III. RULE MAKING

Rule Making v. Adjudication after Wyman-Gordon

In *NLRB v. Delaware Valley Armaments, Inc.*[1] the Court of Appeals for the Third Circuit held that an employer is not denied due process if the order directing him to file a list of the names and addresses of its employees was issued pursuant to a hearing on the union's petition for a representation election. The International Union of Electrical, Radio & Machine Workers, AFL-CIO, petitioned the NLRB for a representation election for the production and maintenance employees of Delaware Valley Armaments. At the pre-election hearing the company notified the hearing officer that it would not file an election eligibility list[2] on the ground that the Board lacked authority to order such a filing despite the so-called "*Excelsior* Rule."[3] Nevertheless, the Board's Regional Director ordered the filing of the list, and the company responded with a partial list. After being defeated in the election, the union filed objections including, *inter alia*, an assertion that the company failed to file the list as required. The Regional Director conducted an *ex parte* investigation and issued a supplemental decision setting aside the election and again demanding a complete list.[4] When the list was not forthcoming, the Board issued a subpoena duces tecum directing the company to produce the list and applied to the federal district court for an order enforcing the subpoena. The district court held that the Board acted within its power in directing the filing of the list.[5] Delaware Valley Armaments appealed on the ground that it had been denied

flagrant denial of the rights conferred by the FOIA. By the end of August, 1970, the FAA had failed to respond at all to the petitions for disclosure of agency documents, although the requests had been filed in July with a special request for expedited action. The FAA was apparently delaying in hopes the students would be forced to return to school. *See* Letter from Reuben B. Robertson, III, to John A. Volpe, Secretary, Dept. of Transportation, Sept. 17, 1970.

1. 431 F.2d 494 (3d Cir.), *cert. denied*, 400 U.S. 957 (1970).

2. The company, claiming that most of its women employees refused to give permission because of union threats and harassment, tendered a list containing the names of all employees and the addresses of only those employees who consented to the disclosure. The union refused to accept this list and reserved the right to demand a complete list. Although there had been off-the-record discussions of the requirement for the list, there was no further discussion of the matter at the hearing. *Id.* at 495.

3. Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966), discussed in text accompanying note 17 *infra*.

4. The company filed "Exceptions and Request for Review to the Second Supplemental Decision" which repeated its allegations of union threats and harassment and added a charge that some of the union organizers had criminal records. 431 F.2d at 495-96.

5. *Id.* at 497.

procedural due process when it was not afforded an adjudicatory hearing before the Board issued the order directing it to file the list. In a divided opinion the Third Circuit Court of Appeals affirmed the district court's order.

The Administrative Procedure Act divides agency action into two categories—rule making and adjudication.[6] This bifurcation is usually described as the delineation of separate quasi-legislative and quasi-judicial powers.[7] For rule making the APA provides several procedural steps to enable all interested parties to participate in the formulation of a rule which will be effective in the future.[8] Adjudication, on the other hand, is a procedure which is limited in effect to the parties directly involved in the matters being adjudicated.[9] Although the APA establishes requirements and procedures for formal hearings,[10] adjudication is not limited to such hearings by the Act. In fact, most of an administrative agency's work is carried out through the process of "informal adjudication,"[11] a process which covers a wide spectrum of conferences, discussions, and settlements outside the framework of a formal hearing. "Formal" adjudication conducted at a "formal" hearing is the means for disposing of a matter which cannot be settled through informal adjudication and at the same time provides experience and guidance for the formulation of a general policy or "rule" when the agency decides that one is needed. Characterizing rule making as "too rigid and inflexible" and rule amending a "cumbersome process,"[12] the NLRB has never elected to

6. 5 U.S.C. §§ 551(4)-(7) (Supp. V, 1970), provides:

(4) "rule" means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order . . . .

7. *Cf.* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.11 (1958). *But cf.* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 8-9 (1962).

8. 5 U.S.C. § 553 (Supp. V, 1970).

9. *Id.* § 554.

10. *Id.* § 556.

11. 1 K. DAVIS, *supra* note 7, § 4.11. *See also* Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 923-24.

