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Intestate Succession: Child Inherits from Stepparent

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Case Comments

Intestate Succession: Child Inherits From Stepparent

The decedent died intestate, his wife having predeceased him. He was survived by a stepdaughter, two brothers, and several nephews and nieces. Upon appointment of one of the nephews as administrator, the stepdaughter cross-petitioned, seeking revocation of the letters of administration and requesting that she be appointed administratrix. The court, ruling on the nephew's motion to dismiss the cross-petition, asserted that determination of the motion was dependent upon whether the stepdaughter was entitled to inherit[1] in preference to the other heirs.[2] In a decision based on a provision of the District of Columbia Code which asserts that "there is no distinction between the kindred of the whole and the half-blood . . ." the court denied the motion to dismiss the cross-petition, *holding* a stepchild is entitled to inherit from his stepparent under the intestate succession laws as if he were a natural child. *In re Estate of Humphrey*, 254 F. Supp. 33 (D.D.C. 1966).

At common law only kin of the whole blood were entitled to inherit real property. If there were no living kin of the whole blood, a decedent's realty would escheat to the lord.[3] Since one who was related to the decedent by the half blood could not inherit realty from him,[4] it follows that stepchildren were also excluded. However, half blood statutes have been enacted in most jurisdictions[5] to eliminate the injustices which arise under

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1. The court apparently felt there was no issue of equitable or virtual adoption of the stepdaughter. This doctrine has sometimes been used to grant rights of inheritance to stepchildren and foster children in cases where hardship might otherwise result. See generally 50 MINN. L. REV. 499 (1966).

2. It is not clear how the court reached this conclusion. A provision of the District of Columbia Code enumerates the persons who are eligible to administer the estate of an intestate decedent in the order in which they are to be preferred. D.C. CODE ANN. § 20-334 (Supp. V, 1966). This statute provides that spouses and children are to be preferred to all others. The court apparently felt that if the stepdaughter was to be treated as a natural child for the purposes of inheritance, she could be treated as such for the purpose of granting letters of administration.

3. 2 POLLOCK & MAITLAND, THE HISTORY OF THE ENGLISH LAW 302 (2d ed. 1911).

4. In the case of personalty, however, the Statute of Distributions of 1670 was construed to permit relatives of the half blood to share equally with those of the whole blood of the same degree. Watts v. Crooke, 2 Vern. 124, 23 Eng. Rep. 689 (1690). See generally ATKINSON, LAW OF WILLS § 8 (2d ed. 1953).

5. ATKINSON, *op. cit. supra* note 4, at 74.

the common law rule.[6] These statutes give relatives of the half blood rights of inheritance which, with various exceptions in different jurisdictions,[7] are on a par with those given to relatives of the whole blood.[8] However, stepchildren have not fallen within the terms of any of those statutes, since they are not even relatives of the deceased by the half blood.[9]

Although the laws of descent and distribution have generally followed lines of blood relationship,[10] there have been exceptions. In most United States jurisdictions adopted children

6. For example, a man leaves a son and daughter by a first wife, and a son by a second wife. His eldest son inherits and is entitled to seisin. However, if that son dies without issue before he has obtained seisin, his father is still the *propositus*—the one from whom the relationships are to be measured. The father now has a daughter by his first marriage and a son by the second. The son inherits before the daughter due to the common law rule of primogeniture. (Under modern law, however, the son and daughter would share equally.) He inherits from the father, not his half brother. On the other hand, if the elder son acquires seisin, all is altered. If he dies without issue, he is the *propositus*. The choice is now between a sister by the whole blood and a half brother. In this situation, not merely is the sister to be preferred, but the land shall sooner escheat to the lord than go to the half brother. 2 POLLOCK & MAITLAND, *op. cit. supra* note 3, at 302.

7. Statutes in a number of states place relatives of the half blood in a position of equality with those of the whole blood. *E.g.*, ILL. ANN. STAT. ch. 3, § 11 (Smith-Hurd Supp. 1965). Others qualify this position of equality when the property in question has descended from an ancestor whose kin of the half blood are not of his blood. *E.g.*, MINN. STAT. § 525.17 (1965). Other statutory schemes give twice as much to relatives of the whole blood as to those of the half blood. *E.g.*, ARIZ. REV. STAT. ANN. § 14-210 (1956). Some postpone the rights of the half blood to those of the whole blood. *E.g.*, CONN. GEN. STAT. ANN. § 45-276 (1958). And some give preference to siblings of the whole blood and their representatives, over siblings of the halfblood and their representatives, but provide for equality beyond the level of siblings. *E.g.*, S.C. CODE ANN. § 19-52 (1962). See generally Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 197-202 (1935); Note, 42 YALE L.J. 101, 104-06 (1933).

8. In the example presented in note 6 *supra*, most jurisdictions would now allow the half brother to inherit equally with the whole blooded sister. See, *e.g.*, statutes cited note 7 *supra*.

