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The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*

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* An earlier version of this paper entitled "*Excelsior: A Cautionary Tale for Administrative Agencies, Recounting How the National Labor Relations Board, an Innocent but Indecisive Agency, Rebuffed Rule Making but Was Compelled to Submit to Its Embrace, with Instructions for Identifying the Oft-Slighted Suitor and How to Deal with It,*" was presented as the 1969 Report of the Secretary of the American Bar Association Section of Labor Relations Law. In connection with the preparation of this paper the Ohio Legal Center Institute provided financial assistance for travel and questionnaire mailing. Its Director, James Young, was extremely helpful. Klaus Ziermaier, then a second year law student at Ohio State, diligently provided research assistance. I benefited from discussion with Professors Russell Smith of Michigan, Clyde Summers of Yale, and Robert Bard and Philip Shuchman of The University of Connecticut Law Schools. I am very appreciative for all that help.

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I. Introduction

Like many another promising youth, the administrative process is having a so-so middle age. Regarded as vigorous and idealistic when young, administrative agencies came to be regarded as slack, partisan, and possibly corrupt by the 1950's. When they were first widely instituted, agencies were to perform Herculean tasks with which no legislature or court could cope. Where legislatures were unable to devise precise rules for an unforeseen future, agencies were to concentrate their energies on filling out the legislative design; where courts were unable to inform themselves about the complexities of modern industry, agencies were to collect data and fashion remedies for unique problems in many different segments of an industrial society.¹ The sheer bulk and variety of problems requiring rules and decisions had threatened to overwhelm the whole governmental process, and the administrative agencies were set up as a kind of defense. But, as happens so often, yesterday's reform has become today's problem.²

Administrative law results from a system of interacting elements. Major policy decisions are made by the legislature and subsidiary rules are promulgated by an agency. The agency also hears and decides cases, subject to court review, in which private compliance with statute and agency-declared norms is the major issue. The legislature, the agency, and the courts periodically affect one another's attitudes and actions. This description of the circulatory system of the administrative process, however, lacks little—except the blood.

1. J. LANDIS, *THE ADMINISTRATIVE PROCESS* 13-15, 17, 23 (1938). This expansive view of their role reflects the temper of the New Deal, at least among the liberal academic community. One can readily understand how the business community feared many such agencies then.

In the New Deal era, "independent agencies" were set up because of distrust of regular departmental personnel. Witte, *Administrative Agencies and Statute Law Making*, 2 *PUB. ADMIN. REV.* 116, 117 (1942).

2. See generally, J. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT*, Part I, 4-35 (1960). (Also printed as *STAFF OF THE SENATE COMMITTEE ON THE JUDICIARY, REPORT ON REGULATORY AGENCIES*, 86th Cong., 2d Sess. (1960).)

Interaction of the regulated with the regulators is perhaps the most crucial element in the process. The perceived nature of private conduct, for example, shapes the form of legislation and the design of the machinery to administer it, while the more detailed patterns of private conduct as seen by the administrative agency have a strong influence on subsidiary legislation and individual case decisions. Meanwhile, private parties carry appeals from agency decisions to the courts and occasionally to the legislature, and they influence executive appointments to the agency. How the agency and the special public subject to its authority keep apprised of each other's activities constitutes a major, if often elusive, element in the administrative process. For the process to succeed, the agency must understand the conduct it seeks to regulate, while the public must comprehend the rules under which it must act.

Rejuvenation of the administrative agencies has been sought in many reforms, few of which have come to pass. One such proposal, suggested by a handful of scholars, judges, and bar groups, and further considered in the following pages, urges those agencies which possess both rule making and adjudicatory authority—notably the National Labor Relations Board—to make greater use of their rule making powers.³ But as is common with the objects of reform, some agencies, including the Board, have resisted the proposal. In *N.L.R.B. v. Wyman-Gordon Co.*,⁴ however, the Supreme Court for the first time implied that in some situations an agency possessing both rule making and adjudicatory authority must employ the former,⁵ thus calling into question a long-

3. H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 146-47 (1962) [hereinafter cited as *FRIENDLY'S AGENCIES*]; 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.13 (1965 Pocket Part) [hereinafter cited as *DAVIS' TREATISE*]; The American Bar Association House of Delegates at the instance of its Section of Administrative Law, 16 *ADMIN. L. REV.* 77 (1964); and the House of Delegates at the instance of the Section of Labor Relations Law, 42 *LAB. REL. REP.* 513 (1958); Peck, *The Atrophied Rule Making Powers of the National Labor Relations Board*, 70 *YALE L.J.* 729 (1961) [hereinafter cited as *Peck's Atrophy*]; Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 78 *HARV. L. REV.* 921, 942 (1965) [hereinafter cited as *Shapiro's Choice*]; Wason, *The National Labor Relations Act and the National Labor Relations Board in Hearings on Congressional Oversight of Administrative Agencies (National Labor Relations Board) Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. (1968) [hereinafter referred to as *Ervin Hearings*].

The Board's power to make rules is found in section 6 of the National Labor Relations Act, 29 U.S.C. § 156 (1964):

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

4. 394 U.S. 759 (1969) [hereinafter cited as *Wyman-Gordon*].

5. This summary employs what might be called "opening paragraph license." Part IV provides a guided tour through the cobwebs of the decision which one takes at his own risk. It is not a trip for the squeamish.

standing belief verging on doctrine⁶ that an agency can choose between the two procedures.⁷ Most agencies have chosen adjudication, and the NLRB has been the most monogamous of all. After all these years of fidelity (as with many long marriages, all has not been bliss, but a strong sense of attachment has grown up) must the Board take rule making, Leah as well as Rachel, to its unwilling bosom? Should it do so, not simply from compulsion, but for the children's sake?

II. Inadequacies of the National Labor Relations Board

A. *The NLRB: Its Machinery and Role*

The National Labor Relations Board is like most administrative agencies. A five member Board sits at its apex and is empowered to "prevent" unfair labor practices and to determine who, if anyone, is the freely chosen exclusive representative of employees in appropriate units for purposes of collective bargaining. For the thirty-four years of the Board's life its members have discharged these functions almost exclusively by deciding contested cases in the manner of an appellate court.⁸

While some berate it for failing to do so, the Board cannot simply apply the National Labor Relations Act in the sense of reading its text and deciding cases according to its manifest dictates. Portions of the Act dating from 1935 are extremely broad and general; and while the 1947 and 1959 amendments were more detailed than their forerunners, the language frequently remains inconclusive and requires considerable interpretation. Over the years the Board necessarily has made law; it could not help doing so.⁹

When the Board does make policy,¹⁰ it should base its decisions on

6. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

7. *E.g.*, 1 DAVIS' TREATISE, *supra* note 3, § 5.01.

8. On rare occasions press releases have announced new policy. Agency members also make speeches, which are indicative of policy but not binding on the agency.

9. Summers, *Politics, Policy Making and the NLRB*, 6 SYRACUSE L. REV. 93 (1954). Much the same point is made with more recent illustrations in Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUPREME COURT REV. 53, 54-67.

This does not mean that the Board's legislative function is boundless; on the contrary, the statute provides the limits. Within the confines of the statute, however, the courts permit the exercise of legislative power, albeit unevenly and rather unpredictably. *E.g.*, compare *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (the Board may balance the impact of employer conduct on protected activity and employer business justification in an economic strike) with *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1960) (the Board may not decide what are permissible bargaining weapons).

10. Policy shifts by new majorities effected by new presidential appointments usually are deplored as unprincipled. I suggest that, within bounds not readily defined, such a process of change is not only justifiable but desirable. We take for granted that statutes once enacted continue in force until a later legislature takes affirmative action by a fresh majority to repeal or amend. Few statutes other than appropriation measures are

the realities of industrial relations: indeed, that was the major reason for creating the Board. Only thus can it fashion rules of conduct that promote healthy labor relations and reduce rather than stimulate litigation. The Board's habitual practices, however, seem ineffective in stemming an ever freshening flood of cases. In a recent year, the Board members themselves decided about 1,200 contested cases (roughly 740 unfair labor practice cases and 450 representation cases).¹¹ Board trial examiners heard and decided, subject to appeal to the Board, about 1,500 unfair labor practice cases, while the regional directors decided over 2,500 representation cases. During the same fiscal year, the entire agency received some 30,425 new cases and closed 29,494 cases. The overwhelming bulk of these cases were handled administratively and either withdrawn, dismissed, settled, or carried through the election procedure by party consent without hearings. In understanding and assessing the Board's performance, and that of many other agencies, it is crucial to bear in mind the necessity of informal administrative disposition of all but a small fraction of the case load.

enacted for limited periods; practically none expires with the legislature that enacted it despite the sometimes tenuous majority that enacted it. Although that majority no longer commands voter support, its law continues in force until a new coalition can be mustered to enact a new statute—a formidable task because not only must the old statute be repealed but a successor must be fashioned in a very complex process of accommodation. A famous example exists in labor-management relations. The only Republican Congress in a period of twenty years enacted the Taft-Hartley Act in 1947. A Democratic resurgence featured by the success of candidates prominently pledged to that statute's repeal failed to achieve the announced goal. For a dozen years, therefore, the measure continued in force with only slight, primarily technical, amendment. Only in 1959 were significant amendments made despite repeated attempts in both houses, and these were not achieved until the proponents of internal union reform legislation found it necessary to broaden the base of Congressional support.

The administration of a statute like the National Labor Relations Act requires the continual balancing of competing claims. The task is not a simple one. Congress is incapable of making required adjustments in the balance as they seem to become necessary but, by convulsive effort, at rather substantial intervals, it does make some gross adjustments in response to major shifts in political forces. In the interim, it is undemocratic to permit an evanescent majority to work its will unabated after it no longer commands that majority. The unavoidable periodic selection of a President enables new majorities (coalitions of minorities) to obtain political power which carries the authority to make appointments to agencies. These new appointees reflect the most recent political alignment and, by new policy decisions, ameliorate the rigors of existing legislation. Of course, it can be argued that the electorate does not vote on transportation, labor, or dozens of other policies when it chooses a President. But in a general way it does. The interest groups usually know the stakes and support those candidates who are believed well disposed to their interests. The electorate at large knows the general orientation of the major parties and the presidential candidates, probably more clearly in the area of labor relations than in most. Hence, they vote for policy changes, albeit within limits set by existing statutes (which may afford considerable latitude). Thus viewed the policy shifts of newly-constituted majorities are democratic means of preventing long-dead majorities from ruling from the grave. The appropriations process, with its reordering of priorities and its extensive influence upon executive and administrative personnel, constitutes another "informal" amendatory process despite the bans upon substantive legislation in appropriation measures.

11. 32 N.L.R.B. ANN. REP. 9-14 (1967).

Two major features of the Board's habitual mode must be considered in assessing its performance: long delays and delphic opinions. The most constant criticism of the Board over the years concerns delay in administrative case processing and, even more, in Board decision making.¹² Delay often unsettles the parties and the work process, and the ultimate decision frequently comes too late to provide a meaningful remedy.¹³

The opinions in cases acted on directly by the Board members tend to be brief and require, for their full understanding, a reading of the usually lengthy, always detailed, Trial Examiner Decisions.¹⁴ Even the more extended opinions need such supplementation, and a large proportion of Board decisions do not reveal the members' reasoning. Professor Lesnick undoubtedly expresses the opinion of legions of labor lawyers that often the Board

doesn't state the grounds of what it is doing, it doesn't explain itself. It has a passion for what it views as case-by-case decisionmaking; that is to say, simply state [sic] the facts and without really attempting to come to grips with the concrete issues, say, "we think on all the facts and circumstances this is the answer."¹⁵

It is important, of course, that Board opinions are often long in forthcoming and short in substance, but more important still are the questions of whether this method of decision and policy making enables the Board to inform itself adequately about the reality of industrial relations—whether it can acquire the special knowledge it was created to accumulate—and whether emphasis upon individual case decisions

12. This was the principal criticism of the distinguished tri-partite committee headed by Professor Archibald Cox, THE SENATE ADVISORY PANEL ON LABOR-MANAGEMENT RELATIONS LAW, ORGANIZATION AND PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD, S. Doc. No. 81, 86th Cong., 2d Sess. (1960).

13. Samoff, *Taft-Hartley Discrimination Victories*, 17 LAB. L.J. 643 (1966). This is a rare example of the exploration of the effects in practice of Board doctrine.

14. These were formerly called Intermediate Reports. The Trial Examiner Decisions frequently discuss the interpretation and application of court and Board decisions. Their potential importance is attested to by a comment of the Chairman of the NLRB, who once referred to "relevant Trial Examiner Decisions I had not even read." (He was not talking about decisions pertinent to cases in which he participated, but those pertaining to unresolved "controversial issues.") Procedures Employed by the NLRB in Determining Policy, address to the A.B.A. Section on Administrative Law, reprinted in *Ervin Hearings*, *supra* note 3, 1237. For the most part, however, Trial Examiner Decisions are studied only by the parties to the particular case, reviewing courts, and those preparing briefs in later cases. Even the most expert in the field seldom have the time to resort to these decisions to learn, if possible, what the Board has decided. They do not become part of the current kit which labor specialists use regularly.

15. His oral testimony in *Ervin Hearings*, *supra* note 3, Part 1 at 528. For a minor example on a procedural point that came to hand at random, see Int'l. Bhd. of Electrical Workers (*Asplundh Tree Expert Co.*), 161 N.L.R.B. 1397 (1966).

provides adequate guidance to those subject to the National Labor Relations Act.

B. How the Board Informs Itself

Unlike some other administrative agencies, the Board itself cannot initiate its own processes. Rather, its ability to act on a particular matter depends, in the first instance, on the filing of an unfair labor practice charge or a petition in a representation case by an outside party. Lacking independent authority to investigate or oversee the industrial scene generally, the Board frequently becomes aware of a problem . . . only when it is raised in the context of a particular case. Thus, the bulk of the Board's experience has been accumulated through the adjudication of issues brought to it by outside parties.¹⁶

One may wonder whether such a limited diet is nutritious. Except for a portion of their representation case load, which occupies a small segment of their attention, the Board members are preoccupied with labor litigation which Willard Wirtz, in another context, observed, "offers no real insight into the basic laws of decent labor relations."¹⁷ Litigation occurs where labor-management relations have been disrupted, if they ever existed. Seeing only diseased conditions, he argued, is a dubious way of becoming acquainted with healthy labor relationships. Nor do Board members experience extensive exposure to industrial relations outside of litigation. The Board's staff consists mostly of lawyers and a few researchers who are primarily concerned with the statistics of the Board's own operations¹⁸ and with legal case analysis. Board members and senior staff address and meet with industry, union groups, and bar representatives and appear before Congressional committees. Although at least some of these occasions must be useful to

16. Brief of the NLRB at 15-16, *N.L.R.B. v. Wyman-Gordon*, 394 U.S. 759 (1969). It also declares in a footnote to this passage:

Congress' unwillingness to grant the Board such powers [of overseeing the industrial scene] is reflected in § 4(a) of the Act, which precludes the Board from appointing "individuals for the purpose of conciliation or mediation, or for economic analysis."

