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Administrative Law—National Labor Relations Board Order Requiring Compliance with the *Excelsior* Rule Held Enforceable Although Rule Not Adopted in Accordance With Rule Making Provisions of the Administrative Procedure Act

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RECENT CASES

ADMINISTRATIVE LAW—NATIONAL LABOR RELATIONS BOARD ORDER REQUIRING COMPLIANCE WITH THE *Excelsior* RULE HELD ENFORCEABLE ALTHOUGH RULE NOT ADOPTED IN ACCORDANCE WITH RULE MAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

On petition of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO[1] the National Labor Relations Board[2] ordered an election[3] among certain employees of the Wyman-Gordon Company[4] to determine their exclusive bargaining representative. The employees were given the choice between the Brotherhood, a competing union (the United Steelworkers of America), or no union at all. Pursuant to its responsibility to ensure a fair election,[5] the Board, relying on its rule announced in *Excelsior Underwear, Inc.*,[6] ordered the Company to furnish a list of names and addresses of its employees eligible to vote in the election. The list was to be made available to the unions for election purposes. The Company refused to furnish the list, contending that the rule requiring it was not adopted in accordance with procedures of the Administrative Procedure Act[7] specifically regulating rule making.[8] Upon this refusal, the Board issued a subpoena duces tecum ordering the Company to supply the list. The Company did not comply with the subpoena. The Board then filed an action in the Massachusetts district court[9] seeking to have its subpoena enforced, or, in the alternative, seeking a mandatory injunction compelling the Company to comply with its order. The district court ordered enforcement, finding the rule making and adjudicatory requirements of the APA not applicable to the *Excelsior* rule adoption.[10] The court of appeals reversed, holding that the Board's order was unenforceable because it was based on a rule that had not been adopted in accordance with

1. Hereinafter referred to as the Brotherhood.
2. Hereinafter referred to as the Board.
3. Pursuant to the Board's power under the Labor-Management Relations Act, 29 U.S.C. § 159 (1964).
4. Hereinafter referred to as the Company.
5. Labor-Management Relations Act, 29 U.S.C. § 159 (1964).
6. 156 N.L.R.B. 1236 (1966). In the *Excelsior* decision, the Board decided to establish "a requirement that will be applied in *all* election cases. That is, within 7 days after the Regional Director has approved a consent-election entered into by the parties . . . or after the Regional Director or the Board has directed an election . . . the employer must file with the Regional Director an election-eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." *Id.* at 1239-40 (emphasis added).
The Board declined to apply its new rule to the companies involved in the *Excelsior* case. Instead, it held that the rule would apply "only in those elections that are directed, or consented to, subsequent to 30 days after the date of [the] decision." *Id.* at 1240, n.5.
7. 5 U.S.C. § 551 *et seq.* (Supp. III, 1968). (hereinafter cited as the APA).
8. *Id.* § 553.
9. N.L.R.B. v. Wyman-Gordon Co., 270 F. Supp. 280 (D. Mass. 1967).
10. *Id.* at 284.

the rule making requirements of the APA.[11] On certiorari, the Supreme Court of the United States again reversed. *Held*, although the Board did not comply with the required rule making procedures of the APA in adopting the rule requiring a list of names and addresses of the employees, the Board's specific direction to the employer compelling him to furnish the list in the instant *adjudicatory* proceeding was nevertheless valid, and was enforceable by a district court order requiring compliance with the Board's subpoena. *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Administrative agencies formulate substantive policies,[12] and these policies are implemented by "rules"[13] promulgated by the agency. The APA provides for this policy implementation either by invoking special rule making procedures or by administrative adjudication.[14] Once the decision to proceed by the special rule making provisions or by adjudication is made, the APA mandates distinct and specific procedural requirements for each. The special rule making procedure requires publication of notice of intended rule making, an opportunity for interested persons to participate, publication of the rules, and deferred effectiveness of the newly adopted rules.[15] The adjudicatory proceeding provides for notice of the issues, responsive pleadings, an opportunity to submit evidence before a hearing officer, and a decision substantiated by facts.[16] The APA fails to indicate, however, under what circumstances each process should be used.[17]

11. Wyman-Gordon Co. v. N.L.R.B., 397 F.2d 394 (1st Cir. 1968), *cert. granted*, 393 U.S. 932 (1968).

12. The Supreme Court has expounded the underlying rationale for this fact: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940). Professor Kenneth Culp Davis, a leading administrative law authority, points out, however, that because judicial opinions are characteristically filled with unrealistic verbiage, and because many lawyers tend to take this verbiage seriously, controversy as to this fact may still remain. K. DAVIS, ADMINISTRATIVE LAW 29 (1960). For an example of this latter viewpoint *see* Petro, *Expertise, The NLRB, and the Constitution: Things Abused and Things Forgotten*, 14 WAYNE L. REV. 1126 (1968).

