

1943

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### Recommended Citation

Clyde W. Summers, *WHAT CONSTITUTES A FAIR PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD*, 41 MICH. L. REV. 595 (1943).

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## WHAT CONSTITUTES A FAIR PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD

*Clyde W. Summers\**

NO administrative body in recent times has received as much criticism, both favorable and unfavorable, as has the National Labor Relations Board in its administration of the National Labor Relations Act.<sup>1</sup> Such a vast amount of material has been written on the procedure before the board that any further discussion would seem superfluous.<sup>2</sup> However, the discussion of the board's procedure has been related more to the wisdom of choice which the board has made in setting up its procedure than to a determination of the line that separates legality from illegality in its determination of cases.

The author has sought to determine from the published decisions of the board<sup>3</sup> and from the cases before the Supreme Court and the Circuit Courts of Appeals<sup>4</sup> what the boundaries are that divide fair from unfair procedure. The principles derived from the due process clause of the Fifth Amendment are applicable, and the act specifically provides for a procedure which complies with the principles of due process.<sup>5</sup> But more than that should be required of administrative tribunals if they are to gain popular respect and confidence. They should be held to standards of fairness based on equal rights and impartiality in all stages of the proceeding.

In attempting to determine what the board and the courts feel is a fair procedure, the decisions of the board are of little help. The

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<sup>1</sup> 49 Stat. L. 449 (1935), 29 U. S. C. (1940), § 151 et seq.

<sup>2</sup> The best discussion of the board's procedure is the Monograph on the National Labor Relations Board in ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPHS OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. 10, 77th Cong., 1st sess. (1941), pt. 5 (hereinafter cited as "Administrative Procedure Monograph"). One of the most helpful criticisms of that procedure from the practical standpoint is Gellhorn and Linfield, "Politics and Labor Relations: An Appraisal of Criticisms of N. L. R. B. Procedure," 39 COL. L. REV. 339 (1939).

<sup>3</sup> Volumes 1-25 covering all decisions up to August 1, 1940.

<sup>4</sup> All Supreme Court cases up to 63 S. Ct. 206 (December 15, 1942), and all circuit court cases up to 131 F. (2d) 112 (December 14, 1942).

<sup>5</sup> N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937).

issues on procedural points are not clearly defined, the facts are not fully stated, and the reasoning on which the board bases its conclusions is not given. It is difficult, therefore, to determine just what a decision holds, predict what may happen in future cases, or work out any reliable guiding principles. Many of the board decisions cited in this discussion are cited with the inner fear that the board did not mean at all what it apparently said.

The court decisions are somewhat better, but one has the lurking suspicion that often behind all of the abstract generalizations of the court lies an unexpressed major premise based on the judge's personal philosophy of the wisdom of administrative justice or the basic purposes of the act. However, there are many well-defined rules which the courts mechanically follow, and many other more intangible rules which give clues as to what the courts may do in the future. Decisions concerning other tribunals have not been examined, although they might shed some light on the decisions concerning the Labor Board. However, the kind of procedure that will be fair depends to a large degree upon the nature of the issues being litigated and the relationship between the parties in the litigation. Here the board is charged with the settling of disputes between labor and capital under circumstances of great emotional tension and according to principles that have only recently been established in this country. Its procedure must accordingly provide greater safeguards and some of a sort different from those provided by other tribunals.

It is the purpose of this discussion to follow the complaint procedure of the board step by step from the filing of the charge to the issuing of the order and to state the principles and rules which have been established at each step. The procedure in representation proceedings is not discussed because it is primarily investigatory and gives little help in determining the attributes of a fair hearing.

The ordinary complaint case begins with the filing with the board of a charge by a union against an employer, charging the employer with certain violations of the act. The respondent is served with a complaint stating the charges against him<sup>6</sup> and the time when a hearing will be held on the charges. The hearing is held before a trial examiner with the regional attorney attempting to prove the allegations in the complaint and the respondent attempting to disprove them. At the end of the hearing, the trial examiner draws up his recommen-

<sup>6</sup> Although the respondent is often a corporation and only occasionally a human being, the third person masculine singular pronoun will usually be used to refer to a respondent, corporate or human.

dations in an intermediate report and transfers this with the record of the hearing to the board. After the consideration of briefs filed by both parties, and after the hearing of oral argument, the board makes its findings of fact and order. If the respondent fails to comply with the order, the board asks for an enforcement order from the circuit court of appeals, which then reviews the proceeding and the evidence. If the court grants the enforcement order, subsequent noncompliance by the respondent constitutes contempt.

There are three main stages in the entire process: the pre-hearing stage involving the problems of the requirements in pleading and the joinder of parties; the hearing stage involving the problems of obtaining and presenting evidence before the trial examiner, the formation of an unbiased record, and the making of the intermediate report; and the decision stage involving the problems as to who must make the decision, on what it must be based, and the scope of the order.

## I

### PLEADINGS AND PARTIES

#### A. *Pleadings*

The pleadings in the procedure before the board consist of the charge, which gives the board notice of a violation of the act and gives it jurisdiction to act; the complaint, which serves notice on the respondent of the institution of formal action; and the answer, which gives the board notice of the respondent's intended defenses. The pleadings here are informal in nature and are not intended to define a cause of action, but only to give the parties an adequate opportunity to prepare for the hearing. No party can complain of defects in the pleading unless he can show that he was injured thereby.

#### I. *The Charge*

The board has no power to institute proceedings of its own motion, but can obtain jurisdiction over unfair practices only when a charge has been filed with it.<sup>7</sup> The board's rules and regulations authorized by the act<sup>8</sup> provide the rules for the filing of charges.

A charge may be filed by any person or labor organization<sup>9</sup>

<sup>7</sup> N. L. R. A., § 10 (b); *Consumers Power Co. v. N. L. R. B.*, (C. C. A. 6th, 1940) 113 F. (2d) 38.

<sup>8</sup> N. L. R. A., § 6.

<sup>9</sup> Rules and Regulations (1940), art. II, § 1. Also published in 4 FED. REG. 3155 (1939), as amended by 5 *id.* 317, 1046 (1940).

whether parties to the dispute or not.<sup>10</sup> It must be in writing, signed and sworn to,<sup>11</sup> must contain the name and address of the one filing the charge and of the one against whom the charge is filed and contain a statement of the facts alleged to constitute the unfair labor practices,<sup>12</sup> and must be filed with the regional director for the region in which the practice occurred.<sup>13</sup>

The charge will give the board jurisdiction even though it fails to comply with the board's own rules as long as there is substantial satisfaction of the safeguards.<sup>14</sup> Since the rules for the filing of charges are designed primarily to protect the board against proceeding on unwarranted charges, the respondent cannot ordinarily rely on defects in the charge. The board has jurisdiction to proceed even though the charge is not sworn to<sup>15</sup> and the charging union has not signed properly so long as there is no mistake as to its real identity.<sup>16</sup> Likewise the misnaming of the respondent is not error if he receives notice and appears.<sup>17</sup> If there is a failure to comply with the board's rules in any respect, the board can in its own discretion refuse to assume jurisdiction.

The charge need not set out the facts with particularity, but only sufficiently to inform the board of the subject matter which is to be investigated and on which the complaint is to be issued.<sup>18</sup> The charge can be amended to make it more particular or to add new matters discovered at any time before final adjudication by the board.<sup>19</sup>

Since the board's function is not only to adjudicate the private rights of the parties, but also to protect the public's rights, once a charge has been filed, it is the duty of the board to protect the public interest. The charge can be withdrawn only with the consent of the board<sup>20</sup> and it can refuse to allow withdrawal even though the

<sup>10</sup> *Matter of Washougal Woolen Mills*, 23 N. L. R. B. 1 (1940). Even though the union which filed the charge was nonexistent at the time of filing the amended charge, the charge is good as it purports to be by a union and can also be treated as being filed by an individual. *Matter of Universal Match Corp.*, 23 N. L. R. B. 226 (1940).

<sup>11</sup> Rules and Regulations, art. II, § 3.

<sup>12</sup> *Id.*, § 4.

<sup>13</sup> *Id.*, § 2.

<sup>14</sup> *Consumers Power Co. v. N. L. R. B.*, (C. C. A. 6th, 1940) 113 F. (2d) 38; *Matter of Diamond T Motor Car Co.*, 18 N. L. R. B. 204 (1940).

<sup>15</sup> *N. L. R. B. v. J. S. Popper, Inc.*, (C. C. A. 3d, 1940) 113 F. (2d) 602.

<sup>16</sup> *N. L. R. B. v. Vincennes Steel Corp.*, (C. C. A. 7th, 1941) 117 F. (2d) 169.

<sup>17</sup> *Matter of Aluminum Ore Co.*, 8 N. L. R. B. 914 (1938).

<sup>18</sup> *Matter of Beckerman Shoe Corp.*, 19 N. L. R. B. 820 (1940).

<sup>19</sup> *Matter of Armour & Co.*, 14 N. L. R. B. 682 (1939); *Matter of Diamond T Motor Car Co.*, 18 N. L. R. B. 204 (1939). The ability to amend will be dealt with in more detail under the heading of complaint.

<sup>20</sup> Rules & Regulations, art. II, § 1.

charging party claims that all differences have been settled.<sup>21</sup> However, the board will usually permit withdrawal of the charge without prejudice and with the right of the charging party to petition for reinstatement.<sup>22</sup> If withdrawal after the hearing and the filing of the intermediate report is granted with the reservation to reinstate, the determination on reinstatement can be made according to the record prior to the withdrawal unless there is a showing of injury by the passage of an unreasonable time.<sup>23</sup>

## 2. *The Complaint*

### (a) *Investigation*

After the charge has been filed, the case is assigned to a field examiner for investigation to determine whether the charge is justified and whether the board has jurisdiction.<sup>24</sup> The field examiner gathers all of the relevant facts available, interviews the parties, and arranges for a joint conference between the parties.<sup>25</sup> As a result of this investigation the charges may be withdrawn by the union or a settlement reached. If the case is not disposed of in this way and the regional director feels the charge is unjustified, he may decline to issue a complaint, his refusal being subject to review by the board.<sup>26</sup> The investigation is of utmost importance, for one-fourth of all complaint charges are withdrawn, one-half settled, and one-sixth dismissed at this stage.<sup>27</sup> In 1939-1940, formal proceedings were had on only eleven per cent of the complaint cases filed.<sup>28</sup>

### (b) *Issuance of the Complaint*

If the case cannot be otherwise disposed of, the regional director must request the issuance of a formal complaint by the board.<sup>29</sup> The

<sup>21</sup> *N. L. R. B. v. Prettyman*, (C. C. A. 6th, 1941) 117 F. (2d) 786.

<sup>22</sup> *Matter of C. G. Conn, Ltd.*, 7 N. L. R. B. 337 (1938) (withdrawn when the Carter Coal case threw doubts on the constitutionality of the act, reinstated after the act had been held constitutional).

<sup>23</sup> *C. G. Conn, Ltd., v. N. L. R. B.*, (C. C. A. 7th, 1939) 108 F. (2d) 390.

<sup>24</sup> Subpoenas may be issued to determine whether the acts charged affect commerce even though no complaint has been issued. *N. L. R. B. v. Barrett Co.*, (C. C. A. 7th, 1941) 120 F. (2d) 583; but the party charged is not entitled to a hearing on whether there is sufficient grounds to warrant an investigation, *Matter of Gate City Cotton Mills*, 1 N. L. R. B. 57 (1935).

<sup>25</sup> ADMINISTRATIVE PROCEDURE MONOGRAPH 4-5 (1941).

<sup>26</sup> Rules & Regulations, art. II, § 9.

<sup>27</sup> 1936 N. L. R. B., ANNUAL REPORT 35-36; 1937 *id.* 20-21; 1938 *id.* 30-31; 1940 *id.* 16-17.

<sup>28</sup> 1940 *id.* 16.

<sup>29</sup> Rules & Regulations, art. II, § 5.

complaint is the formal notice of the proceedings and the facts in issue and must be served on the parties. It may be served personally, by registered mail, or by telegraph,<sup>30</sup> anywhere in the United States.<sup>31</sup> It should be served on the respondent at his place of business,<sup>32</sup> but if it is served on the respondent's attorney and the respondent had actual knowledge of the complaint, the notice is good.<sup>33</sup>

The time of issuing the complaint is at the discretion of the board;<sup>34</sup> delay of one or two years after the commission of the acts complained of will not constitute laches,<sup>35</sup> give the court the right to modify the order,<sup>36</sup> or constitute a constructive declination to issue the complaint.<sup>37</sup> The rules provide that the complaint must be served at least ten days before the date set for the hearing,<sup>38</sup> but a failure to comply with the rules will not void the proceedings where there is no showing of prejudicial injury from a lack of time to prepare.<sup>39</sup> The respondent cannot claim prejudice if it answers the complaint without asking for an extension.<sup>40</sup> If the ten day notice is not given and the respondent objects, an extension must be granted or a new hearing will be ordered.<sup>41</sup>

The rules provide that a copy of the charge upon which the complaint is based shall be attached to the complaint.<sup>42</sup> The respondent cannot demand that the original charge be attached<sup>43</sup> but the attaching of a copy of the amended charges is sufficient compliance with the rules.<sup>44</sup> If no charge at all is attached, then the complaint will probably be held bad,<sup>45</sup> although such action is not necessarily injurious, for the

<sup>30</sup> N. L. R. A., § 11 (4).

<sup>31</sup> N. L. R. B. v. Hearst, (C. C. A. 9th, 1939) 102 F. (2d) 658 (service in a region other than the one in which the complaint was issued).

<sup>32</sup> N. L. R. A., § 11 (4).

<sup>33</sup> Matter of Emerson Electric Mfg. Co., 13 N. L. R. B. 448 (1939).

<sup>34</sup> Berkshire Employees Assn. v. N. L. R. B., (C. C. A. 3d, 1941) 121 F. (2d) 235 (even though there was intentional delay for the convenience of the union).

<sup>35</sup> Matter of Charles Banks Stout, 15 N. L. R. B. 541 (1939).

<sup>36</sup> N. L. R. B. v. Wilson Line, (C. C. A. 3d, 1941) 122 F. (2d) 809.

<sup>37</sup> Matter of Bussmann Mfg. Co., 14 N. L. R. B. 322 (1939).

<sup>38</sup> Rules & Regulations, art. II, § 5. The act requires only 5 days notice. N. L. R. A., § 10 (b).

<sup>39</sup> N. L. R. B. v. American Potash & Chemical Corp., (C. C. A. 9th, 1938) 98 F. (2d) 488 (notice of 6 days).

<sup>40</sup> Matter of Lone Star Bag Co., 8 N. L. R. B. 244 (1938) (notice of 3 days); Matter of National Candy Co., 7 N. L. R. B. 1207 (1938).

<sup>41</sup> Matter of Lane Cotton Mills, 9 N. L. R. B. 952 (1938).

<sup>42</sup> Rules & Regulations, art. II, § 5.

<sup>43</sup> Matter of L. C. Smith & Corona Typewriters, 11 N. L. R. B. 1382 (1939).

<sup>44</sup> Matter of National Meter Co., 11 N. L. R. B. 320 (1939).

<sup>45</sup> N. L. R. B. v. Hopwood Retinning Co., (C. C. A. 2d, 1938) 98 F. (2d) 97 at 102 (semble).

issues tried at the hearing are based on the allegations in the complaint rather than on the charges.<sup>46</sup> However, to allow the board to disregard its own rules<sup>47</sup> adds an air of unfairness to the whole proceeding. Mere technical violations of the rules should not necessitate voiding the whole proceeding, but the board cannot hope to gain the confidence of those who come before it if it fails to live up to its own regulations.

(c) *Sufficiency of Complaint*

Section 10(b) of the act provides that "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practices, the Board . . . shall have power to issue . . . a complaint stating the charges in that respect. . . ." This clause does not limit the board's jurisdiction to the matters specifically stated in the charge. The allegations in the complaint need not conform to the charges,<sup>48</sup> nor need the evidence be restricted to the matters charged,<sup>49</sup> but the charge will usually be amended to conform to the complaint and to the evidence in order to avoid any possible procedural defects.<sup>50</sup> The board, by issuing the complaint can, in effect, expand the charge without waiting for the union to amend.<sup>51</sup>

The complaint here has the sole function of giving notice of the issues that are to be tried and need not be as definite as a pleading in law or equity. It need not specify any particular incidents,<sup>52</sup> nor state the names, date, or places involved<sup>53</sup> as long as it gives an adequate opportunity to all parties to prepare their evidence and cross-examination. There will be no reversal unless there is a showing of actual prejudice by lack of notice. If the respondent does not ask for a bill of particulars or for an adjournment but puts in evidence to meet that

<sup>46</sup> Matter of Lone Star Bag Co., 8 N. L. R. B. 244 (1938).

<sup>47</sup> N. L. R. B. v. Pacific Gas & Electric Co., (C. C. A. 9th, 1941) 118 F. (2d) 780 at 788-789 ("There is a suggestion that the complaint violates the Board's rules, but we assume that since the Board has the power to make the rules it has power to suspend them").

<sup>48</sup> Matter of Titmus Optical Co., 9 N. L. R. B. 1026 (1938).

<sup>49</sup> Matter of Shell Petroleum Co., 10 N. L. R. B. 719 (1938) (charge of interference with unionization; complaint and evidence included preference of nonunion members).

<sup>50</sup> ADMINISTRATIVE PROCEDURE MONOGRAPH II, note 47 (1941).

<sup>51</sup> Matter of Killefer Mfg. Co., 22 N. L. R. B. 484 (1940).

<sup>52</sup> Consumers Power Co. v. N. L. R. B., (C. C. A. 6th, 1940) 113 F. (2d) 38; N. L. R. B. v. Piqua Munising Wood Products Co., (C. C. A. 6th, 1940) 109 F. (2d) 552.

