Duquesne Law Review

Volume 13 | Number 4 Article 11

1975

Rulemaking or Adjudication in Administrative Policy Formation: Rock versus Hard Place [Note]

M. Beth Troiano

Note

Rulemaking or Adjudication in Administrative Policy Formation: Rock versus Hard Place?

The Administrative Procedure Act[1] imposes uniform procedural requirements on all governmental agencies.[2] It provides two avenues for the development of agency policy: rulemaking[3] and adjudication.[4] This note traces conceptual and practical problems raised by the rulemaking/adjudication dichotomy, with particular attention to the most recent Supreme Court decision on the subject.[5]

I. Rule vs. Order

An agency's "identity" comes from its enabling legislation, which spells out the agency's purpose and function. Some enabling statutes explain in detail when the agency must act, what it must do, and how it must proceed.[6] Often such legislation leaves the agency no choice as to the procedure for formulating policy.[7] Other statutes merely direct the agency to implement the provisions of the act, without specifying how or when.[8] Statutes of the latter type embody

1. 5 U.S.C. §§ 551-59 (1970) [hereinafter referred to as APA].

2. The legislative and judicial branches of the government, military authority, and "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them" are specifically excluded from the APA. *Id.* § 551(1). Subsequent legislation may supersede the APA if it does so expressly. *Id.* § 559.

3. " 'Rule making' means agency process for formulating, amending, or repealing a rule." *Id.* § 551(5) (1970).

4. " 'Adjudication' means agency process for the formulation of an order." *Id.* § 551(7). The adjudicatory procedure set forth in the APA applies only to adjudication required by statute to be determined on a record. *Id.* § 554(a).

5. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

6. *E.g.*, the Federal Food, Drug and Cosmetic Act directs the Food and Drug Administration to fix food standards on the basis of a record compiled at a formal hearing. 21 U.S.C. § 371 (1970).

7. The Federal Coal Mine Health and Safety Act of 1969, for example, requires that the Secretary promulgate mandatory safety standards according to the procedure outlined therein. 30 U.S.C. § 811 (1970).

8. *E.g.*, the Federal Trade Commission Act provides: "The commission shall also have power . . . (g) From time to time . . . to make rules and regulations for the purpose of carrying out the provisions of this title." 15 U.S.C. § 46 (1970).

broad congressional policy;[9] the agency must fill gaps in the legislation since it cannot be administered as written. The administrative interpretations gradually develop into a body of law.[10] In addition, such broad legislation usually empowers the agency to promulgate rules in accordance with the APA.[11]

Absent guidance in its enabling statute, the agency must look to the APA to determine when law should be developed by rulemaking rather than by adjudication. The APA, however, does not acknowledge this problem. The APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."[12] The definition does not recognize that administrative case law, evolving in adjudicatory proceedings, has future effect. Nor is this aspect of case law reflected in the definition of the adjudicative "order": " 'order' means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making."[13] The definition is ambiguous since "order" overlaps "rule" when an agency statement has "particular applicability" and future effect.

Procedurally, rulemaking and adjudication are more readily distinguishable. Rulemaking directs the future conduct of a class of persons; adjudication determines the legal status of the parties before the agency, usually with respect to events which have already occurred.[14] Rulemaking requires publication of advance notice in the Federal Register,[15] while an adjudication requires no notification

9. Congress created the National Labor Relations Board, for example, to define and protect the rights of employees and employers, to encourage collective bargaining, and to eliminate certain labor and management practices that harm the general welfare. Labor-Management Relations Act (Taft-Hartley Act) § 1(b), 29 U.S.C. § 141(b) (1970).

10. FTC v. Ruberoid Co., 343 U.S. 470, 486-87 (1952) (Jackson, J., dissenting on other grounds).

11. The NLRB is one such agency. 29 U.S.C. § 156 (1970).

12. 5 U.S.C. § 551(4) (1970).

13. *Id.* § 551(6).

14. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 924 (1965) [hereinafter cited as Shapiro]. *See also* 1 K. DAVIS, TREATISE ON ADMINISTRATIVE LAW § 511 (1958).

15. The APA provides:

> The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or the substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b) (1970).

of parties outside the case or controversy.[16] Interested parties have a *right* to participate in a rulemaking proceeding through written or oral submissions,[17] but may intervene in adjudications only at the agency's discretion.[18]

It may be that certain agency action must be accomplished through the exclusive use of either rulemaking or adjudication. It has been suggested that rulemaking is necessary when an agency adopts or modifies policy.[19] But when the legislative intent as to what must be done by rulemaking is unclear, many agencies consistently use adjudication rather than rulemaking as the vehicle for policy formation. Proponents of rulemaking maintain that these agencies are promulgating rules in violation of the APA requirements.[20]

The APA definitions of "rule" and "order" indicate that Congress intended the use of rulemaking when agencies act like legislatures, and adjudication when they act like courts.[21] But rules and orders do not always conform to the legislative-judicial model. Rules are prospective—but in some cases they are applied retroactively.[22] Orders affect the parties before the agency—but in some cases they are applied prospectively.[23] Some adjudications are resolved by use of formulas,[24] which are like rules because they articulate standards and like orders because the standard remains flexible. But if the formula resembles a policy pronouncement, the order may not with-

16. *Id.* § 554(b).