13. The term "rule" in the administrative law context may have at least two meanings. It may refer to that specific policy formulation required to be promulgated in accordance with the procedures set forth in § 553 of the APA, or it may refer to a policy formulation the effect of which is simply that of a rule of law as would be announced in a court opinion. Instant case at 769, n.1.

14. The APA provides:

§ 551. Definitions

. . .

(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . .

(5) 'rule making' means agency process for formulating, amending, or repealing a rule;

(6) 'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . .

(7) 'adjudication' means agency process for the formulation of an order . . . .

15. 5 U.S.C. § 553 (Supp. III, 1968).

16. *Id.* § 554.

17. *See generally* N.L.R.B. v. A.P.W. Products Co., 316 F.2d 899 (2d Cir. 1963); FitzGerald, *Trends in Federal Administrative Procedure*, 19 S.W.L.J. 239, 266-72 (1965); Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

The definitional distinction between rule making and adjudication[18] is of no practical value in this regard, since the statutory definitions of rule making and adjudication overlap.[19] Further, the legislative history of the APA is of minimal assistance in determining when each process should be implemented. Although the history indicates that a careful distinction between rule making and adjudication was intended,[20] no clear standards for practical application of this distinction were provided. However, two rather vague standards for the employment of the rule making procedure are mentioned: these procedures are to be implemented when the agency seeks to prescribe a course of conduct for the future (rather than merely pronounce existing rights or liabilities),[21] and also when the agency acts as a quasi-legislature. Adjudicatory procedures, on the other hand, are to be used when the agency acts in its quasi-judicial capacity.[22]

Judicial precedent likewise offers limited guidance.[23] The leading case, *SEC v. Chenery Corp.*,[24] leaves to agency discretion the means by which to proceed. *Chenery* expressly states that "the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[25] Up to the present, no attempt has

18. *See* note 14 *supra.*

19. The area of overlap may be rather broad. For example, adjudication involves the "particular applicability" of a law which § 551(4) of the APA also classifies as a characteristic of a "rule." Moreover, adjudication, by virtue of the precedential value of a decision, carries with it some "future effect," also characteristic of rule making by virtue of § 551(4). Address by Professor Merton C. Bernstein at the meeting of the American Bar Association's Section of Labor Relations Law on August 11, 1969 in BNA 71 LRR 585, 606 (1969); *see* N.L.R.B. v. Wyman-Gordon Co., 394 U.S. at 770-71 (1969); Comment, *A Judicial Demand for Utilization of Substantive Rule Making by the NLRB: Wyman-Gordon Co. v. N.L.R.B.*, 15 WAYNE L. REV. 763, 767 (1969).

20. S. Doc. No. 8, 77th Cong., 1st Sess. 1392-419 (1941). *See also* S. Rep. No. 752, 79th Cong., 1st Sess. 30-31 (1945).

21. Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., 14, 197, 254 (1946). *See also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 5.02 (1958); Ginnane, *"Rule Making," "Adjudication" and Exemptions under the Administrative Procedure Act*, 95 U. PA. L. REV. 621, 630-32 (1947); Note, *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 679-83 (1947).

22. Commenting on the statutory definitions, Rep. Walker, one of the sponsors of the bill, stated: "[W]e speak of rule or rule making whenever agencies are exercising legislative powers. We speak of orders and adjudications when they are doing things which courts otherwise do." 92 CONG. REC. 5649 (1946) (Leg. Hist. of the APA, 355).

Similarly, the House Report asserts: "In stating the essentials of the different forms of administrative proceedings, the bill carefully distinguishes between so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights and liabilities in particular cases). It provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies. In the 'rule making' (that is 'legislative') function it provides . . . [and] in 'adjudication' (that is, the 'judicial function'). . . ." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 17 (Leg. Hist. of the APA, 251) (1946). *See also* Reich, *Rule Making Under the Administrative Procedure Act*, in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 492-97 (1947).

23. *See generally* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 8-11 (1962); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 6.13 (Supp. 1965); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 753-61 (1961).

24. 332 U.S. 194 (1947).

