Michigan Law Review

Volume 37 | Issue 7

1939

ADMINISTRATIVE LAW - LABOR LAW - FEDERAL COURTS - EQUITY - PROPRIETY OF INTERROGATORIES DIRECTED TO THE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Administrative Law Commons, Courts Commons, Labor and Employment Law Commons, and the Litigation Commons

Recommended Citation

Michigan Law Review, *ADMINISTRATIVE LAW - LABOR LAW - FEDERAL COURTS - EQUITY - PROPRIETY OF INTERROGATORIES DIRECTED TO THE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD*, 37 MICH. L. REV. 1121 (1939).
Available at: https://repository.law.umich.edu/mlr/vol37/iss7/10

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RECENT DECISIONS

ADMINISTRATIVE LAW — LABOR LAW — FEDERAL COURTS — EQUITY — PROPRIETY OF INTERROGATORIES DIRECTED TO THE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD — The National Labor Relations Board brought a proceeding under section 10[1] of the National Labor Relations Act for the enforcement of an order to cease certain unfair labor practices, its petition stating that the board had considered the case before it and upon all the testimony and evidence made its findings of fact and issued its order. The answer alleged that the board did not consider the evidence but referred it to others for suggested findings of fact, and that with no opportunity to respondent to know of or criticize the suggestions they were adopted by the board without further inquiry or investigation. Under Equity Rule 58 [2] respondent filed interrogatories to be answered by the board. The board objected, inter alia, that Equity Rule 58 applied only to equity proceedings in the district courts and that the interrogatories related to matters not competent to be inquired of by the court. *Held,* interrogatories granted by analogy to the procedure provided in Equity Rule 58: "we are of opinion that the method of making this order ought to be enquired of by this court before undertaking to enforce it." *National Labor Relations Board v. Cherry Cotton Mills,* (C. C. A. 5th, 1938) 98 F. (2d) 444 at 447.[3]

When an employer against whom a complaint has been filed under the act [4] has sought an injunction against the board, the courts have held that the act itself adequately provides for relief against the board's orders,[5] since the orders are not enforceable until the board obtains an order from a circuit court

[1] 49 Stat. L. 453 (1935), § 10 (e), 29 U. S. C. (Supp. 1938), § 160 (e): "The Board shall have power to petition any circuit court of appeals of the United States . . . for the enforcement of such order and for appropriate temporary relief or restraining order. . . ."

[2] "The plaintiff . . . and the defendant . . . may file interrogatories in writing for the discovery by the opposite party . . . of facts and documents material to the support or defense of the cause. . . ." The instant case was decided in July, 1938, and the Rules of Civil Procedure, although completed, were not adopted until September, 1938.

[3] The court subsequently permitted the NLRB to withdraw its petition for enforcement of the order of the board and also dismissed the order requiring the board to answer the interrogatories. See 3 L. R. R. 6:1 (Sept. 5, 1938). Rehearing on the dismissal of the order to answer the interrogatories was denied in 98 F. (2d) 1021.

[4] 49 Stat. L. 453 (1935), § 10 (b), 29 U. S. C. (Supp. 1938), § 160 (b): "Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice, the Board" can give notice and conduct a hearing, etc.

[5] Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U. S. 54, 58 S. Ct. 466 (1938); Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459 (1938); Elliott v. Elpaso Electric Co., (C. C. A. 5th, 1937) 88 F. (2d) 505; Clark v. Lindeman & Hoverson Co., (C. C. A. 7th, 1937) 88 F. (2d) 59; Carlisle Lumber Co. v. Hope, (C. C. A. 9th, 1936) 83 F. (2d) 92; Bradley Lumber Co. v. National Labor Relations Board, (C. C. A. 5th, 1936) 84 F. (2d) 97.

of appeals,[6] and provision is made by the act for review of orders of the board on the petition of any person aggrieved thereby.[7] It has been held that suit against the board for an injunction is prohibited because such suit is one against the government and cannot be brought without statutory permission.[8] Recent decisions of the Supreme Court have dealt with the nature of the hearing which must be given by alministrative tribunals. Among other things the Court has said: "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." [9] When the board alleges that it has considered the testimony and found certain things to be true and has thereon made its order, but the employer believes otherwise, how can the respondent obtain the adequate relief to which the injunction cases refer and be sure that he has had the "full hearing" to which due process of law entitles him? A recent case has held that a mere allegation that the board did not consider all the evidence was but an allegation of a conclusion of law, and did not furnish sufficient information of what was done for the court to decide whether or not a full hearing was given; [10] but the Supreme Court has said that it is error for such an allegation to be stricken from plaintiff's bill.[11] Nothing more than this was alleged in the instant case, and the court said: "We are very confident that the Court ought not to enforce pretended findings of the Board which are not really such," [12] and allowed interrogatories to be directed to the board to determine what consideration had been given to the evidence. The power of the circuit courts of appeals to hear proceedings brought by the board is granted by the act itself.[13] No other statute

[6] See note 1, supra.

[7] 49 Stat. L. 453 (1935), § 10 (f), 29 U. S. C. (Supp. 1938), § 160 (f): "Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any circuit court of appeals of the United States . . ." in the proper district.

[8] Jamestown Veneer & Plywood Corp. v. National Labor Relations Board, (D. C. N. Y. 1936) 13 F. Supp. 405.

