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CONFLICT OF JURISDICTION BETWEEN FEDERAL DISTRICT COURTS AND THE NATIONAL LABOR RELATIONS BOARD

Resistance to the administrative enforcement of the Wagner Act¹ has raised several important issues. At least three major problems have been involved in cases seeking relief against hearings by the National Labor Relations Board: (1) the application of the doctrine of "jurisdictional facts" to hearings by the Labor Board; (2) the effect of allegations of irreparable damage in suits to enjoin hearings by the Board; (3) the availability of the declaratory judgment to test the propriety of administrative action where a prescribed administrative remedy has not been exhausted by the applicant. The present Note will be concerned with these three problems.

In the past two and a half years, approximately 95 injunction suits were filed in the district courts of the United States² to restrain the Labor Board from conducting hearings and other proceedings pursuant to the Wagner Act. Usually coupled with the prayer for an injunction to prevent irreparable damage was a request for a declaratory judgment holding the Wagner Act unconstitutional. In none of these suits, however, was a declaratory judgment ever rendered. Since the Supreme Court has upheld the constitutionality of the Act,³ that prayer has, for the most part, been abandoned.

Prior to the Supreme Court holding on January 31, 1938, in *Newport News v. Schauffler*⁴ and *Myers v. Bethlehem Shipbuilding Corp.*,⁵ the majority of the federal district courts (73 of the 95 cases) had denied injunctive relief when the cases were first presented to them.⁶ The First Circuit Court of Appeals was the only court of appeals to support the minority group of district courts and hold that the district court possessed such equitable jurisdiction.⁷ In view of the exclusive procedure⁸ and remedies

1. (1935) 49 Stat. 449, (1937) 29 U. S. C. A. sec. 153.

2. Second Annual Report of the National Labor Relations Board For The Fiscal Year Ended June 30, 1937 (1938) 31.

3. *Associated Press v. N. L. R. B.* (1937) 301 U. S. 103, 57 S. Ct. 560, 81 L. ed. 953; *N. L. R. B. v. Jones & Laughlin Steel Corp.* (1937) 301 U. S. 49, 57 S. Ct. 642, 81 L. ed. 893.

4. 58 S. Ct. 459, 82 L. ed. (adv. op.) 399.

5. 58 S. Ct. 466, 82 L. ed. (adv. op.) 406.

6. *Supra*, note 2.

7. *Myers v. Bethlehem Shipbuilding Corp.*, *Myers v. Mackenzie et al.* (C. C. A. 1, 1937) 88 F. (2d) 154, affirming (D. C. D. Mass. 1936) 15 F. Supp. 915, rehearing den. 89 F. (2d) 1000, cert. (1937) 58 S. Ct. 26, 82

provided in the Wagner Act, the Supreme Court held in the above-mentioned cases that a federal district court does not have equitable jurisdiction to enjoin the Labor Board from conducting a hearing upon a complaint filed by the Board against an employer allegedly engaged in unfair labor practices prohibited by the Act.

IMPLICATIONS OF THE DOCTRINE OF "JURISDICTIONAL FACTS"

The Wagner Act grants exclusive power to the Labor Board⁹ to prevent unfair labor practices "affecting commerce"¹⁰ and defines the latter phrase as meaning "in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce."¹¹ The Supreme Court has said that the Act does not "impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce," but rather "purports to reach only what may be deemed to burden or obstruct that commerce."¹² Such a qualification of the authority of the Labor Board preserves the constitutionality of the Act.

