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REFORMING PROCEDURE OF THE N.L.R.B.*

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My subject implies a dichotomy which constitutes one of the law's perpetual paradoxes, seemingly impossible of resolution, the differentiation between procedure and substance. By all experience divorcement of the two seems impossible. Procedure must be a function of the substance sought to be achieved; it is the instrument fashioned to attain previously determined goals. Yet substance is the function of the procedures which produce it; policy can be made, changed, perverted by procedure. This seeming paradox is not peculiar to administrative law and, perhaps, not even peculiar to law alone. And it does not leave us helpless. It merely requires us, when considering procedural reform—specifically in administration—to bear clearly in mind three obvious ideas—axioms so commonplace that, unless specifically adverted to, they are likely to be ignored to the detriment of our thinking.

The first of these three ideas, if you will forgive me for belaboring the obvious, is that no procedure can insure “right” or “fair” or “wise” decisions; it cannot insure honest judgment, loyalty to prescribed goal or faithful execution of statutory duty. These objectives necessarily depend on the qualities of the human beings who are the

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administrators. If they are fired "with a zeal to pervert" they can do it despite meticulous compliance with the finest procedures; and, *per contra*, if they are superior and gifted men, they may achieve fair results despite poor procedure. All that procedure can do for the result, all that we can expect it to do, is to assure full opportunity for fair and wise consideration, to make unfairness more difficult than fairness, and not to mislead an honest, ordinary administrator into uninformed judgment.

Second, procedure must be fashioned for, and its appropriateness judged by, the particular policy which it is designed to enforce. The goal of procedure is not fairness alone. Its goal is the efficient enforcement, as fairly as possible, of a prescribed policy. A fully fair procedure which impedes efficient enforcement is no better, and indeed, may sometimes be worse, than one which produces the desired results even though it may otherwise be deemed unfair. This may be but another way of saying that the fairness of a procedure is not absolute, but relative—relative, that is, to the circumstances in which it is to be employed. And it means that the procedure must be fashioned only with firm belief in, and loyalty to, the task entrusted to the agency which is to be guided by the procedure. Hostile critics of the procedure who are also hostile to the substantive policy for which the procedure is instrumental must be doubly careful to assure that the former criticism is not merely the product of the latter hostility. They must necessarily be ready to be suspect in their criticism and to demonstrate that their proposals are calculated to promote fairness in efficient enforcement rather than to impede enforcement.

The essentially instrumental character of procedure implies also that its architects must be persons who are fully acquainted with the problems, the needs, the idiosyncracies of the agency which it is to serve. A house designed by an architect in Mars would hardly serve a family on earth. This means that ordinarily the persons

most qualified to fashion procedure are those who are to live by it; specifically it means that the agency entrusted with the task of executing a statutory policy is ordinarily the most qualified to fashion suitable procedures for its enforcement. Yet continuous outside criticism also is necessary and desirable, certainly when it is informed and even when it is not so well informed—because, in any event, (a) it will tend to prod the agency into self-examination, and conquest of inertia and habit and (b) even an uninformed and seemingly silly suggestion may nevertheless prove to be the spark which will ignite experience and wisdom to produce desirable change.

Finally, the instrumental quality of procedure implies that its first and most important requisite is to promote its appointed task. The same procedure may, perchance, adequately serve more than one agency. But always, the first question is what procedure will best serve the particular agency. Uniformity in administrative procedure may be a good, although its advantages, and the difficulties of variety can be easily exaggerated. But uniformity is a good only if the uniform procedure adequately serves each agency that employs it. And so the crucial question continues to be—how well does the procedure serve the particular agency?

The third axiom is that an agency's procedure must necessarily depend on its resources. An agency cannot establish field offices, for example, or hold hearings in the field unless it has the required financial means. It cannot acquire all the desired skills and information unless it is permitted to employ the needed staff. It will be tempted to cut corners if its appropriations so limit it that it must cut corners or fall hopelessly short of accomplishing its task. Abundance of funds may, indeed, encourage waste or overelaboration in procedures; but excessive penury in appropriation surely impedes adoption of the optimum procedure.

