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# Administrative Procedure-Enforcement of NLRB Orders-Power of Cour of Appeals to Modify Scope of Consent Order

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# RECENT DECISIONS

ADMINISTRATIVE PROCEDURE—ENFORCEMENT OF NLRB ORDERS—POWER OF COURT OF APPEALS TO MODIFY SCOPE OF CONSENT ORDER—A complaint issued by the National Labor Relations Board charged respondents, an employer and two labor unions, with illegally maintaining a closed or preferential shop.[1] Following the issuance of the complaint, a settlement agreement was reached in which respondents stipulated to waive a hearing and all other proceedings to which they might be entitled under the National Labor Relations Act or under rules and regulations of the Board.[2] Respondents also consented to the entry of a broad cease-and-desist order and a subsequent decree in which they were ordered to refrain from unlawful preferential hiring arrangements with each other, or with *any other* employer or labor organization. When the NLRB petitioned for enforcement of the consent order, the First Circuit, on its own motion, excised the references to *any other* employer or labor organization.[3] On certiorari to the United States Supreme Court, *held,* reversed, one Justice dissenting. Section 10(e) of the National Labor Relations Act[4] deprives courts of appeals of power to modify, sua sponte, NLRB consent orders not contested before the Board even though the Board's record contains no findings supporting such order. *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961).

Although the National Labor Relations Act gives the Board exclusive initial authority to prevent unfair labor practices, its orders are not self-enforcing. In order to obtain judicial enforcement the Board must first petition a court of appeals for a decree,[5] which can then serve as the basis for contempt proceedings in the event of non-compliance.[6] The courts of appeals have the power to modify Board orders when the Board petitions for enforcement, such power being derived from the provision of section 10(e) which authorizes the court "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."[7] This broad authorization is immediately followed, however, by a clause providing that no objection that has not been raised before the Board shall be considered by a reviewing court,

1 The complaint alleged violations of §§ 8(a)(1)-(3), 8(b)(1)(A), (2) of the National Labor Relations Act, 49 Stat. 452-453 (1935), as amended, 29 U.S.C. §§ 158 (a)(1)-(3), (b)(1)(A), (2) (1958).

2 See 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(b), (c) (1958); 29 C.F.R. §§ 101.9, 102.46 (Supp. 1961).

3 283 F.2d 26 (1st Cir. 1960).

4 § 10(e), 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1958).

5 NLRA, § 10(e), 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1958). See H.R. REP. No. 1147, 74th Cong., 1st Sess. 3-6 (1935); S. REP. No. 573, 74th Cong., 1st Sess. 4-6 (1935).

6 See H.R. REP. No. 1371, 74th Cong., 1st Sess. 5 (1935).

7 § 10(e), 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1958).

unless the failure or neglect to urge such an objection can be excused because of extraordinary circumstances.[8] However, although the power of the court to modify, and the limits on that power, are expressly set forth in the statute, the judicial interpretation of section 10(e) has not yielded uniform results.

In the leading case of *NLRB v. Express Publishing Co.*,[9] the Supreme Court held that the Board had no authority to obtain a decree proscribing more than the specific violations found unless the record indicated the likelihood of future violations on a wider scale.[10] The Board had issued a "blanket" order which, in effect, restrained the employer from violating any and all provisions of the act. Since the decision in the *Express Publishing* case, however, the practice of the Board in issuing broad cease-and-desist orders has shifted to orders restraining specific unfair labor practices against *any other* employer or union. This practice has not been favorably received by the courts, the majority of which have modified the orders when properly objected to, relying on *Express Publishing*.[11] The courts have the authority when they are "called upon to enforce such orders by their own decrees, [to] examine its scope to see whether, on the evidence, they go so beyond the authority of the Board as to require modification as a matter of law before enforcement."[12] The reasons most often given are that

8 The relevant portions of § 10(e) are as follows: "The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order and for appropriate temporary relief or restraining order. . . . [T]he court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

9 312 U.S. 426 (1941). See Manoff & Schmiedigen, *The Express Publishing Co. Case*, 23 B.U.L. REV. 477 (1943). See also Note, 26 WASH. U.L.Q. 554 (1941).