25. *Id.* at 203; *see* California v. Lo-Vaca Gathering Co., 379 U.S. 366, 371 (1965); Columbia Broadcasting System v. United States, 316 U.S. 407, 421 (1942).

been made to define the circumstances under which an agency is free to exercise its discretion in choosing a method of policy formulation.

The National Labor Relations Board is subject to the requirements of the APA.[26] The Board, in contrast to other administrative agencies which have willingly employed the rule making procedures of the APA,[27] has interpreted *Chenery*[28] as giving it a blank check to make its rules by adjudication. Not once utilizing the rule making procedures of the APA, it has gone to the extreme of relying exclusively on adjudication for the formulation of its administrative rules, and in so doing has obliterated the APA distinction drawn between "rules" and "orders."[29] This practice has evoked extensive criticism from both the courts[30] and legal commentators.[31] However, in the past, the position adopted by the reviewing courts has been one of continued permissiveness accompanied by numerous unheeded reprimands.[32]

The controversy concerning the Board's rule making procedure has currently focused on the rule issued in *Excelsior Underwear, Inc.*[33] The substantive validity of the *Excelsior* rule has been continuously upheld,[34] but the courts have been divided on the procedural validity of its adoption. Before the Supreme

26. Labor-Management Relations Act, 29 U.S.C. § 156 *et seq.* (1964).

27. *E.g.*, Fuchs, *Agency Development of Policy Through Rule Making*, 59 NW. U.L. REV. 781 (1965) (discusses the FCC and FPC); Notes, *The Federal Regulatory Agencies: A Need for Rules of Decision*, 50 VA. L. REV. 652 (1964) (discusses the FCC, ICC, and FPC).

28. The authority of an agency to make rules and standards on a case-by-case basis established in *Chenery* was applied to the Board in Optical Workers' Local 24859 v. N.L.R.B., 227 F.2d 687, 691 (5th Cir. 1955), *cert. denied*, 351 U.S. 963 (1956): "We hold in accordance with the Chenery case . . . that the Board has authority to adopt and reverse policy, either in the form of an individual decision or as rule-making for the future, in any manner reasonably calculated to carry out its statutory duties, without regard to whether such action strictly conforms to the rules applicable to courts or legislative bodies."

29. *See* note 14 *supra*. The language used by the Board clearly indicates that it intends its adjudicatory decisions to have more than mere precedential effect. In *Excelsior*, for example, the Board openly referred to its decision as a "rule" and said that "We now establish a requirement that will be applied in all election cases." 156 N.L.R.B. 1236 (1966). Similarly, in Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953), the Board said that "we now establish an election rule which will be applied in all election cases."

30. *E.g.*, N.L.R.B. v. Penn Cork & Closures, Inc., 376 F.2d 52, 57 (2d Cir. 1967), *cert. denied sub nom.* District Lodge No. 15 v. N.L.R.B., 389 U.S. 843 (1967); N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966); N.L.R.B. v. A.P.W. Products Co., 316 F.2d 899, 905 (2d Cir. 1963).

31. *E.g.*, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 6.13 (Supp. 1965); H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 141-47 (1962); Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

32. Cases cited note 30 *supra*.

33. 156 N.L.R.B. 1236 (1966). *See* note 6 *supra*.

34. "[I]t is noteworthy that every court which has passed on the issue has held the *Excelsior* rule to be a legitimate exercise of the Board's jurisdiction over representation proceedings." N.L.R.B. v. Q-T Shoe Mfg. Co., 409 F.2d 1247, 1250 (3d Cir. 1969). *E.g.*, Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969); N.L.R.B. v. Beech-Nut Life Savers, Inc., 406 F.2d 253 (2d Cir. 1968); Howell Refining Co. v. N.L.R.B., 400 F.2d 213 (5th Cir. 1968); British Auto Parts, Inc. v. N.L.R.B., 405 F.2d 1182 (9th Cir. 1968); N.L.R.B. v. Hanes Hosiery Div.-Hanes Corp., 384 F.2d 188 (4th Cir. 1967).