Now the N.L.R.A. proclaimed a basic yet revolutionary policy for the governance of labor relations. The first choice of procedure had to be made by Congress. It might have proclaimed its policy and made violation a crime, leaving enforcement to the ordinary machinery of the criminal law. But for reasons deeply rooted in experience Congress chose the method of administrative enforcement. And because the policy as a statutory command was revolutionary, because it required a complete change in century-old habits, the Congress prescribed a relatively mild and largely educative machinery for enforcement. When an employer is charged with an unfair labor practice the Board is empowered to investigate; and if, after formal trial, the employer is found guilty of the charge, the Board is empowered to order him to stop violating the Act. Only the provision for back pay orders can operate as risk of detriment for a first violation. Where those orders are not involved, as they are not in many cases, an employer has a privilege of at least one violation—something like the dog's privilege of one bite. And probably that is a wise way in which to introduce a radical change and provide the education requisite for its accomplishment.

For similar reasons and because of the suspicions and legal doubts which hung over it, the Board also adopted a cautious procedure when its turn to choose came. Before a complaint could be issued on a charge of an unfair labor practice, the Board required a careful informal investigation to ascertain whether there was reasonable likelihood that the charge was sustainable. The power to issue complaints was expressly withheld from Regional Directors. They could recommend; but they could issue a complaint only upon specific authorization from the Board through its Secretary. In this way the Board sought to avoid issuance of unwarranted complaints and to control the careful and consistent development of its policy and power.

The hearing procedure and the process of decision were equally surrounded with safeguards. Hearings were full, detailed and long. Evidence was taken almost exclusively by oral testimony—direct examination, cross, redirect, re-cross, until counsel had nothing more to ask. After the hearing, oral argument and briefs could be submitted to the trial examiner. He would then make an intermediate report to which exceptions could be filed as a basis for further argument and briefs to the Board itself. In the meantime a review attorney would make an independent study of the entire record; he would be checked by his supervisor and both would be checked by the chief of the Review Section. Then the Board, having heard argument and had briefs; would confer with these three, reach a decision and direct an opinion to be drafted. Whereupon the review attorney would draft an opinion, which would be checked by his supervisor, rechecked by the chief and submitted to the Board members—who would finally issue it as the Board opinion after procuring such revisions or amendments as they might have directed. The process was slow and cumbersome and doubtless accounted for much of the long delays in Board decisions. And perhaps the broth suffered from too many cooks. Perhaps one review merely nullified another. But there is no doubt of the intention of the procedure. The Board wanted to be sure that each of its decisions was “right” and that together they comprised a uniform and consistent policy. By the system of check and double check it sought to achieve this “rightness,” uniformity and consistency.

Yet, in all this the Board wasn't really inventive. On the contrary it played safe and borrowed known and established procedures.

I speak of this in the past tense because the Board is now engaged in revision and has already announced some changes. And I do not wish to question the propriety of the procedure in the years in which it was employed. The Board's first years were peculiarly difficult, as we well

know. A procedure which may seem inappropriate now may have been requisite then. The question now relates to procedure under present circumstances—when the constitutionality of the Act is well established, when the impact of judicial review on Board action is more predictable and when 15 or more volumes of Board opinions, in addition to the many court opinions, chart the policy of the Act's enforcement and provide guiding precedent for most cases. For present circumstances the disadvantages of the old procedure are fairly apparent:

First, and most important, given the Board's actual resources, the old procedure is too elaborate and too time-consuming. It did not enable the Board to keep abreast of its docket or to decide cases expeditiously. I suppose that in much of the Board's work, expedition is as desirable as in the administration of unemployment insurance or work accident compensation. And it is probably just as important in those cases that the decisions be "right," consistent or uniform. Yet the emphasis on expedition in those cases was lacking in the Board procedure and was subordinated to an emphasis on review and recheck. The trial examiner's report was not a final judgment subject only to appeal but was rather a document in the record something like the testimony of a witness. The review attorney made a thorough and independent study of the case. Though provision was made for exceptions to the report, the exceptions operated in effect as a notice of appeal and review extended to the entire case regardless of the exceptions. The attorney for the Board who tried the case and who was presumably intimately familiar with all its details and the trial examiner who presided over the hearings and wrote the intermediate report were eliminated from all proceedings subsequent to the report and new men began to study the case *ab initio*. A completely new and independent opinion was prepared for the Board even when the trial examiner's report was confirmed and when no new principles were to be established.

