persuasive reasons to favor incumbent licensees in renewal proceed-

ings, the decision in *Citizens Communications Center* appropriately

permits the FCC some leeway to impose a greater burden on challeng-
ers. In the face of a statutory provision that does not favor incum-
bents, however, there are tangible limits placed upon this authority

which, failing amendment of the Communications Act, are inescapa-
ble. If the short period of license effectiveness does indeed pose a great

problem for the radio and television industry, it is clear that amend-
ment of the statute is a more efficacious approach to solving the

problem than the stretching of administrative authority beyond its

proper limits. No compelling reason exists why an amendment to the

Communications Act need be destructive of competition, as the

amendment proposed in the Senate subsequent to the *WHDH*

decision would have been. An alternative which might be considered

is an extension of the period of license effectiveness. Such an ap-

proach has the possibility of resulting in greater industry stability,

without distortion of the administrative process or a total stifling of

competition.

IV. INTERVENTION

PROCEDURAL RIGHTS OF THE CHARGING PARTY IN UNFAIR LABOR

PRACTICE PROCEEDINGS

Courts have limited the procedural rights of charging parties in

unfair labor practice proceedings by interpreting the National Labor

Relations Act to protect only public rights, thereby precluding any

81. See notes 58, 72 supra and accompanying text.
82. See text accompanying note 64 supra.
83. See note 51 supra.
84. The extension of the licensing period to, for example, eight or ten years, might have the

effect of making licensees too secure in their positions to create a sufficient incentive to improve

broadcasting quality. However, if such a change were combined with a mandatory public

hearing halfway through the license period solely on the acceptability of the performance of the

licensee, with loss of license occurring if “substantial service,” or some other appropriate

standard of service, has not been rendered, this problem could be avoided. A hearing of this

nature, while of the kind declared improper in the *Citizens Communications Center* decision,
might be appropriate as an interim proceeding under an amended communications statute.

consideration of private interests. Commentators have criticized this exaltation of public rights as unjustifiably harsh on the private parties involved in labor disputes, and a constant pressure is exerted in litigation to recognize the interests of private parties as well. This section will discuss the effect of three recent cases on charging parties who apply for mandatory injunctions or raise objections to proposed compromise settlements. Additionally, the right to appellate review will be analyzed for its impact upon pre-review procedural rights.

Mandatory Injunctions

Although the Norris-LaGuardia Act and the NLRA almost entirely eliminate the use of injunctions in labor disputes, a narrow exception is made for certain particularly serious unfair labor practice charges for which the NLRB may initiate injunction procedures.


3. 3 Davis § 22.13, at 275; Jaffe, supra note 2, at 724; The Charging Party, supra note 2, at 797.

4. See, e.g., UAW Local 283 v. Scofield, 382 U.S. 205 (1965); Terminal Freight Handling Co. v. Solien, 444 F.2d 699 (8th Cir. 1971), cert. denied, 40 U.S.L.W. 3451 (U.S. Mar. 20, 1972) (No. 71-609); Solien v. Miscellaneous Drivers Local 610, 440 F.2d 124 (8th Cir. 1971); Concrete Materials, Inc. v. NLRB, 440 F.2d 61 (5th Cir. 1971); Sears, Roebuck & Co. v. Carpet Layers Local 419, 410 F.2d 1148 (10th Cir. 1969), vacated as moot, 397 U.S. 655 (1970); Leeds & Northrup Co. v. NLRB, 357 F.2d 527 (3d Cir. 1966); Teamsters Local 282 v. NLRB, 339 F.2d 795 (2d Cir. 1964); Textile Workers v. NLRB, 294 F.2d 738 (D.C. Cir. 1961); Marine Eng'rs Ass'n No. 13 v. NLRB, 202 F.2d 546 (3d Cir. 1953).

