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Labor Law--The Permissible Scope of the National Labor Relations Board's Rule Against Relitigation

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NOTES

LABOR LAW—The Permissible Scope of the National Labor Relations Board's Rule Against Relitigation

Under section 9 of the National Labor Relations Act (NLRA or Act),[1] the National Labor Relations Board (NLRB or Board) is charged with the responsibility of determining what group of employees constitutes an appropriate unit for purposes of collective bargaining with an employer. While the Board itself originally handled representation petitions and determined appropriate bargaining units, Congress in 1959 amended the NLRA and authorized the Board to delegate its section 9 powers to the regional directors in order to expedite NLRB operations.[2] Pursuant to this authorization, and in accordance with its rule-making authority under section 6 of the Act,[3] the Board issued a series of rules and regulations to govern the regional directors in the exercise of their delegated responsibilities.[4] In order to effectuate the expeditious resolution of representation issues, rule 102.67(f) established what has become known as the Board's "rule against relitigation."[5] Through application of this rule, certain issues that are decided by regional directors in representation proceedings under section 9—and that are subsequently affirmed either by the Board's denial of a request for review[6] or by the failure of the aggrieved party to seek such review—are foreclosed from Board consideration in subsequent related unfair labor practice proceedings conducted under section 10 of the Act.[7] The effect of this

1. 29 U.S.C. § 159(b) (1964).

2. The Labor-Management Reporting and Disclosure Act of 1959 [hereinafter LMRDA], Pub. L. No. 86-257, § 701(b), 73 Stat. 542, amended § 3(b) of the National Labor Relations Act [hereinafter NLRA], codified in 29 U.S.C. § 153(b) (1964), to provide in part:

> . . . The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. . . .

3. 29 U.S.C. § 156 (1964).

4. 29 C.F.R. §§ 102.60-.72 (1970).

5. 29 C.F.R. § 102.67(f) (1970) provides:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

6. 29 C.F.R. § 101.21(d) (1970).

7. NLRA § 10, 29 U.S.C. § 160 (1964), empowers the National Labor Relations Board

rule is to relieve the Board of its statutory function of determining the existence or absence of unfair labor practices.[8] This res judicata feature of the rule against relitigation has produced a conflict in recent decisions by the Courts of Appeals for the First and Second Circuits in *NLRB v. Magnesium Casting Company*[9] and *Pepsi-Cola Buffalo Bottling Company v. NLRB*.[10] These cases reflect a fundamental perceptual difference concerning the congressional purpose behind

(NLRB or Board) to determine and remedy unfair labor practices, which are defined in § 8 of the NLRA, 29 U.S.C. § 158 (1964). The proscribed activity most germane to this Note involves an employer's refusal to bargain with a union that has been certified as the representative of a group of employees for purposes of collective bargaining after winning an election that was directed by an NLRB regional director. 29 U.S.C. § 158(a)(5) (1964). *See* text accompanying notes 12-23 *infra*. The problem dealt with in this Note results from the manner in which the rule against relitigation has been generally applied. Although the rule could arguably be applied to collateral-estoppel situations—*i.e.*, cases in which the unfair labor practice is not directly related to the prior § 9 determination—the actual operational parameters of the rule are significantly narrower than the broad language of rule 102.67(f) might indicate. Court and NLRB invocations of the rule have heretofore confined its importance to res judicata situations, where the refusals to bargain have arisen as a direct result of prior representation proceedings. For example, in NLRB v. Union Bros., Inc., 403 F.2d 883, 887 n.8 (4th Cir. 1968), the court noted: "Application of the board's rule, § 102.67(f) [29 C.F.R. § 102.67(f) (1970)], prohibiting relitigation of issues decided in representation proceedings has not been sanctioned when an unfair labor practice, other than a refusal to bargain, is charged." *See also* Leonard Niederriter Co., 130 N.L.R.B. 113, 115 (1961), in which the Board noted that findings in an earlier representation proceeding did not conclusively settle a status question in a § 10 case when the later unfair labor practice dispute stemmed from something other than a refusal to bargain based upon disagreement with the prior § 9 decision; and Amalgamated Clothing Workers v. NLRB, 365 F.2d 898, 903-05 (D.C. Cir. 1966), discussed in text accompanying notes 105-07 *infra*.

8. NLRA § 10(c), 29 U.S.C. § 160(c) (1964), provides in part:

> . . . 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 state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . . . If . . . the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . .

See also 29 C.F.R. §§ 102.9-.59 (1970).

9. 427 F.2d 114 (1st Cir.), *cert. granted*, 39 U.S.L.W. 3146 (U.S. Oct. 12, 1970) (No. 370).

10. 409 F.2d 676 (2d Cir.), *cert. denied*, 396 U.S. 904 (1969).

For an earlier decision dealing with the controversial policies behind the rule, see Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 158 (1941), discussed in note 108 *infra*.