9. See, *e.g.*, Houston v. McKinney, 54 Fla. 600, 45 So. 480 (1907); *In re* Marquet's Will, 13 Misc. 2d 958, 178 N.Y.S.2d 783; Annot., 63 A.L.R. 2d 303 (1959).

10. An example of blood relationship which at common law did not carry with it the right of inheritance is in the area of illegitimacy. However, statutes in most American jurisdictions now make an illegitimate child an heir of the mother, and a majority make such a child an heir of the mother's kindred. In addition, a few jurisdictions allow him to inherit from the father if the biological parental relationship has been established or if the father has acknowledged the child to be his. See ATKINSON, *op. cit. supra* note 4, at 81-83; MADDEN, PERSONS AND DOMESTIC RELATIONS 352-53 (1931).

have been given many of the rights of inheritance enjoyed by natural children.[11] Similarly, statutes in several jurisdictions confer limited rights of inheritance on stepchildren in specifically designated situations.[12] For example, if property has come to a person's stepparent from his natural parent, especially as community property,[13] or if there is no spouse, child, or other next of kin surviving the deceased, he inherits from his stepparent.[14] Beyond these few situations, however, stepchildren have not been able to inherit under statutes of intestate succession. Although a number of attempts have been made to extend rights of inheritance to stepchildren by means of arguments based on half blood statutes, the courts have uniformly held them inapplicable since stepchildren are blood strangers rather than half bloods.[15]

The court in the instant case recognized that a stepchild is neither of the whole nor of the half blood, but argued that to confine the statute of intestate succession to collaterals inheriting from each other[16] would be to place a more restricted interpretation upon the statutes than is warranted by their language.[17]

The court applied the statutes to the relationship between collaterals when they inherit from someone else. For example,

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11. See generally Note, 25 BROOKLYN L. REV. 231 (1959) (chart showing rights of parties to adoption).

12. See generally Annot., 63 A.L.R.2d 303, 304-07 (1959).

13. See, *e.g.*, CAL. PROB. CODE § 228; OHIO REV. CODE ANN. § 2105.10 (Page 1953). See generally Annot., 49 A.L.R.2d 391 (1956) (concerning relatives by affinity).

14. *E.g.*, FLA. STAT. ANN. § 731.23(7) (1949); OHIO REV. CODE ANN. § 2105.06 (Page 1953). See generally Annot., 63 A.L.R.2d 303, 304-07 (1959).

15. *E.g.*, *In re* Wall's Will, 216 N.C. 805, 5 S.E.2d 837 (1939); In the Matter of Smith's Estate, 49 Wash. 2d 229, 299 P.2d 550 (1956); *cf.* *In re* Paus' Estate, 324 Ill. App. 58, 57 N.E.2d 212 (1944).

16. In the area of intestate succession the term "half blood" refers to the relationship between the heir and the deceased. *In re* Long's Estate, 180 Okla. 28, 67 P.2d 41 (1936). See generally Annot., 110 A.L.R. 1014 (1937). Thus, when collateral relations inherit from each other, half blood statutes require that those related to the deceased by the half blood be treated equally with those related by the whole blood.

17. The section of the District of Columbia Code which specifically deals with issuance of letters of administration contains a command that "relations of the whole blood shall be preferred to those of the half-blood in the equal degree . . . ." D.C. CODE ANN. § 20-334a(6) (Supp. V, 1966). Since the instant case arose over a controversy pertaining to issuance of letters of administration, it could be argued that the above provision is more appropriate to the issue of inheritance than that relied upon by the court.

a woman has two children by a prior marriage and one by her present husband. In the past, half blood statutes have been applied in the situation where one of these children dies, requiring that his half and whole blooded siblings share equal rights of inheritance from him. However, the court applied the statute to a different situation, holding that when the second husband dies, all of the wife's children share equally, even though some are not related by blood to the deceased. The court, focusing on the relationship between the children rather than on the relationship between each child and the deceased parent, stated that siblings of the half blood were to be treated as if they were siblings of the whole blood. Since siblings of the whole blood are entitled to share equally in the estate of an intestate parent, the court reasoned that siblings of the half blood are similarly entitled.

A basic difficulty arises when a statute which abrogates the distinction between whole and half blood relationships is applied in such a manner as to give a right of inheritance to a blood stranger. The difficulty is not overcome merely by stating that the statute is to be broadly construed, since such a statute is not intended to create a new class of heirs unrelated by blood to the deceased.[18] Thus, other jurisdictions have interpreted their half blood statutes as curative of the common law exclusion of half blood collateral relatives, but have refused to use them to create rights of inheritance in stepchildren.[19] Moreover, Congress had no apparent intent to depart from this interpretation, since the provision was introduced as being in the "form of a uniform law."[20]

Instead of straining its interpretation of the half blood statute, the court could have argued that the term "child" includes stepchildren within its meaning. The main difficulty with this approach is that the term "children" is generally used to refer to immediate progeny or offspring.[21] Moreover, since Congress for some purposes has explicitly stated that stepchildren should be included within the term "children,"[22] and because stepchildren are not mentioned in the statute in question, it is arguable that

18. *In re* Paus' Estate, 324 Ill. App. 58, 57 N.E.2d 212 (1944).
19. See note 15 *supra* and accompanying text.
20. 103 CONG. REC. 14227 (1957) (remarks of Senator Clark).
21. New York Life Ins. Co. v. Beebe, 57 F. Supp. 754, 757 (D. Md. 1944) (parentage—first generation of offspring); Houston v. McKinney, 54 Fla. 600, 45 So. 480 (1907) (offspring—cannot include stepchildren).
22. Several examples are mentioned in the opinion of the court. 254 F. Supp. 33, 35 (1966). See generally note 27 *infra*.

