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# Government Contracts—Disputes Clause—Judicial Review—Extent of Finality Under the Wunderlich Act.—Utah Constr. & Mining Co. v. United States

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ments could be construed by the casual reader to be unqualified assertions of therapeutic worth, and that the Commission could order petitioner to rephrase his advertisement so that this impression would not be created.[29]

Therefore, notwithstanding that an advertisement merely restates what the book is about, as Commissioner Elman believed to be the case in *Rodale*, still the FTC has the power to restrict the publication of the advertisement should it have a tendency to mislead. Such restriction, although to some extent inhibitory of freedom of speech and circulation, would not be forbidden by the First Amendment in view of the major public interest involved. Regardless of the form of an advertisement—that is, whether it be found to contain expressions of opinion or excerpts from the publication being advertised—the FTC may insist on the most literal truthfulness of such representations if they are found to create the impression that the ideas and suggestions contained in a publication will unqualifiedly produce a given result. Such advertisement may be prohibited upon a finding that the results apparently claimed in the advertisement in fact will not occur. While this result would not effect a ban on legitimate advertising of the publication as Commissioner Elman seemed to fear, it would provide for the protection of the public from the danger of deceptive advertising in this crucial area.

MARK D. SHUMAN

**Government Contracts—Disputes Clause—Judicial Review—Extent of Finality under the Wunderlich Act.—*Utah Constr. & Mining Co. v.* United States.**[1]—Plaintiff had a contract with the Atomic Energy Commission for construction of an assembly facility. Plaintiff made various claims against the government for increased costs and for damages, some of which claims arose under the contract, and some of which arose on alleged breaches of contract. Plaintiff sought administrative decision on these various claims pursuant to the standard "disputes" clause of the contract.[2] The Advisory

having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgement."

[29] This decision should be compared with that in Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941), where the court of appeals said "the publication, sale and distribution of matter concerning an article of trade by a person not engaged or financially interested in commerce in that trade is not an unfair or deceptive act or practice within the contemplation of the Federal Trade Commission Act, as amended, if the published matter, even though unfounded or untrue, represents the publisher's honest opinion or belief. . . . Congress did not intend to authorize the Federal Trade Commission to foreclose expression of honest opinion in the course of one's business of voicing opinion. The same opinion, however, may become material to the jurisdiction of the Federal Trade Commission and enjoinable by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public. . . ." Id. at 644. Cf. Koch v. FTC, 206 F.2d 311 (6th Cir. 1953).

[1] 339 F.2d 606 (Ct. Cl. 1964).

[2] The "disputes" clause involved in *Utah* read:

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting

Board on Contract Appeals—AEC affirmed the contracting officer's denial of the plaintiff's claims. Plaintiff subsequently appealed to the Court of Claims. A trial commissioner issued an order defining the scope of the testimony to be taken with reference to the several claims in light of the Supreme Court's holding in *United States v. Bianchi*.[3] The Commissioner determined that as to those claims arising under the contract no new evidence may be submitted, and that the court is confined to the administrative record. As to those claims based on alleged breaches of the contract it was determined that new evidence may be introduced. The government appealed this order to the Court of Claims.[4] HELD: Order affirmed. Facts found by an administrative board of contract appeals in a dispute under the contract shall not be binding upon the court in deciding *another* case based on breach of contract in which the same facts are involved.[5]

The principal case is the latest skirmish in a conflict of views between the Court of Claims and the Supreme Court of the United States concerning the nature of judicial review to be accorded Contract Appeals Boards' decisions made under the standard "disputes" clause in government contracts.[6]

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officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Defendant's Supplementary Memorandum, p. 4.

[3] 373 U.S. 709 (1963). The holding of this case is discussed in the text infra at note 28.

[4] In so doing the government specifically limited the issue involved:

It is not the purpose of the pending proceeding to argue the merits of the disputes presented, *i.e.*, whether the decisions are final under the Wunderlich Act. This request for review is solely concerned with establishing that the disputes are within the ambit of the contractual arbitral procedure, and that de novo trial proceedings are thereby precluded.