A major source of dissatisfaction with the rule has been the lack of a right to judicial review of a regional director's decision unless a petition is filed pursuant to §§ 9(d) and 10(e) of the NLRA, 29 U.S.C. §§ 159(d), 160(e) (1964), for review or enforcement of a bargaining order based on a finding of a § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964), violation arising from a refusal to bargain by the aggrieved employer. *See* Boire v. Greyhound Corp., 376 U.S. 473 (1964); American Fedn. of Labor v. NLRB, 308 U.S. 401 (1940). The § 8(a)(5) route has become the accepted method of challenging such representation determinations. *See, e.g.*, Boire v. Greyhound Corp., 376 U.S. 473 (1964); NLRB v. Magnesium Casting Co., 427 F.2d 114 (1st Cir.), *cert. granted*, 39 U.S.L.W. 3146 (U.S. Oct. 12, 1970) (No. 370).

the 1959 delegation authorization, the use of the rule against relitigation to effectuate that purpose, and the propriety of the rule's effect on unfair labor practice proceedings under section 10.[11]

In *Pepsi*, a three-judge panel of the Second Circuit Court of Appeals announced a restrictive view of the permissible use of the rule against relitigation.[12] The problem in *Pepsi* involved a union attempt to gain recognition as the bargaining representative for a bottling company's employees.[13] In order to deliver its products throughout the market region, the company used a system of fifty-four "distributors"—individuals who owned or leased trucks and carried the soft drinks to various retail stores.[14] The union's petition for certification included these individuals in the proposed bargaining unit. Pepsi-Cola challenged the petition on the ground that the distributors were independent contractors and consequently ineligible for inclusion in the employee unit.[15] Following a representation hearing, the acting regional director decided that the fifty-four distributors were employees of the company for purposes of the NLRA, and ordered a representation election covering the unit that included the challenged individuals.[16] Pepsi-Cola disputed the regional director's decision and petitioned for NLRB review.[17] The Board dismissed the petition on the ground that the issues raised were not sufficiently substantial to warrant review.[18] After the union won the election and was certified by the Board as the exclusive bargaining representative for Pepsi-Cola's employees, the company continued to contest the decisions on the status of its distributors and sought reconsideration of that issue by refusing to bargain with the union. As anticipated, the employer was charged with an unfair labor practice consisting of an unlawful refusal to bargain in violation of

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11. 29 U.S.C. § 160 (1964). *See* note 7 *supra.*

12. 409 F.2d 676 (2d Cir. 1969).

13. 409 F.2d at 677. The union involved was District 50, United Mine Workers of America.

14. 409 F.2d at 677.

15. 409 F.2d at 678. "Independent contractors" are not included within the definition of "employee" for purposes of the NLRA. NLRA § 2(3), 29 U.S.C. § 152(3) (1964).

16. 409 F.2d at 678.

17. 409 F.2d at 678. Requirements for the granting of review of a regional director's decision are defined in Board rules 102.67(b), (c), and (d), 29 C.F.R. §§ 102.67(b), (c), (d) (1970). Subsection (b) requires that the request be filed within ten days after the service of the regional director's decision. Subsection (c) provides that the Board will grant review only when one or more of the following compelling reasons exist: (1) a *substantial question* of law or policy raised by the absence of or departure from official Board precedent; (2) a *clearly erroneous* decision on the facts; (3) misconduct of the hearing resulting in *prejudicial error*; (4) *compelling reasons* for reconsideration of a Board rule or policy. Subsection (d) requires that the request contain summaries of evidence and argument sufficient to allow the Board to make a ruling without actual recourse to the record.

18. 409 F.2d at 678.

section 8(a)(5) of the Act.[19] In responding to the complaint, the company conceded the refusal to bargain, but claimed that it was entitled to further hearings on the inclusion of the distributors in the bargaining unit. In the ensuing unfair labor practice hearing, the General Counsel for the NLRB moved for summary judgment against Pepsi-Cola.[20] Citing the rule against relitigation, he argued that the regional director's decision on the issue of distributors' status was final, that the Board's previous denial of review constituted affirmance of the decision, and that the regional director's decision was therefore res judicata on the issue for purposes of the unfair labor practice hearing.[21] The trial examiner agreed with the General Counsel, and hence granted the motion for summary judgment and ordered the company to bargain with the union.[22] Following Board affirmance, Pepsi-Cola petitioned the Second Circuit Court of Appeals for relief.[23]

The court perceived the issue before it in terms of administrative convenience and congressional intent: "We are thus called upon to reconcile the Board's need to keep its house in an efficient manner by standards it believes will achieve that end with a litigant's right to have his case adjudicated by the persons Congress has chosen to make final decisions in labor cases."[24] Feeling that the latter consideration deserved to be accorded more weight than the former, the court remanded the case for further Board proceedings concerning the status of the distributors.[25] It held that in unfair labor practice proceedings that are related to section 9 determinations the Board must at least review the record before the regional director on such issues as employee status: "we seek only to insure that, before taking the serious step of declaring that an employer has committed an unfair labor practice, the Board will simply review the record before the Regional Director to determine whether his decision was correct, and not merely whether it was clearly erroneous."[26]

Essentially, the court's criticism was directed at the Board's procedure and standards for reviewing or not reviewing regional-director decisions and the resulting res judicata effect of unreviewed decisions in subsequent related unfair labor practice cases. This Board procedure was deemed unacceptable because it merely

19. 29 U.S.C. § 158(a)(5) (1964).

20. 409 F.2d at 679.

21. *See* 29 U.S.C. § 160(b) (1964), and 29 C.F.R. §§ 102.9-.59 (1970) for the procedure employed in preventing unfair labor practices.

22. 409 F.2d at 679.

23. 409 F.2d at 679. Any person who believes himself aggrieved by a final order of the Board may seek review of such order in an appropriate United States court of appeals. NLRA § 10(f), 29 U.S.C. § 160(f) (1964).

24. 409 F.2d at 679.

25. 409 F.2d at 682.

