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## LABOR LAW--TAFT-HARTLEY ACT--RIGHT OF BOARD TO DISMISS UNFAIR LABOR PRACTICE COMPLAINTS FOR POLICY REASONS

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LABOR LAW—TAFT-HARTLEY ACT—RIGHT OF BOARD TO DISMISS UNFAIR LABOR PRACTICE COMPLAINTS FOR POLICY REASONS—In recent months the National Labor Relations Board and its General Counsel, Robert N. Denham, have come to grips over the right of the Board to dismiss unfair labor practice charges on ground that to take jurisdiction would not effectuate the policies of the National Labor Relations Act.<sup>1</sup> After unsuccessfully opposing the Board in several cases,<sup>2</sup> Mr. Denham aired the controversy publicly,<sup>3</sup> charging the Board with application of “their old Wagner Act formulae” when “the principle of the theory has been repudiated by the passage of the Taft-Hartley Act.” The Board retaliated by revoking all the General Counsel’s independent powers not resting in specific provisions of the 1947 Act.<sup>4</sup> The President attempted to do away with even these powers in his recently defeated Administrative Reorganization Plan Number 12.<sup>5</sup>

<sup>1</sup> 51 Stat. L. 136, 29 U.S.C. (1947) §§141-197.

<sup>2</sup> H. W. Smith d.b.a. A-1 Photo Service, 83 N.L.R.B. No. 86 (1949); Haleston Drug Stores, Inc., 86 N.L.R.B. No. 125 (1949); Pereira Studios, 83 N.L.R.B. No. 87 (1949); Row Construction Co., 88 N.L.R.B. No. 132 (1950).

<sup>3</sup> Address before New York Building Trades Employers’ Association, January 12, 1950, reproduced in 16 VITAL SPEECHES 226-231 (1950); N.Y. TIMES, January 13, 1950, p. 1:2.

<sup>4</sup> See 83 CCH LABOR LAW REPORTER WEEKLY SUMMARY (March 2, 1950). In defending Board decisions before the courts the General Counsel must proceed in “full accordance with the directions of the Board.” The new regulations appear in 15 FED. REG. 1088 (1950). 84 CCH LABOR LAW REPORTER WEEKLY SUMMARY (March 9, 1950) reports that Mr. Denham refuses to obey what he regards as a curtailment of his independent authority under the act, including the right to make policy decisions relative to local-type businesses.

<sup>5</sup> Plans are submitted by the President pursuant to the Reorganization Act of 1949, c. 226, P.L. 109 (June 20, 1949). By section 6(a), had the plan not been disapproved by an actual majority of either house of Congress within sixty days from date of submission, it would have gone into effect at the end of the period. The plan [H. Doc. 503, 81st Cong., 2d sess. (1950),

The General Counsel bases his argument against the power of the Board to dismiss for policy reasons on section 3(d) of the amended act, which gives the General Counsel "final authority" over issuance of unfair labor practice complaints, and upon the legislative intent to separate the judicial functions of the Board from its prosecuting functions, and to give the General Counsel the power to determine policy in unfair labor practice cases. The Board contends that once a complaint is brought, the General Counsel's "final authority" is exhausted, so that the Board is then free to dismiss on policy grounds. The Board also denies any legislative intent to limit it to quasi-judicial functions.

The Board is empowered to take jurisdiction in any case involving an unfair labor practice "affecting commerce."<sup>6</sup> The term "affecting commerce" has potentially a large coverage—"all conduct having such consequences that constitutionally [Congress] can regulate."<sup>7</sup> The Board has, however, considered several factors in determining whether particular businesses come within the terms of the act, including type of customers served,<sup>8</sup> inter-relation of local and interstate activities,<sup>9</sup> separability of local and interstate operations,<sup>10</sup> and percentage of sales or purchases made in interstate commerce.<sup>11</sup> But over and above these substantive bases for deciding whether a particular business is covered, the Board asserts its power to dismiss if (1) the business is essentially local in nature, and (2) to assert jurisdiction in such cases would not effectuate the policies of the act. Since policy is at best an uncertain basis in determining whether a given business will be covered, it becomes important to determine whether the Board is in fact acting within its statutory powers when asserting a right to make these decisions on policy grounds.