Defendant's Supplementary Memorandum, p. 16.

[5] What is meant by the term "binding," is that judicial review is limited to the administrative record, subject only to the standards set forth in the Wunderlich Act. See note 11 infra.

[6] The current version of the "disputes" clause is worded as follows:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision. (b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; *provided*, that nothing in this contract shall be construed as making final the

Since 1861, a form of disputes procedure has been utilized in government contracts as an administrative tool for settlement of government contractors' claims against the United States.[7] In 1942 the first Board of Contract Appeals was established.[8] Today there are some fourteen individual administrative boards established to hear and consider contract appeals. In some agencies, boards are not established because there is an insufficient volume of contracts to warrant such a board.[9] Each of these boards has separate rules of practice and is autonomous in the rendering of decisions, subject of course, to review by the Court of Claims or the district courts[10] of the United States on the standards set forth in the Wunderlich Act.[11] The formality of the hearings before the different boards varies from that of a round-table conference type of hearing to that approaching a civil trial before a federal judge without a jury.

Most administrative boards are creatures of statute,[12] and judicial review of the determinations of such boards is governed by the Administrative Procedure Act.[13] However, the authority of the government's contracting officers and the boards of appeal is not statutory, but is derived solely from

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decision of any administrative official, representative, or board on a question of law.

Miller, Administrative Determination and Judicial Review of Contract Appeals, 4 B.C. Ind. & Com. L. Rev. 111 (1963).

[7] Id. at 112-13. The "disputes" clause is mutually beneficial in that the contractor is not required to litigate every disagreement, and the government is entitled to have him proceed with the contract while disputes are being resolved on appeal.

[8] Spector, Anatomy of a Dispute, 20 Fed. B.J. 398, 399-400 (1960).

[9] Miller, supra note 6, at 116-17.

[10] The jurisdiction of the Court of Claims extends, inter alia, to any claim upon any express or implied contract involving liquidated or unliquidated damages in cases other than those involving tort liability. 28 U.S.C. § 1491 (1958). To relieve congested dockets of the Court of Claims, Congress granted concurrent jurisdiction to the district courts of the United States for claims in contracts of less than $10,000. 28 U.S.C. § 1346 (1958). Theoretically then, these tribunals are the arbiters of the rights, liabilities, and obligations of the parties to government contracts. However, the "disputes" clause creates an inroad on this jurisdictional grant in that the practical effect of the clause is to remove from the jurisdiction of the courts all questions of fact which might arise under government contracts.

[11] 68 Stat. 81 (1954), 41 U.S.C. § 321 (1958):

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

68 Stat. 81 (1954), 41 U.S.C. § 322 (1958):

> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

[12] See, e.g., 61 Stat. 139 (1947), 29 U.S.C. § 153 (1958) (NLRB); 35 U.S.C. § 7 (1958) (Patents Board of Appeals); 54 Stat. 913 (1940), 49 U.S.C. § 17 (1958) (ICC Boards).

[13] 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952).

the "disputes" clause in their contracts.[14] Therefore, they are not subject to the Administrative Procedure Act.[15] The boards are administrative in character, however, and their decisions are consistently referred to as such by the courts. The truth of the matter is that the jurisprudential status of the administrative boards is a hybrid one, they being neither a court nor an independent administrative agency.

Due to the "informal" nature of the boards, the Court of Claims has always had a relatively narrow viewpoint toward their administrative decisions made under "disputes" clauses of standard government contracts.[16] The Supreme Court, however, has not shared this viewpoint. In *United States v. Moorman*,[17] the Supreme Court upheld the validity of a contract provision giving to government officers the power to determine questions of law under such contract. The difference of opinion between the Court of Claims and the Supreme Court on the finality to be accorded administrative board decisions culminated in the well known *Wunderlich* case.[18] The Supreme Court in that decision flatly narrowed the judicial review to a single ground: namely, allegation and proof of actual fraud in the rendering of the decision; and it defined fraud as "conscious wrongdoing, and intention to cheat or be dishonest."[19] The decision expressly invited congressional action if this standard was too limited.[20]

Three years later Congress accepted the invitation and enacted legislation for the purpose of overruling the *Wunderlich* and the *Moorman* cases.[21] The first part of this act dealt with the problem of the *Wunderlich* case, *i.e.*, judicial review of an administrative decision as to questions of fact. The second part dealt with the problem of the *Moorman* case, *i.e.*, judicial review of an administrative decision as to questions of law. In substance, the act prohibits a contract provision from limiting judicial review of administrative

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[14] Utah Constr. & Mining Co. v. United States, supra note 1, at 610.