Second, while the procedure was designed to assure fairness and accuracy, it did not fully inspire confidence in its operation. It made possible the disingenuous, if not the honest, charge that decisions were made by anonymous youngsters in the back rooms. Lawyers could complain that, in their arguments to the Board, they were required to address themselves to the trial examiner's report when their important obstacle was the analysis of the review attorney which they were not permitted to know. They could say, with plausible demonstration, that the Examiner's report merely entrapped them into venting their powers on general argument of the whole case rather than directing themselves to the specific and determinative issues which the review attorney and his supervisors would pose. The charges could be denied of course and laid to bad faith; but they could not in that way be stilled or their effects avoided.

The reforms so far announced by the Board are two-fold:

First, the Board is establishing a new relationship with its regional officers. A new section has been set up, under a former regional director, to head the Board's administrative relationships with its field staff. The Board's Secretary who previously performed this function has been relieved of it. The step is not merely a reorganization and an effort to relieve the field staff of the feeling that they have been "isolated and more or less neglected." It is, rather, the result of a realization of the extreme importance of the field staff and is an effort to improve administration at its major activity. As Chairman Millis wrote in his announcement of the change:

The Board feels strongly that the regional offices are of major importance in its operations. There the cases are investigated and the great majority disposed of. There the cases not settled locally are prepared for further necessary procedures. The whole future of a case depends upon the most careful investigation at the start. Moreover, it can be truthfully said that attitudes of labor, employers and public toward the Board and the Act depend quite as much upon the work and demeanor of the regional

staffs as upon all other things taken together, including Board decisions.

The details of this effort have not yet been promulgated, but are due soon.

Similarly, a unit has been set up in the General Counsel's office to coordinate and assist the legal work in the field.

The second announced reform is in the post-hearing procedure. There the trial examiner's report is to become the focal point. The review attorney is no longer to start from scratch and make a new and independent study of the whole case. He is now to start with the trial examiner's report and is to study the entire record, exceptions and briefs for the purpose of discovering "whether the trial examiner's report represents a fair and accurate reflection of the facts as revealed by the record and a correct statement of applicable principles of law." Then, instead of appearing before the Board to make an oral presentation and subjecting himself to oral examination, the review attorney is to prepare a memorandum setting forth his findings. The instructions are that:

. . . Where the intermediate report appears accurate and its application of legal principles appears to be correct, the review attorney's memorandum shall so state. He shall also point out those instances in which, despite his individual agreement with the trial examiner's findings or legal conclusions, reasonable doubts might be raised as to their accuracy or soundness, summarizing the evidence or considerations in point. Wherever the review attorney shall indicate the portions of the intermediate report which he believes are inaccurate or incorrect, either in fact or in law, he shall likewise summarize the evidence or considerations in point. In the event of material disagreement between the review attorney and the supervisor, the memorandum shall specifically indicate such points of disagreement together with reasons therefore based on the record.

Then:

The memorandum so prepared shall go to each Board member, who shall also have available for consideration therewith the entire record, including exhibits, the trial examiner's intermediate report, the exceptions thereto and briefs thereon, in making an independent decision.

Then, when the Board has decided the case, the review attorney is not in each instance to draft a wholly new opinion as in the past but is to prepare:

. . . a draft decision incorporating the intermediate report with such changes, additions, and modifications as may be necessary, unless the Board directs otherwise.

These changes were apparently decided upon independently of the recommendations of the Attorney General's Committee on Administrative Procedure, but they are in line with those recommendations and seek to remove the two types of disadvantages of the old procedure which I outlined.

