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Administrative Law—New Judicial Remedy Under APA

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FEDERAL CASES

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New Judicial Remedy Under APA. In *Deering Milliken, Inc. v. Johnston*,[1] the Court of Appeals for the Fourth Circuit held that a district court had jurisdiction to enjoin a regional director of the National Labor Relations Board from proceeding with certain further hearings that the Board had ordered. The court of appeals decided that the plaintiff was not precluded from turning to the district court for protection of its rights, because there were no administrative remedies available.

In May 1956, the Textile Workers' Union of America obtained authorization cards from a majority of the employees of the Darlington Manufacturing Company.[2] The TWUA then requested that it be recognized as the bargaining agent for the employees, but the company refused to recognize and bargain with the union. The union immediately filed a petition for certification with the NLRB. In September, the NLRB conducted an election at the Darlington Manufacturing Company, and the TWUA won. In October 1956, the stockholders voted to discontinue operations and liquidate the company, an action that had been threatened if the union tried to represent the workers. Because of the liquidation, the union in October 1956, filed unfair labor practice charges with the NLRB under the Taft-Hartley Act.[3]

The general counsel of the NLRB offered to prove that the Darlington Company was one of a chain of manufacturing mills controlled by Deering Milliken & Co., Inc.[4] This offer of proof was rejected by the trial examiner. The Board decided that this issue had to be decided before it would pass on the substantive issue of whether or not Darlington had committed an unfair labor practice. Therefore, the case was remanded to the trial examiner. At the hearing on remand,

[1] 295 F.2d 856 (4th Cir. 1961).

[2] For a complete discussion of the situation in the Darlington Mill, see Johannesen, *Case of the Runaway Mill: Darlington Manufacturing Company*, 12 LAB. L.J. 1189, 1192 (1961).

[3] 29 U.S.C. § 158(a)(1) (1959).

[4] Darlington's assets, though liquidated, had not been completely distributed. Darlington did have assets available for back pay (the remedy for the unfair labor practice charged), but if all employees were entitled to back pay from 1956, the total award might exceed Darlington's remaining assets. Also, even though an unfair labor practice might have been committed, there was no reinstatement remedy at the Darlington plant because of the cessation of business.

it was found that Deering Milliken & Co., Inc. was a sales representative for a group of manufacturing concerns (controlled by the Milliken family) of which Darlington was a member, and that Deering-Milliken itself was not engaged in manufacturing operations.[5] On the basis of this finding the examiner concluded that Deering-Milliken did not occupy the status of an employer under the National Labor Relations Act. On December 31, 1959, the trial examiner recommended that Deering be dismissed from the complaint.

In January 1961, the union petitioned to reopen and remand the case as to Deering.[6] At this time, the case was before the NLRB for its decision and had been there since early 1960. Although more than two years had passed since the first hearing on remand, no decision had been made by the Board. The new remand was

> for the purpose of taking newly discovered testimony and evidence relating to (1) the Deering, Milliken & Co., Inc. press release . . . (2) the responsibility of Deering, Milliken & Co., Inc., either for the unfair labor practices of Darlington Manufacturing Company or to remedy those unfair labor practices and (3) such further evidence as may be deemed proper and appropriate under the circumstances.[7]

Deering brought suit to enjoin the reopening and remand of the case. The district court granted the injunction.[8]

On appeal the Board argued that the district court lacked jurisdiction for basically two reasons. First, the Board contended that § 10 (e) and (f) of the National Labor Relations Act[9] provide methods of review which are exclusive and, as there had not been any final action by the Board, no other tribunal had power to act. Second, the Board contended that under § 10(c) of the Administrative Procedure Act Deering could not turn for relief to the federal courts until "final agency action"[10] had been taken.

As to the Board's first contention, the court of appeals held that § 10(f) of the National Labor Relations Act did not provide adequate

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[5] Johannesen, *supra* note 2, at 1192-93.

[6] The union made its petition because of newspaper articles which reported that Deering had appointed presidents for its three manufacturing divisions. This was inconsistent with the position that the company had taken when it denied being engaged in manufacturing. This change was explained as resulting from a merger in 1960 of Deering Milliken & Co., Inc. into the Cotwood Manufacturing Corporation and the latter had changed its name to Deering Milliken & Co., Inc.

[7] 295 F.2d at 860.