17. *Id.* § 554(c).

18. *Id.*

19. *See* Shapiro, *supra* note 14.

20. *See, e.g.*, Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961) [hereinafter cited as Peck].

21. NLRB v. A.P.W. Prods. Co., 316 F.2d 899, 905 (2d Cir. 1963).

22. Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129 (1936) (amended regulation given retroactive effect); Miller v. United States, 294 U.S. 435 (1935) (administrative regulation which creates an obligation can be retroactive when this intent appears on its face). *But cf.* Safarik v. Udall, 304 F.2d 944 (D.C. Cir. 1962) (new construction of Mineral Lands Leasing Act could be prospective only).

23. NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952) (if retroactivity works a hardship on parties which outweighs the public end sought, prospectivity is permissible); NLRB v. Red Rock Co., 187 F.2d 76 (5th Cir. 1951) (redefinition of jurisdictional requirement did not apply to complaint entered before the order); Goodyear Tire & Rubber Co., 138 N.L.R.B. 453 (1962) (new procedure for assessing consent elections applied only to petitions filed two weeks after the decision).

24. NLRB v. Hondo Drilling Co., 428 F.2d 943 (5th Cir. 1970) (application of eligibility formula was not rulemaking).

stand the objection that it is really an invalidly promulgated rule.[25] Agencies must conform to Supreme Court pronouncements; this may require reversal of prior-established agency case law in an adjudicatory proceeding.[26] And since agencies need not reach the same result in all comparable cases,[27] the agency is free, within the limits of the enabling statute, to contradict its own case law.

Adjudication is like rulemaking in the sense that it can give birth to "rules" which affect parties outside the proceeding. This is expected in a judicial setting. Those who disapprove of the formation of policy in an adjudicative setting, however, suggest that rulemaking is the preferable method because it taps outside information sources for the agency[28] and protects the regulated from unpublished ad hoc policy changes.[29]

An agency is in an awkward position when its enabling legislation does not tell it when to proceed by rulemaking. It must act within the sometimes conceptually inadequate categories of the APA.[30] It may be difficult to determine when *only* rulemaking will satisfy the need for efficient notification of the regulated and the agency's own need for input. The agency may feel that rulemaking is an inefficient means for resolving a problem or dispute. Yet it runs the risk of appeal and reversal on procedural grounds if it ignores the APA requirements.

---

25. NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960) (court suggested that rulemaking would have been a more appropriate means for announcing new policy, and overruled on the merits). *Contra*, NLRB v. Carpenters Local 176, 276 F.2d 583 (1st Cir. 1960) (court viewed same order as valid development of policy).

26. *E.g.*, H. & F. Binch Co. v. NLRB, 456 F.2d 357 (2d Cir. 1972) (Board order overturning some thirty years of Board precedent was permissible in light of prior Supreme Court decisions); American Mach. Corp. v. NLRB, 424 F.2d 1321 (5th Cir. 1970) (retroactive application of Board's new position that economic strikers had right to reinstatement was proper because the view had been expressed earlier in NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967)).

27. FCC v. WOKO, Inc., 329 U.S. 223, 228 (1946).

28. It has been suggested that since an agency is insulated from extensive exposure to the field it regulates, the APA provisions for discretionary intervention by interested parties in adjudications may not provide the full range of data needed to make an informed decision. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 577-78 (1970) [hereinafter cited as Bernstein].

29. *Id.* at 576.

30. For a discussion of conceptual difficulties inherent in the categories used by administrative agencies, including the rule/order dichotomy see Bernstein, *The Regulatory Process: A Framework for Analysis*, 26 LAW & CONTEMP. PROB. 329 (1961).

II. A Brief History

The question of when rulemaking is required has reached the Supreme Court only several times.[31] In *SEC v. Chenery Corp. [Chenery I]*,[32] a public utility holding company challenged the substantive validity of the standard used to evaluate its reorganization plan. The plan called for management trading during reorganization, a problem the Commission had never confronted. Since there was no pre-existing agency standard by which to judge the proposal, the Commission relied on its own interpretation of judicial precedent in the area to invalidate the plan. On appeal, the Court remanded the case because it appeared that the SEC had misinterpreted the judicial standard.[33]

The Commission reconsidered the reorganization plan and once again rejected it, this time on the basis of its accumulated experience with utility reorganization. In *Chenery II*,[34] the corporation questioned the merits of the Commission's new standard and the procedure through which the standard was formulated and applied. The corporation argued that if the Commission wished to fashion a standard for the future, it should be required to proceed by rulemaking.