26. 409 F.2d at 681.

gave "rubber-stamped" approval of such decisions, and thereby permitted regional directors to decide unfair labor practice cases despite Congress' intention that the Board should make such decisions.[27] The court stated:

> The Board seeks to use the rule against relitigation to carve out an exception for unfair labor practices that happen to arise in the context of a representation dispute, though conceding that if this unfair labor proceeding arose independently of the representation dispute the petitioner would have been entitled to full review by the Board of the Hearing Examiner's findings of fact and conclusion of law.[28]

Although not requiring a de novo hearing on the issues delegated to the regional director, the court indicated that the rule against relitigation improperly relieves the Board of its statutory responsibilities when a representation issue is "difficult and requires a fine-drawn balancing of facts and law."[29] In support of this position, the court emphasized that the Board's "experience is particularly relevant and desirable in deciding complex [representation] issues . . . before the potent sanctions arising from the finding of an unfair labor practice are invoked."[30] While the court provided no definitive standards concerning the required extent of Board review of regional-director decisions,[31] it clearly held that at least in situations similar to that in *Pepsi* the Board cannot confer res judicata effect—as contemplated by the rule against relitigation—on representation decisions originally reviewed under the "substantial question," "clearly erroneous," "prejudicial error," and "compelling reason" criteria established by subsection (c) of Board rule 102.67.[32]

The controlling factor in the *Pepsi* decision was the perceived effect of the rule against relitigation on the congressional policy, manifested in section 10 of the NLRA, that the Board determine the existence of unfair labor practices. Although the court recognized

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27. 409 F.2d at 679. *See* text accompanying note 21 *supra*.

28. 409 F.2d at 680.

29. 409 F.2d at 679.

30. 409 F.2d at 680. Regarding difficulties encountered in determining independent-contractor questions, see Adelstein & Edwards, *The Resurrection of NLRB v. Hearst: Independent Contractors Under the National Labor Relations Act*, 17 KAN. L. REV. 191 (1969).

31. Language in the *Pepsi* opinion would seem to indicate that the Board must independently redecide a representation issue whenever such issue subsequently affects an unfair labor practice determination. The court commented that the 1959 delegation of authority was to be "subject to the safeguard of *plenary review* by the Board at the unfair labor practice stage." 409 F.2d at 681 (emphasis added). "Plenary review" would seem to indicate a system in which the agency gives full and complete reconsideration to exceptions to regional-director decisions. However, the opinion does not discuss specifically the nature and extent of such review.

32. *See* note 17 *supra*.

that the 1959 amendment manifested a desire to hasten Board operations,[33] it emphasized repeatedly that the Board had been given the responsibility for deciding unfair labor practice cases, and that it is improper to use a rule that allows the Board's delegate in effect to make such a decision.[34] Aside from the actual language of section 10,[35] the principal support for the court's conclusions was drawn from Congress' rejection in 1961 of a proposal that would have permitted the delegation of the Board's unfair labor practice authority to the regional directors.[36] Equating the effect of the rejected proposal with the res judicata effect on unfair labor practice cases that the rule against relitigation gave to regional-director decisions, the court concluded that it was contrary to congressional policy to "authorize all hearing examiners [and by implication regional directors] to render final, unreviewable decisions."[37] Viewing the rule as a mistaken implementation of the 1959 amendment,[38] the court rejected the practical operation of the rule, saying, "[w]e see no basis for thus mutilating the legislative scheme. The consequences of committing an unfair labor practice are the same no matter what the source of the dispute."[39]

The holding in *Pepsi* was further amplified and refined in subsequent circuit court cases, including one in which the Second Circuit Court of Appeals reconsidered the problem.[40] Three cases decided outside the Second Circuit dealt with the *Pepsi* issue in dicta. In *NLRB v. Chelsea Clock Company*,[41] a case decided on grounds independent of the *Pepsi* rationale, the First Circuit Court of Appeals cited *Pepsi* as authority for the proposition that the Board cannot delegate to regional directors the authority to render "ultimate decisions" in unfair labor practice cases.[42] In *State Farm Mutual*

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33. 409 F.2d at 681.

34. 409 F.2d at 679-81.

35. *See* 29 U.S.C. § 160(c) (1964) (set out in pertinent part in note 8 *supra*); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

36. 409 F.2d at 681. For a discussion of this proposal, see Auerbach, *Scope of Authority of Federal Administrative Agencies To Delegate Decision Making to Hearing Examiners*, 48 MINN. L. REV. 823, 865 (1964). In essence, the proposal would have allowed Board agents—hearing officers or trial examiners—to render final decisions in § 10 cases subject only to discretionary review by the Board. Auerbach included a complete documentation of the legislative history of the proposal. *Id.* at 839-40 n.61.

37. 409 F.2d at 681.

38. The 1959 amendment to NLRA § 3(b), 29 U.S.C. § 153(b) (1964), is set out in note 2 *supra* and discussed in the text accompanying notes 2-8 *supra*.

39. 409 F.2d at 680.

40. NLRB v. Olson Bodies, Inc., 420 F.2d 1187 (2d Cir.), *petition for cert. filed*, 38 U.S.L.W. 3498 (U.S. June 9, 1970) (No. 1670, 1969 Term; renumbered No. 238, 1970 Term). *See* notes 51-57 *infra* and accompanying text.

41. 411 F.2d 189 (1st Cir. 1969).

42. 411 F.2d at 192.

Automobile Insurance Company v. NLRB[43] the Seventh Circuit Court of Appeals also interpreted the *Pepsi* decision. Although that case, which involved a dispute over an employee's status, was also decided on non-*Pepsi* grounds,[44] the court rendered an interesting construction of the *Pepsi* doctrine: "In Pepsi-Cola the court held that the Board failed to perform its *statutory function of independently determining the 'crucial issue'—whether Pepsi-Cola's distributors were employees.*"[45] Similarly, in *NLRB v. Clement-Blythe Companies*,[46] the Fourth Circuit Court of Appeals read *Pepsi* as requiring a Board determination of underlying representation issues in related unfair labor practice cases. That court reversed the Board because of the Board's failure to follow the requirements of section 8 of the Administrative Procedure Act[47] by not providing the required statement of findings and conclusions when ruling that the company had committed an unfair labor practice.[48] Although the court in dictum interpreted the *Pepsi* decision as not requiring the NLRB to conduct a de novo hearing at the unfair labor practice stage on a representation issue previously decided by a regional director, it did say that in such cases "the Board *must thoroughly review the record before the Regional Director and make its own decision.*"[49] Thus, the Fourth and Seventh Circuit Courts of Appeals apparently feel that the NLRB has a broad duty to review extensively the factual and legal basis of a previously unreviewed regional director's representation decision when it arises in a subsequent related unfair labor practice proceeding.