[15] This led Justice Douglas, dissenting in *Bianchi*, to comment that: "We are dealing, in other words, with subnormal administrative procedures." Moreover, Justice Douglas pointed out that were the Administrative Procedure Act applicable, the *Bianchi* decision would have reached the opposite result. United States v. Bianchi, supra note 3, at 721.

[16] See, e.g., Volentine & Littleton v. United States, 136 Ct. Cl. 638, 145 F. Supp. 952 (1956); Continental Ill. Nat'l Bank & Trust Co. v. United States, 126 Ct. Cl. 631 (1953); Wunderlich v. United States, 117 Ct. Cl. 92 (1950), rev'd, 342 U.S. 98 (1951); Moorman v. United States, 113 Ct. Cl. 159, 82 F. Supp. 1010 (1949), rev'd, 338 U.S. 457 (1950).

As a further example of the adamancy of the Court of Claims, the procrastination of the court in recognizing the old "all disputes" clause should be noted. The court held that it was deprived of its jurisdictional grant to decide legal questions and, therefore, refused to recognize the clause until twice reversed by the Supreme Court, once per curiam in United States v. John McShain, Inc., 308 U.S. 520 (1939); and once unanimously in United States v. Moorman, 338 U.S. 457 (1950).

[17] 338 U.S. 457 (1950).

[18] United States v. Wunderlich, 342 U.S. 98 (1951).

[19] Id. at 100.

[20] Justice Minton, speaking for the majority, stated that, "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." Ibid.

[21] It is commonly referred to as the "Wunderlich Act." See note 11 supra. The statutory intent is specifically set out in 2 U.S. Code Cong. & Admin. News 2191 (1954).

decisions solely to the "fraud" test, and provides affirmatively that such decisions shall be final and conclusive unless fraudulent, capricious or arbitrary, grossly erroneous as necessarily to imply bad faith, or if not supported by substantial evidence. The statute further prohibits "a provision making final on a question of law the decision of any administrative official, representative, or board."[22] The Wunderlich Act provided, for the first time, legislation dealing with government contract "disputes" clauses. The courts were now required to render their decisions on "disputes" clauses in the light of a statute rather than in the light of judge-made law.[23]

Although explicit in setting forth the *standard* of review to be applied to board decisions, the Wunderlich statute was not specific as to the *nature* of review to be employed by the Court of Claims and the district courts. In short, the question remained open as to whether the courts were restricted to review of the administrative record in deciding an appeal from a board decision or whether the court could review de novo. The lower federal courts adopted completely opposing views on this question. The district courts had the numerical weight of authority in holding that review was restricted to the administrative record.[24] A significant minority, led by the Court of Claims in *Volentine & Littleton v. United States*,[25] took the opposite view. Thus, the finality provisions regarding the nature of judicial review under the Wunderlich Act were open to diametrically opposed applications. The district courts relied on precedents of the courts of appeals which review decisions of more formal administrative bodies.[26] The Court of Claims, on the other hand, has emphasized the "informality" of procedures of the various boards of contract appeals.[27]

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[22] 68 Stat. 81 (1954), 41 U.S.C. § 321 (1958).

[23] Prior to the Wunderlich Act, the law in the area of judicial review of administrative decisions under the "disputes" clauses was developed and shaped, primarily, by the Court of Claims. The standards thus developed required that an administrative decision would not be reviewed by the courts unless the decision was fraudulent, or arbitrary, or capricious, or so grossly erroneous as necessarily to imply bad faith. Committee on the Judiciary, Government Contracts—Finality Clauses, H.R. No. 1380, 83d Cong., 2d Sess. 24 (1954).