Congress intended to exclude them, or at least that the rights of stepchildren were not considered.

Aside from the difficulties inherent in the approach taken by the instant case, two basic questions remain to be answered. It must be determined whether stepchildren should, in fact, inherit from intestate stepparents; and, if so, whether a court is the proper body to provide that right.

To determine whether a stepchild should inherit, it is necessary to examine the purposes of the laws of intestate succession. Basically, these laws are intended to fulfill the probable intent of the deceased and to pursue certain goals of public policy. It would be difficult to determine whether a stepparent would be more likely than not to intend his stepchild to inherit. In many instances, since a stepchild is a minor who is raised by his stepparent, there is a likelihood of mutual affection. Just as often, however, a couple may marry when children of their prior marriages are fully grown and independent. It must also be recognized that if stepchildren are included in the class of heirs, others obviously will be excluded. It therefore becomes even more difficult to make this determination for the deceased. Similarly, there are competing considerations with respect to social policies pursued by the statutes. In some instances a stepchild's future may depend upon financial assistance from his stepparent.[23] Society's interest in providing a substitute for such obligations assumed by a deceased stepparent when he was living may dictate a conclusion that a stepchild shall inherit from his stepparent. However, this again is not always the case. Thus, these considerations afford no definite indication whether stepchildren should inherit from stepparents in all cases or in none.[24]

23. See Lewis & Levy, *Family Law & Welfare Policies: The Case for "Dual Systems,"* 54 CALIF. L. REV. 748, 763 (1966).

24. Sociological data seem to demonstrate that the conclusion is sound. For example, in 1948 50% of divorced males remarried after age 56, and 50% of divorced females remarried after age 50. Regarding widowed spouses, 50% of the males remarried after age 54 and 50% of the females after age 40. See JACOBSON, AMERICAN MARRIAGE AND DIVORCE 83 (1959). Since the stepchild-stepparent relationship is a result of remarriage, assuming that generally the ages of children are directly related to the ages of their parents, these figures demonstrate that stepchildren are not more likely to fall into one particular age bracket than another. Attempts have been made in areas other than inheritance to here provide criteria by which it may be determined whether stepchildren (or children) should benefit from statutory schemes. *E.g.*, the term " 'child' shall include . . . a stepchild . . . who . . . [is] under eighteen years of age, and also persons who, though eighteen years of age or over, are wholly dependent upon the deceased employee. . . ." 52 Stat. 1164 (1938), 33 U.S.C. § 902 (14) (1964) (Longshoremen's & Harbor Workers'

Since no definite answer can be ascertained from the purposes of intestate succession laws, it is necessary to consider the effects of inclusion or exclusion from the class of heirs. Assuming a stepchild is to inherit *from* his stepparent, should he inherit *through* his stepparent? It could be argued that the stepparent is forcing an heir upon his relatives. However, this does not seem to be forcing an heir any more than when natural children are born. More important, it is less a question of forcing an heir than of undertaking the difficult task of determining the stepparent's probable intent. Similarly, if a stepchild is to inherit from his stepparent, should he also inherit from or through his natural parent in whose place the stepparent stands? In the area of adoption, all ties between natural parents and an adopted child are generally terminated by statute.[25] However, since a stepchild's natural parents may still have parental rights, complete severance is less justifiable in this situation. If the right to inherit from a natural parent is not terminated, a stepchild will be in a position to inherit from two families. It could be argued that such dual inheritance is inequitable. There is also a question whether a subsequent divorce of a natural parent and stepparent should operate to terminate a child's right to inherit from his stepparent and/or to reinstate his right to inherit from his other natural parent if that right has been terminated. It can be argued that the right to inherit from the stepparent should terminate because the relationship out of which it arose has been severed. If this is done, it is necessary to face the problem of reinstating the right to inherit from the other natural parent. The confusion which will be created both in the law and for the individuals involved suggests that divorce should not alter a stepchild's right to inherit from his stepparent. Finally, if a stepparent leaves a will

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Compensation Act); "The term 'child' . . . shall mean an unmarried child, including . . . a stepchild . . . who received more than one-half his support from and lived with the Member or employee in a regular parent-child relationship, under the age of eighteen years . . . ." 70 Stat. 743 § 1(j)(1956), 5 U.S.C. § 2251 (j)(1964) (Civil Service Retirement Act); "a stepchild or stepchildren shall be regarded the same as issue of the body only when the stepparent has actually provided the principal support for such child or children." IOWA CODE ANN. § 85.42 (1959) (Workmen's Compensation Act); "member of the family of a deceased employee . . . and dependent upon him for support." MINN. STAT. § 176.011(2) (1965) (Workmen's Compensation Act). Perhaps criteria could be provided along these lines to determine whether stepchildren should be able to inherit in a particular situation.