In the aforementioned *Myers* case the corporation contended that jurisdiction to determine the constitutional question of the applicability of the Wagner Act is vested in the courts and cannot be circumvented by statutory enactment.¹³ Since the corporation denied that it was engaged in interstate or foreign commerce, and since it claimed that a hearing before the Board would subject it to irreparable injuries, it took the position that its

L. ed. 11, rev'd (1938) 58 S. Ct. 459, 82 L. ed. (adv. op.) 299. The circuit courts of appeal which held such jurisdiction did not lie were: *Alexander Smith & Sons Carpet Co. v. Herrick* (C. C. A. 2, 1936) 85 F. (2d) 16; *Newport News Shipbuilding Co. v. Schauffler* (C. C. A. 4, 1937) 91 F. (2d) 730, affirming (D. C. E. D. Va. 1937) C. C. H. Labor Service, par. 18,009, cert. (1937) 58 S. Ct. 43, aff'd (1938) 58 S. Ct. 466, 58 L. ed. (adv. op.) 406; *Bradley Lumber Co. v. N. L. R. B.* (C. C. A. 5, 1936) 84 F. (2d) 97, cert. den. (1936) 299 U. S. 559, 57 S. Ct. 21, 81 L. ed. 441; *Bowen v. James Vernor Co.* (C. C. A. 6, 1937) 89 F. (2d) 968 (reversing district court decision); *Beman v. Bendix Product Co.* (C. C. A. 7, 1937) 89 F. (2d) 661, rev'g (D. C. N. D. Ill. 1936) 14 F. Supp. 58; *Eagle-Picher Lead Co. v. Madden* (C. C. A. 10, 1937) 89 F. (2d) 661, reversing (D. C. N. D. Ill. 1936) 14 F. Supp. 58; *Beman v. Iowa Mfg. Co.* (C. C. A. 8, 1937) 90 F. (2d) 249 (reversing district court decision); *Beaver Mills v. Madden* (App. D. C. 1936) 86 F. (2d) 862, cert. den. (1937) 300 U. S. 672, 57 S. Ct. 611, 81 L. ed. 878.

8. Sec. 10 (a-f), (h).

9. Sec. 10 (a).

10. *Ibid.*

11. Sec. 2 (7).

12. *N. L. R. B. v. Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, 31, 57 S. Ct. 615, 81 L. ed. 893; *supra*, note 4.

13. *Supra*, note 5.

constitutional rights would be violated unless the district court assumed jurisdiction to enjoin the holding of a hearing by the Labor Board.¹⁴

This contention was based upon the decision in *Crowell v. Benson*¹⁵ requiring review *de novo* of jurisdictional facts found by an administrative agency. The corporation, however, was urging the extension of the *Crowell v. Benson* principle to a new type of case. Independent judicial determination of jurisdictional facts was sought here *prior* to the administrative proceeding and not, as in *Crowell v. Benson*, upon appeal from the administrative decision.

The Supreme Court in the *Myers* case said that if such a view were adopted, it would practically substitute the district court for the Labor Board as the tribunal to hear and determine that which Congress had declared that the Board exclusively should hear and determine in the first instance.¹⁶ The doctrine that the courts will not interfere with administrative action until the prescribed administrative remedy has been exhausted requires that all such jurisdictional matters be first submitted to the proper administrative agency.¹⁷

Whatever may be the extent of the general power of the courts to determine *de novo* jurisdictional questions decided by administrative agencies, and to permit the introduction and consideration of additional evidence of such issues, it is submitted that there will be no *de novo* review of jurisdictional facts determined by the Labor Board.¹⁸ Any independent judicial review will be

14. The following are a few of the cases cited in support of this contention: *Ohio Valley Water Co. v. Ben Avon Borough* (1919) 253 U. S. 287, 40 S. Ct. 527, 64 L. ed. 908; *Crowell v. Benson* (1932) 285 U. S. 22, 52 S. Ct. 285, 76 L. ed. 598; *St. Joseph Stock Yards Co. v. United States* (1935) 298 U. S. 38, 56 S. Ct. 720, 80 L. ed. 1033. See also *First Annual Report of the National Labor Relations Board For The Fiscal Year Ended June 30, 1936* (1937) 46-48.

15. (1932) 285 U. S. 22, 52 S. Ct. 285, 76 L. ed. 598. This was a suit to enjoin the enforcement of an award for personal injury made by a deputy commissioner under the Longshoremen's & Harbor Workers' Act, (1927) 44 Stat. 1424, (1937) 33 U. S. C. A. secs. 901-905, enacted under the admiralty and maritime jurisdiction of Congress. The application of the statute was predicated on two fundamental limitations: (1) that the injury took place on navigable water, and (2) that the relation of employer and employee existed.

