Pacific* rule in this case would work hardship on the parties charged with violation. The court recognized the fact that administrative law-making may properly operate retroactively in the same manner as court law-making; nevertheless, it found that the application of the Board's rule would work hardship on the employer and the union "altogether out of proportion to the public ends to be accomplished."[92] One year after *E. & B. Brewing Co.*, the United States

89. 276 F.2d at 597, quoting a statement made by the Board.
90. *Ibid.*
91. *Id.* at 598.
92. *Id.* at 600.
In NLRB v. Guy F. Atkinson Co., 195 F.2d 141, 149 (9th Cir. 1952), it was said that the test of whether an administrative ruling may be given retroactive effect is whether "the practical operation of the Board's change of policy . . . [will] work hardship upon respondent altogether out of proportion to the public ends to be accomplished."

Supreme Court, in *Local 357, Int'l Bhd. of Teamsters v. NLRB*,[93] held that since Congress has not outlawed the hiring hall as such, it was not within the power of the Board to do so; the legislative history of the Taft-Hartley Act indicates that unions may operate hiring halls as long as they are not used to create a closed shop. The Court further explained its position as follows:

> It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. . . . But . . . the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination." . . . [The Board's] power, so far as here relevant, is restricted to the elimination of discrimination. Since the agreement contains such a prohibition, the Board is confined to determining whether discrimination has in fact been practiced.[94]

The dissent by Mr. Justice Clark recognized that the need for the Board's rule arises from the inherently coercive nature of the hiring hall system:

> Of the gravity of such a situation [referring to testimony of the complainant that he always knew he had to be a member of the union in order to have a job] the Board is the best arbiter and best equipped to find a solution. . . . I need only assume that, by thousands of common workers like Slater, (the complainant) the contract and its conditioning of casual employment upon union referral will work a misunderstanding as to the significance of union affiliation unless the employer's abdication of his role be made less than total and some note of the true function of the hiring hall be posted where all may see and read.[95]

The hiring hall is probably the closest institution to the closed shop remaining on the industrial scene today. The Board's rule, formulated as a result of its vast experience in labor relations and requiring merely that the coercive and discriminatory elements of the hiring hall be offset, seems to be a reasonable means of effectuating the anti-discrimination policies enunciated in the Labor Act. The Supreme Court's denial of the Board's power to formulate a decisional rule requiring safeguards against discrimination in hiring of employees appears to be no less than a judicial denial of the Board's informed exercise of administrative power.

93. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961), *reversing* Local 357, Int'l Bhd. of Teamsters v. NLRB, 275 F.2d 646 (D.C. Cir. 1960).

94. 365 U.S. at 675–76.

95. *Id.* at 691–92.

D. MINORITY PICKETING FOR RECOGNITION

Another area of concerted activity—picketing for recognition[96] —has resulted in Board action and judicial consideration which merits discussion. It demonstrates the formulation of a decisional rule which met with disapproval in the courts as beyond the Board's statutory powers, but which Congress found sufficiently reasonable to form the basis for an amendment of the Act.

Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7.[97] Section 8(b)(1)(A) was first interpreted by the Board in *Matter of National Maritime Union of America*[98] where the Board held that the union had violated section 8(b)(2) by calling a strike during contract negotiations for the unlawful purpose of obtaining a provision maintaining a discriminatorily operated hiring hall.[99] Despite this finding, the Board was unable to conclude that the picketing, peaceful in nature, constituted activity to "restrain" or "coerce" within the meaning of section 8(b)(1)(A). The Board reasoned further that a broad application of section 8(b)(1)(A) to peaceful picketing would render section 8(b)(4)(C) superfluous. That section makes it an unfair labor practice for a union to "force or require" an employer to recognize it when another union has been certified by the Board.[100]

In *Curtis Bros.*[101] the Board, overruling its prior decisions, stated the broad rule that any picketing for recognition by a minority union was a violation of section 8(b)(1)(A). In so doing, the Board distinguished between organizational and recognitional picketing; it found the former to be permitted by the Act and the latter to be conduct which would unlawfully "restrain and coerce" the employees in the exercise of section 7 rights.[102]

On certiorari, the United States Supreme Court reversed the Board's decision in *Curtis Bros.*[103] The Court held that peaceful

96. Such picketing is conducted by a union with the object of forcing the employer to recognize and contract with the picketing local although it is not the chosen representative of his employees. The Board has distinguished this from organizational picketing which has as its purpose, according to the Board, to merely organize the employees with a view to demanding recognition in the future should majority support be acquired. See Drivers Local 639 (Curtis Bros.), 119 N.L.R.B. 232 (1957) discussed *infra*.

97. See note 56 *supra*.

98. 78 N.L.R.B. 971 (1948).

99. See discussion of hiring halls in text accompanying notes 71–95 *supra*.

100. 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(4)(C) (1958).

101. Drivers Local 639 (Curtis Bros.), 119 N.L.R.B. 232 (1957).

102. See note 56 *supra*.

103. NLRB v. Local 639, Int'l Bhd. of Teamsters, 362 U.S. 274 (1960).

picketing to compel the employer to recognize a minority union as the representative of his employees is not conduct to "restrain and coerce" the employees in the exercise of section 7 rights and therefore does not constitute a violation of section 8(b)(1)(A). The Court maintained that section 8(b)(1)(A) must be interpreted so as to safeguard the right to strike and that the Board's broad holding would "impede" this right.[104]

While *Curtis* was pending in the Supreme Court, Congress passed the Labor-Management Reporting and Disclosure Act which added section 8(b)(7) to the Labor Act.[105] This provision made it an unfair labor practice for a union which is not currently certified to picket or threaten to picket when an object of such picketing is to gain recognition or to promote organization of the employees under any of the following circumstances: 1) the employer has lawfully recognized another union; 2) a valid representation election has been held within the preceding twelve months; 3) the picketing has been conducted without the filing of a petition for a representation election.

It is likely that the Supreme Court would have upheld the Board's decision in *Curtis* had it issued its order on the basis of section 8(b)(7). However, the Court rejected the Board's claim that it could proceed against peaceful recognitional picketing directly under 8(b)(1)(A) without regard to the new section or its limitations. The Court stressed the argument that the power of the Board is limited to the scope of the congressional mandate, saying "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions."[106] The Court felt that the broad standard of section 8(b)(1)(A) did not vest in the Board the power to "sit in judgment upon, and to condemn, a minority union's resort to a specific economic weapon, here peaceful picketing."[107]

The *Curtis* case illustrates how the courts frequently restrict the Board to the confines of the statute. In an earlier case, the Supreme Court had pointed out that the Taft-Hartley Act was intended to balance the powers of labor and management in the furtherance of their respective interests; it implied that Congress had left a wide margin for interpretation and had set the broad standards of which section 8(b)(1)(A) is an example.[108] The

104. *Id.* at 282.

105. Labor-Management Reporting & Disclosure Act, § 704(e), 73 Stat. 544 (1959), *amending* the Labor Management Relations Act, 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1958).

106. 362 U.S. at 282–83, quoting from NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 498 (1960).

107. 362 U.S. at 282.

108. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 99–100 (1958).

Court in *Curtis* warned against "finding in the nonspecific, indeed vague, words 'restrain or coerce' that Congress intended the broad sweep for which the Board contends."[109] Rather, section 8(b)(1)(A) grants power to the Board to proceed against only those union tactics which involve violence, intimidation, and reprisal or threats thereof. That the Court would have approved the Board decision in *Curtis* had it been based on section 8(b)(7) is indicated by its citation with approval of *NLRB v. Local 182, Int'l Bhd. of Teamsters.*[110] In that case the Court of Appeals for the Second Circuit recognized that section 8(b)(1)(A) did not proscribe peaceful picketing for recognition, but that reliance on the new section would produce such a result provided the activity fell within the purview of section 8(b)(7). It was there held that Congress, by the new section, had set the standard which alone would be a guide for future decision.