The Attorney General's Committee made several recommendations for the Labor Board specifically. It suggested that more care be taken to make the issued complaints as specific as possible in order to deter motions for bills of particulars and for amendment of the complaint and charges of surprise. It suggested that evidence be not adduced at the hearings on uncontested issues. It felt that the Board's practice of adducing evidence on each issue of fact not covered by a stipulation, whether or not the issue was denied by the respondent, was wasteful and not required by the Act. And it recommended that effort be made to utilize the trial attorney's ready knowledge of the case in the post-hearing process,—that is, that he be permitted to file exceptions to the trial examiner's report and argue orally and/or by brief before the Board in support of his position.

The other recommendations applicable to the Labor Board are addressed to all the agencies, but as applied to the Labor Board they seem to me peculiarly appropriate. I can see why some agencies may view the recommendations with misgivings; but for the Labor Board, the suggestions seem to me to be well designed to promote efficient enforcement and to provide a procedure which is not only fair in fact but fair also in appearance, so as to make for acceptance rather than suspicion.

The Committee recommends, first, that more power be decentralized and delegated to Regional Offices—subject to supervision from Washington. The decision to issue a complaint may probably now be safely entrusted to the field staff. The power of the Board is well established and there is no longer the need for careful selection of trial cases in order to test the Board's authority in the courts. Control of the work of the regional directors in this respect may probably be adequately retained by the requirement of periodic reports, further sample reviews and inspection, and the requirement that on difficult, novel or important matters the regional offices consult headquarters before action. In this way duplication of effort would be avoided and the time between the completion of investigation and issuance of complaint would be shortened.

The Committee also recommends further encouragement of settlement and other informal disposal of cases. The Labor Board's record in this respect is enviable. Only some 8% of its unfair practice cases result in formal proceedings and even less in formal disposition. Yet perhaps improvement may be possible even here. To be sure, settlement should not compromise enforcement so as to make violation painless or attractive. But voluntarism and speedy termination rather than prolongation of controversy are also good. Between the extremes of this seeming paradox there is much room for satisfactory adjustment. And immediate satisfactory adjustment is more to be desired than ultimate, unsatisfactory, literal "rightness."

The Committee then makes a series of recommendations with respect to the process of formal proceedings. It suggests first that the trial examiners be supplanted by hearing commissions, whose sole function it will be to hear and decide cases subject to review by the Board, who will be appointed for a period of seven years and will be paid \$7,500 per year without diminution during that pe-

riod. It recommends that effort be made to shorten the records and the hearings by pre-hearing conferences, stipulations, admissions and other devices. For example, though this is not stated in the report, in the Board's earlier cases, its jurisdiction was a matter of great importance. The relation of the respondent's business to interstate commerce was explored at length at the hearing and elaborated in the opinion. This matter now requires less time; but it is still a matter of proof and finding in each case. It seems to me that some economy may still be possible here. The cases in which the Board has been held to have exceeded its jurisdiction because of the nature of the respondent's business are practically nil. May it not therefore be appropriate now to put on the respondent the burden of challenging jurisdiction and to adduce evidence on the issue of commerce only if the respondent has introduced evidence tending to show lack of jurisdiction? Or would it not be sufficient to let the investigator who prepared the case merely submit a statement of the facts on this point and leave it to the respondent to introduce disproving testimony if he will? If Mr. Capizzi refuses to stipulate that the Ford Motor Company's business is in or affects interstate commerce, is it really necessary to provide elaborate, oral testimony on the issue? And perhaps there are other matters with reference to which the process of proof may be readily expedited.

The Board further recommends that the hearing Commissioner's report be the final decision in the case unless exceptions are taken to it or unless the Board of its own motion decides to review it. The suggestion is that the Board's attorney as well as the respondent be permitted to file exceptions. And the Board is given authority, although it is not required, to confine its review to those issues to which exception has been taken. The Board can then adopt the Commissioner's decision as its own or reverse or modify it in such way as it desires. This suggestion would curtail, if not eliminate, the Review Division

as it has developed. The Board might, of course, employ assistants to aid either individual members or the Board as a whole in analyzing the cases or writing the opinions. But there would be no occasion for the complete and independent consideration by the Review Division between the decision of the Hearing Commissioner and the submission to the Board.