The language quoted from the Act originated in the 1947 Taft-Hartley amendments. The legislative history lacks any indication of the motivation or extent of the provision beyond a plaintive note by opponents of the bill that it was senseless because the Board had abolished its Bureau of Economic Research in 1940. S. MINORITY REP. NO. 105, Pt. 2, 80th Cong., 1st Sess., 1 (1947), *LEG. HIST. OF LABOR MANAGEMENT RELATIONS ACT* 495.

17. Wirtz, *On Teaching Labor Law*, 42 ILL. L. REV. 1, 4 (1947) (emphasis omitted).

18. The Board keeps tab on its own operations as revealed in statistics published in its annual reports. They are valuable in monitoring the Board's handling of its caseload, case trends (e.g., the shift in the late 50's to a preponderance of unfair labor practice cases), the showing of various unions in elections, and the Board's box score in the courts.

their education, irregular meetings can not substitute for purposeful, methodical study.

Board members and staff also have recourse to the considerable literature of the labor economists (even if they cannot be employed, they can be read) which today rarely has relevance to NLRA problems.¹⁹ The Bureau of Labor Statistics and Bureau of Labor Standards produce an occasionally pertinent study, but they too generally focus attention elsewhere. Board and court decisions involving the Act receive much critical gloss from practitioners and academics. While they may produce some doctrinal tidiness, they seldom enlarge the Board's knowledge of the real world of labor-management relations.

What the Board lacks notably is (1) specific information about labor-management practices and employee attitudes and reactions that may be pertinent to its work, and (2) any systematic means of monitoring the impact of Board and court NLRB doctrines upon industrial practice. Apparently it even lacks a mechanism for mobilizing the considerable expertise of its own regional staffs, who learn a great deal about labor relations that does not become part of the hearing transcript upon which the Board's Washington staff battens. Thus, the Board's decision-making fails to provide a bridge between Board members, their staff, and the real world of labor relations. In addition to or perhaps as a result of these handicaps, it is doubtful that the Board effectively communicates its policy decisions to those who should shape their conduct to conform to the Act.

C. Fibreboard: *A Case Study of the Inadequacy of Adjudication*

The *Fibreboard*²⁰ decision serves as an example of some of the shortcomings of adjudication. The case was initiated by unfair labor practice charges filed in July, 1959,²¹ but the NLRB decision was not handed down until 1962 and was not finally enforced until after the Supreme Court decision of 1964.²² Because the case resulted in a Supreme Court opinion, it can be assumed that a majority of labor law specialists would be familiar with it.²³ While the Supreme Court's opinion affirming the

19. *E.g.*, the whole of 21 IND. & LAB. REL. REV. has but one directly NLRA-related article, Krislov, *Union Organizing of New Units, 1955-1966*, *id.*, at 31 (1967). The article analyzed the Board's own statistics, and thus brought no fresh information to the Board otherwise unavailable to it.

20. *Fibreboard Paper Prods. Corp.*, (Supplemental Decision and Order), 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964). The various decisions called forth a vast literature of exegesis, which I hardly need augment.

21. 379 U.S. at 207.

22. See note 20, *supra*.

23. See p. 585, *infra*.

NLRB decision seemed narrow, the labor-management community apparently seldom doubted that the case generally stood for the proposition that an employer contemplating the subcontracting of work being performed by employees represented by a union has the obligation, under section 8(a)(5) of the National Labor Relations Act, to bargain over the subcontracting decision itself and not merely over its effects upon the employees involved. In my questionnaire survey²⁴ conducted a bit more than four years after the Supreme Court decision and more than six years after the Board's final decision, I set out to ascertain what impact the decision actually had had on bargaining and subcontracting of unit work, *i.e.*, to see if *Fibreboard* was compatible with industrial reality.

As a rationale for its bargaining requirement in *Fibreboard*, the Board offered the following:

Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved.²⁵

The Supreme Court echoed the same idea, albeit with reserve.²⁶ Thus it seemed appropriate to attempt to ascertain whether this expectation had been realized to any appreciable degree. My questionnaire asked whether over the past decade the respondent's clients had had problems concerning subcontracting, what legal doctrines or documents affected the handling of such problems, and whether bargaining about subcontracting had led to the modification or cancellation of a company decision to subcontract work.²⁷

Most of those who responded reported that subcontracting had been an active and common issue with their clients or organizations. *Fibreboard*, and its predecessor, *Town & Country Mfg. Co.*,²⁸ were chief among the sources of legal doctrine to which the lawyers resorted in dealing with the problem.²⁹ The overwhelming majority of those who answered the last question about cancellation or modification of sub-

24. See pp. 582-83, *infra*.

25. 138 N.L.R.B. at 551, quoting *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027 (1962).

26. See 379 U.S. at 214.

27. This last question was somewhat garbled in the questionnaire and led to a few non-responses. By and large, however, respondents seem to have divined what the question meant as indicated by their frequent written comments.

28. *Supra* note 25.

29. *N.B.* Law teachers who bear down on what *Fibreboard* means: no one volunteered that either the Board or court doctrines were unclear, although a question on impact was quite open-ended.

contracting decisions replied that bargaining had not caused a modification or abandonment of the decision to shift work out of the unit.³⁰ Even more impressive was the certainty and vehemence of many interviewees and questionnaire respondents that the bargaining requirement has no practical meaning. In typical replies, management lawyers, for example, characterized the requirement as

a charade; we just go through the pretense of bargaining. It means more lawyers' fees, but it makes no difference in the end. [M]anagement play-acts. We go through a routine of pretending to let the union participate in the decision and after hours of taking a lot of *guff*, we write a carefully drawn letter, going ahead. (Emphasis in original.)

Of seven union lawyers who responded to both questions, two reported an affirmative impact. Of the latter, one's comment was undecipherable; the other's indicated that under contracts known to him, joint labor-management boards in the trucking industry pass upon employer subcontracting proposals, approving some and modifying or turning down others. Whether the arrangement grew out of the *Town & Country-Fibreboard* line of decisions did not affirmatively appear.

These results suggest, at the least, that there is serious question whether *Fibreboard* is working out as the Board majority had anticipated and the Supreme Court was led to believe it might. I feel considerable concern that a major Board doctrine is regarded so widely as a meaningless bother or worse. The disrespect engendered hardly conduces compliance with other Board doctrines. In the particular area concerned, it may not only be unproductive of the intended results, but positively mischievous. Employees often are unrealistic about threats to continued employment.³¹ If the union representative sets out to bargain about keeping the work within the unit (a hopeless proposition), all concerned may neglect to formulate devices to cushion the loss that is almost sure to take place. This might lead to bargaining about the wrong issue. One management respondent indicated that this had been his experience: union members were unprepared, chagrined and embittered about the eventual discontinuance of work.

30. Of the 46 management attorneys whose clients or organizations had subcontracting problems and who answered the last question, 34 replied in the negative. The comments of several of those who knew of such changes indicated that they were referring to single instances among many subcontracting situations.

31. Several studies show that even in the face of plant shutdowns with no realistic prospects of reopening, many employees hope that their old jobs will become available and some even base job decisions on such unrealistic hopes. See, e.g., R. WILCOCK, COMMUNITY AND WORKER REACTIONS TO A PERMANENT PLANT SHUTDOWN IN A DEPRESSED AREA, U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1254 (1954).

The Board probably could not have *known* in 1962 that its *Fibreboard* decision might prove meaningless, although the majority indicated it was well aware that employers would not have to agree to abstain from subcontracting. Perhaps the majority members were naive about the possibility that an employer would change its decision once it concluded that subcontracting would be financially advantageous.³² A realistic assessment of the likelihood of an employer changing his mind, however, might have emerged from a rule making proceeding on the subject.

I suggest that, at the least, the Board should seek organized hindsight. It should have a regular research procedure for monitoring the effects of its decision in action.³³ Moreover, the rule making process offers the Board a splendid source of information on the operation of its policies. If the potential parties to such undertakings are informed of the kinds of field research in which the Board has an interest, many will undertake it. There are problems with partisan research, but once the Board establishes that it will disregard slanted questionnaires and biased samples, it probably will get what it wants.

The *Fibreboard* experience makes clear what can happen if the Board regards its task merely as one of exegesis aided by expertise in what it already knows. But the Board has several complementary tasks, including the long neglected function of actively informing itself about the changing world of many different kinds of unions, employees and managements. The term quasi-judicial agency may mean less than a court in terms of authority; but it also should mean more than a court in terms of information gathering.

32. After all, the employer has unusual initiative in the situation both in proposing and in implementing the change after bargaining to a deadlock. The Board and Supreme Court both regarded *Order of Railroad Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), as dispositive of whether discontinuance of unit work is a mandatory subject of bargaining. The *Chicago & Northwestern* case involved the propriety of a federal court injunction restraining union action in support of a demand that the carrier bargain over a union-proposed contract provision not to abandon agencies (stations) without an agreement. That such an issue may be a mandatory bargaining subject under the Railway Labor Act, as the Court indicated does not mean necessarily that something somewhat similar should be so classified under the NLRA. Under the former the union has real bargaining power due to its ability to prevent a carrier from changing its operations until time-consuming bargaining procedures are exhausted. In the NLRA situation the union is virtually powerless in most situations. Once the employer bargains to impasse, it may put the change into effect; *NLRB v. Crompton-Highway Mills*, 337 U.S. 217, 225 (1949); *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963); *Pacific Gamble Robinson Co. v. NLRB*, 186 F.2d 106 (6th Cir. 1950). Under such differing rules of the game, bargaining can mean markedly different things. Concluding that one is just like the other can result only from a lack of information or a lack of analysis.

33. The Board should take its case for a research program to Congress. And if the labor-management community is interested in realistic Board decisions, it ought to support such a program.

I suggest that an enormous number of Board doctrines are based upon untested suppositions. For example, we have had more than twenty-five years of litigation about organizing activities on and off company property but little data on how employees actually react to various organizing devices. We simply do not know what makes an employee feel fear in election situations.³⁴ We do not even know whether substantial groups of employees regard Board elections as truly secret. If many do not, the whole Board election process is askew.

What the Board needs is a body of information it has not been getting. Whenever the Board is able to obtain such information, however, the data and conclusions should be subject to critical commentary by the affected public and interested critics *before* the Board acts upon it. For that task, formal rule making on notice seems indispensable.

D. *Communication from Board to Bar*

Beyond the problem of how the Board informs itself in order to reach its own decisions is the problem of how the Board informs the labor bar of the meaning of its decisions once they are made. An agency like the NLRB, which has the authority to interpret the law, also has the obligation to communicate the law's requirements in such a way as to maximize ready understanding, and hence observance, of them.

I developed a questionnaire to ascertain (among other things) the extent to which labor lawyers obtain accurate information about developments in labor law and feel adequate to their counseling tasks. I first

34. Although Professor (now Dean) Bok's analysis of the problems and issues involved in Board election proceedings is superb, it has, I suggest, a major flaw. He wrote: If the Board were to rely upon evidence obtained from the voters themselves, it would be necessary in a disputed election to elicit testimony from a large number of individuals in order to determine the actual (net) effect of particular campaign tactics, for although some employees may be intimidated by coercive tactics, others may vote against the party indulging in such behavior due to motives of resentment. *See, e.g.,* Butler, Factors Affecting Trade Union Organizing of Manufacturing Firms in Iowa, 1946-1957 (unpublished Ph.D. thesis, Univ. of Wisconsin (1959)). Hence, very cumbersome investigations would have to be made in a large number of cases. Moreover, the testimony received would often be unreliable both because voters may be largely unaware of the true reasons for their ultimate decision and because testimony might be slanted due to fear of reprisal from the employer of a desire to assist the union's cause.

Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 40, n.8 (1964).

It is not necessary to query voters in each election. The results of such an enterprise could be misleading for the reasons put forward by Bok. But field research could elicit information about what kinds of communications register with employees, a major point of dispute now resolved primarily on the basis of supposition. In a well-designed survey, the respondents will not be aware of the thrust of the inquiry. My favorite example of good research design is that of subjects led into a room full of wires and a wired chair in which they were to be seated. The subjects were told that there was some electrical trouble and that when it was untangled they would be brought back to be tested. They were asked to wait in a designated place. The investigators wanted to study reactions to stress. The real test took place in the "waiting" room unbeknownst to the subjects.

interviewed eight labor law specialists (four representing management and four, unions) in different cities and pre-tested the questionnaire. Then I mailed the questionnaire to almost one-tenth the membership of the American Bar Association's Section on Labor Relations Law. About 25% responded.³⁵ Of the respondents, 17% represent unions and 80% serve management (either in private practice or as house counsel). The other respondents either represent both, hold public office, or arbitrate.

Management respondents generally spend less than half their labor relations working hours on matters involving the National Labor Relations Act,³⁶ but more than half the union lawyers (a very small sample, I should note) devote 50 percent of their labor law time to this subject area. The remainder of their time is consumed by activities such as arbitration work, negotiations, and for some, considerable involvement in equal opportunity problems. Except for a handful, therefore, labor law specialists (particularly those representing management) must be informed on many non-NLRA areas of labor relations law which comprise the bulk of their practice.

A considerable amount of all labor relations legal work involves counseling, which frequently requires the provision of advice on very short notice. Respondents indicate that much advice is rendered immediately and that many problems "require" an answer within the same working day.³⁷ The questionnaire also asked:

35. The respondents were assured anonymity and most used the plain white wrappers provided for mailing their replies, a factor which I believe enhances the candor of the answers. In addition to showing whether the responding attorney represents management or unions, other characteristics such as age, length of labor practice, size of firm or staff, number of associates specializing in labor work, and name of city were obtained. These variables did not make any discernible difference in the responses concerning counseling and case decision reading habits. The kindness and sense of obligation of members who replied are greatly appreciated. Even greater thanks are due those members, including members of the Section Council, who set aside generous amounts of working time to pretest the questionnaire and discuss the problems it covered with me.

The totals and percentages reported in the text include questionnaires answered by those interviewed and some of their associates. But questionnaires of those reporting that labor law work takes less than 25% of their time were excluded. Most respondents were included.

While the questionnaire may not conclusively "prove" my argument that adjudicatory decision-making is an inadequate way for the Board to communicate to the bar, the results at least suggest such a conclusion.