<sup>53</sup> N. L. R. B. v. Pacific Gas & Electric Co., (C. C. A. 9th, 1941) 118 F. (2d) 780; Swift & Co. v. N. L. R. B., (C. C. A. 10th, 1939) 106 F. (2d) 87.

<sup>54</sup> N. L. R. B. v. Yale & Towne Mfg. Co., (C. C. A. 2d, 1940) 114 F. (2d) 376.



of the board's, he cannot claim that he had insufficient notice.<sup>54</sup> However, motions for a bill of particulars or to make the complaint more definite and specific will usually be denied on the condition that the respondent will be granted a continuance in case he is surprised,<sup>55</sup> or that he will be allowed to recall witnesses for cross-examination,<sup>56</sup> or allowed an adjournment at the close of the board's case to obtain time to prepare rebuttal.<sup>57</sup> The denial of the motions on these conditions is held not to deny a fair hearing unless there is a showing of real surprise.<sup>58</sup> This will not usually work a hardship on the respondent, because, after the interviews and conferences of the preliminary investigation, he is aware of the facts relied on the charge. In addition the hearing is by intervals sufficient to ordinarily give opportunity to prepare for the unexpected evidence.<sup>59</sup> It is submitted that there is little reason to deny motions made in good faith for more information on the issues. Though there may be no prejudice resulting from the denial, it can only serve to antagonize those who come before the board.

#### (d) *Amendments of Complaints*

The complaint may be amended at any time before the issuance of an order by the board<sup>60</sup> and the respondent is not entitled to five days after the amendment to file his amended answer or prepare his case. He is entitled only to that time which is reasonably necessary.<sup>61</sup> The allowance of only one day to answer an amended complaint may be sufficient<sup>62</sup> if the respondent is unable to show he has not had time to prepare.<sup>63</sup> If he fails to ask for a continuance and enters the evidence, then he cannot claim surprise.<sup>64</sup> The complaint may be amended at any

<sup>55</sup> Matter of Baldwin Locomotive Works, 20 N. L. R. B. 1100 (1940).

<sup>56</sup> Matter of John A. Roebling's Sons Co., 17 N. L. R. B. 482 (1939).

<sup>57</sup> Matter of Midlands Steel Products Co., 11 N. L. R. B. 1214 (1939).

<sup>58</sup> Valley Mould & Iron Co. v. N. L. R. B., (C. C. A. 7th, 1940) 116 F. (2d) 760.

<sup>59</sup> See N. L. R. B. v. Remington Rand, (C. C. A. 2d, 1938) 94 F. (2d) 862 at 873.

<sup>60</sup> Rules & Regulations, art. II, § 7; Matter of Henry Glass & Co., 21 N. L. R. B. 727 (1940) (amendment after intermediate report and oral argument before the board); Matter of Capitol Theater Bus Terminal, 16 N. L. R. B. 104 (1939) (amendment five months after hearing to make specific a general allegation of discriminatory discharge).

<sup>61</sup> Matter of Quality Art Novelty Co., 20 N. L. R. B. 817 (1940) (evidence on amended matter not entered for four days).

<sup>62</sup> M. H. Ritzwoller Co. v. N. L. R. B., (C. C. A. 7th, 1940) 114 F. (2d) 432.

<sup>63</sup> Matter of Lane Cotton Mills, 9 N. L. R. B. 952 (1938).

<sup>64</sup> Matter of Indiana & Michigan Electric Co., 20 N. L. R. B. 989 (1940); Matter of Diamond T Motor Car Co., 18 N. L. R. B. 204 (1939).

time and from time to time during the hearing to conform to the evidence presented, and at the end of the hearing to conform to all of the evidence.<sup>65</sup> Amendments will be permitted to state correctly the names of the employees,<sup>66</sup> the union, and of the company;<sup>67</sup> to clarify<sup>68</sup> or extend the bargaining unit contended for,<sup>69</sup> and to add names of workers discriminatorily discharged.<sup>70</sup> Amendments should not be permitted unless there is a definite assurance of a full litigation of the issues. If the amendment is made during the hearing, there should be adequate time given to prepare on the new issues. If the amendment is at the close of the hearing it should not be allowed to include new issues unless it is clear that both sides have been aware that these issues were being tried and have had full opportunity to present their evidence.<sup>71</sup>

### 3. *The Answer*

The respondent has the right to file an answer to the complaint with the regional director within ten days after the service of the complaint,<sup>72</sup> or later if granted an extension by the director.<sup>73</sup> The answer must be in writing, signed and sworn to by the respondent,<sup>74</sup> must contain a statement of the grounds for defense, and should explain or deny every allegation in the complaint. Any allegation not specifically denied may be deemed to be admitted.<sup>75</sup> The answer may be amended to meet any amendments made to the complaint by the board, or for any other reason upon the discretion of the board or the trial examiner.<sup>76</sup>

<sup>65</sup> Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206 (1938).

<sup>66</sup> Matter of Lone Star Bag Co., 8 N. L. R. B. 244 (1938).

<sup>67</sup> Matter of Pacific Greyhound Lines, 9 N. L. R. B. 557 (1938).

<sup>68</sup> Matter of Times Publishing Co., 8 N. L. R. B. 1170 (1938).

<sup>69</sup> Matter of Aluminum Ore Co., 8 N. L. R. B. 914 (1938).

<sup>70</sup> Matter of Hamilton-Brown Shoe Co., 9 N. L. R. B. 1073 (1938). But in Matter of Republic Creosoting Co., 19 N. L. R. B. 267 (1940), it was conditioned on the trial attorney's agreement to recall the witnesses upon the respondent's request.

<sup>71</sup> However, the board has been unwilling to allow amendment of the complaint to cover issues fully litigated which were inadvertently omitted from the complaint. See, e. g., Matter of Titmus Optical Co., 9 N. L. R. B. 1026 (1938), but it has restricted amendments after the hearing to unsubstantial matters.

<sup>72</sup> Rules & Regulations, art. II, § 10.

<sup>73</sup> Id., § 12.

<sup>74</sup> Id., § 11.

<sup>75</sup> Id., § 10.

<sup>76</sup> Id., § 13. But the respondent may be allowed to have his original answer serve as the answer to the amended complaint where the amendment was to add names of workers discharged. Matter of Montgomery Ward & Co., 9 N. L. R. B. 539 (1938).

## B. *The Parties*

The parties to the proceedings are of two classes, necessary and proper. If a party is necessary and is not joined either by being served notice or by intervention, the order can have no binding effect as to it. A proper party is one who may be allowed to intervene, or who in some cases is given notice, but whose participation is not necessary to the validity of the order.

### I. *Necessary Parties*

Section 10 (b) of the act requires only that notice of hearing be given to the employer respondent and thereby makes the board and the respondent the only necessary parties,<sup>77</sup> even though others may be vitally affected by the order. In a hearing on charges for discriminatory discharge, the workers who replaced those discharged are not entitled to intervene even though the reinstatement order may deprive them of their jobs.<sup>78</sup> In a hearing on charges of refusal to bargain collectively, the workers who are alleged to have been represented by the union are not entitled to intervene to show that the charging union does not represent them.<sup>79</sup> The court's rationale of these decisions is that these persons are not necessary parties because the order does not run against them. This is, at best, superficial and technical reasoning. All who are so directly affected should be allowed to present any evidence which they might have that would protect their interest.

This concept was extended in the *Pennsylvania Greyhound* case,<sup>80</sup> which held that company-dominated unions were not entitled to notice in a proceeding which resulted in an order invalidating a contract between the employer and the union just because the order technically ran against the company and not the union. This was qualified by the *Consolidated Edison* case,<sup>81</sup> which held that if the contracting union was not fostered or dominated by the employer, the rule did not apply and the union was entitled to notice. The circuit courts have all followed this rule that company-dominated unions were not entitled to

<sup>77</sup> By N. L. R. A., § 10 (b), any other person may be permitted to intervene on the discretion of the board or the agent conducting the hearing.

<sup>78</sup> *N. L. R. B. v. Star Publishing Co.*, (C. C. A. 9th, 1938) 97 F. (2d) 465.

<sup>79</sup> *Oughton v. N. L. R. B.*, (C. C. A. 3d, 1941) 118 F. (2d) 486.

<sup>80</sup> *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 58 S. Ct. 571 (1938).

<sup>81</sup> *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206 (1938) (contract with A. F. L. union charged as being supported by the company in opposition to C. I. O. union).

notice and had no right to intervene,<sup>82</sup> with the exception of the ninth circuit, which requires notice to company unions in all cases where the order is to invalidate the contract or disestablish the union.<sup>83</sup>

The distinction that a union is entitled to notice depending on whether or not it is dominated is unsound. A union is not any less vitally affected by the order simply because it is dominated. If it is in fact dominated, then clearly it may be destroyed, but failure to give notice of the hearing which finds that it is dominated is to condemn it without giving it a chance to acquit itself. If the contract invalidated is unfair on its face, an opportunity to present evidence would be superfluous<sup>84</sup> but in all other cases the union should not be deprived of its property right in a contract or its right of association by orders of invalidation or disestablishment without a chance to be heard. This danger is partly alleviated by the provision that notice shall be served on all unions charged with being dominated and all parties to a contract whose validity is being questioned.<sup>85</sup> However, as long as the board is entitled to ignore its own rules there is no guarantee of a fair hearing.<sup>86</sup>

## 2. *Proper Parties*

Even though a party is not entitled to notice according to the above principles, he may become a party by receiving notice or by intervening. If the motion to intervene is not in accord with the rules of the board,<sup>87</sup> the motion can be denied on that ground alone,<sup>88</sup> but the

<sup>82</sup> *Reliance Mfg. Co. v. N. L. R. B.*, (C. C. A. 7th, 1941) 125 F. (2d) 311; *N. L. R. B. v. Indiana & Michigan Electric Co.*, (C. C. A. 6th, 1941) 124 F. (2d) 50; *Bethlehem Shipbuilding Corp. v. N. L. R. B.*, (C. C. A. 1st, 1940) 114 F. (2d) 930; *N. L. R. B. v. Christian Board of Publication*, (C. C. A. 8th, 1940) 113 F. (2d) 678; *Republic Steel Corp. v. N. L. R. B.*, (C. C. A. 3rd, 1939) 107 F. (2d) 472; *N. L. R. B. v. Stackpole Carbon Co.*, (C. C. A. 3rd, 1939) 105 F. (2d) 167; *N. L. R. B. v. National Licorice Co.*, (C. C. A. 2d, 1939) 104 F. (2d) 655; *N. L. R. B. v. Wallace Mfg. Co.*, (C. C. A. 4th, 1938) 95 F. (2d) 818.

<sup>83</sup> *N. L. R. B. v. Sterling Electric Motors*, (C. C. A. 9th, 1940) 112 F. (2d) 63, affirming 109 F. (2d) 194 on rehearing; *N. L. R. B. v. Cowell Portland Cement Co.*, (C. C. A. 9th, 1939) 108 F. (2d) 198.

<sup>84</sup> *National Licorice Co. v. N. L. R. B.*, 309 U.S. 350, 60 S. Ct. 569 (1940) (the contracts were with individual employees and prohibited bargaining for a closed shop).

<sup>85</sup> Rules & Regulations, art. II, § 5.

<sup>86</sup> The board has also held that one who has no right to intervene is not entitled to a fair hearing after it becomes a party, *Matter of Harrisburg Children's Dress Co.*, 14 N. L. R. B. 1035 (1939), but there is serious doubt whether such a ruling will be supported by the courts.

<sup>87</sup> Rules & Regulations, art. II, § 19. The motion must be in writing setting out the grounds of interest, and be signed and sworn to by the intervenor.

<sup>88</sup> *Matter of De Vilbiss Co.*, 18 N. L. R. B. 187 (1939) (motion made after

motion may be granted even though there is a failure to comply with the rules.<sup>89</sup>

Individual employees will be allowed to intervene to protect their individual interests,<sup>90</sup> but they will not be allowed to intervene on behalf of fellow employees without a showing of authorization by the other employees.<sup>91</sup> Even though an individual can show such authorization, there is no error in limiting his intervention to his individual interest if the interests of all the employees are identical.<sup>92</sup> Unions will not be permitted to intervene unless they show substantial interest<sup>93</sup> and that intervention may be for a limited purpose only.<sup>94</sup> Thus where the charge is one of domination of a company union and other unfair labor practices, the intervention can be limited to the issue of domination<sup>95</sup> as this is the only issue in which the union has a substantial interest.

### 3. *Successor Parties*

Because of the protracted nature of the hearings,<sup>96</sup> the original respondent may have gone into bankruptcy or receivership. If this occurs before or during the hearing, the receiver or trustee in bankruptcy may be substituted as respondent by amending the complaint, be ordered to proceed with the defense, and compelled to comply with the order.<sup>97</sup> If the substitution is made after the hearing, the case will

hearing); *Matter of Walt Disney Productions*, 13 N. L. R. B. 865 (1939); *Matter of Standard Oil of New Jersey*, 8 N. L. R. B. 1094 (1938) (motions made orally at the hearing and denied by the trial examiner).

<sup>89</sup> *Matter of Vail-Ballou Press*, 15 N. L. R. B. 378 (1939).

<sup>90</sup> *Matter of Reed & Prince Mfg. Co.*, 12 N. L. R. B. 944 (1939). *Contra*: *Matter of John J. Oughton (Windsor Mfg. Co.)*, 20 N. L. R. B. 301 (1940).

<sup>91</sup> *Matter of Reed & Prince Mfg. Co.*, 12 N. L. R. B. 944 (1939).

<sup>92</sup> *N. L. R. B. v. Reed & Prince Mfg. Co.*, (C. C. A. 1st, 1941) 118 F. (2d) 874, affirming 12 N. L. R. B. 944 (1939).

<sup>93</sup> *Matter of Calco Chemical Co.*, 13 N. L. R. B. 34 (1939); *Matter of Interstate Water Co.*, 11 N. L. R. B. 417 (1939) (failed to show that it represented any of the employees or that it had a contract with the respondent).

<sup>94</sup> Rules & Regulations, art. II, § 19; *Matter of Burnside Steel Foundry Co.*, 7 N. L. R. B. 714 (1938) (company union allowed to show only date of origin, number it represented, and relationship with employer).

<sup>95</sup> *Matter of Gutmann Coal Co.*, 18 N. L. R. B. 64 (1939); *Matter of Cudahy Packing Co.*, 15 N. L. R. B. 676 (1939); *Matter of Consumer's Power Co.*, 9 N. L. R. B. 701 (1938).

<sup>96</sup> The time elapsing between the filing of charges and the rendering of a decision by the board has averaged in past years from 191 days in 1935-36 to 389 days in 1937-38. ADMINISTRATIVE PROCEDURE MONOGRAPH 1, note 3 (1941).

<sup>97</sup> *N. L. R. B. v. Bachelder*, (C. C. A. 7th, 1941) 120 F. (2d) 574; *Matter of Hoosier Veneer Co.*, 21 N. L. R. B. 907 (1940).

be reopened for the purpose of amending the complaint and giving the substituted party a chance for further hearing.<sup>98</sup> If the prior party has violated the act and there is a continuity of interest, the successor will be bound even though there is no charge that he has violated the act.<sup>99</sup>

Sometimes the respondent will attempt to make a fictitious conveyance of its assets in order to cover up a discriminatory discharge and escape back pay orders. In the first case of that type presented, the court refused to allow the order to run against the successor company because it was not the one charged with the violation but was a separate entity.<sup>100</sup> Later the same court overruled itself by holding that the successor was guilty of contempt for violating the enforcement order against its predecessor.<sup>101</sup> There is no reason why the successor should not be bound regardless of the technicalities of the pleadings as long as it has been given a fair chance to present evidence in its defense.<sup>102</sup>

If the charging union is reorganized or has its name changed, the new union may be substituted for the charging union<sup>103</sup> without giving the respondent a hearing on the substitution if the new union is in fact the successor of the charging union.<sup>104</sup> If a company union which is charged with being dominated by the employer is disbanded and a new union is organized, the new union is bound by any order made against the old union only if there is actually a continuity of interest found.<sup>105</sup>

#### 4. Consolidation

Because of the great mass of cases before the board,<sup>106</sup> it is often convenient to consolidate related cases and dispose of several at a single

<sup>98</sup> Matter of Ryan Car Co., 21 N. L. R. B. 139 (1940).

<sup>99</sup> N. L. R. B. v. Bachelder, (C. C. A. 7th, 1941) 120 F. (2d) 574.

<sup>100</sup> N. L. R. B. v. Hopwood Retinning Co., (C. C. A. 2d, 1938) 98 F. (2d) 97.

<sup>101</sup> N. L. R. B. v. Hopwood Retinning Co., (C. C. A. 2d, 1939) 104 F. (2d) 302.

<sup>102</sup> N. L. R. B. v. Baldwin Locomotive Works, (C. C. A. 3d, 1942) 128 F. (2d) 39; Union Drawn Steel Co. v. N. L. R. B., (C. C. A. 3d, 1940) 109 F. (2d) 587 (successor brought in during first day of hearing).

<sup>103</sup> Matter of Consumers Power Co., 9 N. L. R. B. 701 (1938).

<sup>104</sup> Cudahy Packing Co. v. N. L. R. B., (C. C. A. 10th, 1941) 118 F. (2d) 295.

<sup>105</sup> N. L. R. B. v. Hollywood-Maxwell Co., (C. C. A. 9th, 1942) 126 F. (2d) 815 (new union not a continuation and free of domination); Eagle-Picher Mining & Smelting Co. v. N. L. R. B., (C. C. A. 8th, 1941) 119 F. (2d) 903 (new union merely a disguise for the old one).