Thus, the congressional purpose of the Wunderlich Act was to substantially restore the law to the point at which presumably it was before the Supreme Court decisions in the *Moorman* and *Wunderlich* cases.

[24] See, e.g., Union Painting Co. v. United States, 194 F. Supp. 803 (D. Alaska 1961); Allied Paint & Color Works, Inc. v. United States, 199 F. Supp. 285 (S.D.N.Y. 1960); Wells & Wells, Inc. v. United States, 164 F. Supp. 26 (E.D. Mo. 1958); Mann Chem. Labs., Inc. v. United States, 174 F. Supp. 563 (D. Mass. 1958).

[25] 136 Ct. Cl. 638, 145 F. Supp. 952 (1956).

[26] In affirming the *Wells* case, supra note 24, the Court of Appeals, undoubtedly thinking of its own role in reviewing appeals from the more formal administrative agencies, held that in reviewing decisions of these agencies, the court is confined to the record made before such agencies. Wells & Wells, Inc. v. United States, 269 F.2d 412 (8th Cir. 1959).

[27] In *Volentine & Littleton*, the Court of Claims commented on the abuses of some administrative boards in deciding cases, particularly, review of documents outside the record, review in the absence of the parties, and inadequacy of the administrative records presented on review to the court. Judge Madden stated that:

> The so-called "administrative record" is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure

The Supreme Court in the case of *United States v. Bianchi*[28] granted certiorari to resolve this conflict among the lower courts on the important question of the kind of judicial proceeding to be afforded in cases governed by the Wunderlich Act. The precise issue before the Court in *Bianchi* was a narrow one. It concerned whether, in a suit governed by the Wunderlich Act, the court is restricted to a review of the administrative record on issues of fact submitted to administrative determination or is free to receive new evidence on such issues. The Court stated that:

> apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.[29]

The holding in *Bianchi* was also narrow, the Court stating that:

> We hold only that in its consideration of matters *within the scope of the "disputes" clause* in the present case, the Court of Claims is confined to review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence.[30] (Emphasis supplied.)

The reaction of the Court of Claims to the clear mandate laid down by *Bianchi* was eagerly awaited by all concerned. *Utah* is a part of that re-

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in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does, search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence or absence of the claimant.

Volentine & Littleton v. United States, supra note 25, at 641-42, 145 F. Supp. at 954.

[28] Supra note 3.

[29] Id. at 714.

[30] Id. at 718. Thus, *Bianchi* does not decide the *scope* of the standard "disputes" agreement in government contracts, beyond the recognition that no argument was addressed to this question. Id. at 714. Therefore, although the Supreme Court in *Bianchi* obviously moved to strengthen, or to encourage the strengthening of the administrative appellate process for handling contract disputes, the decision provided a limited reply to the controversial question of the scope of the "disputes" clause.

Presently the scope of the "disputes" clause is dependent upon a "law-fact" test for determination of the field of responsibility between the administrative boards and the courts. This "law-fact" distinction is frozen into the "disputes" clause and into the Wunderlich Act, thus afflicting the boards and the courts with the unfortunate responsibility of analyzing these disputes on the basis of the alleged distinction between law and fact. The distinction between questions of law and fact also arises in the area of administrative finality and judicial review. The courts, and the Wunderlich Act itself, draw a distinction between the finality of any decision upon the basis of whether the question involved is one of law or fact.