reprinted, 96 CONG. REC. 3290 (1950); digested, 96 CONG. REC. 3579 (1950)] would have transferred the functions of the General Counsel to the Chairman and the Board, and abolished the General Counsel. The Hoover Commission had made no recommendations exclusively affecting the N.L.R.B. H. Res. 512, 81st Cong., 2d sess. (1950) and S. Res. 248, 81st Cong., 2d sess. (1950) both expressed disapproval of Reorganization Plan Number 12. The plan was disapproved by the Senate on May 10, 1950, 96 CONG. REC. 6874 (1950).

<sup>6</sup> Section 10(a), National Labor Relations Act as amended in 1947.

<sup>7</sup> *Polish National Alliance v. N.L.R.B.*, 322 U.S. 643 at 647, 64 S.Ct. 1196 (1944).

<sup>8</sup> *New York Steam Laundry*, 80 N.L.R.B. 1597 (1949).

<sup>9</sup> *Spickelmeier Co.*, 83 N.L.R.B. No. 71 (1949).

<sup>10</sup> *Duke Power Co.*, 77 N.L.R.B. 652 (1948); *Bangor Auto Body Shop*, 82 N.L.R.B. No. 76 (1949); *Collins Baking Co.*, 83 N.L.R.B. No. 88 (1949); cf. *Fehr Baking Co.*, 79 N.L.R.B. 440 (1948).

<sup>11</sup> *New York Steam Laundry*, 80 N.L.R.B. 1597 (1949), where only 7% of receipts were derived from interstate commerce.

## I

*Congressional Intent to Curb Board Discretion*

Under the original act, the Board had wide discretion in matters of procedure and evidence,<sup>12</sup> and free reign to decide whether taking jurisdiction in a given case would accord with the goals and policies of the act.<sup>13</sup> As a result, the outlook of Board decisions varied greatly from time to time.<sup>14</sup> Since this vacillation was to varying degrees duplicated in other administrative bodies, Congress limited free and uncontrolled discretionary power generally in this so-called fourth branch of government by the Administrative Procedure Act, part of which called for limited separation of prosecuting from judicial functions of administrative bodies.<sup>15</sup> Congress in the Taft-Hartley Act seems clearly to have intended further and more basic changes in the nature of the Board, although whether they used adequate language for the purpose is another question. Board discretion in procedural matters was curbed. Section 10(c) requires that a finding of an unfair labor practice must be based on the "preponderance of evidence."<sup>16</sup> By section 10(b) "any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United

<sup>12</sup> *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 65 S.Ct. 982 (1945), allowing the Board to infer from proven facts such conclusions as might be based on the facts proven. Only limited review by the courts was available. *N.L.R.B. v. Standard Oil Co.*, (C.C.A. 2d, 1943) 138 F. (2d) 885; *N.L.R.B. v. Indiana and Michigan Electric Co.*, 318 U.S. 9, 63 S.Ct. 394 (1943).

<sup>13</sup> *Johns-Manville Sales Corp.*, 61 N.L.R.B. 1 (1945). Scope of court review was also limited in this area. *Consolidated Edison v. N.L.R.B.*, 305 U.S. 197, 59 S.Ct. 206 (1938); *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 67 S.Ct. 789 (1947); *Jacobsen v. N.L.R.B.*, (C.C.A. 3d, 1941) 120 F. (2d) 96; *N.L.R.B. v. Federal Engineering Co.*, (C.C.A. 6th, 1946) 153 F. (2d) 233.

<sup>14</sup> "But there are difficult questions of policy involved in these cases, which, together with changes in Board membership, account for the contradictory views that characterized their history in the Board. . . . We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute." *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 at 492, 67 S.Ct. 789 (1947).

<sup>15</sup> 60 Stat. L. 237, 5 U.S.C. (1946) §§1001-1011. Section 5(c) provides that "no officer, employee or agent engaged in the performance of investigating or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings."