Court decision in the instant case, four circuit courts[35] had rejected the argument accepted by the first circuit in *Wyman-Gordon*,[36] typically concluding that "[t]he Board can resolve a problem . . . either by quasi-legislative promulgation of general rules designed to meet the problem . . . or in quasi-judicial proceedings when the problem arises as an issue in a case before the Board. . . . The procedure it chooses to follow in resolving any particular problem is a matter for the Board, in its informed judgment, to decide."[37]

The Supreme Court granted certiorari to resolve this conflict among the circuits.[38] The Court, however, fell into conflict itself as to the proper grounds for decision.[39] Mr. Justice Fortas, writing for the plurality, while agreeing with the court of appeals that the rule making provisions of the APA "may not be avoided by the process of making rules in the course of adjudicatory proceedings,"[40] nevertheless reversed.[41] He maintained that since the Company *itself* was *specifically* directed by the Board to submit a list of the names and addresses of its employees as part of an unquestionably valid order directing that an election be held, the Company should be required to obey the direction.[42] The Court noted that absent the order directing the election, the Company "was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so."[43] In pointing out that the APA requires the Board to use its rule making procedures, the Court indicated that general rules for future application formulated in the course of adjudicatory proceedings are *not* enforceable[44] without a subsequent adjudicatory order. Taking another

35. The Second, Third, Fifth, and Ninth Circuits all expressed approval of the procedure by which the *Excelsior* rule was adopted. N.L.R.B. v. Beech-Nut Life Savers, Inc., 406 F.2d 253 (2d Cir. 1968); N.L.R.B. v. Q-T Shoe Mfg. Co., 409 F.2d 1247 (3d Cir. 1969); Howell Refining Co. v. N.L.R.B., 400 F.2d 213 (5th Cir. 1968); Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969); British Auto Parts, Inc. v. N.L.R.B., 405 F.2d 1182 (9th Cir. 1968). Two other circuits approved enforcement of the *Excelsior* rule without explicitly passing on the correctness of the method by which it was adopted. N.L.R.B. v. Hanes Hosiery Div.-Hanes Corp., 384 F.2d 188 (4th Cir. 1967); N.L.R.B. v. Rohlen, 385 F.2d 52 (7th Cir. 1967).

36. *See* text accompanying notes 8 and 11 *supra*.

37. N.L.R.B. v. Beech-Nut Life Savers, Inc., 406 F.2d 253, 257 (2d Cir. 1968).

38. Instant case at 762.

39. There were four separate opinions in the instant case: a plurality opinion (in which Warren, C.J., Fortas, J., Stewart, J., and White, J. joined) a concurring opinion (in which Black, J., Brennan, J., and Marshall, J. joined) and two dissenting opinions (Douglas, J. and Harlan, J.).

40. Instant case at 764.

41. The primary issue and that upon which the reversal rested concerned the validity of the manner in which the rule was adopted and whether it should be enforced. In a subsequent portion of the opinion, the Court upheld the substantive validity of the *Excelsior* rule. Instant case at 767-69.

42. Instant case at 766. As Mr. Justice Black's concurring opinion points out, the APA exempts Board certification proceedings from the requirements of the section governing adjudication. 5 U.S.C. § 554(a)(6) (1968). Hence, the hearing and decisional procedures in representation cases are not in strict truth adjudicatory in the APA sense. The absence of these safeguards in representation cases of the kind involved in *Wyman-Gordon* drew no mention in the Court's decision nor in the briefs. Address by Professor Merton C. Bernstein at the meeting of the American Bar Association's Section of Labor Relations Law on August 11, 1969 in BNA 71 LRR 585, 603 n.72.

43. Instant case at 766.

44. In this context the Court rebuked the Board for its questionable rule making prac-

position, Mr. Justice Black in his concurring opinion, differed substantially with regard to the proper ground for decision. He first criticized the plurality's "novel theory . . . [of upholding] enforcement of the *Excelsior* practice in spite of what it consider[ed] to be statutory violations present in the procedure by which the requirement was adopted."[45] Then, relying on *Chenery's* dictate that "the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency,"[46] he concluded that "the *Excelsior* practice was adopted by the Board as a legitimate incident to the adjudication of a specific case before it"[47] and consequently "the Board properly followed the procedure applicable to 'adjudication' rather than 'rule making.' "[48] It is implicit in Justice Black's analysis that the decision in *Excelsior* was a binding precedent, with the same effect as a validly adopted rule, which the Company must obey even without an order specifically directing compliance with it. Mr. Justice Douglas, dissenting, maintained that the Board in *Excelsior* chose to make a rule to fit future cases rather than to perform its adjudicatory function in the conventional way of treating each case on its special facts. When agencies choose this course, he "would hold the agencies governed by the rule-making procedure strictly to its requirements and not allow them to play fast and loose as the National Labor Relations Board apparently likes to do."[49] Mr. Justice Harlan, also dissenting, contended that due to the future effect of the *Excelsior* rule "it clearly [fell] within the rule-making requirements of the [Administrative Procedure] Act"[50] and "[g]iven the fact that the Labor Board ha[d] promulgated a rule in violation of the governing statute . . . there [was] no alternative but to affirm the judgment of the Court of Appeals in the case."[51] He further maintained that he would at least remand the case for the Board's determination as to whether it would reach the same result in the instant case without relying on the invalidly adopted rule.[52]

"To put it mildly, the reasoning of *Wyman-Gordon* lacks clarity if not intelligibility."[53] Whether it will prove to be just another in a line of judicial reprimands distinguished only by the fact that it emanates from the highest

tice saying: "The rule-making provisions of that Act [the APA], which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application . . . . There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention." Instant case at 764.