25. See generally Note, 42 B.U.L. REV. 210 (1962); Note, 16 N.Y.U. INTRA L. REV. 223 (1961); Comment, 24 GA. B.J. 139 (1962).

which does not mention his stepchild, and the governing jurisdiction has a pretermitted heir statute protecting omitted children, it must be determined whether the stepchild should be included within the statute's protection. Since the instant case apparently treated the stepchild as a natural child, it would seem that he should be included. However, since a stepparent's intention to include his stepchild is less clear than is a natural parent's intention to include his natural child, the inference provided by the stepchild's omission may lead to the opposite conclusion. In addition, the sense of justice which is embodied in the pretermitted heir statutes in the case of natural children may not seem as strong when dealing with a stepchild.

The problems involved in giving stepchildren the right to inherit from stepparents indicate that doing so may create a great amount of uncertainty which must be eliminated if laws of intestate succession are to be predictable in their application.[26] Predictability may be accomplished by either excluding stepchildren completely, as is presently done in most jurisdictions, or by providing a comprehensive scheme in an attempt to solve these problems. The apparent hardship which arises when a stepchild cannot inherit from his stepparent is not as great a consideration as it might at first appear, since such a child will still have the right to inherit from both of his natural parents. Further, if a stepparent intends to provide for his stepchild upon his death he has the alternatives of adoption or inclusion in a will. In cases of serious hardship a court can always make provision for a stepchild by means of the doctrine of equitable adoption[27] or some similar fiction. Therefore, granting the right of inheritance to stepchildren is not as necessary as it might seem, and in view of the uncertainties which are inherent in doing so, it is better not to so extend this right.

However, the law in the District of Columbia following *Humphrey* is that a stepchild has the right to inherit from his stepparent. The court's decision leaves open all of the problems discussed above. Moreover, the judiciary is not the proper body to undertake to provide the comprehensive scheme required. Since such a scheme could develop only on a case by case basis, it would require many years to re-establish predictability in the law of intestate succession. Therefore, if stepchildren should to any extent inherit from their stepparents, the necessary guidelines can be provided only by the legislature.

26. Such uncertainty often arises with respect to adopted children, whose rights have been fixed by statute in most jurisdictions. See *ibid.*

27. See 50 MINN. L. REV. 499 (1966).

Labor Law: Charging Party's Right to Hearing After Issuance of Complaint

Petitioner filed charges with the National Labor Relations Board, alleging the union with which petitioner bargained collectively had committed unfair labor practices under the National Labor Relations Act. A complaint was issued, and a date for hearing was set. After an indefinite postponement of the hearing, the Regional Director and the union entered into an informal settlement agreement which stipulated that approval of the agreement by the Regional Director would constitute withdrawal of the complaint.[1] Petitioner filed formal objections to the settlement with the Regional Director and requested a hearing on the complaint. The latter's dismissal of the objections and denial of the request for hearing were affirmed by the General Counsel. Petitioner's subsequent request for review of this action by the court of appeals was opposed by the Board for lack of jurisdiction.[2] The court reversed the determinations of the General Counsel, *holding* it had jurisdiction over the matter and that petitioner was entitled to an evidentiary hearing on its objections to the settlement agreement. *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966).

The position and rights of the charging party in unfair labor practice proceedings[3] before the NLRB have never been clearly

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1. The NLRB rules and regulations provide for withdrawal of a complaint by the Regional Director on his own motion prior to a hearing. 29 C.F.R. § 102.18 (1966).

2. The Board contended that since no order of the Board had been issued, there was no final action by the Board subject to review under the statute. See National Labor Relations Act [hereinafter cited NLRA], § 10(f), 61 Stat. 148 (1947), as amended, 29 U.S.C. § 160(f) (1964); Brief for Respondents, pp. 6-7.

3. The basic procedure of the NLRB in an unfair labor practice case is as follows. Charges are filed by an interested party and investigated by a Regional Director as agent for the General Counsel. On the basis of this investigation the charges are dismissed, or a formal complaint with notice of a hearing is issued. If the charges are dismissed, the charging party may appeal to the General Counsel, whose review is final. If a complaint is issued, the charged party files an answer, and an evidentiary hearing is held before a trial examiner. The record of the hearing and the examiner's own report are filed with the Board, which reviews both and issues a final order. The order is appealable to the courts of appeals, and the Board may apply to the courts for an enforcement decree. At any time prior to the hearing, however, the Regional Director may work out a settlement with the parties. This settlement may be formal, calling for approval by the Board, or informal, resulting in a withdrawal of the complaint, as in the instant case. See 29 C.F.R. § 101.2-.15 (1966).

defined.[4] The NLRA covers specifically only the rights of the charged party,[5] while the rights of the charging party have been left to judicial interpretation of the relevant provisions of the NLRA[6] and the Administrative Procedure Act.[7] Once a final order of the Board has been entered contrary to the interests of the charging party, it is then a "person aggrieved" within section 10(f) of the NLRA and is entitled to judicial review of the Board's order.[8] However, a refusal by the General Counsel to issue a complaint based upon the charges filed is within his sole discretion, thus not reviewable either by the Board or the courts.[9] It is between these extremes that the law is uncertain, and the courts are sharply divided.