5. Terminal Freight Handling Co. v. Solien, 444 F.2d 699 (8th Cir. 1971), cert. denied, 40 U.S.L.W. 3451 (U.S. Mar. 20, 1972) (No. 71-609); Solien v. Miscellaneous Drivers Local 610, 440 F.2d 124 (8th Cir. 1971); Concrete Materials, Inc. v. NLRB, 440 F.2d 61 (5th Cir. 1971).

6. Forcing an employee to join any labor or employer organization, 29 U.S.C. § 158(b)(4)(A) (1970); conducting an illegal secondary boycott, id. at § 158(b)(4)(B); forcing an employer to recognize a union other than that already representing his employees, id. at § 158(b)(4)(C); conducting illegal secondary picketing, id. at § 158(b)(7); and contracting with one employer to boycott another, id. at § 158(e).

7. The continual use of federal court injunctions to curtail union activity, see Brotherhood
When such a charge is filed the NLRB is required to conduct a preliminary investigation which takes priority over all other cases. If the investigating officer finds that there is reasonable cause to believe the charge is true and that a complaint should issue, he “shall” petition a United States District Court for injunctive relief pending final adjudication by the NLRB.

In Solien v. Miscellaneous Drivers Local 610, the Court of Appeals for the Eighth Circuit, relying primarily on the legislatively intended exclusivity of the NLRB’s privilege to seek labor injunctions, held that the charging party in a mandatory injunction proceeding was entitled to neither full party status nor the right to intervene. In that case, the charging party sought full party status in the district court injunction proceeding but was permitted to make only a limited appearance. On appeal, the court of appeals concluded that the


10. 440 F.2d 124 (8th Cir. 1971).
11. A proposal to amend the NLRA to permit private individuals, as well as the NLRB, to seek federal court injunctions to halt unfair labor practices was defeated by a Senate vote of 62 to 28. 93 CONG. REC. 4835, 4847 (1947).
12. The charging parties were allowed to be present with counsel at hearings, to introduce evidence, to file briefs, to be informed of all actions taken in the case, to keep the court advised of pertinent developments, and to receive copies of all documents filed. 420 F.2d at 126. This
wording and legislative history of the NLRA injunction exception and the overall legislative scheme of labor injunctions prohibited the vindication of purely private rights in the district court proceeding and therefore precluded the charging party's intervention or full party status.14

In contrast to the public right position of the Solien court, the Supreme Court has suggested that a charging party's rights can be enforced simultaneously with those of the public:

In short, we think that the statutory pattern of the Labor Act does not dichotomize "public" as opposed to "private" interests. Rather, the two interblend in the intricate statutory scheme.15

Of course, the Solien court accorded the charging party a limited appearance,16 thus not forging a revolutionary departure from the contrasts with the rights granted the charging party before the NLRB during the unfair labor practice hearing itself, which include the right to appear in person or by counsel or other representative, to introduce documentary or other evidence, and to call, examine, and cross-examine witnesses. 29 C.F.R. § 102.38 (1971).

13. The charging parties appealed the district court's refusal to grant them full party status. Even though the labor dispute had been settled, the court of appeals ruled that the question was not moot since the settlement between the Regional Director and the charged party had not yet been approved by the General Counsel and the repetition of the unlawful secondary boycott was still a possibility. 440 F.2d at 126, 127.

14. The court noted that while section 10(l) provides that service of process shall make the charged labor organization "a party to the suit," the section further provides that the charging party shall only be "given an opportunity to appear by counsel and present any relevant testimony." 440 F.2d at 128. The court also quoted the Senate Report on the proposed section 10(l), which states: "[W]e have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief . . . ." S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947) (emphasis added). The court reasoned that in light of the restrictive federal approach to labor injunctions as reflected by the Norris LaGuardia and National Labor Relations Acts, any granting of additional procedural rights to parties in section 10(l) proceedings must be clearly authorized by statute, and such legislative authorization had been held lacking in a case which denied the charging party the right to appeal an adverse section 10(l) proceeding decision, Sears, Roebuck & Co. v. Carpet Layers Local 419, 410 F.2d 1148, 1150 (10th Cir. 1969), vacated as moot, 397 U.S. 655 (1971).