This artificial distinction between law and fact in the "disputes" clause area looms large as being the next "bone of contention" between the Supreme Court and the Court of Claims.

action.[31] In *Utah* the Court of Claims emphasized the essentially contractual nature of the disputes procedure in reasoning that the board's authority was limited to disputes "concerning questions of fact *arising under this contract*."[32] The court then went on to state that an action for *breach* of contract is not within the scope of the clause, and distinguished *Bianchi* as restricting the court's review to the administrative record only as "to matters within the scope of the disputes clause."[33]

Actually, the *Utah* factual situation does present an issue not directly covered by the *Bianchi* holding. Under the *Bianchi* interpretation of the Wunderlich Act, finality attaches to a board fact-finding only when that fact-finding is made within the scope of the board's authority. Assuming the converse of this to be valid, *i.e.*, that finality does not attach to a board's finding of fact when made outside the scope of the board's authority, the question remains as to what finality will be given to a fact-finding that has a "dual aspect"? In other words, what finality should be extended to a finding of fact made within the scope of authority when that fact also becomes relevant to a second factual question outside the board's scope of authority? Will the fact-finding carry the attached finality with it as it crosses the confines of the board's jurisdiction, or will finality be applied only as the fact relates to questions within the board's fact-finding authority?

There are three separate points of view as to what degree of finality will attach to fact-findings made under the administrative board's authority when they subsequently become relevant to an issue outside the board's authority.

The first viewpoint is that of the Court of Claims, as exemplified in its *Utah* decision. As far back as 1943 the court has treated board fact-findings relating to questions outside the board's scope of authority as being advisory only and having no binding effect whatsoever.[34]

A second viewpoint is that expressed by two recent district court decisions.[35] This viewpoint could well be called a "pragmatic" one. In *Allied Paint & Color Works, Inc. v. United States*,[36] plaintiff contractor sued for alleged breach of contract in the district court. It was plaintiff's contention

[31] Another aspect of this reaction may be seen in a case before the Court of Claims only one month after *Bianchi*. Despite the apparently clear mandate laid down by *Bianchi*, the Court of Claims was determined to have things its own way. In Stein Bros. Mfg. Co. v. United States, 337 F.2d 861 (Ct. Cl. 1963), the Court of Claims expressly said that it did not regard *Bianchi* as jurisdictional in the sense that the case held that no new evidence in addition to the administrative record could be introduced at trial. Confining *Bianchi* to its facts as clearly as possible without expressly doing so, the court held for the contractor on the basis that the government failed to make timely objection to the new evidence, thus waiving its right to object, whereas such objection had been made in *Bianchi*.

[32] Utah Constr. & Mining Co. v. United States, supra note 1, at 610.

[33] Ibid.

[34] See, e.g., Continental Ill. Nat'l Bank & Trust Co. v. United States, supra note 16; Miller, Inc. v. United States, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); Silberblatt & Lasker, Inc. v. United States, 101 Ct. Cl. 54 (1944); Langevin v. United States, 100 Ct. Cl. 15 (1943).

[35] Allied Paint & Color Works, Inc. v. United States, supra note 24; United States v. Hamden Co-op. Creamery Co. 185 F. Supp. 541 (E.D.N.Y. 1960).

[36] Supra note 24.

that the board's prior findings of fact related to a question of law which was without the board's jurisdiction. The government maintained that the court was restricted to the factual record of the board even though the facts were primarily relevant to an issue beyond the board's authority. The district court granted the government's motion to preclude the taking of further testimony. In so doing the court stated:

> The Wunderlich Act . . . does not require the district court to try de novo every case which has run the gamut of the administrative procedure provided for in the government contract solely because an issue of law is present. Section 322 merely provides that a decision of an administrative board on a question of law is not final. . . . The Court, in this case, must make its independent determination of the meaning of the contract based upon the evidence adduced before the administrative tribunal.[37]

On appeal, the court of appeals affirmed. In so doing, the court adopted guidelines set forth in a previous decision.

> We agree with the statement by the Court of Appeals . . . in Blake . . . that "a practical approach to the allocation of functions is the guideline" we should follow, but in so resolving the problem before us we reach the opposite result from the one that court arrived at in Blake. Here, the issue on which appellant wants the district court to take additional testimony was squarely presented to the Contracting Officer and to the Board of Contract Appeals . . . . Since the parties had proceeded through a full hearing before the Board of Contract Appeals, the district court was quite correct, under the circumstances here presented, in limiting its review to the record made before the administrative board.[38]

The rationale behind this "practical approach" is that although the fact-finding relates to an issue outside of the board's authority, a full board hearing was held concerning an issue which the board had special competence to deal with; and therefore the court should restrict itself to the record insofar as the particular facts are concerned.[39]

A third approach to the problem is set forth by the dissenting opinion of Judge Davis in *Utah*. He urged that "well-supported factual findings,

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[37] Id. at 286.