Neither the *Pepsi* decision nor any of the three subsequent cases discussed above specified the exact extent of Board review that is required in unfair labor practice proceedings that are related to a representation issue previously decided by a regional director in a section 9 hearing. However, all four decisions stressed the desirability of having the Board independently redetermine the underlying representation issue. Hence, these cases may be read as negating the delegation of section 9 authority to some extent, and they virtually nullify the application of the rule against relitigation. The con-

43. 413 F.2d 947 (7th Cir.), *cert. denied*, 396 U.S. 958 (1969).

44. In *State Farm*, contrary to the situation present in *Pepsi*, the representation case had been transferred to the Board during the § 9 proceeding for resolution by it, thereby rendering application of the rule against relitigation clearly proper in the subsequent § 8(a)(5) proceeding since it would be useless for the Board to reconsider its own determination. 413 F.2d at 949. *See* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 158 (1941).

45. 413 F.2d at 949 (emphasis added).

46. 415 F.2d 78 (4th Cir. 1969).

47. 5 U.S.C. § 557(c) (Supp. V, 1965-1969), *amending* 5 U.S.C. § 1007 (1964).

48. 415 F.2d at 82.

49. 415 F.2d at 82 (emphasis added).

gressional policy underlying section 10 of having the NLRB make final decisions in unfair labor practice cases seems to have been the predominant consideration for these courts. However, the similarly important legislative purpose of expediting Board operations, as manifested in the 1959 amendment to section 3 of the NLRA,[50] was at least partially recognized by the Second Circuit Court of Appeals itself in the recent case of *NLRB v. Olson Bodies, Incorporated*,[51] which modified the strict language found in the *Pepsi* opinion.[52]

The *Olson* case, which evolved through the familiar *Pepsi* procedure,[53] concerned the propriety of a previous unreviewed regional-director determination that a certain challenged individual held a supervisory position and was therefore ineligible to vote in a representation election.[54] Following a summary judgment by the Board on the section 8(a)(5) complaint, the company appealed to the Second Circuit on the basis of *Pepsi* and sought remand of the case to the Board for a full determination of the status question.[55] The court denied the requested relief and held that *Pepsi* did not govern the situation. Writing for the court, Judge Friendly interpreted the *Pepsi* language in a restrictive light:

> Accepting *Pepsi-Cola* we do not regard it as making remand automatic whenever the Board has declined to review a decision of a regional director under powers delegated to him pursuant to § 3(b). This court was there dealing with an issue, whether distributors were employees or independent contractors, which, as the Board conceded, "is difficult and requires a fine-drawn balancing of facts and law"....[56]

Since the court believed that a relatively simple employee status question was involved in *Olson*, it concluded that the Board had properly

50. LMRDA § 701(b), Pub. L. No. 86-257, § 701(b), 73 Stat. 542, *amending* NLRA § 3(b), codified in 29 U.S.C. § 153(b) (1964). *See* note 2 and text accompanying notes 2-8 *supra*.

51. 420 F.2d 1187 (2d Cir.), *petition for cert. filed*, 38 U.S.L.W. 3498 (U.S. June 9, 1970) (No. 1670, 1969 Term; renumbered No. 238, 1970 Term). It should be noted that the *Pepsi* and *Olson* cases were decided by different three-judge panels in the Second Circuit: *Pepsi* was decided by a panel consisting of Chief Judge Lumbard, and Circuit Judges Smith and Kaufman; *Olson* was decided by a panel consisting of Circuit Judges Friendly, Smith, and Feinberg.

52. *See* text accompanying notes 28 & 39 *supra*.

53. The procedural steps and strategy that led to the *Pepsi* decision (*see* 409 F.2d at 677-79, and text accompanying notes 13-23 *supra*) were largely duplicated in the first cases of the *Pepsi* generation (*see* notes 41-49 *supra* and accompanying text), and are found in *Olson* (427 F.2d at 116). *See also* text accompanying notes 62-65 *infra*.

54. *See* 29 U.S.C. §§ 152(3), 152(11) (1964).

55. 420 F.2d at 1188-89.

56. 420 F.2d at 1190 quoting *Pepsi* at 409 F.2d at 679. Although Judge Friendly did not fully discuss the point, his opinion criticized the *Pepsi* court's prior analysis and treatment of the 1959 amendment. 420 F.2d at 1190.

incorporated the prior regional-director determination in the unfair labor practice case.[57]

Although *Olson* represented a partial retreat from the *Pepsi* doctrine, it did not fully restore the Board's rule against relitigation. Nevertheless, the NLRB has continued to adhere to its rule. This perseverance was recently rewarded in *NLRB v. Magnesium Casting Company*,[58] in which the Court of Appeals for the First Circuit completely repudiated the *Pepsi* doctrine. The Supreme Court has granted certiorari in *Magnesium Casting* to resolve this conflict between the First and Second Circuits.[59]