15. UAW v. Scofield, 382 U.S. 205, 220 (1965). See Concrete Materials, Inc. v. NLRB, 440 F.2d 61, 67 (5th Cir. 1971). Noting in Scofield that Congress had made a "careful adjustment of individual and administrative interests," 382 U.S. at 209, the Court cited the "clear words" of section 10(f) of the NLRA which give "any person aggrieved" by a Board order the right to appeal. 29 U.S.C. § 160(f) (1970). See Extent of Discretion, supra note 2, at 104. Provisions for the protection of vital private rights of the charging party can also be seen in his ability to file the unfair labor practice charge, 29 U.S.C. § 160(b) (1970), 29 C.F.R. § 102.9 (1971), his formal recognition as a "party" at the adjudicative stage, 29 C.F.R. § 102.8 (1971), and his power to call and cross-examine witnesses, file exceptions, and file petitions for reconsideration, 29 C.F.R. § 102.46 (1971). See Retail Clerks Local 137 v. Food Employers Council, Inc., 351 F.2d 525 (9th Cir. 1965).

16. See note 12 supra.
middle position advocated by the Supreme Court. However, the public right orientation of the decision prevents the charging party from calling, examining, or cross-examining witnesses,\(^\text{17}\) and raises the possibility that a charging party's inability to fully present his case in district court might result in an unjustified denial of injunctive relief. By making at least limited provision for mandatory injunctions, the Congress recognized that certain activities posed grave and immediate danger not only to the public but to the individual victim.\(^\text{18}\) While eventual NLRB action on the unfair labor practice may vindicate public rights, an injunction is necessary since the nature of the offense might meanwhile destroy the victim. These considerations indicate the desirability of allowing intervention to assure the fullest possible presentation of the case. The charging party's role can still be controlled since the investigating officer must initially institute the suit,\(^\text{19}\) and the district court's decision whether to enjoin is not appealable.\(^\text{20}\)

The Court of Appeals for the Eighth Circuit further subordinated private interests in mandatory injunction proceedings in another 1971 case, *Terminal Freight Handling Co. v. Solien*,\(^\text{21}\) holding that the NLRB agent has discretion to either seek the injunction immediately or permit a slight delay in hopes of a settlement.\(^\text{22}\) The charging party

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17. See note 12 supra.
22. After discussing the somewhat inconclusive legislative history behind the seemingly mandatory language of section 10(l), the court reasoned that the Regional Director was obliged to seek section 10(l) injunctive relief only after determining that "a complaint should issue," i.e., after hopes of a settlement had been dashed. 444 F.2d at 708. This conclusion seems contrary to that of another court of appeals, which maintained that "the Regional Director's discretion as to whether injunctive relief should be sought is limited to whether or not reasonable cause exists to believe that one of the unfair labor practice provisions enumerated in section 10(l) has been violated . . . . It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair labor practices for those of the Congress." Retail Clerks Local 137 v. Food Employers Council, Inc., 351 F.2d 525, 530-31 (9th Cir. 1965); cf. Herzog v. Parsons, 181 F.2d 781, 784-85 (D.C. Cir. 1949); Douds v. Teamsters Local 294, 75 F. Supp. 414 (N.D.N.Y. 1947); 93 CONG. REC. 6506 (daily ed. June 6, 1947) (analysis of section 10(l)) by Senator Murray, protesting mandatory nature of the 10(l) injunction.)
contended that the statute offered no room for discretion. Even though the discretion allowed the Board officer by the court merely resulted in a short delay in which the officer could seek cessation of the unfair practice, the danger of such discretion soon became apparent, for the charging party was forced to request cessation a second time. The period during which a charging party must endure certain unfair labor practices without the benefit of injunctive relief provided by the NLRA may be so crucial that perhaps the interpretation that Congress intended no administrative discretion in these matters reflects the better balance of public and private rights.

