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Notice and Hearing in Minimum Wage Regulation

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NOTICE AND HEARING IN MINIMUM WAGE REGULATION

Recent cases indicate the increasing prominence of the question of notice and hearing in administrative rule-making of all kinds. On the ground of inadequate hearing minimum wage orders applicable to women and minors employed in industry were temporarily enjoined in *Western Union Telegraph Co. v. Industrial Commission of Minnesota;*[1] relief was granted *pendente lite* against a minimum price order for coal in *Saxton Coal Mining Co. v. National Bituminous Coal Commission;*[2] and a minimum price order relating to milk was returned to a milk commission for reconsideration upon additional evidence in *Colteryahn Sanitary Dairy v. Milk Control Commission.*[3] This new vigilance of the judiciary is due, in part at least, to the Supreme Court's decision in *Morgan v. United States*[4] that the hearing which had preceded an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City stockyards was fatally defective.[5]

What constitutes "adequate notice and hearing" in rule-making procedure for constitutional purposes is a difficult question—difficult because "due process" has never been defined by the courts, has been exemplified only. Sufficient content has been given to the concept that three main classes of regulations may be distinguished. The first class comprises mainly regulations affecting public health and safety, which "belong to that class of police regulations to which all individual rights of property are held subject, whether established directly by enactments of the legislative power, or by its authority through boards of local administration."[6] Here, unless there is statutory provision to the contrary, no advance notice and hearing are necessary because of the emergency nature of the regulations and the technical character of the investigations. Examples include regulations to prevent pollution of water supply,[7] to compel vaccination of

1. (D. C. D. Minn. 1938) 24 F. Supp. 370.
2. (App. D. C. 1938) 96 F. (2d) 517.
3. (Pa. 1938) 1 A. (2d) 775.
4. (1938) 304 U. S. 1, (1938) 23 WASHINGTON U. LAW QUARTERLY 564.
5. The Morgan case is responsible also for the recent change in procedure before the Federal Communications Commission by which all proposed reports or findings of fact and conclusions must be offered to all interested parties who then have argument thereon as a matter of right. (1938) 6 U. S. L. Week 317.
6. Nelson v. State Board of Health (1904) 186 Mass. 330, 334, 71 N. E. 693. See Black, Legislation and Administration (1935) 2 U. of Chi. L. Rev. 270, 280 ff.
7. Nelson v. State Board of Health (1904) 186 Mass. 330, 71 N. E. 693.

school children in order to prevent the outbreak of small pox,[8] to force landlords to supply tenants with water,[9] to protect fish by exclusion of sawdust from a river,[10] and to control plant diseases.[11] The second class conists of price-fixing and regulation of wages to control competition and regulate standards in various industries. It is generally concerned with commodities such as milk[12] and tobacco,[13] with services such as barbering,[14] laundry, and dry-cleaning,[15] and with hours and wages in industry.[16] The necessary amount of advance notice and hearing, absent statutory requirement, varies. In the third class, *viz.*, rate-fixing, due process plays the largest role. Rate-fixing is the regulation of prices to be charged by public utilities, and is differentiated from price-fixing by the features of potential confiscation, large capital investment, and monopolistic tendencies. The feature of confiscation underlies the decisions of the courts requiring strict notice and hearing.[17]

The three recent cases in which the question of adequacy of notice and hearing appeared involve the price fixing class of rule-making. Two of them throw little light on our inquiry. *Colteryahn Sanitary Dairy v. Milk Control Commission* is a case of pure statutory construction, the court finding that the legislative intent was that the hearings should be complete; the commission might make an independent survey, but its conclusions had to be placed in the administrative record, subject to cross-examination by all interested parties.[18] The statute, however, passed in 1937,

8. State ex rel. Horne v. Beil (1901) 157 Ind. 25, 60 N. E. 672.

9. Health Dep't of N. Y. v. Rector of Trinity Church (1895) 145 N. Y. 32, 39 N. E. 833.

10. Commonwealth v. Sisson (1905) 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752.

11. Wallace v. Feehan (1934) 206 Ind. 522, 190 N. E. 438.

12. Nebbia v. New York (1934) 291 U. S. 502; Highland Farms Dairy, Inc. v. Agnew (D. C. E. D. Va. 1936) 16 F. Supp. 575; Colteryahn Sanitary Dairy v. Milk Control Comm. (Pa. 1938) 1 A. (2d) 775. See Note (1938) 22 Minn. L. Rev. 789.