The crucial representation issue involved in *Magnesium Casting* concerned the voting status of seven workers who were employed as assistant foremen. The company contended that the men were ineligible supervisory personnel.[60] The regional director, however, ruled that six of the seven assistant foremen were employees rather than supervisors, and he therefore included them in the proposed bargaining unit.[61] The company's petition for review of the decision was denied.[62] Following a union election victory, the company sought to reopen the issue by refusing to bargain, and the *Pepsi* procedural pattern once again unfolded. The NLRB followed its usual practice and summarily issued a bargaining order.[63] After denying the company's request for reconsideration,[64] the Board petitioned the First Circuit Court of Appeals for enforcement of its bargaining order.[65] The court succinctly formulated the issue as "whether the National Labor Relations Board must make its own findings of fact before it can conclude that a Company has committed an unfair labor practice by its admitted refusal to bargain."[66] The court felt that the *Pepsi* holding definitely eliminated that part of the rule against relitigation that allowed the Board summarily to find a section 8(a)(5) violation without independently deciding the representation issue that originally prompted the refusal to bargain.[67] Although recognizing that

57. 420 F.2d at 1190.

58. 427 F.2d 114 (1st Cir.), *cert. granted*, 39 U.S.L.W. 3146 (U.S. Oct. 12, 1970) (No. 370).

59. 39 U.S.L.W. 3146 (U.S. Oct. 12, 1970) (No. 370).

60. 427 F.2d at 116. *See* 29 U.S.C. §§ 152(3), 152 (11) (1964).

61. 427 F.2d at 116.

62. 427 F.2d at 116.

63. 427 F.2d at 116.

64. 427 F.2d at 116. Motions for reconsideration after a Board decision due to "extraordinary circumstances" are authorized by the Board's procedural rules. 29 C.F.R. § 102.48(d) (1970).

65. 427 F.2d at 116.

66. 427 F.2d at 118.

67. 427 F.2d at 118-19.

it had previously indicated acceptance of the *Pepsi* doctrine in *NLRB v. Chelsea Clock Company*,[68] the court decided to reject completely both the *Pepsi* doctrine and the *Olson* modification.[69]

The court analyzed the *Pepsi* problem almost exclusively in terms of the history and policy behind the 1959 amendment to section 3 of the Act. It acknowledged and then discounted the reasoning behind the *Pepsi* holding:

> Viewing the problem as tabula rasa, there may be some merit to the proposition that discretionary review by the Board is not a sufficient guarantee of the exercise of the expertise attributed to the Board; that section 10(c) of the Act requires the Board to make its own determinations of fact in unfair labor practice cases . . . ; and that Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors. . . .
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> *But the slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act 29 U.S.C. § 153(b), in 1959.*[70]

Contrary to the Second Circuit's position in *Pepsi*, the First Circuit Court of Appeals believed that this amendment was designed to permit regional directors to make decisions with final effect.[71] It concluded that the delegation provision indicated a congressional willingness to allow the Board to authorize delegates to act in its place.[72] This equation of Board and delegate authority led the court to reject the company's contention, based on the *Pepsi* holding, that the 1959 amendment on its face limits the regional directors to the exercise of section 9 powers and thus leaves determination of unfair labor practice issues solely to the Board under section 10. The court noted that it is well established that the Board is not required to reconsider issues decided by it in section 9 proceedings when they arise in related subsequent unfair labor practice cases.[73] It therefore reasoned that a decision by a regional director acting in the Board's stead under the authority of the section 3(b) delegation should be afforded the same effect in a subsequent unfair labor practice case, even when Board review is denied.[74]

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68. 411 F.2d 189 (1st Cir. 1969). *See* text accompanying notes 41-42 *supra*.

69. 427 F.2d at 119.

70. 427 F.2d at 119 (emphasis added).

71. A regional director's "determination—when not set aside by the Board—is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded." 427 F.2d at 119.

72. 427 F.2d at 119.

73. 427 F.2d at 119. *See, e.g.*, Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941).

74. 427 F.2d at 119. *See also* Amalgamated Clothing Workers v. NLRB, 365 F.2d 898, 904 (D.C. Cir. 1966), in which the court noted that the practical effect of the rule against relitigation was to carry over "the earlier Board practice precluding relitigation in a 'related' unfair labor practice hearing of an issue determined in a representation

In the eyes of the First Circuit, this conclusion was supported by the legislative history of the 1959 amendment.[75] From the court's analysis of that history, it drew two important conclusions: first, the amendment reflects a congressional judgment that regional directors possess sufficient ability with respect to representation issues that the Board's expertise need be exercised only through a narrow discretionary review; and second, the primary purpose of the amendment was to expedite final resolution of representation questions.[76] The court reasoned that implementation of these congressional policies was most fully accomplished through complete operation of the Board's rule against relitigation: "Thus, while the Company's interpretation—based on *Pepsi-Cola*—would expedite only elections and certification but not the disposition of the issues resolved therein, the Board's interpretation makes it unnecessary to redetermine each of those issues [in subsequent unfair labor practice proceedings], thereby effectuating the Congressional purpose more completely."[77]

It is apparent that the *Pepsi*, *Olson*, and *Magnesium Casting* courts had disparate conceptions of the congressional desires manifested in the enactment of the pertinent provisions of the NLRA. Although each court utilized a rationale founded upon interpretations of the same legislative histories—concerning sections 3 and 10 of the NLRA—in order to support its conclusions, they reached widely divergent results. It may be instructive to examine afresh those legislative histories and to determine the relevant congressional considerations; an attempt may then be made to accommodate the opposing policies involved with the Board's application of its rule against relitigation.

It is clear from the legislative history that surrounded the passage of sections 9 and 10 of the original NLRA that Congress intended that the Board make the ultimate agency determinations in all representation and unfair labor practice cases.[78] Congress recognized the inherent difficulties present during the formative years of an innovative administrative scheme and desired that the NLRB develop a uniform body of labor law through the exercise of its particular expertise.[79] However, important developments that oc-

hearing, even though now the representation determination may have been made by the Regional Director." This case is discussed in text accompanying notes 105-07 *infra*.