The Court held that new standards could be drawn in adjudications[35] where the agency determined that a principle could not be cast as a general rule:

> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.[36]

---

31. Due to the highly abstract nature of the issue, these few decisions have shed more heat than light on the problem. As Prof. Bernstein puts it, an examination of these cases "is not a trip for the squeamish." Bernstein, *supra* note 28, at 573 n.5.

32. 318 U.S. 80 (1943).

33. *Id.* at 87.

34. SEC v. Chenery Corp. 332 U.S. 194 (1947).

35. However, since the Commission, unlike a court, has the ability to make law prospectively by rulemaking, it has less reason to do so in ad hoc litigation. *Id.* at 202.

36. *Id.* at 202-03.

The Court emphasized that inflexible technical requirements should not prevent an agency from doing its job[37] and, while policy should be formulated by rulemaking whenever possible, the decision to proceed by rulemaking or adjudication is primarily within the agency's informed discretion.[38]

Some appellate courts cited *Chenery II* for the proposition that agencies could always adopt or reverse policy in adjudications so long as the standards pronounced were fair to the parties[39] and consistent with the enabling statute.[40] Others interpreted it to mean that rulemaking was mandatory except in special situations where it would be impractical, premature, or of marginal utility.[41]

Some twenty years after *Chenery II* the issue was still unsettled. The Court re-examined it in *NLRB v. Wyman-Gordon Co.*[42] and upheld a Board order enforcing a rule promulgated in a prior adjudicative proceeding. In the first adjudication, *Excelsior Underwear Inc.*,[43] the National Labor Relations Board announced a requirement to be applied in all representation elections: in order to equalize the comparative campaign strength of organizers and employers, employers would be required to furnish unions with lists of employee names and addresses before representation elections. The effective date of this "rule" was set for thirty days after the decision; it was not applied to the parties before the Board. When the Board enforced the *Excelsior* rule in a subsequent election at Wyman-Gordon Company, the company objected that the rule had been promulgated in violation of the APA rulemaking requirements.

A plurality of the Court upheld the order in *Wyman-Gordon* but by irreconcilably opposite reasoning. In the opinion announcing the judgment of the Court, four Justices held that the Board had vio-

37. *Chenery II* sanctions the use of adjudication rather than rulemaking where the agency feels incapable of articulating a standard—but the agency's lack of experience may be one reason to solicit information from interested parties in a rulemaking proceeding.

38. 332 U.S. at 203.

39. NLRB v. Q-T Shoe Mfg. Co., 409 F.2d 1247 (3d Cir. 1969); NLRB v. Beech-Nut Life Savers, Inc., 406 F.2d 253 (2d Cir.), *cert. denied*, 394 U.S. 1012 (1968).

40. Optical Workers' Local 24859 v. NLRB, 227 F.2d 687, 691 (5th Cir. 1955) ("Board has authority to adopt and reverse policy . . . in any manner reasonably calculated to carry out its statutory duties.")

41. SEC v. Capital Gains Research Bureau, Inc., 300 F.2d 745 (2d Cir. 1961), *rev'd on other grounds*, 375 U.S. 180 (1963) (SEC could not set standard for disclosure without first conducting hearing).

42. 394 U.S. 759 (1969).

43. 156 N.L.R.B. 1236 (1966).

lated the APA by giving the *Excelsior* "rule" wholly prospective effect. They sustained the rule as enforced in *Wyman-Gordon*, however, because it had been specifically applied to a named party before the Board as part of an order.[44] Three concurring Justices viewed *Excelsior* as a proper adjudicatory proceeding[45] which was correctly followed in *Wyman-Gordon*. They cited *Chenery II* to support their contention that the Board had not abused its discretion by adopting policy in an adjudication.[46] Justice Douglas[47] and Justice Harlan,[48] dissenting separately, argued that the illegally-promulgated *Excelsior* rule could not be redeemed in a subsequent adjudication.

Some commentators felt that the Board won a Pyrrhic victory in *Wyman-Gordon*, since six Justices had refused to endorse its practice of making wholly prospective rules in adjudicatory proceedings.[49] But a question remained as to how the Court would view a procedural challenge when the agency's order was not applied prospectively. What result, for example, when the Court confronted a policy change adopted in an adjudication, binding on future conduct, and imposed on the parties before the agency as well? That question reached the Court[50] in *NLRB v. Bell Aerospace Co., Division of Textron, Inc.*[51]

---

44. 394 U.S. at 765-66.