The Third Circuit established, in *Marine Engineers' Beneficial Ass'n v. NLRB*,[10] that the charging party is entitled to a hearing on its objections to a consent order entered by the Board, pursuant to a settlement worked out between the Regional Director and the charged party. The facts of *Marine Engineers'* differed from those of the instant case only in that a formal consent order was issued by the Board in the former, while the Regional Director simply withdrew the complaint as part of an informal settlement agreement in the latter. The opinion in *Marine Engineers'* laid no stress upon the consent order; rather,

4. For a detailed discussion of the law in this area, see Note, 32 U. CHI. L. REV. 786 (1965).

5. See NLRA § 10(c), 61 Stat. 147 (1947), as amended, 29 U.S.C. § 160(b) (1964).

6. NLRA § 3(d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153 (d) (1964), establishes a General Counsel and grants him sole authority to investigate charges, issue complaints, and prosecute the complaints issued. NLRA § 10(f), 61 Stat. 148 (1947), as amended, 29 U.S.C. § 160 (f) (1964), grants appellate review for: "Any person aggrieved by a final order of the Board granting or denying . . . the relief sought . . . ."

7. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (1964), [hereinafter cited as APA]. APA § 5(b), 60 Stat. 239-40 (1946), 5 U.S.C. § 1004(b) (1964), provides in part: "The agency shall afford all interested parties . . . (2) to the extent that the parties are unable to determine any controversy by consent, hearing, and decision upon notice . . . ." Section 10(c), 60 Stat. 243 (1946), 5 U.S.C. § 1009(c) (1964), states: "[E]very final agency action for which there is no other adequate remedy shall be subject to judicial review."

8. Note 6 *supra*; see, *e.g.*, Local 283, UAW v. Scofield, 382 U.S. 205 (1965); American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953); Insurance Workers Union v. NLRB, 360 F.2d 823 (D.C. Cir. 1966).

9. NLRA § 3(d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153 (d) (1964); *e.g.*, NLRB v. Lewis, 249 F.2d 832 (9th Cir. 1957), *aff'd*, 357 U.S. 10 (1958); Anthony v. NLRB, 204 F.2d 832 (6th Cir. 1953); General Drivers Union v. NLRB, 179 F.2d 492 (10th Cir. 1950).

10. 202 F.2d 546 (3d Cir.), *cert. denied*, 346 U.S. 819 (1953).

it appeared to consider the fact that a complaint was issued to be of primary importance. Thus, the court stated:

> Our best judgment is that the charging party, after the complaint is issued, does have some standing. The Board may refuse to do anything . . . . But . . . once it goes to the extent of filing a complaint, then we think that he is entitled to have a chance to be heard . . . .[11]

However, seven years later in *Insurance Workers v. NLRB*,[12] on facts virtually identical to those of the instant case, the same court, per curiam, denied a petition for review on the ground it lacked jurisdiction. But in a later case that year the court quoted with approval from the language of *Marine Engineers'* referred to above.[13] Thus, contrary to the lack of emphasis upon the consent order in the *Marine Engineers'* opinion, the entire sequence of decisions suggests that jurisdiction was dependent upon this factor. Since the approach of *Marine Engineers'* was later affirmed, the decision in *Insurance Workers* can be distinguished only on the absence of a formal disposition by consent order in the latter.

In 1961 the District of Columbia Circuit, in *Textile Workers v. NLRB*,[14] on facts similar to *Marine Engineers'*, adopted a rule requiring the NLRB either to grant the charging party an opportunity to be heard or to enter into the record a detailed statement of its basis for accepting the settlement despite the charging party's objections.[15] In 1964, however, the Second Circuit in *Local 282, Teamsters Union v. NLRB*,[16] held on facts similar to *Marine Engineers'* and *Textile Workers* that a charg-

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11. *Id.* at 549.

12. 46 L.R.R.M. 2028 (3d Cir.), *cert. denied*, 363 U.S. 806 (1960).

13. Piasecki Aircraft Corp. v. NLRB, 280 F.2d 575, 588-89 (3d Cir. 1960).

14. 294 F.2d 738 (D.C. Cir. 1961).

15. The rationale in establishing these alternatives appears to be that since the court of appeals has jurisdiction to review the Board's consent orders, the record necessary for such review can be provided equally well by either an evidentiary hearing or a detailed statement of the Board's reasons for its decision. On remand, the Board entered a statement of its reasons into the record, and on the second appeal the order was affirmed. 315 F.2d 41 (D.C. Cir. 1963). The original opinion of the court has been strongly criticized for its failure to deal with section 5(b) of the APA. Note, 32 U. CHI. L. REV. 786, 792 (1965).