13. Townsend v. Yeomans (1937) 301 U. S. 441.

14. Board of Barber Examiners v. Parker (La. 1938) 182 So. 485; Herrin v. Arnold (Okla. 1938) 82 P. (2d) 977.

15. Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board (Fla. 1938) 183 So. 759.

16. West Coast Hotel Co. v. Parrish (1937) 300 U. S. 379, overruling Adkins v. Children's Hospital (1923) 261 U. S. 525.

17. Chicago, M. & St. P. Ry. v. Minnesota (1890) 134 U. S. 418; Acker v. United States (1936) 298 U. S. 468; Morgan v. United States (1938) 304 U. S. 1; St. Joseph Stockyards Co. v. United States (1936) 298 U. S. 38; Consolidated Water Co. v. Maltbie (Sup. Ct. 1938) 167 Misc. 269, 3 N. Y. S. (2d) 799; Cushman, Due Process of Law in 5 *Encyc. Soc. Sci.* (1931).

18. (Pa. 1938) 1 A. (2d) 775, 779, cited supra, note 3.

itself testifies to the increasing exactions which state legislatures now deem themselves forced to demand to avoid unexpected constitutional pitfalls.[19] The *National Bituminous Coal Commission* case[20] dealt not with the scope of the hearing required but with the fact that, by the statute, hearing before the issuance of a minimum price order was mandatory. A hearing subsequent to the order was held not to fulfil the requirements.

Western Union Telegraph Co. v. Industrial Commission[21] directly presents the question of constitutional requirements. Here the commission established minimum rates of wages for women and minors employed in many trades in the state of Minnesota. It appointed an advisory board of eleven members, five suggested by the Minnesota Employers' Association, five by the Minnesota State Federation of Labor, and one elected by these ten, who after much study made a report and recommendation to the board. Thereafter the commission held a public hearing, at which it introduced no evidence and no witnesses and heard only brief statements from the opposition. It then made the orders challenged. The court granted an interlocutory injunction, saying that the commission had either to show that due process had been accorded in its procedure or that such requirements were not applicable to it. The court, quoting at length from *Ohio Bell Telephone Co. v. Public Utilities Commission*[22] and *Morgan v. United States*,[23] said that unless the action of the commission was "executive or administrative" only (without, however, defining these terms) and hence did not require "the gathering and weighing of evidence and the exercise of judgment in determining important, difficult, and controversial questions of fact," a "full hearing" must be accorded.[24] The burden was said to rest upon the commission to show that it "is not such a regulatory board or administrative agency performing quasi-judicial functions as is subject to the requirements of the due process clause of the Constitution of the United States, as those requirements have been stated by the Supreme Court in the cases to which we have referred."[25]

The *Morgan* Case involved an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies

19. (1937) 31 P. S. secs. 700j—801.
20. (App. D. C. 1938) 96 F. (2d) 517, cited supra, note 2.
21. (D. C. D. Minn. 1938) 24 F. Supp. 370.
22. (1937) 301 U. S. 292.
23. (1938) 304 U. S. 1.
24. (D. C. D. Minn. 1938) 29 F. Supp. 370, 377.
25. Ibid.

for buying and selling livestock at Kansas City stockyards. There was taking of evidence before an examiner and oral argument before the Acting Secretary of Agriculture. The Government submitted no brief, formulated no issues, and furnished no statement or summary of its contentions and no proposed findings. The Bureau of Animal Industry prepared elaborate findings which the Secretary considered, but these could not be examined by the respondents until they were served with the order. The Secretary was not present at the hearings, where "thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies."[26] The order of the Secretary was held invalid because of an incomplete hearing, the court declaring broadly that "the right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them," and that "those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command."[27]

Both cases illustrate the same judicial approach to procedural problems.[28] All governmental functions are divided into legislative, executive, and judicial, with accompanying classes of quasi-legislative, administrative, and quasi-judicial functions. New governmental functions are forced into this stereotyped classification without analysis of their role in meeting actual needs. A particular function is labeled quasi-legislative, and by analogy to the power of the legislatures to proceed without notice and hearing[29] the conclusion is drawn that notice and hearing are not necessary before an administrative board performing the function.[30] By a like technique a function called quasi-judicial is