This analysis further exemplifies the difference between the judicial and the administrative approaches to a single problem. The courts, in their concern about arbitrary administrative action, strive to prevent the Board from exercising powers not specifically granted it by statute. The Board, guided by its careful evaluation of the practical problems of labor-management relations, tends to read between the lines of the statute, as demonstrated by its *Curtis* decision. The Board reasoned that the employees "cannot escape a share of the damage caused to the business"[111] of the employer as a result of the picketing. The Board said that it could find "nothing in the statutory language of section 8(b)(1)(A) which limits the intendment of the words 'restrain or coerce' to direct application of pressure."[112] The enactment of section 8(b)(7)[113] demonstrates congressional concern about the serious problems which the Board, in *Curtis Bros.*, found in minority union picketing for recognition—but as to which the Supreme Court held the Board to be unauthorized to construct a remedial rule under section 8(b)(1)(A).

109. 362 U.S. at 290.

110. 272 F.2d 85 (2d Cir. 1959).

111. Drivers Local 639 (Curtis Bros.), 119 N.L.R.B. 232, 236 (1957).

112. *Ibid.*

113. Labor-Management Reporting & Disclosure Act, § 704(c), 73 Stat. 544 (1959), *amending* the Labor Management Relations Act, 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1958).

For treatments of § 8(b)(7) and the Landrum-Griffin amendments in general, see Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN. L. REV. 257 (1959); Comment, *The Landrum-Griffin Amendments: Recognition and Organizational Picketing,* 45 CORNELL L.Q. 769 (1960). The *Curtis* case has been discussed in: Isaacson, *"Organizational Picketing: What is the Law?—Ought the Law to be Changed?",* 8 BUFFALO L. REV. 345, 360 (1959), and Comment, *"Minority Picketing and Allied Activities Under the Labor Management Reporting and Disclosure Act,"* 20 LA. L. REV. 400 (1960).

E. THE FASHIONING OF REMEDIES

Section 10(c) of the National Labor Relations Act grants the Board power to redress unfair labor practices by an order requiring the person committing such practice to cease and desist and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . ."[114] The Board's broad discretion to fashion remedies is limited, however, by the judicially imposed requirement that the remedy be "appropriate"[115] and "adapted to the situation which calls for redress."[116]

In *F. W. Woolworth Company*,[117] the Board established an explicit rule for the computation of back pay in cases involving a discriminatory discharge. It unequivocally stated a policy for future application: "we shall order, in the case before us *and in future cases*, that the loss of pay be computed on the basis of *each separate calendar quarter or portion thereof* during the period from the Respondent's discriminatory action to the date of a proper offer of reinstatement."[118] The language used by the Board would not seem to permit an interpretation that would limit its rule to the facts of the particular case before it. The desirability of setting a standard for the computation of back pay for the present and "future cases" was well supported by the Board. It maintained that in all unfair labor practice cases its aim was to restore the employee to the situation which would have obtained in absence of the illegal discrimination, and that the rule formulated was essential to accomplish this end.

For many years prior to this decision, the Board had followed the practice established in *Pennsylvania Greyhound Lines, Inc.*,[119] of calculating back pay on the basis of the entire period between discharge and offer of reinstatement. The change to the *Woolworth* formula emerged from the accumulation of administrative experience which revealed that the old rule did not effectuate the policies of the Act; because employers were allowed to deduct from back pay the amounts earned in temporary employment subsequent to discharge, they were induced to delay reinstatement where the employee had obtained a better paying temporary job. It is interesting to note that neither the courts nor Congress were able to recognize the deficiencies of the pre-*Woolworth* rule. It required the understanding of the expert to with-

114. National Labor Relations Act, 49 Stat. 453 (1935), *as amended*, 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1958).
115. NLRB v. Linkbelt Co., 311 U.S. 584, 600 (1941).
116. NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318 (1940).
117. 90 N.L.R.B. 289 (1950).
118. *Id.* at 292–93. (Emphasis added.)
119. 1 N.L.R.B. 1 (1935).

draw its own rule in favor of a more desirable one. Indeed, it was the congressional approval of the pre-*Woolworth* formula which raised the question whether the Board could change its policy despite such approval. In *Seven-Up Bottling Co. of Miami, Inc.*,[120] the Board ordered reinstatement of discriminatorily discharged employees with back pay computed on the basis of the *Woolworth* rule. The Supreme Court upheld the Board's order[121] saying that congressional re-enactment of section 10(c) while the Board continued to adhere to its *Pennsylvania Greyhound* formula prevented neither the formulation of the *Woolworth* rule nor its application to this and other like cases. In deference to the Board's expertise, the Court stated:

> [I]n devising a remedy the Board is not confined to the record of a particular proceeding. "Cumulative experience" begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.[122]

The Court went on to say that depriving the Board of the power to make changes based on experience would have required a positive congressional enactment.

It has been suggested that "the reasons for withholding substitution of judicial judgment on choice of remedies may be stronger than on many issues of statutory interpretation and the idea of commitment of problems of remedies to administrative discretion may therefore have validity in many cases."[123] A refusal by the courts to substitute judgment may be explained simply by reference to the involved nature of the remedies devised in the *Pennsylvania Greyhound* and *Woolworth* decisions. However, it may well be questioned whether the courts would, in fact, be less qualified than the Board to determine whether one form of back pay award would more adequately compensate the employee than another. On the other hand, in many of those cases in which there has been substitution of judicial judgment to defeat Board rulemaking, the courts might well have considered the fact that " 'cumulative experience' begets understanding and insight."[124]

120. 92 N.L.R.B. 1622 (1951).
121. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).
122. *Id.* at 349.
123. 4 DAVIS § 30.10, at 252.
124. See discussion of comparative qualifications of agencies and courts at p. 654 *infra*.

F. GOOD FAITH BARGAINING

Section 8(a)(5) of the National Labor Relations Act requires an employer to bargain in good faith with the representatives of his employees as to wages, hours and other conditions of employment.[125] "Good faith" being the only standard prescribed by Congress to govern behavior in the negotiating process, "the nature and extent of the control depend on the standards of good faith adopted by the Board and the courts."[126] In its search for a yardstick by which to determine the existence of bad faith, the Board at first set no absolute standards, and in some respects continued to base findings of bad faith on an examination of all the circumstances. The Board, however, was prompted to formulate an absolute standard by the employers' frequent practice of refusing to grant wage increases on grounds of financial inability, while at the same time refusing to furnish the union with substantiating data relating to the financial condition of the business.

The Board had originally held that refusal to furnish information as to financial condition was merely some evidence of bad faith bargaining and that the employer's whole conduct must be examined—that no single factor was conclusive evidence of bad faith.[127] Subsequently, in *Whitin Mach. Works*,[128] the Board held that an employer who bases his bargaining position on financial inability is required *as a matter of law* to furnish data relating to the wages of particular employees as an incident to bargaining and that failure to do so is a *per se* violation of the duty to bargain in good faith. The Board said that "it is sufficient that the information sought by the Union is related to the issues involved in collective bargaining, and that no specific need as to a particular issue must be shown."[129]

125. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958) reads: "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, . . ." Subsection (d) defines collective bargaining:

> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . ., but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

126. Delony, *Good Faith in Collective Bargaining*, 12 U. FLA. L. REV. 378, 396 (1959).

127. Southern Saddlery Co., 90 N.L.R.B. 1205 (1950).

128. 108 N.L.R.B. 1537 (1954), *enforced*, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955).