[8] Deering Milliken, Inc. v. Johnston, 193 F.Supp. 741 (M.D.N.C. 1961).

[9] 29 U.S.C. § 160(e), (f) (1959)

[10] Section 10(c) of the Administrative Procedure Act makes reviewable "every final agency action for which there is no other adequate remedy in any court. . . ." 5 U.S.C. § 1009(c) (1959).

protection for the plaintiff's rights as required by APA § 6(a).[11] Section 10(f) of the National Labor Relations Act did not give Deering relief because it allows a right of appeal only after a final order of the Board granting or denying the relief sought. Deering would be deprived of its rights under APA § 6(a) to have the matter before an agency concluded with reasonable dispatch, if it had to wait for such a final order. (Under § 10(f) of the National Labor Relations Act, the delay of which Deering complained would terminate only on the Board's volition.)

As to the Board's second contention, the court held that "final action" under APA § 10(c) is not synonymous with a final order of the Board granting or denying relief.[12] When the delay amounts to a violation of APA § 6(a) and to a legal wrong within the meaning of APA § 10(a),[13] then final action under APA § 10(c) will be deemed to have occurred.[14]

It has long been held by the federal courts that one must exhaust his administrative remedies[15] before he can appeal to a federal court for review, because Congress intended that administrative agencies decide the questions falling within their jurisdiction and not the several federal courts. In the *Deering* case, the question of exhaustion of remedies was argued by the Board, but the court rejected this argument on the basis that there was no administrative remedy with which the plaintiff could protect the right claimed. If hearings had been held before a trial examiner pursuant to the second remand order, Deering would have had no right to attack the propriety of the Board's action in again remanding the case. Nor would Deering have had any effective right to assert its contention that the second remand order, and the holding of extended additional hearings pursuant to it, constituted a present denial of Deering's rights under APA § 6.

As pointed out by Professor Davis, "No court requires exhaustion

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[11] 5 U.S.C. § 1005(a) (1959). This section provides that " . . . Every agency action shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives . . . ."

[12] This is the requirement for review under § 10(f) of the National Labor Relations Act. 29 U.S.C. § 160(f) (1959).

[13] 5 U.S.C. § 1009(a) (1959). This section sets forth the rights of review available to an aggrieved party under the Administrative Procedure Act. "Any person suffering any legal wrong because of any *agency action* . . . shall be entitled to judicial review thereof." (Emphasis added.)

[14] 5 U.S.C. § 1009(c) (1959): "Every agency action made reviewable by statute and every *final* agency action for which there is no adequate remedy in any court shall be subject to judicial review. . . ."

[15] Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41 (1938).

when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction . . . ."[16] There was no claim of lack of jurisdiction by Deering, but there was one of irreparable injury. According to the court APA § 6(a) guarantees to litigants that administrative agencies will proceed with "reasonable dispatch." If, by excluding the federal courts, this congressionally created right would be obliterated, then it would seem that Congress intended the courts to protect this right with their equitable jurisdiction.[17] If Congress did not intend such protection, then the purpose of the Act could easily be thwarted by the agencies.

Probably no better words sum up the lack of need for exhaustion in a situation such as this than those of the United States Supreme Court:

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.[18]

One of the purposes of the Administrative Procedure Act appears to be protection against the type of injury claimed in the *Deering* case. By its ruling, the Board deprived Deering of a right which, in this instance, could only be protected by a federal court. It thus appears that the *Deering* case is one of those "exceptional" cases.

The court in the present case found jurisdiction in the district court on the basis of APA § 10(e).[19] This section states that the scope of review of the district court is such that the court can "hold unlawful and set aside agency action . . . found to be . . . not in accordance with the law . . . ." Because of its long delay the Board was held to have violated APA § 6(a). Thus, APA § 10(c) gave the district court jurisdiction to prevent the remanding of the case.

Section 6(a) was held not to be a "precatory declaration," but

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[16] DAVIS, ADMINISTRATIVE LAW § 20.01, at 56 (1958).

[17] Justice Douglas in Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 300 (1943), held this to be the purport of previous decisions of the Supreme Court.

[18] Columbia Broadcasting System v. United States, 316 U.S. 407, 425 (1942).