<sup>16</sup> "The conference agreement provides that the Board shall act only on the 'preponderance' of the testimony—that is to say, on the weight of the credible evidence. . . . [The Board's decision] should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurably increased respect for decisions of the Board should result from this provision." Conf. Rep. 510 on S. 1126, 80th Cong., 1st sess. (1947) p. 53.

States."<sup>17</sup> Section 4(a) abolished the Board's review division and curtailed its supervision of trial examiners' reports.<sup>18</sup> An extremely important innovation was the establishment of the office of General Counsel. The original House bill called for an administrator who would act as an independent agency of the government, and whose function would be to investigate and prosecute unfair labor practice charges, independent of influence and control of the Board.<sup>19</sup> In section 3(d) of the compromise bill these functions were given to the General Counsel,<sup>20</sup> which is evidence of an intent to limit the Board to quasi-judicial functions.

Other provisions in the act indicate that Congress probably intended to remove all discretion from the Board as to the prosecution of cases and vest such discretionary power in the General Counsel. The Administrator under the House bill was to have little latitude in determining whether to prosecute unfair labor practice charges, even if he found the case "inconsequential";<sup>21</sup> this concept was carried into the compromise bill.<sup>22</sup> The minority members of the Senate recognized and attacked this as a limitation on Board discretion,<sup>23</sup> and President Truman attacked the innovation in his veto message.<sup>24</sup> Nor would the

<sup>17</sup> "If the Board is required, so far as practicable, to act only on legal evidence, the substitution, for example, of assumed 'expertness' for evidence will no longer be possible." Conf. Rep. 510 on S. 1126, 80th Cong., 1st sess. (1947) p. 53.

<sup>18</sup> "The combination of the provisions dealing with the authority of the General Counsel, the provision abolishing the Board's review division, and the provision relating to the trial examiners and their reports effectively limits the Board to the performance of quasi-judicial functions." Conf. Rep. 510 on S. 1126, 80th Cong., 1st sess. (1947) p. 37.

<sup>19</sup> H.R. 3020, 80th Cong., 1st sess. (1947); H. Rep. 245 on H.R. 3020, 80th Cong., 1st sess. (1947).

<sup>20</sup> "[H.R. 3020] contemplated that, in unfair practice cases, the Administrator would investigate charges, issue complaints, and prosecute cases. . . . [T]he conference agreement contemplates that these duties will be performed under the exclusive and independent direction of the General Counsel." Conf. Rep. 510 on S. 1126, 80th Cong., 1st sess. (1947) p. 53.

<sup>21</sup> "It is only when the facts the complainant alleges do not constitute an unfair practice, or when the the complainant clearly cannot prove his claim, that the Administrator has any discretion not to issue a complaint. It is to be expected that, if a case is weak or is inconsequential, he may attempt to persuade the charging party to drop the case, or he may, without acting as a mediator, conciliator, or arbitrator, suggest that the parties try to settle the dispute between themselves." H. Rep. 245 on H.R. 3020, 80th Cong., 1st sess. (1947) p. 40.

<sup>22</sup> "Under this bill the counsel will have the right to make the decision as between employer and employee; but his decision will be subject to the judicial decision of the Board, and, above the Board, the courts. . . ." Senator Taft, 93 CONG. REC. 7538 (1947).

<sup>23</sup> See for example, 93 CONG. REC. 7441 (1947), where Senator Morse stated that the General Counsel's power "is independent power, sole power, to determine what complaints shall issue and what shall not." See also Senator O'Mahoney's indictment of the "labor czar," 93 CONG. REC. 7524 (1947).