45. The proceeding was "adjudication" within the meaning of the APA even though the requirement was prospectively applied. Its future effect was legitimate "sunbursting." *Id.* at 772-73.

46. *See* text at notes 35-38.

47. 394 U.S. at 775.

48. *Id.* at 780. Justice Harlan felt that if the NLRB could enforce an invalid rule in a subsequent adjudication, the rulemaking provisions of the APA would be completely trivialized. The Court's strong objection to *Excelsior's* prospective effect indicated that as long as the agency applied new requirements to the parties before it, rulemaking would not be necessary.

If an order has no immediate effect, the parties have little incentive to pursue an expensive appeal which could result merely in remand with instructions to the agency to reach the same result by rulemaking. In all likelihood, the procedure would not be challenged until the rule was applied in a later adjudication. At that point, according to the opinion of the Court in *Wyman-Gordon*, the rule would be valid because it had been applied in an adjudication. Thus, Justice Harlan concluded that the Board could continue to issue invalid rules with assurance that they would ultimately be enforced.

49. Bernstein, *supra* note 28, at 609.

50. The answer was unpredictable since the Court's membership had changed since *Wyman-Gordon*. While three of the six Justices who held *Excelsior* invalid remained on the Court (Stewart, White & Douglas, JJ.), only two reached the same result. With them were two concurring Justices (Brennan & Marshall, JJ.), who had emphasized the Board's discretionary power to develop policy in adjudicatory proceedings.

51. 416 U.S. 267 (1974).

III. THE *Bell Aerospace* DECISION

A. *Background*

The National Labor Relations Act authorizes the Board to make rules periodically to effectuate the provisions of the Act.[52] When the Board promulgates a rule, it is directed to follow the procedure for rulemaking outlined in the APA. The NLRA does not indicate what situations require rulemaking. Presumably, the Board is to identify the circumstances under which rulemaking is mandatory by referring to the APA[53]; as seen above, however, the APA does not address this issue.

The NLRB has interpreted the delegation of rulemaking authority merely as a procedural option: only if it decides that rulemaking is necessary to carry out the provisions of the Act will it utilize the procedure prescribed by the APA. Critics of the Board's practice of developing policy in adjudicatory proceedings believe rulemaking should be required when the Board adopts or modifies policy.[54]

Although the Board is not the only agency accused of avoiding the APA requirements,[55] it bears the brunt of complaints from proponents of rulemaking.[56] The NLRB has developed a body of law through adjudication for over thirty-five years[57] and in that time has held rulemaking proceedings only twice.[58] This reluctance to codify

52. Labor-Management Relations Act (Taft-Hartley Act) § 101, 29 U.S.C. § 156 (1970) [hereinafter referred to as NLRA].

53. The House Conference Report on the administrative aspects of the Labor-Management Relations Act stated that the words "in the manner prescribed by the Administrative Procedure Act" were inserted to assure that subsequent amendment of the NLRA would not supersede the general rules in the APA presently controlling the Board's power to promulgate regulations. U.S. CODE CONG. & AD. NEWS, 80th Cong., 1st Sess., 1143-44 (1947).

54. The Board is so notorious for promulgating rules in adjudicative proceedings that in 1964 the House of Delegates of the American Bar Association unanimously passed a recommendation urging the Board to utilize rulemaking procedures. 16 AD. L. REV. 77 (1964).

55. Morningside Renewal Council v. United States Atomic Energy Comm'n, 482 F.2d 234, 240 (2d Cir. 1973) (dissenting opinion) (safety standards for operating nuclear reactors should be set in rulemaking proceeding).

56. *See* Kahn, *NLRB and Higher Education: the failure of policymaking through adjudication*, 21 U.C.L.A.L. REV. 63 (1973); Peck, *supra* note 20; Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction*, 25 LAB. L.J. 607 (1974); Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954).

57. For an illustration of how the Board's contract bar rules evolved in case law see Peck, *supra* note 20, at 739.

58. One proceeding promulgated a standard for the exercise of jurisdiction over private colleges and universities. 35 Fed. Reg. 18,370 (1970). The other considered whether dog racing

an established policy may be a function of the Board's unstable composition.[59] Or it may be that in the dynamic field of labor relations each case is so unique that elaborate statutory standards should not be attempted; in many cases the Board can do no more than apply the Act to the particular facts at hand.[60] Nevertheless, the Board often states holdings broadly in individual cases in an attempt to reduce its extraordinarily large caseload.[61] The Board's critics say that more frequent promulgation of rules in accordance with the APA could have the same effect.[62]

B. "Managerial Employees"—An Attempt at a Simplified Standard

In August, 1971, the NLRB certified Amalgamated Local No. 1286 of the United Automobile, Aerospace and Agricultural Implement Workers of America as the collective bargaining representative for the twenty-five buyers at Bell Aerospace Company. The company feared that union buyers would favor union suppliers and refused to bargain with the union on the grounds that the buyers were "managerial employees" outside the coverage of the NLRA.[63]

---

and horse racing should be brought under the Act. 37 Fed. Reg. 14,242 (1972).