10 "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." 312 U.S. at 437.

11 Communications Workers v. NLRB, 362 U.S. 479 (1960) (per curiam); NLRB v. Miscellaneous Drivers & Helpers, 293 F.2d 437 (8th Cir. 1961); NLRB v. Dallas Gen. Drivers Union, 281 F.2d 593 (5th Cir. 1960) (per curiam); NLRB v. Bangor Bldg. Trades Council, 278 F.2d 287 (1st Cir. 1960); Morrison-Knudsen Co. v. NLRB, 276 F.2d 63 (9th Cir. 1960); NLRB v. Local 926, Int'l Union of Operating Eng'rs, 267 F.2d 418 (5th Cir. 1959); NLRB v. UMW, 202 F.2d 177 (3d Cir. 1953); NLRB v. UMW, 198 F.2d 389 (4th Cir.), *cert. denied*, 344 U.S. 884 (1952); NLRB v. UMW, 195 F.2d 961 (6th Cir. 1952), *cert. denied*, 344 U.S. 920 (1953); NLRB v. Burry Biscuit Corp., 123 F.2d 540 (7th Cir. 1941); NLRB v. Grower-Shipper Vegetable Ass'n, 122 F.2d 368 (9th Cir. 1941); McQuay-Norris Mfg. Co. v. NLRB, 119 F.2d 1009 (7th Cir. 1941); NLRB v. Ford Motor Co., 119 F.2d 326 (5th Cir. 1941). *Contra*, NLRB v. Standard Oil Co., 138 F.2d 885 (2d Cir. 1943). See Note, 29 GEO. L.J. 1026 (1941).

12 May Dep't Stores Co. v. NLRB, 326 U.S. 376, 392 (1945).

Congress did not intend to make of the courts mere rubber stamps to the Board's unrestrained will,[13] but that it was to be the function of the courts under the act to determine, in their discretion, whether the findings are supported by the evidence and whether the scope of the order is an appropriate exercise of the Board's jurisdiction.[14]

Although it is settled that a court will consider the appropriate scope of a proposed decree when the respondent properly objects to its breadth,[15] it is not quite so clear whether a respondent may question the scope of a proposed decree when he failed to make such objection before the Board. In a dissenting opinion in the *Express Publishing* case, Mr. Justice Douglas contended that the majority had overstepped the limits of judicial review of Board orders established by section 10(e), as no objection had been raised at any time to the breadth of the order.[16] Thereafter in *NLRB v. Cheney Cal. Lumber Co.*, the Court held that a court of appeals could not modify a Board cease-and-desist order where no such objection had been made before the Board.[17] This holding has been followed in two circuits.[18] Two other circuits[19] have apparently adopted the view, expressed by Mr. Justice Stone in his concurring opinion in *Cheney*,[20] that a petition for enforcement of a Board order calls for an exercise of the equity powers of the court, including at least "the power to fix, on its own motion, the scope of the decree which it may be required to enforce by contempt proceedings, in conformity to recognized equitable standards applied to the record before it."[21] The First Circuit, however, has been inconsistent in its application of section 10(e).[22] This range of judicial opinion following the *Cheney* case has involved, for the most part, situations in which the respondent, due to his default, was unable to object to the scope of the order before the Board. The statutory answer to modifications seems clear enough in these circumstances, as section 10(e) provides that failure or neglect to urge an

13 NLRB v. Ford Motor Co., 119 F.2d 326, 330 (5th Cir. 1941).

14 *Ibid.* See also cases cited note 11 *supra.*

15 See May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945), and cases cited note 11 *supra.*

16 312 U.S. at 439. *Cf.* Moog Industries, Inc. v. FTC, 355 U.S. 411, 413 (1958) (per curiam).

17 327 U.S. 385 (1946). The Supreme Court reiterated this view in NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). See NLRB v. District 50, UMW, 355 U.S. 453 (1958); *cf.* United States v. Tucker Truck Lines, Inc., 344 U.S. 33 (1952); Hecht Co. v. Bowles, 321 U.S. 321 (1944).

18 Carpenters Dist. Council v. NLRB, 285 F.2d 289 (D.C. Cir. 1960); NLRB v. Combined Century Theatres, Inc., 278 F.2d 306 (2d Cir. 1960).