<sup>24</sup> "It would invite conflict between the National Labor Relations Board and its general counsel, since the general counsel would decide, without any right of appeal by employers and employees, whether charges were to be heard by the Board, and whether orders of the

language of the act as passed seem to warrant the exercise of discretionary power by the Board. By section 10(a) the Board is "empowered" to prevent unfair labor practices. Under section 10(c), "if upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action . . . as will effectuate the policies of this act." The final act certainly did not as categorically limit Board discretion by its terms as did the original House bill. But from pre-enactment materials and the quoted provisions of the act, enough may be gleaned to indicate that the Board was no longer to have unlimited freedom to deal summarily with cases as it saw fit.<sup>25</sup>

## II

### *Political Implications of the Board's Activities*

Upon an examination of cases, one cannot avoid noting the difference in treatment of the amended act by the courts and by the Board. In dealing with the test of coverage under section 10(a), "affecting commerce," lower federal courts have given the act broad coverage over local industries, which were not considered to be covered under the old act.<sup>26</sup> Courts have readily granted injunctions against secondary boycotts in local industries affecting commerce when the Board has requested such relief.<sup>27</sup> Some federal courts in dealing with the changed provisions regarding evidence have held that scope of review has there-

Board were to be referred to the courts for enforcement. By virtue of this unlimited authority, a single administrative official might usurp the Board's responsibility for establishing policy under the Act." 93 CONG. REC. 7587 (1947).

<sup>25</sup> In retaliation against Reorganization Plan Number 12, Senator Taft submitted S. 3339, 81st Cong., 2d sess. (1950), which would establish an independent administrator and define the duties of the N.L.R.B.

<sup>26</sup> Slater v. Denver Trades Council, (10th Cir. 1949) 175 F. (2d) 608; Shore v. Building and Construction Trades Council, (3d Cir. 1949) 173 F. (2d) 678, holding that under the authority of Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82 (1942) the act has application to local cases where the activities charged would if multiplied into a general practice exert a disruptive influence on interstate commerce calling for preventive regulation.

<sup>27</sup> Section 10(1) authorizes the Board to seek temporary restraining orders against violations charged under 8(b)(4)(A). Slater v. Denver Trades Council, (10th Cir. 1949) 175 F. (2d) 608; Shore v. Building and Construction Trades Council, (3d Cir. 1949) 173 F. (2d) 678; Cranefield v. Bricklayers Union, (D.C. Mich. 1948) 78 F. Supp. 611. United Brotherhood of Carpenters and Joiners v. Sperry, (10th Cir. 1948) 170 F. (2d) 863, held that a secondary boycott was a prohibited activity which in local building trades activities could be regulated as affecting commerce.

by been increased.<sup>28</sup> The courts in general have applied the act as written.

The Board at first deliberately strived to reach every conceivable practice outlawed and new industry covered by the amended act, its decisions after a time becoming harsher than those of the courts. Perhaps one of cynical outlook might conclude that there is a noticeable correlation between the increasing harshness of Board decisions and increased Administration efforts to do away with the Taft-Hartley Act. During the summer of 1949 the Thomas-Lesinski (Administration) bill, which in practical effect restored the original Wagner Act, was replaced by the Taft substitute bill,<sup>29</sup> which was passed by the Senate on June 30, 1949. Since then, by coincidence or design, the Board appears to have pursued a course which apparently has vitiated the force of the act in many respects. The General Counsel has resisted this change in attitude, in furtherance of which policy dismissals by the Board play a useful role. The following lines of cases serve to indicate this change in approach to enforcement of the act.

The Board has severely limited the scope of certain union unfair practices under section 8(b). In the area of secondary picketing, forbidden under 8(b)(4)(A), the Board first held in *Matter of Sealright Pacific, Ltd.*<sup>30</sup> that it was secondary picketing where striking employees followed their employer's trucks to their destination and picketed them there. *Matter of Pure Oil*,<sup>31</sup> however, involved a picket line around the primary employer's dock, which employees of a second employer also using the dock refused to cross. The Board held it was primary action because confined to the primary employer's premises. A majority considered "hot cargo" letters not an inducement to concerted action under 8(b)(4)(A). The *Sealright* case was narrowly limited in *Matter of Schultz Refrigerated Service*<sup>32</sup> by a holding that where strikers