16. *Supra*, note 5.

17. *Ibid.*; *First Annual Report of the National Labor Relations Board For The Fiscal Year Ended June 30, 1936* (1937) 9; *supra*, note 2.

18. The various theories as to *de novo* review of jurisdictional facts found by the N. L. R. B. may be found in Note (1936) 30 Ill. L. Rev. 884, 925; *Legis.* (1935) 30 Col. L. Rev. 1098, 1115.

based solely upon the record¹⁹ formulated by the Board. Such seems to be the inference in the *Myers* case where the Court states

* * * if it [the National Labor Relations Board] finds that interstate or foreign commerce is involved but the Circuit Court of Appeals concludes that *such finding was without adequate evidence to support it*,²⁰ or otherwise contrary to law,²¹ the board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted.

The application of the rule of *Crowell v. Benson* will probably be limited so as not to include the orders of the Labor Board because the judicial temper of the Supreme Court has changed since that decision.²² It should also be noticed that provisions of the Wagner Act as outlined above are similar to the provisions of the Federal Trade Commission Act.²³ As yet the courts have not applied the *Crowell v. Benson* principle in any case in which an order of the Federal Trade Commission was reviewed.

It has been suggested, however, that the accused employer may raise the question of jurisdictional fact *prior* to a hearing and order of the Board by refusing to answer the Board's subpoena

19. The record consists of the pleadings, testimony, and proceedings conducted by the Board. Sec. 10 (e).

20. Italics supplied. *Quaere*: Should "adequate" be construed to be the weight of the evidence or should it be construed to be substantial evidence?

21. The conclusions of the Federal Trade Commission as to what constitutes "unfair methods of competition" have been held to be conclusions of law and subject to judicial definition. *Federal Trade Commission v. Gratz* (1920) 253 U. S. 421, 40 S. Ct. 572, 64 L. ed. 993. Although sec. 8 of the Wagner Act enumerates the various "unfair labor practices," they can similarly be construed by the courts.

22. *Crowell v. Benson* was a 5-3 decision, in which Mr. Justice Cardozo did not participate. Since that decision Mr. Justice Sutherland and Mr. Justice Vandevanter who joined in the majority opinion have retired and have been replaced by Mr. Justice Reed and Mr. Justice Black.

23. "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia. It is intended here to give the party aggrieved a full, expeditious and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured and cannot be heard to complain as has been held in cases under the Federal Trade Commission Act." H. R. Rep. No. 1147, 74th Cong., 1st Sess. (1935) part 3, p. 24. See also *Hurst v. Federal Trade Commission* (D. C. E. D. Va. 1920) 268 Fed. 874; *Federal Trade Commission v. Claire Furnace Co.* (1927) 274 U. S. 160, 47 S. Ct. 553, 71 L. ed. 978; *Chamber of Commerce v. Federal Trade Commission* (C. C. A. 8, 1922) 280 Fed. 45.

to a hearing.²⁴ The Board cannot enforce its subpoenas, nor can it compel an employer to produce documents or books for the purpose of a hearing. The Board must appeal to a circuit court of appeals for the enforcement of such orders.²⁵ If the employer who refuses to answer the subpoena of the Board could prove that he really is not subject to the jurisdiction of the Board, the court would refuse to enforce any such order of the Board.²⁶ Such a *bona fide* resistance would not come within the penal provisions of the Act.²⁷ Although an employer may be able to challenge the Board's jurisdiction in such a manner, he cannot secure an injunction against the holding of a hearing by the Board.²⁸