129. 108 N.L.R.B. at 1539.

Truitt Mfg. Co.[130] raised the problem of whether the standard adopted in *Whitin* should be applied not only to requests for information dealing with wage rates of particular employees but also to proof of financial inability to pay by requiring the employer to open his books for examination. In *Truitt,* the employer claimed financial inability to give a wage increase and, on demand by the union, refused to reveal data connected with the operations of the business. The company was, however, willing to produce information as to comparative wage rates and competitive bidding. The Board found a violation of section 8(a)(5) stating:

> [I]t is settled law, that when an employer seeks to justify the refusal of a wage increase upon an economic basis . . . good-faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof.[131]

The Supreme Court upheld the Board's decision on the facts but indicated that refusal to furnish the data requested could not be a *per se* violation of the Act.[132] This caveat was actually dictum for the Court did not contend that the Board had gone beyond the facts of the case to establish a rule of *per se* illegality. However, the dissent was of the opinion that there had been a finding of violation as a matter of law, and took issue with what it termed the Board's "ultra-vires law-making." The dissent[133] objected to the Board's flat statement that "it is well settled law" that good faith bargaining would require the employer to submit to the union's demand. It distinguished the finding of an 8(a)(5) violation in the Board's *Jacobs Mfg. Co.*[134] decision on the ground that in *Jacobs* the holding was based only on the facts in that case. The dissent said that this was "a very far cry indeed from a *ruling of law* that failure to open a company's books establishes lack of good faith."[135] Although the Board in *Truitt* indicated that its decision was based solely on the particular facts of that case, the contention of the dissent has some merit. One noted authority has pointed out the validity of the dissent's position, saying

130. 110 N.L.R.B. 856 (1954), *enforcement denied,* 224 F.2d 869 (4th Cir. 1955), *enforced,* 351 U.S. 149 (1956).

131. 110 N.L.R.B. at 856.

132. The Court said: "Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." 351 U.S. at 153–54.

133. *Id.* at 157.

134. The Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforced,* 196 F.2d 680 (2d Cir. 1952).

135. 351 U.S. at 156.

that with the Board's ruling in *Truitt* the "good faith" test became insufficient.[136]

> The agency's attention is really focused on the particular items of conduct which are alleged to fall short of accepted bargaining practices. The shortcomings are *per se* violations. The NLRB has undertaken to regulate the manner in which collective bargaining is conducted regardless of the actor's state of mind.[137]

It seems clear that the Board in *Truitt* applied a *per se* doctrine and that by claiming that it did not, the Court "evaded every issue."[138] In a later case,[139] the Board applied the *Truitt* ruling to "particular facts" identical to those in *Truitt*. Then, in a subsequent decision, it further clarified its position by saying that the broad duty to furnish financial information established in *Truitt* would only apply when such information is specifically shown to be relevant to an issue under negotiation.[140] This is clear indication of the Board's recognition that its *per se* doctrine could not be applied arbitrarily and without qualification.

III. STARE DECISIS—THE SUBSEQUENT APPLICATION OF DECISIONAL RULES

The inclination of judicial and quasi-judicial bodies to follow precedent is particularly relevant to any discussion of Board lawmaking through adjudication. Although statements have been made to the effect that administrative agencies are not bound by the principle of stare decisis to the same extent as the courts,[141] an examination of actual practice, especially in the National Labor Relations Board, has revealed a strong tendency to follow prior holdings and such holdings themselves have been phrased so as to command future application.[142] The need to maintain con-

136. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

137. *Id.* at 1430.

138. *Id.* at 1432.

139. B. L. Montague Co., 116 N.L.R.B. 554 (1956).

140. Pine Indus. Relations Comm., Inc., 118 N.L.R.B. 1055 (1957). The Board here said that in so holding it was following the Supreme Court's opinion in NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

141. In American Glue Co. v. Boston & M.R.R., 191 I.C.C. 37, 39 (1932), the Interstate Commerce Commission stated its position as follows:

> We are not bound by any rule of *stare decisis*. . . . But when, upon a given state of facts, we reach a conclusion regarding certain rates we will adhere to that conclusion in subsequent proceedings regarding the same or similar rates unless new facts are brought to our attention, conditions are shown to have undergone a material change, or we proceeded on a misconception or misapprehension.

Also see Pittman, *The Doctrine of Precedents and Public Service Commissions*, 11 MO. L. REV. 31, 41 (1946).

142. In its 1941 study the Attorney General's Committee on Administra-

sistency in administrative decisions by adhering to precedent,[143] however, may frequently be outweighed by the need for flexibility. Rules to the effect that specific conduct is unlawful *per se* are frequently applied to succeeding fact situations without consideration of peculiar factors that should make the rule inapplicable; and such a practice may result in serious administrative arbitrariness. Changing economic conditions or new experience with changed factual circumstances may necessitate shifts in Board policy. It has been suggested that—

> A foundation of the existence of administrative agencies is flexibility through discretion. Sometimes the very justification for creation of an administrative body is that it may exercise discretion in handling individual problems which are difficult to fit within inflexible boundaries laid down by precedents. Any attempt to impose rules of rigid adherence to the notion of stare decisis would strike at the basis of agency existence.[144]

Thus it would seem that the establishment of a rule which would inform employers and unions of the Board's position would be desirable, provided the Board may reverse its precedents to meet changing conditions. Indeed the Board's actual practice indicates its agreement with the latter proposition. It has followed prior decisions[145] until such time as experience demonstrated that arbitrary application of the established rule would produce an unde-

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tive Procedure found it to be "a striking fact that in almost every instance the agencies' officers who were interviewed expressed the belief that they accorded to the precedents of their respective agencies as much weight as is thought to be given by the highest court of a state to its own prior decisions." U.S. ATT'Y GEN. COMM. AD. PROC., ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 466 (1941).

For an example of Board language commanding future application of an established rule, see discussion of F. W. Woolworth Co., 90 N.L.R.B. 289 (1950), in text accompanying notes 117–18 *supra*.

143. The failure to formulate rules may be more arbitrary than their application where the recurrence of similar fact situations demands consistency in administrative decisions. The Court of Appeals for the Seventh Circuit stated, in NLRB v. Mall Tool Co., 119 F.2d 700, 702 (7th Cir. 1941), that "consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily." The problem was well stated by one authority who said that—

> individual orders may be particularly susceptible to attack, either because they come without previous warning, or because they are inconsistent with other orders in comparable situations. General regulations on the other hand may be vulnerable to the charge that they are too rigid and do not allow enough play for significant individual differences.

Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 490 (1950).

144. Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 131 (1957).

145. See Note, *Stare Decisis in N.L.R.B. and S.E.C.*, 16 N.Y.U.L.Q. REV. 618 (1939).

sirable or unfair result. At that time it has overthrown precedent—in several instances a *per se* rule—to meet the special facts of the case before it.[146]

Strong considerations weigh against a rigid adherence to precedent; but difficult problems also arise in connection with deviations from stare decisis. Where a case is used as a vehicle for a change of prior Board policy, the result is a retroactive application of the new rule to the parties involved in the case in which the rule is formulated; and retroactive rule-making may work serious hardship on parties who have relied upon former rulings. Thus, while flexibility in administrative decisions is often essential, there may be unconscious violations which would be avoided if the parties involved were apprised of the policy of the Board in advance. Mr. Justice Clark has stated that "too often basic continuing problems are not decided but are left to *ad hoc* adjudication. This gives industry no guide-lines and results in confusion. Certainly this must be corrected by agency action."[147] It is inevitable, however, that in setting down certain guide-lines by which industry may govern its conduct of labor relations, the Board also creates the circumstances in which the retroactive application of a modified rule may work hardship on those who have attempted to comply.