<sup>28</sup> The Supreme Court in *N.L.R.B. v. Pittsburgh Steamship Co.*, 337 U.S. 656, 69 S.Ct. 1283 (1949) remanded to the Court of Appeals to determine whether the scope of review over Board findings had been enlarged by the new evidence requirements of the act. In *Pittsburgh Steamship Co. v. N.L.R.B.*, (6th Cir. 1950) 180 F. (2d) 731, the court held that section 10(e) of the act meant in light of section 10(b), (c) and (f) a broadened scope of review, and indicated that even if this were not so, section 7(3) of the Administrative Procedure Act would result in broader review powers. Opposed are *N.L.R.B. v. Minnesota Mining and Manufacturing Co.*, (8th Cir. 1950) 179 F. (2d) 323; *N.L.R.B. v. Booker*, (5th Cir. 1950) 180 F. (2d) 727; and *N.L.R.B. v. Universal Camera Corp.*, (2d Cir. 1950) 179 F. (2d) 749, where Hand, J. indicated that he believed section 10(e) merely made definite what had been implied under the old act. The Supreme Court will without doubt resolve this conflict by rehearing the Pittsburgh Steamship case.

<sup>29</sup> Labor-Management Relations Act of 1949, S. 249, 81st Cong., 1st sess. (1949).

<sup>30</sup> 82 N.L.R.B. No. 36 (1949).

<sup>31</sup> 84 N.L.R.B. No. 38 (1949).

<sup>32</sup> 87 N.L.R.B. No. 82 (1949).

followed the struck employer's trucks to their destination it was "primary picketing" because the employer did business everywhere his trucks went, even though the fact situation there and in the *Sealright* case were similar. The result is certainly a restricted application compared to the broad coverage which the language of 8(b)(4)(A) and its legislative history<sup>33</sup> might warrant.

A similar pattern has appeared in Board decisions on the use of "unfair lists" in the building trades industry. *Matter of United Brotherhood of Carpenters and Joiners*<sup>34</sup> had stated that to place an employer on an "unfair list" was an inducement for other employees and employers to cease handling the goods or using the services of the primary employer, and was therefore an unfair labor practice under section 8(b)(4)(A). But in the *Grauman Company* case<sup>35</sup> the Board held that the use of such an "unfair list," "whatever its psychological impact," does not induce employees of other employers to engage in a work stoppage within the meaning of 8(b)(4)(A). The opinion went on to state that even if such stoppages occurred, there was no intent evidenced to produce the specified result. But it is difficult to see for what other purpose the list was circulated in the construction industry where no retail patronage by union members is involved.

The Board recognized in numerous cases after 1947 that the amended act was designed to reach the construction industry, in which the secondary boycott and closed shop have been prevalent.<sup>36</sup> In the earlier cases the Board did not claim the power to dismiss complaints of unfair labor practices on policy grounds because the business was local, or for any other reason,<sup>37</sup> although it still claimed the right to exercise policy

<sup>33</sup> See H. Conf. Rep. 510 on S. 1126, 80th Cong., 1st sess. (1947) pp. 42-46; H. Rep. 245 on H.R. 3020, 80th Cong., 1st sess. (1947) pp. 23-24, 44.

<sup>34</sup> 81 N.L.R.B. No. 127 (1949). See also *Osterink Construction Co.*, 82 N.L.R.B. No. 27 (1949).

<sup>35</sup> 87 N.L.R.B. No. 136 (1949). See also *Pure Oil*, 84 N.L.R.B. No. 38 (1949) for treatment of "hot cargo" letters.

<sup>36</sup> J. H. Patterson, 79 N.L.R.B. 355 (1948). "Moreover, the legislative history of the 1947 amendments is replete with evidence that, especially where secondary boycotts were concerned, Congress intended the Board to exercise its plenary power to protect small and relatively local enterprises against the impact of union boycotts. . . ." *United Brotherhood of Carpenters and Joiners, Local 74*, 80 N.L.R.B. No. 91 (1948). The Board adopted the same rule as the Court of Appeals in *Shore v. Council*, (3d Cir. 1949) 173 F. (2d) 678, in *United Brotherhood of Carpenters and Joiners*, 81 N.L.R.B. No. 127 (1949).