75. The legislative history is discussed in text accompanying notes 83-96 *infra*.

76. 427 F.2d at 120.

77. 427 F.2d at 120.

78. *See* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2233, 2352, 3222 (1935).

79. 105 CONG. REC. 8873 (1959) (remarks of Rep. Kearns), in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING & DISCLOSURE ACT OF 1959, 1749-50 (1959) [hereinafter LEGIS. HIST. LMRDA].

curred over the twenty-four years following passage of the NLRA[80] indicated to Congress that it was no longer necessary or desirable to require the Board itself to determine all representation and unfair labor practice cases.[81] These developments culminated in the 1959 amendment that was incorporated into section 3(b),[82] and which gave rise to the *Pepsi* problem.

An examination of the legislative history behind the 1959 amendment[83] reveals that while the amendment to section 3(b) of the NLRA received substantial congressional attention in some respects, there was no direct consideration of the potential effect of that amendment on section 10. The concern that first prompted Congress to consider the delegation authorization was the Board's increasingly heavy workload of representation and unfair labor practice cases. This excessive caseload led the Board to refuse to exercise the full scope of its jurisdiction and thereby to create the "no-man's land" problem.[84] The no-man's land consisted of those disputes over which the Board possessed exclusive jurisdiction—thus pre-empting state jurisdiction—but over which the Board refused to assert jurisdiction in order to reduce its caseload, on the ground of their insubstantial effect on commerce.[85] The first appearance of the section 3(b) amendment was in a draft bill introduced by Representative Kearns of Pennsylvania.[86] H.R. 8342, the House committee's bill,

80. Perhaps the most significant development was the accumulation of a substantial body of precedent based on actual NLRB experience in deciding representation and other labor problems. The compilation of such precedent in the NLRB's own reports and the establishment of uniform rules on procedure and decision-making based on actual Board experience made it reasonable in most representation and unfair labor practice cases for the Board to rely upon the determination of its delegates, since it could generally be confident that such agents were applying the relevant law. *See* notes 89-90 *infra* and accompanying text. Another development prompting the change in congressional opinion was the size of the Board's caseload and the emergence of the "no-man's land" problem. *See* notes 84-85 *infra* and accompanying text.

81. 105 CONG. REC. 8873 (1959) (remarks of Rep. Kearns), in 2 LEGIS. HIST. LMRDA 1749-50.

82. *See* note 2 *supra*.

83. The 1959 amendment to NLRA § 3(b), 29 U.S.C. § 153(b) (1964), is set out in note 2 *supra* and discussed in the text accompanying notes 2-8 *supra*.

84. H.R. REP. No. 741, 86th Cong., 1st Sess. 17-18 (1959), in 1 LEGIS. HIST. LMRDA 775.

85. The Supreme Court held in Guss v. Utah Labor Bd., 353 U.S. 1 (1956), that the Board possessed exclusive jurisdiction over all labor problems that affect commerce. The practical effect of *Guss* and the Board's policy of refusing to exercise jurisdiction over cases it felt lacked an *appreciable* effect on commerce was to exclude many small employers and unions from the protection and services of the NLRB. Since state agencies could not take jurisdiction, such excluded parties were left in a no-man's land without a source of administrative or judicial remedy. The resolution of this problem was an important factor in the development of the 1959 amendment that authorized the delegation of § 9 powers. Congress also dealt with this problem by amending § 14 of the NRLA to provide for the assumption of jurisdiction by state agencies and courts over cases declined by the NLRB. LMRDA § 701(a), Pub. L. No. 86-257, § 701(a), 73 Stat. 541, *amending* NLRA § 14, codified in 29 U.S.C. § 164(c)(2) (1964).

86. H.R. 7265, 86th Cong., 1st Sess. (1959), in 1 LEGIS. HIST. LMRDA 591.

included the identical provision,[87] and the final draft contained the amendment as originally proposed except for the addition of three minor words of clarification.[88] Representative Kearns described his proposed amendment to section 3(b) as one of three suggested changes designed to "increase the Board's capacity and to provide faster processing of N.L.R.B. cases."[89] Recognizing that in the early period of the NLRA's history it was necessary and desirable for the Board itself to handle representation cases, Kearns emphasized that after twenty years of experience the rules of decision were firmly established and that most representation cases were decided on precedent. He therefore felt that the handling of such matters could safely and profitably be delegated to Board subordinates, thereby relieving the Board of primary responsibility over an area that accounted for over half of its burgeoning workload.[90] The House committee similarly emphasized the desirable expediting effect that adoption of the proposed amendment would have on Board operations, and it related this result to alleviation of the "no-man's land" dilemma.[91]

The Senate was also cognizant of the problems exacerbated by the increasing Board caseload, and initially sought a solution that would have authorized the NLRB to utilize the services of state labor agencies for the resolution of no-man's land cases.[92] However, after the introduction of the Kearns bill in the House, the Senate's attention shifted to the section 9 delegation concept as a means of generally lightening the Board's workload while improving its efficiency.[93] Subsequent Senate consideration tended to focus primarily on the expediting effect the House proposal would have on Board operations and only secondarily on its effect on the "no-man's land" problem. Thus, Senator Dirksen pointed out that the delegation of power would result in "more expeditious" handling of labor cases,[94]

87. H.R. REP. No. 741, 86th Cong., 1st Sess. 59 (1959), in 1 LEGIS. HIST. LMRDA 747.

88. LMRDA § 701(b), Pub. L. No. 86-257, § 701(b), 73 Stat. 542, *amending* NLRA § 3(b), codified in 29 U.S.C. § 153(b) (1964). The words of clarification consisted of the phrase, "of section 9," after the reference to the provisions for directing an election and taking a secret ballot.