12. *Hearing on Congressional Oversight of Administrative Agencies (National Labor Relations Board) Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pt. 2, at 1663 (1968).

take this final step in the progression from informal adjudication to formal adjudication to rule making.[13] The courts have recognized that an agency has considerable discretion in any particular case to choose between rule making and adjudication,[14] but this total reliance upon the latter procedure is contrary to the legislative intent that basic policy be made in rule-making proceedings whenever possible.[15]

The controversy concerning the role of adjudication in the development of an agency's policy is illustrated by the evolution of the "*Excelsior* Rule." Prior to *Excelsior Underwear, Inc.*[16] the NLRB had consistently held that a petitioning union had no right to demand that an employer provide a list of employees' addresses, although it did have a right to inspect such a list prior to the election.[17] The Board considered the need for providing the union with an address list in an adjudicative hearing on the Amalgamated Clothing Workers Union's objections to the election which it lost at Excelsior Underwear. The Board's decision announced a "rule" requiring submission of this list.[18] Although the NLRB invited selected amici curiae to submit briefs on the issue and made the rule applicable only to elections called 30 days after the decision was announced, there was no effort to follow the rule-making requirements of the APA.[19].

The Board later relied on the "*Excelsior* Rule" in requiring submission of a list in *NLRB v. Wyman-Gordon Co.*[20] In that case the plurality opinion of the Supreme Court held that the requirement was invalid as a "rule" because of the Board's failure to comply with the APA but sustained the requirement for submission of the list in *Wyman-Gordon* because the order issued from an adjudicatory pre-election hearing.[21] The plurality opinion considered the possibility of remanding the case since the Board had misconceived the law[22] but recognized that the Board would simply re-issue the order without citation to *Excelsior*—a valid procedure in an adjudicatory

13. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 779 n.2 (1969).

14. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

15. *Id.* at 202. *See also* S. REP. NO. 752, 79th Cong., 1st Sess. 13-16 (1945); H.R. REP. NO. 1980, 79th Cong., 2d Sess. 23-26 (1946).

16. 156 N.L.R.B. 1236 (1966).

17. *See, e.g.*, Reflector Hardware Corp., 121 N.L.R.B. 1544 (1958); Wesco Mfg. Co., 97 N.L.R.B. 901 (1951).

18. 156 N.L.R.B. at 1239.

19. 5 U.S.C. § 553 (Supp. V, 1970).

20. 394 U.S. 759 (1969), *rev'g* 397 F.2d 394 (1st Cir. 1968).

21. 394 U.S. at 766.

22. *Id.* n.6; *see* SEC v. Chenery Corp., 318 U.S. 80 (1943).

proceeding.[23] Three of the justices concurred in the result but on the ground that such a requirement could be the product of adjudication or rule making with the choice of method left to the Board.[24] The remaining two justices in separate opinions concurred with the plurality opinion's contention that the "*Excelsior* Rule" was invalid but argued that this invalidity required that the decision be remanded.[25] Although *Wyman-Gordon* has been the source of considerable discussion, commentators have failed to reach agreement as to whether it will force the NLRB to utilize the technique of rule making[26] or whether it will simply encourage other agencies to promulgate "rules" through adjudication.[27]

The Third Circuit in *Delaware Valley Armaments* applied the plurality position in *Wyman-Gordon* to sustain the requirement for an election eligibility list. The court reasoned that a pre-election hearing is an adjudicatory proceeding and therefore an order entered by it is "unquestionably valid."[28] The court then set forth two additional grounds for affirming the district court's order. It noted that a hearing on a union's petition is the only hearing required by the National Labor Relations Act[29] and that due process is not violated when a party is denied a discretionary hearing.[30] The court concluded that the company was not deprived of procedural due process when the Regional Director decided to conduct an administrative investigation rather than a hearing on the issue of the employee eligibility list. The majority opinion also accepted the district court's

23. 394 U.S. at 766. Although the requirement for the list was not actually adjudicated in *Wyman-Gordon*, the plurality opinion asserted that the requirement was "not seriously contestable" and that there was "not the slightest uncertainty as to the outcome of a proceeding before the Board [on the issue of the requirement], whether the Board acted through a rule or an order." *Id.* at 766-67 n.6. *Contra, id.* at 783 (Harlan, J., dissenting).

24. *Id.* at 772 (Black, Brennan, Marshall, JJ. dissenting).