A district court, however, has ruled that where an informal settlement agreement is attempted by the General Counsel, the charging party is entitled to be heard on its objections to the settlement. Local 112, Int'l Union Allied Industrial Workers v. Rothman, 209 F. Supp. 295 (D.D.C. 1962). *Textile Workers* was distinguished on the dubious ground that it involved formal Board action.

16. 339 F.2d 795 (2d Cir. 1964).

ing party who objects to a settlement worked out between the Regional Director and the charged party has no right to a hearing. The Board in *Teamsters* had complied with the requirement of *Textile Workers* by filing a supplementary statement setting out its reasons for denying the objections to the settlement.[17] Since the court chose to decide only whether or not there should have been a hearing,[18] however, the substance of the Board's order was not in issue, and the sufficiency of the Board's method of stating its reasons was considered only secondarily.

The reason the Second and Third Circuits reached opposite conclusions regarding the same legislation lies in the different premises from which they reasoned. The Second Circuit based its interpretation of the statutes on its conceptions of the NLRB as an agency established to protect public rights and interests, and of the NLRA as granting no private rights.[19] To adopt this position the court was forced to resort to what even it admitted[20] was a strained interpretation of section 5(b) of the APA. It declared that the "interested parties" entitled to a hearing within the meaning of that section were to be distinguished from a "person . . . adversely affected or aggrieved"[21] or "aggrieved"[22] by final order of an agency entitled to judicial review under other sections of the APA or under the NLRA. "Interested parties" were held to be only those having some legally recognized private interest.[23] Since the court was satisfied that the NLRA

17. *Id.* at 798.

18. What course the Second Circuit would take if an appeal were taken solely upon the sufficiency of the reasons given for denying objections to a settlement is purely speculative. Since the court has determined that a charging party has no right to a hearing under these circumstances, the choices open to it would be: to accept the reasons given; remand for a clearer statement or further proceedings at the Board's discretion; overturn the Board's order; or broaden the area of administrative discretion by not requiring the Board to make any statement of its reasons for disregarding the objections.

19. As the primary authority for this position, the court relied upon Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940). The language of the Court there indicated that the Board acts only on behalf of the public, and that "no private right of action is contemplated" by the NLRA. *Id.* at 267 n.9.

20. In Teamsters Union v. NLRB, 339 F.2d 795, at 800 (2d Cir. 1964), the court stated: "The distinction admittedly is easier to state than to apply."

21. APA § 10(a), 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1964). "Any person . . . adversely affected or aggrieved by . . . [any agency] . . . action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

22. NLRA § 10(f), 61 Stat. 148 (1947), as amended, 29 U.S.C. § 160(f) (1964).

23. Teamsters Union v. NLRB, 339 F.2d 795, 800-01 (2d Cir. 1964).

created no private rights of action, it was able to conclude that section 5(b) of the APA was inapplicable.

Although the Third Circuit stated that it recognized the Board's function is to represent the public interest, it found that "this is one of those situations where general propositions do not decide concrete cases."[24] It considered *Amalgamated Util. Workers* only in passing,[25] without referring to the language of that case upon which the *Teamsters* court relied to deny the existence of private rights under the NLRA. Relying instead upon section 5(b) of the APA, which had been distinguished by the Second Circuit, and upon the NLRB rules and regulations establishing the charging party to the Board's hearings,[26] the court concluded that the NLRA was intended to protect private as well as public rights and that a hearing must be granted when a charging party objects to the settlement agreement.[27]

In deciding the question of jurisdiction, the court in the instant case was faced with its previous decision in *Insurance Workers*, and with the problem of interpreting the terms "final order" in section 10(f) of the NLRA,[28] and "final" in the review provisions of the APA.[29] The court bypassed the numerous attempts made by other courts to establish what is meant by final order of the Board.[30] Instead it relied upon the test of reviewability stated by the Supreme Court in *Columbia Broadcasting Sys., Inc. v. United States*:[31] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings . . . ."[32] and

24. Marine Engineers' Ass'n v. NLRB, 202 F.2d 546, 547 (3d Cir. 1953).

25. *Id.* at 548.

26. 29 C.F.R. § 102.8 (1966).

27. Marine Engineers' Ass'n. v. NLRB, 202 F.2d 546, 547-50 (3d Cir. 1953). The positions adopted by the two circuits are discussed at length in connection with § 10 of the APA, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964), in a series of articles by Raoul Berger and Kenneth Culp Davis, beginning with Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965), followed by DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1965), and concluding with a series of short alternating articles by each of the two men in 114 U. PA. L. REV. 783-833 (1966).

28. 61 Stat. 148 (1947), as amended, 29 U.S.C. § 160(f) (1964).

29. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (1964).

30. *E.g.*, Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955); Manhattan Const. Co. v. NLRB, 198 F.2d 320 (10th Cir. 1952); Lincourt v. NLRB, 170 F.2d 306 (1st Cir. 1948); Thompson Prods., Inc. v. NLRB, 133 F.2d 637 (6th Cir. 1943).