36. In the management sample of 65 only one respondent reported 100% of his time devoted to NLRA matters; one reported 65%; five 60% and nine 50%; and the rest reported lower percentages. About two-thirds spend a third or less (mostly less) of their labor relations working hours on NLRA activities.

37. Over 40% of the respondents indicated that 50% or more of the advice they give is required "immediately." Almost all respondents reported that between 5% to 30% of such counsel must be rendered within the same working day as the request. Where the individual's responses to the three categories ("immediately," "within two hours" and "within the same working day") cumulated to more than 100%, the answers to the less inclusive categories were subtracted from the more inclusive; where this did not

What percentage of the questions on which you counsel requires advice without the opportunity for research which you consider sufficient to supply advice that is as reliable as complete research can make it?

Note that the respondent must make his own assessment. Almost half (24 out of 50) of the management attorneys answering this question believed that 50% or more of their advice was not as good as full research could make it.³⁸ Only a very few (5) were completely confident of the quality of their counsel, and all but 20% (11 out of 50) had misgivings about 20% or more of the advice given. While no attempt was made to break down this response by subject matter on which counsel was rendered, answers to a preceding question showed that counseling on NLRA matters is a substantial activity among this group. Of the nine union lawyers who answered this question, four had such misgivings about 50% or more of their counseling.

In earlier interviews with both management and union practitioners who devote full time to labor law (all quite successful and with excellent reputations), many declared that they were under the gun to supply substantial amounts of quick advice which resulted in guesswork, not simply slight uncertainties. Probably the misgivings of questionnaire respondents are of the same import. If the advice sought really was required within the time limits imposed by the client, it appears to be impossible to supply completely reliable legal advice in the actual conditions of labor law practice. Although the questionnaire responses (except in a few instances) do not make clear the areas of labor practice where the basis of counseling is shakiest, one can expect that counseling on NLRA matters has its fair share of dubiety—perhaps more than in other areas,³⁹ given the enormous and inexorable flow of decisional material.⁴⁰

The question then becomes, how do labor lawyers keep themselves informed about the law? Questionnaire responses show that it is the rare lawyer who reads all of the available decisional matter, which is itself incomplete because the labor services on which they rely do not

occur, the responses were regarded as reporting the actual percentage for each category. This means that much—perhaps a majority—of counseling must be done with opportunity for no or only limited research.

38. One lawyer who set the figure at 100% wrote: "I'm not kidding."

39. Lacking similar studies for other specialists, the performance of labor counselors cannot be assessed on a comparative basis. However, on an absolute basis the labor specialists' assessment of their own performances, surely not exaggerated by pride in favor of inadequacy, would seem to necessitate attempts at improvement.

40. In thirty-four years the Board has produced over 170 volumes of decisions, each of some 1700 pages, containing several hundred decisions. In addition, there are thousands of court decisions. Each week's labor service reports brings at least dozens of both.

publish the full text of Board decisions and do not reproduce Trial Examiner Decisions. About one-third of all respondents (34 of 90) have access to the *Daily Labor Reporter*: two-thirds of those (23) use it daily; the bulk of the rest use it "often" or "sometimes." Most who answered whether they skim or read it, answered "skim." Almost all use a weekly labor service (except for the small number with scanty total labor activity who were not included in these tabulations). Principal reliance for "keeping up" seems to be placed upon the weekly summaries of new developments the several services provide. But even these are not read or even skimmed with complete regularity; quite a few practitioners (about 40%) skip issues. The patterns for keeping abreast of court opinions on the NLRA are just about the same as those for keeping informed about Board decisions.⁴¹ As might be expected, Supreme Court decisions involving the NLRA command considerable, but not universal or complete, attention. Of 104 responses, 64 indicated that all Supreme Court decisions involving the NLRA were either read or, in a minority of cases, skimmed. No respondent wholly overlooks these decisions,⁴² but when the Court denies certiorari, few go back to the court of appeals opinion to refresh their recollection.⁴³

41. About one-fourth (26.7%) read or skimmed most Board decisions as reported in a weekly service, while 34.6% attended to "some." Of the 73 responses that differentiated between reading and skimming (quite a few respondents did not differentiate), only six declared that they read all such reports and another 15 skimmed them. About equal numbers report reading "most" (11) or "some" (10), while 13 skim "most" and 17 skim "some."

42. Total responses exceed the number of respondents because of multiple answers; some indicated combinations such as "skimmed most" and "read some." The answers were distributed as follows:

Responses			Responses Differentiating Between Reading and Skimming			
All:	64	61.54%	All:	Read	42	77.78%
				Skim	12	22.22%
Most:	28	26.92%			54	
Some:	12	11.53%	Most:	Read	15	68.18%
				Skim	7	31.81%
					22	
None:	0	-0-	Some:	Read	6	66.67%
	104			Skim	3	33.33%
					9	
43. Responses			Responses Differentiating Between Reading and Skimming			
All:	7	7.52%	All:	Read	1	33.33%
				Skim	2	66.66%
Most:	11	11.83%	Most:	Read	3	50%
Some:	44	47.31%		Skim	3	50%
					6	
None:	31	33.33%	Some:	Read	8	28.57%
	93			Skim	20	71.43%
					28	

In my pre-questionnaire interviews, several lawyers expressed the view that they limit their reading because of scarcity of time, not because they regard the omitted material as irrelevant to their tasks. Some undoubtedly make decisions based upon clearly understood priorities, but most indicated that they read Board and court decisions concerning the NLRA whenever they have time left over from other non-deferrable work. Several indicated that when their backlog of unread reporters gets too large, they forget that batch and start with the current reporter, hoping, vainly as it turns out, to do a better job of keeping up thereafter.⁴⁴ Of course, some can consult partners and other associates, but the respondents' lack of confidence in their counseling indicates that this does not fill the preparedness gap.

All in all, these activities constitute a valiant effort at "keeping up" which nonetheless indicates that labor practitioners can be aware at any moment of only a fraction of the decisional material and commentary available.⁴⁵ The considerable misgivings expressed over the reliability of their advice suggest that the level of preparation on NLRA matters

44. Only a minority of respondents answered the questions indicating the time lapse since they last read the weekly service issue of Board decisions. Most of them were reasonably current. However, interviewees report the phenomenon described in the text. And in several oral presentations of the subject, this description has been met with laughs of recognition followed by cocktail party confirmation that that's the way it is. Indeed, a stack of unread weekly service reports is an almost standard feature of the labor lawyer's office.

45. Law reviews do not seem a major source of information to management practitioners about NLRA matters. The *Labor Law Journal* and the ABA Labor Section's publications get a fair amount of attention. Practitioners seem to favor a law review in their own state or region although neither the contents pertaining to the NLRA nor the law depend upon geography.

Of the 96 respondents the following indicated some use (most did not indicate frequency or the nature) of the designated law reviews.

Journal	Number	Percent
Harvard	53	55.20
Yale	30	31.25
Michigan	21	21.87
Columbia	18	18.75
California	9	9.37
Own School's	32	33.33
In state	28	29.16
Other	13	13.54

The *Labor Law Journal* gets some use from 59 (61.45%) of the respondents; of those indicating (43), 27 read it and the other 16 skim. The *Monthly Labor Review* received some attention from 30 of the 96 (31%) respondents. The *Industrial and Labor Relations Review*, respondents report, is used in some fashion by 22 (22.91%) and *Industrial Relations* by 11 (11.45%).

Annual reports of the American Bar Association Section of Labor Relations Law, which summarize the preceding year's developments in several areas, including Board and court decisions under the NLRA, receive the attention of 73 respondents (76.04%). These publications are now published in August and cover up to the preceding Spring. Of course, Association members are more likely than non-members to use Section materials.

is not equal to lawyers' needs—or at least the needs of those counseled. Put another way, the unrefined case flow is unmanageable.⁴⁶

It is desirable that labor specialists be more fully informed about authoritative interpretations of the Act. A major way of accomplishing that end would be to put such material in a form that can be digested and mastered by practitioners in the time they actually have available for the task. If the Board's purposes are to be served and if those governed by the Act are to have a better chance of avoiding conflicts with it, a better method of communicating what the Act means should be devised. Rule making may provide a major means of improvement.

III. The Comparative Utility of Adjudication and Rule Making in NLRB Policy Formulation⁴⁷

A. *The Utility and Limits of Adjudication*

Adjudication⁴⁸ provides an incentive to parties to a dispute to make as full a presentation as possible of the evidence and arguments in defense of their interests. From the clash of adversary interests, the decision maker is supposed to become fully informed. Narrow concrete issues are posed and thoroughly explored; determination of issues beyond those absolutely necessary for resolution of the immediate dispute is avoided.

46. Even when there is time for research, the job can be formidable and full of uncertainty. See, for example the comments of Professor Shapiro, who is not readily daunted by research tasks. *Shapiro's Choice*, *supra* note 3, at 940-41.

47. No purpose would be served in replying the ground so expertly tilled by Professor David Shapiro, *Shapiro's Choice*, *supra* note 3, or Professor Cornelius Peck, *Peck's Atrophy*, *supra* note 3. This section summarizes the salient points of their excellent articles and adds some observations of my own; however, on one major point—developed in IV below—I do differ with Professor Shapiro.

The discussion in this section is of rule making under the Administrative Procedure Act, 5 U.S.C. § 553 (Supp. IV 1969) [hereinafter often referred to as APA; all later citations to the Code refer to the 1969 supplement]. Its principal characteristics are: agency announcement, in the Federal Register, of proposed rule making stating the substance or text of the rule to be considered; opportunity, on notice published in the Federal Register, to all who desire to do so, to submit comments on the proposal; agency statement of the rule and its justification; publication in the Federal Register of the authoritative text in a systematic fashion.

Adjudication, in this text, does not always mean APA adjudication, because representation cases are exempt from APA adjudication requirements. However, unfair labor practice procedures must conform to these requirements. What is meant by adjudication is a formal hearing on notice to named parties of the matter to be determined, with a decision to be made based upon the hearing record and served upon the parties whose conduct or status is affected by it.

48. Although both representation and unfair labor practice proceedings depart from the civil court adjudicatory model (e.g., administrative officials decide, in the first instance, whether formal hearings are in order; the General Counsel controls the main presentation of an unfair labor practice case against the respondent), the essentials of adjudication as already defined, *supra* note 47, are present. In the NLRB versions, adjudication gives greater protection to respondents than to those who seek to initiate proceedings, whose interests may be disposed of by informal decision. But, once at the hearing stage, they too get their say.

How helpful are these several attributes of the adjudicative process in the formulation of policy which will be applied to future parties similarly situated and which must fit the realities of labor-management relations?

The case-by-case approach, of course, enables the agency to consider issues with care, exploring and testing each piece of new ground before it proceeds. It also permits adjustments and refinements as criticism and experience recommend. But the method is largely haphazard.⁴⁹ Issues do not arise in any logical order and the information provided may come in bits and pieces that do not make the same sense as when found in the whole.⁵⁰ Under these circumstances, individual litigants can hardly be expected to be aware of the larger questions at issue, nor to be able to muster the data necessary for their full exploration.⁵¹

We have been conditioned to the view that case-by-case development guards against premature generalization,⁵² but there is at least an equal and opposite danger of excessive particularization. A distorted emphasis upon the dominant factors in particular cases which have been decided tends to stunt the growth of balanced and flexible doctrine. It is a fact of legal life that when confronted by a problem in which the law is uncertain, counsel will attempt to bring his case (through his client's actions or his own arguments) within the confines of what little doctrine there is. This tactical approach means that instead of confronting an expanding panorama of industrial experience as it receives more cases involving an emerging problem, the Board often confronts a steady stream of lawyers who seek to persuade it that what has happened is

49. In the case of the NLRB, a measure of control is exercised by the General Counsel who has wide discretion in deciding which unfair labor practice cases to process formally. This kind of supervision is absent from the representation area. In both he cannot control the order in which cases are filed.

50. Professor Fuller calls the solution to such a problem a "polycentric task," that is, one in which the parts of the whole are so interrelated that any decision on one part affects all the others; hence all must be decided in concert. Fuller, *Adjudication and the Rule of Law*, in R. FALK & S. MENDLOVITZ (ed.), 3 *THE STRATEGY OF WORLD ORDER* 440, 442-43 (1966), reprinted from 1960 *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 1.

51. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 725-26 (4th ed., 1960) makes the same point very incisively. Some parties use non-expert counsel, and the proceedings probably suffer.

52. I doubt that the arguments can be more skillfully or elegantly put than in A. BICKEL, *THE LEAST DANGEROUS BRANCH* 169-183 (1962). While there is much to be said for the "simmering" process he advocates, one looks mostly in vain for Board decisions that finally yield the "enduring solution" to which the "simmering" is the advertised prelude. *Id.* at 176. Indeed, I suggest, enduring solutions simply are not to be had in a society as dynamic as ours. The problems, or at least their manifestations, change too rapidly for the case-by-case process to keep pace. Rather, the method may institutionalize a state of permanent indecision. Usually we must determine policy on what we know at the time a decision is required; even if that knowledge is incomplete, it ought to be as full as systematic inquiry can make it.

governed by the Board's smidgen of doctrine. Such a process offers limited enlightenment on industrial change. Undoubtedly, the case-by-case method presents some advantages, but one must question whether it *always* is the *best* method for policy formulation, as the Board insists.

At least one commentator has defended the utility of adjudication in establishing clear standards of general applicability in the area of labor relations. While advocating greater use of the rule making power, Judge Friendly lauded the NLRB's achievement in enunciating broad standards through adjudication.⁵³ It should be observed, however, that he comes to Board decisions as an appellate judge who tends to see the Board's products at or near their best, thanks to the advocacy of the General Counsel's excellent appellate section. Furthermore, he can generally take whatever time is required to make sense where subtlety often outweighs directness. Quite apart from his rarified vantage point, however, Judge Friendly's examples raise a question whether the Board's performance is as good as he says it is. He applauds the early cases, for example, which declared the basic NLRB rules concerning organizational activity on company property.⁵⁴ The former is a rather curious example since the *Peyton Packing* rule was so incomplete and since, after its initial Supreme Court approval in *Republic Aviation*,⁵⁵ attempts to build upon it were bludgeoned by the courts.⁵⁶ Indeed, practically every major Board decision in this line failed to extend or elaborate the original rules concerning organizational activity on company property. While there is no guarantee that rule making would have done better, the case-by-case approach can hardly offer a poorer advertisement.

B. *The Utility and Limits of Rule Making*

1. *Advantages*

Both the Administrative Law and Labor Sections of the American Bar Association have urged rule making upon the Board,⁵⁷ as have

53. FRIENDLY'S AGENCIES, *supra* note 3, at 36-52.

54. *E.g.*, *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943).

55. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

56. Notably, in the order of disapproval, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1958); *May Dept Stores Co. v. NLRB*, 316 F.2d 797 (6th Cir. 1963). The cases are reviewed and analyzed in Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964), and Bok, *supra* note 34; and, for special attention to the earlier cases, see Hanley, *Union Organization on Company Property*, 47 GEO. L.J. 266 (1958).

57. Indeed, in 1964 the House of Delegates at the instance of the Administrative Law Section so resolved. 16 ADMIN. L. REV. 77 (1964).

The Labor Section in 1958 prompted the House of Delegates to resolve to urge the

Judge Friendly, Professors Davis⁵⁸ and Peck⁵⁹ and some other academics.⁶⁰

The principal advantage of rule making is that it provides a clear articulation of broad agency policy. By contrast, the entire array of the Board's adjudicatory decisions on a subject often gives a diffuse, overly subtle mosaic of current NLRB doctrine. Rule making confronts the agency with the immediate necessity of declaring its policy in full. Of course, a regulation can be as airtight as Swiss cheese if it is riddled with terminology like "reasonable," "where appropriate," or "under all the circumstances"; on the other hand, it is asking a great deal of the Board to be decisive where Congress could not make up its mind. In short, even if we cannot expect perfection, rule making procedures may exert some salutary pressures toward clarification.

Clearly enunciated and properly drawn rules should reduce litigation⁶¹ by authoritatively advising the regulated what may, must, or must not be done. The Administrative Procedure Act requires that the agency publish its rules⁶² and make them readily available to all who are affected by them.⁶³ The huge NLRB staff also must know what Board policy is; their performance in informal case handling would be improved if they could be more readily certain of their agency rules. Rule making provides the agency with the opportunity to initiate changes in its own doctrine, whereas adjudication leaves this initiative to the

Board to "reconsider" its views on rule making in regard to jurisdictional and contract bar questions. 42 LAB. REL. REP. 513 (1958).

58. DAVIS' TREATISE, *supra* note 3, § 6.13 (1965 Pocket Part.).

59. Peck's Atrophy, *supra* note 3.

60. E.g., Professor Shapiro states his belief that "there are instances in which the superiority of the rule making route seems plain." *Shapiro's Choice*, *supra* note 3, at 942.

61. Concern over case load is not limited to the agencies but extends to the Federal courts of appeals. In a recent two year period, appeals involving administrative agencies contributed some 2639 cases of the 15,086 total. NLRB cases accounted for an unbelievable 1207 cases (a number about equal to half the cases decided by the Board members in the same period). Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 545 (1969). But the courts of appeals decide them at a decidedly slower rate: 244 in fiscal year 1967. 32 NLRB ANN. REP. 225 (1968). While Prof. Carrington understandably concentrates his analysis and proposals upon rationalizing court organization to handle the case flow, there is a good deal to be said for contraceptive efforts at the agency stage to prevent overproduction of cases. Rules capable of resolving key issues in large numbers of potential cases might perform that function.

62. Note, *The Federal Register and the Code of Federal Regulations—A Reappraisal*, 80 HARV. L. REV. 439 (1966).

63. The Federal Register is not breakfast-time reading for the American public nor even those with substantial interests affected by federal agency regulation. Lawyers and clients do not scan it to ferret out new regulations of interest to them. Rather, like the statutes at large, and session laws, it (along with the permanent version, the *Code of Federal Regulations*) is the official and authoritative version and record of agency regulations. In turn these are disseminated to the interested public through specialized, usable services and journals which organize, publicize, and provide the gist, and sometimes the corpus, of the agency rule.

few private parties who have the resources, the hardheadedness, or the innocence to persevere in the litigation process.

The procedures of rule making have broad utility. In the first instance, the agency must give notice that it is contemplating rule making and declare the proposed rule or state its substance or subject matter. This notice, carried by specialized publications to those who are potentially affected, sets in motion the processes of private groups who will seek to advance their own policy by mobilizing their sources of information and experience and making them available to the agency. In a rule making procedure, the Board can call upon the talents of many parties and lawyers; in adjudication it rarely hears others than the immediate parties to the case. While many submissions may seem to duplicate or overlap, each will give the Board some idea of the extent and nature of the industrial sectors which would be affected by the proposed rule, and the variety of views expressed will tell the Board about possible complexities in the rule as well as its interrelationship with other rules. In rule making, all potentially affected have the opportunity to shape the initial decision before the agency attitude hardens, whereas adjudication often burdens non-parties with persuading the agency to overrule or modify a precedent.

If the agency affords itself the opportunity, the contemplated rule itself can be the subject of critical comment. Agencies should not be content with merely general questions. With the possible exception of a case which must be decided immediately, public discussion of the actual language of a rule before it is promulgated is always desirable, even if more than one submission must be made to the affected public. Dissection and comment by interested parties can focus remedial attention upon provisions whose impact may not be fully appreciated by the agency. Such a procedure can avoid a full generation of litigation over ambiguities and inconsistencies.

How Board members allocate their time and talents is a major problem in the administrative process. Rule making would require them to focus upon a comparatively few major policy issues rather than spread their attention thinly over hundreds of litigated cases. Although the essence of their talent is their informed judgment, it cannot reasonably be brought to bear on each (nor perhaps any) of the 1200 contested cases they nominally decide each year. When a major case comes before the the Board, its members often show a tendency to fasten onto peculiarities of the case in order to justify a new departure. This puts fuzz on the "rule" which the industrial community needs to guide its actions. The synthesizing talents of the Board members and their staffs, there-

fore, would seem best concentrated upon major policy—explicitly considered as such and from which they cannot hide in the thicket of case peculiarities.

The question of uniform treatment should be considered briefly. As Professor Shapiro points out,⁶⁴ rule making tends to uniform treatment while adjudication may result in unequal treatment due to unrationalized fact distinctions. I would observe, however, that the rigors of rule making uniformity can be ameliorated by interpretation in adjudication, while the mere existence of a rule will forestall many potential cases or provide the basis for summary disposition of many others. Professor Shapiro also argues that potentially affected parties would more readily contest rules to which no immediate risk attaches rather than go to litigation in a concrete case with the potentiality of an adverse order.⁶⁵ Even if this were so, and I am not persuaded that it is, such challenges need not result in any net delay, since both the agency and the public can find out early rather than late the validity of the agency's doctrine.

Moreover, I would add, quite a few employers, employees, and insurgent unions are represented by counsel lacking experience in the field. They require means for ready orientation in a field that lacks a comprehensive, up-to-date treatise (it is widely considered to be impossible to produce such a treatise) if they, adverse parties, and the agency are not to waste a lot of time, energy, and resources.

One policy area in which rule making is particularly important—since cease and desist orders after the commission of unlawful acts often are ineffective—is the area of affirmative duties. Many agencies, especially those endowed with licensing power, mandate affirmative actions by the regulated. An agency like the NLRB, however, thinks and acts primarily in terms of interpreting its statute to define improper activity or to provide authoritative answers to disputes between parties (*e.g.*, what is an appropriate unit for bargaining). On the isolated occasions when the Board has attempted in adjudicatory proceedings to lay down requirements of affirmative conduct, it has failed badly.⁶⁶

Unfair labor practices proceedings have proven of doubtful value in discouraging the commission of unfair labor practices and undesirable representation election campaign conduct. Some informed observers believe that some major abuses to which the statute was directed have

64. *Shapiro's Choice*, *supra* note 3, at 935.

65. *Id.* at 941.

66. *E.g.*, *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961).

never been seriously dented, let alone stopped. The closed shop allegedly persists in effect in several industries.⁶⁷ Employers discriminate against union adherents with relative impunity, hardly deterred by the prospect of back pay orders in a near full employment, high profit economy. Much bargaining is *pro forma*.

Perhaps these, and other chronic illegalities cannot be eradicated or even substantially reduced by the Board no matter what it does. However, rules prescribing affirmative conduct may contribute to amelioration where the old individual case formula has failed to produce notable improvement. Professor Peck stated what many of us already believed to be the proper approach to minimizing the potentiality for discrimination in hiring halls: a rule making investigatory hearing culminating in rules setting standards to insure fair treatment of all applicants for employment. The rules that emerge could hardly help but be more realistic than those the Board concocted *in camera* and they probably would be enforceable.⁶⁸

Many of the comparative advantages of rule making rather than adjudication as a means of policy making assume that the Board will utilize the rule making procedure effectively. If the Board holds a rule making hearing, for example, but does not carefully study the views of those who contribute them, the advantage of a variety of viewpoints is nullified. Similarly, if the Board does not use rule making aggressively to reduce some of the sources of litigation, the continuing demands of heavy litigation will prevent the Board from concentrating on major policy. The settled habits of union and management advocates, the comparatively weak demand for rule making, and most importantly, the almost undeviating rejection of rule making by all members of the Board during its thirty-four years of operation make the potential effectiveness of a new approach subject to some doubt.

2. Board Objections Stated and Assessed

The Board has criticized rule making as a "cumbersome process of amending substantive rules that necessarily impedes the law's ability to respond quickly and accurately to changing industrial practices."⁶⁹ As

67. See, J. GOLDBERG, *THE MARITIME STORY* (1958); W. HADER & H. LEVINSON, *LABOR RELATIONS AND PRODUCTIVITY IN THE BUILDING TRADES* (1956).

68. *Peck's Atrophy*, *supra* note 3, at 746-51. One court of appeals suggested the possible utility of rule making in the hiring hall situation. *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 598 (6th Cir. 1960).

69. *Ervin Hearings*, *supra* note 3, at 1663. For a fairly full authoritative exposition of the Board view see F. McCulloch, *Procedures Employed by the NLRB in Determining Policy*, 1964 PROCEEDINGS, A.B.A. SECTION OF ADMINISTRATIVE LAW, reprinted in *Ervin Hearings* at 1231.

compared with both representation and unfair labor practices, however, formal rule making does not appear to be unduly "cumbersome." All three processes require preliminary staff investigation, notice to parties, a hearing for the submission of evidence and an opportunity for argument. Adjudicatory proceedings, moreover, are not very different: while rule making may involve both oral and written submissions (often only the latter), written briefs must always be allowed after an adjudicatory hearing. Routine cases aside, adjudication procedures consume substantial blocks of time. In *Excelsior*,⁷⁰ for example, the first election was held in 1963, the regional director issued his report in January, 1964, and exceptions were filed soon thereafter. The Board did not formally take the matter in hand until April 2, 1965, when it ordered oral argument for May 20, 1965. Its decision issued on February 4, 1966, after nine and one half months gestation. "Stately" seems the kindest term to characterize the pace of such adjudication. Rule making could hardly be less "quick."

Since adjudication and rule making are relatively equal in time consumption, the crucial question in comparing the two is which tends to induce informal disposition of cases and thus cut down on litigation. Board actions in the area of jurisdictional criteria and contract bar, although normally decided in "cases," have resulted in what are tantamount to rules. Experience indicates that the first promulgation of the jurisdictional criteria reduced litigation on this issue.⁷¹ On the other hand, adjudications which do not develop clear criteria but stress doctrinal subtlety and fasten upon fact distinctions, as the Board cases so often do, probably *encourage* litigation. To the extent that certainty and clarity can be achieved by rules, I suggest that litigation will be discouraged and dismissal and settlement by the Board regional staff greatly facilitated.

Board members and other high NLRB officials apparently do not feel that clarity is a problem in NLRA doctrine as developed through the adjudicatory process. One NLRB regional director asserts that the bulk of the agency's cases do not involve difficult legal questions so that the clarification of doctrine, if any, achieved by rule making would yield little advantage. Like many other senior agency officials, however, this

70. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

71. I am not aware of supporting data on this point because records of issues raised in proceedings, other than the sections invoked in unfair labor practice cases, are not published. However, as an attorney in a Board regional office at the time, I can report that the publication of jurisdictional criteria eliminated most of the litigation on the subject, which frequently had precipitated time consuming wrangling and proof. Thereafter, the issue was the subject of stipulations and routine fact finding, by and large. Published Board decisions thereafter were not much concerned with the problem.

director's Board experience spans most of his professional career, every day of which has been devoted largely to NLRA problems. Even the most expert private practitioner, who must deal with many other kinds of problems, cannot match such familiarity. Nor does the practitioner command the resources available to regional directors. Hence the familiarity of senior administrative officials with Board lore may lead to their misperception of the value of clarification and codification to those subject to the law. Legions of lesser officials who must process cases do not have the experience of most regional directors, nor are they generally as talented. These subordinate officials, who process the major portion of the Board's work, arguably would perform their functions more adequately and rapidly if many of the Board's fragmented pieces of doctrine squirreled away in innumerable cases, were collected, organized, and rationalized in rules. Private parties often violate the law or press spurious positions for tactical purposes (*e.g.*, in attempts to delay union recognition or to force bargaining concessions), more certain and speedier disposition of cases by subordinate officials would reduce the advantages of such tactical maneuvers.

Quite apart from the asserted clarity of adjudicated doctrine, Board officials claim that the issues before them simply do not lend themselves to rule making. Board Chairman McCulloch for example argues that aside from jurisdictional criteria and contract bar rules, little else on the Board's indigestible menu is subject to rule making. He asks:

is broad rule making really suited to the multitude of variant fact patterns in which the Board must determine such matters as (a) the extent and the limits of the duty to bargain in good faith, for instance in reference to subcontracting, plant transfers and shut-downs; . . . (c) under what circumstances employer or employer association lockouts do not trench on employees' rights; (d) the degree of deference to be accorded arbitration awards, or the mere availability of a grievance-arbitration procedure; (e) nice distinctions between primary and secondary union conduct, at plants, or separate gates, or construction sites, or roving situses; (f) the content of the bargaining representative's duty of fair representation and the consequences of its violation; (g) the limits presumptively appropriate for employers' no-solicitation and no-distribution rules; (h) the thorny question of alleged representation election misconduct, or so-called "free-speech"; (i) the voting rules for economic strikers; (j) the correct construction of new statutory provisions concerning organizational picketing; hot-cargo contracts and secondary hand-billing; etc.⁷²

72. McCulloch, *supra* note 69, at 1241.

Some of these may defy rule making. But I wonder. Indeed, the frequent subtlety and confusion of the case decisions cry out for the harmonization that rule making could provide. But the Chairman also declares:

The process of case-by-case adjudication over the past 29 years on the other hand has achieved a clarification of standards under the law which some forget. If you will consider the scope and variety of the provisions of our Act, it is suprising how relatively small is the area of uncertainty.⁷³

One would suppose that much of this vast area of claimed certainty could be captured in intelligible rules. On the other hand, if most Board doctrines *cannot* be reduced to cogent organized explication, the adjudicatory method has been a bust.