[38] Allied Paint & Color Works, Inc. v. United States, 309 F.2d 133, 138 (2d Cir. 1962). In Blake Constr. Co. v. United States, 296 F.2d 393 (D.C. Cir. 1961), the case upon which the Court of Appeals in *Allied Paint* relied, the "pragmatic" approach was employed in distinguishing between "fact" and "law" as regards the scope of the "disputes" clause. See note 30 supra. However, the Court of Appeals in *Allied Paint* found this "pragmatic" viewpoint quite useful in determining the extent of finality accorded board fact-findings under a "disputes" clause.

[39] Cf. United States v. Hamden Co-op. Creamery Co., supra note 35, at 545, where the district court remarked that "otherwise the hearing before the Board would be rendered nugatory and constitute a time-consuming nullity providing both parties with two opportunities to present their case;" and Dobson v. Comm'r, 320 U.S. 489, 502 (1943), wherein it was stressed that the administrative body in question had a special competence to deal with the subject matter at issue.

appropriately made by the board in deciding a dispute 'arising under the contract,' " should be binding in a court trial of a cause of action which is outside the "disputes" clause, *i.e.*, outside of the board's scope of authority.[40]

It would seem that the third point of view provides a sounder solution to the problem presented by *Utah*. Judge Davis' position on this issue of the extent of finality of board fact-findings is a logical extension of *Bianchi*. His viewpoint provides for the unqualified conclusiveness of any supportable factual decision by the board within the scope of its authority.[41] He felt that this position was required by (1) the terms of the "disputes" clause, (2) the phrasing of the Wunderlich Act, (3) the principle underlying the *Bianchi* decision, and (4) the policy of collateral estoppel.[42]

As the Supreme Court has done since *Moorman*,[43] Judge Davis employed a literal interpretation of the unambiguous language of the "disputes" clause.

> Once an issue of fact arises in a controversy under the contract and is decided by the agency, the text of the Disputes clause makes that decision, if supported, final and conclusive on the parties—not simply final and conclusive for a special purpose, but final and conclusive without qualification and without limitation.[44]

Judge Davis also extended this literal interpretation to the Wunderlich Act and found that "[it] too, is framed in terms of the conclusiveness, without restriction. . . ." He felt that the wording of the act "seem[s] to grant finality to all factual findings properly made by the board in the course of resolving a disputed question under the contract" and that this finality also extended to questions outside the scope of the board's authority.[45]

Judge Davis then turned to the cornerstone of his viewpoint, the *Bianchi* decision. He felt that the *Bianchi* decision established the "basic rationale" for accepting completely the clause and the act as they are written.[46] This "basic rationale" involves

> avoidance of "a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end."[47]

Most important, he felt further that this "basic rationale" is support for applying *unqualified* finality to facts validly found by the board in the scope of its authority. And consequently, "there is no need for a second hearing on an issue already tried and resolved."[48]

Judge Davis then pointed out that such a policy of finality is not novel to the law. This same general policy of avoiding "a second hearing on an

[40] Utah Constr. & Mining Co. v. United States, supra note 1, at 617.
[41] Ibid.
[42] Ibid.
[43] United States v. Moorman, supra note 17.
[44] Utah Constr. & Mining Co. v. United States, supra note 1, at 617.
[45] Ibid.
[46] Id. at 618.
[47] Ibid.
[48] Ibid.

issue already tried and resolved" is the basis for the established doctrine of collateral estoppel wherein conclusive finality attaches to a judgment in a prior action when the judgment is relevant to a subsequent adjudication upon a different cause of action.[49]

The viewpoint expressed by Judge Davis seems to be based upon a mature consideration of the current nature and operation of the administrative boards. His position is based upon a recognition of the federal policy of rapid decision that seems implicit in the Wunderlich Act, in light of the Supreme Court's holding in *Bianchi*. Although the basic purpose of the act was to broaden the scope of review after its extreme limitation in *United States v. Wunderlich*, the legislative intent includes the desire to maintain a limited review of the facts.[50]