59. The Board consists of five members appointed by the President with Senate consent. Board members serve five-year terms, the term of one expiring each year. Reappointments may be made. 29 U.S.C. §§ 153-54 (1970). It has been suggested that the Board's doctrinal instability reflects shifts in political power and the consequent reconstitution of the Board's membership. "Republican Boards," for example, may emphasize freedom of contract, while a "Democratic Board" may actively encourage collective bargaining. Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 Sup. Ct. Rev. 53, 64.

60. Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961) (Board erred in holding hiring-hall arrangement unlawful per se, since such arrangements are not unlawful unless they in fact result in discrimination); NLRB v. Radio & Television Local 1212, 364 U.S. 573 (1961) (Board must solve jurisdictional disputes between unions on a case-by-case basis).

61. Each fiscal year the NLRB receives more than 400,000 cases, most of them unfair labor practice charges. Since the Board encourages voluntary disposition of cases at all stages, only about five percent of the unfair labor practice charges filed with Regional Offices actually percolate to the five-man tribunal. Despite the small percentage, the Board decides almost 1,000 unfair labor practice cases and more than 400 representation cases each year, and the total flow of cases filed with the NLRB is on the increase. NLRB, The NLRB . . . What It Is, What It Does (1974).

62. Peck, *supra* note 20, at 753.

63. Managerial employees are not expressly excluded in the Taft-Hartley Act. The drafters considered this direction unnecessary, since prior to 1947 the Board consistently prevented the organization of "managerial employees" either separately or as part of a rank-and-file unit. U.S. Code Cong. & Ad. News, 80th Cong., 1st Sess. 1141 (1947). The exclusion reflected the Board's concept of the predominant concern of the Act—the protection of work-

In the Board's view, only "managerial employees" who were associated with the "formulation or implementation of labor relations policies" were excluded from the Act. The test for affiliation with management was whether union membership would create a "conflict of interest" with employees' duties to their employer.[64] The Board held that the Act covered the buyers at Bell Aerospace Company even though they might be "managerial employees," because the company had not shown that their organization would cause a conflict.

The court of appeals denied enforcement of the Board's order to bargain,[65] and certiorari was granted.[66] Like the circuit court, the Supreme Court rejected the Board's application of the "conflict of interest" test,[67] holding instead that the established inquiry into the degree of authority exercised is the correct legal standard for determining whether the buyers are true "managerial employees."[68]

---

ers. *Cf.* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).

64. The company had petitioned the Board to reconsider its endorsement in light of a recent decision holding that under no circumstances could an employee be brought under the Act once he was deemed "managerial." NLRB v. North Ark. Elec. Corp., 446 F.2d 602 (8th Cir. 1971). The Board stated that it disagreed with the Eighth Circuit and would adhere to its own decision. Bell Aerospace Co., 196 N.L.R.B. 827, 828 (1972). *See* 26 VAND. L. REV. 850 (1973).

65. Bell Aerospace Co. v. NLRB, 475 F.2d 485 (2d Cir. 1973).

66. NLRB v. Bell Aerospace Co., 414 U.S. 816 (1973).

67. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

68. Although the Board has purposely defined "managerial employee" in a vague, flexible fashion, it has developed the meaning of the term consistently. Generally, "managerial employees" are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947).

The Board usually placed buyers who were invested with responsibility and discretion in the "managerial" category because their interests were closely aligned with management. *E.g.*, Western Gear Corp., 160 N.L.R.B. 272 (1966) (buyers prepared purchase orders and had discretionary authority to pledge employer's credit up to $5,000); ACF Indus., Inc., 145 N.L.R.B. 403 (1963) (buyers could reject bids and commit employer's credit up to $2,500); Kearney & Trecker Corp., 121 N.L.R.B. 817 (1958) (buyers interviewed prospective suppliers, cancelled orders and placed them with alternative vendors); Federal Tel. & Radio Co., 120 N.L.R.B. 1652 (1958) (buyers made actual purchases in amounts up to $2,500 without management approval); Mack Trucks, Inc., 116 N.L.R.B. 1576 (1956) (in one fiscal year buyers pledged employer's credit in amounts ranging from $800,000 to $6,000,000, negotiated prices, changed delivery dates, and adjusted disputes with suppliers).