Objections to Compromise Settlements

At any time between the filing of an unfair labor practice charge and the moment when the record of the case is filed for court enforcement of the NLRB order, the Board may modify or set aside any finding or order it has issued. Courts of appeals have split sharply over a charging party’s procedural rights if he objects to a settlement between the NLRB and the party charged with the violation. An early case which faced the issue is Marine Engineers Association No. 13 v. NLRB, decided in 1953 by the Court of Appeals for the Third Circuit. Marine Engineers relied upon the Board’s Rules and Regulations and the Administrative Procedure Act (APA) to hold that once a complaint has been issued by the Board the charging party is entitled to an evidentiary hearing on its objections to the settlement. This

23. The charging party based its position on the statutory language:

If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such a charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States District Court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts his business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. 29 U.S.C. § 160(i) (1970).

24. 444 F.2d at 708.

25. Id. at 702.

26. Section 10(d) of the NLRA provides that:

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it. 29 U.S.C. § 160(d) (1970).

27. 202 F.2d 546 (3d Cir. 1955).

28. The court reasoned that since the charging party is within the definition of “party” in the Board's Rules and Regulations, 29 C.F.R. § 102.8 (1971), then the charging party is an “interested party” who should be given an opportunity “to the extent that the parties are unable
approach was only partially accepted by the Court of Appeals for the Distri-

cbt of Columbia Circuit in *Textile Workers v. NLRB*, which

held that the objecting charging party is entitled to an evidentiary

hearing only when the NLRB fails to justify its adoption of the com-

promise settlement on the record. This court also rejected the argu-

ment that the charging party’s consent was necessary to validate a

settlement, concluding that the foundations for such a position, the

Board’s Rules and Regulations and the NLRA, were too ambigu-

ously worded to justify imposing such a rule on the Board.30

In 1964 the Court of Appeals for the Second Circuit rejected the

Third Circuit’s 1953 interpretation of the APA and flatly ruled that

a charging party has no right to an evidentiary hearing on its objec-

tions to a settlement.31 The Court of Appeals for the Third Circuit

responded to this challenge by buttressing its earlier viewpoint and

holding that a Regional Director does not have absolute authority to

adopt a settlement agreement once a complaint has been issued. An

evidentiary hearing must be granted to afford the charging party an

opportunity to explain its objections.32

so to determine a controversy by consent, [for a] hearing . . . .” as provided by the Administra-


29. 294 F.2d 738 (D.C. Cir. 1961).

30. The court noted that no provision in the NLRA provides that the charging party, by

mere virtue of its status, is able to veto a settlement, and that the rules of the Board are not

clear about the matter. The court felt that the relevant provisions of the Board’s Rules and

Regulations, 29 C.F.R. §§ 102.8, 101.9 (1971), merely indicate that the charging party is given

the opportunity for submission of facts and argument, and is recognized as having a substantial

part in assisting the Board in fulfilling its public responsibilities. 294 F.2d at 740.

31. Teamsters Local 282 v. NLRB, 339 F.2d 795, 800, 801 (2d Cir. 1964). The court

maintained that section 5(b) of the APA, 5 U.S.C. § 554(e) (1970), which only applies to

“interested parties,” id., does not embrace the charging party since the charging party has no

legally recognized private interest in an unfair labor practice proceeding. 339 F.2d at 800, 801.

The court insisted that section 5(b) did not refer to the “persons entitled to a hearing” in section

5(a) nor those persons who may be entitled to review per section 10(a), basing its conclusions

largely on the legislative history of the APA. Id. at 800, 801. In surveying the APA’s legislative

history, however, the court seems to have overlooked the interpretation of section 5(b) by

Pennsylvania Congressman Walter, Chairman of the House subcommittee that studied and

introduced the proposed APA to the House: “Subsection (b) of section 5 simply provides that,

apart from notice [provided in subsection (a)], parties must be afforded opportunity for the

settlement of cases in whole or in part and, to the extent that issues are not so settled, by hearing

and decision in compliance with the later provisions of the bill.” 92 CONG. REC. 5651 (1946).