31. 316 U.S. 407, 425 (1942) (involving the FCC).

32. *Ibid.*

upon section 10(c) of the APA,[33] which the court contended was intended for situations where adequate judicial review has not been provided.[34] In answering the Board's jurisdictional argument that there had been no final order of the Board, and therefore no right to judicial review under the NLRA,[35] the court noted the only reason there was no Board order was that the Regional Director chose to enter into an informal rather than a formal settlement. Had there been a formal settlement, under *Marine Engineers'* jurisdiction would clearly have been obtained because of the resulting consent order issued by the Board. Therefore, if the court were to hold it lacked jurisdiction in this case, the right of a charging party to judicial review of the Board's refusal to conduct a hearing would depend upon a discretionary choice of procedural methods by the Regional Director. This the court concluded could not have been the intent of Congress in adopting the NLRA, and therefore the formal-informal distinction could not be determinative.[36] The court concluded that while there was no final action of the Board within the terms contemplated by the NLRA, the action taken by the Regional Director was final agency action within the terms of the APA under the *Columbia Broadcasting* test, since it operated as a final determination upon the charging party. Therefore, jurisdiction was found to lie within the terms of section 10(c) of the APA.[37] Apparently with reference to future cases, the court then stated that where consent of all the parties to an informal settlement cannot be reached, the Board action must be formalized to present a record for judicial review.[38]

The determination that the Board's action must be formalized presented the basic issue: whether that formalization must take the form of a hearing on the charging party's objections to the settlement. In deciding this question, the court gave much weight to *Local 283, UAW v. Scofield*,[39] in which the Supreme

33. 60 Stat. 243 (1946), 5 U.S.C. § 1009(c) (1964).
34. 357 F.2d at 532.
35. See note 2 *supra*.
36. 357 F.2d at 531-33.
37. 60 Stat. 243 (1946), 5 U.S.C. § 1009(c) (1964).
38. 357 F.2d at 533.
39. 382 U.S. 205 (1965). It was held that the party in whose favor the Board rules can intervene as of right if the losing party appeals the Board's final order to a court of appeals. *Scofield*, which involved intervention by the charged party, was consolidated on certiorari with Fafnir Bearing Co. v. NLRB, 339 F.2d 801 (2d Cir. 1964), which presented the reverse situation. The courts of appeals in both cases held that there was no right to intervene. *Fafnir*, decided by the same court that decided *Teamsters*, was based on the public-private interest concept in reliance upon *Amalgamated Util. Workers*.

Court stated regarding public and private interests: "[W]e think that the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests. Rather the two interblend in the intricate statutory scheme."[40] The Court further stated that it did not believe its holding in *Amalgamated Util. Workers* cast any doubt upon the interblending of these interests.[41] This reasoning appears to be a clear rejection of the basis for the Second Circuit's position as stated in *Teamsters*[42] and an indication the court is willing to follow the line of reasoning adopted by *Marine Engineers'*.

Relying on the *Scofield* case, the Third Circuit questioned the validity of the delegation to the Regional Director of the authority to withdraw complaints on his own motion. The Board argued that the Regional Director acts in this regard as an agent for the General Counsel to whom Congress has granted discretionary power to control prosecution of complaints.[43] This power would be meaningless, according to the Board, if the Regional Director could not determine whether to continue or drop their prosecution.[44] The court, however, refused to accept this interpretation of the statute. It determined that the withdrawal of the complaint was an adjudicatory action not within the discretionary area granted to the General Counsel by the NLRA. Therefore, the Regional Director must have been acting as an agent of the Board. The court found such delegation of the Board's final authority to adjudicate a complaint to a subordinate official to be inconsistent with the statutory scheme of the NLRA and contrary to law.[45]

This conclusion strongly appears to have been motivated by the court's concern about the effects acceptance of the Board's argument would have upon the charging party. The general

40. 382 U.S. at 220.

41. *Ibid.* The holding in *Amalgamated Util. Workers*, 309 U.S. 261 (1940), that the successful party before the NLRB cannot apply to a court of appeals to have the losing party judged in contempt for its failure to obey a decree enforcing the Board's order, is compatible with an interblending of public and private interests. However, there is language in that case to the contrary. See note 19 *supra*. Further, the Second Circuit was not alone in its belief as to the significance of *Amalgamated Util. Workers*. See, *e.g.*, Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720, 726-30 (1946); Note, 32 U. CHI. L. REV. 786, 794 n.48 (1965).

42. See note 20 *supra* and accompanying text.

43. NLRA § 3(d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153 (d) (1964).

44. Brief for Respondents, pp. 7-10.

45. 357 F.2d at 535; *cf.* Greene v. McElroy, 360 U.S. 474 (1959).

tenor of the opinion indicated that upon evidence of a violation of the NLRA sufficient to warrant issuance of a complaint, the injured private party should be granted an opportunity to prove the violation and obtain redress therefor. Informal withdrawal of the complaint without consent of the charging party, however, would give the Regional Director the power to make "factual findings without affording an opportunity to the aggrieved charging party to prove or amplify its grievances . . . ."[46] Moreover, in the absence of a right to appeal such an action, that power would be absolute. Therefore, in view of the policy underlying the opinion, since these practices would deny redress for colorable complaints, they should not be tolerated unless explicitly provided by the review provisions of the NLRA.