In contrast, the viewpoint of the Court of Claims appears to be grounded on a hypersensitive concern over its jurisdictional grant. This concern is motivated, no doubt, by a feeling that the strong tradition of judicial recourse demands that good reason be given when access to the courts is limited or made unavailable, and that due primarily to the "nature and genesis" of the administrative boards, good reason is lacking.[51] However, it seems that this concern is somewhat unwarranted when it is recognized that the advantages of a speedy and efficient administrative process for the settlement of controversies would be vitiated without some limitation on judicial review. This fact, coupled with the judicial[52] and legislative[53] trend toward strengthening and formalizing board procedures makes one feel that the Court of Claims needs to objectively reevaluate its adamant stand on the issue of judicial review of administrative board decisions.

At first blush, the second, or "pragmatic" viewpoint—based upon a feeling that since a board of special competence has made extensive fact-

[49] Ibid.

[50] 2 U.S. Code Cong. & Admin. News 2191, 2194-95 (1954).

[51] Utah Constr. & Mining Co. v. United States, supra note 1, at 618. The Court of Claims is not totally unwarranted in resisting what it considers encroachment upon its statutory jurisdiction, especially in light of the fact that all other areas excepted from the court's basic jurisdictional grant are excepted expressly by statute. See note 10 supra. Furthermore, although it seems that the Court of Claims has gone too far in not recognizing and giving effect to the implications inherent in the *Bianchi* decision, it should be recognized that the Court of Claims has played a major role in development of "disputes" clause law and procedures. See note 23 supra. In effect, the Court of Claims has been a "gadfly" in the "disputes" area. Ironically, much of the strengthening and formalizing of board procedures is due to the recalcitrant attitude of the Court of Claims.

[52] United States v. Bianchi, supra note 3.

[53] The substantial evidence clause was added to the Wunderlich Act specifically for the purpose of strengthening board procedures. 2 U.S. Code Cong. & Admin. News, supra note 50, at 2195:

> It is believed that if the standard of substantial evidence is adopted this condition [the lack of opportunity for contractors to become acquainted with all evidence in support of the government's position] will be corrected and that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions. It would not be possible to justify the retention of the finality [clauses] in Government contracts unless the hearing procedures were conducted in such a way as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal.

findings, review of the board's decision should be limited to the board record—presents a more flexible middle-ground than that of the Court of Claims. However, this element of flexibility also presents a good reason for rejecting a "pragmatic" view in this particular area. The Court of Claims could, and likely would, employ such a standard to its own decisional advantage.[54]

Yet, the Court of Claims has not been wholly unjustified in adopting a restrictive view as to the role of the administrative boards. For one thing, the status of the boards is not clear. As mentioned previously, they are neither a court nor an independent agency. Further, there is yet to be an explicit congressional mandate as to the specific role of the Court of Claims in this type of judicial review. Instead, the agencies and Congress have relied on patchwork solutions to specific problems. These makeshift solutions have failed to provide for a needed uniform procedure in this area of judicial review.[55] Bearing this in mind, it can be seen that more explicit guidelines are needed than those which a "pragmatic" approach would provide. The "pragmatic" approach is itself an example of the patchwork solutions made necessary by the lack of a specific mandate as to the nature and scope of judicial review.

Finally, then, the existing guidelines for judicial review of "disputes" clause appeals are set forth in the Wunderlich Act.[56] The act, although setting forth specific *standards* of review, is unclear as to the *nature* of the review by the courts, *i.e.*, whether the courts are restricted to the administrative record in applying the standards set forth or whether de novo review may be employed. However, the act, as interpreted by *Bianchi*, provides for recognition of the change in the policy of the law as regards the function and nature of the administrative boards. Moreover, *Bianchi* articulates the modern view, embraced by all but the Court of Claims, that, under the