<sup>106</sup> During the first four years the board handled 22,500 cases, ADMINISTRATIVE PROCEDURE MONOGRAPH I (1941).

hearing.<sup>107</sup> The consolidation may consist of representation and complaint proceedings<sup>108</sup> against the same respondent,<sup>109</sup> charges of separate unions against the same employer,<sup>110</sup> and charges by the same union against separate employers. The determination to consolidate is solely within the discretion of the board and the parties are not entitled to be heard on this issue.<sup>111</sup>

Consolidation has the effect of incorporating the record of another case into the record of the instant case. This saves the retaking of a vast amount of evidence and enables the board to consider both cases conjunctively. There is an evident danger that the incorporation may force the parties to meet some issues for which they are not prepared. The same length of notice or right to continuance should be granted here to protect the parties from surprise as is given in cases of amending the complaint as to matters of substance,<sup>112</sup> and the parties should be given an adequate opportunity to rebut the evidence incorporated.<sup>113</sup> A second danger is that the acts in the various incorporated cases will be so unrelated as to confuse the issues and to prevent a clear understanding of the different cases.

## II

### THE HEARING

After a charge has been filed, a complaint served, and an answer made, there must be a hearing to determine the merits of the allegations in the complaint. The hearing is not for the purpose of rendering a decision at that time but to adduce evidence and compile a record from which the board can reach a decision and issue the proper order. Though the order may result in money damages in the form of back

<sup>107</sup> See *Matter of General Petroleum Corp. of California*, 5 N. L. R. B. 982 (1938) (15 cases consolidated).

<sup>108</sup> *Matter of Henry Glass & Co.*, 21 N. L. R. B. 727 (1940) (consolidation after representation proceedings had reached the stage of oral argument).

<sup>109</sup> *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, (C. C. A. 5th, 1941) 122 F. (2d) 433.

<sup>110</sup> *Matter of Block-Friedman Co.*, 20 N. L. R. B. 625 (1940) (three companies in Dallas associated on a blacklisting device and dominating a single local union); *Matter of Heyward Granite Co.*, 18 N. L. R. B. 542 (1939) (five companies in the same business in the same locality).

<sup>111</sup> *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, (C. C. A. 5th, 1941) 122 F. (2d) 433; *Matter of Cudahy Packing Co.*, 17 N. L. R. B. 302 (1939).

<sup>112</sup> *Matter of Eagle & Phenix Mills*, 11 N. L. R. B. 361 (1939) (evidence not taken on consolidated issues for one week held not to be error where no actual prejudice was shown).

<sup>113</sup> *Matter of Niles Fire Brick Co.*, 18 N. L. R. B. 883 (1939).

pay for employees wrongfully discharged, there is no right to a jury trial for it is a purely statutory proceeding.<sup>114</sup>

### A. *The Trial Examiner*

The statute provides that the hearing shall be before the board, one of its members, or a designated agent or agency.<sup>115</sup> Practically all hearings are now held before the trial examiners employed by the board. The primary function of the examiner is to make a complete and accurate record of all of the facts from which the board can make a fair decision.<sup>116</sup> He therefore can and should cross-examine the witness to clarify the testimony,<sup>117</sup> call other witnesses, and enter other documentary evidence of which he may have knowledge.<sup>118</sup> He may limit cross-examination and exclude irrelevant or incompetent testimony to keep the record down to a reasonable size.<sup>119</sup>

The second function of a trial examiner is to rule on all motions made during the hearing as to intervention, amendment of pleadings, consolidation, issuance of subpoenas, admission of evidence, and dismissal of the complaint. Since he is the agent of the board taking evidence for their use, he can consult the board for advice on ruling on these motions.<sup>120</sup> On a motion to dismiss, he may reserve his decision until all evidence is in and rule on it in his intermediate report,<sup>121</sup> but rulings on all other motions should be made before further hearing.

The third function of the trial examiner is to prepare an intermediate report stating his findings of fact and his recommendations for the disposition of the case.<sup>122</sup> These are only recommendations to the board and are in no sense binding on it. If there has been an interruption in the trial and a different trial examiner assigned to complete the hearing, neither will be able to make a report, but the board can take jurisdiction of the case and make an order based on the record alone.<sup>123</sup>

<sup>114</sup> *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937); *Aqwilines v. N. L. R. B.*, (C. C. A. 5th, 1936) 87 F. (2d) 146.

<sup>115</sup> *N. L. R. A.*, § 10 (c).

<sup>116</sup> Rules & Regulations, art. II, § 23.

<sup>117</sup> *Subin v. N. L. R. B.*, (C. C. A. 3d, 1940) 112 F. (2d) 326; *Cupples Co. Mfrs. v. N. L. R. B.*, (C. C. A. 8th, 1939) 106 F. (2d) 100; *N. L. R. B. v. Stackpole Carbon Co.*, (C. C. A. 3d, 1939) 105 F. (2d) 167.

<sup>118</sup> Rules & Regulations, art. II, § 24.

<sup>119</sup> *N. L. R. B. v. Remington Rand*, (C. C. A. 2d, 1938) 94 F. (2d) 862.

<sup>120</sup> *Consumers Power Co. v. N. L. R. B.*, (C. C. A. 6th, 1940) 113 F. (2d) 38.

<sup>121</sup> *Matter of Times Publishing Co.*, 13 N. L. R. B. 652 (1939).

<sup>122</sup> Rules & Regulations, art. II, § 32, as amended 6 FED. REG. 4603 (1941).

<sup>123</sup> *Matter of Condenser Corp. of America*, 22 N. L. R. B. 347 (1940); *Matter of Model Blouse Co.*, 15 N. L. R. B. 133 (1939).



Perhaps no criticism of the board's procedure has been quite as vituperative as the criticism that the trial examiners are biased against the respondent. Often this charge is made when there has been complete fairness in his conduct at the hearing,<sup>124</sup> and in only three cases have the courts found the trial examiner's bias was so great as to require a reversal.<sup>125</sup>

Mere claiming of bias is not enough.<sup>126</sup> There must be a pointing out of specific instances<sup>127</sup> of conduct which work a substantial prejudice.<sup>128</sup> The mere cross-examination of witnesses, even though it brings out evidence unfavorable to the respondent,<sup>129</sup> and even though it is unnecessarily extended<sup>130</sup> is not a ground for reversal. However, if the cross-examination is hostile or partisan, not being equally searching on both sides, there is such unfairness as to require a new hearing.<sup>131</sup> The showing of feeling,<sup>132</sup> expressions of sarcasm,<sup>133</sup> impatience and abruptness,<sup>134</sup> though unbecoming of a judge, are not sufficient if there is no showing of actual prejudice.<sup>135</sup> The mere fact that the trial examiner made erroneous rulings is not sufficient to show bias,<sup>136</sup> but if he is not equally liberal on both sides in the admission of incompetent and hearsay evidence, it may show such bias as to require reversal.<sup>137</sup>

<sup>124</sup> *N. L. R. B. v. Baldwin Locomotive Works*, (C. C. A. 3d, 1942) 128 F. (2d) 39; *Subin v. N. L. R. B.*, (C. C. A. 3d, 1940) 112 F. (2d) 326; *Kansas City Power & Light Co. v. N. L. R. B.*, (C. C. A. 8th, 1940) 111 F. (2d) 340; *Wilson & Co. v. N. L. R. B.*, (C. C. A. 8th, 1939) 103 F. (2d) 243.

<sup>125</sup> *N. L. R. B. v. Washington Dehydrated Food Co.*, (C. C. A. 9th, 1940) 118 F. (2d) 980; *Inland Steel Co. v. N. L. R. B.*, (C. C. A. 7th, 1940) 109 F. (2d) 9; *Montgomery Ward & Co. v. N. L. R. B.*, (C. C. A. 8th, 1940) 103 F. (2d) 147.

<sup>126</sup> *Matter of Union Die Casting Co.*, 7 N. L. R. B. 846 (1938).

<sup>127</sup> *Matter of Condenser Corp. of America*, 22 N. L. R. B. 347 (1940).

<sup>128</sup> *Cudahy Packing Co. v. N. L. R. B.*, (C. C. A. 8th, 1940) 116 F. (2d) 367; *N. L. R. B. v. Remington Rand*, (C. C. A. 2d, 1938) 94 F. (2d) 862.

<sup>129</sup> *Jefferson Electric Co. v. N. L. R. B.*, (C. C. A. 7th, 1939) 102 F. (2d) 949.

<sup>130</sup> *Cupples Co. Mfrs. v. N. L. R. B.*, (C. C. A. 8th, 1939) 106 F. (2d) 100 (where the trial examiner's questioning of 4 witnesses covered 155 pages).

<sup>131</sup> See cases cited supra, note 125 (all three of these cases are good examples of extreme bias of trial examiner).

<sup>132</sup> *Bethlehem Steel Corp. v. N. L. R. B.*, (App. D. C. 1941) 120 F. (2d) 641.

<sup>133</sup> *N. L. R. B. v. Stackpole Carbon Co.*, (C. C. A. 3d, 1939) 105 F. (2d) 167.

<sup>134</sup> *Matter of Johns-Manville Products Corp.*, 17 N. L. R. B. 895 (1939).

<sup>135</sup> *N. L. R. B. v. Ford Motor Co.*, (C. C. A. 6th, 1940) 114 F. (2d) 905. The court will look fully into the facts to see if the charges of unfairness are supported by proof. *N. L. R. B. v. Acme-Evans Co.*, (C. C. A. 7th, 1942) 130 F. (2d) 477.

<sup>136</sup> *Donnelly Garment Co. v. N. L. R. B.*, (C. C. A. 8th, 1941) 123 F. (2d) 215; *N. L. R. B. v. Luxuray*, (C. C. A. 2d, 1941) 123 F. (2d) 106; *Wilson & Co. v. N. L. R. B.*, (C. C. A. 8th, 1939) 103 F. (2d) 243.

<sup>137</sup> *N. L. R. B. v. Washington Dehydrated Foods Co.*, (C. C. A. 9th, 1940) 118 F. (2d) 980.

The board itself has held that if the trial examiner admitted he was influenced in his report by matters outside of the record, it will order a new hearing,<sup>138</sup> but it will not order a new hearing because he took part in the preliminary investigation.<sup>139</sup> The two holdings are in conflict, but the latter reveals the board's lack of concern in maintaining adequate safeguards of fairness and lays it open to the charge of combining the functions of prosecutor and judge.

If the board does not consider the trial examiner's report but only the record and there are no improper rulings apparent on the face of the record, it might be thought that the bias of the trial examiner was irrelevant.<sup>140</sup> It is true that the mere fact of bias alone may not prejudice the respondent, but if there is a showing of some effect, either on the face of the record or in the intimidation of witnesses so as to handicap the obtaining of relevant testimony,<sup>141</sup> then the proceeding is bad. If there is a clear showing of improper conduct, even though it does not apparently affect the face of the record, it should be presumed that such conduct had a prejudicial effect.<sup>142</sup> This is necessary if the respondent is to be assured of a fair hearing because of the subtle effect that bias might have upon those present at the hearing. It is also necessary if the board is to gain the respect and confidence of those who come before it.

### B. *The Attorneys*

The board is one of the essential parties to the hearing and is always represented by its attorney. The regional attorney's function is not to prosecute the respondent but to make a record which will accurately reflect the facts upon which the board must decide. He is, however, essentially an advocate entrusted with establishing the truth of the charges contained in the complaint.<sup>143</sup> There would seem, therefore, no necessity for the rule that a representative of the charging union has a right to participate<sup>144</sup> but the respondent cannot object to this participation.<sup>145</sup>

The respondent or intervening parties may be represented by

<sup>138</sup> Matter of Express Publishing Co., 8 N. L. R. B. 162 (1938).

<sup>139</sup> Matter of Ansley Radio Corp., 18 N. L. R. B. 1028 (1939).

<sup>140</sup> Matter of Air Associates, 20 N. L. R. B. 356 (1940).

<sup>141</sup> N. L. R. B. v. Air Associates, (C. C. A. 2d, 1941) 121 F. (2d) 586.

<sup>142</sup> Inland Steel Co., v. N. L. R. B., (C. C. A. 7th, 1940) 109 F. (2d) 9.

<sup>143</sup> ADMINISTRATIVE PROCEDURE MONOGRAPH 13 (1941).

<sup>144</sup> Matter of Consumers Power Co., 9 N. L. R. B. 701 (1938).

<sup>145</sup> Consumers Power Co. v. N. L. R. B., (C. C. A. 6th, 1940) 113 F. (2d) 38.

counsel, by any other person, or by themselves.<sup>146</sup> The respondent is entitled to be represented by counsel if he so desires, but if his counsel is unavailable by his own fault or choice, the trial examiner need not grant a continuance<sup>147</sup> for there is no necessity that he be so represented. The trial examiner may insist on lawyer-like conduct by the representatives and may exclude them from the hearing for contemptuous conduct<sup>148</sup> if necessary to preserve the dignity of the hearing. He may exclude counsel even though such exclusion leaves the respondent wholly unrepresented<sup>149</sup> at the hearing for it may use some other person as its representative.

### C. *The Evidence*

The primary purpose of the hearing is to develop a record of all the facts which the board should consider in making its decision. Therefore, the most important problems at the hearing stage are those dealing with the presentation of evidence. There are four main problems—the right to present evidence and cross-examine witnesses, the right to compel documentary evidence and testimony, the admissibility of evidence, and the right to adduce additional evidence subsequent to the hearing.

#### 1. *The Right to Present Evidence and Cross-examine Witnesses*

Every party to the proceeding is entitled to present evidence and participate in the cross-examination. However, because of the short notices required and the liberality in allowing amendments to the complaint, one of the parties may need additional time to gather evidence and prepare for cross-examination. The trial examiner can exercise his discretion in granting continuances during the hearing for this purpose<sup>150</sup> as long as his denial does not cause surprise<sup>151</sup> and there is adequate preparation of defense and cross-examination.<sup>152</sup> The one requesting the continuance must show that he has a substantial need and that it will render him a substantial benefit. He must show what

<sup>146</sup> Rules & Regulations, art. II, § 25; *Matter of Hyman S. Levy*, 11 N. L. R. B. 964 (1939).

<sup>147</sup> *N. L. R. B. v. American Potash & Chemical Corp.*, (C. C. A. 9th, 1938) 98 F. (2d) 488.

<sup>148</sup> *Matter of Weirton Steel Co.*, 8 N. L. R. B. 581 (1938).

<sup>149</sup> *Matter of Baldwin Locomotive Works*, 20 N. L. R. B. 1100 (1940).

<sup>150</sup> Rules & Regulations, art. II, § 30.

<sup>151</sup> *Jefferson Electric Co. v. N. L. R. B.*, (C. C. A. 7th, 1939) 102 F. (2d) 949.

<sup>152</sup> *Matter of Firestone Tire & Rubber Co.*, 22 N. L. R. B. 580 (1940).

evidence he intends to present, that it is relevant,<sup>153</sup> when he will be able to proceed,<sup>154</sup> and that he is not at fault for his inability to proceed.<sup>155</sup> The trial examiner must use reasonable discretion in ruling on motions to call additional witnesses, weighing the importance of the evidence and the delay which it involves.<sup>156</sup>

The right to present evidence and cross-examine witnesses may be an empty right if the hearings are held at some place distant from the scene of the contested conduct because of the larger number of witnesses which are usually involved.<sup>157</sup> This is true even though the act gives the board power to hold hearings anywhere in the United States, and even though there is a right to take depositions<sup>158</sup> and counter depositions<sup>159</sup> in rebuttal of unavailable witnesses, for the depositions are not as effective evidence as personal testimony. As a matter of practice the board usually holds a public hearing<sup>160</sup> in the community in which the unfair practices occurred.<sup>161</sup>

A party may not claim a denial of the right to present evidence unless he uses due diligence in trying to present it.<sup>162</sup> Claims that the

<sup>153</sup> Matter of Leroy C. Phenix, 12 N. L. R. B. 993 (1939).

<sup>154</sup> Matter of Quality Art Novelty Co., 20 N. L. R. B. 817 (1940).

<sup>155</sup> Matter of La Pree Undergarment Co., 17 N. L. R. B. 166 (1939) (date for hearing set at the convenience of the respondent's attorney and then he failed to appear because he was handling another suit, continuance refused).

<sup>156</sup> Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206 (1938) (respondent asked to call two additional witnesses who were in the room, evidence offered shown to be highly important and would take only a short time; held an abuse of discretion to refuse).

<sup>157</sup> In N. L. R. B. v. Prettyman, (C. C. A. 6th 1941) 117 F. (2d) 786, the hearing was moved from Michigan to Washington, D. C., because the respondent obtained an injunction from a Michigan court enjoining holding the hearing there. Though the principle is undoubtedly sound, there is no reason to apply it when the respondent has made it impossible to hold the hearing at a convenient place. However, in N. L. R. B. v. Southwestern Greyhound Lines, (C. C. A. 8th, 1942) 126 F. (2d) 883, it was found not prejudicial to hold the hearing at Kansas City instead of Fort Worth where the respondent had its home offices. Many of the witnesses were nearer Kansas City and holding the hearing there was more expensive for the respondent but not shown to be unduly burdensome.

<sup>158</sup> Rules & Regulations, art. II., § 20.

<sup>159</sup> Matter of Quality Shirt Mfg. Co., 18 N. L. R. B. 352 (1939).

<sup>160</sup> The public can be excluded while testimony is entered to show the employee had been guilty of a crime for which he has not been convicted. Matter of Goodyear Tire & Rubber Co., 21 N. L. R. B. 306 (1940).

<sup>161</sup> ADMINISTRATIVE PROCEDURE MONOGRAPH 14 (1941).