It appears that the court attempted to visualize and conform to the statutory scheme interblending public and private interests formulated by the Supreme Court in *Scofield.* It attempted to avoid unreasonably infringing upon NLRB procedures designed to expedite settlement of cases without infringing upon those rights and interests of private parties protected by the NLRA.

In the extremely important area of unfair labor practices, private rights of the parties are clearly affected by administrative and judicial determinations.[47] The public interest in efficient operation of the NLRB should be sufficiently protected by the discretionary authority of the General Counsel to issue complaints[48] and the authority of the Board or its agents to negotiate settlements to which all parties agree.[49] Once a complaint has been issued, if amicable settlement cannot be reached, protection of the private rights of the charging party demands a hearing on the merits of the complaint.[50]

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46. 357 F.2d at 535-36.

47. *Id.* at 536.

48. See NLRA § 3(d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153(d) (1964).

49. 29 C.F.R. §§ 101.7, 101.9 (1966).

50. The exact nature of the required hearing is not clear. From the opinion in the instant case it could be either a hearing on the objections to the settlement agreement before the Regional Director, possibly with a line of appeal through the General Counsel to the courts, or a hearing before a trial examiner on the merits of the complaint, with appeals going first to the Board and then to the courts. However, NLRB procedure, which at the time the instant case was decided only provided for the latter type of hearing, has not been amended. See note 3 *supra.* Thus, under the NLRB's interpretation of the instant case a full hearing on the merits before a trial examiner would result from a charging party's failure to agree to a settlement. While this forces a greater burden upon the Board because of an increased case load, it is to be preferred to the alternative procedure, which would create additional steps

Since the court explicitly determined that the NLRB's informal withdrawal provision is contrary to law and is no longer acceptable procedure, the instant case will undoubtedly affect NLRB procedure. The number of hearings regarding charges of unfair labor practices will probably increase, since objections by charging parties will prevent informal withdrawal of complaints,[51] and the assurance of obtaining hearings will probably increase the number of objections to settlements. Further, at least in the Third Circuit, the time between filing charges and issuance of complaints will increase, since once issued, no complaint can be withdrawn without the consent of the charging party. Eventually, however, the number of complaints issued may decrease, due both to more extensive investigations and to an increased need for the Board to minimize its work load by issuing complaints only in clearly meritorious cases.

The instant case is a reversal of an appellate trend to broaden the area of administrative discretion within the structure of the NLRB. The cumulative effects of *Marine Engineers'*, *Scofield*, and the instant case, representing "expanding judicial concepts giving full range to the Labor Management Relations Act and to fundamental due process,"[52] will probably influence the views of other circuits not only upon the question of the rights of charging parties in unfair labor practice proceedings, but also regarding generally the permissible scope of administrative discretion entrusted to the NLRB.

The basic issues covered by the instant case are worthy of determination by the Supreme Court. The conflict between the Second and Third Circuits has not been resolved, and depending upon how *Scofield* affects the Second Circuit's position, the instant case only serves to widen the breach between them. The uncertainty of the law outside these circuits, due in part to the conflict between them, hampers the efficient operation of the NLRB. The Third Circuit appears to be correct in its interpretation of the NLRB and APA and of the reasoning of the

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in the review process. Thus under that approach, before the courts would be confronted with the first question presented under present procedure—validity of the Board's determination on the merits—they would first have to determine the validity of the General Counsel's disposition of the objections to a settlement agreement.

51. See Brief for Respondents, p. 10 n.12. Approximately 3800 complaints were settled or adjusted in 1965 (259 of the total cases closed), although the Board's statistics gave no indication how many of these settlements were over the objections of the charging party. 13 NLRB ANN. REP. 9-10 (1965).

52. Leeds & Northrup Co. v. NLRB, 357 F.2d 527, 534 (3d Cir. 1966).

Supreme Court. The alternative position adopted by the Second Circuit would appear in some measure to sacrifice a charging party's right to relief from unfair labor practices to the desire of the Board to dispose of cases as expeditiously as possible and to the willingness of a charged party to bargain for some minor punishment in return for a settlement prior to a formal hearing.[53] Until the question is settled by the Supreme Court, the NLRB and the parties before it will remain uncertain as to the propriety of their actions and the extent of their rights.

53. Such an effect could result either from a charged party's offer to the Board of an opportunity to avoid the time and expense of a hearing, administrative review, and possible appeal to the courts, or from the Board's attempt to avoid these consequences by offering a settlement of substantially less than maximum punishment. In either case the charging party would be denied an effective opportunity to obtain full redress, since there would be no review of the denial of a hearing on the merits.