The Board's characterization of the rule making process as "inaccurate" is unclear in itself. Apparently it is *not* referring to accuracy in terms of fitting a ruling to the facts of an individual case. But if the Board is to react "accurately to changing industrial practices," it should have before it as complete a picture about the nature and details of the problem as possible rather than the keyhole view afforded by individual cases.

If deciding case facts against such a large panorama is what the Board means by "accuracy," the *amicus* device does not provide adequate additional range to the adjudicatory method. Any limitation upon participation excludes potentially relevant experience, which in an economy as vast, complex, and varied as ours, should be known as completely as possible before an agency promulgates policy. The adversary system depends not only upon rational analysis of a controversy, but also upon information and arguments which may well be solely within the knowledge of those affected. Similarly, a rule making requirement assumes that litigants in individual cases do not represent the full range of possible fact situations and arguments potentially involved in a prospective rule. The agency consults, or is required to consult with, all those sufficiently interested to present their views. Hence the exclusionary aspect of the Board's *amicus* procedure (under which it invites a few eminent non-parties of its selection to participate in oral argument and present briefs to the Board) may result in failure both to inform the Board fully and to provide those with substantial interests with the opportunity to affect agency formulation of the rule. Rule mak-

73. *Id.* at 1242.

ing seems a more hospitable and appropriate method of bringing to bear the enormous accumulated experience of Board regional office personnel; its very variety may prove useful. In any event, this invaluable potential resource has been largely frittered away—another instance of the cost of the Board's attitude that it is essentially a court.

A very different kind of objection to rule making is that it provides too easy an opportunity for rapid and radical changes of policy. Implicit in this view are two false assumptions: first, that precedent operates more powerfully in the adjudicatory process than in the essentially legislative process of rule making;⁷⁴ and second, that the adjudicatory process contains a built-in lag which precludes such rapid policy changes. Those familiar with legislatures know that precedent is a powerful force in facilitating or retarding change, and is often invoked both in aid and in opposition to legislative measures.⁷⁵ On the other hand, the power of precedent in agency adjudicatory proceedings cannot forestall policy changes resulting from major political changes. The extensive overruling by the "Eisenhower Board" and by the "Kennedy-Johnson Board" of their predecessors' doctrines make the point.⁷⁶ If new Board majorities have not staged policy changing orgies, they certainly have gobbled up precedents with relish.

The Board's generally conservative attitude toward adjudication can be explained in part by its politically vulnerable status. While other agencies have received some attention and criticism from Congress and the bar, the NLRB has been a whipping boy without rival, since it constantly decides the controversies of powerful groups with talented counsel, expert publicists, and important political allies. One may surmise that the Board has reacted by adopting the mechanism least subject to attack—the decision of individual cases on the narrowest possible ground, riveted to the factual peculiarities of the particular

74. But see *Shapiro's Choice*, *supra* note 3, at 946-47.

75. For example, during the 1957 Congressional debates on that year's Civil Rights Act, the unfortunate experiences of labor organizations at the hands of the federal judiciary prior to the Norris-LaGuardia Act was constantly invoked in opposition to the use of the federal courts' civil contempt power without jury trial in aid of civil rights.

As one who participated in and observed that legislative struggle as a Senatorial aide, I offer the conclusion that while some invoked the precedents cynically, others were sincerely disturbed by them. The net effect was curtailment of the original proposals on court contempt power, despite majority support for the objectives of the overall bill.

76. It would be an act of supererogation to rehash yet again the stories of these developments. Several writers have described them, e.g., Professor Peck in *Ervin Hearings*, *supra* note 3, at 135, 136, 141, 149 (1968). This presentation also was published as Peck, *A Critique of the National Labor Relations Board Performance Policy Formulation: Adjudication and Rule Making*, 117 U. PA. L. REV. 254, 255-56, 263-64 (1963).

E.g., the controversial Breeding Transfer Co., 110 N.L.R.B. 493 (1954), involved revision of the Board's jurisdictional criteria—essentially a rule making operation in the guise of adjudication.

proceeding, and often heavily dependent upon findings of fact supported (in Trial Examiners' Decisions) by almost stream-of-consciousness detail. Review of such decisions properly lies with the courts, which, although not uncritical, have sustained the Board in a high proportion of cases. Ironically, rule making might have the effect of insulating Board decisions even more effectively from judicial scrutiny and second-guessing. On the other hand, the Board apparently is afraid that rule making decisions would be rendered without elaborate fact-finding, and would focus explicitly on policy, thus bringing excessive attention from Congress, the most dangerous branch to bureaucrats.⁷⁷ Although such fears are understandable, there is no reason they could not be allayed if the Board were given adequate resources to accomplish its fact-finding task. Congress will have to provide funds for staff to do the job, and the Board will have to cut down the time it devotes to adjudicatory decisions. It is about time that the Board be put on a par with other agencies and be effectively empowered to perform and commission research efforts to probe the realities of the labor-management world. The fruits of such endeavors, of course, would be subjected to analysis and comment in the rule making proceedings before being used for policy making.

While rejecting rule making in principle, the Board is not entirely frigid to the advantages of rule making. In order to eliminate a sticky doctrinal problem, the Board has on occasion resorted to what might be called "rule making by adjudication."⁷⁸ The *Excelsior*⁷⁹ decision was the result of such an effort.

IV. The *Wyman-Gordon* Decision and Its Forbear, *Excelsior*

A. *The Excelsior "Rule"*

Excelsior represents the latest stop on a long and tortuous path traveled by the NLRB in its efforts to provide union organizers with some means of matching employers' ready access to their employees.⁸⁰

77. As Professor Summers has pointed out, some Board members have pretended that they merely apply the statute, thereby avoiding, or seeking to avoid, criticism directed to policy. Summers, *supra* note 9, at 95-98. Judge Friendly suggested, but with a different purpose, that the proper method of challenging an agency rule is to seek agency reconsideration or Congressional reversal. FRIENDLY'S AGENCIES, *supra* note 3, at 7.

78. E.g., *Breeding Transfer Co.*, *supra* note 76.

79. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). The Board heard and decided it with *K.L. Kellog & Sons*.

80. That complicated story lies beyond this essay. The essentials are summarized and analyzed in Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); and Bok, *supra* note 34, at 92-106 (1964).

In *Excelsior* and its companion case, the employers had mailed anti-union material to employees prior to a Board election. Thereafter, in each case, the union requested the employer to provide a list of employee names and addresses in order to make possible the mailing of rebuttal material, and the employer refused. Both unions lost the elections and filed objections which included the mailing list refusal; in both cases the regional directors recommended against sustaining that ground. Before ruling on exceptions to these regional directors' reports, the Board ordered oral argument and gave the parties leave to file briefs directed to three questions concerning union access to mailing lists. The Board also invited several non-parties to file *amicus* briefs addressed to the questions. One union that had not been invited also filed a brief, and the Board accepted it.⁸¹

The Board decision announced: "[W]e now establish a requirement that will be applied in all election cases."⁸² Thereafter, employers were to be required to supply, within seven days of the direction of election, a list of employee names and addresses to the regional director who would make it available to "all parties." But the requirement was *not* applied to the parties before the Board, and the union election losses were left undisturbed; the effective date of the "rule" was set for thirty days after the *Excelsior* decision to insure party knowledge of their "rights and obligations."⁸³ In subsequent litigation involving the list issue, the Board generally prevailed until the *Wyman-Gordon* case.⁸⁴

B. *The Wyman-Gordon Case*

In a representation hearing the Wyman-Gordon Company contested the validity of the *Excelsior* doctrine⁸⁵ and declined to honor the regional director's order to produce the name and address list in connection with an election. Nonetheless, the election was held, and "no union" received a majority of the votes cast. Both the petitioning and intervening unions filed objections on the ground of non-compliance with the *Excelsior* rule. The regional director sustained the objections and ordered a new election; the Board denied the employer's appeal

81. Letter of Howard LeBaron, Associate Secretary of the NLRB, to the author, dated July 7, 1969, in response to a query about communications from volunteers.

82. 156 N.L.R.B. at 1239.

83. 156 N.L.R.B. at 1240. The Board decision repeatedly referred to its "new rule." 31 NLRB ANN. REP. 61-3 (1966) also refers to the Board's "rule," as does the 32 NLRB ANN. REP. 67 (1967).

84. The Board denial of review of the regional director's decision in that case is unreported.

85. Brief for respondent at 3, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969):

on the ground that "it raises no substantial issues." In connection with the new election, the regional director again directed the company to supply the *Excelsior* list⁸⁶ and sought a mandatory injunction enforcing that order or, in the alternative, enforcement of a Board subpoena for the list. The district court enforced the subpoena,⁸⁷ but the court of appeals reversed.⁸⁸

Naturally enough, by the time the Supreme Court undertook to decide⁸⁹ the issues generated by *Excelsior*, the views of the lower courts differed.⁹⁰ But, so did those of the Justices. Hence we must puzzle our way through a plurality opinion (written by Justice Fortas, joined by Chief Justice Warren, and Justices Stewart and White), a concurrence (by Justice Black, joined by Justices Brennan and Marshall) that regards all but the result from a point 180 degrees away from that used by the first four Justices, and separate dissents by Justices Douglas and Harlan that harmonize with each other and, surprisingly enough, see the basic issue of rule making as the Fortas foursome does.

The Fortas opinion views the major issue as a question of whether the Board "has discretion to promulgate new rules in adjudicatory proceedings, without complying with the [rule-making] requirements of the Administrative Procedure Act."⁹¹ The answer given is not quite clear. The opinion condemned what was done in *Excelsior* because the Board did not abide by the APA rule-making procedures. Nor was the substance of the APA requirements satisfied: only a select group was invited to comment, whereas the APA requires announcement to all and opportunity for all to comment on a proposed rule; furthermore, the notice of hearing did not state "the terms and substance of the rule."⁹²

The opinion rejects the proposition assertedly argued for by the Solicitor General that the *Excelsior* rule is "a valid substantive regulation," binding in the later case upon the Wyman-Gordon Company

86. Brief for petitioner at 4, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

87. *NLRB v. Wyman-Gordon Co.*, 270 F. Supp. 280 (D. Mass. 1967).

88. *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394 (1st Cir. 1968).

89. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

90. Four circuits had upheld the *Excelsior* rule, explicitly approving the procedure employed. Two other circuits approved the rule but had not passed on the method of adoption. *Id.* at 762, n.1.

91. *Id.* at 764. In all fairness, it should be noted that the government attempted to finesse this issue.

92. *Id.* at 764. However section 4(b)(3) of the APA would be satisfied by a "description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). In *Excelsior* the questions on which the Board invited comment would seem to meet that requirement.

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because it was promulgated in a valid adjudicatory proceeding.⁹³ Mr. Justice Fortas observed that cases adjudicated by agencies "serve as vehicles for the formulation of agency policies," but, he declared, this phenomenon falls short of the Solicitor General's suggestion that "policies announced in adjudication are 'rules' that . . . must without more, be obeyed by the affected public."⁹⁴ He seemed to object particularly to the fact that in *Excelsior* the Board did not apply the new standard to the parties to that proceeding.⁹⁵

Nonetheless, the plurality opinion held that the order in *Wyman-Gordon* to furnish the name and address list was valid and enforceable because it specifically directed a named party to do so in the particular adjudicatory proceeding.⁹⁶ It also declared that given the Board's broad "discretion to ensure the fair and free choice of bargaining representatives," the company attack on the substance of the rule lacked merit. Although the Board's procedure was incorrect, the Fortas opinion declared the *Excelsior* rule enforceable by subpoena because "[t]here is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand."⁹⁷

93. Fortas's characterization may not be a wholly accurate rendering of the Solicitor General's argument that, according to *SEC v. Chenery Corp.*, 392 U.S. 194 (1968) [hereinafter referred to as *Chenery II*], an administrative agency may, in the exercise of its discretion, choose either rule making or adjudication in the formulation of "statutory standards." See pp. 605-607 *infra*.

94. 394 U.S. at 765-66.

95. *Id.* at 765.

96. As Mr. Justice Black's concurrence pointed out, the APA exempts NLRB certification proceedings from the sections governing adjudications. 5 U.S.C. § 554(a)(6). Hence, the hearing and decisional procedures in representation cases are not in strict truth adjudicatory in the APA sense; unfair labor practice proceedings are. The absence of these safeguards in representation cases of the kind involved in *Wyman-Gordon* drew no mention in the Court's decision nor in the briefs.

One would have expected some exploration of the possible relationship between the APA adjudication exception and the applicability of other APA provisions. An easy answer is that the absence of a similar exemption from the rule making requirements argues for their application. This assumes a conscious choice by Congress (really the drafters). The lack of adjudication safeguards may argue for some party protections that only the rule making provisions can supply. On the other hand, the exemption implied great agency discretion, limited, however, by the National Labor Relations Act provisions governing such proceedings in section 9, 29 U.S.C. § 159. Perhaps the representation election process is meant to be subject only to the APA requirement that procedural rules be published.

97. 394 U.S. at 766-67, n.6.

The *Excelsior* "rule" is quite inadequate and has required supplementation. One would hope—and I would expect—that a full canvass of views would result in a fuller expression of the Board's requirements. Mr. Justice Fortas, in my judgment, was quite wrong that rule making would produce the same product. On the contrary, the *Excelsior* rule exhibits the partial nature of case-promulgated doctrine. It partakes of the Board's habit of engaging in a stately intellectual striptease, which never quite makes full disclosure—the process may be stimulating but it is decidedly unsatisfying.

The two dissenters endorsed Justice Fortas's view that the APA commanded rule making in *Excelsior*. Mr. Justice Douglas stated:

I am willing to assume that, if the Board decided to treat each case on its special facts and perform its adjudicatory function in the conventional way, we should have no difficulty in affirming its action. The difficulty is that it chose a different course in the *Excelsior* case and, having done so, it should be bound to follow the procedures prescribed in the Act⁹⁸

He endorsed the Harlan view that rule making, not adjudicating, occurs when an agency makes "a rule to fit future cases *Excelsior* is designed to fit all cases at all times. It is not particularized to special facts."⁹⁹ Mr. Justice Harlan emphasized the future operation of the "rule" as the touchstone for deciding that rule making is required. Both dissenters objected that approving enforcement of the subpoena because *Wyman-Gordon* had been ordered to produce the list in an adjudicatory proceeding "trivialized" (in Justice Harlan's phrase) the APA rule making requirement.¹⁰⁰

The concurrence by Mr. Justice Black, joined by Justices Brennan and Marshall, provided the votes for enforcing the Board's order in *Wyman-Gordon* but on grounds wholly different from those of the plurality opinion. According to the concurring opinion, an agency can in adjudication reach binding precedents which guide future conduct in much the same way that rules do. Finding nothing in the National Labor Relations Act or the Administrative Procedure Act to require the Board to use one method to the exclusion of the other,¹⁰¹ the concurring opinion endorsed the results reached by the adjudicatory method but rejected the plurality view that if rule making were necessary, it could be dispensed with for the purposes of this case.