25. *Id.* at 775-80 (Douglas, J., dissenting); *id.* at 780-83 (Harlan, J., dissenting).

26. *See, e.g.*, 11 B.C. IND. & COM. L. REV. 64 (1969).

27. *See, e.g.*, 394 U.S. at 779 (Douglas, J., dissenting); *id.* at 781-82 (Harlan, J., dissenting); *Project, Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 106-07; 43 TEMP. L.Q. 160 (1970). For the position that the result cannot be predicted, see 83 HARV. L. REV. 220 (1970); 24 S.W.L.J. 378, 383-84 (1970).

28. 394 U.S. at 766; *cf.* American Mach. Corp. v. NLRB, 424 F.2d 1321, 1329 (5th Cir. 1970), where the court, citing *Wyman-Gordon*, held that the Board could depart from its previous decisional rule without following the procedures required by the APA in a rule-making proceeding since the Board's decision only applied specifically to the parties before it in the adjudicatory proceeding.

29. 29 U.S.C. § 159(c)(1) (1964); 5 U.S.C. § 554(a)(6) (Supp. V, 1970).

30. Law Motor Freight, Inc. v. CAB, 364 F.2d 139, 143-44 (1st Cir. 1966), *cert. denied*, 387 U.S. 905 (1967).

finding that the issue had been "adjudicated" in the course of the administrative investigation.[31] The dissenting opinion attacked the majority's contention that an adjudicatory proceeding had been conducted, arguing that neither the pre-election hearing nor the off-the-record discussions among the hearing officer, the company, and the union satisfied the requirement for a proper "adjudicatory proceeding."[32] If the Board is to require an eligibility list, the dissent concluded, it must grant the company a hearing on the validity of that requirement.[33]

In *Excelsior* the Board, by means of an adjudicatory hearing, sought to formulate a rule requiring employers to submit election eligibility lists. In *Wyman-Gordon* the Board attempted to apply the "*Excelsior* Rule"; that attempt failed although the Court upheld the Board's order because it was issued as a result of an adjudicatory proceeding. In *Delaware Valley Armaments* the Third Circuit also upheld the requirement for an eligibility list because it was issued as a result of an adjudicatory proceeding even though the question of the validity of that requirement in the instant case had not been formally adjudicated. The court reached this conclusion because it misunderstood the effect of a prior adjudication and the nature of the adjudication required in this case. Agency decisions generally have the force of stare decisis,[34] but to apply a holding—the requirement for the list—from an earlier adjudication—*Excelsior* by way of *Wyman-Gordon*—to another controversy—*Delaware Valley Armaments*—is more analogous to an application of res judicata[35] than stare decisis inasmuch as the former prohibits relitigation of an issue.[36] For a number of reasons res judicata could not be asserted to apply the "*Excelsior* Rule" or "*Wyman-Gordon* Rule" to *Delaware Valley Armaments*.[37] The use of prior decisions as stare decisis gives the work

31. 431 F.2d at 498-99.

32. *Id.* at 501.

33. *Id.* at 501-02.

34. *See* 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.403, at 353 (2d ed. 1965). "*Stare decisis* . . . to abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1577-78 (rev. 4th ed. 1968). *See also* 394 U.S. at 766.

35. *See generally* 1B, J. MOORE, *supra* note 34, ¶ 0.405. "*Res judiciata* . . . rule that final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in former suit." BLACK'S LAW DICTIONARY 1470 (rev. 4th ed. 1968).

36. *See* 1B J. MOORE, *supra* note 34, ¶ 0.405(2).

37. The parties are not the same, and the issue, the requirement for producing the election eligibility list for Delaware Valley Armaments, is not precisely the same. *See generally id.* ¶ 0.405-0.415.