19 "The whole structure of the law demands judicial consideration when an order of enforcement is prayed." NLRB v. Red Spot Elec. Co., 191 F.2d 697, 698 (9th Cir. 1951) (dictum); NLRB v. Ford Motor Co., 119 F.2d 326 (5th Cir. 1941) (implied); *cf.* NLRB v. W. B. Jones Lumber Co., 245 F.2d 388 (9th Cir. 1957).

20 327 U.S. at 391.

21 *Ibid.*

22 In 1941 the court enforced a "blanket" Board order, holding that it was justified

objection before the Board may be excused when extraordinary circumstances exist.[23] However, the modification problem is of a different nature in a consent case where the respondent has affirmatively agreed to the scope of the proposed decree.

Taken literally, the clause of section 10(e) relied upon by the Court in the principal case[24] does not necessarily restrict a court's power to narrow a decree in situations in which proper objection has been made before the Board. The clause refers only to consideration of "objections" and does not purport to cover the "consent order" situation where no objections whatever can be presented. Moreover, the legislative history of the clause indicates that its purpose was merely to allow the Board a prior opportunity to rule on the specific issue before the court,[25] in keeping with the general doctrine of exhaustion of administrative remedies.[26] However, as early as 1928 the Supreme Court held that once a court has jurisdiction of the subject-matter and of the parties, "even gross error in the [consent] decree would not render it void."[27] So also, in *Marshall Field & Co. v. NLRB*,[28] the Court implied that all issues contained in a consent decree were precluded from review by section 10(e). In light of the need for speedy resolu-

by the circumstances, NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941). In 1960, it expressly followed *Express Publishing* in modifying a broad order, NLRB v. Bangor Bldg. Trades Council, 278 F.2d 287 (1st Cir. 1960). In 1947, the court expressly followed the *Cheney* majority, NLRB v. Draper Corp., 159 F.2d 294 (1st Cir. 1947), and NLRB v. Cutler, 158 F.2d 677 (1st Cir. 1947) (per curiam). In NLRB v. Auburn Curtain Co., 193 F.2d 826 (1st Cir. 1951), the court enforced a broad default order, disagreeing with the Ninth Circuit's decision in NLRB v. Red Spot Elec. Co., 191 F.2d 697 (9th Cir. 1951). In 1955 the court expressly followed the *Auburn Curtain Co.* case in NLRB v. Hansen, 220 F.2d 733 (1st Cir. 1955). In Local 111, United Bhd. of Carpenters, 278 F.2d 823 (1st Cir. 1960), the court reversed its position from the *Auburn Curtain* case, and modified a broad default decree.

23 § 10(e), 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1958).

24 § 10(e), 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1958): "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

25 "The provision in both drafts that the objections not urged before the Board shall not be considered by the court except under unusual circumstances is included for the reason that administrative tribunals are frequently harried and their proceedings unduly prolonged by objections raised for the first time in the reviewing court. Plain justice requires that objections should first be made before this Board." NLRB, 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1362, Comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.) Senate Comm. Print (1949). See also *Hearings on S. 2926 Before the Senate Committee on Education and Labor*, 73d Cong., 2d Sess. 37 (1934).

26 See generally 3 DAVIS, ADMINISTRATIVE LAW §§ 20.01-.10 (1958); *cf.* FPC v. Colorado Interstate Gas Co., 348 U.S. 492, 498 (1955).

27 Swift & Co. v. United States, 276 U.S. 311 (1928) (a broad antitrust consent decree).

28 318 U.S. 253 (1943). The parties had expressly reserved jurisdiction of the court of appeals to determine one issue. The Supreme Court affirmed, stating that consideration on review of all other questions was precluded by § 10(e). See also NLRB v. American Mfg. Co., 132 F.2d 740 (5th Cir.), *cert. denied*, 319 U.S. 743 (1943); *cf.* Nashville, C. & St. L. R.R. v. United States, 113 U.S. 261, 266 (1885).