[9] Morgan v. United States, 298 U. S. 468 at 480-481, 56 S. Ct. 906 (1936). The case was sent back to the circuit court of appeals for further proceedings and was again appealed. Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 999 (1938). The statute involved in the Morgan cases, 42 Stat. L. 159 at 166 (1921), § 310, 7 U. S. C. (1934), § 211, specifically required a "full hearing" to be given by the Secretary of Agriculture. No such language is to be found in the National Labor Relations Act. Chief Justice Hughes stated in the first Morgan case, 298 U. S. at 477-478, "Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied." If due process is satisfied only by a "full hearing," certainly the National Labor Relations Board must give a "full hearing." For further discussion on the Morgan cases, see comments in 37 MICH. L. REV. 597 (1939); 33 ILL. L. REV. 227 (1938); 23 WASH. UNIV. L. Q. 564 (1938).

[10] National Labor Relations Board v. Biles Coleman Lumber Co., (C. C. A. 9th, 1938) 98 F. (2d) 16.

[11] See the Morgan cases, note 9, supra.

[12] Principal case, 98 F. (2d) 444 at 446.

[13] 49 Stat. L. 453 (1935), § 10 (e), 29 U. S. C. (Supp. 1938), § 160 (e), provides that when the board has made petition to the circuit court of appeals and has

grants power to hear such proceedings. The instant court concluded that the act, in using language applicable to courts of equity and in stating that sections of the statute which limited the powers of courts of equity did not restrict the courts in proceedings under the act, purported to give to the circuit courts of appeals equity powers for enforcing the act.[14] The court concluded that, as such court of equity, it had the power to grant interrogatories for discovery; and said, admitting that Equity Rule 58 had application only to equity proceedings in the district courts, that it would, "by analogy," adopt the procedure provided for in Rule 58, "rather than go back to the English equity practice." [15] The Judicial Code expressly empowers the circuit courts of appeals "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of [its jurisdiction] . . . and agreeable to the usages and principles of law." [16] If a court interpreted the word "writ" to include an interrogatory for discovery, it would have statutory authority to grant interrogatories, provided the court found it "necessary" to do so, and it could be said to be "agreeable to the usages and principles of law." It is almost certain, however, that "writs" does not include interrogatories. One cannot question the court's conclusion that the circuit courts have equitable powers for the purpose of enforcing the act; and it follows that the equitable powers derived from the act are limited to those which are necessary for its enforcement. A court having plenary jurisdiction in equity may exceed the scope of necessary powers in handling a particular case. It is not certain, however, that the circuit courts of appeals actually have any power which is not created by necessity. One may reasonably argue in this case that the board's function would be so seriously hampered by subjecting it to such interrogatories that, as a matter of policy, the courts should refuse to grant them. The act empowers the board to become a litigant in the United States courts; [17] does this mean that the board assumes the character of an ordinary litigant so that it should not be given special consideration? The courts may well treat the board with some deference, it being an arm of the government, seeking to enforce the law.[18] If this view be adopted, does the power to issue interrogatories arise from necessity? One may say, on the other hand, that it is wiser to protect litigants from the chance of irregularity, and create no

filed the pleadings, the record of the trial examiner, and the findings and the order of the board, "the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . ."

[14] The act confers jurisdiction on the district courts if the circuit courts are in vacation. 49 Stat. L. 453 (1935), § 10 (e), 29 U. S. C. (Supp. 1938), § 160 (e).

[15] Principal case, 98 F. (2d) 444 at 447.

[16] 36 Stat. L. 1162 (1911), 28 U. S. C. (1934), § 377.

[17] 49 Stat. L. 453 (1935), § 10 (e), 29 U. S. C. (Supp. 1938), § 160 (e); Jamestown Veneer & Plywood Corp. v. National Labor Relations Board, (D. C. N. Y. 1936) 13 F. Supp. 405; see also Texas & Pac. R. R. v. Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666 (1896).

[18] This seems to have been done in the principal case. See note 3, supra.

presumption in favor of the board. The instant court thought that the board could always submit a proposed finding of fact to the respondent so as to prevent any question of irregularity.[19] If the respondent agrees with the findings, certainly he can have no objection to the method of making the findings. It would certainly be "necessary" for the court to have power to issue interrogatories if this policy were adopted, i.e., inquiring into the board's treatment of facts. Little authority has been found for the use of such interrogatories. The Supreme Court did recognize their use by a district court, stating in the facts of a case on appeal that the district court had used interrogatories, but expressing no opinion as to the wisdom or policy of such procedure.[20] The instant court subsequent to its order allowed the board to dismiss the enforcement petition, and dismissed also the order which directed the board to answer interrogatories.[21] The use of such procedure in the future is doubtful.

[19] The court said, 98 F. (2d) at 447, "It seems, as is set forth in the opinion in Re National Labor Relations Board [304 U. S. 486, 58 S. Ct. 1001 (1938)] that since the making of the order before us the Board has instituted a practice of making an intermediate report, where there was none by the trial examiner, and serving it on the parties to give opportunity to discuss it. This confesses the essential fairness of such procedure, and also implies that it had previously been practiced; lending color to the respondents' contention here." Usually the trial examiner prepares an intermediate report to which the respondent is given opportunity to except. See Wolf, "Administrative Procedure before the National Labor Relations Board," 5 UNIV. CHI. L. REV. 358 at 372 et seq. (1938).

[20] In the first Morgan case the district court had struck from the plaintiff's bill the allegations "that the Secretary had made the order without having heard or read the evidence and without having heard or considered the arguments submitted, and that his sole information with respect to the proceeding was derived from consultation with employees in the Department of Agriculture." 304 U. S. 1 at 13-14. The Supreme Court held that this was error, that the defendant should be required to answer the allegations, and that the question whether plaintiffs had a proper hearing should be determined. "After the remand, the bills were amended and interrogatories were directed to the Secretary which he answered." 304 U. S. 1 at 14. In the first appeal, the Supreme Court merely said that the secretary should be required to answer the allegations; no mention was made of the use of interrogatories for this purpose.

[21] See note 3, supra.