Boston College Law Review

Volume 6 | Issue 4 Article 17

7-1-1965

Administrative Law—Banking Law— Roles of Comptroller of the Currency and Federal Reserve Board—Judicial Review.—Whitney Nat'l Bank v. Bank of New Orleans

Thomas C. Cameron

CASE NOTES

Administrative Law—Banking Law—Roles of Comptroller of the Currency and Federal Reserve Board—Judicial Review—*Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*[1]—Whitney-New Orleans National Bank, wishing to circumvent Louisiana's law limiting branch offices to the home parish of the parent bank,[2] formed Whitney Holding Co., which was to acquire Whitney-New Orleans by exchanging its own stock for that of Whitney-New Orleans shareholders. It would then establish Whitney National Bank in Jefferson Parish with funds supplied by Whitney-New Orleans. Fulfillment of this plan required approval of the holding company arrangement by the Federal Reserve Board[3] and issuance of a certificate of authority to open for business by the Comptroller of the Currency.[4]

There are two suits involved in this controversy. One, pending the outcome of the instant case, is before the Court of Appeals for the Fifth Circuit for review of the Board's approval of the holding company proposal.[5] The instant case was brought by competitor banks in the District Court for the District of Columbia, after the Board's approval was announced, for a declaratory judgment that the Comptroller cannot issue his certificate and an injunction prohibiting him from doing so. The district court assumed jurisdiction and issued the injunction[6] because the Louisiana legislature had, after the Board's approval, passed a law prohibiting bank holding companies or their subsidiaries from opening for business in Louisiana.[7] The Court of

---

[1] 379 U.S. 411 (1965).

[2] La. Rev. Stat. § 6:54 (1950) is implicitly made applicable to national banks by the Banking Act of 1933, 48 Stat. 189, as amended, 12 U.S.C. § 36(c) (1958).

[3] The Bank Holding Company Act of 1956, 70 Stat. 133-38, as amended, 12 U.S.C. §§ 1841-48 (1958) prohibits bank holding companies from acquiring ownership or control of a national bank, new or existing, without approval of the Board. 70 Stat. 134 (1956), 12 U.S.C. § 1842(a) (1958). The Board is directed to consider:

> the convenience, needs, and welfare of the communities and the area concerned; and . . . whether or not the effect of such acquisition . . . would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking. 70 Stat. 134 (1956), 12 U.S.C. § 1842(c) (4)-(5) (1958).

[4] The National Bank Act, 13 Stat. 104 (1864), as amended, 12 U.S.C. § 26 (Supp. V, 1964), provides that the Comptroller check the condition of the new bank, its directorate, etc., in determining whether or not to issue the certificate of authority to open for business.

If Whitney-Jefferson were an established bank which the holding company sought to acquire, the Comptroller's certificate would be unnecessary and he would be involved with the Board only as a consultant under the Act of 1956, 70 Stat. 134, 12 U.S.C. § 1842(b) (1958). The Court points out that the fact that it is a new bank which is sought to be organized (thus requiring the Comptroller's certificate) does not alter the procedure of bank holding company approval and review required by the Act of 1956. Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., supra note 1, at 419.

[5] The Bank Holding Company Act of 1956, § 9, 70 Stat. 138, as amended, 12 U.S.C. § 1848 (1958), provides for review of the Board's decision in specified courts of appeals.

[6] Bank of New Orleans & Trust Co. v. Saxon, 211 F. Supp. 576 (D.D.C. 1962).

[7] La. Act No. 275 of 1962, La. Rev. Stat. §§ 6:1001-6:1006 (1962 Supp.).

Appeals for the District of Columbia affirmed, but on the alternate ground that Whitney-Jefferson would be a prohibited branch of Whitney-New Orleans.[8] The Supreme Court, reversing and dismissing, HELD: the district court had no jurisdiction to pass upon the merits of the holding company proposal and appropriate disposition of the controversy cannot be made without further consideration by the Board in the light of the Louisiana statute, since original exclusive jurisdiction rests with the Board.

The Court reached its conclusion by looking into and behind the relevant statutes for congressional intent. The Bank Holding Company Act of 1956 prohibits a bank holding company from acquiring ownership or control of a national bank, new or existing, without approval of the Federal Reserve Board.[9] The act provides for review of Board determinations in these cases by specified courts of appeals which must accept administrative findings of fact if supported by substantial evidence.[10] The specificity of this statutory scheme, coupled with the knowledge that Congress had rejected proposals that the Comptroller have a veto power over the Board[11] or that district courts be given de novo review power over Board decisions,[12] led the Court to conclude that the power of the Board in bank holding company proposals is exclusive.