<sup>37</sup> "The General Counsel having seen fit to prosecute this case, I believe that the Board is under a duty to complete the task by asserting jurisdiction. If I thought the exercise of Board discretion permissible, I would, consistently with the view expressed in representation cases, refrain from applying the federal power to so local and so diminutive a controversy." Chairman Herzog concurring in *United Brotherhood of Carpenters and Joiners*, 81 N.L.R.B. No. 127 (1949).

discretion in representation disputes in the building industry.<sup>38</sup> The difference may be attributed to the method of initiation of Board action—unfair labor practice charges are initiated by the General Counsel, representation disputes by action of the parties. But in the latter part of 1949 the Board began its drive to assert policy discretion, both in the construction industry<sup>39</sup> and in local and service businesses.<sup>40</sup> It may well be that the Board is concerned only with case load, or is merely asserting an understandable combativeness against the claims of the General Counsel. But it would also appear that such policy dismissals form handy precedents for avoiding cases involving industries where union unfair labor practices are strongly entrenched, although it is only fair to indicate that most such dismissals to date have been of charges of employer unfair labor practices under the several provisions of section 8(a). Policy discretion would also be useful in avoiding such cases as are still covered by the act under the Board's earlier restrictive interpretation of the provisions of section 8(b)(4)(A).

### III

#### *Conclusions*

From the legislative history of the act it would appear that Congress intended by the separation of functions and by the changes in Board rules of evidence and procedure that the Board should function primarily as a quasi-judicial agency. Courts themselves generally view disposition of cases on grounds of policy as extraordinary, particularly when jurisdiction is conferred by statute.<sup>41</sup> However, extraordinary remedies are ordinarily not granted as a matter of course, and the whole area of equitable remedies is considered discretionary.<sup>42</sup> The applica-

<sup>38</sup> In *Liddon-White Truck Co.*, 76 N.L.R.B. 1181 (1948) the majority found the "policies of the act can best be effectuated if the organizational activities . . . herein involved are conducted within the framework of the act." Chairman Herzog, dissenting in *J. H. Patterson*, 79 N.L.R.B. 355 (1948), stated that "we do not share our colleagues' desire to exercise the jurisdiction which appears sustainable as a pure matter of law. The fact that this Board may do something does not mean it must or should."

<sup>39</sup> *Petredis & Fryer*, 85 N.L.R.B. No. 45 (1949); *Valley Concrete Co.*, 88 N.L.R.B. No. 116 (1950); *Row Construction Co.*, 88 N.L.R.B. No. 132 (1950).

<sup>40</sup> *Hom-Ond Food Stores, Inc.*, 77 N.L.R.B. 647 (1948); *Haleston Drug Stores, Inc.*, 82 N.L.R.B. No. 148 (1949); *Haleston Drug Stores, Inc.*, 86 N.L.R.B. No. 125 (1949); *A-1 Photo Supply*, 83 N.L.R.B. No. 86 (1949); *Indianapolis Cleaners and Launderers Club*, 85 N.L.R.B. No. 202 (1949); *Asax Co.*, 85 N.L.R.B. No. 199 (1949); *Millage*, 87 N.L.R.B. No. 42 (1949); *Childs Co.*, 88 N.L.R.B. No. 139 (1950).

<sup>41</sup> *Meredith v. Winter Haven*, 320 U.S. 228 at 234, 64 S.Ct. 7 (1943) states that dismissal on policy grounds where diversity jurisdiction is properly invoked is possible only where there is "some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise."

<sup>42</sup> See *Meredith v. Winter Haven*, 320 U.S. 228 at 234, 64 S.Ct. 7 (1943).

tion of the de minimis doctrine is in practical effect a policy matter. Exercise of the de minimis principle by the Board was approved under the Wagner Act,<sup>43</sup> and would hardly be denied even if the Board were considered strictly judicial. But the Board is apparently not using de minimis in its policy dismissals.<sup>44</sup> Nor would it seem that there is any room for equitable-type discretion except as granted in 10(c) as to remedies. One might well analogize diversity jurisdiction of federal courts and jurisdictions over businesses affecting interstate commerce as given to the Board, and argue for the limited discretion recognized in the *Milford* case.