IRREPARABLE DAMAGE

It is well settled that judicial relief is not to be granted until the prescribed administrative remedy has been exhausted.²⁹ An attempt was made in the *Myers* and *Newport News* cases to evade this requirement by alleging that the mere holding of the prescribed administrative hearing would in itself result in irreparable damage. The allegations of irreparable damage in the numerous suits to enjoin the Labor Board were generally³⁰ to the effect that the company would be held up to scorn as a violator of a federal law and would incur the odium and ill-will of its employees and the public during the pendency of the proceeding; that its officials would be compelled to produce documents of a confidential nature which were irrelevant in so far as the issues of the hearing were concerned; that the hearing would result both in a financial loss to the company and the loss of the time of its officials and employees;³¹ that the harmonious relations ex-

24. *Bradley Lumber Co. v. N. L. R. B.* (C. C. A. 5, 1936) 84 F. (2d) 97; cf. *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 56 S. Ct. 654; 80 L. ed. 1015.

25. Sec. 11 (2).

26. Sec. 10 (e).

27. *Ibid.*, sec. 12.

28. *Supra*, notes 4 and 5. *Quaere*: may a witness wholly unconnected with the employer challenge the validity of the jurisdiction of the Board over the employer?

29. This rule has been applied more often in equity where injunctive relief was sought. *Dalton Adding Machine Co. v. State Corp. Commission* (1915) 236 U. S. 699, 35 S. Ct. 480, 59 L. ed. 797; *Federal Trade Commission v. Claire Furnace Co.* (1927) 274 U. S. 160, 47 S. Ct. 553, 71 L. ed. 978. The rule is applicable to proceedings at law as it is to suits in equity. *First Nat. Bk. v. Board of County Commissioners* (1932) 264 U. S. 450, 44 St. Ct. 385, 68 L. ed. 784; *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 343, 57 S. Ct. 816, 81 L. ed. 1143.

30. First Annual Report of the National Labor Relations Board For The Fiscal Year Ended June 30, 1936 (1937) 47, 48.

31. It was alleged in *Myers v. Bethlehem Shipbuilding Corp.* (1938) 58 S. Ct. 459, 82 L. ed. (adv. op.) 406, that in 1934 and 1935 the predecessor

isting between the corporation and its employees would be seriously impaired; and that the Board's proceedings, regardless of their outcome, would hinder the company in exercising its rights to bargain freely with its employees. The Supreme Court said that the alleged damage was similar to the incidents of an ordinary law suit, and that as yet no way has been devised to relieve a defendant from the necessity of a trial to establish that the suit is actually groundless.³²

Although the Supreme Court has taken an authoritative stand on the issue of irreparable damage when applied to the Labor Board, it is interesting to note the different approaches adopted by the lower federal courts toward this issue.³³

Some district courts apparently rationalized the granting of preliminary injunctions against the Labor Board on the "balance of convenience" theory. Prior to the establishment of the constitutionality of the Wagner Act, they reasoned that whereas the granting of the injunction would not seriously damage or inconvenience the Labor Board, the denial of the injunctive relief might mean certain and irreparable injury to the employer.³⁴ Thus injunctions were issued when it seemed that there would be no harm in maintaining the *status quo* until constitutional questions were settled in order to avoid some otherwise imminent injury.

Other district courts held that the complainants were entitled to relief from harassment by government officials and therefore granted injunctions to prevent irreparable damage.³⁵ Still other courts, however, held that such harassment was too indirect and speculative to warrant relief and in no sense constituted irreparable injury.³⁶ This last position was taken by the Supreme

of the present Labor Board instituted somewhat similar action against the Bethlehem Shipbuilding Corporation. Although the proceedings were eventually dismissed, the hearings cost the corporation more than \$15,000 and consumed a total of 2,500 hours of working time of officials and employees.

32. *Supra*, note 5.

33. Cf. Note, *Irreparable Injury In Constitutional Law Cases* (1936) 46 *Yale L. J.* 255.

34. *Independent Workers of Clayton Mark & Co. v. Beman* (D. C. N. D. Ill. 1936) 13 *F. Supp.* 627, (C. C. A. 7, 1937) 88 *F.* (2d) 59.