The Court was of the opinion that this exclusive jurisdiction included the power to pass upon the effect of the new Louisiana statute. The Act of 1956, like the Banking Act of 1933[13] which regulated branch-banking, left considerable power in the states to prohibit expansion by means of bank holding companies.[14] The Court considered this reservation of power one of the guidelines to be followed by the Board and concluded that the Board's power was exclusive and that it would have properly considered the effect of the state statute had the matter been before it.

The Court thus forbade the district court to pass on the merits of the bank holding company proposal; it also directed the Court of Appeals for the Fifth Circuit, in effect, to remand an issue to the Board which conceivably could be considered within the competence of a court and which arose after the Board completed its findings.[15] The reasons for this second step are not so clear as those for the first.

The Court refused to allow the Comptroller's involvement to obscure

[8] Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 323 F.2d 290 (D.C. Cir. 1963).

[9] 70 Stat. 134 (1956), 12 U.S.C. § 1842(a) (1958).

[10] 70 Stat. 134 (1956), as amended, 12 U.S.C. § 1848 (1958).

[11] See 101 Cong. Rec. 8186-87 (1955) for proposal that the Comptroller have a veto power over the Board's decisions under the Bank Holding Company Act. The proposal did not become part of the Act as passed.

[12] Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., supra note 1, at 420.

[13] Banking Act of 1933, 48 Stat. 189, as amended, 12 U.S.C. § 36(c) (1958). The act permits branching, but only at locations affirmatively authorized by state law.

[14] 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1958).

[15] The Court did not direct the Court of Appeals for the Fifth Circuit to remand to the Board but strongly suggested this by staying its dismissal order for 60 days to enable the parties to move before the reviewing court for such a remand and to enable that court to take such steps as may be necessary to protect its jurisdiction. Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., supra note 1, at 415.

this issue. It exposed the action in the district court as a collateral attack on the Board's approval. The complaint alleged violations of the branching laws and the Louisiana holding company statute. Since these alleged violations could be made only after Board approval, an injunction founded upon them would constitute a district court review of the Board's approval. Even the court of appeals, reviewing the district court, pointed out that the issue before it could be resolved only after the legality of Whitney-Jefferson's creation had been determined.[16] The Supreme Court noted the similarity between what was attempted here and the proposal for de novo review in the district court which Congress specifically rejected.[17] Inherent in the district court's decision was a finding that the Board erred in approving the holding company arrangement. Such review of the Board's decision necessarily assumes a concurrent jurisdiction in the Board and the courts to pass on holding company proposals. The Act of 1956 clearly precludes such an assumption. The Court reasoned that the intent of Congress to keep review out of the district courts would be undermined if these courts were permitted to share initial jurisdiction with the Board. The majority indicated that the Comptroller poses no real threat to the petitioners since, in any event, his issuing a certificate would be premature until the Board's approval has been upheld in the Fifth Circuit.

Having established the exclusive jurisdiction of the Board as against the district courts and the Comptroller, and having put the latter's involvement into proper perspective, the Court faced the problem of sending the issue of the new statute back to the Board or leaving it with the Fifth Circuit. In suggesting that the circuit court remand to the Board, the Court made the strongest possible interpretation of Congress' intent. It laid down a rule that the Board shall make *all* preliminary determinations and that in bank holding company matters only the courts of appeal may become involved, and then only as courts of review.

There can be little doubt that in finding a violation of branching laws, the Court of Appeals for the District of Columbia invaded the Board's province in the instant case. Less obvious is the lack of power in the district court to take notice of a statute which was passed after the Board made its decision and which would seem to require no administrative expertise to interpret.[18] Indeed, the only real question remaining would seem to be the constitutionality of the statute, a question raised when Whitney-Jefferson asserted that it "collided with the Supremacy Clause of the Constitution."[19] The statute could also be held to be ex post facto.

Initial consideration of the state holding company statute by a court might have been upheld in the past. In *Louisville & Nashville R. R. v. F. W. Cook Brewing Co.*,[20] the Court held that it was competent to determine the validity of a Kentucky statute regulating interstate commerce, without

[16] Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., supra note 8, at 299.
[17] Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., supra note 1, at 420.
[18] Mr. Justice Black holds this view. He would affirm the district court. Id. at 432.
[19] The district court found the Louisiana statute constitutional. Bank of New Orleans & Trust Co. v. Saxon, supra note 6, at 578.
[20] 223 U.S. 70 (1912).

sending the issue to the Interstate Commerce Commission.[21] In other cases the Court has refused to remand questions of constitutionality.[22] Moreover, the Court has held in *NLRB v. Jones & Laughlin Steel Corp.*[23] that the reviewing court has discretion to determine or remand certain issues arising after the agency's determination. The Court chose not to use these cases to permit the reviewing court to decide the issue of the statute's validity before remanding to the Board. Instead, it gave the Board the opportunity to make its administrative determinations in the light of the new statute.

