Michigan Law Review

Volume 41 | Issue 5

1943

ADMINISTRATIVE LAW - SUBPOENA POWER IN ADMINISTRATIVE AGENCIES

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RECENT DECISIONS

This section is divided into two parts: notes and abstracts. The abstracts consist merely of summaries of the facts and holdings of recent cases and are distinguished from the notes by the absence of discussion.

NOTES

ADMINISTRATIVE LAW — SUBPOENA POWER IN ADMINISTRATIVE AGENCIES — The Secretary of Labor, acting under the authority vested in her by the Walsh-Healey Act,[1] instituted an administrative proceeding against the petitioner charging violations of the minimum and overtime payment provisions of a government contract. Upon the petitioner's refusal to furnish certain records believed to be essential in determining jurisdiction, the secretary issued a subpoena duces tecum for their production. Shortly thereafter, this suit was begun in the district court to obtain an enforcement order directing the petitioner to obey the subpoena. The petitioner, contending that the secretary was without jurisdiction to investigate the plants and employees involved, successfully resisted the suit in the district court.[2] The secretary appealed to the circuit court of appeals, where the decision was reversed.[3] On certiorari to the United States Supreme Court, *held* (two justices dissenting), Congress vested in the Secretary of Labor the right and duty to determine the coverage of the act and the plants and employees included within her jurisdiction. Therefore, it was the duty of the district court to enforce the subpoena on the pleadings without taking any testimony whatsoever on the issue of jurisdiction. *Endicott Johnson Corp. v. Perkins*, (U.S. 1943) 63 S. Ct. 339.

An increasing liberality in the judicial attitude towards administrative agencies is nowhere better exemplified than in the gradual relaxation of the safeguards formerly placed around the subpoena power.[4] While the courts have never countenanced administrative enforcement of the subpoena by contempt proceeding,[5] they have approved a legislative formula[6] whereby the agency is authorized to invoke the aid of the federal courts to require obedience to its

[1] 49 Stat. L. 2036 (1936), 41 U.S.C. (1940), §§ 35-45.

[2] Perkins v. Endicott Johnson Corp., (D. C. N. Y. 1941) 37 F. Supp. 604, 40 F. Supp. 254.

[3] Perkins v. Endicott Johnson Corp., (C. C. A. 2nd, 1942) 128 F. (2d) 208, discussed in 52 YALE L. J. 175 (1942).

[4] The word "subpoena" is seldom used in its technical sense in regard to administrative agencies. In this field, it is little more than a formal demand, since the tribunal is without power to penalize for disobedience. See In re Spencer, McA. & M. (11 D.C.) 433 (1883).

[5] Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336 (1924); Smith v. Interstate Commerce Commission, 245 U. S. 33, 38 S. Ct. 30 (1917); Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125 (1894); United States v. Delaware & H. Co., 213 U. S. 366, 29 S. Ct. 527 (1909); United States v. Jin Fuey Moy, 241 U. S. 394, 36 S. Ct. 658 (1916).

[6] This formula consists of three steps: (1) investing the tribunal with power to issue subpoenas; (2) authorizing it to resort to the courts for an enforcement order; (3) authorizing the courts to compel obedience through contempt proceedings. Lilien-

demands. This formula, now used extensively in congressional legislation,[7] was at one time declared unconstitutional in lower federal courts [8] when first incorporated into the Interstate Commerce Act of 1887.[9] Seven years later, however, in *Interstate Commerce Commission v. Brimson*,[10] the Supreme Court overruled earlier decisions and approved the provisions. At the same time, the Court, recognizing the drastic nature of the subpoena power [11] and its possible abuse, insisted that it be kept within well-defined channels.[12] It is implicit and basic in the decisions of the earlier period that, upon application to the federal courts for enforcement of the subpoena, a full hearing would be allowed upon any defense interposed by the recalcitrant party. [13] If the defense were that the proposed examination was not of the kind authorized,[14] or that it threatened to violate the privilege of the witness against self-incrimination,[15] or that the subpoena was issued by a person without authority,[16] or was unduly vague or oppressive,[17] then the courts would exercise their judicial discretion in granting

thal, "The Power of Government Agencies to Compel Testimony," 39 HARV. L. REV. 694 (1926).

[7] Walsh-Healey Act, 49 Stat. L. 2038 (1936), 41 U. S. C. (1940), § 39; Federal Trade Commission Act, 38 Stat. L. 722 (1914), 15 U. S. C. (1940), § 49; Act to Regulate Commerce, 24 Stat. L. 383 (1887), 49 U. S. C. (1940), § 12 (2); Act to Investigate Government-aided Railroads, 24 Stat. L. 488 at 491 (1887); Grain-futures Act, 42 Stat. L. 1002 (1922), 7 U. S. C. (1940), § 15.

[8] In re Pacific Railway Commission, (C. C. Cal. 1887) 32 F. 241; In re Interstate Commerce Commission, (C. C. Ill. 1892) 53 F. 476, reversed sub nom. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125 (1894).