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[54] Harrison, Eight Years after Wunderlich—Confusion in the Courts, 28 Geo. Wash. L. Rev. 561, 571-72 (1960), poignantly points this out in relating an incident at the congressional hearings on the Wunderlich legislation:

> [I]t [the Justice Department] expressed the view that the standards "arbitrary" and "capricious," as contained in the pending bills (and in the ultimate statute), were unsound. [T]he Department's representative at the . . . hearing candidly and precisely enunciated the reason for opposition to these standards, and his statement is particularly significant because it is probably the closest the legislative history ever comes to predicting the course the Court of Claims would pursue. [The representative] stated: "We would, however, be vigorously opposed to the employment in such a declaration of such words as 'arbitrary' or 'capricious' . . . . If you use words like 'arbitrary' and 'capricious,' which are completely devoid of substantive meaning and are indefinite in nature, it will constitute an open invitation to the Court of Claims to do what it has done, despite the fact that the rule of law was otherwise; that is, to substitute its judgment for that of the head of the department concerned in any case it felt so inclined."

[55] Lidstone and Witte, Administration of Government Contracts: Disputes and Claims Procedures, 46 Va. L. Rev. 252, 293-94 (1960). The article presents an extremely thorough examination of the "disputes" clause area and offers valuable and concrete solutions to three major problems in the area. The solutions place an emphasis on the need for specific and comprehensive legislation as the means for resolution of the basic problems in the "disputes" area.

[56] 68 Stat. 81 (1954), 41 U.S.C. § 321 (1958). See text quoted supra note 11.

Wunderlich Act, when the administrative board acts within the scope of its authority, any fact-finding must be received, if valid, in the same manner as those of the independent administrative agencies. Therefore, as Judge Davis urges, where the issue in dispute is one of fact under the contract and the board has acted within the scope of its authority, it is submitted that the proper role of the courts is strictly one of review, *i.e.*, limited to the administrative record unless there is specific evidence of one of the defects enumerated in the Wunderlich Act.

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**Labor Law—Labor Management Relations Act—Section 8(a)(5)—Refusal of Employer to Bargain in Good Faith.**—***General Elec. Co. & International Union of Elec. Workers, AFL-CIO.***[1]—After an unsuccessful three-week strike against GE following the 1960 national contract negotiations, the IUE filed a complaint with the NLRB that GE had refused to bargain in good faith during the negotiations and had otherwise acted in derogation of the IUE's status as bargaining representative. The facts found by the trial examiner were as follows.

On June 13, 1960, the union presented its offer to the company. Although formal contract negotiations were not to begin until July 19, the parties had agreed that the early meetings would be negotiating and not merely review meetings, and would deal with employment-security proposals.

Prior to June 13, in its communications program to employees, GE had, in effect, committed itself to reject the IUE's employment-security proposals, and at the meetings merely repeated positions already publicly taken. During the four weeks of early negotiations, while the union formally presented and argued its contract demands, GE gave no indication to the union of the employment-security program it was eventually to include in its offer. The IUE was thus denied the opportunity to consider and propose alternatives to the company's program.

As the negotiations proceeded concerning the union's general demands (other than employment-security proposals), GE continued to maintain that it was primarily interested in "fact-finding": that is, in listening to the union's demands and considering them as facts in formulating its own demands. As demonstrated here and throughout the negotiations, GE's position consistently followed the pattern of Boulwareism,[2] its own particular approach to collective bargaining.

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[1] 150 N.L.R.B. No. 36, 2 Lab. Rel. Rep. (57 L.R.R.M.) 1491 (1964).

[2] Boulwareism, named after its creator, Lemuel R. Boulware, a GE vice-president, was the result of a reassessment of company-employee relations policies in the aftermath of strikes in 1946. It was an answer to the concern among GE management that the power of the unions had been too greatly enhanced during the war.

In practice, GE first seeks through extensive research to determine what is "right" for its employees in the light of business conditions, competition, economic trends and employee desires. At the early bargaining sessions, the company listens to the union's demands and carefully evaluates them in view of its own facts. On the basis of this evaluation, GE formulates what is "right" and makes an offer to the union. The offer