26. (1938) 304 U. S. 1, 19.
27. Id. at 18-19.
28. See Willis, Three Approaches to Administrative Law: The Judicial, The Conceptual, and The Functional (1935) 1 U. Toronto L. J. 53; Dickinson, *Administrative Justice and the Supremacy of Law* (1927) 18-22.
29. Highland Farms Dairy, Inc. v. Agnew (D. C. E. D. Va. 1936) 16 F. Supp. 575; Herrin v. Arnold (Okla. 1938) 82 P. (2d) 977; Townsend v. Yeomans (1937) 301 U. S. 441.
30. Commonwealth v. Sisson (1905) 189 Mass. 247, 252, 75 N. E. 619; Highland Farms Dairy, Inc. v. Agnew (D. C. E. D. Va. 1936) 16 F. Supp. 575; Gillioz v. Webb (C. C. A. 5, 1938) 6 U. S. L. Week 457; Black, Is the Test of the Reasonableness of an Administrative Determination Subjective or Objective? (1935) 12 N. Y. U. L. Q. Rev. 601, 608.

burdened with strict requirements.[31] A clearer analysis is that which describes the exercise of administrative functions under the heads of rule-making and orders of specific application. Rule-making may be characterized as the "issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations"; it is useful to distinguish it "from issuance of orders or findings or the taking of action applying to named or specific persons or situations."[32] The content of procedural due process should be made to depend, not on whether the particular exercise of power involved is analogous to legislative action, but on such matters as the character of the parties affected, the nature of the problems to be dealt with, the character of the administrative determination, and the type of administrative agency exercising the function.[33]

Realistically it is necessary to estimate the practical problems of the functioning of a minimum wage board as a rule-making agency in order to determine the requirements of due process. The nature of these problems to be investigated depends on the type of statute involved. In general, there are three types of minimum wage acts. The first is that exemplified by the Minnesota statute involved in the *Western Union Telegraph* case,[34] requiring a "living wage" for all women and minors in industry, *i. e.*, in the words of the statute, "wages sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life."[35] Another is drafted with reference to the "fair wage" standard, based not only upon the worker's living conditions, but also taking into account the value of the service or class of services rendered.[36] In the third, the wage is based upon what the "traffic can bear," meaning the ability of industry to pay.[37]

To discover a "living wage" the problems of the regulatory

31. Morgan v. United States (1938) 304 U. S. 1; McKee v. Board of Elections (Tenn. 1938) 116 S. W. (2d) 1033; Buhler v. Dep't of Agriculture & Markets (Wis. 1938) 280 N. W. 367; Dairy Distributors v. Dep't of Agriculture & Markets (Wis. 1938) 280 N. W. 400.

32. Fuchs, Some Problems of Administrative Rule-Making (1938) 52 Harv. L. Rev. 259, 264.

33. Id. at 266-273.

34. (D. C. D. Minn. 1938) 24 F. Supp. 370, cited supra, note 1.

35. Minn. Mason's Stat. (1927) c. 23, sec. 4232. This is the type of statute most commonly employed among American jurisdictions.

36. N. Y. Supp. to Gen. Stat. (1931, 1933, 1935) c. 131a, sec. 910c.

37. R. I. Laws of 1936, c. 2289. This standard was prescribed in the early laws of South Australia and Victoria but is now nowhere the sole criterion. Burns, Minimum Wage in 10 *Encyc. Soc. Sci.* (1933) 491, 493.

board center on economic questions such as changing price levels, appropriate indices, family size, *et cetera*. Establishing a "fair wage," on the other hand, involves consideration of factors which stress conditions other than the welfare of employees. According to the statutes themselves it involves, first, all relevant circumstances affecting the value of the services rendered; second, such considerations as would guide a court in a suit for the reasonable value of services not performed under contract; and third, the amount of wages paid by employers voluntarily maintaining minimum fair wage standards for work of like or comparable character.[38] Practically, when there is declining demand for certain types of skilled labor or a rise in wages of the unskilled, this has come to mean the wage that will insure the desired supply of any particular kind of labor.[39] The third type of statute requires even more thorough analysis of industrial economic problems: if a general wage is to be set, the board must investigate the general level of productivity in industry as a whole; if it concerns the wage in a particular industry, the board must discover adequate measuring sticks of the industry's "ability to pay." All of this indicates that the character of the administrative determination in wage fixing ranges from the simple finding of facts, such as the actual wages paid in certain industries and the prices of butter and eggs, to a difficult evaluation of controversies regarding the general economic effects of wage regulation.