In so deciding, the Court endorsed the view of the courts of appeal regarding their function as reviewing bodies. The Eighth Circuit has said that a court of appeals cannot substitute its findings and judgment for those of the Board.[24] The Seventh Circuit said that in discharging its duty of determining whether Board findings have substantial support in the record, it is not a super-agency; inferences of fact must remain within the purview of the agency; the test is not whether the Board's findings are those the court might have found de novo, but rather whether the Board's findings are reasonable.[25] The Court was unwilling to consider the courts of appeal as more than bodies of pure review.

The result finds support in the cases. The objection that only a court can decide issues of constitutionality is met by *Aircraft & Diesel Equip. Corp. v. Hirsch*,[26] where the Court would require that administrative procedure be exhausted in the hope that the constitutional question be avoided. Professor Davis feels that the case for exhaustion of administrative remedies before resort to courts becomes stronger as the chances that the agency can satisfactorily dispose of the case increase.[27] This consideration of the Board's utility would appear to be a material consideration in the discretion given the reviewing court to decide issues which arise after the Board has concluded its hearings.[28] This "discretion" did not seem so broad in *Unemployment Compensation Comm'n v. Aragon*,[29] where the Court said that the reviewing court "usurps" the agency's power when it sets aside the administrative decision on grounds not theretofore presented, and deprives the agency of an "opportunity to consider the matter, make its ruling, and state the reasons for its action."

This goal of giving administrative agencies the opportunity to consider *all* relevant factors in reaching their administrative decisions was emphasized in *Far East Conference v. United States* where Mr. Justice Frankfurter said:

> [I]n cases raising issues of fact not within the conventional experi-

[21] See Far East Conference v. United States, 342 U.S. 570, 577 (1952) where the Court suggests that questions "only incidentally" related to an agency's jurisdiction need not be returned to the agency for an answer.

[22] E.g., Public Utilities Comm'n v. United States, 355 U.S. 534 (1958).

[23] 331 U.S. 416 (1947).

[24] Northwest Bancorporation v. Board of Governors, 303 F.2d 832, 840 (8th Cir. 1962).

[25] First Wisc. Bankshares Corp. v. Board of Governors, 325 F.2d 946, 948 (7th Cir. 1963).

[26] 331 U.S. 752, 772 (1947).

[27] 3 Davis, Administrative Law Treatise 80 (1958).

[28] NLRB v. Jones & Laughlin Steel Corp., supra note 23.

[29] 329 U.S. 143, 155 (1946).

> ence of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.[30]

Mr. Justice Frankfurter did not ask merely that administrative *issues* be referred to agencies; he sought referral of the entire case if such issues could be found within it. Professor Davis says that appropriate agencies should make the initial decisions in cases involving problems of relief beyond administrative jurisdiction so long as some parts of the case are within the exclusive jurisdiction of the agency.[31] The majority accorded this treatment to the instant case, which required it all the more urgently since Congress gave the Board exclusive jurisdiction, and provided only for review by certain courts accepting all facts based on substantial evidence.

In dissent, Mr. Justice Black pointed out that the only reason for sending the instant case back to the Board was a "technical" one, since the district court was correct in holding that the Louisiana statute barred the Board's action.[32] Congress did not provide, however, that courts could determine issues which did not need the Board's special talents. The only power in the courts is that of review. The Court thus effectuates the desire of Congress that agencies be permitted to make their findings with all relevant factors at their command. The Court, therefore, has not delegated judicial power to determine questions of law; it has, rather, postponed its exercise.

Federal Maritime Board v. Isbrandtsen[33] illustrates the Court's view that referral of an issue to an agency does not indicate that the agency can properly approve the particular activity. The Maritime Board, in that action, contended that if the Court had viewed certain activity as illegal per se, it would not have referred the issue to the Board in previous cases. The Court rejected this, stressing that it had not implied that the Board could authorize the activity.[34] Since practical considerations dictate functional divisions between court and agency in certain types of litigation, the Court had referred to the Board for a preliminary, comprehensive investigation of all the facts. The "practical considerations" were the desirability of uniformity and consistency in regulation of business.

In the instant case, under prior law, a court might have decided the question of the applicability of the Louisiana law. A court, doubtless, will make the *final* determination on this issue, since the agency has *initial* jurisdiction only. It does not follow, however, that the Board has nothing to offer. It is possible that the Board will arrive at an administrative rationale which the reviewing court will find convincing. In any event, the case emphasizes the Court's view that where agencies are involved, they shall exercise to the utmost the fact-finding jurisdiction entrusted to them by Congress.

THOMAS C. CAMERON

---

[30] Supra note 21, at 574.
[31] 3 Davis, supra note 27, at 39.
[32] Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., supra note 1, at 432.
[33] 356 U.S. 481 (1958).
[34] Id. at 498.