of an agency a degree of uniformity and stability while permitting it to retain the flexibility necessary to deal with "the fluctuating problems of the administrative process."[38] The flexibility is derived by the fact that stare decisis provides merely a rebuttable guide for adjudication. If adjudication is required, stare decisis does not obviate that requirement. Thus, any adjudication which occurred in *Excelsior* does not dispose of an issue requiring adjudication in a later case. The NLRB's contention that the order was valid because it was issued in the course of an "adjudicatory proceeding"[39] is likewise unpersuasive. A particular issue is not "adjudicated" on the basis of the forum which decides it. The Board cannot hold a hearing on one issue—the union's petition—and promulgate an "adjudicated" order on another—the requirement for the list—any more than a court can give a defendant a "fair trial" on a charge of burglary and convict him of murder.[40] This confused merger of the issue being adjudicated and the ancillary issue of the election eligibility list is also reflected in the manner in which the court extended the "certification of worker representatives" statutory adjudication exemption[41] to the separate issue of the order requiring the list. In the absence of a rule requiring such a list, the APA demands that the union obtain an order requiring it and bear the burden of showing a need for it.[42] *Excelsior* could be cited in such a request for its stare decisis value, but the company must have the opportunity to present "[a]ny oral or documentary evidence."[43] This procedure differs sharply from civil proceedings in a federal court where a subpoena duces tecum may be issued "as a matter of course,"[44] but there the question is covered by a rule,[45] and furthermore, the party subject to the subpoena may raise objections

38. *Id.* ¶ 0.403, at 358.

39. 431 F.2d at 497.

40. It may be argued that *Excelsior* and *Wyman-Gordon* had put the company on notice that the requirement was at issue and that it should have presented all of its objections at the pre-election hearing. This argument overlooks the fact that the burden of proof was on the union. 5 U.S.C. § 556(d) (Supp. V, 1970). In the criminal law analogy, the defendant may be aware that a death occurred in the course of the burglary, but he is not required to defend a charge of murder until and unless the prosecution brings that charge; if the charge is brought but not substantiated by evidence, the defendant need not present a defense at all.

41. *Id.* § 554(a)(6).

42. *Id.* § 556(d). This section provides: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

43. *Id.* "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence."

44. 5 J. MOORE, *supra* note 34, ¶ 45.05(1) (2d ed. 1969).

45. FED. R. CIV. P. 45(b).

by a motion to quash under the same rule.[46] Although the term "adjudication" encompasses many informal administrative activities,[47] the request for an order requiring an eligibility list clearly demands a higher level of action. *Wyman-Gordon* focused primarily on the invalidity of the "*Excelsior* Rule" *qua* rule and approved the requirement only in the interest of expediting that particular case. The error of that decision is demonstrated in *Delaware Valley Armaments* which transformed expediency into unassailable doctrine. Once the Court recognizes that there is no "rule" requiring this list and that an order requiring it can be issued only after a formal adjudication of that issue, it will increase the pressure on the NLRB to conform to the legislative intent that rule making be the primary means for the determination of policy. The Board will then be faced with a clear choice between conducting rule-making proceedings or properly adjudicating the issue anew in each case.

Requirement of Notice and Hearing in Rate-Making Proceeding

In *Moss v. CAB*[48] the Court of Appeals for the District of Columbia Circuit held that certain fare increases approved by the Civil Aeronautics Board, which the Board claimed were carrier-made and within its power to allow,[49] had actually been prescribed by the Board and were illegal because granted without fulfillment of the public notice and hearing requirements applicable to fare increases specified and imposed by the Board itself.[50] The petitioners, 32 Congressmen, had complained to the CAB on several occasions about its practice of holding *ex parte* meetings with air carrier representatives concerning the need for increased fares. Following a series of such meetings the carriers filed tariffs with the Board, proposing new rates to take effect after 30 days.[51] While its decision on these rates was pending, the Board held another *ex parte* meeting with the carriers,[52] after which it announced that it would hold a

46. *Id.*

47. See note 12 *supra.*

48. 430 F.2d 891 (D.C. Cir. 1970).

49. *See* Federal Aviation Act § 1002(g), 49 U.S.C. § 1482(g) (1964) (if the Board does not suspend proposed fare increases within thirty days after filing, they become effective); *Id.* § 403(d), 49 U.S.C. § 1373(d).

50. *Id.* § 1002(d), 49 U.S.C. § 1482(d).

51. The carriers were following the procedure prescribed in 49 U.S.C. § 1373(c) (1964). See notes 64-68 *infra* and accompanying text.

52. Congressman Moss requested, but was denied, admission to this meeting. 430 F.2d at 894 & n.12.