Justice Black objected to what he regarded as the plurality opinion's requirement (seemingly endorsed by Mr. Justice Harlan, I would add) that adjudication be confined to cases in which any policy enunciated is applied to the parties to the case decided. This, he argued, requires

98. *Id.* at 775-76.

99. *Id.* at 777.

100. *Id.* at 781-82. Harlan invoked *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*), for the proposition that when an agency decides a case on incorrect grounds it is not the Court's function to find a proper basis for it. He did not make the Fortas assumption that a remand would make no difference.

101. Citing *Chenery II*, *supra* note 93. As noted at p. 606 *infra*, the decision did not involve the APA.

the Board to determine *before* it hears the case whether it will decide to utilize any new doctrine retrospectively or only prospectively.¹⁰²

C. *What Did Wyman-Gordon Decide?*

1. *Must the Board Use Rule Making?*

As a practical matter *Wyman-Gordon* may mean no more than that the Board can continue to make “rules” without rule making and can compel unwilling parties to comply if it goes through an adjudicatory proceeding. While that might seem to enable recalcitrant parties to force the Board to an adjudication in every case, that is precisely what the statute already provides in both representation¹⁰³ and unfair labor practice¹⁰⁴ cases. Even in the face of rules promulgated under the APA, a party could insist upon the full hearing procedures. The Board, however, disposes of the overwhelming bulk of its case load, either by administrative dismissal, withdrawal (the latter basically a face-saving device when dismissal is imminent), or settlement. Administrative dismissal based upon case precedent, such as the contract bar rules, may be open to question if not newly adopted through rule making.¹⁰⁵ Appeal from such administrative actions ordinarily does not lie. The wronged party’s lack of access to the courts, therefore, may persuade judges to forbid administrative action based upon case-promulgated doctrines.¹⁰⁶ The inability to dismiss representation petitions administratively in a systematic fashion would disrupt the Board’s operations, which already are staggering under a mammoth backlog of cases.

The plurality opinion’s conclusion that the Board must use rule making procedure, but may nonetheless require a party to take action to satisfy NLRB policy simply by ordering it to do so in a quasi-adjudicatory proceeding, is intellectually unsatisfying (and was to a

102. This choice would not be made in the first instance by the Board members but by the General Counsel’s delegate in unfair labor practice cases and regional personnel who in the case of representation proceedings investigate the facts and consider the issues and evidence required before deciding how to proceed.

103. 29 U.S.C. § 159(c)(1) (Section 9(c)(1)).

104. 29 U.S.C. § 160(b) (Section 10(b)).

105. This possible consequence was first suggested to me by Mr. Burton Kainen, a second year law student at the University of Connecticut. Conceivably, administrative determination of unit appropriateness could be open to such attack. Decisions to issue complaints in unfair labor practice cases would not present like difficulties because of their discretionary nature.

106. See *Leedom v. Kyne*, 358 U.S. 184 (1958). In *Hotel Employees Local 255 v. Leedom*, 358 U.S. 99 (1958), the Court dealt on the merits with an administrative dismissal by a regional director that had been sustained by the Board. The *Kyne* doctrine is, however, a very limited one. *Railway Clerks v. Non-Contracts Employees*, 380 U.S. 650 (1965); *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).

majority of the court). The plurality may have felt that the logical conclusion of its finding that the *Excelsior* rule could not be adopted by adjudication would throw the Board's work into chaos. It may therefore have designed its holding to prevent the Board from having to switch suddenly from all adjudication to adjudication and rule making, but it did not endorse the continuation of adjudication as the sole method of decision-making. If this is so, the Board's exclusively adjudicatory approach is living on borrowed time.¹⁰⁷

Wyman-Gordon suggests that rule making—instead of adjudication—may be required in some circumstances, but it does not reveal how the Board is to identify those circumstances. While often desirable, one need not always understand “why,” if one understands “what”;¹⁰⁸ but both the reasoning and the consequences of *Wyman-Gordon* are as unintelligible as they are unclear.¹⁰⁹ The fragmentation of the Court suggests that the Justices divided because the resolution of the rule making-adjudication rationale remains to be explicated.¹¹⁰ In short, *Wyman-Gordon* poses more questions than it answers.

The Court's basic division centers upon the distinction between “adjudication” and “rule making” under the Administrative Procedure Act. The source of the difficulty lies in the circular definitions of the Act, which declare that adjudication is merely that which is not

107. I emphatically disagree with the conclusion in the *Report of the Committee on Practice and Procedure under the National Labor Relations Act of the American Bar Association Section on Labor Relations Law*, 1969 SECTION OF LABOR RELATIONS LAW 34, 39, that a majority of the Court “upheld the Board's right to utilize the adjudicatory method . . . in enunciating doctrines of general application.” Despite the eminence of attorneys for both management and unions who apparently endorsed that view, I believe that the dissenters read the Court more accurately. The Section did not adopt either view. Since 1965, it has been settled Section practice not to take policy positions unless endorsed with practical unanimity by the Section and the Section Council; Section Committees have no general authority to bind the Section or its Council nor has any such power been conferred upon the Practice and Procedure Committee.

108. For example, some find faulty the analysis underlying the Court's decision in *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), but the upshot of the decision cannot be mistaken.

109. To me, it seems a way station, like *Ass'n of Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), which also perplexed rather than clarified.

110. Of the Justices sitting then, six held the view that the *Excelsior* rule required rule making for its effective promulgation, those joining the plurality opinion (Fortas, Warren, Stewart, and White) and the two dissenters (Douglas and Harlan). The three concurring Justices (Black, Brennan, and Marshall) found adjudication adequate for the promulgation of the “rule” and the order. The plurality Justices found a specific order in a specific case an adequate basis for requiring a particular respondent to observe the rule, but the concurring Justices rejected that formula.

Of the Justices now sitting, four believe that the *Excelsior* rule required rule making, but three do not. Among the Justices likely to remain in the Court for any appreciable time (the odds that Justices Black, Douglas and Harlan will stay on the Court for long are not good), the division boils down to two and two. These line-ups also argue for the proposition that *Wyman-Gordon*, like Alec Guinness' white suit, is spectacular but unstable.

rule making. Thus Section 2(7) defines "adjudication" as "agency process for the formulation of an order," while Section 2(6) defines "order" as "the whole or any part of the final disposition . . . in any matter other than rule making . . ." That definition might be bearable if the definition of rule making were clear and sharp. But under Section 2(5) "rule making" means "'agency process for the formulation, amendment, or repeal of a rule," and under Section 2(4) "rule" means "the whole or any part of any agency statement of general or *particular* applicability and future effect designed to implement, interpret or prescribe law or policy" [followed by specific subjects included].¹¹¹

Some agency actions, of course, are clearly identifiable as either rule making or adjudication.¹¹² Determining whether a specified individual, firm or organization has violated a statute or rule the agency is to enforce calls for "adjudication." The promulgation of standards to be generally observed requires rule making. Nevertheless, the area of overlap between the two may be rather broad. Adjudication involves the "particular applicability" of a law which according to Section 2(c) is also a characteristic of a "rule." "Adjudication," by virtue of the precedential value of a decision carries with it "future effect," also a characteristic of rule making by virtue of a Section 2(c).

While the question of how an agency should deal with the common ground between rule making and adjudication may present policy issues, it poses no grave legal difficulty if the agency may use either method. The rub comes if an agency *must* use one to the exclusion of the other. Such a mandatory choice assumes that the critical characteristics requiring one course rather than the other exist and can be discovered. Some members of the Supreme Court in *Wyman-Gordon*—indeed a decided majority—apparently believed both that the processes are exclusive and can be differentiated. The Court really came apart with the Justices' attempt to describe the critical factors requiring rule making rather than adjudication.

2. *The Chenery Doctrine*

To assess *Wyman-Gordon*, one must view it against what preceded. The logical starting place is *Chenery II*,¹¹³ a case which provides at least

111. All in 5 U.S.C. § 551 (emphasis added).

112. Before the Supreme Court's decision in *Wyman-Gordon*, Professor Peck indicated his belief that most NLRB policy required rule making, but he noted the occasional utility of adjudication, for much the same purposes as I suggest in Part V of this article. *Ervin Hearings*, *supra* note 3, 135 ff.

113. *SEC v. Chenery Corp.*, *supra* note 93. The Supreme Court reviewed a decision made by the Commission after remand in which it reached the same conclusion as it

a flickering light. Some of its language and concepts bear on the rule making-adjudication dichotomy, although the APA did not come into play in the decision (a point which the Supreme Court did not mention).

Stripped of many of its perplexities, the Court in *Chenery II* held that in an adjudicatory proceeding (it did not use those terms), the SEC could apply a standard enunciated for the first time in that proceeding; the absence of a pre-existing rule of general application was not fatal to the Commission's action. The Court reasoned that the Commission could not be required to approve improper conduct simply because it had not already developed a rule to govern it. It laid down a balancing test for retroactivity: the proper inquiry is whether the mischief to be prevented is more serious than the ill effects of retroactivity. While the test is nebulous, the Court did exhibit concern over applying a standard announced in a proceeding to conduct predating its enunciation.

Mr. Justice Murphy's opinion for the Court often has been cited for the proposition that whether to employ rule making or adjudication is a matter solely within the agency's discretion.¹¹⁴ While at least one passage makes no differentiation between the two kinds of proceeding,¹¹⁵ elsewhere the opinion suggests a pattern for choosing between rule making and adjudication. Mr. Justice Murphy said:

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, *as much as possible*, through this quasi-legislative promulgation of rules to be applied in the future.¹¹⁶

had in its first proceeding but on a different basis. I suspect that it is relevant that in *Chenery II* the dissenters of *Chenery I*, *supra* note 100, provided the majority opinion and votes and the dissenters came from the majority in *Chenery I*. The failure to muster a majority of the court also seems significant. The votes in *Chenery II* were: four in the majority, one concurrence in the result, two dissents and two non-participants. Withal, it has had a powerful influence.

114. "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." 332 U.S. at 203.

115. "The application of those criteria, whether in the form of a particular order or a general regulation, necessarily requires the use of informed discretion by the Commission." *Id.* at 208. The observation is quite correct. However, that is not to say that the two kinds of proceedings may not involve different doses of discretion or, more importantly, differing kinds of in-puts.

116. *Id.* at 202 (emphasis added).

Justice Murphy emphasized that rule making may be premature (for lack of agency foresight or experience) or may never be appropriate because of the peculiarities of the problem. By endorsing agency promulgation of a new standard in an adjudicatory proceeding and its application in that same case, the Court did not endorse any and all rule making in adjudication. Read with due recognition of the facts before the court, *Chenery II* is not *carte blanche* to administrative agencies to use adjudication and rule making as the spirit moves them. On the contrary, it declares that rule making is the rule, although it permits simultaneous promulgation and application of a standard in the same proceeding in dealing with a question of first impression.

3. Differing Views on Rule Making in *Wyman-Gordon*

A variety of views apparently impelled those Justices who believed that implementing the *Excelsior* doctrine required rule making.¹¹⁷

The plurality opinion posed the issue before it in sweeping terms in response to the NLRB's brief. The Board's brief in *Wyman-Gordon* did not characterize the agency's action as rule making, nor did it reject the characterization; occasionally it did refer to its "rule."¹¹⁸ Rather it emphasized that *Chenery II* gives an agency discretion to choose between rule making or ad hoc litigation. Furthermore, it argued that the APA definitions of rule making and adjudication "are in general terms and are not mutually exclusive."¹¹⁹ The Board sought to sustain this position with courts of appeals decisions upholding its authority to institute new policies "through decisions in particular cases rather than by promulgation of formal rules."¹²⁰ It wound up this line of argument with the observation that the Board has "formulated substantive principles and requirements only through the decisional process."¹²¹

The plurality replied in equally broad terms: after describing the

117. None of the opinions raises any question that section 6 of the National Labor Relations Act empowers the Board to make "substantive" rules. Since the Act itself refers only to "rules," see text of section 6, *supra* note 3, and since the legislative history is so scanty, see *Peck's Atrophy*, *supra* note 3, at 732-33 n.20, the assumption of substantive rule making power was—in the language of show biz—a "throwaway." If and when the Board undertakes rule making, especially if it establishes affirmative obligations designed to prevent unfair labor practices, the reach of that power will be sharply disputed.

118. *E.g.*, Brief for petitioner at 22-3.

119. *Id.* at 11.

120. One example cited, *NLRB v. A.P.W. Products Co.*, 316 F.2d 899 (2d Cir. 1963), adopted a new policy on the computation of back pay in unfair labor practice cases. While the agency presumably has considerable experience with the subject, I would say that the adoption of such a policy should be preceded by wide ranging consultation and fact finding about the potential impact of the policy being changed.

121. Brief for petitioner at 14.

ways in which it believed the Board failed to observe both the letter and substance of the APA rule making provisions, the opinion became a bit confusing:

There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceedings, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: *i.e.*, to exercise its quasi-legislative power.¹²²

Does that mean that the agency may make the same rule-like determination if it applies to the respondent in an individual case? It would seem so, but does it also imply that such a conclusion would have to be based upon the record facts of that case? The plurality ambiguously declared:

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents.¹²³

What does all that add up to? I would say that the plurality rejected the Board's broad proposition. While stressing their common characteristics, it did declare that rule making and adjudication are mutually exclusive, but without providing a guide as to what factors impel the choice of one rather than the other.

The two dissents, while they endorse one another, differ on when rule making is required. Justice Douglas was "willing to assume" that if the Board adjudicated "in the conventional way" [in *Excelsior*?] there would be "no difficulty in affirming its action" [in *Wyman-Gordon*?].¹²⁴ Again, the opinion seems to say that rule making requires observance of APA rule making procedure, but it is less than clear whether he believes that the two procedures are mutually exclusive. No sure guide emerges from the Douglas dissent as to what situations require APA rule making procedures.

Justice Harlan emphasized the definition of a rule in the Act as "an agency statement of general or particular applicability and future

122. 394 U.S. at 765.

123. *Id.* at 765-66.