This indicates that “party” and “interested party” were used interchangeably in the two above-

discussed subsections of the APA and that the Teamsters court might have applied an overly

restricted interpretation to the latter of those terms.

Against this background in 1971 the Court of Appeals for the
Fifth Circuit in Concrete Materials, Inc. v. NLRB\(^3\) sought an equita-
ble balance between the rights of the private charging party and the
interests of the public. Two unions charged with unlawful secondary
boycott entered into a settlement agreement with the NLRB Regional
Director over the objection of the charging party. The NLRB refused
to give the charging party an evidentiary hearing on its objections,\(^4\)
and the charging party petitioned the court of appeals to set aside the
order allowing settlement. The court denied the petition and held that
a charging party is entitled to a hearing on its objections to a settle-
ment only when the objections raise a material issue of disputed fact
or when the Board fails to justify its acceptance of the settlements.\(^5\)
The court granted that the public right dogma had been rejected and
that the charging party's private rights must be considered. However,
the court felt that there was no explicit statutory authorization for
allowing the charging party a veto of the settlement.\(^6\) In any event,
reasoned the court, the legitimate right of the charging party to effec-
tive appellate review\(^7\) was adequately safeguarded by its decision re-
quiring a hearing if the Board failed to justify the compromise or if
it was necessary to give the charging party an opportunity to present
its interpretation of the factual situation for the record.\(^8\)

\(^{33}\) 440 F.2d 61 (5th Cir. 1971).

\(^{34}\) [T]he Company indicated that it was contemplating a private damage action
against the Unions under Section 303 of the Act [29 U.S.C. § 187 (1970)], and that it
expected to rely on the Board's finding that the Unions had violated Section 8(b)(4) of
the Act as res judicata as to the Unions' liability in its action under Section 303. 440
F.2d at 63.

\(^{35}\) 440 F.2d at 68.

\(^{36}\) The court felt that the decisions rendered in the Court of Appeals for the Third Circuit
led to the maxim, “no settlement agreement can be effectuated by the Board without the consent
of the charging party,” an approach which violated the “legislative scheme.” 440 F.2d at 68
n.9. Moreover, the court decided that the charging party is not an “interested party” whose
consent is needed (citing Teamsters Local 282 v. NLRB, 339 F.2d 795 (2d Cir. 1964)), 440 F.2d
at 68.


\(^{38}\) 440 F.2d at 68. The charging party planned to seek the private suit remedy provided in
NLRA § 303(b):

> Whoever shall be injured in his business or property by reason or [sic] any violation of
subsection (a) [unfair labor practices defined in 29 U.S.C. § 158(b)(4) (1970)] may sue
therefor in any district court of the United States . . . or in any other court having
jurisdiction of the parties, and shall recover the damages by him sustained and the cost

It was evident in that case that there is little “public interest” justification for providing a
hearing for the sole purpose of easing the charging party's burden in a subsequent section 303
suit.
The *Concrete Materials* decision is a clear effort to balance public and private interests while supporting the NLRA's primary goal of resolving labor disputes and while acknowledging the vital role of settlement agreements. The court noted that to automatically grant the charging party a hearing after the resolution of a labor dispute does not necessarily further the public interest. However, the court was concerned with the protection afforded private rights by the right to appellate review and demanded that pre-review procedures preserve the efficacy of that right. This position, while avoiding the undesirable extremities of exclusively supporting public or private rights, rightly recognizes the demise of the public right dogma while protecting NLRB administrative procedures from needless hearings. A recent case decided by the Court of Appeals for the Ninth Circuit wholeheartedly adopts the compromise position of *Concrete Materials*.