<sup>162</sup> N. L. R. B. v. Newberry Lumber & Chemical Co., (C. C. A. 6th, 1941) 123 F. (2d) 831. Respondent claimed it could not afford an attorney but was represented by its plant manager. He claimed that he could not call witnesses and did not know how to cross-examine. None of these claims were justified but were mere dilatory tactics.

board is hostile to the employer,<sup>163</sup> or that presenting evidence would waive constitutional objections to the act will not justify a refusal to enter evidence.<sup>164</sup> The regional attorney will proceed to present his evidence in support of the charge and the board will base its decision on that evidence alone.

The parties should be given all possible opportunity to cross-examine witnesses as to all testimony, whether elicited by the opposing party or by the trial examiner,<sup>165</sup> but the court will not reverse if there is no showing of injury by a restriction of cross-examination.<sup>166</sup> When new parties are added during the hearing, evidence taken prior to their admission will not be binding on them because they have had no opportunity to cross-examine.<sup>167</sup> This difficulty may be overcome by allowing the new parties to call back prior witnesses and examine them as to all evidence previously taken.

If proffered evidence is excluded by the trial examiner, offers of proof should be made. If the exclusion is wrongful, the board will consider the offers of proof as part of the record in making its decision,<sup>168</sup> but if there is no offer of proof, the board may order a new hearing because of the exclusion of competent and relevant evidence.<sup>169</sup>

## 2. *The Right to Compel Documentary Evidence and Testimony*

If a witness on the stand refuses to answer a proper question, the trial examiner can order that all the witness's previous testimony be stricken from the record.<sup>170</sup> The witness cannot justify his refusal to

<sup>163</sup> N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937).

<sup>164</sup> N. L. R. B. v. Anwelt Shoe Co., (C. C. A. 1st, 1937) 93 F. (2d) 367 (nor will the court require a reopening to give the respondent a chance to enter its evidence).

<sup>165</sup> Montgomery Ward & Co. v. N. L. R. B., (C. C. A. 8th, 1940) 103 F. (2d) 147 (undue and prejudicial cross-examination by the trial examiner): Matter of Bercut-Richards Packing Co., 13 N. L. R. B. 101 (1939) (board sent case back for a new hearing because the trial examiner refused cross-examination on matter brought out by his questioning).

<sup>166</sup> N. L. R. B. v. Friedrich, (C. C. A. 5th, 1940) 116 F. (2d) 888 (denied cross-examination on irrelevant testimony).

<sup>167</sup> Matter of Condenser Corp. of America, 22 N. L. R. B. 347 (1940).

<sup>168</sup> Matter of Goodyear Tire & Rubber Co., 21 N. L. R. B. 306 (1940); Matter of Armour & Co., 14 N. L. R. B. 682 (1939).

<sup>169</sup> Matter of Owens-Illinois Glass Co., 11 N. L. R. B. 38 (1939). There were numerous erroneous rulings and no statement as to whether or not offers of proof were made.

<sup>170</sup> Rules & Regulations, art. II, § 31.

testify on the grounds of self-incrimination, for the act grants immunity for all testimony taken during the proceedings.<sup>171</sup>

Subpoenas to compel the attendance of witnesses and the production of documents may be issued by any member of the board<sup>172</sup> either at the investigation or the hearing stage of the proceedings.<sup>173</sup> The board has no power to punish for a refusal to obey the subpoena but must apply to the federal district court for an order requiring compliance with the subpoena. Failure to comply with this court order constitutes contempt. The district court's function, on application for such an order, is only to determine the relevancy and materiality of the evidence sought, and not to inquire into the merits of the controversy.<sup>174</sup>

The respondent's application for a subpoena must comply with the rules laid down by the board. The application may be refused for failure to name the person sought to be subpoenaed,<sup>175</sup> to describe the documents desired, or to describe the nature of the evidence expected.<sup>176</sup> The evidence sought must be relevant,<sup>177</sup> unavailable by other means,<sup>178</sup> and no more should be asked than is absolutely necessary.<sup>179</sup> Subpoenas to obtain confidential information about the charging union will not be allowed.<sup>180</sup> In this are included minutes of meetings,<sup>181</sup> membership lists,<sup>182</sup> books of account,<sup>183</sup> and copies of contracts

<sup>171</sup> N. L. R. A., § 11 (3).

<sup>172</sup> Rules & Regulations, art. II, § 21.

<sup>173</sup> N. L. R. B. v. Barrett Co., (C. C. A. 7th, 1941) 120 F. (2d) 583.

<sup>174</sup> Cudahy Packing Co. v. N. L. R. B., (C. C. A. 10th, 1941) 117 F. (2d) 692 (compelled production of payroll so board could hold an election).

<sup>175</sup> North Whittier Heights Citrus Assn. v. N. L. R. B., (C. C. A. 9th, 1940) 109 F. (2d) 76.

<sup>176</sup> N. L. R. B. v. Acme-Evans Co., (C. C. A. 7th, 1942) 130 F. (2d) 477; N. L. R. B. v. Delaware-New Jersey Ferry Co., (C. C. A. 3d, 1942) 128 F. (2d) 130; North Whittier Heights Citrus Assn. v. N. L. R. B., (C. C. A. 9th, 1940) 109 F. (2d) 76.

<sup>177</sup> N. L. R. B. v. Baldwin Locomotive Works, (C. C. A. 3d, 1942) 128 F. (2d) 39; Bethlehem Steel Corp. v. N. L. R. B., (App. D. C. 1941) 120 F. (2d) 641; Matter of Eagle & Phenix Mills, 11 N. L. R. B. 361 (1939) (denial of subpoena upheld where matter to which it was related was later dropped).

<sup>178</sup> N. L. R. B. v. Blackstone Mfg. Co., (C. C. A. 2d, 1941) 123 F. (2d) 633 (subpoena of employees to cross-examine as to authenticity of signatures on union cards where no showing of inability to prove by comparison denied as mere delaying move).

<sup>179</sup> Goodyear Tire & Rubber Co. v. N. L. R. B., (C. C. A. 6th, 1941) 122 F. (2d) 450.

<sup>180</sup> Matter of Charles Banks Stout, 15 N. L. R. B. 541 (1939).

<sup>181</sup> Matter of Song Paper Co., 8 N. L. R. B. 657 (1938).

<sup>182</sup> Matter of Charles Banks Stout, 15 N. L. R. B. 541 (1939).

<sup>183</sup> Matter of Marlin-Rockwell Corp., 5 N. L. R. B. 206 (1938).

with other companies.<sup>184</sup> Subpoenas for this information may be refused not only because it is confidential but also because it is not shown to be pertinent to the inquiry.<sup>185</sup>

The mere denial to a respondent of a subpoena will not constitute reversible error unless there is substantial prejudice. Thus if the witnesses are obtained without the process,<sup>186</sup> or if the board accepts as true all that the respondent desired to prove<sup>187</sup> by the subpoenaed evidence, there can be no claim of a denial of fair hearing.

The respondent is not entitled to a subpoena unless he can show good cause why it should be issued. The regional attorney, on the other hand, usually has a supply of subpoenas signed in blank and need not state the reasons why one should be issued. Such inequality of availability is obviously unfair,<sup>188</sup> but it has been held not sufficient to cause a reversal unless actual prejudice is shown.<sup>189</sup> The placing of the parties on such different planes in obtaining evidence goes to the very heart of a fair hearing and should not be continued. The fact that the regional attorney may be controlled in his use of subpoenas by his superiors is not sufficient, for the very essence of a fair hearing is that both parties shall be governed by the same rules.

This inequality in the issuance of subpoenas by the board is not corrected by courts in reviewing applications for subpoenas. If the respondent applies and is refused, he can raise the issue in the circuit court at the time of the petition for an enforcement order. The test there will be whether denial constituted a substantial prejudice. On the other hand, if the regional attorney applies for a subpoena and it is granted over the objection of the respondent, the issue will be raised in the district court on the petition for a compliance with the order. The test here is not whether the subpoena is necessary to the board's case, but only whether it seeks to obtain evidence that is relevant and "touching the matter."<sup>190</sup> This results in the court's affirming the

<sup>184</sup> *Matter of Bethlehem Steel Corp.*, 14 N. L. R. B. 539 (1939).

<sup>185</sup> *Matter of Revere Copper & Brass*, 16 N. L. R. B. 437 (1939); *Matter of General Petroleum Corp. of California*, 5 N. L. R. B. 982 (1938).

<sup>186</sup> *N. L. R. B. v. Friedrich*, (C. C. A. 5th, 1940) 116 F. (2d) 888.

<sup>187</sup> *N. L. R. B. v. Dahlstrom Metallic Door Co.*, (C. C. A. 2d, 1940) 112 F. (2d) 756.

<sup>188</sup> *Inland Steel Co. v. N. L. R. B.*, (C. C. A. 7th, 1940) 109 F. (2d) 9.

<sup>189</sup> *Bethlehem Steel Corp. v. N. L. R. B.*, (App. D. C. 1941) 120 F. (2d) 641; *North Whittier Heights Citrus Assn. v. N. L. R. B.*, (C. C. A. 9th, 1940) 109 F. (2d) 76.

<sup>190</sup> *N. L. R. B. v. Goodyear Tire & Rubber Co.*, (D. C. Ohio, 1940) 36 F. Supp. 413, partially reversed in *Goodyear Tire & Rubber Co. v. N. L. R. B.*, (C. C. A. 6th, 1941) 122 F. (2d) 450.

action of the board in discriminating against the respondent in the issuance of the subpoena. The remedy for this unfairness lies primarily with the board in requiring its regional attorney to fulfill the same requirements as the respondent, and if this is not done the court ought to reverse all cases in which the inequality appears regardless of whether any prejudice can be proved.

### 3. *What Evidence is Admissible*

The act provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling."<sup>191</sup> This means simply that much evidence which is not admissible in the courts will be admitted at the hearing. Any evidence that may be of help to the board in reaching a decision should be made a part of the record for the board's consideration.

Irrelevant, immaterial, and incompetent evidence may be admitted by the trial examiner but of course the exclusion of it does not constitute error.<sup>192</sup> However, the exclusion of relevant and material evidence is a denial of a fair hearing even though the board's decision might not have been changed thereby.<sup>193</sup> The inevitable result of these holdings is that the board will lean over backwards in admitting extremely remote evidence in order to avoid being reversed for its exclusion. The board has consistently allowed evidence of remarks and actions of the respondent's officers and supervisory employees to show the respondent's attitude toward the charging union.<sup>194</sup> Evidence of the respondent's acts prior to the passage of the Wagner Act are admissible as background to show the employer's attitudes and to show motives for the discharge of employees.<sup>195</sup> The whole history of the respondent's labor policy for the last twenty years may be admitted so that the

<sup>191</sup> N. L. R. A., § 10 (b).

<sup>192</sup> *Matter of Gates Rubber Co.*, 8 N. L. R. B. 303 (1938).

<sup>193</sup> *Donnelly Garment Co. v. N. L. R. B.*, (C. C. A. 8th, 1941) 123 F. (2d) 215. But if equivalent error is admitted so that there is no prejudice, there is no reversible error. *Jefferson Electric Co. v. N. L. R. B.*, (C. C. A. 7th, 1939) 102 F. (2d) 949; *Matter of Gates Rubber Co.*, 8 N. L. R. B. 303 (1938). But see *N. L. R. B. v. Cities Service Oil Co.*, (C. C. A. 2d, 1942) 129 F. (2d) 933 (exclusion of relevant hearsay not error where court believes it of only slight evidentiary value).

<sup>194</sup> *Hamilton-Brown Shoe Co. v. N. L. R. B.*, (C. C. A. 8th, 1939) 104 F. (2d) 49. The weight of evidence will be considered in the next subdivision.

<sup>195</sup> *N. L. R. B. v. McLain Fire Brick Co.*, (C. C. A. 3d, 1942) 128 F. (2d) 393; *N. L. R. B. v. Eclipse Moulded Products Co.*, (C. C. A. 7th, 1942) 126 F. (2d) 576; *C. G. Conn, Inc. v. N. L. R. B.*, (C. C. A. 7th, 1939) 108 F. (2d) 390; *N. L. R. B. v. Pacific Greyhound Lines*, (C. C. A. 9th, 1937) 91 F. (2d) 458; *Matter of A. S. Abell Co.*, 5 N. L. R. B. 644 (1938).



board may have the proper background to interpret its acts since 1935.<sup>196</sup> Acts subsequent to the filing of the charge can be proved at the hearing both to interpret past acts and to ground additional charges.<sup>197</sup> The mere fact of discharge of a union member is evidence of discrimination if the company fails to show any explanation for the discharge.<sup>198</sup>

The greatest departure from the common-law rules of evidence is in respect to the admission of hearsay evidence. Hearsay evidence will not be excluded if it has any probative value,<sup>199</sup> the question of remoteness or credibility because of inability to cross-examine goes only to the weight of the evidence and not to its admissibility.<sup>200</sup> Where witnesses testifying as to the genuineness of authorization cards admitted they had no actual knowledge, they were allowed to testify that they were told by solicitors that the cards were genuine.<sup>201</sup> Hearsay evidence in written affidavits is also admissible even though here the opportunity to cross-examine is twice removed.<sup>202</sup> Hearsay in the form of government publications is admissible even though it consists of bulletins by one of the board's own divisions.<sup>203</sup>

Hearsay in a different form is admitted when cases are incorporated, for the whole record of the prior case becomes a part of the present case.<sup>204</sup> The option to incorporate is with the board, the respondent having no right to have the record of a prior case entered on the record<sup>205</sup> and no right to object if the board orders the consolidation<sup>206</sup> even though he claims he would have objected to the evidence had he known that it might be used for this purpose.<sup>207</sup> Evidence

<sup>196</sup> *Sperry Gyroscope Co. v. N. L. R. B.*, (C. C. A. 2d, 1942) 129 F. (2d) 922; *Matter of Western Union Telegraph Co.*, 17 N. L. R. B. 34 (1939).

<sup>197</sup> *Matter of John A. Roebling's Sons Co.*, 17 N. L. R. B. 482 (1939).

<sup>198</sup> *N. L. R. B. v. Remington Rand*, (C. C. A. 2d, 1938) 94 F. (2d) 863.

<sup>199</sup> *Union Drawn Steel Co. v. N. L. R. B.*, (C. C. A. 3d, 1940) 109 F. (2d) 587. *Contra*: *Matter of Lindeman Power & Equipment Co.*, 11 N. L. R. B. 868 (1939). This case, if accurately reported, is definitely out of line with other holdings.

<sup>200</sup> *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206 (1938).

<sup>201</sup> *N. L. R. B. v. Service Wood Heel Co.*, (C. C. A. 1st, 1941) 124 F. (2d) 470.

<sup>202</sup> *Cudahy Packing Co. v. N. L. R. B.*, (C. C. A. 8th, 1940) 116 F. (2d) 367.

<sup>203</sup> *N. L. R. B. v. Crowe Coal Co.*, (C. C. A. 8th, 1939) 104 F. (2d) 633.

<sup>204</sup> *N. L. R. B. v. Hawk & Buck Co.*, (C. C. A. 5th, 1941) 120 F. (2d) 903; *Matter of Hoover Co.*, 12 N. L. R. B. 902 (1939). These are usually cases of consolidating a representation proceeding with a complaint proceeding involving the same parties.

<sup>205</sup> *Matter of Pacific Greyhound Lines*, 22 N. L. R. B. 111 (1940).

<sup>206</sup> *N. L. R. B. v. Niles Fire Brick Co.*, (C. C. A. 6th, 1941) 124 F. (2d) 366.

<sup>207</sup> *Matter of Armour & Co.*, 8 N. L. R. B. 1100 (1940).

can be admitted to amplify or explain the evidence in the prior case but it cannot be admitted to contradict.<sup>208</sup> It is evident that this liberality in the use of hearsay constitutes a severe limitation on the right to cross-examine, but such testing of the evidence at common law was for the protection of the jury and therefore is not so important in administrative proceedings before critical judges. The board is qualified to weigh the evidence according to its tested credibility and accuracy and it is far better to have the doubtful hearsay for what it is worth than not to have it for consideration at all. However, the board should not make the hearsay in the consolidated cases available only at its discretion, but should allow the respondent an equal right to incorporate. It should also allow all parties a full opportunity to amplify, explain, or rebut the evidence thus incorporated the same as any other evidence.<sup>209</sup>

The board has refused to apply fully the common law rules as to parol evidence<sup>210</sup> and the best evidence. The latter is involved when the union refuses to show its membership lists or records and is allowed to prove the number of members it has by oral testimony.<sup>211</sup> This is consistent with the policy of not requiring the revealing of the union's records, as was illustrated by the cases of requested subpoenas. There has not been as much freedom in allowing second best evidence in other situations,<sup>212</sup> and it would seem that the board will require the best evidence unless it is not readily available. Evidence is not inadmissible simply because it fails to conform to the allegations in the complaint,

<sup>208</sup> *Matter of Niles Fire Brick Co.*, 18 N. L. R. B. 883 (1939).

<sup>209</sup> The parties may stipulate for the incorporation of findings of fact or record of a prior proceeding, see *Matter of Alloy Cast Steel Co.*, 19 N. L. R. B. 1 (1940), or that the trial examiner's findings of fact should be the finding of the board, see *Matter of National Battery Co.*, 20 N. L. R. B. 166 (1940). The board may either incorporate or merely take judicial notice of the items stipulated. See *Matter of Motion Picture Producers*, 15 N. L. R. B. 224 (1939); *Matter of Consolidated Paper Co.*, 21 N. L. R. B. 125 (1940).

<sup>210</sup> *Matter of Delaware-New Jersey Ferry Co.*, 1 N. L. R. B. 85 (1935) (allowed showing that signing of national union membership cards was intended for membership in the local union).