124. *Id.* at 755-76.

effect.'"¹²⁵ He seems to regard the fact that the Board announced that its new policy would not be applied for thirty days—the period of delay normally employed in APA rule making—as clinching the rule characterization. He declared that such prospective effect is required when the new policy represents a substantial departure from previous understandings and that it would be “unfair to impose the rule upon the parties in pending matters.”¹²⁶ That is the sort of situation, he contended, for which rule making was meant.

Harlan seems to imply that where private parties act in reliance on agency policy, any change should take effect only in the future because of past reliance. That reasoning does not square with *Chenery II* (which may not be fatal, of course) because one arguably may rely upon the absence of an agency declaration. More importantly, the reasoning is not very helpful. In *Excelsior* what element of reliance was there?¹²⁷—simply a refusal to supply the list in a pending case. If the employer incorrectly relied on his supposed “right” not to furnish the list, he was not severely harmed by an order to produce it. Providing the list is not burdensome. Nor would the employer be punished if an election were held; a new election would be held solely for the purpose of vindicating the employees’ rights.

Perhaps, these fragments add up to a decision that when, and only when, the Board does not apply a new policy to the parties before it, rule making is required. But the Board argued for a broad endorsement of its policy making exclusively through adjudication; the plurality of four and two dissenters refused that endorsement. The fact that in *Excelsior* the Board attempted to promulgate a requirement for the future only seems to have provided extra nails in the coffin of adjudicatory policy making. (If the defect in *Excelsior* was only that the new rule would not apply to the parties, the reliance argument would be of no avail in later cases—which is a commentary upon the insubstantiality of both that analysis of *Excelsior* and the reliance reasoning in *Wyman-Gordon*.)

A newly constituted court, faced with the unresolved problems of

125. *Id.* at 780 (emphasis supplied).

126. *Id.* at 781.

127. The Board opinion said that the 30-day delay was only “to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations. . . .” 156 N.L.R.B. at 1240 n.5. The Board’s brief to the Supreme Court said that delay and prospectivity insure fairness when the rules of the game are changed. Brief at 22-23. It was arguing, however, that prospectivity is permissible in adjudication.

In *Excelsior*, I suspect that the Board’s administrative convenience may have been a major factor in deferring the effect date. Professor Peck shares that view. Peck, *A Critique of the National Labor Relations Board’s Performance in Policy Formulation: Adjudication and Rule Making*, 117 U. PA. L. REV. 254, 274 (1963).

Wyman-Gordon, conceivably could retreat to the narrower ground that rule making is required only when the new policy does not apply to the parties before the Board. Such a view seizes upon what frequently will be an unessential factor. Often a policy will be made prospective to enable the agency to prepare itself to cope with it. Reliance may seem to be a factor, but it sometimes is illusory—as in *Excelsior*—particularly in representation cases. However, if there is no essential difference between rule making and adjudication, then one formal distinction will serve as well as another. The game will be played as a game and not because it makes a difference.

But, I suggest, rule making and adjudication differ in important and identifiable ways.

V. Distinguishing Rule Making From Adjudication

A. Past Efforts and the APA

One might say, with Judge Friendly, that defining the differences between rule making and adjudication defies comprehension and expression.¹²⁸ This may appeal as the counsel of prudence and wisdom, but if *Wyman-Gordon* does anything more than bind the NLRB to APA rule making procedures when the agency *believes* it is making a rule, or is launching a generally applicable policy that it does not wish to impose upon the parties before it in an adjudicatory proceeding, then the differentiation must be attempted. That *Wyman-Gordon* goes beyond *Chenery II* is evident from the Supreme Court's indication in *Wyman-Gordon* that there are recognizable situations requiring rule making, where substitutes will not be accepted. Either the Supreme Court must repent, or say it never said so, or we must come up with a formula that tells when policy making can be carried out only by rule making.

Several attempts have been made to articulate the critical differences. While some, particularly those of Professor Fuchs, seem cogent and have received approbation, they do not unlock the APA dilemma apparent in a group of federal court decisions which fail to provide any sure guide to choice.¹²⁹

128. FRIENDLY'S AGENCIES, *supra* note 3, at 8-11. A jurist not noted for his obtuseness, he declared: "[M]y own litmus paper is not sensitive enough for me to do the job." *Id.* at 8.

129. Their inconclusiveness is made quite clear in 1 DAVIS' TREATISE, *supra* note 3, §§ 5.01, 5.02 and *id.*, § 5.01 (1965 Pocket Part). No purpose would be served by duplicating that effort here.

One attempted generalization is that rule making "operates as to the future whereas other mandatory governmental acts affect present or past situations."¹³⁰ That test quickly breaks down because so much of the adjudicatory process, especially administrative remedial orders, deals with future conduct and not only applies but also makes law which is prospective.¹³¹ The test fails utterly in regard to Board representation cases (such as *Excelsior* and *Wyman-Gordon*) because their sole purpose is to determine whether in the future any union will be the bargaining representative of a group of employees and, if so, which union. In the process, the Board, or its delegate, the Regional Director, decides such non-judicial questions as the appropriateness of proposed bargaining units, the extent of common interests of different groups of employees, what constitutes a timely representation petition—issues which may involve past conduct but often do not. After the election, the Board may pass upon objections to the conduct of the election or conduct affecting the election, which requires primarily fact finding. But the purpose is not to assess blame or culpability but rather to determine whether the election results fairly reflect the uncoerced will of the employees. The decision that follows looks entirely to the future—the status of the union. Staunch precedent declares that the representation proceeding is not adversary and the result is not an order.¹³² All of which fits the exemption of representation proceedings from the adjudication provisions of the APA.

Nor does it help greatly to suggest that if fact finding about particular transactions predominates, the proceeding is or should be adjudication, but if policy making dominates, then rule making is or should be employed. In the first place, the comparison is between apples and oranges, and the fiction of assigning weights is so subjective that it might obscure the judgmental factor as to which procedure might be preferred for other more palpable reasons. Such a test, for example, might require rule making when prudence would recommend proceeding by small increments in dealing with certain emerging problems whose future cause and characteristics could not easily be anticipated. That is what *Chenery II* was about.

Professor Shapiro makes a different suggestion:

130. Fuchs, *Procedure in Administrative Rule Making*, 52 HARV. L. REV. 259, 260 (1938). [hereinafter cited as *Fuchs' Procedure*.] This was not Professor Fuchs' proposition, but one deriving from Supreme Court decisions and commentaries.

131. *Id.* at 261-62.

132. A.F. of L. v. NLRB, 308 U.S. 401 (1940). The exception provided by *Leedom v. Kyne*, 358 U.S. 184 (1958), has proved to be a narrow one, *Supra* note 105.

"[R]ulemaking"—the process leading to the issuance of regulations—is typically a proceeding that is entirely open ended in form, specifying only the class of persons or practices that will come within its scope, while "adjudication" is a proceeding directed at least in part at determining the legal status of persons who are named as parties, or of the acts or practices of those persons. Such an approach may be unsatisfactory in many contexts, for by stressing one factor to the exclusion of others it leaves some of the hardest questions unresolved, may occasionally be inaccurate, and may permit some formal agency actions to escape identification entirely. But our interest is primarily with the typical case, and thus an illustration may well be as useful as an abstract definition; indeed, it may be appropriate to quote Mr. Justice Stewart's recent answer to his own question whether hard-core pornography could be adequately defined: "[P]erhaps I could never succeed in intelligently doing so. But I know it when I see it" ¹³³

In addition to Professor Shapiro's own caveats, this analysis is open to the same objection as the "dominant" element approach—the unit of measure is so utterly subjective as to lack utility. And, in this context, I really do not know what is meant by "the typical case." It could not be the type which is settled daily by the Board, for there the necessity of classifying does not arise; nor does the run of the mill representation or unfair labor practice case which turns on its own facts present any problem. The issue of classification arises only when a case requires both fact finding concerning the parties and the enunciation of a standard which has applicability beyond that single case. Under these circumstances, the truffle-snuffing, "I know it when I see it" approach leaves much to be desired. What is the critical scent? The inability of courts to articulate a pornography standard has led to an almost complete judicial abandonment of attempts to deal with such a "standard."

Professor Davis provides a non-guide in his non-rule:

Often the best solution of the problem of classifying borderline activities is to avoid classifying them—to skip the labelling and to proceed directly to the problem at hand. Thus, if the problem is to determine appropriate procedure for a particular activity, the practical procedural needs may be studied without calling the activity either rule making or something else; usually nothing will be lost if the activity is regarded as borderline or mixed or unclassifiable. ¹³⁴

133. *Shapiro's Choice*, *supra* note 3, at 924-25. Mr. Justice Stewart's remark was made in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (concurring opinion). I rather prefer my own version: "I may not be able to define pornography, but I know what I like."

134. 1 DAVIS' TREATISE, *supra* note 3, § 5.01, 286. In all fairness that is not all he suggests. He fully discusses the hybrid qualities of many situations. He did not foresee nor

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He does, however, endorse the utility of Professor Fuchs' conclusion that

[i]t is feasible to distinguish a general regulation from an order of specific application on the basis of the manner in which the parties subject to it are designated. If they are named, or if they are in effect identified by their relation to a piece of property or transaction or institution which is specified, the order is one of specific application. If they are not named, but the order applies to a designated class of persons or situations, the order is a general regulation or a rule.¹³⁵

The Fuchs test helps to identify what an agency *has done*, but does not help to select one procedure or the other *before* the initiation of a proceeding, which *Wyman-Gordon* apparently requires an agency to do. *Wyman-Gordon* seems to require, at the least, that the agency know at the outset whether it will issue an order of individual or general applicability. Of course, the agency could change during a proceeding if it became apparent that the procedure selected was inappropriate. Such an arrangement might not be very speedy, but the delays occasioned by the requisite notice and hearing seem minimal in comparison with current Board practice.

The APA apparently did not adopt the Fuchs general versus specific application test, rather it contemplated that a rule may be *either* of "general or particular applicability."¹³⁶ Does the legislative history help? An analogy appears in several places: rule making is like what the legislature does, while adjudication is like what the courts do.¹³⁷ But that only gets us back to where we started—the recognition that case precedent and policy enunciated in case decisions have general applicability to non-parties in the future. *The Final Report of the Attorney General's Committee on Administrative Procedure* emphasized that rules, "like statutes, are addressed to people generally."¹³⁸ Similarly it explained that setting rates and price fixing (which involve only one or a few named parties) constitute rule making because

advocate the mandatory, exclusive approach employed by the *Wyman-Gordon* plurality and dissenters. Neither did Professor Shapiro. They both took *Chenery II* to mean that the agency could choose the method it preferred, a reasonable and widely shared interpretation, although caution should have been exercised in view of the fact that the APA was not involved.

135. *Fuchs' Procedure*, *supra* note 130, at 264.

136. APA § 1, 5 U.S.C. § 1001(c) (1964).

137. *E.g.*, 79 CONG. REC. 5754 (May 24, 1946) (remarks of Representative Walter), quoted in Ginnane, "Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. PA. L. REV. 621 at 627, n.16 (1947). [hereinafter cited as Ginnane's "Ruling Making."]

138. U.S. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT at 12 (1941).

they affect "great numbers"¹³⁹ who are not immediate parties to the proceeding.¹⁴⁰

The Committee's draft bill drew the distinction on the same lines; it did not define either rule, rule making, or adjudication, but did except from adjudication requirements "proceedings which precede the issuance of a rule, regulation or order involving the future governance or control of persons not required by law to be parties to the proceedings."¹⁴¹ The Senate Judiciary Committee Print of June 1, 1945, which formed the basis of the ultimate enactment, provided definitions of these terms somewhat like those in the final measure. The Print Commentary emphasized the importance of differentiating between rule making and adjudication because the prescribed procedure "differs . . . in essential respects."¹⁴² It explained that in the definition of adjudication "the words 'other than rule making' serve to make the essential distinction." The Print Commentary rejected the suggestion that "substantive rules" required to be published by Section 3 included "'substantive criteria' whereby cases are decided."¹⁴³ In doing this, of course, it implied that substantive criteria (other than rules) would affect case decisions. This argues for the establishment of criteria of general applicability in case decisions.

At the time the Print was written, the definition of rule did not include the words, "or particular," after the words, "general applicability," nor did it include the words, "and future effect."¹⁴⁴ Understanding how these terms came into the measure decreases *some* of the difficulties in puzzling out just what rule making is. The words "particular applicability" refer to some of the specific activities, such as rate making, which frequently involve one or only a few named parties.¹⁴⁵ When seen as keyed to specified activities, "particular" ceases to complicate the definition of rule (and hence rule making), which can then be regarded as primarily concerned with matters of general applicability. The Congressional committees' attention to clarifying the status of rate making and wage and price setting as rule making also may explain the addition of the terms, "and future effect," and the re-

139. *Id.* at 107.

140. *Id.* at 54.

141. *Id.* at 196, § 301(c).

142. SEN. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess., 14 (1946).

143. *Id.*, 16.

144. In its enacted form the definition in section 2 reads: "[R]ule means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law"

145. Ginnane's "Rule Making," *supra* note 137, at 625-26.

sultant emphasis upon that aspect of rule making. Many aspects of adjudication, however, have future effect, so as a *differentiating* factor the addition is not much help. Moreover, if futurity is regarded as primarily characteristic of a specified kind of rule making rather than rule making in general, "general applicability," as in the Fuchs formula, would again become the guiding characteristic of rule making. If future effect were thus considered one aspect rather than the sole characteristic of general rule making, rules might be applied to past conduct, which probably would be at odds with policy underlying APA in regard to substantive rules. On the other hand, this could be a recognition that procedural rules, which are exempted from formal rule making requirements, can be applied retrospectively. By this point, however, the analysis is entirely speculative and places undue emphasis upon abstractions.

Unfortunately, the legislative history of the particular language in question provides no net gain. My conclusion is that the terminology remains part of the problem rather than providing help toward a solution. The legislative history appears to demonstrate that while many changes in APA drafts attempted to distinguish between rule making and adjudication, Congress simply did not resolve the difficulties posed by the substantial area of overlap between the two. Agencies were expected to decide policy issues of future significance to non-parties in adjudication, but rules of general applicability and future effect were to be formulated in rule making (even if the parties to the proceeding were named and few in number). The *terms* used to define the two simply do not provide the means for distinguishing one from the other.

A more rewarding exercise, I suggest, is to clarify the purposes of the differing procedures,¹⁴⁶ and then to seek a way of promoting these goals, a method not only consistent with, but rooted in, the statute.

B. *A Proposed Analysis Emphasizing Information Gathering and Communication*

Administrative agencies were established at a time when the courts were widely regarded as unable to formulate new policy and discharge regulatory functions because of judicial attitudes toward social change, the episodic exposure of the courts to empirical data, and the lack of technical expertise of most judges.¹⁴⁷ The latter two considerations

146. A description of the detailed differences can be found in Rutledge, *The Distinction Between a Rule and an Order in the Administrative Procedure Act*, 6 MIAAMI L.Q. 359 (1952).