tion of labor disputes involving unfair labor practices it would appear that judicial review or modification of consent orders should be confined within the limiting clause of section 10(e), but the term "objections" should be construed to include consent. This was apparently the Court's purpose in the *Marshall Field* case, and was an obvious purpose in the principal case. Informal settlements in the delicate area of labor-management relations have long been recognized as valuable, particularly in eliminating tedious hearings and adjudication, and in avoiding the need for specific admissions of wrongdoing and the notoriety concomitant with public proceedings.[29]

Prior to the decision in the principal case, both the Second[30] and the Fifth[31] Circuits recognized the limitations on judicial review in consent cases imposed by section 10(e). The First Circuit, in the principal case, reconsidered its original excision from the consent order in light of the Second Circuit decision, but denied a motion for rehearing.[32] The court reasoned that it had "no right to deny enforcement of an order warranted by the record"; but it "equally [had] no right to enter one which is not warranted," stating, "We do not think that consent makes the difference."[33] Hence, section 10(e) was no barrier to its sua sponte revision of the consent order. Contrary to the court of appeals, the Supreme Court thought that "consent makes a significant difference; it relieves the Board of the very necessity of making a supporting record. A decree rendered by consent 'is always affirmed, without considering the merits of the cause.' "[34] Since it is unnecessary for the Board to make a supporting record in petitions for enforcement of consent orders, the *Express Publishing* doctrine, that a blanket cease-and-desist order is beyond the Board's authority unless justified by the record,[35] is not inconsistent with the decision in the principal case, and there is a conclusive presumption that the consent order is justified. But with no record before it, a court of appeals appears even more to be a mere rubber stamp to a Board practice of issuing broad orders "as a

29 NLRB v. J. L. Hudson Co., 135 F.2d 380, 384 (6th Cir. 1943). See generally Dunau, *Consent Adjustments Under the National Labor Relations Act*, 12 FED. B.J. 216 (1952); *cf.* Silverberg, *Informal Procedures of the National Labor Relations Board*, 6 SYRACUSE L. REV. 72 (1954); Weyland and Zarky, *Informal Procedures Before the NLRB*, 1 PRAC. LAW. 31 (1955).

30 NLRB v. Combined Century Theatres, Inc., 278 F.2d 306 (2d Cir. 1960).

31 NLRB v. Carpenters' Dist Council, 288 F.2d 455 (5th Cir. 1961) (per curiam); NLRB v. American Mfg. Co., 132 F.2d 740 (5th Cir.), *cert denied*, 319 U.S. 743 (1943).

32 283 F.2d 26 (1960). Immediately following the decision in the principal case the Supreme Court, in per curiam opinions, reversed three similar cases two of which were consolidated with the principal case in the First Circuit. NLRB v. Local 476, Plumbers, 368 U.S. 401 (1962); NLRB v. Las Vegas Sand & Gravel Corp., 368 U.S. 400 (1962); NLRB v. Brandman Iron Co., 368 U.S. 399 (1962), *reversing* 281 F.2d 797 (6th Cir. 1960); *cf.* FTC v. Henry Broch & Co., 368 U.S. 360 (1962).

33 283 F.2d at 31.

34 368 U.S. at 323.

35 See, *e.g.*, cases cited notes 10-13 *supra*.

matter of course,"[36] a policy which the Fifth Circuit has termed an "abdication of judical responsibility."[37]

Until such time as employers and unions become more fully aware of the ramifications of signing broad consent decrees, the Board will more than likely continue its broad-form order policy, despite the controversy such a policy has aroused. However, the Supreme Court can extricate itself from the purview of such a sweeping decision as is embodied in the principal case, by invoking the reservation it laid down in *NLRB v. Cheney Cal. Lumber Co.*, that a different result will obtain if the Board has "patently traveled outside the orbit of its authority."[38] Yet, exactly how it will be determined whether the Board has overstepped its authority, and by whom, is not clear. Until that determination is made, the courts of appeals will find themselves compelled summarily to order enforcement of NLRB consent decrees.

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36 NLRB v. Ochoa Fertilizer Corp., 283 F.2d at 29 (1st Cir. 1960).
37 NLRB v. Ford Motor Co., 119 F.2d 326, 330 (5th Cir. 1941).
38 327 U.S. 385, 388 (1946).