<sup>211</sup> *Matter of Columbia Broadcasting System*, 8 N. L. R. B. 508 (1938) (letters by employees authorizing the union to represent them not shown because they were confidential); *Matter of Burdick Steel Foundry Co.*, 7 N. L. R. B. 714 (1938); *Matter of Gate City Cotton Mills*, 1 N. L. R. B. 57 (1935) (membership records not shown).

<sup>212</sup> *N. L. R. B. v. Kentucky Fire Brick Co.*, (C. C. A. 6th, 1938) 99 F. (2d) 89. Board refused to enter affidavits of violent acts by the employees because it was apt to cause more violence. Held, oral claims of such proof need not be admitted.

for the complaint can be amended at the end of the hearing to include any such evidence that is admitted.<sup>213</sup>

#### 4. *The Right to Adduce Additional Evidence*

After the hearing has been closed, one of the parties may desire to present other evidence to be used in making the decision. The board may move to reopen for the presentation of additional testimony<sup>214</sup> or the respondent may move for leave to adduce additional evidence. The respondent's motion may be made either to the trial examiner before the filing of the intermediate report, to the board on argument, or to the circuit court on petition. The evidence may be taken either by the trial examiner or by the board and becomes a part of the record but it cannot be entered before the court in the petition proceedings.<sup>215</sup> The case must be remanded to the board for further hearing.

The only reason for the granting of leave to adduce additional evidence after the close of the hearing is to permit the bringing before the board of relevant and material evidence which for some reason could not be presented at the hearing.<sup>216</sup> The board may refuse to reopen where there is no showing that the evidence sought to be adduced is relevant<sup>217</sup> and material.<sup>218</sup> Even though it is relevant and material, the respondent must show why it was not adduced at the hearing.<sup>219</sup> The mere absence of a witness is not sufficient reason if it was possible for him to be present.<sup>220</sup> The failure to enter evidence in the belief that the board has not established a prima facie case is not

<sup>213</sup> *M. H. Ritzwoller Co. v. N. L. R. B.*, (C. C. A. 7th, 1940) 114 F. (2d) 432 (dates of acts proved did not comply with dates set out in the complaint).

<sup>214</sup> *N. L. R. B. v. Kentucky Fire Brick Co.*, (C. C. A. 6th, 1938) 99 F. (2d) 89.

<sup>215</sup> *N. L. R. B. v. Sunshine Mining Co.*, (C. C. A. 9th, 1940) 110 F. (2d) 780.

<sup>216</sup> *Matter of Revere Copper & Brass*, 16 N. L. R. B. 437 (1939) (exhibits had been mislaid at the time of the trial and could not be found); *Jacobsen v. N. L. R. B.*, (C. C. A. 3d, 1941) 120 F. (2d) 96 (board was arbitrary in refusing right to adduce evidence on affectation of commerce when it admitted there was insufficient evidence in the record). The right to reopen may be denied if the evidence sought to be introduced is based on a new theory of defense. *Matter of Oil Well Mfg. Co.*, 14 N. L. R. B. 1114 (1939).

<sup>217</sup> *Bethlehem Steel Co. v. N. L. R. B.*, (App. D. C. 1941) 120 F. (2d) 641.

<sup>218</sup> *N. L. R. B. v. Carlisle Lumber Co.*, (C. C. A. 9th, 1937) 94 F. (2d) 138.

<sup>219</sup> *N. L. R. B. v. Aluminum Products Co.*, (C. C. A. 7th, 1941) 120 F. (2d) 567; *Matter of Revolution Cotton Mills*, 9 N. L. R. B. 468 (1938).

<sup>220</sup> *N. L. R. B. v. Algoma Plywood & Veneer Co.*, (C. C. A. 7th, 1941) 121 F. (2d) 602 (respondent's officers were in Florida but there was no showing they were unable to attend or that it would endanger their health; respondent had failed to take depositions granted); *Matter of Indiana & Michigan Electric Co.*, 20 N. L. R. B. 989 (1940) (vice-president absent).

sufficient,<sup>221</sup> but the belief that the act was unconstitutional has been held to justify a failure to enter evidence on the merits.<sup>222</sup> Even though the proposed evidence is relevant and unavailable, there is no right to a reopening to enter it if it is merely cumulative.<sup>223</sup>

Evidence of facts occurring subsequently to the hearing will not be permitted where they go only to the change of business conditions,<sup>224</sup> change in union membership,<sup>225</sup> or to the respondent's compliance with the order.<sup>226</sup> Though such evidence, if admitted, might necessitate a different decision and order, the constant reopening to show these fluctuating conditions would make it impossible to get a final order.

#### D. *The Record and Intermediate Report*

The purpose of the hearing is to provide the board with the necessary information to enable it to arrive at a just decision. There are two main sources of this information, the record and the intermediate report. The act provides that a written record shall be made in all complaint cases<sup>227</sup> containing all of the pleadings, a transcript of all testimony, copies of all exhibits, incorporated records of other proceedings, all offers of proof, and rulings on motions.<sup>228</sup> Arguments on motions during the hearing and oral argument at the end of the hearing may be included on the discretion of the trial examiner, but their exclusion will not constitute prejudice.<sup>229</sup> The trial examiner is not

<sup>221</sup> N. L. R. B. v. Aluminum Products Co., (C. C. A. 7th, 1941) 120 F. (2d) 567.

<sup>222</sup> Matter of Fashion Piece Dye Works, 6 N. L. R. B. 274 (1938). This is the decision on the case after the court had ordered a reopening. The court decision could not be found. *Contra*: N. L. R. B. v. Anwelt Shoe Mfg. Co., (C. C. A. 1st, 1937) 93 F. (2d) 367. This question is now moot because there is no question as to the constitutionality of the act.

<sup>223</sup> See *New Idea, Inc. v. N. L. R. B.*, (C. C. A. 7th, 1941) 117 F. (2d) 517 at 525; *N. L. R. B. v. J. S. Popper, Inc.*, (C. C. A. 3d, 1940) 113 F. (2d) 602 at 604.

<sup>224</sup> *N. L. R. B. v. Swift & Co.*, (C. C. A. 8th, 1942) 129 F. (2d) 222; *N. L. R. B. v. Condenser Corp.*, (C. C. A. 3d, 1942) 128 F. (2d) 67; *Matter of Viking Pump Co.*, 13 N. L. R. B. 576 (1939).

<sup>225</sup> *N. L. R. B. v. Biles-Coleman Lumber Co.*, (C. C. A. 9th, 1938) 96 F. (2d) 197. *Contra*: *N. L. R. B. v. Goodyear Tire & Rubber Co.*, (C. C. A. 5th, 1942) 129 F. (2d) 661.

<sup>226</sup> *N. L. R. B. v. Oregon Worsted Co.* (C. C. A. 9th, 1936) 96 F. (2d) 193; *N. L. R. B. v. Westinghouse Air Brake Co.*, (C. C. A. 3d, 1941) 120 F. (2d) 1004; *Matter of Lone Star Bag Co.*, 8 N. L. R. B. 244 (1938).

<sup>227</sup> N. L. R. A., § 10 (c).

<sup>228</sup> Rules & Regulations, art. II, § 32, as amended 6 FED. REG. 4603 (1941).

<sup>229</sup> *Id.*, § 29; *N. L. R. B. v. Condenser Corp.*, (C. C. A. 3d, 1942) 128 F. (2d) 67.

allowed to take "off the record" statements<sup>230</sup> and exclusion from the record of questioning and discussion makes the record incomplete and invalidates the proceedings.<sup>231</sup> The respondent has a right to have his own reporter present to record the whole proceedings even though the official reporter records all of the testimony. The exclusion of the respondent's reporter is a denial of a substantial right even though no injury is shown.<sup>232</sup>

The intermediate report is primarily the trial examiner's summation and interpretation of the record based on his observations at the hearing and containing proposed findings of fact and recommendations as to the disposition of the case.<sup>233</sup> It may include his reasons for rulings on motions, his method of weighing the evidence, and his belief as to the credibility of the witnesses. The report is only a recommendation to the board and is in no way binding.<sup>234</sup> The board may ignore or discard it.<sup>235</sup> However, the board may accept the findings in the report as final if the parties file no exceptions<sup>236</sup> according to the rules.<sup>237</sup>

An intermediate report need not be made, but the case may be transferred directly from the trial examiner to the board for it to make the proposed findings of fact.<sup>238</sup> This practice is followed only in the exceptional cases.

The intermediate report is not only filed with the board but is served on the parties and gives them notice of the probable nature of the order so that they may file exceptions and have oral argument on these issues before the board. If no intermediate report is made, the board will serve its proposed findings of fact on the parties. After the *Second Morgan Case*,<sup>239</sup> there was the question whether the absence of the proposed findings constituted a denial of a fair hearing. The board

<sup>230</sup> Matter of Inland Steel Co., 9 N. L. R. B. 783 (1938). The nature of the excluded portion is not clear, but the board ordered it incorporated into the records.

<sup>231</sup> Montgomery Ward & Co. v. N. L. R. B., (C. C. A. 8th, 1940) 103 F. (2d) 147 (exclusion of testimony taken and arguments on its admissibility).

<sup>232</sup> Inland Steel Co. v. N. L. R. B., (C. C. A. 7th, 1940) 109 F. (2d) 9.

<sup>233</sup> Rules & Regulations, art. II, § 32, as amended 6 FED. REG. 4603 (1941).

<sup>234</sup> N. L. R. B. v. Oregon Worsted Co., (C. C. A. 9th, 1938) 94 F. (2d) 671.

<sup>235</sup> N. L. R. B. v. Air Associates, (C. C. A. 2d, 1941) 121 F. (2d) 586.

<sup>236</sup> Matter of Bishop & Co., 13 N. L. R. B. 207 (1939). A party not involved in the hearing may file exceptions if they may be affected by the proposed findings. Matter of Ward Baking Co., 8 N. L. R. B. 558 (1938).

<sup>237</sup> Rules & Regulations, art. II, § 33, as amended 6 FED. REG. 4603 (1941).

<sup>238</sup> Id., § 36 (a); Matter of Killefer Mfg. Co., 22 N. L. R. B. 484 (1940).

<sup>239</sup> Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 999 (1938) (holding invalid an order of the Secretary of Agriculture under the Packers and Stockyards Act based upon a proceeding in which no specific complaint or any proposed findings had been served on the parties).

immediately sought to withdraw several of its cases which were before the circuit courts in order to supply the proposed findings which it had omitted. The power of the circuit court to remand and the board to correct was upheld.<sup>240</sup> This question, however, became moot by the decisions that the board's cases were not governed by the *Second Morgan Case* because the only purpose of the proposed findings was to give the parties notice of the issues in the case and this need was supplied in the board's procedure by the issuance of a complaint which specifically stated the charges relied on by the board. Therefore, an intermediate report of proposed findings was not necessary where the parties filed briefs and had oral argument before the board.<sup>241</sup> There need not be any filing of briefs or any oral arguments where the parties do not request it.<sup>242</sup> It naturally follows from these decisions that the board can disregard or completely discard the intermediate report without denying a fair hearing.<sup>243</sup>

The soundness of these conclusions must be considered in the light of the rules governing the necessity for specific allegations in the complaint. The extreme liberality of those rules may seem to make the above result unsound, but the test should not be on the abstractions of the rules but whether, in a particular case, there was any surprise due to a lack of knowledge of the issues. The detail of the particular complaint, the time elapsing during the hearing, the nature of the evidence presented, and the opportunity for oral argument should all be considered together to determine whether there has been any actual prejudicial surprise. If there is any question about there being surprise, the doubt should be resolved in favor of the respondent so as to assure him of a fair hearing.

### III

#### THE DECISION AND ORDER

Upon the filing of the intermediate report or the proposed findings and the serving of copies on the parties, any party may file exceptions

<sup>240</sup> *Ford Motor Co. v. N. L. R. B.*, 305 U.S. 364, 59 S. Ct. 301 (1938); *N. L. R. B. v. Lane Cotton Mills*, (C. C. A. 5th, 1940) 108 F. (2d) 568; *Inland Steel Co. v. N. L. R. B.*, (C. C. A. 7th, 1939) 105 F. (2d) 246.

<sup>241</sup> *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S. Ct. 904 (1938); *N. L. R. B. v. Biles Coleman Lumber Co.*, (C. C. A. 9th, 1938) 98 F. (2d) 16.

<sup>242</sup> *N. L. R. B. v. Hearst*, (C. C. A. 9th, 1939) 102 F. (2d) 658; *N. L. R. B. v. American Potash & Chemical Corp.*, (C. C. A. 9th, 1939) 98 F. (2d) 488.

<sup>243</sup> *N. L. R. B. v. Air Associates*, (C. C. A. 2d, 1941) 121 F. (2d) 586.

and request oral argument.<sup>244</sup> A failure to make a request waives all exceptions and right to argument and permits the board to adopt the findings of the trial examiner. The function of the exceptions is to limit the matters which the board must review, and the function of the argument is to point out why certain rulings or findings constitute error. It is then the responsibility of the board to weigh all of the factors on the disputed points, make findings of fact, and issue an order.<sup>245</sup>

*A. The Right That the Decision Be Made by the Board*

It is evident from the mass of work which the board must handle that the board members cannot possibly read the whole record of the cases that come before it.<sup>246</sup> Therefore, it has a review section whose duty is to analyze and summarize the record, the intermediate report, and all arguments before the board and to present this to the board without making any formal recommendations. The board may consult the review attorney to get further information which it may need in making its decision. After oral argument the board will state the nature of the result desired to the review attorney and have him draw up findings of fact and an order in compliance with those desires. These, when approved, become the final decision of the board.

This procedure has caused severe criticism on the ground that the decision is not made by the board but by subordinates. As long as the review attorney acts only as a clerk or an assistant, there is no harm, but respondents are constantly fearful that the record will not be fairly summarized and that the board members will not exercise their independent judgment but rely on informal recommendations of the review attorney. Therefore some respondents have alleged a failure of the board to give adequate consideration and have asked the circuit court for interrogatories to the board to determine the method by which it has arrived at its decision.

In only one case have the requested interrogatories been granted to determine whether the board has substantially mastered the record before adopting a report.<sup>247</sup> The cases refusing interrogatories have

<sup>244</sup> Rules & Regulations, art. II, § 37, as amended 6 FED. REG. 4604 (1941).

<sup>245</sup> Though it is not necessary that all of the board members attend the oral argument, the board will order further argument where one of its members has been replaced after argument and before issuing the order. *Matter of Firestone Tire & Rubber Co.*, 22 N. L. R. B. 580 (1940).

<sup>246</sup> As of January 1, 1940, there were awaiting decision 306 cases with a total record of 600,000 pages. ADMINISTRATIVE PROCEDURE MONOGRAPH 25, note 107 (1941).

<sup>247</sup> *N. L. R. B. v. Cherry Cotton Mills (C. C. A. 5th, 1938)* 98 F. (2d) 444.

gone on two separate theories. One group has held that the court could not and would not examine into the mental processes of the board; that the board, like a court or jury, was immune to such questioning because it would put a fear in the members of being revealed by their colleagues. In addition, the granting of such interrogatories would harrass the board to such an extent that would make it impossible for it to handle the cases presented.<sup>248</sup> These cases give the board unlimited power to use subordinates.

The larger group of cases have refused interrogatories on the ground that the respondent's allegations were insufficient to justify the court's using its power to issue interrogatories. An allegation of failure by the board to read "all of the record" is certainly insufficient.<sup>249</sup> The exceptions to the Intermediate Report need not be considered, and the briefs are presumed to have been read.<sup>250</sup> The court will inquire into the method used only when there is no showing from the record that the order which purports to come from the board does in fact come from it.<sup>251</sup> The receipt of briefs and hearing of oral argument by the board is sufficient and the court will presume the regularity of the proceedings.<sup>252</sup>

There is little difference in the net result of the two theories, for the second limits the cases in which interrogatories may be granted to those cases in which there is not full oral argument and no showing of any consideration of the record or the Intermediate Report.<sup>253</sup>

It is necessary for effective administration that the board should be allowed a liberal use of its review section to expedite the speedy handling of cases, even to the extent of permitting the review attorney to attend the oral argument. However, the board should not abdicate its judicial function by a delegation to subordinates. If the first theory is followed, there is nothing to prevent this abdication. Certainly the

<sup>248</sup> *N. L. R. B. v. Baldwin Locomotive Works*, (C. C. A. 3d, 1942) 128 F. (2d) 39; *Bethlehem Steel Co. v. N. L. R. B.*, (App. D. C. 1941) 120 F. (2d) 641; *Bethlehem Shipbuilding Corp. v. N. L. R. B.*, (C. C. A. 1st, 1940) 114 F. (2d) 930; *N. L. R. B. v. Botany Worsted Mills*, (C. C. A. 3d, 1939) 106 F. (2d) 263.

<sup>249</sup> *N. L. R. B. v. Ford Motor Co.*, (C. C. A. 9th, 1941) 118 F. (2d) 766; *N. L. R. B. v. Biles Coleman Lumber Co.*, (C. C. A. 9th, 1938) 98 F. (2d) 18.

<sup>250</sup> *Cupples Co., Mfrs. v. N. L. R. B.*, (C. C. A. 8th, 1939) 103 F. (2d) 953.

<sup>251</sup> *N. L. R. B. v. Lane Cotton Mills*, (C. C. A. 5th, 1940) 108 F. (2d) 568.

<sup>252</sup> *Inland Steel Co. v. N. L. R. B.*, (C. C. A. 7th, 1939) 105 F. (2d) 246.