**Appellate Review**

As has been mentioned, the NLRA safeguards the charging party against administrative error by giving him or any other “person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought,” an opportunity to seek modification or nullification of the order in a court of appeals. The charging party’s entrenched right to appellate review has been viewed as producing benefits which justify occasional impairment of administrative expediency. However, it must be recognized that the value of judicial review is dependent upon the various procedural prerogatives accorded the charging party at different stages of the unfair labor practice proceeding. Denial of a full participatory role at the investigative stage, refusal of full party status and the consequent inability to call

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39. An alternate viewpoint, consistent with the more liberal decisions rendered by the Court of Appeals for the Third Circuit, see notes 27-28, 32 supra and accompanying text, would be to grant the hearing as a corollary of the charging party’s status as a full-fledged party throughout the unfair labor practice proceeding.

40. NLRB v. International Bhd. of Electrical Workers Local 357, 445 F.2d 1016 (9th Cir. 1971).

41. See p. 201 supra.


45. Once an unfair labor practice charge is filed with the NLRB, an investigation is conducted by a Regional Board officer on behalf of the independent General Counsel. 29
and examine witnesses in a mandatory injunction proceeding, and the rejection of a request for an evidentiary hearing on objections to a compromise settlement can all significantly affect the presentation of the charging party’s appeal. Professor Jaffe notes that the NLRA “is almost alone in committing to the sole enforcement of a public agency a policy which is universally recognized as vindicating individual and group interests.”

The realization that victims of unfair labor practices are largely dependent upon the adequacy of Board proceedings for the protection of their interests demands that courts closely examine any circumscription of procedural rights which would reduce the one safeguard available to the charging party—judicial review of administrative actions.

V. REFUND POWERS

FPC REFUND POWERS UNDER THE NATURAL GAS ACT

The “refund power” is the equitable power of a regulatory agency to order the return of rate charges improperly assessed. The most retroactive and effective application of the refund power is the “reparation order,” defined as the assessment of damages caused by the unreasonableness of past rates.

Although some federal agencies have

C.F.R. § 101.4 (1971); AMERICAN BAR ASSOCIATION, SECTION OF LABOR RELATIONS, THE DEVELOPING LABOR LAW 833 (1971); 1 J. JENKINS, LABOR LAW § 2.53, at 135 (1968). The charging party is expected to cooperate with the Board officer, but may participate in the investigation only to the extent of furnishing facts and formally presenting his theories of applicable law. DEVELOPING LABOR LAW, supra, at 833-34. If the investigating officer feels that the charge is without merit he may formally refuse to issue a complaint. 29 C.F.R. § 101.6 (1971); DEVELOPING LABOR LAW, supra, at 834; see 29 C.F.R. § 102.19 (1971). Although this refusal is appealable to the General Counsel, 29 C.F.R. §§ 101.6, 102.19 (1971), DEVELOPING LABOR LAW, supra, at 834, if the determination of the investigating officer is affirmed, the charging party has no further avenue of appeal. Contractors’ Ass’n v. NLRB, 295 F.2d 526 (3d Cir. 1961), cert. denied, 369 U.S. 813 (1962); J. JENKINS, supra; DEVELOPING LABOR LAW, supra, at 834.

46. Jaffe, supra note 2, at 726.

1. The refund power is effectuated through use of the “refund order,” which may be fashioned in a variety of forms. One common use, for example, is the return of a portion of increased rate charges which are allowed to take effect pending final administrative approval. See Note, Use of the Refund Device in Rate Regulation, 63 HARV. L. REV. 1023, 1023 (1950); notes 38-39 infra and accompanying text.

2. See Clark, Protection of the Consumer Under the Natural Gas Act—Refunds and Reparations, 14 GEO. WASH. L. REV. 261, 270 (1945). This broad definition of “reparation”