89. 105 CONG. REC. 8873-74 (1959) (remarks of Rep. Kearns), in 2 LEGIS. HIST. LMRDA 1749-50. The other proposed changes were an increase in Board size to seven members and delegation of purely administrative responsibilities to the Board's General Counsel.

90. 105 CONG. REC. 8873 (1959) (remarks of Rep. Kearns), in 2 LEGIS. HIST. LMRDA 1749-50.

91. H.R. REP. No. 741, 86th Cong., 1st Sess. 17-18 (1959), in 1 LEGIS. HIST. LMRDA 775. *See* notes 80 & 85 *supra*.

92. S. REP. No. 187, 86th Cong., 1st Sess. 26 (1959), in 1 LEGIS. HIST. LMRDA 422.

93. 105 CONG. REC. 14,988 (1959) (remarks of Senator Morse), in 2 LEGIS. HIST. LMRDA 825-26. It should be noted that Senator Morse was a member of the conference committee that produced the final version of the LMRDA. 2 LEGIS. HIST. LMRDA 1400.

94. 105 CONG. REC. 17,918 (1959) (remarks of Senator Dirksen), in 2 LEGIS. HIST. LMRDA 1452.

and Senator Goldwater said that the section 3(b) amendment was "designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination."[95] Similarly, the final House comment on this legislation stressed the amendment's expediting effect rather than the jurisdictional considerations.[96]

As the legislative history therefore clearly indicates, the logical and intended result of the delegation amendment was to allow the regional directors to make final decisions on most representation questions. While there was some congressional concern over possible deviation from established Board practice or arbitrary action by regional directors, the availability of discretionary review by the Board under the amendment[97] was believed to be a sufficient safeguard against such dangers.[98] Therefore, Congress clearly contemplated that except when the Board felt it necessary to review a particular problem, regional-director decisions under section 9 would be regarded as final.[99]

This conclusion concerning section 3(b) does not, however, provide a complete answer to the question presented by the decisions construing the rule against relitigation in *Pepsi, Olson,* and *Magnesium Casting.* The Board's application of the rule, as approved in *Magnesium Casting,*[100] tends to negate the policy expressed in section 10 of the Act that the Board shall decide unfair labor practice cases. It was this policy that concerned the *Pepsi* court.

Thus, neither *Pepsi* nor *Magnesium Casting* satisfactorily resolves the rule-against-relitigation problem because both cases tend to exaggerate the importance of one congressional policy at the expense of another and to neglect the significance of the factual pattern involved. The failure of the *Pepsi* court lies in the stress it places on the policy embodied in section 10(c) that the NLRB should make its own determination of fact in unfair labor practice cases and the

95. 105 CONG. REC. A8522 (daily ed. Oct. 2, 1959) (remarks of Senator Goldwater), in 2 LEGIS. HIST. LMRDA 1856.

96. 105 CONG. REC. 18,128 (1959) (remarks of Rep. Barden), in 2 LEGIS. HIST. LMRDA 1714.

97. *See* NLRA § 3(b), 29 U.S.C. § 153(b) (1964), set out in note 2 *supra.*

98. 105 CONG. REC. 18,153 (1959) (remarks of Rep. Barden), in 2 LEGIS. HIST. LMRDA 1812; 105 CONG. REC. 18,152 (1959) (remarks of Rep. Griffin), in 2 LEGIS. HIST. LMRDA 1811; 105 CONG. REC. 8873-74 (1959) (remarks of Rep. Kearns), in 2 LEGIS. HIST. LMRDA 1749-50; 105 CONG. REC. A8522 (daily ed. Oct. 2, 1959) (remarks of Senator Goldwater), in 2 LEGIS. HIST. LMRDA 1856.

99. 105 CONG. REC. 14,988 (1959) (remarks of Senator Morse), in 2 LEGIS. HIST. LMRDA 1327; 105 CONG. REC. A8522 (daily ed. Oct. 2, 1959) (remarks of Senator Goldwater), in 2 LEGIS. HIST. LMRDA 1856. That the regional director's decisions were to be final subject only to discretionary review was evidenced, in the opinion of the Second Circuit in *Magnesium Casting,* by exactly this concern over possible deviation from established precedent. *See* 427 F.2d at 120 n.4.

100. 427 F.2d at 121.

court's correlative disregard of the section 3 policy.[101] Under the *Pepsi* doctrine, any employer involved in a representation proceeding can effectively negate the expediting purpose of the 1959 amendment since by refusing to bargain he can force a relitigation of issues resolved by a regional director in a previous representation proceeding and thus achieve substantial delay.[102]

However, the First Circuit's holding in *Magnesium Casting* is subject to similar criticism because it advances the expediting goal of the section 3(b) amendment at the expense of the section 10 policy. In fact, language in that case, if taken literally, would permit the Board to utilize the rule against relitigation in collateral-estoppel situations when the subsequent section 10 case involves a matter other than a refusal to bargain.[103] For although the court mentioned the prior Board practice regarding unfair labor practice cases arising *subsequent* to a section 9 determination, it failed to stress that such subsequent proceedings must be *related* to the original representation issue.[104] In *Amalgamated Clothing Workers v. NLRB*,[105] the Court of Appeals for the District of Columbia held that the rule against relitigation could not be applied in a section 10 case that did not arise from an employer's refusal to bargain, in order to challenge a regional director's section 9 determination.[106] Thus, for example, under the *Amalgamated* approach the rule against relitigation could be applied in a section 8(a)(5) case in which the employer claimed that the regional director had improperly classified an individual as an "employee"; but it could not be applied in a section 8(a)(3) case in which the employer justified a discriminatory discharge of an individual, whom the regional director had included in the bargaining unit, on the ground that he was not an "employee."[107]