<sup>253</sup> *N. L. R. B. v. Cherry Cotton Mills*, (C. C. A. 5th, 1938) 98 F. (2d) 444. Interrogatories were granted where there was no oral argument by the complainant. However, this case was in effect overruled by *N. L. R. B. v. Lane Cotton Mills*, (C. C. A. 5th, 1940) 108 F. (2d) 568, where there was no oral argument in support of the proposed finding and interrogatories were refused.



court should overthrow a decision reached by a method not in compliance with the statute. Is there any reason why it should refuse to aid the injured party in obtaining the evidence of such violation where there is good reason to believe it exists? The objection of harassment by such inquiries can be avoided by a strict requirement of substantial showing of a reason to believe that the proceeding was unfair. However, the rule that administrative tribunals should have the same immunity as the courts is now undoubtedly the law in the federal courts and no interrogatories will be granted to determine how they arrived at their decision.<sup>254</sup>

If there is no method of determining whether the board or its subordinates made the decision, there is no way of guaranteeing that the decision was made by an unbiased tribunal. It is essential that the body making the final decision be without bias, especially since there is no guarantee of an unbiased trial examiner. The board, through its separate divisions, acts as prosecutor, judge, and jury. These functions are kept separate as much as possible; so the belief of the regional attorney that the respondent is guilty when the complaint is served does not constitute prejudgment by the board in its judicial capacity.<sup>255</sup> Where a member of the board has participated in a case prior to becoming a member, there is such predetermination as to disqualify him from sitting on the case. If he does participate and the decision is unanimous, the proceeding is still unfair, for there is no way of knowing how much his position influenced the other members.<sup>256</sup>

### B. *The Findings of Fact*

Before the board can issue a cease and desist order, it is required by the act to make findings of fact on which that order is based. The

<sup>254</sup> *United States v. Morgan*, 313 U. S. 409, 61 S. Ct. 999 (1941), noted 30 ILL. B. J. 155 (1941).

<sup>255</sup> *Press Co. v. N. L. R. B.*, (App. D. C. 1941) 118 F. (2d) 937 at 940. The board attorney at hearing said, "The Board's position is that both companies have violated the act." On oral argument, the company attorney was asked if he really believed this was prejudice and when he refused to answer a board member said, "You know that is sheer demagoguery for the benefit of the small audience to your rear." When the attorney asked how much time he had left, he was told, "You have four minutes if you think it will do you any good." Held this did not show prejudgment.

<sup>256</sup> *Berkshire Employees Assn. v. N. L. R. B.*, (C. C. A. 3d, 1941) 121 F. (2d) 235. Edwin Smith, board member, prior to the case had urged a boycott in favor of the union. The case was then remanded to the board to see if one of its members were biased. The court should have ordered a reargument before the two unbiased members.

findings need not set forth any abstract or summary of the record but only the ultimate facts on which the order is based.<sup>257</sup> The purpose of the findings is not to determine whether the order is supported by the evidence but only to enable the respondent to determine the bases on which the board justifies its order. The findings need not, therefore, set out conflicts in the evidence, or facts which are contrary or immaterial to the decision, but only the primary evidentiary facts relied on.<sup>258</sup> The findings should not include statements of witnesses, expressions of opinion, or reasoning by which the board arrived at its findings, but merely a "clear-cut statement of the ultimate facts."<sup>259</sup> The distinction between ultimate facts and mere evidence is very intangible in its application, but the court will not reverse for faulty findings of fact provided they state the basic facts and are sufficiently definite to inform the respondent of the facts relied on.<sup>260</sup> The mere allegation of defective findings without specification of particular instances is insufficient. The court will not search the record for undesignated error.<sup>261</sup>

The findings of fact must comply with the pleadings. There is no right to make findings on issues not tried at the hearing. Formal compliance with the complaint is not necessary if the findings are in accord with the issues actually litigated at the hearing.<sup>262</sup> The findings must also comply with the order, stating all of the facts necessary for the issuing of the order. If the findings of fact stated make a clear inference of the violation of the act, they need not state specifically<sup>263</sup>

<sup>257</sup> *N. L. R. B. v. Swift & Co.*, (C. C. A. 8th, 1940) 116 F. (2d) 143.

<sup>258</sup> *N. L. R. B. v. Texas Mining & Smelting Co.*, (C. C. A. 5th, 1941) 117 F. (2d) 86.

<sup>259</sup> *N. L. R. B. v. Thompson Products*, (C. C. A. 6th, 1938) 97 F. (2d) 13.

<sup>260</sup> *N. L. R. B. v. Bradley Lumber Co.*, (C. C. A. 8th, 1942) 128 F. (2d) 768; *Swift & Co. v. N. L. R. B.* (C. C. A. 10th, 1939) 106 F. (2d) 87. The findings need not be stated formally. The inclusion of evidence and reasoning does not necessarily make them bad enough to constitute reversible error.

<sup>261</sup> *North Whittier Heights Citrus Assn. v. N. L. R. B.*, (C. C. A. 9th, 1940) 109 F. (2d) 76 (petitioner alleged "The so-called findings . . . are admixture of recitation of evidence, argument . . . and conclusions of fact not based upon evidence").

<sup>262</sup> *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904 (1938). Amended complaint alleged discriminatory refusal to rehire employees who had struck. Findings stated discriminatory discharge. Held, the distinction is based upon whether there was a "labor dispute" under the act, which was too technical. The respondent knew that the issue was discrimination and litigated it.

<sup>263</sup> *N. L. R. B. v. National Motor Bearing Co.*, (C. C. A. 9th, 1939) 105 F. (2d) 652. No specific finding of discriminatory refusal to reinstate but a clear inference from evidence stated in the findings that this was true. No need to state employees unable to obtain substantial equivalent employment as it will be implied.

that the act has been violated, but if the facts which constitute a violation are in dispute, the findings must resolve the conflict in the evidence before an order can be issued regarding that violation.<sup>264</sup>

### C. *The Basis of the Findings*

The board is entitled to make findings of fact based only on evidence in the record. The act provides that on appeal to the circuit court, "The findings of the board as to the facts, if supported by evidence, shall be conclusive."<sup>265</sup> This is a limitation on the court's power to review the action of the board, but still leaves the parties a barrier of protection against arbitrary decisions by the board.

The findings of fact upon which the board's order is based are for the board and not the courts to determine. Whether there has been a bargaining in good faith,<sup>266</sup> what is a proper bargaining unit,<sup>267</sup> whether there has been any change in union membership,<sup>268</sup> what constitutes equivalent employment,<sup>269</sup> and what constitutes a labor dispute,<sup>270</sup>—all of these are questions of fact for the board to determine just as much as questions of interference, domination, discrimination,<sup>271</sup> or refusal to bargain. These findings of fact must be "supported by evidence" which is construed to mean supported by "substantial evidence."<sup>272</sup>

<sup>264</sup> *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490 (1939) (blanket order to reinstate all strikers. Respondent contended it had cause to refuse as to some because of refusal to work or inefficiency. No finding as to whether there was such just cause.

<sup>265</sup> *N. L. R. A.*, § 10 (e).

<sup>266</sup> *N. L. R. B. v. Martin Bros. Box Co.*, (C. C. A. 7th, 1942) 130 F. (2d) 202; *Singer Mfg. Co. v. N. L. R. B.*, (C. C. A. 7th, 1941) 119 F. (2d) 131; *Jeffery-DeWitt Insulator Co. v. N. L. R. B.*, (C. C. A. 4th, 1937) 91 F. (2d) 134.

<sup>267</sup> *N. L. R. B. v. Delaware-New Jersey Ferry Co.*, (C. C. A. 3d, 1942) 128 F. (2d) 130; *Pittsburg Plate Glass Co. v. N. L. R. B.*, (C. C. A. 8th, 1940) 113 F. (2d) 698.

<sup>268</sup> *N. L. R. B. v. Piqua Munising Wood Products Co.*, (C. C. A. 6th, 1940) 109 F. (2d) 552.

<sup>269</sup> *Mooreville Cotton Mills v. N. L. R. B.*, (C. C. A. 4th, 1940) 110 F. (2d) 179.

<sup>270</sup> *Phelps Dodge Corp. v. N. L. R. B.*, (C. C. A. 2d, 1940) 113 F. (2d) 202. But see *C. G. Conn. Ltd. v. N. L. R. B.*, (C. C. A. 7th, 1939) 108 F. (2d) 390.

<sup>271</sup> Where discharge is because of violation of the respondent's rules, the question of the reasonableness of the rule is one of law for the court to determine. *Midland Steel Products Co. v. N. L. R. B.*, (C. C. A. 6th, 1940) 113 F. (2d) 800.

<sup>272</sup> See *Washington, Va. & Md. Coach Co. v. N. L. R. B.*, 301 U. S. 142 at 147, 57 S. Ct. 648 (1937).

I. *What Is Substantial Evidence?*

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>273</sup> This is the classic definition that is frequently quoted, but this definition does not give a clear test. The court cannot overrule the decision of the board simply because it would have arrived at an opposite result<sup>274</sup> but can overrule only if it feels there is no reasonable ground for the board's decision.<sup>275</sup>

The courts have, in search of a test, tried to draw an analogy between the board's hearings and jury trials. The courts have not been clear whether the test of what is substantial evidence is that which would justify the judge in refusing to direct a verdict for the respondent<sup>276</sup> (defendant), or that which would justify a judge in refusing to set aside a verdict for the board<sup>277</sup> (plaintiff). An entirely different measure is used in these two situations in common-law trials. If the plaintiff presents sufficient evidence to make out a case, the verdict cannot be directed against him regardless of how much contradicting evidence is presented by the defendant. The judge does not weigh the evidence, but considers only the plaintiff's case. However, if the jury finds for the plaintiff, the judge may then weigh both sides of the evidence and if he finds that a reasonable man would not have found for the plaintiff, he can set aside the verdict and order a

<sup>273</sup> See *Consolidated Edison Co. v. N. L. R. B.*, 305 U.S. 197 at 229, 59 S. Ct. 206 (1938).

<sup>274</sup> *N. L. R. B. v. Waterman Steamship Co.*, 309 U.S. 206 at 226, 60 S. Ct. 493 (1940).

<sup>275</sup> *A. E. Staley Mfg. Co. v. N. L. R. B.*, (C. C. A. 7th, 1940) 117 F. (2d) 868; *N. L. R. B. v. Union Pacific Stages*, (C. C. A. 9th, 1938) 99 F. (2d) 153. Dissent by one member of the board does not lessen the weight that must be given to the findings. *Sperry Gyroscope Co. v. N. L. R. B.*, (C. C. A. 2d, 1942) 129 F. (2d) 922.

<sup>276</sup> *Hazel Atlas Glass Co. v. N. L. R. B.*, (C. C. A. 4th, 1942) 127 F. (2d) 109; *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 59 S. Ct. 501 (1939); *Foot Bros. Gear & Machine Corp. v. N. L. R. B.*, (C. C. A. 7th, 1940) 114 F. (2d) 611; *N. L. R. B. v. Norfolk Shipbuilding & Drydock Co.*, (C. C. A. 4th, 1940) 109 F. (2d) 128; *N. L. R. B. v. Wallace Mfg. Co.*, (C. C. A. 4th, 1938) 95 F. (2d) 818.

<sup>277</sup> *N. L. R. B. v. Goodyear Tire & Rubber Co.*, (C. C. A. 5th, 1942) 129 F. (2d) 661; *Southern Assn. of Bell Telephone Employees v. N. L. R. B.*, (C. C. A. 5th, 1942) 129 F. (2d) 410; *Stonewall Cotton Mills v. N. L. R. B.*, (C. C. A. 5th, 1942) 129 F. (2d) 629; *American Smelting & Refining Co. v. N. L. R. B.*, (C. C. A. 8th, 1942) 126 F. (2d) 680; *N. L. R. B. v. Bell Oil & Gas. Co.*, (C. C. A. 5th, 1938) 98 F. (2d) 406; *Magnolia Petroleum Co. v. N. L. R. B.*, (C. C. A. 10th, 1940) 115 F. (2d) 1007.

new trial. The courts have talked about both of these tests, but have not been fully aware of the distinction between them.<sup>278</sup>

The real distinction between the two tests is whether the court upholds the board by considering only the board's evidence and ignoring the respondent's evidence or whether it reverses the board upon consideration of all of the evidence of both sides. It is clear that the Supreme Court has adopted the principle of examining only the board's evidence, and if that is substantial, the board's findings will be upheld regardless of the strength of the respondent's evidence.<sup>279</sup>

The circuit courts have not consistently followed this test, but in a majority of cases have reviewed the whole record to consider both the board's and the respondent's evidence.<sup>280</sup> Some circuit courts, in

<sup>278</sup> *Magnolia Petroleum Co. v. N. L. R. B.*, (C. C. A. 5th, 1940) 112 F. (2d) 545; *N. L. R. B. v. Asheville Hosiery Co.*, (C. C. A. 4th, 1939) 108 F. (2d) 288. In both cases the court used the two terms almost interchangeably.

<sup>279</sup> *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 59 S. Ct. 501 (1939) (enunciated directed verdict test); *N. L. R. B. v. Waterman Steamship Corp.*, 309 U. S. 206, 60 S. Ct. 493 (1940) (recited only evidence of the board); *N. L. R. B. v. Bradford Dyeing Assn.*, 310 U. S. 318, 60 S. Ct. 918 (1940) (seems to consider only the board's evidence); *N. L. R. B. v. Automotive Maintenance Machinery Corp.*, 315 U. S. 282, 62 S. Ct. 608 (1942) (per curiam opinion refused to consider clear evidence of discharge for insubordination); *N. L. R. B. v. Nevada Consol. Copper Corp.*, 316 U. S. 105, 62 S. Ct. 960 (1940) (per curiam opinion looked only at board's evidence).

<sup>280</sup> Some of those reversing upon consideration of the whole record: *Dannen Grain & Milling Co. v. N. L. R. B.*, (C. C. A. 8th, 1942) 130 F. (2d) 321; *N. L. R. B. v. Williamson-Dickie Mfg. Co.*, (C. C. A. 5th, 1942) 130 F. (2d) 260; *N. L. R. B. v. Goodyear Tire & Rubber Co.*, (C. C. A. 5th, 1942) 129 F. (2d) 661; *Stonewall Cotton Mills v. N. L. R. B.*, (C. C. A. 5th, 1942) 129 F. (2d) 629; *N. L. R. B. v. Dixie Motor Coach Corp.*, (C. C. A. 5th, 1942) 128 F. (2d) 201; *Hazel-Atlas Glass Co. v. N. L. R. B.*, (C. C. A. 4th, 1942) 127 F. (2d) 109; *American Smelting & Refining Co. v. N. L. R. B.*, (C. C. A. 8th, 1942) 126 F. (2d) 680; *N. L. R. B. v. Sheboygan Chair Co.*, (C. C. A. 7th, 1942) 125 F. (2d) 436; *N. L. R. B. v. Aluminum Goods Mfg. Co.*, (C. C. A. 7th, 1942) 125 F. (2d) 353; *Wilson & Co. v. N. L. R. B.*, (C. C. A. 7th, 1941) 120 F. (2d) 913; *N. L. R. B. v. International Shoe Co.*, (C. C. A. 8th, 1940) 116 F. (2d) 31; *N. L. R. B. v. Asheville Hosiery Co.*, (C. C. A. 4th, 1939) 108 F. (2d) 288; *N. L. R. B. v. Union Pacific Stages*, (C. C. A. 9th, 1938) 99 F. (2d) 153; *N. L. R. B. v. Thompson Products*, (C. C. A. 6th, 1938) 97 F. (2d) 13.

Some of those sustaining the board upon consideration of the whole record: *N. L. R. B. v. Precision Castings Co.*, (C. C. A. 6th, 1942) 130 F. (2d) 639; *N. L. R. B. v. Bank of America*, (C. C. A. 9th, 1942) 130 F. (2d) 624; *Sperry Gyroscope Co. v. N. L. R. B.*, (C. C. A. 2d, 1942) 129 F. (2d) 922; *N. L. R. B. v. Empire Worsted Mills*, (C. C. A. 2d, 1942) 129 F. (2d) 668; *Gamble-Robinson Co. v. N. L. R. B.*, (C. C. A. 8th, 1942) 129 F. (2d) 588; *N. L. R. B. v. Condenser Corp.*, (C. C. A. 3d, 1942) 128 F. (2d) 67; *N. L. R. B. v. Mason Mfg. Co.*, (C. C. A. 9th, 1942) 126 F. (2d) 810; *Owens Illinois Glass Co. v. N. L. R. B.*, (C. C. A. 6th, 1941) 123 F. (2d) 670; *N. L. R. B. v. Texas Mining & Smelting Co.*,

applying the Supreme Court's test, have clearly expressed their own disapproval of it.<sup>281</sup>

There seems to be little reason for bringing in an analogy to the review of jury trials. The rules developed for a hearing before laymen<sup>282</sup> are unsuitable for administrative hearings. The question for the court is simply whether the board's decision is one which might have been arrived at by a reasonable prudent man. If the court examines one side of the evidence and does not consider the conflicting evidence, there is no guarantee of a reasonable result. The board may be able to prove a prima facie case only to have the respondent completely destroy it by contradicting evidence. The court can determine the reasonableness of the result and protect the parties from arbitrary decisions only by a consideration of the whole record. If there be any merit in the jury analogy, the board is the jury and the decision its verdict, and the test is whether it should be set aside.

This is not an argument for a more rigid review of the facts, for the court should have some faith in the board's inherent fairness.

(C. C. A. 5th, 1941) 117 F. (2d) 86; *Magnolia Petroleum Co. v. N. L. R. B.*, (C. C. A. 10th, 1940) 115 F. (2d) 1007; *N. L. R. B. v. Skinner & Kennedy Stationery Co.*, (C. C. A. 8th, 1940) 113 F. (2d) 667.