Another factor that is prominent in the problem facing a minimum wage board is whether its order affects all industries or only one industry. From an investigational standpoint, this question is not as important when the statute involves solely a "living wage" as when it deals with the other two standards.[40] From the standpoint of due process this fact is important.

The conventional content of due process in problems as complicated as these becomes well-nigh meaningless. The concept evolved as a protection first to real persons, then to fictional persons; in the beginning it was the guardian of life and liberty, now much oftener the guardian of property. When the inquiry only indirectly threatens the owner's stake in enterprises, as in the prescription of living wages, it is difficult to see why administrative action should be subject to procedural requirements before promulgation of orders. When a single industry, however,

38. Supra, note 36.
39. Burns, supra, note 37, at 494.
40. This because of the many interests in the various industries which must be balanced in the application of the latter criteria.

is being investigated for the purposes of the second and third types of rule-making, it is much more likely that a hearing could be both useful and protective. A factor that should be kept in mind in procedures as flexible as these is the type of administrative board exercising particular functions: a non-expert board has less justification for refusing a hearing; so also has a board that is not made up of representatives of both employers and employees.[41]

Minimum wage making has elements in common with milk-price fixing. The latter involves also an investigation into a complicated field of business, where the rights of numerous persons—consumers, producers, and middlemen—must be considered, and the factors of public health and interest pitted against the benefits to each of these groups. The amount of notice and hearing in this field has been before the courts relatively often. Two cases closely in point were decided before *Morgan v. United States*. The first, *Baldwin v. Dellwood*[42] involved the validity of price-fixing orders of the Milk Control Board of New York. The statute provided for reasonable notice to all parties concerned and to the public and for a hearing in advance of the order. The court held that the board in making its order could consider its own investigations as well as facts brought out in the hearing. The case implies that the results of independent investigations need not be divulged before the orders are made.[43] *State ex rel. State Board of Milk Control v. Newark Milk Co.*[44] allowed still more latitude. The court found that the board in supervising and regulating the milk industry, including the production, importation, transportation, manufacturing, storage, distribution, delivery, and sale of milk and milk products, was exercising an administrative function in that it merely effectuated the will of the legislative body. Neither notice nor hearing was deemed necessary.[45] In *Highland Farms Dairy, Inc. v. Agnew*,[46] decided after *Morgan v. United States*, a state milk commission which was authorized to fix prices to producers after public hearing and investigation was held justified in basing its order on evi-

41. See Fuchs, Some Problems of Administrative Rule-Making (1938) 52 Harv. L. Rev. 270, 271.

42. (Sup. Ct. 1934) 15 Misc. 762, 270 N. Y. S. 418.

43. The board's order, however, was reversed on the ground of lack of equal protection of the laws.

44. (1935) 118 N. J. Eq. 504, 179 Atl. 116.

45. It was held that due process was satisfied on judicial review of the administrative proceeding, giving relief from any arbitrary or unreasonable regulation; or if rate-making, by inquiry into confiscation.

46. (D. C. E. D. Va. 1936) 16 F. Supp. 575.

dence other than that presented at the hearing. The opinion distinguished the *Morgan* Case by saying that the proceeding there had "special attributes" and that the Secretary was required to make his determinations in accordance with the procedural requirements of the statute, including full hearing and evidence adequate to support necessary finding of fact. It was held that the packers and stockyards cases had no application to the hearing required by the milk control act.

That there is a difference in the essential nature of a proceeding to fix stockyard agencies' prices and one fixing minimum milk prices or minimum wages, there can be little doubt. The former proceeding, in the first place, involves only one industry, huge though it be. A wage proceeding may do the same; but in that case, a second, more important difference arises, which is that the requisite statistics and factors upon which the wage is set or the milk price determined do not emerge from the one source, the industry. Instead, as has been noted, the wage survey includes economic theories and social statistics as well. Third, the crux of the problem of the wage or milk commission lies in the balancing of innumerable interests, human as well as economic; while the question of reasonable financial return to the live stock brokers after subtracting reasonable costs is the prime determining factor in the other investigation. Next, the problem involved in the stockyards cases is that of setting maximum charges for services, while the milk and wage cases set minimum prices; the first being an outgrowth of the control of monopoly, the second of control of competition. The pragmatic difference which this makes is that, where maximum charges are prescribed, since costs remain relatively fixed, it is not possible for the market agencies to shift their losses; milk-dealers, however, compelled to pay minimum prices to farmers, can raise their retail prices within limits just as employers can largely recoup increased selling prices, subject to the restrictions imposed by effective demand. Conversely, farmers and workers, dissatisfied with prescribed minima, can seek to exact more. A last and most important difference between the two lies in the fact that minimum wage making is still largely in the experimental stage, where its effects are not yet fully understood and its benefits may or may not turn out to be an economic blessing. Business as well as labor may have to suffer a little until fair adjustment is brought about.