45. *Id.* at 769.
46. Instant case at 772, *quoting* SEC v. Chenery, 332 U.S. 194, 203 (1947).
47. Instant case at 770.
48. *Id.*
49. *Id.* at 779.
50. *Id.* at 780.
51. *Id.* at 781.
52. The plurality rebutted this argument saying that "[t]o remand would be an idle and useless formality . . . . There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand." *Id.* at 766-67, n.6.
53. Address by Professor Merton C. Bernstein at the meeting of the American Bar Association's Section of Labor Relations Law on August 11, 1969 in BNA 71 LRR 585, 605.

court of the land, or will realize its intended effect to make the Board implement the formal rule making provisions of the APA,[54] remains to be seen. *Wyman-Gordon* has declared that rule making and adjudication are mutually exclusive, but the plurality opinion does not provide a sure guide to the factors that compel the choice of one procedure rather than the other.[55] The consequence of the decision may result in one of two divergent courses of conduct. The Court might in the future pierce the "adjudicatory facade" used by the Board to evade the rule making procedures of the APA by simply requiring that certain subsequent Board directives of future-general application be adopted in accordance with the rule-making procedures of the APA.[56] Instances where adherence to the APA rule-making procedures would be enforced could be judicially defined in terms of specific substantive areas until Congress chooses to act.[57] Since the holding of the instant case, resting on specific Board directives for enforcement, is not applicable to non-directive rule[58] situations, perhaps the Court in the future will enforce the rule making procedures of the APA in areas where non-directive rules predominate. On the other hand, if the instant case is applied literally, the Court might enforce any adjudicatory order issued by the Board regardless of the validity of the adoption of the rule on which the order is based. Such a development would make *Wyman-Gordon* but another empty judicial rebuke, since the Board could work its will without rule making by going through an adjudicatory proceeding.

Predictably, the Board, until coerced, will continue its current practice,[59] for in its judgment the "formal rule-making procedures are . . . too rigid and inflexible for most of the problems with which it is concerned."[60] That the

54. Instant case at 764.

55. Address by Professor Merton C. Bernstein at the meeting of the American Bar Association's Section of Labor Relations Law on August 11, 1969 in BNA 71 LRR 585, 608.

56. *Id.* 585 *et seq.* Professor Bernstein offers a thorough analysis of this possible ramification of the instant case.

57. Rather than judicial coercion Professor Bernstein suggests self-regulation by the Board. *Id.* at 619-21. He maintains that "we should choose our fate, rather than have it simply happen to us." *Id.* at 621.

58. A non-directive rule achieves Board policy without the necessity of a specific command, request, or order to a party. The Board's contract bar rule, Deluxe Metal Furniture Co., 21 N.L.R.B. 995 (1958), followed in General Cable Corp., 139 N.L.R.B. 1123 (1962), is an example of such a rule. Under this rule, when an established collective bargaining agreement exists, this agreement bars an election petitioned for by a rival union seeking to represent the employees. Such a non-directive rule is to be contrasted with directive rules such as the *Excelsior* rule, which specifically directs certain conduct of a party, *i.e.*, the furnishing of eligibility lists.

59. NLRB Solicitor William Feldsman has recently said:

> As I read Wyman-Gordon, there is nothing in the plurality opinion or the dissents to warrant the conclusion that the Court has mapped out subject matter sectors, even those having far reaching significance, in which the Board, irrespective of any other factor must engage in substantive rule making. . . . Unless the law will now compel large-scale substantive rule-making, or voluntary experience with such procedures will teach that very extensive use of them is desirable, neither of which events I think will occur, adjudication will remain as the Board's staple.

Wyman-Gordon: Rule-Making v. Adjudication, BNA 71 LRR 622-23.