Some of those sustaining on the board's evidence alone: *N. L. R. B. v. Swift & Co.*, (C. C. A. 8th, 1942) 129 F. (2d) 222; *Canyon Corp. v. N. L. R. B.*, (C. C. A. 8th, 1942) 128 F. (2d) 953; *N. L. R. B. v. Bersted Mfg. Co.*, (C. C. A. 6th, 1942) 128 F. (2d) 738; *N. L. R. B. v. Bradley Lumber Co.*, (C. C. A. 8th, 1942) 128 F. (2d) 768; *N. L. R. B. v. Hudson Motor Car Co.*, (C. C. A. 6th, 1942) 128 F. (2d) 528; *N. L. R. B. v. Quality Art Novelty Co.*, (C. C. A. 2d, 1942) 127 F. (2d) 903; *N. L. R. B. v. Eclipse Moulded Products Co.*, (C. C. A. 7th, 1942) 126 F. (2d) 576; *N. L. R. B. v. Alladin Industries*, (C. C. A. 7th, 1942) 125 F. (2d) 377; *N. L. R. B. v. Elkland Leather Co.*, (C. C. A. 3d, 1942) 114 F. (2d) 221; *N. L. R. B. v. Wallace Mfg. Co.*, (C. C. A. 4th, 1942) 95 F. (2d) 818.

Some of those reversing on the board's evidence alone: *N. L. R. B. v. Times-Picayune Publishing Co.*, (C. C. A. 5th, 1942) 130 F. (2d) 257; *United Biscuit Co. v. N. L. R. B.*, (C. C. A. 7th, 1942) 128 F. (2d) 771; *N. L. R. B. v. Norfolk Shipbuilding & Drydock Co.*, (C. C. A. 4th, 1940) 109 F. (2d) 128; *N. L. R. B. v. A. S. Abell*, (C. C. A. 4th, 1928) 97 F. (2d) 951.

It is obvious that cases in the second and fourth group are at best only dicta for either test.

<sup>281</sup> "We have recognized (or tried to) that findings must be sustained, even when they are contrary to the great weight of the evidence, and we have ignored, or at least have endeavored to ignore, the shocking injustices which such findings, opposed to the overwhelming weight of the evidence, produce." *Wilson & Co. v. N. L. R. B.*, (C. C. A. 7th, 1942) 126 F. (2d) 114 at 117.

<sup>282</sup> The verdict cannot be directed if the plaintiff has presented substantial evidence, for that would deny jury trial. However, the verdict can be set aside when it is against the manifest weight of the evidence, for this does not deny jury trial but requires a new jury trial. These principles have no relevance to the procedure before the board.

The court should not reverse unless the board's decision is clearly unreasonable and arbitrary. The Supreme Court rule is based on an unexpressed desire to protect administrative tribunals from overzealous and distrustful courts, but in trying to do this the court has itself adopted an arbitrary rule instead of meeting the issue squarely.

In many cases the court has found the board's decision unsupported on the ground that the burden of proof was on the board and that it had not met that burden.<sup>283</sup> In other cases the court has held that once the board has established its case, the burden of proof was on the respondent to explain or disprove the charges<sup>284</sup> and that on a petition for enforcement, the respondent has the burden of proving that the findings are not supported by the evidence.<sup>285</sup> All of this language is merely a rationalization to give an appearance of objectivity to a decision at which the court has arrived. If the court looks only to one side of the evidence, the burden of proof is irrelevant, for there is only the burden on the board of going forward with the evidence until it has made out a case. If the court looks at both sides of the evidence, the burden of proof is equally irrelevant for the sole question then is whether, on all of the evidence, the result is reasonable. The resort to language of burden of proof is only an attempt by the court to hide its desire to require a greater amount of evidence.

#### D. *The Weighing of Evidence*

Although the tests as to what is substantial evidence are indefinite and are primarily based on the court's personal attitude toward administrative bodies, there are some general principles used in a court's weighing of the evidence. The common-law rules for the admission of evidence do not apply, but the rules of deductions from that evidence should still apply<sup>286</sup> in so far as they are based upon the rules of reasoning rather than upon common-law tradition.

##### I. *Conflicting Evidence*

Regardless of which test of substantial evidence is used, if the

<sup>283</sup> N. L. R. B. v. Riverside Mfg. Co., (C. C. A. 5th, 1941) 119 F. (2d) 302; Martel Mills Corp. v. N. L. R. B., (C. C. A. 4th, 1940) 114 F. (2d) 624; Magnolia Petroleum Co. v. N. L. R. B., (C. C. A. 5th, 1940) 112 F. (2d) 545; N. L. R. B. v. Express Publishing Co., (C. C. A. 5th, 1940) 111 F. (2d) 588.

<sup>284</sup> N. L. R. B. v. Stackpole Carbon Co., (C. C. A. 3d, 1939) 105 F. (2d) 167; N. L. R. B. v. Viking Pump Co., (C. C. A. 8th, 1940) 113 F. (2d) 759.

<sup>285</sup> N. L. R. B. v. Brown Paper Mill Co., (C. C. A. 5th, 1940) 108 F. (2d) 867.

<sup>286</sup> N. L. R. B. v. Illinois Tool Works, (C. C. A. 7th, 1941) 119 F. (2d) 356; N. L. R. B. v. Lion Shoe Co., (C. C. A. 1st, 1938) 97 F. (2d) 448.

evidence is conflicting and equivocal, the board should be upheld.<sup>287</sup> The interpretation of the facts is for the board and not the court.<sup>288</sup> When the evidence is conflicting the board is entitled to resolve every reasonable doubt against the respondent and in favor of the allegations on the complaint.<sup>289</sup> If the second test<sup>290</sup> is used, the board can act on inconsistent and disputed testimony,<sup>291</sup> for mere contradiction will not justify reversal. However, the court should see to what extent conflicting evidence explains or qualifies the board's evidence and inferences and determine whether the board has remained within the bounds of reasonableness in resolving the conflicts.<sup>292</sup>

In a number of cases the courts have held that the findings were not supported because, they say, the evidence was equally consistent with two contrary hypotheses, therefore it supports neither.<sup>293</sup> If this statement is made in reference to a single piece of evidence, it is correct, for if a fact is equally consistent with two contrary hypotheses, then by common rules of reasoning it can infer neither and no reasonable man would act in reliance on either without more evidence.<sup>294</sup> However, in all of these cases the statement was made in reference to evidence of a whole course of conduct, some of which tended to support and some of which tended to deny the findings of the board. To expand the rule to hold that when the whole evidence supports either of two

<sup>287</sup> *N. L. R. B. v. Griswold Mfg. Co.*, (C. C. A. 3d, 1939) 106 F. (2d) 713; *N. L. R. B. v. Pacific Greyhound Lines*, (C. C. A. 9th, 1937) 91 F. (2d) 458; *Aquilines v. N. L. R. B.*, (C. C. A. 5th, 1936) 87 F. (2d) 146.

<sup>288</sup> *N. L. R. B. v. Link Belt Co.*, 311 U. S. 584, 61 S. Ct. 358 (1941).

<sup>289</sup> *N. L. R. B. v. Keystone Freight Lines*, (C. C. A. 10th, 1942) 126 F. (2d) 414; *Reliance Mfg. Co. v. N. L. R. B.*, (C. C. A. 7th, 1942) 125 F. (2d) 311; *Great Southern Trucking Co. v. N. L. R. B.*, (C. C. A. 4th, 1942) 127 F. (2d) 180; *N. L. R. B. v. Chattanooga Bakery*, (C. C. A. 6th, 1942) 127 F. (2d) 201; *N. L. R. B. v. Walworth Co.*, (C. C. A. 7th, 1941) 124 F. (2d) 816.

<sup>290</sup> The test of whether the evidence of the board alone is substantial will be termed the first test and the test of whether the evidence of the whole record shows a reasonable ground for the finding will be termed the second test.

<sup>291</sup> *N. L. R. B. v. Skinner & Kennedy Stationery Co.*, (C. C. A. 8th, 1940) 113 F. (2d) 667.

<sup>292</sup> *Foote Bros. Gear & Machine Corp. v. N. L. R. B.*, (C. C. A. 7th, 1940) 114 F. (2d) 611. If the board had unlimited powers of resolving the conflicts, judicial review would be no protection against arbitrary findings.

<sup>293</sup> *Nevada Consolidated Copper Corp. v. N. L. R. B.*, (C. C. A. 10th, 1941) 122 F. (2d) 587; *Bussman Mfg. Co. v. N. L. R. B.*, (C. C. A. 8th, 1940) 111 F. (2d) 783; *Cupples Co. Mfrs. v. N. L. R. B.*, (C. C. A. 8th, 1939) 106 F. (2d) 100.

<sup>294</sup> *Chicago, M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 46 S. Ct. 564 (1926). This is the principal case relied on and is restricted to inferences from a single piece of evidence. In a logical sense such evidence is irrelevant.



equally justifiable but inconsistent inferences it supports neither<sup>295</sup> is dangerously unsound, for it removes from the board all power to choose which inference to believe. It leads to the conclusion that the findings will be supported only if there is a single justifiable inference. This is contrary to the intent of the act and the great weight of authority.

### 2. *Credibility of Witnesses*

The court will not pass on the credibility of witnesses but will accept the board's conclusion on whether a witness can be believed.<sup>296</sup> As a matter of fact, the board has no more opportunity to observe the witnesses than the court, so there is no reason why the board's finding should be conclusive. The trial examiner is the only one who can observe, and it is his findings as to credibility that should be conclusive on both the board and the court. Under the present plan, however, his findings are only recommendations and are not binding on the board.

When the evidence is disputed, the board is entitled to resolve all reasonable doubts as to credibility of witnesses in favor of those supporting the charge,<sup>297</sup> but the board cannot disregard the testimony of the respondent's witnesses unless they are impeached or contradicted.<sup>298</sup> This rule, preventing the board from discrediting a witness, should not be applied when the board's discrediting is based on the personal observation of the witness by the trial examiner.

### 3. *Hearsay and Incompetent Evidence*

Hearsay evidence can be admitted and may be considered for its probative value,<sup>299</sup> but hearsay alone will not support a finding.<sup>300</sup> If it is corroborated by other relevant evidence which alone might not be

<sup>295</sup> See *Texarkana Bus Co. v. N. L. R. B.*, (C. C. A. 8th, 1940) 119 F. (2d) 480 at 486.

<sup>296</sup> *N. L. R. B. v. Wallace Mfg. Co.*, (C. C. A. 4th, 1938) 95 F. (2d) 818.

<sup>297</sup> *N. L. R. B. v. Armour & Co.*, (C. C. A. 10th, 1942) 129 F. (2d) 316; *N. L. R. B. v. Burry Biscuit Corp.*, (C. C. A. 7th, 1941) 123 F. (2d) 540.

<sup>298</sup> *American Smelting & Refining Co. v. N. L. R. B.*, (C. C. A. 8th, 1942) 126 F. (2d) 680; *N. L. R. B. v. Sheboygan Chair Co.*, (C. C. A. 7th, 1942) 125 F. (2d) 436; *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, (C. C. A. 5th, 1941) 122 F. (2d) 433; *Cupples Co. Mfrs. v. N. L. R. B.*, (C. C. A. 8th, 1939) 106 F. (2d) 100; *N. L. R. B. v. Empire Furniture Corp.*, (C. C. A. 6th, 1939) 107 F. (2d) 92.

<sup>299</sup> *Union Drawn Steel Co. v. N. L. R. B.*, (C. C. A. 3d, 1940) 109 F. (2d) 587.

<sup>300</sup> *N. L. R. B. v. Bell Oil & Gas*, (C. C. A. 5th, 1938) 98 F. (2d) 406. See *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197 at 230, 59 S. Ct. 206 (1938); *Tyne v. N. L. R. B.*, (C. C. A. 7th, 1942) 125 F. (2d) 832.

enough, the finding will be supported.<sup>301</sup> On the same reasoning, affidavits alone will not support a finding as there is no opportunity to cross-examine or test the honesty of the witness.<sup>302</sup>

The same principle applies to incompetent evidence. It is admissible,<sup>303</sup> carries weight, but will not support a finding unless corroborated by other evidence.<sup>304</sup>

The rule that hearsay or incompetent evidence cannot support a finding is contrary to the principle that the finding will be upheld if it is reasonable from the evidence. A large amount of hearsay may make an inference much more reasonable than some circumstantial evidence. The sole test should be whether the inference is reasonable regardless of the technical nature of the evidence relied upon,<sup>305</sup> but the courts have not fully escaped from their common-law concepts and demand some bit of "legal evidence" to corroborate the hearsay or incompetent evidence.

#### 4. *Circumstantial and Background Evidence*

There is no question but that circumstantial evidence is admissible and will be sufficient to support a finding.<sup>306</sup> The board may even consider as evidence the failure of the respondent to call a witness who is available and who would be able to refute the charges if they were refutable.<sup>307</sup> In absence of direct evidence, the board may rely on circumstantial evidence even though it is contradicted by the respondent's direct evidence.<sup>308</sup> This is undoubtedly true under the Supreme Court's test of substantial evidence, but should be qualified by the rule of reasonableness under the second test.

The board may consider the history of the situation as a background in which to view the facts involved in the acts complained of as well as the facts themselves. Background evidence alone will not support

<sup>301</sup> N. L. R. B. v. Service Wood Heel Co., (C. C. A. 1st, 1941) 124 F. (2d) 470.

<sup>302</sup> N. L. R. B. v. Rath Packing Co., (C. C. A. 8th, 1941) 123 F. (2d) 684.

<sup>303</sup> N. L. R. B. v. Griswold Mfg. Co., (C. C. A. 3d, 1939) 106 F. (2d) 713.

<sup>304</sup> N. L. R. B. v. Bell Oil & Gas, (C. C. A. 5th, 1938) 98 F. (2d) 870.

<sup>305</sup> See *Martel Mills Corp. v. N. L. R. B.* (C. C. A. 4th, 1940) 114 F. (2d) 624 at 630. Hearsay may be sufficient if direct evidence is not available and the hearsay is not denied by direct evidence, for it is the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

<sup>306</sup> *F. W. Woolworth Co. v. N. L. R. B.*, (C. C. A. 2d, 1941) 121 F. (2d) 658; *N. L. R. B. v. Entwistle Mfg. Co.*, (C. C. A. 4th, 1941) 120 F. (2d) 532; *Hartsell Mills Co. v. N. L. R. B.*, (C. C. A. 4th, 1940) 111 F. (2d) 291.

<sup>307</sup> *N. L. R. B. v. Fruehauf Trailer Co.*, 301 U. S. 49, 57 S. Ct. 642 (1937).

<sup>308</sup> *Indianapolis Power & Light Co. v. N. L. R. B.*, (C. C. A. 7th, 1941) 122 F. (2d) 757.

a finding,<sup>309</sup> but the failure to consider it may lead the court to hold that the findings are not supported by substantial evidence under the second test.<sup>310</sup>

### 5. *Statements by Supervisory Employees*

In practically all cases, the respondent is a large business concern. The act constituting domination, interference, or coercion of employees can be found only in the acts of its agents. The difficult problem is the extent of authority which must be vested in the employee before his unauthorized acts will be binding on the respondent. The board has designated an employee who has this necessary authority as a "supervisory" employee.

The test of who is a supervisory employee is not the same as in cases of respondeat superior, for here he need have no actual authority to commit the acts constituting the violation.<sup>311</sup> If he has power to hire and fire,<sup>312</sup> or the power to recommend dismissal,<sup>313</sup> certainly the respondent is bound by his antiunion conduct, because that conduct is bound to create a sense of fear in the workers whom he controls. However, the control over dismissal is not the sole determining factor.<sup>314</sup> It is sufficient that the workers reasonably believe he expresses the wishes of the respondent or was acting in the respondent's behalf<sup>315</sup> and were thereby restrained or coerced. Casual statements in private conversation are usually not enough,<sup>316</sup> for such statements will not be considered by the workers as expressions of the company.

<sup>309</sup> *N. L. R. B. v. Union Pacific Stages* (C. C. A. 9th, 1938) 99 F. (2d) 153.

<sup>310</sup> *Newport News Shipping & Dry Dock Co. v. N. L. R. B.*, (C. C. A. 4th, 1939) 101 F. (2d) 841.

<sup>311</sup> *International Assn. of Machinists v. N. L. R. B.*, 311 U. S. 72, 61 S. Ct. 83 (1940); *N. L. R. B. v. Moench Tanning Co.*, (C. C. A. 2d, 1941) 121 F. (2d) 951; *N. L. R. B. v. Swank Products*, (C. C. A. 3d, 1940) 108 F. (2d) 872. *Contra*: *Cupples Co. Mfrs. v. N. L. R. B.*, (C. C. A. 8th, 1939) 106 F. (2d) 100.

<sup>312</sup> *N. L. R. B. v. Planters Mfg. Co.*, (C. C. A. 4th, 1939) 105 F. (2d) 750; *N. L. R. B. v. A. S. Abell Co.*, (C. C. A. 4th, 1928) 97 F. (2d) 951.

<sup>313</sup> *New Idea, Inc. v. N. L. R. B.*, (C. C. A. 7th, 1941) 117 F. (2d) 517; *N. L. R. B. v. Chicago Apparatus Co.*, (C. C. A. 7th, 1940) 116 F. (2d) 753; *Virginia Ferry Corp. v. N. L. R. B.*, (C. C. A. 4th, 1939) 101 F. (2d) 103.

<sup>314</sup> *N. L. R. B. v. Continental Oil Co.*, (C. C. A. 10th, 1941) 121 F. (2d) 120; *Matter of All-Steel Products Mfg. Co.*, 16 N. L. R. B. 72 (1939). *Contra*: *Ballston-Stillwater Knitting Co. v. N. L. R. B.*, (C. C. A. 2d, 1938) 98 F. (2d) 758.