An example of the conflicting effects of the establishment of a rule is found in the Board's development of its jurisdictional standards. Even if Board policies as to certain practices are known, there may be a variance between state and Board approaches to the same problem. Consequently it should be known in which instances the Board will take jurisdiction.[148]

The Board originally determined on a case-by-case basis whether or not it would take jurisdiction. In 1950, however, recognizing the necessity for clarification of its policy, the Board established specific jurisdictional standards by adjudication,[149] basing its

146. *E.g.*, Blue Flash Express, Inc., 109 N.L.R.B. 591 (1954), discussed in text accompanying notes 67–70 *supra*.

147. Address by Tom C. Clark on "Administrative Justice, 1960" to the annual meeting of the administrative law section of the American Bar Association, as reported in Harris, *Activities of the Section*, 46 A.B.A.J. 1127 (1960).

148. One writer has suggested that "to the extent that the agency knows the policy it desires to follow, to that same extent it should inform those coming within its regulation of that policy." Baker, *Policy by Rule or Ad Hoc Approach—Which Should it Be?*, 22 LAW & CONTEMP. PROB. 658 (1957).

149. See, *e.g.*, Central Kentucky Broadcasting Co., Inc., 93 N.L.R.B. 1298 (1951); Tampa Times Co., 93 N.L.R.B. 224 (1951); Seven-Up Bottling Co., 92 N.L.R.B. 1622 (1951); Cherokee County Rural Elec. Coop. Ass'n, 92 N.L.R.B. 1181 (1951); Amalgamated Bank of New York, 92 N.L.R.B. 545 (1950); Press, Inc., 91 N.L.R.B. 1360 (1950); WBSR, Inc., 91 N.L.R.B. 630 (1950); Rutledge Paper Prod., Inc., 91 N.L.R.B. 625 (1950).

change from the case-by-case method on the fact that "experience warrants the establishment . . . of certain standards which will better clarify and define where the difficult jurisdictional line can best be drawn."[150] Subsequently the problem of retroactivity arose in *Guy F. Atkinson Co.* where the Board, after consistent refusal to assert jurisdiction in the construction industry, had issued an order for reinstatement of an employee who had been discharged for failure to pay dues to the union with which the employer had a closed shop agreement. The Court of Appeals for the Ninth Circuit reversed the order of the Board because of the "inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act."[151] In 1954 the Board established a further set of standards by means of a series of press releases.[152] The latter method of announcing its policy represents an attempt by the Board to avoid the retroactive law-making through adjudication which invoked the court's disapproval in *Atkinson.*

While the courts have properly been concerned with retroactive rule-making, there is also a considerable body of case law indicating that retroactive law-making through adjudication by an administrative agency is no less desirable than the same practice in the courts.[152] In fact, it cannot be denied that most judicial decisions which create law apply that law retroactiyely. Indeed, the effectiveness of both the judicial and the administrative process is best promoted by continuous re-evaluation of precedents resulting in the creation of new law. Arbitrariness may result as well from an excess of adherence to precedent as from unwarranted and sharp deviations from prior policy. Thus in the formulation of a rule by an administrative agency, as well as in judicial review of the decision in which the rule is established, due regard must be given to these countervailing considerations.

The announcement by the Board of its policy through the establishment of a *per se* standard, which more clearly defines illegal conduct than a rule which is subject to variant defenses, is helpful from the standpoint of making administrative policy known, and is conducive to a reduction of litigation.[154] However,

150. Hollow Tree Lumber Co., 91 N.L.R.B. 635, 636 (1950).

151. N.L.R.B. v. Guy F. Atkinson Co., 195 F.2d 141, 149 (9th Cir. 1952), denying enforcement to Guy F. Atkinson Co., 90 N.L.R.B. 143 (1950).

152. See *Revision of NLRB Jurisdictional Standards,* 34 L.R.R.M. 75 (1954).

153. See 2 DAVIS § 17.07, at 530–32, citing Optical Workers' Union v. NLRB, 227 F.2d 687 (5th Cir. 1955), *cert. denied,* 351 U.S. 963 (1956); NLRB v. National Container Corp., 211 F.2d 525 (2d Cir. 1954); NLRB v. Kobritz, 193 F.2d 8 (1st Cir. 1951).

154. With reference to Board rule-making, the following statement was

where the facts of a particular case do not fit within the scope of the prescribed standard, it is incumbent upon the Board to rule either that the standard does not apply or to use the case as a vehicle for changing the standard.[155] In those instances where the Board fails to recognize the inapplicability of a standard to a particular fact situation, an aggrieved party still has available to him a remedy in the courts.

IV. JUDICIAL REVIEW OF NLRB LAW MAKING THROUGH ADJUDICATION

The proliferation of controversies growing out of the legislation regulating labor-management relations emphasizes the fact that the adjudicatory function of the National Labor Relations Board is its most important one. Furthermore, it cannot be disputed that adjudication, whether judicial or administrative, inevitably results in the creation of law.[156]

In the development of the common law, as well as in judicial application of regulatory statutes, the courts have held certain prac-

made by the American Bar Association Committee on Agency Rule-Making:

> Although the NLRB performs adjudicatory functions, the mass of cases of which it disposes, though issued in the form of an adjudication, generates pressure to codify its substantive rules if only to avoid an increase in its case load by stating the full implication of departures from former precedents, even though unnecessary to disposition of the immediate case.
>
> Recognizing that the Board—and the courts—have had to proceed for a time on a case-by-case basis in formulating, for example, the jurisdictional boundaries of "commerce," the Board by inviting public participation in formulating jurisdictional boundaries, by issuing press releases with respect to its jurisdictional policies has in fact engaged in rule-making. We believe this to be desirable but recommend that there be full compliance with the rule-making provisions of the APA.

Report of the Committee on Agency Rule-Making (Administrative Law Section, American Bar Association), 11 AD. L. BULL. 280 (1959).

155. The problem of setting standards and subsequently adjusting them to specific cases, has been well stated as follows:

> One need . . . in policy development is for more definiteness in standards which guide in the approval or disapproval of licenses, certificates, and other applications, and in the decision of other types of cases affecting concretely the rights of particular parties . . . . There is, of course, necessity for adjustment to special circumstances, but this often can be done through refinement of policy for new categories of situations . . . . [P]redictability evaporates where standards are multiple and are weighed anew without reference to guiding priorities in application to each situation.

REDFORD, NATIONAL REGULATORY COMMISSIONS: NEED FOR A NEW LOOK (1959).