That these functional differences in types of administrative action exist and have an influence on the type of proceedings

necessary has been recognized by the Supreme Court itself. In 1936, in *Acker v. United States*,[47] a bill to enjoin a maximum rate order for Chicago market agencies under the Packers and Stock Yards Act of 1921 was dismissed. Supreme Court indorsement of the trial court's refusal to hold that a judicial trial *de novo* on the question of confiscation was necessary was based upon the view that the issue was not confiscation but the reasonableness of a charge for personal service, and that there had been adequate notice and a full hearing.

Furthermore, cases decided after the *Morgan* Case by the Supreme Court indicate that the language of that case is not to be construed too literally.[48] *National Labor Relations Board v. Mackay*[49] states that "the Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."[50] The real question as regards the need for interim findings is stated to be whether the issues and contentions of the parties were clearly defined at some stage of the proceeding; it was held that here they were, and "as no other detriment or disadvantage is claimed to have ensued from the Board's procedure, the matter is not one calling for a reversal of the order."[51] The recent case of *Consolidated Edison Co. v. National Labor Relations Board*[52] is of like import: while "it would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon," there was no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully advised of them.[53] The same notion is expressed in *American Toll Bridge Co. v. Railroad Commission*.[54] After holding that the findings of fact were stated with sufficient fullness to apprise the parties and the court of all the facts supporting the commission's decision, the court said:

> Opportunity to examine and object to proposed findings before the decision was rendered was not essential. The number and complexity of findings, and a lack of opportunity to examine, which in the *Morgan* Case evoked criticism, were not here present.[55]

47. 298 U. S. 426.
48. Comment (1938) 23 WASHINGTON U. LAW QUARTERLY 564.
49. (1938) 304 U. S. 333.
50. Id. at 351.
51. Ibid.
52. (1938) 83 S. Ct. 131.
53. Id. at 140.
54. (Cal. 1938) 83 P. (2d) 1.
55. Id. at 12.

There is no substantial reason why the requirements of the *Morgan* Case should be applied strictly to the procedure of such boards as minimum wage commissions. They are not required of boards performing analogous functions nor by considerations of expediency. Courts are likely to forget that there are other means of controlling the administrative rule-making necessary to our complex civilization. These include legislative power to appoint the boards and define their policies and standards; a capable and expert personnel; and a well-informed and articulate public opinion. Intertwined in today's multifarious processes are far-reaching social problems which can be solved only by trained workers. And " 'Courts,' as Mr. Justice Stone has reminded us, 'are not the only agency of government that must be assumed to have capacity to govern'; nor are they the only agency moved by the desire for justice."[56]

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UNIFORMITY OF TAXATION IN MISSOURI

I

Tax legislation, because of its immediate and vital effect upon such great numbers of persons and properties, has been the source of endless controversy. A tax provision that is constantly being litigated and which has resulted in many far-reaching and important decisions is Section 3, Article X, of the Missouri Constitution, which provides that

> They [taxes] shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

The interpretation of Section 3 has resulted in certain rules and restrictions which many believe to be socially and economically unsound and impractical as well as inconsistent with the true intent of the drafters of its terms. In order clearly to understand these rules and restrictions, as well as the conclusions that have been urged upon but rejected by the courts, some reference must be made to the law relating to this subject prior to enactment of the section.[1]

Since 1820 the following important provision, now Section 4, Article X, has been a part of the Constitution.[2]

56. Landis, *The Administrative Process* (1938) 154.

1. In 1875. R. S. Mo. (1929) 134.

2. See Glasgow v. Rowse (1865) 43 Mo. 479; Hamilton v. St. Louis County Court (1851) 15 Mo. 3.