<sup>315</sup> *N. L. R. B. v. Cities Service Oil Co.*, (C. C. A. 2d, 1942) 129 F. (2d) 933; *International Assn. of Machinists v. N. L. R. B.*, 311 U. S. 72, 61 S. Ct. 83 (1940); *N. L. R. B. v. Moench Tanning Co.*, (C. C. A. 2d, 1941) 121 F. (2d) 951; *N. L. R. B. v. Pacific Gas & Electric Co.*, (C. C. A. 9th, 1941) 118 F. (2d) 780.

<sup>316</sup> *Quaker State Oil Refining Corp. v. N. L. R. B.*, (C. C. A. 3d, 1941) 119 F. (2d) 631; *N. L. R. B. v. Whittier Mills Co.*, (C. C. A. 5th, 1940) 111 F. (2d) 474.

Conduct of supervisory employees apparently amounting to coercion will not support a finding if it is shown that it did not in fact result in any restraint on the workers' exercise of their rights,<sup>317</sup> or if it is substantially outweighed by contradicting evidence,<sup>318</sup> or if the respondent informs the workers that such statements do not represent the will of the employer.<sup>319</sup>

### 6. *The Trial Examiner's Report*

The findings in the trial examiner's report are only recommendations to the board. It may uphold, or reverse those findings in whole or in part.<sup>320</sup> The board will give weight to the trial examiner's recommendations, for he has first-hand knowledge of the hearing and can observe the witnesses.<sup>321</sup> These recommendations are not binding on the board,<sup>322</sup> but if the board overrules them, the court will give them weight in considering whether the board's findings are supported by evidence.<sup>323</sup>

Of all of the individuals involved in the procedure, the trial examiner is in the best position to arrive at the proper decision. He has first-hand knowledge of all that is in the record, hears the arguments on all motions, and observes the witnesses. The board members seldom read the record, need not read the briefs, and need not all attend the oral argument. They rely largely on the summary of the record (excluding most of the oral argument) made by members of the review section. The court can properly place greater reliance and responsibility on the conclusions of the original hearing officer. The Attorney General's Committee on Administrative Procedure recommends that the trial examiner be given power to render a final order subject to review by the board.

<sup>317</sup> *Wilson & Co. v. N. L. R. B.*, (C. C. A. 7th, 1941) 120 F. (2d) 913.

<sup>318</sup> *N. L. R. B. v. Sparks Withington Co.*, (C. C. A. 6th, 1941) 119 F. (2d) 78. This limitation would not apply under the first test of substantial evidence.

<sup>319</sup> *N. L. R. B. v. Aluminum Goods Mfg. Co.*, (C. C. A. 7th, 1942) 125 F. (2d) 353; *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 61 S. Ct. 320 (1941), affirming (C. C. A. 6th, 1940) 110 F. (2d) 843 (denial can be made through the foremen or by posting notices on the bulletin board).

<sup>320</sup> *Matter of Semet-Solvay Co.*, 7 N. L. R. B. 511 (1938).

<sup>321</sup> *Matter of Fashion Piece Dye Works*, 6 N. L. R. B. 274 (1938).

<sup>322</sup> *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, (C. C. A. 5th, 1941) 122 F. (2d) 433; *Burk Bros. v. N. L. R. B.*, (C. C. A. 3d, 1941) 117 F. (2d) 686.

<sup>323</sup> *Wilson & Co. v. N. L. R. B.*, (C. C. A. 8th, 1941) 123 F. (2d) 411 (board's findings upheld in spite of trial examiner's findings to the contrary); *A. E. Staley Mfg. Co. v. N. L. R. B.*, (C. C. A. 7th, 1941) 117 F. (2d) 868 (board's findings reversed partly because contrary to the trial examiner's findings).

### 7. *Other Evidence*

The board has the same powers to take judicial notice of facts outside of the record as a court.<sup>324</sup> The board should have no more power than a court, for it should preserve the right of a party to refute the evidence used against him. Offers of proof made at the hearing when evidence is wrongfully excluded will be considered by the board and weighed the same as if it had been admitted.<sup>325</sup>

If the board relies on only part of the evidence which supports its findings and that part is not substantial, then the finding will be reversed even though the whole evidence which the board could have relied on would have supported the findings.<sup>326</sup> There is little justification for holding that such an error justifies reversal, but it will have the salutary effect of compelling the board to be more accurate and more explicit in stating the full basis upon which the findings have been made.

### E. *The Order*

The act provides that the board can issue and serve on any person named in the complaint an order requiring such person to cease and desist the unfair labor practices found or to take such affirmative action as will effectuate the policies of the act.<sup>327</sup> The board has the power to decide how prior unfair practices can best be expunged and the court will not modify the order if it is reasonable.<sup>328</sup>

The order can compel the reinstatement of discriminatorily discharged employees with back pay,<sup>329</sup> can compel the respondent to

<sup>324</sup> N. L. R. B. v. Griswold Mfg. Co., (C. C. A. 3d, 1939) 106 F. (2d) 713 (notice that failure to bargain collectively has been one of the most prolific causes of labor disturbances); Jefferson Electric Co. v. N. L. R. B., (C. C. A. 7th, 1939); 102 F. (2d) 949 (notice of the cleavage in the labor movement).

<sup>325</sup> Matter of Van Iderstine Co., 17 N. L. R. B. 771 (1939).

<sup>326</sup> N. L. R. B. v. Virginia Electric & Power Co., 314 U. S. 469, 62 S. Ct. 344 (1941).

<sup>327</sup> N. L. R. A., § 10 (c).

<sup>328</sup> International Assn. of Machinists v. N. L. R. B., 311 U. S. 72, 61 S. Ct. 83 (1940). It can order the respondent to bargain collectively with the union even though there has been a shift in membership if it reasonably believes this is necessary to correct prior interference. N. L. R. B. v. P. Lorillard & Co., 314 U. S. 512, 62 S. Ct. 397 (1942). But the board will not grant the injunction where all but minor findings have been found unsupported. Virginia Electric & Power Co. v. N. L. R. B., (C. C. A. 4th, 1940) 115 F. (2d) 414.

<sup>329</sup> N. L. R. A., § 10 (c). This is not a common-law action resulting in a money judgment but a statutory action and therefore is not a denial of jury trial. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937).

withdraw recognition from a dominated union<sup>330</sup> even though this forces him to break his contract with that union,<sup>331</sup> and the order will not become invalid by the respondent's subsequent compliance.<sup>332</sup> The order cannot compel an employer to post notices that it will cease and desist the unfair labor practices; this would be like compelling him to make an admission of a crime. It can compel him to post copies of the order and a statement that he will comply.<sup>333</sup>

The order cannot bind any one who was not a party to the proceedings, but it may affect those who are not parties<sup>334</sup> in case of withdrawing recognition of dominated unions or reinstatement of employees wrongfully discharged.<sup>335</sup>

### 1. *The Scope of the Order*

It is elementary that the order should not prohibit practices which are not proved at the hearing<sup>336</sup> except in so far as absolutely necessary to effectuate the policies of the act. The rule here need not be as strict as in legal proceedings, where the effect of the judgment is to work an immediate injury, for the order, unless it be for affirmative action, is only to cease and desist from illegal activities. However, if a petition of enforcement is granted by the court, the respondent then becomes liable to contempt proceedings without a hearing before the board. Therefore, the orders should be restricted to matters related to those proved at the hearing.

Regardless of these principles, the board issued blanket orders prohibiting respondents from "in any manner" interfering with the employee's rights guaranteed by the act.<sup>337</sup> Some of the courts upheld

<sup>330</sup> N. L. R. B. v. Pacific Greyhound Lines, 303 U. S. 272, 57 S. Ct. 577 (1938).

<sup>331</sup> National Licorice Co. v. N. L. R. B., 309 U. S. 350, 60 S. Ct. 569 (1940). The respondent can set up the board's order as a defense in any suit on the contract.

<sup>332</sup> N. L. R. B. v. Pennsylvania Greyhound Lines, 303 U. S. 261, 58 S. Ct. 571 (1938).

<sup>333</sup> N. L. R. B. v. Southwestern Greyhound Lines, (C. C. A. 8th, 1942) 126 F. (2d) 883; N. L. R. B. v. Louisville Refining Co., (C. C. A. 6th, 1939) 102 F. (2d) 678; Virginia Ferry Corp. v. N. L. R. B., (C. C. A. 4th, 1939) 101 F. (2d) 103.

<sup>334</sup> Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206 (1938); N. L. R. B. v. Hopwood Retinning Co., (C. C. A. 2d, 1938) 98 F. (2d) 97.

<sup>335</sup> See supra, p. 604.

<sup>336</sup> N. L. R. B. v. West Kentucky Coal Co., (C. C. A. 6th, 1940) 116 F. (2d) 816 (order to bargain collectively cannot be enforced where there has been no showing of a refusal to bargain collectively).

<sup>337</sup> "In any manner interfering with, restraining, or coercing its employees in exercise of their rights to self-organization, to form, to join, or assist labor organiza-

the use of this blanket order where the evidence was only of a single species of violation.<sup>338</sup> These decisions were based on the mystifying logic that since sections 8 (2) (domination), 8 (3) (discrimination for union activities), 8 (4) (discrimination for testifying), and 8 (5) (refusal to bargain), were all species of the unfair labor practices in 8 (1) (interference, restraint, or coercion in exercise of the rights guaranteed), then the finding of a violation of any other one constituted a violation of 8 (1). This then would be grounds for a general order.<sup>339</sup> This might result in an employer being cited for contempt for discrimination on an order based solely on the unrelated finding of refusal to bargain collectively. Ultimately this would mean that an employer need be found guilty of only one violation and ever after he would be liable for contempt for any conduct that might be found to be in violation of the act. This obviously fallacious position was denied by the Supreme Court, which held that the order could prohibit only those acts which the employer is found to have committed or ones closely related thereto.<sup>340</sup> The finding of discriminatory discharges,<sup>341</sup> or domination of company unions,<sup>342</sup> or refusal to bargain collectively,<sup>343</sup> or interference with the right of self-organization<sup>344</sup> will not justify a blanket order, but any of these findings will justify an order to cease and desist from all acts within that category. However, where there

tions, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act." This will be termed the blanket order.

<sup>338</sup> *N. L. R. B. v. Yale & Towne Mfg. Co.*, (C. C. A. 2d, 1940) 114 F. (2d) 376 (evidence only of aiding a company union); *N. L. R. B. v. Highland Park Mfg. Co.*, (C. C. A. 4th, 1940) 110 F. (2d) 632 (evidence only of refusal to bargain collectively).

<sup>339</sup> *Art Metals Construction Co. v. N. L. R. B.*, (C. C. A. 2d, 1940) 110 F. (2d) 148.

<sup>340</sup> *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 61 S. Ct. 693 (1941). *Globe Cotton Mills v. N. L. R. B.*, (C. C. A. 5th, 1939) 103 F. (2d) 91.

<sup>341</sup> *N. L. R. B. v. Newark Morning Ledger Co.*, (C. C. A. 3d, 1941) 120 F. (2d) 262. *Wilson Co. v. N. L. R. B.*, (C. C. A. 7th, 1941) 124 F. (2d) 845, is seemingly contrary, but the court futilely tries to make it square with *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 61 S. Ct. 693 (1940).

<sup>342</sup> *Wilson & Co. v. N. L. R. B.*, (C. C. A. 8th, 1940) 123 F. (2d) 411; *N. L. R. B. v. Youngstown Mines Corp.*, (C. C. A. 8th, 1941) 123 F. (2d) 178; *N. L. R. B. v. Continental Oil Co.*, (C. C. A. 10th, 1941) 121 F. (2d) 120.

<sup>343</sup> *Singer Mfg. Co. v. N. L. R. B.*, (C. C. A. 7th, 1941) 119 F. (2d) 131. *Globe Cotton Mills v. N. L. R. B.*, (C. C. A. 5th, 1939) 103 F. (2d) 91.

<sup>344</sup> *N. L. R. B. v. Pacific Gas & Electric Co.*, (C. C. A. 9th, 1941) 118 F. (2d)

has been more than a single type of violation constituting a whole course of conduct in violation of the act, a blanket order will be sustained.<sup>345</sup>

An order may run against a successor to the respondent where there has been no real transfer, but it cannot run against a good faith successor. Therefore an order against "respondent, agents, successors, and assigns" is too broad and the last three words must be struck.<sup>346</sup>

No hard and fast rule can be formulated for the determination of the proper breadth of the order, but it must depend on the circumstances of each case. The order should not prohibit practices which have not been in issue at the hearing, yet it should be sufficiently broad to prevent the respondent from evading it by a slight change in methods. It should prohibit all those acts which the board reasonably believes from the evidence that the respondent might commit in the near future.

#### CONCLUSION

As was stated in the introduction, it is not within the scope of this paper to evaluate the practical procedure of the board in typical cases but to determine the limitations within the established procedure which mark the boundaries of fairness. The results reached by the board and the courts have been criticized in respect to the specific problems involving necessary parties, bias of the trial examiner, issuance of subpoenas, requirement of an intermediate report, use of subordinates, test of substantial evidence, weight of conflicting and hearsay evidence, credibility of witnesses, and the scope of the order. It is unnecessary to restate here the principles involved in those discussions.

However, there are some broader observations and evaluations that should be made of the procedure as a whole.

The board is charged with the task of alleviating a major social conflict between two groups, capital and labor, which have been tradi-

<sup>345</sup> *Sperry Gyroscope Co. v. N. L. R. B.*, (C. C. A. 2d, 1942) 129 F. (2d) 922; *N. L. R. B. v. Bradley Lumber Co.*, (C. C. A. 8th, 1942) 128 F. (2d) 768; *N. L. R. B. v. Baldwin Locomotive Works*, (C. C. A. 3d, 1942) 128 F. (2d) 39; *N. L. R. B. v. Reynolds Wire Co.*, (C. C. A. 7th, 1941) 121 F. (2d) 627; *N. L. R. B. v. Entwistle Mfg. Co.*, (C. C. A. 4th, 1941) 120 F. (2d) 532; *N. L. R. B. v. National Motor Bearing Co.*, (C. C. A. 9th, 1939) 105 F. (2d) 652. But see *N. L. R. B. v. Stone*, (C. C. A. 7th, 1942) 125 F. (2d) 752 (findings of domination, making of individual contracts with invalid provisions, and coercive letters to workers did not justify a blanket order).

<sup>346</sup> *N. L. R. B. v. Stone*, (C. C. A. 7th, 1942) 125 F. (2d) 752; *N. L. R. B. v. Bachelder*, (C. C. A. 7th, 1942) 125 F. (2d) 387.



tional enemies. The board came into existence concurrently with an upheaval in the labor movement and an outbreak of industrial unrest. It has been able to settle ninety per cent of the cases coming before it without formal proceedings and adjudication. The remaining ten per cent in which there must be a hearing are those in which there is an irreconcilable disagreement often accompanied by high emotional tensions. The board is charged with adjudicating between these parties in a way that will effectuate the purposes of the act and, if possible, pacify the parties.

It is evident that no matter how the board conducts itself in this situation it will receive severe criticism from the losing side. Since criticism of the underlying purposes is relatively unpopular and of little avail, most of the criticism is directed at the procedure of the board. It is important, therefore, because of the nature of the conflict involved, and because of the inevitable criticism, that the board establish and enforce every safeguard possible which will not too greatly hinder its effectiveness. It must do everything possible to make the parties feel that they have had a fair and equal chance to present their case. This has not been done.

The board has assumed an attitude, especially in purely procedural matters, that it will refuse to reverse unless there is some definite proof of prejudice, and this requirement of proof is almost always placed on the respondent because he is the one who claims injury. If the board fails to comply with procedure set out in the act or in its own rules, the respondent must prove injury, but if the respondent fails to follow the rules even in insubstantial matters, his attempted action may be disregarded by the board. There is no need to impose upon administrative tribunals all the procedural technicalities that have hindered the courts, but the relaxation of restrictions should apply equally to both parties. Theories of proof of injury should not fall to such a large degree on the respondent. If the board fails to comply with its own rules, then the burden should be upon it to prove that such noncompliance did not result in any unfairness.

The parties will never believe they have had a fair hearing unless they feel they have had an opportunity to present their case to the ones who decide. The whole hearing stage is not for the purpose of rendering a decision but merely to compile a record from which the board can make its decision. This indirect method of presenting evidence to the tribunal is not conducive to creating in the parties a feeling that they have had a fair chance to present their case.

This feeling of distrust is increased by the fact that the ones who decide never personally consider the record which has been so carefully prepared. The board considers only abstracts of the record made by subordinates and these abstracts may be colored by the review attorney's personal bias in the case. While the board is making its decision based on mere abstracts of the record, briefs, and oral arguments, the trial examiner who compiled the record, heard all of the evidence personally, observed all of the witnesses, and heard all of the arguments on motions and issues, has no voice in the final determination except to the extent that his recommendations in the intermediate report are accepted. He is in the best position to render a proper decision and should be given that power with the board having only the right to review on appeal. This would allow all parties an opportunity to present their evidence directly to the one who decides, would lend an atmosphere of dignity and importance to the hearing, and would eliminate the whole problem of the review section.

There is some justification in the court's readiness to overthrow the findings of the board, for the court has all the information before it which the board has, is as familiar with the issues as the board, and in many cases probably makes a more complete personal review of the record. If the decision were made by the trial examiner, the court would have less justification in overthrowing the findings because of the trial examiner's personal familiarity with many aspects of the case which could not be reflected in the record.

Fair procedure before the board requires not only that the parties should be protected against proven prejudice but should be protected against probable prejudice even though none can be proved. The nature of the conflict being adjudicated demands strict safeguards to give the parties confidence in the tribunal's procedure and a satisfaction that they have had a fair chance to be heard.