156. Professor Davis has said that "development of new law through the process of adjudication . . . amounts to no more than an administrative imitation of what courts have done from time immemorial." 2 DAVIS § 17.08, at 536.

tices to be so clearly against the letter and spirit of the law that they have declared them unlawful *per se* with the result that, upon the finding of a single fact or set of facts, no extenuating circumstances can be a sufficient defense.[157] Similar holdings can and do result from administrative adjudication; and because *per se* rules are, to some extent, arbitrarily determined for reasons of administrative convenience,[158] there is a real danger that their inflexibility may result in the denial of constitutional or statutory rights. On the other hand, to require the Board to adjudicate and determine each case without reference to the law and policy which it has evolved through experience would be to ask the impossible; and it would stultify the entire administrative process. The ultimate question is, then, not whether the Board should make law through adjudication, but rather, where the fulcrum should be placed in balancing the need for effective administrative law-making power against the need to protect individuals in a free society from the effects of arbitrary and inflexible rules applied in administrative adjudication. The need to provide a check on administrative action would seem to increase as agency policies become rigid and inflexible. Certainly the Board's enforcement of a rule declaring a practice unlawful *per se* involves considerable danger if that declaration means that the rule will be followed indiscriminately in cases which are significantly different from the particular fact situation in which the rule originated. Consequently, any examination of the scope of the Board's power of adjudicative law making must be concerned with the effectiveness with which the courts have operated as a check on the arbitrary exercise of administrative power. Judges who review agency determinations, though less familiar with the technicalities of a specialized problem, are nevertheless generally better qualified to evaluate the demands of due process. On the other hand, it should also be clear that if the courts are too quick to substitute their judgment for that of the Board, the

157. *E.g.*, in the area of antitrust law, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

158. Professor Louis B. Schwartz has pointed out opposing contentions on the question of whether per se rules are desirable in the antitrust field:

> Among the opposing contentions are these: Per se rules are absolute and inflexible, leaving no possibility of adaptation to peculiar circumstances of a particular business or to special requirements of trade . . . . Per se rules, *especially if applied by administrative tribunals* like the Federal Trade Commission, preclude the exercise of the specialized, informed discretion which is supposed to guide such bodies. On the other hand, per se rules are *easier for businessmen to understand,* eliminating pro tanto the vagueness which is one of the principal complaints against the antitrust laws, and *easier for the government to enforce.*

SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 20 (2d ed. 1959). (Emphasis added.)

effective use of administrative expertise may be seriously compromised. Therefore, one important question is—what is the effect of judicial substitution of judgment? If judicial review is to operate effectively as a check on administrative action, it becomes necessary to resolve the question whether the Board is actually bound to follow the decisions of the courts approving or disapproving of Board-formulated rules or policies, and, if so, to what degree. An answer to this question was well stated by one author as follows:

> [I]n not every instance in which the Board's policy is upheld by the (Supreme) Court is the Board thereafter precluded by judicial approval alone from altering its policy. Where, however, judicial approval of Board policy is based upon the Court's appraisal of the terms of the statute, where the Court holds, in effect that the Board's policy is the only one consistent with the effectuation of the Act's objectives, the Board is no longer free to adopt a contrary policy, just as it is not free after the Supreme Court has held a particular Board policy inconsistent with the language or purposes of the Act to continue to apply that policy.[159]

The *Blue Flash* case discussed previously[160] is an example of change in Board policy pursuant to court disapproval of its prior position. On the other hand, the adoption of the *Woolworth* formula for back pay[161] illustrates a situation in which the Board changed its position despite court and congressional approval of the *Pennsylvania Greyhound* rule.[162] Thus, while it is clear that court opinion will prevail where the Board has transgressed the limitations of the statute, the experience of the Board may result in a deviation from judicial decisions where the Board is acting within its granted authority.

Of primary importance, therefore, is the question of whether judicial opinions reviewing both Board and other administrative decisions afford any discernible guidelines which could be of assistance in determining the scope of the Board's power to make rules or in determining the extent to which the judiciary will substitute its judgment for that of the Board.

The foregoing discussion of substantive problems of labor law[163] has afforded some indication of court treatment of Board decisions. However, it has not been established whether the courts have developed any standards to be applied in reviewing Board decisions which result in the formulation of rules; nor is it clear whether the manner of review varies at all between adjudications

159. Ratner, *Policy-Making by the New "Quasi-Judicial" NLRB*, 23 U. CHI. L. REV. 12, 14 (1956).
160. See text accompanying notes 67–70 *supra*.
161. See text accompanying notes 117–18 *supra*.
162. See note 119 *supra*.
163. See discussion at pp. 615–37 *supra*.

which are limited to application of statutes to the facts of a particular case and adjudications which, in addition, enunciate principles of law.

It can be said that courts reviewing administrative decisions generally apply the substantial evidence rule under which the court determines some questions of law but "limits itself to the test of reasonableness in reviewing findings of fact."[164] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[165] It means that if the evidence, as it appears from the record taken as a whole, supports the findings of the agency, the reviewing court cannot set aside the administrative decision even though the court would have reached an opposite conclusion had it determined the matter initially.[166] Originally, the National Labor Relations Act omitted the word "substantial" in its provision relating to judicial review of Board decisions. However, pursuant to judicial interpretations to the effect that Congress intended review to be based on substantial evidence, that term was incorporated into the Act by the Taft-Hartley amendments of 1947.[167]

A study of judicial opinions reviewing Board decisions will reveal that the courts will enforce or deny enforcement to a Board decision, whether or not predicated on a Board-established rule, through application of the substantial evidence test. If the case also involves the establishment of a rule, the judicial approach may vary from ignoring the rule to disapproving it as arbitrary or beyond the discretion of the Board. An example of the first approach is the judicial enforcement of the Board's order in *Washington Coca Cola*[168] on the basis of substantial evidence and without any reference to the rules which the Board's

164. 4 DAVIS § 29.01, at 114.

165. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), citing Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

166. See Comm. on Admin. Law of the Dallas Bar Ass'n, *Review of Decisions of Administrative Agencies by Courts*, 22 TEXAS B.J. 517, 538 (1959), citing Radio Corp. of America v. United States, 341 U.S. 412 (1951).

167. Section 10(e) of the National Labor Relations Act as amended by the Taft-Hartley Act provides 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." 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1958). (Emphasis added.) The original Wagner Act provided that "[T]he findings of the Board, as to the facts, if supported by evidence, shall be conclusive." Judicial interpretation of the Wagner Act took the position that "evidence" meant "substantial evidence." For a summary of the history leading up to the Taft-Hartley amendment adding the word "substantial" to the statute, see Universal Camera Corp. v. NLRB, 340 U.S. 474, 477–86 (1951).

168. Washington Coca Cola Bottling Works, Inc. 107 N.L.R.B. 299 (1953). See discussion at p. 617 *supra*.

decision established to supplement the *Moore Dry Dock* rules.[169] The *Moore Dry Dock* rules themselves were not only approved by the courts, but several decisions of the Board were denied enforcement because of failure to apply them.[170] In one such case, the Court of Appeals for the Second Circuit approved of the rules as "a sound interpretation of the Act."[171] However, no mention was made in these decisions of the basis upon which the court rested its support of the Board's adjudicative law-making. Some insight into the manner in which the courts apply the substantial evidence rule as a limitation upon adjudicative rule-making can be gained from *Otis Massey*, discussed previously.[172] In that case, the Fifth Circuit Court of Appeals pointed out that the *Moore Dry Dock* rules had never been approved as rules of general application but were merely held applicable to the facts of particular cases, the substantial evidence rule serving as the primary yardstick. The court concluded its opinion with the following remarks:

> While the drawing of appropriate inferences as to the unlawfulness of objective and motive in a labor dispute is primarily the province of the Board, *there still must be some substantial basis* for inferring a wrongful rather than a legitimate motive, which we think does not exist here.[173]

Thus, the primary concern of the courts in these cases seems to have been whether the Board's opinion rested on factual findings sufficient to support the particular disposition of the case[174] independently of the rule incidentally established. It is uncertain, therefore, whether rules declaring specific conduct unlawful *per se*, will withstand judicial scrutiny for evidentiary findings when the Board attempts to apply those rules to unusual fact situations.

169. See discussion of the *Moore Dry Dock* rules at p. 617 *supra*.

170. *E.g.*, Piezonki v. NLRB, 219 F.2d 879 (4th Cir. 1955).