Under the *Pepsi* approach the rule against relitigation could not be applied in either situation; the *Magnesium Casting* language, on

101. 427 F.2d at 121. The court's emphasis in *Pepsi* on Board determination of unfair labor practices overlooks the practical aspects of the agency's operations. As recognized by the *Pepsi* court, most § 10 disputes are resolved, not by the Board, but rather by a trial examiner, whose decision is generally subjected to only pro forma review, resulting in the Board's "rubber stamp acceptance" of his determination. 409 F.2d at 679. In such situations, Board consideration of the underlying issues is probably no more comprehensive than that afforded regional-director decisions in representation cases. Thus, the *Pepsi* doctrine would not necesarily guarantee that substantially greater Board attention would be given to representation issues in § 8(a)(5) cases.

102. *See* note 53 *supra*.

103. 427 F.2d at 119.

104. *See* note 7 *supra*.

105. 365 F.2d 898 (D.C. Cir. 1966).

106. 365 F.2d at 904-05. *See also* NLRB v. Union Bros., Inc., 403 F.2d 883 (4th Cir. 1968), and Leonard Niederriter Co., 130 N.L.R.B. 113 (1961), discussed in note 7 *supra*.

107. "Employee" is defined in NLRA § 2(3), 29 U.S.C. § 152(3) (1964). Employees are entitled to certain rights under NLRA § 7, 29 U.S.C. § 157 (1964).

the other hand, would permit the rule to be applied in both cases. While the *Pepsi* approach would interfere with the expeditious handling of Board affairs, the *Magnesium Casting* approach would enable regional directors to make final decisions that would be binding on subsequent unfair labor practice proceedings that are unrelated to representation controversies and hence that were not anticipated at the time of the earlier determinations. It is the failure of the courts to perceive properly the significance of the "related" requirement of the rule that makes both decisions unsatisfactory.[108]

Nevertheless, whenever the factual pattern of a case involves the correct operational parameters of the rule, the *Magnesium Casting* decision provides the preferable approach.[109] It furthers the more recently expressed congressional policy of expediting Board operations and, used in the allowable manner, effectively frustrates attempts to delay the resolution of representation problems. The *Pepsi* approach, however, tends to promote delay since any representation dispute can be easily continued in a subsequent unfair labor practice case by a mere refusal to bargain. Once a section 8(a)(5) charge is filed, a dilatory party can successfully delay to the extent of the time required for the Board to determine that the section 9 decision was correct and "not merely whether it was clearly erroneous."[110] Even after being directed by a court of appeals to apply this stiffer standard of review, it is highly probable that the Board, having at least twice confirmed the prior decision,[111] would continue to uphold its agent. Further delay would result if the problem were again forced back to the courts by a continued employer refusal to comply with the bargaining order. Thus, courts applying the *Pepsi* doctrine may tend to aid those seeking such delay since, by virtue of the remoteness of the Board's reversing its delegate on remand and the party's obstinance, a judicial resolution of the representation dispute will ultimately be required. Such delay, however, could be prevented if the court would simply delete the intermediate remand step and use the information contained in the record that is made available to it under section 9(d) of the Act to resolve the issue.[112]

108. *See* note 7 *supra*. Substantial support for the current interpretation of the "related" unfair labor practice requirement is found in Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 158 (1941), in which the Supreme Court noted that a § 8(a)(5) proceeding such as that in *Pepsi* is merely a continuation of the prior representation dispute. Although this case long preceded the formal rule against relitigation, it pertained to the prior decisional practice of the Board that accomplished the same results.

109. *See* Meyer Dairy, Inc. v. NLRB, 429 F.2d 697, 700 (10th Cir. 1970), in which *Magnesium Casting*'s interpretation of congressional policy was accepted.

110. Pepsi-Cola Buffalo Bottling Co. v. NLRB, 409 F.2d 676, 676 (2d Cir. 1969).

111. The first affirmance occurs when § 9 review is denied, and the second when the Board adopts the trial examiner's decision, which is based on summary acceptance of the original regional-director determination.

112. *See* NLRA § 9(d), 29 U.S.C. § 159(d) (1964), which provides for the certification

Despite the expediting policy of the 1959 amendments, the underlying policy of section 10 is still valid to the extent that it requires the Board to decide true unfair labor practice cases. The concern of the Second Circuit Court of Appeals over the NLRB's seeming avoidance of this requirement through application of the rule against relitigation may best be countered by the realization that cases like *Pepsi* are actually only extended representation proceedings that Congress intended to allow regional directors to decide. In this respect, the *Olson* case[113]—which actually nullifies *Pepsi*'s effect on routine representation problems—is a useful accommodation of the competing policies involved in sections 3 and 10. That is, *Olson* reminds the Board that its discretionary power of review need only be exercised when novel and difficult representation problems arise for which there is insufficient guiding precedent. Absent such rare circumstances, regional directors should be able to decide finally representation issues; when not reviewed, their determinations should, through application of the rule against relitigation, govern in subsequent *related* unfair labor practice proceedings, such as those involved in *Pepsi* and *Magnesium Casting*.

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of the entire Board record to the court on a review request. *See* Comment, 44 N.Y.U. L. REV. 1184, 1189 n.28 (1969). *See generally* 1 NLRB, LEGIS. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 (1947); NLRA §§ 9, 10, 29 U.S.C. §§ 159, 160 (1964).

113. *See* notes 51-57 *supra* and accompanying text.