35. *Bendix Products Corp. v. Beman* (D. C. N. D. Ill. 1936) 14 *F. Supp.* 58, *rev'd* (C. C. A. 7, 1937) 89 *F.* (2d) 661; *Eagle-Picher Co. v. Madden* (D. C. N. D. Okl. 1936) 15 *F. Supp.* 407, *remanded* (1937) 90 *F. Supp.* 321.

36. *Bemis Bros. Bag Co. v. Feidelson* (D. C. W. D. Tenn. 1936) 13 *F. Supp.* 153; *Ohio Garment Co. v. Lind* (D. C. S. D. Ohio 1936) 13 *F. Supp.* 877; *Bethlehem Shipbuilding Corp. v. Nylander* (D. C. S. D. Cal. 1936) 14 *F. Supp.* 201; *Buchsbaum & Co. v. Beman* (D. C. N. D. Ill. 1936) 14 *F. Supp.* 444; *John Blood & Co. v. Madden* (D. C. E. D. Pa. 1936) 15 *F. Supp.* 779; *Bradley Lumber Co. v. N. L. R. B.* (C. C. A. 5, 1936) 84 *F.*

Court in the *Newport News* and *Myers* cases. This position is conclusive as it affects the National Labor Relations Board. The Supreme Court may, however, adopt one of the other positions in regard to some other administrative agency.

It has been said that the irreparable injury concept has been distorted and abused in constitutional litigation by judges who are eager to simplify access to the courts by extending the use of the injunction,³⁷ and that the objectives of those who seek a speedy mode of judicial review might be better and more directly attained under the federal declaratory judgment statute.

DECLARATORY JUDGMENT

It will be remembered that coupled with the prayer for injunctive relief in many of the cases considered was a prayer for a declaratory judgment holding the Wagner Act unconstitutional.³⁸ The declaratory judgments were denied. This same prayer for declaratory relief was involved in the *Newport News* and *Myers* cases.³⁹ The question of the availability of a declaratory judgment where a special statutory method was provided has never been decided by the Supreme Court.

If the district court had determined the jurisdiction of the Labor Board by declaratory judgment before a hearing by the Board, the evidence presented to the court would undoubtedly have been the same as though the Board had determined the question of its jurisdiction. No time or expense of the parties would have been wasted. It must be remembered, however, that the courts are not authorized to deliver advisory opinions or pronouncements upon abstract questions.⁴⁰ The Federal Declaratory Judgments Act⁴¹ does not change the essential requisites for the exercise of judicial power. It applies only to "cases of actual con-

(2d) 97, 100, "No doubt an investigation may, as the bill asserts, stir up some feeling among the employees and cause some inconvenience by taking witnesses from their work, but these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage which equity will interfere to prevent; and a suit in equity would not wholly obviate them."

37. *Supra*, note 33.

38. *Bethlehem Shipbuilding Corp. v. Nylander* (D. C. S. D. Cal. 1936) 14 F. Supp. 201; *Bradley Lumber Co. v. N. L. R. B.* (C. C. A. 5, 1936) 94 F. (2d) 97.

39. *Cf. Wilson & Co. v. Gates* (C. C. A. 8, 1937) 90 F. (2d) 247, in which the Circuit Court of Appeals would not consider the issue of whether equitable jurisdiction existed to enjoin the N. L. R. B. It also refused to enter a declaratory judgment declaring the Act unconstitutional, where the basis of the petition was the invalidity of the Act already held valid by the Supreme Court.

40. *Massachusetts v. Mellon* (1922) 262 U. S. 447, 43 S. Ct. 597, 67 L. ed. 1078.