147. J. LANDIS, *THE ADMINISTRATIVE PROCESS* 33-34 (1938). On the first point, he quotes A. DICEY, *LAW AND OPINION IN ENGLAND* 369 (2d ed. 1926): "If a statute . . . is apt to

relate directly to the limited means courts have of informing themselves about facts pertinent to making policy. Perhaps, then, the most pertinent factor about an administrative agency as compared with a court is the various and potentially more effective means it has for gathering and disseminating information bearing on policy.

How the agency informs itself and informs its constituency are precisely the ways in which rule making and adjudication differ most significantly. I suggest that these are the key factors in deciding which set of procedures should be employed. The first questions should be: given the nature of the problem, what means will better assure adequate information upon which to base an agency decision, and what is the better way to insure participation in decision making by those potentially affected by the proposed policy? These are the elements that Justice Fortas' *Wyman-Gordon* opinion fastens upon in describing the reasons for rulemaking procedures: "mature consideration of [the] rule" and "fairness."¹⁴⁸

The scope of the agency's knowledge should determine the breadth of its administrative decision. To the extent that an agency possesses sufficient knowledge,¹⁴⁹ I suggest that it should be free to make policy in a proceeding directly involving only one or a few named parties, despite the fact that the decision may create precedent affecting many others in like situations in the future. Where the agency's knowledge does not provide a sufficient basis for making policy affecting others whose interests are not adequately represented by the parties, the agency must resort to other means of informing itself. Where the information required can be gathered only from the larger public subject to the agency, then only the rule making procedure will suffice. In such a scheme, the choice between rule making and adjudication would depend upon the method which the agency should use to inform itself

reproduce the public opinion not so much of today as yesterday, judge-made law occasionally represents the opinion of the day before yesterday." LANDIS, *supra*, at 97. The judiciary and attitudes toward it change so much that the earlier views about it may be forgotten and must be recalled in re-creating the original purposes of American administrative agencies.

148. 394 U.S. at 764.

149. Some regard expertise as knowing the right answer almost intuitively. In this view, expert quasi-judicial officials are exposed to the facts of a case, judge their significance based upon their own experience in the field, reach a conclusion that fits a grand design and fashion a remedy. But I suggest that agency expertise means the ability to recognize and formulate issues as they emerge from changing circumstances or perhaps even to anticipate them, sensing what data would be pertinent to their possible resolution, assessing the design of research that might be expected to yield relevant information, and weighing the reliability of evidence offered—especially where the source is partisan.

Expertise, then, does not mean knowing the answers but knowing how to get from the problem to the possible answers. Expertise implies a heavy dose of social science method liberally seasoned with experience and practicality.

in deciding a particular issue or cluster of issues. The initial choice would turn upon a consideration of the data the agency needed for an informed decision on a specific subject, given the state of its knowledge and the amount of testimony that could be expected from litigants preoccupied with their own immediate problem. Choice is necessary, however, only when rule making and adjudication both might be employed. As suggested by *Chenery II* and Ginnane,¹⁵⁰ whenever policy is made, rule making should be the rule and adjudication the exception.

The breadth of an agency ruling should depend on the level of participation in the rule making process by those affected by it. An underlying premise in the APA is that an agency should consult those whom it regulates, since the latter often possess information, experience and expertise pertinent to wisely constructed rules.¹⁵¹ It is often argued that the Board's *amicus* procedure affords the same kind of participation as formal rule making, but the Fortas opinion roundly criticized the method as inadequate to APA standards.¹⁵² Distilling experience into expertise and channelling it to those few officials who make decisions are critical aspects of administrative organization and procedure. How can the Board get that experience before it? Justice Fortas suggested that the invitation be open to all, not just a selected few. Do limited invitations make a real difference in view of the special qualifications of those invited? I suggest that they do. In *Excelsior*, for example, the Retail Clerks' International Association was not invited, but submitted a brief¹⁵³ which discussed the questions put by the Board as they bore upon the special problems of labor organizing in retailing. It was a good brief that presented views not contained in the AFL-CIO brief. One other serious omission was the General Counsel, who participates in unfair labor practice proceedings, but not in representation cases. Expertise does not mean simply the resources of the Board members, but also that of the constituent elements of the agency, including its field staff.

The approach suggested would preserve adjudication where it is

150. Ginnane's "Rule Making," *supra* note 137, at 623. Ginnane was an author of the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947), which makes much the same point at 13.

151. One may ask why the legislature requires procedures it does not exact of itself in promulgating policy rules to deal with social problems. A partial answer is that the legislative proponents of any controversial measure are under heavy pressure to observe similar procedures. In addition, members of the legislature are subject to fairly direct reprisal, to which administrators are not. Nor can it be said that legislative performance in the realm of procedure is thoroughly satisfactory.

152. 394 U.S. at 764-65.

153. Letter from Howard LeBaron, Associate Executive Secretary of the Board, to the author, July 7, 1969.

clearly preferable as a tool of policy making, since the case-by-case method serves as a means of tentative exploration of new problems whose dimensions are not yet clear. Furthermore, an agency can encourage parties to call to its attention their experience under and variations from decided cases by announcing that the policy of a particular decision will be tentative. In such a situation hearings are probing and any policy, experimental. Indeed, it should be experimental in the scientific sense—a formula devised to test a thesis which is monitored in operation.

(An example of a set of problems whose solution could be found best through adjudication is presented by the cases precipitated by the CIO expulsion of certain unions for their subservience to Communist influence and the CIO unions' later attempts to capture the exiles' bargaining units. Many of the problems involved in the resulting representation contests could not be anticipated, so the Board developed its schism rulings with caution, and as decisions issued, new developments took place, stimulated in part by the decisions themselves. The Board could not quickly assess the problem in all of its complexity; even after the decisions issued, it was difficult to know their full impact upon those affected. Much of that knowledge resided with regional administrative personnel and the parties themselves. Rule making proceedings would then have been in order to provide the Board with full information for formulating a cohesive set of rules to deal with similar future cases.)

Generally, a rule will be a more compact, readily found, more easily mastered presentation than doctrine developed in scattered cases. However, where doctrine is expected to be but partially formed, these advantages of a rule will not be present in full force.

In an agency system of information gathering and communication, therefore, rule making will predominate over adjudication in the formulation of policy because it affords greater opportunity for data collection (and the clear enunciation of policy for ready transmittal to the affected public). Adjudication, on the other hand, will serve two vital functions in the system: first, as a means of experimenting with tentative policy solutions; and second, as a way of infusing some flexibility into promulgated rules.

C. *Applying APA Rule Requirements—The Roles of the Agency and the Courts*

Who should decide when rule making or adjudication ought to be employed? While a great deal of initiative lies with the agency, private

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parties also have a statutory right to make requests for rule making.¹⁵⁴ In the case of the Board, the General Counsel controls the early stages of unfair labor practice proceedings and can exercise considerable control over representation cases.¹⁵⁵ He should therefore make the first agency decision between rule making and adjudication because, in all classes of cases, his representatives conduct the investigation. The General Counsel's office is equipped to assess whether decision of the case might significantly affect non-parties and whether the parties to the adjudicatory proceeding will adduce the data required for a fully informed decision by the Board. A request by the General Counsel to the Board to undertake formal rule making on questions he propounds, therefore, would obviously carry great weight.¹⁵⁶ Furthermore, if the Board denies his requests and an adjudicatory proceeding ensues, a reviewing court would be likely, in the light of *Wyman-Gordon*, to accept the General Counsel's view that rule making should have been employed. Of course, the General Counsel may not seek rule making and the Board may have to make the decision on its own after it receives the case on appeal. At that juncture, considerations of inertia and economy would favor completion of the proceeding in the adjudicatory mode, especially since launching a rule making proceeding to consider the policy issue would cause delay in the decision of the particular case. The best way for the Board to deal with this problem of inertia or reacting to the General Counsel's decision is to anticipate policy issues in a constant rule making process. Where a party raises an unanticipated or unresolved issue, as was the case in *Excelsior*, he could be told to wait for the policy decision which would be made in a separate rule making procedure. The agency could proceed in two ways: it could postpone a decision in the case until it decided the policy issue; or it could decide the case on the basis of a tentative view of the policy issue, restricting it to that case while launching a rule making proceeding for the formulation of a rule to be applied in future cases. The latter

154. APA § 4(e) provides: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

155. NLRB Regulations provide that the General Counsel may have representation cases transferred to him and may exercise the authority of regional directors in processing them. 29 C.F.R. § 102.72 (1969).

I do not suggest that the General Counsel should embargo unfair labor practice cases going to the Board or that he should take jurisdiction over representation cases in order to "persuade" the Board that it should proceed with rule making when he requests it. I merely observe that he could take these actions.

156. In other agencies without an "independent" General Counsel, the initiative for inaugurating proceedings nonetheless resides in that official. This analysis will hold for many agencies with both rule making and adjudicative functions.

course should probably be pursued only if there is urgency to decide the particular case. On the other hand, a tentative policy actually applied in a case might provide experience of utility in the further consideration of a rule.

Were the Board to adopt this means of developing rules—and thus to engage in considerable rule making—one could reasonably expect the courts to give substantial weight to its choice of adjudication as adequate or necessary to the case at hand and fair to those potentially affected. The Board could defend its choice where the decision interpreted a rule, the policy issue was of slight potential impact, or the problem seemed to require initial exploration by the case method. Admittedly, upon review the courts could effectively assess only extreme situations and their supervisory role would be minimal.

What is the alternative? Although *Wyman-Gordon* does not specifically compel the Board to employ rule making, a Supreme Court majority felt that it was bound to use rule making procedures in formulating policy. If the Board fails to abide by this determination it will invite a chaotic situation in which the courts might choose to invalidate orders involving policy because they were not formulated in rule making proceedings.

VI. Conclusion—Experimenting with Rule Making

Although it has been decided, albeit with something less than clarity, that the APA requires the Board to use rule making, the prospects of spontaneous compliance are not very bright. The almost undeviating rejection of rule making by members of the Board during its thirty-four years of operation, the settled habits of union and management advocates, and the comparatively weak demand for rule making, all raise the question of whether it is desirable, let alone feasible, to expect the Board to shift its operation from adjudicating to large scale rule making. While I believe that rule making is eminently desirable, the conclusion that it should be used in this field is based primarily on supposition. It may not fulfill its theoretical promise in the field of labor regulation because too many forces work against it, such as the Board itself, pressures external to the Board, and the inability of Congress to resolve major policy issues.

Perhaps only legislation can ultimately fit the APA requirements to the peculiar situation of the NLRB, which has reached thousands of decisions but promulgated no rules.¹⁵⁷ Meanwhile, I propose a two-year

157. The superstitious may see confirmation of the observations that labor-manage-

moratorium on APA rule-making requirements, during which the Board and its special public canvass their alternatives and seek suitable adjustments. It behooves the Board and the labor-management community earnestly to seek a negotiated peace that is principled enough to be understood and applied, yet acceptable to the institutional needs of all concerned. If labor and management divide on ideological lines, as so often has happened,¹⁵⁸ and the Board members cling to their own dead past, all will deserve what they get. The Board, working under the temporary umbrella of *Wyman-Gordon*, has the initiative; it could move toward an amicable and balanced solution by soliciting the views of all who might be affected by its policies as to how it should accomplish its new rule making task.

A general strategy for rule making can be devised in the light of *Wyman-Gordon*. First, the Board must develop a general idea of the subjects to be covered by rules. Several areas of Board doctrine are reasonably well settled, *e.g.*, the rules on the wearing of union insignia on the job. After receiving comments from the labor-management community,¹⁵⁹ the Board should announce the subject on which it will proceed to make rules. It should consider "subcontracting" a substantial portion of the initial task to seminar groups in law schools, business schools, and schools of industrial relations which might make preliminary drafts based upon Board decisions in simulated rule making proceedings. While the process of codification proceeds, the Board should direct its major attention and energies to affirmative rules that go beyond the usual remedial order prohibitions of undesirable conduct.

Disinterested and thoughtful scholars have long urged the Board to employ rule making. An ever growing case load and backlog make their arguments today more compelling than ever, while revealing the Board's existing "custom made" procedures as charming but antique.

ment relations legislation takes place every twelve years—1935, 1947, 1959. A new statute in 1971 brought on by *Wyman-Gordon* would be a big boost for numerology.

158. Indications are that opponents of Board rule making include both management and union lawyers, while proponents come only from the ranks of management attorneys. Some union representatives may fear that a Nixon Board would be more inclined to upset doctrines favorable to labor promulgated by the Kennedy-Johnson Board, as they are sometimes called. As already noted, I am very dubious that one method offers more opportunity for politically motivated overruling than another. *See* p. 597 *supra*.

159. Non-lawyers should be encouraged to comment. Special attention should be given to involving members of both management and unions who must live under the Board's rules. The invitation to comment should stress the Board's desire to hear their views on subjects on which such parties need guidance and on doctrines which they find unsound. The case method does not provide a ready means of eliciting laymen's views or of satisfying them. It surely will not hurt to ask.

The Board however has consistently rejected such suggestions,¹⁶⁰ labor lawyers have not yet evidenced a yen for rule making, and the desires of the labor laity have never been recorded on the subject. The latest opinion of an ABA Labor Section Committee (which, however, is not binding policy) seems decidedly adverse, although about a decade ago the Section itself had advocated the use of rule making. Congress, meanwhile, has not shown much interest in pressing rule making since the 1946 enactment of the APA. The issue of rule making versus adjudication, therefore, will probably have to be battled out in the courts, which will do their best to wrestle some reason out of the APA test, the *Wyman-Gordon* case, and the commentary it is sure to evoke. Unfortunately, this will be a case of the wrong issue in the wrong forum with the wrong data for resolving the problem. The debate over rule making has been essentially a side show, but now it should be scheduled for the main tent and should focus on the utility rather than the statutory necessity of rule making, with special attention to the particular occasions for its use.

The administrative process has not performed up to early expectations, which probably were overly ambitious. Rule making will not cure deep seated problems of inadequately expressed Congressional purposes themselves rooted in unresolved political policy. But rule making may help reinvigorate agencies now settled into dull, time-consuming, and relatively unproductive adjudicatory routines that are unequal to growing case loads and the increasing complexity of the areas to be regulated. At the very least rule making should be given a trial. We have nothing to lose but our claims.

160. The Board has not been monolithic on the subject. Former member Joseph A. Jenkins was an advocate of rule making. Sam Zagoria, who sat on the Board until December, 1969, also seemed favorably disposed to some rule making.