60. Brief for Appellant at 15, N.L.R.B. v. Wyman Gordon Co., 394 U.S. 789 (1969). The brief continued:

Board might so easily evade the APA is not necessarily a criticism of the Court. It had few alternatives. The Court could have decided, as Justice Douglas did, to enforce only rules adopted in accordance with the APA's rule making provisions. By so holding, the Court would never enforce adjudicatory orders based on rules adopted in avoidance of the APA rule making procedures. However, such a decision could easily be circumvented by the Board by merely issuing subpoenas based on section 11 of the National Labor Relations Act[61] which confers authority on the Board to compel the production of evidence as part of its general investigative power. The effect of such a practice would be that the Board could often evade the APA's rule making procedures and yet coerce the regulated industry into compliance. As another alternative, the Court could have based its judgment on *Chenery* as did the minority. Although this alternative would have been tantamount to allowing the Board to continue its present practice without even a reprimand it would have also emphasized the real problem—the APA itself. The statute does not indicate under what circumstances each procedure is to be used. Hence, the courts are really without standards to determine which procedure is to be employed in a given set of circumstances. This fact appears to be the reason for *Wyman-Gordon's* failure to provide guidelines for the choice of procedure. Congress should decide under what circumstances each is to be employed. However, any such definitive solution is practically impossible, due to the overlapping nature of rule making and adjudicatory functions on the one hand, and the many variables demanding

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> As the Board has explained, in such complex areas, for example, as secondary boycotts, picketing, duty to bargain in good faith, and restraint of employees in the exercise of their Section 7 rights, regulation is ordinarily better accomplished through case-by-case adjudication, which permits 'gradual development of the law through specific factual patterns . . . [that] emerge from actual industrial experience;' also, the cumbersome process of amending formal rules would impede 'the law's ability to respond quickly and accurately to changing industrial practices.'

The above passage was accompanied by the following footnote:

> Supplemental Memorandum of the National Labor Relations Board to the Senate Judiciary Committee, October 21, 1968, 69 LRRM 159. See also McCulloch, *Procedures Employed by NLRB in Determining Policy,* Speech to the Administrative Law Section of the American Bar Association, August 11, 1964, 56 LRRM 31. *Cf. Administrative Procedures in Government Agencies,* Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., p. 98, n.18.

61. Labor-Management Relations Act, 29 U.S.C. § 161 (1964). Section 11 could be implemented as a means of circumventing the rule making procedures only in those situations where the production of evidence is involved. In a situation where production of evidence is not at issue this method is unavailable to the Board. An example of this latter situation might be an instance in which the Board seeks to enforce its adjudicatory rule promulgated in Peerless Plywood Co., 107 N.L.R.B. 427 (1953) (employers and unions are prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election). Suppose a union claims that the employer violated the *Peerless* rule and, therefore, the election should be set aside. The employer might defend by arguing that the rule was not adopted in accordance with the rule making procedures of the APA, and, therefore, the election cannot be set aside because of its breach. In this case the Board cannot rely on its independent subpoena power to set aside the election, since the production of evidence is not at issue. The Douglas opinion may have teeth in such areas.

flexibility that operate within specific agencies on the other. Perhaps the solution to the courts' dilemma lies not in an enumeration of circumstances in which each procedure should be employed, but rather in a legislatively adopted procedure similar to the hybrid rule making-adjudicatory procedure used by the Board in *Excelsior*. Such a procedure could incorporate an opportunity for all interested parties to be heard through amicus briefs, for notice and publication features, deferred effectiveness of rules, and any other due process requirements determined essential by Congress. Perhaps the Board in *Excelsior*, recognizing that its function was best served by the hybrid procedure, was acting in good faith. As long as the Board continues to act in good faith, maybe it should be allowed, in Justice Douglas' words, "to have its cake and eat it too."[62]

FRANK A. VALENTI

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS—RECREATIONAL FACILITY HELD A COVERED ESTABLISHMENT UNDER 1964 ACT

The petitioners, Negro residents of Arkansas, brought a class action seeking injunctive relief[1] under the public accommodation section of the Civil Rights Act of 1964,[2] to restrain the respondent, owner and operator of the Lake Nixon

62. Instant case at 776.

1. Contrary to the Civil Rights Act of 1871, where civil damages were available, the only remedy provided in the Civil Rights Act of 1964 is injunctive relief. 42 U.S.C. § 2000a 3 (1964).

2. The relevant provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (1964) are as follows:

42 U.S.C. § 2000a(a) (1964). All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C. § 2000a(b) (1964). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . .

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises . . . ;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) . . . (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. § 2000a(c) (1964). The operations of an establishment affect commerce within the meaning of this title if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) . . . there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several states . . . .