171. NLRB v. Service Trade Chauffeurs Local 145, 191 F.2d 65, 68 (2d Cir. 1951).

172. NLRB v. General Drivers, AFL, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955), see p. 618 *supra*.

173. 225 F.2d at 211.

174. This approach is based on the cardinal principle of administrative law that a reviewing court cannot substitute its own findings or reasons where it disagrees with the administrative decision. Instead it must remand the case for further findings by the agency. This principle has been expressed by the Supreme Court as follows:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

The *Sales Drivers* case[175] also lends support to the proposition that the courts are primarily concerned not with the effective scope of Board rule-making, but with the question of whether the findings are sufficient to support the Board's conclusion. Thus, in its initial decision denying enforcement of the Board's determination that section 8(b)(4)(A) had been violated, the Court of Appeals for the District of Columbia explained that the previous affirmance of the *Washington Coca Cola* rule "must be construed only as agreement with the conclusion the Board there reached, which rested in considerable part upon additional findings."[176] Perhaps the best description of judicial review of administrative law-making through adjudication that can be deduced from cases such as *Sales Drivers* is that approval of a Board decisional rule always carries with it the qualification that under the evidence in a particular case, application of the rule accords with the judicial interpretation of the controlling statute. A dual purpose is actually served by this type of review—the rule advises parties within the Board's jurisdiction of administrative policy, but arbitrary application of the rule is prevented through judicial insistence on substantial evidence to support the Board's order.[177]

Distinctly analogous at this point are the well-known *Chenery* decisions[178] which, although involving the Securities and Exchange Commission, resulted—as did *Sales Drivers*—in a remand to the agency followed by court affirmance of a better supported opinion reaching the same conclusion. The *Chenery* cases may also be instructive as an illustration of the judicial approach to administrative law-making and may suggest some theories which explain that approach. The question raised by these cases concerned the propriety of an order of the Commission denying officers, directors and controlling stockholders of a holding company equal participation with all other preferred stockholders in the reorganization of the company. The Court held that in determining whether the proposed reorganization plan was "fair and equitable" within the meaning of the Public Utility Holding Company Act, the Commission was neither bound by nor could it properly base its decision upon judicial precedents which established equitable principles respecting a fiduciary's "duty of fair dealing." The

175. See discussion at p. 618 *supra.*

176. 229 F.2d at 517.

177. As pointed out in text accompanying notes 54–55 *supra,* the Board's decision on remand in Sales Drivers Union (Campbell Coal Co.), 116 N.L.R.B. 1020 (1956), reaching the same conclusion based on findings previously disregarded, was affirmed by the Court of Appeals for the District of Columbia in Truck Drivers Union v. NLRB, 249 F.2d 512 (D.C. Cir. 1957), *cert. denied,* 355 U.S. 958 (1958).

178. SEC v. Chenery Corp., 318 U.S. 80 (1943) and 332 U.S. 194 (1947).

Court seemed to hold that in determining the extent to which directors or officers should be prohibited from buying or selling stock of the corporation during reorganization, the Commission's order *must* be based on a general rule promulgated in reliance upon "its special administrative competence."[179] The Court stated:

> But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority.[180]

In its concluding remarks, the Court seemed, however, to retract somewhat from this requirement of a preliminary, agency-formulated rule, returning once more to the primary requirement of an adequate foundation for the administrative decision:

> [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. . . . We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.[181]

What the Court seems to have said is that the formulation of a rule by the Commission (under the agency's substantive rule-making power) would serve as a guide to the court on review in determining whether the adjudicative order was founded in reason. Thus, the Court did not necessarily take the position that rule-making is the *only* proper approach.

On remand, the Commission explained its position on the basis of its own interpretation of the statute and reached the same conclusion.[182] This time the Supreme Court affirmed.[183] The second *Chenery* decision is of great significance in any consideration of the scope of judicial review of administrative orders. The Court expressly denied that it had meant in its first opinion to make the promulgation of a general rule a condition precedent to sustaining the Commission's order. It merely made the following suggestion:

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct . . . . The function of filling in the interstices

179. 318 U.S. at 92.
180. *Id.* at 92–93.
181. *Id.* at 94–95.
182. Federal Water Service Corp., 18 S.E.C. 231 (1945).
183. 332 U.S. 194 (1947).

> of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . [A]n administrative agency must be equipped to act either by general rule or by individual order.[184]

It is clear that the Court recognized that rules of prospective application might properly be created by administrative adjudication as well as by the exercise of the rule-making power, for the Court further stated:

> There is thus a very definite place for the *case-by-case evolution of statutory standards.* And 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.[185]

Of greatest relevance to the present discussion is the statement of the Court that the Commission could utilize "this particular proceeding for announcing and applying a new standard of conduct."[186] Of course, such a proposition inevitably raises the problem of the retroactive application of a rule established in a case of first impression. But the Court recognized that the solution of any controversy not previously encountered, necessarily involves retroactive law-making whether by an agency or a court.[187]

The principles advanced in the *Chenery* cases can easily be applied to the Labor Board's law-making through adjudication.[188] Recognizing the difficulty of limiting a rule announced in an adjudicative administrative order to prospective force and seeking to avoid retroactive law-making as much as possible, it might be well to advocate an extension of the Board's use of substantive rule-making under the broad grant of power of section 6 of the National Labor Relations Act.[189] Indeed recent suggestions to that

184. *Id.* at 202.
185. *Id.* at 203. (Emphasis added.)
186. *Ibid.*
187. The Court said:
> Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency.

Ibid.
188. It should be noted that the substantive rule-making powers of the SEC have never been questioned, whereas the rule-making powers of the NLRB have, in the past, been limited to procedural regulation, see note 9 *supra.* This does not make the *Chenery* decisions inapplicable to the NLRB, however, because the Court in the second *Chenery* case, while recognizing the Commission's statutory power to make substantive regulations, independently established the propriety and ability of the SEC to make law through adjudication. See text accompanying note 185 *supra.*
189. See note 8 *supra.*

effect have been made.[190] Furthermore, judicial opinions such as those in *Washington Coca Cola, Sales Drivers* and *Chenery* would seem to attach full validity to the creation of law through administrative adjudication as long as the individual order is based on "substantial evidence." As the Court explicitly pointed out in the second *Chenery* case:

> The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. . . . Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress.[191]

Thus, the primary concern is to determine the scope of the rule-making power that remains in the Board after application of the "substantial evidence" test to adjudicative rule-making. It can readily be seen how the purpose of the judicial requirement of adequate findings to support an administrative decision could be thwarted through the establishment and application of a *per se* rule. Let us assume that the *Washington Coca Cola* rule had been affirmed, not only on the facts of that particular case, but also to the extent of allowing the Board to find prohibited secondary activity as a matter of law *whenever* picketing was conducted on neutral premises despite the existence of a primary situs in the area. A case might then arise in which the union could prove that the employees were unable to go to the primary situs during the day for the purpose of picketing. The Board, relying on judicial approval of the *per se* rule, could then issue a cease and desist order; but such an order would be in disregard of proof which should bear upon the desirable scope of the prohibition of secondary boycotts. Adherance to the requirement of substantial evidence of a statutory violation assures that the formulation of Board policy will continually be based upon an understanding of new problems as they develop.

A very recent Supreme Court decision[192] demonstrates clear judicial disapproval of application of previously declared *per se* rules. In denying the power of the Board to declare a hiring hall unlawful *per se*,[193] the Court stated that because there was "no express ban of hiring halls in any provision of the Act, those who

190. See Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

191. 332 U.S. at 207.

192. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961), *reversing* Local 357, Int'l Bhd. of Teamsters v. NLRB, 275 F.2d 646 (D.C. Cir. 1960).

193. See discussion of hiring halls and particularly the *Mountain Pacific* case at p. 624 *supra*.

add one, whether the Board or the courts, engage in a legislative act."[194] The Court further expressed its position as follows:

> Perhaps the conditions [referring to those enunciated by the Board in *Mountain Pacific*[195]] which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. Where . . . Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme. . . . [The Board's] power, so far as here relevant, is restricted to the elimination of discrimination. Since the present agreement contains such a prohibition, the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it.[196]

Judicial disapproval of the use of the adjudicatory power to establish *per se* rules has also been apparent in cases in which the courts, on review, have found substantial evidence to support the Board's determination. Thus, in *NLRB v. Truitt Mfg. Co.*,[197] the United States Supreme Court approved findings which supported the determination that there had been a failure to bargain in good faith but disapproved the rule advanced by the Board. The Court explained its position as follows:

> The Board concluded that under the facts and circumstances of this case the respondent was guilty of an unfair labor practice in failing to bargain in good faith. We see no reason to disturb the findings of the Board. We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. *Each case must turn upon its particular facts.* The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. Since we conclude that there is support in the record for the conclusion of the Board here that respondent did not bargain in good faith, it was error for the Court of Appeals to set aside the Board's order and deny enforcement.[198]

From the foregoing analysis it can be seen that the courts in reviewing the Board's decisions, are primarily interested in insuring that the evidentiary basis for an order is sufficient to bring the particular facts of a case within the purview of the regulatory statute and that the agency does not exceed the bounds of its dele-

194. 365 U.S. at 674.
195. See discussion at p. 624 *supra*.
196. 365 U.S. at 676–77.
197. NLRB v. Truitt Mfg Co., 351 U.S. 149 (1956); see discussion at p. 636 *supra*.
198. 351 U.S. at 153–54. (Emphasis added.)

gated authority. The substantial evidence rule, which leaves some questions of law for the decision of the court,[199] could be a very helpful guide for determining the scope of judicial review, if it were clear what is meant by a question of law and which questions of law may properly be left to the Board. In deciding whether evidence found by the Board is sufficient to establish the commission of an unfair labor practice, the court engages in statutory interpretation which is included in the general understanding of the term "question of law." But is the interpretation of a regulatory statute properly placed within the sole province of the courts? Are there not statutory provisions which could be better interpreted by the agency created for the administration of the statute in the public interest? Is the function of applying the statute entirely one of "interpretation"—or is it also one of supplementing the statute and building upon it a substructure of policy developed from administrative experience? Is it not the realization by the courts that an expert body is frequently better qualified to decide those questions which would typically be classified as "questions of law" that has led to great difficulty and confusion in determining when the court will substitute its judgment for that of the agency?

Of course, most of the fears of arbitrary administrative action could be dispelled by a rule which insures judicial check through substitution of judgment on all questions of law. There is, however, widespread recognition of the fact that many issues are better left to agency discretion. The language of the Administrative Procedure Act supports this proposition for the requirement that "the reviewing court shall decide all relevant questions of law" is qualified by the words, "except so far as . . . agency action is by law committed to agency discretion."[200] The important question thus becomes—to what extent is the development of law through adjudication "committed to agency discretion?" Professor Davis has made the following observation:

> [S]ubstitution of judicial judgment on all questions that are literally or analytically "law" is undesirable, for many questions of policy which through adjudication or rule making become crystallized into law are peculiarly within the agency's competence and not especially within the competence of the reviewing court. This is probably the main reason—although the motivations are complex—for the Supreme Court's frequent rejection of the literal or analytical approach to the law-fact distinction.[201]

Because of the difficulty of placing questions of law and ques-

199. See discussion of the substantial evidence test at p. 644 *supra.*
200. 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1958).
201. 4 DAVIS § 30.01, at 191–92.

tions of fact into two separate and distinct categories, we find few advocates of the proposition that the courts should attempt to make such a clear cut distinction. Countless questions fall into the large gray areas between law and fact which may be described as "policy." In these areas, the courts are frequently quite willing to recognize the Board's competence to make rules—even *per se* rules—and may occasionally even *require* adherence to such rules.[202] A good example of judicial acceptance of adjudicative rule making by the Board, considered earlier in the discussion of the fashioning of remedies,[203] is the development by the Labor Board of formulas for the computation of back pay ordered as the result of discriminatory discharge. The Supreme Court, in *Seven-up Bottling*[204] stated:

> "[T]he relation of remedy to policy is peculiarly a matter for administrative competence." That competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding.
>
> This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.[205]

But is an interpretation of legislative intent, in providing for back pay in section 10(c) of the Labor Act, the determination of a question of fact, or of policy and law? It seems more likely that the Court was really saying that it will call a question one of fact where it is of the opinion that the informed discretion of the expert body would better carry out the congressional purpose than the more removed, less technical evaluation that can be made by the judiciary.

An alternative to the law-fact distinction used by the courts on review is the rational basis test explained in *NLRB v. Hearst Publications*,[206] where the Court said that "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[207] The *Hearst* case involved a question of construction of a statutory term (whether newsboys are "employees" within the National Labor Relations Act)[208]; yet the Court refrained from calling it a question of law and approved the establishment of an interpretative precedent by the Board. On the other hand when the

202. See, *e.g.*, note 170 *supra*.
203. See discussion at pp. 633–37 *supra*.
204. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).
205. *Id.* at 349.
206. 322 U.S. 111 (1944).
207. *Id.* at 131.
208. 49 Stat. 450 (1935), 29 U.S.C. § 152 (1958).

clearly analogous question of whether foremen were to be considered "employees" arose in a subsequent case, the Court substituted its judgment for that of the Board.[209] More recently, the Supreme Court substituted judgment on the general question of whether a labor organization can be considered an "employer" as that term is used in the Act.[210]

Numerous other cases beyond the scope of this Note could serve as authority for the proposition that the courts have never explicitly formulated the bases upon which they decide to substitute their judgment for that of the Board or refrain from doing so out of deference to administrative expertise.[211] Although there is some indication that substitution of judgment is more likely where the agency uses an administrative adjudication for the enunciation of a broad and inflexible principle of law or policy,[212] no generalization can accurately be made to that effect. Thus, the establishment of a general rule relating to the period of time during which an employer may not challenge a Board certification, was held to be within the discretion of the Board "in carrying out congressional policy."[213] Indeed, one reason for a hands-off approach on the part of the courts is their expressed reluctance to delve too far into the sphere of policy formulation.[214] This may be explained by the fact that policy is often better developed through the constant and detailed study of an individual area in which the administrative body is engaged.