At Bell Aerospace Co., buyers procured inter-departmental requisitions and purchased all the company's needs from outside sources. Unless instructed otherwise, they had discretion to choose vendors, draft bid invitations, evaluate submitted bids, negotiate terms, and purchase in amounts up to $5,000 without prior approval from a supervisor. The company maintained that, according to Board precedent, the buyers were "managerial employees." 416 U.S. at 269-70.

Under the "conflict of interest" standard, some "managerial employees" might invoke the protections of the Act despite their alignment with management. It was clear to the Court that the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act, the Board's subsequent construction of the Act, and the decisions of courts of appeals pointed to a flat exclusion of all "managerial employees."[69] The case was remanded to the Board for application of the proper legal standard.

The Court also disagreed with the circuit court's characterization and treatment of the rulemaking issue in *Bell Aerospace*.[70] The circuit court felt that while the Board could determine that buyers, or some buyers, were not "managerial employees," to do so would overturn established Board policy to the contrary.[71] This change of position would affect hundreds of thousands of buyers and employers who would be without notice or the opportunity to be heard because the change had occurred in an adjudicatory proceeding. If the Board wished to significantly alter the current labor-management understanding of which employees where "managerial," it would be required to conduct rulemaking proceedings.[72] The court noted that policy-making by adjudication is often unavoidable in unfair labor practice cases, where the parties have already acted and the Board must resolve the dispute immediately; there is not the same urgency in representation cases.[73]

---

69. 416 U.S. at 289. *See* 24 CATH. L. REV. 118 (1974).

Four dissenting Justices (White, Brennan, Stewart & Marshall, JJ.) could find no intent to exclude "managerial employees" in either the legislative history of the Act or in subsequent Board decisions. "Supervisory employees," a specifically defined subclass of "managerial employees," are the only "managerial" group expressly excluded by the Act. 29 U.S.C. § 152(11) (1970). The dissenters saw no reason to imply a broader exclusion when the Act was so explicit. 416 U.S. at 297.

70. The company attacked the Board's order on the merits in the lower court; the rulemaking issue was raised by the circuit court itself.

71. Only twice had the Board addressed the question whether buyers could organize in a separate unit; both times unionization was prohibited. Swift & Co., 115 N.L.R.B. 752 (1956); American Locomotive Co., 92 N.L.R.B. 115 (1950). The issue may have been raised so infrequently because the Board traditionally identified buyers with management. *See* note 68 *supra*.

72. 475 F.2d at 495-96. This was true despite evidence that the company's buyers were not sufficiently high in the managerial hierarchy to be true "managerial employees." *Id.* at 494.

73. In a representation proceeding the parties seek only a determination of whether the proposed unit is "appropriate" for purposes of collective bargaining. The Board simply establishes the rights of the litigants without ordering anything to be done—much like a declara-

According to the Supreme Court, the question was not whether the Board should have resorted to rulemaking when it held that the Act covered all "managerial employees" except those susceptible to a "conflict of interest." Nor did the Court ask if the Board had improperly promulgated a rule. The conclusion that the standard was wrong made consideration of these issues unnecessary.[74] Rather, the question was whether the Board would be required to proceed by rulemaking if it applied the proper standard to the buyers on remand and determined they were not "managerial employees."[75]

The circuit court thought rulemaking was required because any Board finding that buyers were not "managerial employees" would be contrary to its prior decisions and would presumably be in the nature of a general rule applicable to all other cases. The Supreme Court, however, categorized the case as one of the situations delineated in *Chenery II*[76]—where rulemaking is inappropriate and hence not required.[77] Precisely because there were hundreds of thousands of buyers, whose duties vary widely depending on the industry and the employer, it was doubtful any generalized standard would have more than marginal utility.[78] The Board thus had reason to proceed

---

tory judgment. This affects the rulemaking issue in representation cases, because declaratory judgments are included in the definition of "order" in the APA. *See* text at note 13 *supra*. If the Board makes declaratory judgments or their equivalent in representation proceedings, there should be no rulemaking issue: The Board has issued an order within the meaning of the APA. The court of appeals required rulemaking in *Bell Aerospace* because it focused on how the judgment affected parties *outside* the proceeding. 475 F.2d at 496.

74. The implication is that the "conflict of interest" standard would be substantively incorrect and unenforceable even if it had been formulated in a proper rulemaking proceeding.

75. 416 U.S. at 291.

76. *See* text at notes 35-38 *supra*.

77. The Court indicated that it had a particular *Chenery II* exception in mind: " '*Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.*' " 416 U.S. at 293, *quoting* 332 U.S. 194, 202-03 (1947) (emphasis by the Court). *See* text at notes 35-36 *supra*.