However, that the Board has repudiated any such limitations resting either in the act or in certain of its earlier decisions is shown by the Board's reaffirmance of its position in the recent *Haleston Drugs* case.<sup>45</sup> The premise that Board discretion is inherent in the act would not seem to be supported by the literal language of the act; the Board's contention in the *A-1 Photo Supply* case<sup>46</sup> that there was no Congressional intent to "convert prosecutor into judge" seems unsupported by legislative history of the act as amended. The problem has not been raised before the courts by the General Counsel,<sup>47</sup> but Mr. Denham has urged employers to contest Board policy dismissals.<sup>48</sup> A recent federal case involving section 10(k) of the act, which provides for Board hearings in jurisdictional disputes under 8(b)(4)(D), seems to indicate that the Board could not decline jurisdiction for policy reasons.<sup>49</sup> While not in itself a strong precedent for possible interpretation

<sup>43</sup> N.L.R.B. v. Fainblatt, 306 U.S. 601, 59 S.Ct. 668 (1939).

<sup>44</sup> Board jurisdiction was upheld in cases where percentage of interstate shipments was small in comparison with total shipments of the business involved. For example, see N.L.R.B. v. Green, Inc., (C.C.A. 4th, 1942) 125 F. (2d) 485 (less than 1%); J. L. Brandeis & Sons v. N.L.R.B., (C.C.A. 8th, 1944) 142 F. (2d) 977 (.0024%). Dollar volume is apparently no criterion for the Board. In New York Steam Laundry, 80 N.L.R.B. 1597 (1949) the Board took jurisdiction over a business whose purchases in interstate commerce totaled only \$97,000, and 24% of whose gross of \$439,000 came from services to interstate carriers. Indianapolis Cleaners and Launderers Club, 85 N.L.R.B. No. 202 (1949) involved a policy dismissal where 7% of a gross of more than \$11 million was gained directly in interstate commerce, much of the remaining being derived from businesses themselves affecting interstate commerce.

<sup>45</sup> 86 N.L.R.B. No. 125 (1949). The Board seems to consider itself purely an administrative body, with no limitations on its discretion, either inherently or through Taft-Hartley.

<sup>46</sup> 83 N.L.R.B. No. 86 (1949).

<sup>47</sup> Section 10(f) provides that "any person aggrieved" by a Board order may appeal to a court of appeals for review. There may be some question as to whether the General Counsel comes within the terms of the act, even though in ordinary court procedure a prosecuting or district attorney may appeal adverse rulings.

<sup>48</sup> In his New York speech, *supra*, note 3.

<sup>49</sup> The lower court decision, *Parsons v. Herzog*, (D.C. D.C. 1949) 85 F. Supp. 19, held that a hearing was mandatory regardless of case load or other remedies available under the act. The Court of Appeals reversed in part in *Herzog v. Parsons*, (App. D.C. 1950) 181 F. (2d)

of sections 10(a) and 10(c), the case may indicate that the courts will not favor capricious treatment of situations which the act was intended to cover. It is not the Board's function to change the law to conform with its own idea of proper policy and procedure.<sup>50</sup> One cannot but wonder if the field of labor law has not advanced to the point where a regular tribunal presided over by judges of certain tenure is in order.<sup>51</sup> The Board's decisions, which seem to be subject to every change in membership, and to every change in political climate, are a strong argument for tribunal which would work out a rational scope of coverage and adhere to it.

*B. J. George, Jr.*

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781, holding that the Board could conduct preliminary investigations to determine whether a cause of action was sustained by the evidence, and did not have to hear any case where the irrational result of a hearing on an insufficient cause would result. The court did not consider the difference in language between 10(a) and 10(k) important in considering this point.

<sup>50</sup> The Taft substitute bill, S. 249, 81st Cong., 1st sess. (1949) would have abolished the office of General Counsel and placed the Board subject to the provisions of the Administrative Procedure Act. But when the President attempted the same thing indirectly by his administrative reorganization plan, Senator Taft in S. 3339, 81st Cong., 2d sess. (1950) reverted to the old House plan.

<sup>51</sup> Under Article III of the Constitution, Congress may establish such lesser courts as it feels necessary.