Some other bases for substitution of judgment have been suggested. One is that there may be substitution when inconsistency in administrative decisions indicates that an agency is uncertain respecting the proper approach to a problem.[215] Thus the Supreme Court upheld a reversal of the Board in *Packard Motor Car Co. v. NLRB*,[216] saying: "If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark."[217]

The theory has also been advanced that a court may substitute

209. Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).
210. Office Employees v. NLRB, 353 U.S. 313 (1957).
211. See discussion concerning lack of judicial consistency with respect to substitution of judgment in 4 DAVIS § 30.07, at 229–33.
212. See, *e.g.*, Office Employees v. NLRB, 353 U.S. 313 (1957); FCC v. RCA Communications, 346 U.S. 86 (1953).
213. Brooks v. NLRB, 348 U.S. 96, 104 (1954).
214. In one opinion the Supreme Court stated that in reviewing Board decisions the courts "must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).
215. See 4 DAVIS § 30.08, at 236.
216. 330 U.S. 485 (1947).
217. *Id.* at 492.

judgment in order to give judicial approval to a rule to which the agency may not adhere because of lack of confidence in its desirability.[218] Frequently the question of whether to substitute judgment depends upon the agency involved or, more precisely, upon the degree of discretion which is expressly placed in an agency by the statute from which its powers are derived.[219]

Rather than providing an answer to the question of what criteria the courts employ in determining whether to substitute judgment on issues involving administrative law making through adjudication, the preceding analysis has demonstrated that the question cannot be answered definitively. Generally the question of whether or to what extent courts should substitute their judgment for that of an agency on questions of law or policy should be governed by a consideration of the comparative qualifications of court and agency to determine particular types of issues.[220] The courts are probably best qualified to determine questions involving the application of the common law or the interpretation of statutes in accordance with congressional purpose. There are, however, areas in which an expert body may have greater insight and understanding; these may be issues involving the interpretation of technical terms, or they may involve determinations of the effect that certain practices will have, considered in the light of long and intensive study in the particular field and familiarity with similar fact situations. One decision expressing the need for deference to administrative expertise is *NLRB v. Standard Oil Co.*[221] Although the position taken in this case may currently be discredited, the language of the court is nevertheless significant:

> [T]he 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, [one], 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. That there can be issues of fact, which courts would be altogether incompetent to decide, is plain. If the question were, for example, as to the chemical reaction between a number of elements, it would be idle to give power to a court to pass upon whether there was

218. See 4 DAVIS § 30.08, at 235, citing SEC v. Central-Illinois Securities Corp., 338 U.S. 96 (1949).

219. See 4 DAVIS § 30.08, at 237.

Statistics show how substitution of judgment varies among different administrative agencies. Between 1951 and 1956, the Labor Board decided 139 cases out of which 98 were affirmed and 46 reversed. Five of the 6 cases decided by the FCC were affirmed; all 5 cases decided by the FPC were affirmed, as were 4 cases in the CAB and the 3 cases decided by the ICC and SEC respectively. Cooper, *Administrative Law: The "Substantial Evidence" Rule,* 44 A.B.A.J. 945, 948 (1958).

220. For a discussion of the concept of comparative qualifications see 4 DAVIS § 30.09, at 240–46.

221. 138 F.2d 885 (2d Cir. 1943).

"substantial" evidence to support the decision of a board of qualified chemists.[222]

From all the considerations discussed above that may be helpful in clarifying the outlines of the scope of agency rule-making power and the scope of judicial review of administrative decisions, no definite formula for the substitution of judicial judgment can be derived. However, the unpredictability of the approach of the courts is not authority for the proposition that there is no effective check on administrative action. The same reasons which exist for saying that undue inflexibility may result from the establishment of a Board rule declaring certain conduct a violation of the Act as a matter of law, may militate against the creation by the judiciary of fixed standards for the substitution of judgment. It is quite apparent that the determination of whether a specific issue is one to be decided by the courts or by the agency rests within judicial discretion. This discretion should be applied on a case-by-case basis, for the narrow boundary lines that often exist between law and fact and judicial versus administrative qualification to judge, remain blurred simply because the extenuating factors appearing in individual cases cannot be predicted. One such factor can make an otherwise valid administrative rule inapplicable to a particular case; one statutory provision can turn interpretation of legislative intent which is generally considered a question of law, into a question—or a class of questions—that must be resolved by the application of administrative expertise. Thus it does not seem that the establishment of a code to define the precise scope of judicial review would be either feasible or desirable. The judicial check seems to be present where it is essential.

CONCLUSION

Bureaucracy is a controversial word. It furrows the brow of the political philosopher and lends flavor to the conversation of the drawing room cynic. It has come to convey the stigma of officious arbitrariness in a society dedicated to freedom from an excess of governmental control.

222. *Id.* at 887.

Professor Davis has pointed out that while the last sentence of the language quoted may be excessive, the basic idea seems to be sound. He also made the following observation:

> Judges and administrators may be about equally competent in determining most issues arising under labor relations legislation, and yet on this specific issue [whether an employer's influence was determinative in the formation of a new union] the scope of review may properly be limited on account of the Board's special competence.

4 DAVIS § 30.09, at 245.

But the development and expansion of government services inevitably brings with it a need for decentralization and a distribution of functions between the individual units that comprise the whole machine. An analogy may be found in the development of an industry. Increased demand, the growth of the business, the expansion into new lines of production all result in a division of the labor force into various specialized groups. The industry becomes decentralized to the extent that a need for cohesion arises, resulting in the formulation of company rules; but the rules are general in nature and do not extend to the details of the work of chemists, engineers and accountants. They develop their own rules within the scope of their specialized fields. The management then fears that the specialists will abuse their discretion and encroach upon the functions of other branches of the industry. Thus the supervisor is appointed to administer the general rules and check abuses of power committed under the guise of expertise. The counterparts in the governmental structure can readily be discerned in the Congress, the expert administrative agencies and the courts.

Despite the frequently-expressed desire for freedom from governmental restraints, we have been compelled to accept a considerable amount of regulation. To combat the abuses to which labor was subjected at the hands of management before the advent of 1930 reforms, the National Labor Relations Board was selected as the arbiter of labor-management relations. But the Board could not fulfill its function without the concomitant power to formulate policy. We should not question whether the Board may make law through adjudication, for to establish a tribunal and subsequently wonder whether it may properly develop a body of precedents and rules is to create a paradox. The real question is one of degree—to what extent should the administrative law-making function pervade adjudication?

The pros and cons of Board-formulated rules of general applicability as an alternative to a pure case-by-case approach are fairly clear, as the preceding discussion suggests. The pros undoubtedly prevail. Those who fear bureaucratic arbitrariness because of the unpredictability of Board decisions and constant shifts in policy, cannot be heard to complain of the Board's attempt to cure this defect through the establishment of criteria which will serve as guidelines for the future decision of similar cases. In the cross-section of labor problems discussed above, there is strong indication that rules of *per se* illegality are often warranted by the practices sought to be curtailed. Furthermore, the Board has shown self-limitation in the application of the standards it has set. Board shifts in policy despite judicial and legislative approval of its

prior position, have generally been the result of expert understanding of technical problems.

One factor that may militate against decisional rules is their retroactive application to parties who acted in reliance upon prior policy. On the other hand, it must be realized that any adjudication which builds upon existing law, whether in the courts or in administrative tribunals, operates retroactively. Alternatively, there is a possibility of establishing a rule and giving it only prospective force. Of course, one clear means of avoiding retroactivity is for the Board to announce its policy independently of adjudication, through the rule-making power. Presently, the extent of the Board's power to make substantive regulations under the broad grant of power of section 6 of the Labor Act remains vague. Clarification of the rule-making power through judicial interpretation of section 6 would provide a sounder foundation than now exists for assertions about the source from which Board rules and policy should emerge.

Generally if a Board decisional rule is good, it should stand to advise unions and management of what is lawful under the Act, thus avoiding a mass of useless litigation. If the rule is arbitrary, inflexible or impossible of application to all similar situations under the exigencies of changing conditions or peculiar fact situations, there is ever present the check of judicial review, which brings to the administrative decision the perspective that the specialist may lack. Although there is considerable uncertainty about the manner in which courts will deal with Board decisions and a consequent need for some judicial declaration of specific bases for substitution of judgment, a rigid formula for judicial review would probably be undesirable. Indeed the unpredictability of judicial action in passing upon decisions of lower courts as well as administrative decisions seems unavoidable in the maintenance of a flexible system of review.