78. 416 U.S. at 294. The Board had argued that its *Bell Aerospace* holding was not designed as a general rule, since the factors to be considered in determining if employees are "managerial" have different weight in different contexts. For example, a $5,000 purchase ceiling might evidence more authority where the buyer procures low rather than high priced items. A buyer's discretionary power to choose suppliers means less when potential suppliers are limited in number. In one company, detailed instructions from management might not diminish a buyer's actual authority; in another, less detailed instructions could have that effect. Brief for Petitioner at 32 n.22, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

The company contended that even though a general standard might not accommodate fringe cases, the Board could resolve the issue for a vast majority of buyers by promulgating a rule. In the process, the Board could decrease its own caseload. Brief for Respondent at 22.

cautiously, developing its standard by the ad hoc method with attention to the specific characteristics of the buyers in each company. The Board's judgment that adjudication best served this purpose was entitled to great weight.

Industry's reliance on the Board's past decisions did not compel a different result, since the company had not shown substantial adverse consequences flowing from such reliance; no fines were imposed and no new liability was incurred for past actions undertaken in good faith.[79] In any event, such concern was premature, for the Board had not yet finally determined the status of the buyers. The Court concluded that the Board would not abuse its discretion if it made the determination in an adjudicatory proceeding.

C. Analysis of *Bell Aerospace*—The Functional Approach

The Court in *Bell Aerospace* found that the question whether certain buyers are "managerial" came within a *Chenery II* exception to the rulemaking requirement.[80] But *Chenery II* concerns the agency's pre-judicial review policy formulation; a reviewing court uses the *Chenery II* criteria to determine if the agency abused its discretion by making policy pronouncements in a prior adjudicatory proceeding. The Court never reached that inquiry in *Bell Aerospace* because the policy itself was incorrect. The Court, unconcerned with what the Board should have done, looked ahead to how the Board should proceed on remand.[81] It examined this question in light of the function the Board would perform, and thus adopted a functional approach.

The Court held that rulemaking would not be required if the Board finally classified the buyers as "non-managerial."[82] The implication is that extending the Act's coverage to the buyers would be permissible; it would not constitute a change in policy, despite a long line of contrary precedent, because the standard would not be changed. *Bell Aerospace* did not present a *Chenery II* situation,

79. 416 U.S. at 295. When retroactive policy-making has a disastrous impact upon a party innocent of any conscious misconduct, an order may be applied prospectively. NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952). In extreme cases, the court will call for rulemaking. NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966). These cases turn on general equitable principles rather than the requirements of the APA.

80. *See* note 77 *supra*.

81. 416 U.S. at 294.

82. *Id.* at 295.

where the agency had exercised its law-declaring function prior to any review by the Court. Rather, the Court here announced the correct legal standard through its independent scope of review;[83] on remand the Board was only to *use* the standard. In other words, it was to perform its law-applying function, the exercise of which is consistently affirmed by courts so long as it has a rational basis.[84]

In the Court's view, "policy" is the standard itself, rather than the way the standard is applied. Since rulemaking is at issue only when an agency changes or adopts policy, it follows that the issue is relevant only when the agency executes its law-declaring function. When the agency engages in law-application alone, *Bell Aerospace* indicates the rulemaking question is misplaced.[85] Of course, law-applying could border on law-declaring if the agency uses the standard in an unusual fashion. The question in the wake of *Bell Aerospace* is how far the agency may bend the standard before it has in fact changed policy and resurrected the rulemaking issue.

Bell Aerospace reflects a belief, first articulated in *Chenery II*,[86] that agencies have sufficient expertise[87] to determine whether adjudicative proceedings can provide the information necessary for a fair consideration of the issues.[88] The presumption of expertise contrasts with a theory shared by some lower courts that above all the administrative process must satisfy the agency's constant need for input from many varied sources[89] and direct the regulated through adequate notice.[90]

---

83. Statutory interpretation is a question of law within the exclusive competance of courts. The court may reject the Board's analysis and independently establish the meaning of statutory terms. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 115 (1944).

84. *E.g.*, Gray v. Powell, 314 U.S. 402 (1941).

85. It has been suggested, however, that the law-declaring and law-applying labels are so amorphous as to be interchangeable at the whim of the court. K. DAVIS, ADMINISTRATIVE LAW TEXT 551-52 (1972).

86. 332 U.S. at 203.

87. Some commentators feel that reviewing courts defer to agency expertise to the point of abdication. *See generally* Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 471-75 (1954).

88. 416 U.S. at 295.

89. *See* Hess & Clark, Inc. v. FDA, 495 F.2d 975 (D.C. Cir. 1974) (agency must give parties adequate notice and in turn receive response sufficient to raise the material issues); Hill v. FPC, 335 F.2d 355 (5th Cir. 1964) (suggests that agency might conduct its rate-making in two stages: one providing affected parties the opportunity to inform the agency of special facts it might find useful, and another, following the announcement of the standard, allowing the parties a reasonable chance to satisfy any burden imposed).

90. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 (D.C. Cir. 1973) (con-

Bell Aerospace may evidence tacit disapproval of this movement among the lower courts. It suggests that in the future the Court's appraisal of the law developed by the Board will be more substantive than procedural,[91] because it makes the Board virtually impervious to procedural attack on law-application. If the Board applies the standard incorrectly, a court might reverse its decision on the merits. But if the Board has done no more than apply the proper standard improperly, *Bell Aerospace* seems to preclude a challenge based on the rulemaking issue even if the Board's decision affects parties outside the proceeding.[92]

The Court may have reached this result because the Board's notoriously settled habits make the rulemaking issue academic[93] in all but the most dramatic cases. Or it could be a recognition that the Board cannot effectively perform its statutory mandate within the framework of the APA, particularly in representation cases.[94] On the

curring opinion) (administration of Clean Air Act is so critical to the public at large that a limited right of cross-examination and opportunity to challenge the Administrator's assumptions should be provided at hearings); Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972) (directive issued by Secretary which changed the rights of aliens invalidated because it was adopted without prior publication in the Federal Register).

91. It has been suggested that when the rulemaking issue is raised the real villain is usually the agency's substantive inconstancy. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 529 (1970).

92. The Court might have softened the blow it dealt proponents of rulemaking by permitting the Board to choose its method for developing policy, provided it explained its choice—particularly in cases where information-gathering is essential and the litigants do not represent the full range of possibilities involved. The Court frequently demands explanations from agencies on other matters to determine whether they have strayed from the bounds of their enabling statute. Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973) (Commissioner must justify charging same rates for reduced services); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (although formal findings not required, Secretary must show that only one possible construction route existed); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (Board must explain basis for ordering back pay remedy).

Such a requirement might force the Board to weigh more carefully the efficacy of the proceeding it chooses, and might actually result in more rulemaking.

93. *See* Bernstein, *supra* note 28, at 620.

94. Before the NLRB can certify a bargaining representative, it must investigate the petition requesting the election and, if necessary, hold a hearing. The investigation determines, among other things, whether the Board has jurisdiction to conduct an election, whether the election is sought in an appropriate unit of employees, whether the representative named in the petition is qualified, and whether there are any pre-existing barriers to the election. 29 U.S.C. § 159(c) (1970). The Board has a statutory duty to follow this procedure "in each case." *Id.* § 159(b).

Over the years the Board has purposely failed to formulate general identifying features of an "appropriate" bargaining unit, since what is "appropriate" varies in different contexts.

other hand, *Bell Aerospace* may be a deliberate attempt to lift the conceptual fog which has beclouded the issue since *Wyman-Gordon*.

Justice Harlan cautioned in *Wyman-Gordon* that "[o]ne cannot always have the best of both worlds. Either the rule-making provisions are to be enforced or they are not."[95] Congress designed the APA rulemaking procedure with good intentions. One crucial omission—when rulemaking *must* be used—created a maze of conceptual and practical problems. Strict adherence to the APA requirements obliges agencies to choose between a rock and a hard place: they must be faithful to the APA at the risk of wasting time, money, and human resources, or follow their own instincts and face the consequences on judicial review. The functional approach in *Bell Aerospace* may reflect sympathy for the agencies' dilemma and a movement toward simplification of the rulemaking issue.[96]

M. Beth Troiano

Generally, employees with substantially similar interests concerning wages, hours, and working conditions are grouped together in a bargaining unit. The Board also considers the desires of the employees concerned, the extent to which the employees are organized, and any history of collective bargaining. NLRB, A LAYMAN'S GUIDE TO BASIC LAW UNDER THE NATIONAL LABOR RELATIONS ACT 9 (1971).

In this setting, rulemaking may be inappropriate and even counter-productive, since in some instances the statute requires quick dispatch of petitions. 29 U.S.C. § 158(b)(7)(C) (1970). It might be argued, however, that before a representation question exists, a determination must be made whether the employees are covered by the Act at all. This might be expedited by promulgation of a general standard for industries where the management-employee hierarchy is consistent from company to company. This was the position taken by the circuit court in *Bell Aerospace*. *See* text at note 73.

95. 394 U.S. at 781. It might be argued that Justice Harlan was wrong in characterizing rulemaking and adjudication as an "either/or" imperative. The adjudicatory procedure of the APA includes some features of rulemaking; the only difference between the two is that these features are discretionary in adjudication. 5 U.S.C. § 554(c) (1970).

96. *Cf.* Professor Davis' suggestion that borderline cases should not be saddled with APA labels. He advocates a study of the practical procedural needs in hybrid situations where rulemaking is a possibility, without characterizing the activity as either rulemaking or adjudication. 1 K. DAVIS, TREATISE ON ADMINISTRATIVE LAW § 5.01 (Supp. 1965).