41. (1934) 48 Stat. 955, (1937) 28 U. S. C. A. sec. 400.

troversy"⁴² and there must be a justiciable controversy between real parties upon real issues.⁴³ Moreover, relief under the Federal Declaratory Judgments Act is a discretionary matter. Where a special statutory method for the determination of the particular type of cases has been provided, to permit that issue to be tried by declaration would be improper. Practically speaking, it would oust the court of appeals from its exclusive jurisdiction over the National Labor Relations Board.⁴⁴ Congress could not have intended that the Declaratory Judgments Act be employed where, as in the case of the Wagner Act, a special statutory method for review is provided.⁴⁵ This differs from denying a declaration merely because a general or common-law remedy could have been invoked.⁴⁶

The Supreme Court's position in the *Myers* and *Newport News* cases is of great significance in fields of administrative and labor law. Its effects are already being felt.⁴⁷ The adverse comment that the *Crowell v. Benson* doctrine of "jurisdictional fact" has received⁴⁸ would indicate that the Supreme Court was wise in rejecting this attempt to extend the doctrine.

42. *Aetna Life Ins. Co. v. Haworth* (1936) 300 U. S. 227, 57 S. Ct. 461, 81 L. ed. 617, 108 A. L. R. 1000; *Ashwander v. Tennessee Valley Authority* (1935) 297 U. S. 288, 56 S. Ct. 466, 80 L. ed. 688.

43. *Bethlehem Shipbuilding Corp. v. Nylander* (D. C. S. D. Cal. 1936) 14 F. Supp. 201, 207, the District Court would not consider the prayer for declaratory judgment because such a judgment is only binding upon the real parties before the court and the only parties actually named defendant were the trial examiner, the attorney for the board, and two administrative subordinates. *Bradley Lumber Co. v. N. L. R. B.* (C. C. A. 5, 1936) 84 F. (2d) 97, 100; *Nashville, Chattanooga and St. Louis R. R. v. Wallace* (1932) 288 U. S. 249, 53 S. Ct. 345, 77 L. ed. 730.

44. Cf. Borchard, *Declaratory Judgments* (1934) 156; supra, note 8.

45. "The new power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not under settled principles, have interfered with or stopped them under its power to enjoin." *Bradley Lumber Co. v. N. L. R. B.* (C. C. A. 5, 1936) 84 F. (2d) 97, 100.

46. Supra, note 44.

47. See *The Nevins v. Boland* (Feb. 4, 1938) C. C. H. Labor Service, par. 18,090, 99 N. Y. L. J. 29, p. 590, wherein the New York Supreme Court held it had no jurisdiction to restrain the New York State Labor Relations Board from conducting a hearing based on a complaint alleging unfair labor practices on the part of the petitioning employer, although the employer has previously begun legal proceedings against the Union which had filed charges before the Board; *Myers v. Coheco Woolens Mfg. Co.* (C. C. A. 1, Feb. 9, 1938) C. C. H. Labor Service, par. 18,095, rev'g (D. C. D. N. H. 1936) 16 F. Supp. 788, citing the *Newport News* and *Myers* cases in holding that a federal district court is without jurisdiction to enjoin proceedings of the N. L. R. B.

48. *Dickinson, Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"* (1932) 80 U. Pa. L. Rev. 1055, 1060; Comment (1932) 32 Col. L. Rev. 738; Comment (1932)

Had the federal district courts been empowered to strike down the statutory procedure provided in the Wagner Act, the Labor Board, as an expert body, would have lost a large measure of its function of initially determining in what instances the Act should be applied and would have been prevented from applying the Act to particular factual situations.⁴⁹

JOSEPH KUTTEN.

41 Yale L. J. 1037; Comment (1932) 30 Mich. L. Rev. 1312; Note (1933) 46 Harv. L. Rev. 478.

49. First Annual Report of the National Labor Relations Board For The Fiscal Year Ended June 30, 1936 (1937) 48; *quaere*: What will be the effect of sec. 77-B of the Bankruptcy Statute upon the problem of conflict of jurisdiction between the federal district courts and the National Labor Relations Board? It has recently been held that a plan of reorganization which had been approved by all interested parties and was at the stage of confirmation would not be disturbed by the district court upon application of the N. L. R. B. to require the debtor to incorporate certain provisions which would bind the reorganized company. In the Matter of Baldwin Locomotive Works, Debtor (D. C. E. D. Pa. Feb. 29, 1938) C. C. H. Labor Service, par. 18,107.