[9] Act of Feb. 4, 1887, 24 Stat. L. 379.

[10] 154 U. S. 447, 14 S. Ct. 1125 (1894).

[11] The issuance of a subpoena duces tecum must comply with the provisions of the Fourth Amendment against unreasonable searches and seizures. Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524 (1886). See Fraenkel, "Concerning Searches and Seizures," 34 HARV. L. REV. 361 (1921).

[12] Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524 (1886); Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370 (1906); Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336 (1924); Cudahy Packing Co. of Louisiana v. Holland, 315 U. S. 357, 62 S. Ct. 651 (1942); Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 S. Ct. 115 (1908); Ellis v. Interstate Commerce Commission, 237 U. S. 434, 35 S. Ct. 645 (1915); United States v. Basic Products Co., (D. C. Pa. 1919) 260 F. 472.

[13] Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125 (1894); Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 S. Ct. 115 (1908); Gonzales v. Williams, 192 U. S. 1, 24 S. Ct. 177 (1904); Darger v. Hill, (C. C. A. 9th, 1935) 76 F. (2d) 198.

[14] Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 S. Ct. 115 (1908).

[15] Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524 (1886).

[16] Cudahy Packing Co. of Louisiana v. Holland, 315 U. S. 357, 62 S. Ct. 651 (1942).

[17] Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370 (1906); Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336 (1924).

or withholding an enforcement order. Considerable difficulty arises, however, in case the evidence sought by the subpoena is necessary before the administrator can intelligently determine whether or not his jurisdiction attaches. In such cases the defense denies that the administrator has jurisdiction to pursue the inquiry. This is the question of the principal case. By the terms of the Walsh-Healey Act, this determination of jurisdiction, or "coverage," is vested exclusively in the Secretary of Labor.[18] If the court were to decide the issue of coverage, it would deprive the secretary of one of her important functions. On the other hand, a refusal to hear the defense and determine the issue may easily result in gross injustice to the victims of arbitrary administrative investigations. This issue is a puzzling one and it is not surprising, therefore, to find a sharp conflict among the courts in attempting to solve this type of problem.[19] Rather, it is indicative of the compelling arguments which support either position. The majority in the principal case emphasizes the impropriety of an unwarranted intrusion by the judicial branch of the government into the affairs entrusted to administrative agencies. In a vigorous dissenting opinion, however, Justice Murphy points out that while the agencies may be temporarily handicapped in some instances by frivolous objections, the public will be securely protected against vexatious proceedings if we allow complete judicial determination of jurisdictional questions. Although it is not expressly stated in the decision, it seems reasonable to conclude that, when a lack of jurisdiction is evident upon the face of the pleadings, the courts may validly refuse to issue an enforcement order. Considerations of policy and justice require that the courts be more than mere "rubber stamps" of the agencies in enforcing administrative subpoenas.[20]

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[18] "The matter which the Secretary was investigating and was authorized to investigate was an alleged violation of this Act and these contracts. Her scope would include determining what employees these contracts and the Act covered." Principal case, 63 S. Ct. 339 at 343. See Walsh-Healey Act, §§ 1 (b), 1 (c), 2, 3, 4, 5, 6, 44 Stat. L. 2036 (1936), 41 U. S. C. (1940), §§ 35-40. Also RULINGS AND INTERPRETATIONS UNDER THE WALSH-HEALEY PUBLIC CONTRACTS ACT, No. 1 (1937).

[19] In accord with the principal case: Cudahy Packing Co. v. Fleming, (C. C.A. 8th, 1941) 122 F. (2d) 1005; President of the United States v. Skeen, (C. C.A. 5th, 1941) 118 F. (2d) 58; National Labor Relations Board v. Barrett Co., (C. C. A. 7th, 1941) 120 F. (2d) 583; Gradam v. Federal Tender Board, (C. C. A. 5th, 1941), 118 F. (2d) 8; In re Securities and Exchange Commission, (C. C. A. 2d, 1936), 84 F. (2d) 316. *Contra:* Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160, 47 S. Ct. 553 (1927); Dupont de Nemours & Co. v. Boland, (C. C.A. 2d, 1936), 85 F. (2d) 12; Bradley Lumber Co. v. National Labor Relations Board, (C. C. A. 5th, 1936) 84 F. (2d) 97; Securities and Exchange Commission v. Tung Corp., (D. C. Ill. 1940) 32 F. Supp. 371; Federal Trade Commission v. Smith, (D. C. N. Y. 1929) 34 F. (2d) 323; Goodyear Tire & Rubber Co. v. National Labor Relations Board, (C. C. A. 6th, 1941) 122 F. (2d) 450; General Tobacco & Grocery Co. v. Fleming, (C. C. A. 6th, 1942) 125 F. (2d) 596. Compare Myers v. Bethlehem Shipbuilding Corp. 303 U. S. 41, 58 S. Ct. 459 (1938).

[20] The principal case is also noted in 11 GEO. WASH. L. REV. 377 (1943).