[19] 5 U.S.C. § 1009(e) (1959). Section 10(e) provides that the court ". . . shall (A) *compel agency action* unlawfully withheld or *unreasonably delayed;* and (B) hold unlawful and *set aside agency action,* findings, and conclusions found to be (1) arbitrary, capricious, and *abuse of discretion* or otherwise not in accordance with law . . .; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ."

rather an enforceable command under § 10(e). Upon examination of the Senate committee reports,[20] the court of appeals concluded that Congress had intended the federal courts to protect rights created by the APA and the agencies to "proceed with reasonable expedition."

The court in this case also found that the district court had jurisdiction on the basis of the 1958 Supreme Court decision of *Leedom v. Kyne*.[21] The plaintiff there was a union president who, individually and in his official capacity, brought an action against the NLRB members individually and in their official capacities. The action was to set aside the certification of a bargaining unit which included both professional and non-professional employees. The plaintiff claimed that this was an unlawful act of the Board under § 9(b)(1) of the National Labor Relations Act.[22] The Supreme Court held that the district court had jurisdiction to set aside the Board's classification of the bargaining unit that was being represented by the union.

The statute involved in the *Kyne* case said the Board "shall not"[23] include both professional and non-professional employees in the same bargaining unit, unless the former so choose. The statute involved in the *Deering* case is also mandatory, and says the "agency *shall* proceed with reasonable dispatch . . ."[24] to conclude the business before it. (Emphasis added.) Because of the similarity in the statutory language it appears that the court in the *Deering* case properly relied on *Kyne*.

In *Kyne*, the Court pointed out that under the circumstances, " 'absence of jurisdiction of the federal courts would mean a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control, to protect and enforce that right."[25] In the *Deering* situation, rights under APA § 6(a) can be enforced only in the federal courts. If Deering had to wait for the trial examiner to re-hear the case and could appeal to the federal courts only after the Board had decided there would be no remedy available to protect the right it was being deprived of.

Deering indicates that new doors have been opened to the federal courts under the Administrative Procedure Act. The case augments the remedies available under the *Kyne* decision. On the basis of *Deering*, a complainant would not have to show that a right under

[20] Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 263-65, 326-27, 217, 278-79, 281-82 (1946).
[21] 358 U.S. 184 (1958).
[22] 29 U.S.C. § 159(b)(1) (1959).
[23] *Ibid.*
[24] Statute cited note 11 *supra*.
[25] 358 U.S. 190.

the National Labor Relations Act was being violated in order for a district court to acquire jurisdiction. Now, all that the complainant must show is that he is being deprived of a right under the Administrative Procedure Act and that there are no other remedies available to enforce that right.

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Notice of Unpublished Rules. In the recent case of *United States v. Aarons*,[1] the failure of the Coast Guard to publish one of its substantive rules in the Federal Register was held not to bar conviction for violation of the rule where the defendants had actual knowledge of the contents of the rule violated. In so holding the Court of Appeals for the Second Circuit refused to follow the Ninth Circuit decision to the contrary in *Hotch v. United States*.[2]

The defendants in the *Aarons* case were members of a group called the Committee for Non-Violent Action (CNVA), which was conducting demonstrations against the Navy's Polaris program at the Electric Boat Company's plant in New London, Connecticut. In response to a request from the Navy, the Commander of the Third Coast Guard District issued a "Special Notice" by which he closed a section of the Thames River directly in front of the Company's property to all persons and vessels between specified hours. The purpose of the closure was to afford a clear area for the launching of the nuclear submarine Ethan Allen. The "notice" was published in the Local Notice to Mariners, and a copy was sent by registered mail to the CNVA which acknowledged it. It was not, however, published in the Federal Register.[3]

On the date of the launching the defendants attempted to enter the restricted area in two boats and to obstruct the launching. They were intercepted and shown a copy of the order closing the area. Nevertheless they continued into the area and were apprehended and taken into custody by the Coast Guard.

After trial and conviction for violation of the rule,[4] defendants appealed, contending (among other things) that the "Special Notice" was invalid because it had not been published in the Federal Register

[1] 310 F.2d 341 (2d Cir. 1962).
[2] 212 F.2d 280 (9th Cir. 1954).
[3] United States v. Aarons, 310 F.2d 341, 343 (2d Cir. 1962).
[4] Defendants were convicted under 50 U.S.C. § 192 (1958) of a knowing violation of an order issued under 50 U.S.C. § 191 (1958).