Objection to the Commissioner system proposed by the Committee may well be anticipated. It will be said that the Board should have full control over the appointment or removal of the Commissioners; that the Board should have power to remove a Commissioner who becomes disloyal to its policies; that the assurance of tenure to the Commissioners may deprive the Board of ability to enforce the statute uniformly in accordance with its interpretation.

The objections are not to be lightly regarded. The responsibility for enforcement of the Act lies with the Board. So long as it is responsible for the result, it should not be deprived of power to produce it. The possibility that a Commissioner will become obstreperous is not wholly imaginary, though it may be exaggerated. But, in my opinion, the objections, seriously considered, are not sufficient to outweigh the merits of the plan.

Under the Committee's plan, the Board will still have some control over the appointment of Commissioners. No appointment can be made except from the Board's nominees. No appointment can be forced on the Board. Provisional appointment may be made for one year to enable the Board to observe the appointee at work and determine whether it desires him for a full term. If the Board will have made a mistake or if a Commissioner will have gone through a mental metamorphosis, the Board is not powerless to deal with him. It can, of course, subject his decisions to special scrutiny and reverse him. If his refusal to follow Board policy is persistent, it may well constitute "malfeasance in office," a cause for removal. If reversal

of his decisions is too frequent and due to his deficiency, it may constitute neglect or inefficiency in the performance of his duty, again grounds for removal. But if removal is not practical, administrative ingenuity is not thereby exhausted. It might be possible to lighten the Commissioner's assignments, to assign him only to cases in which his perversity would not be given scope or to assign him for sittings with another Commissioner. Parenthetically, in view of the saving anticipated from this procedure, it may be possible and desirable in a number of cases to assign a panel of two Commissioners for the hearing. If a residuum of risk still remains it is more than compensated by the advantages of making of the Trial Examiner's position a real office which can attract able men, of the gains in efficiency resulting from the treatment of his determination as a real decision commanding the respect which his office deserves, and of the increased public confidence which his stature and the proposed procedure will inspire.

Other suggestions may be made which were beyond the scope of the Committee's reference. For example, it may be desirable to empower the Board to proceed against alleged violators in the District Courts as an alternative to the administrative proceeding. The Securities and Exchange Commission has found this power very useful and has proceeded in the courts for injunctions in many cases.¹ By making initial resort to the courts optional with the Board, there will be no sacrifice of administrative policy or of the advantages of unified enforcement of the statute by the Board. Only the Board will have power to choose the court rather than the administrative route; and its choice will be made on the basis of its judgment of the desirable. There may be many cases in which resort to the court may be advantageous. To the extent that the remedy is made available and is used by the Board, the adminis-

¹ See Sen. Doc. No. 10, 77th Cong., 1st Sess., ATTORNEY GENERAL'S COMMITTEE MONOGRAPH ON SECURITIES & EXCHANGE COMMISSION (1941) 6, 8.

trative burden will be lightened and Board members may find time occasionally themselves to sit on the trial of cases.

It may also be time to require obedience for the Board's order rather than, as is now the case, only for the judgment of the court approving the Board's order. The present procedure may well have been appropriate in order to educate employers in the new policy. But it is rather anomalous to continue the assumption that every Board order is presumably wrong and that its violation involves no penalty until and unless it is first approved by a court. In the judicial hierarchy the assumption is that the judgment of a trial court is presumably correct; it commands obedience and is not automatically stayed by an appeal. As with the court, so with the Board, provision may be made for a stay by the Board or by the reviewing court pending judicial review. But unless stayed, the order should be operative and command obedience on pain of penalty for violation. This is not, of course, a suggestion that violation of the Act itself be made subject to penalties, as, for example, in the case of the Railway Labor Act. It is merely a proposal that the Board's determinations, after formal trial, should command the respect of the parties as well as of the reviewing court.