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The Leeds & Northrup Company, manufacturer of electronic equipment, filed unfair labor practice charges against the Leeds & Northrup Employees Union, averring that during a plant strike the union had violated the Labor Management Relations Act.[1] After investigating the charges,[2] the Regional Direcor of the Fourth Region, acting on behalf of the Board's General Counsel, filed a complaint against the union alleging unfair labor practices within the meaning of section 8(b)(1)(A) of the NLRA.[3] This complaint was later withdrawn by the Regional Director on the basis of an informal settlement agreement between the union and himself.[4] The company refused to consent to this agreement and requested a hearing on its objections. This request was denied initially by the Regional Director and later by the General Counsel on review.[5] The company then brought the case for review in the Third Circuit court of appeals, seeking to have the ruling of the Regional Director and General Counsel set aside. *Held, reversed:* Once a complaint has issued, a charging party is entitled to an evidentiary hearing on its objections to an informal settlement agreement. *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966).

I. NLRB Procedure

The National Labor Relations Board was given the power by the NLRA to prevent persons from engaging in any unfair labor practice

[1] 61 Stat. 136 (1947), as amended, 29 U.S.C. § 158(b)(1)(A) (1964). The original act was called the National Labor Relations Act; the 1947 amendment, the Labor-Management Relations Act. The statute in its present form will hereafter be referred to as the NLRA.

[2] The company charged the union with coercing its employees during the strike: by threatening them with violence, loss of employment, and union fines if they crossed the picket lines; by imposing fines against non-strikers prior to union trials; by applying dues on account of fines to be imposed, as opposed to waiving dues for strikers; and by subsequently imposing fines equal in amount to the wages that were earned during the strike.

[3] 29 U.S.C. § 158 (1964):

> (b) It shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157. . . .

29 U.S.C. § 157 (1964):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

[4] The union agreed to the posting of notices at the plant which stated that the union would not threaten employees with violence or loss of employment for failing to act concordantly with the union in the future.

[5] The Regional Director, by letter of May 22, 1964, denied the relief sought and stated that pursuant to NLRB rules and regulations § 102.19 the company was entitled to seek

affecting interstate commerce.[6] The Board's regulations provide that any person wishing to charge another person with engaging in an unfair labor practice shall file a charge with the Regional Director for the region in which the alleged unfair labor practice has occurred.[7] The Regional Director acts on behalf of the Board's General Counsel[8] in investigating the charge and determining whether or not a complaint should issue.[9] If the Regional Director decides a complaint should issue, the usual procedure results in service of the complaint on the charged party,[10] an answer to the charge,[11] a hearing,[12] and the trial examiner's decision which is filed with the Board.[13] If exceptions[14] are filed, the Board reviews the case and makes a final ruling;[15] if not, the decision automatically becomes the decision and order of the Board.[16] Any person aggrieved by a final order of the Board may obtain review in the United States Court of Appeals for the District of Columbia or in the court of appeals for the circuit where the alleged unfair labor practice occurred.[17]

The Regional Director may withdraw a complaint on his own motion[18] by entering into either a formal or an informal settlement agreement with the charged party.[19] The agreement stipulates that the charged party agrees to take the affirmative action which the Board might have ordered in a formal proceeding.[20] A formal settlement

review of the action by filing a request for review with the General Counsel of the NLRB. The company did this, but the General Counsel advised the company that he approved the action of the Regional Director in executing the settlement agreement.

[6] 49 Stat. 449 (1935), as amended, 29 U.S.C. § 160(a) (1964).

[7] 29 C.F.R. § 102.10 (1965) (NLRB rules and regulations).

[8] 29 U.S.C. § 153(d) (1964): "There shall be a General Counsel of the Board. . . . He shall have final authority, on behalf of the Board, in respect of investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board."

[9] The Regional Director's decision on whether or not to issue a complaint is reviewable by the General Counsel whose decision on the matter is final and unappealable. 29 C.F.R. § 102.19 (1965) (NLRB rules and regulations). Once a complaint is issued the General Counsel is responsible for prosecuting the matter.

[10] The complaint states the unfair labor practice and contains a notice of a hearing before a trial examiner designated by the Board. 29 C.F.R. § 102.15 (1965) (NLRB rules and regulations).

[11] 29 C.F.R. § 102.20 (1965) (NLRB rules and regulations).

[12] 29 C.F.R. § 102.34 (1965) (NLRB rules and regulations).

[13] 29 C.F.R. § 102.45 (1965) (NLRB rules and regulations).

[14] 29 C.F.R. § 102.46 (1965) (NLRB rules and regulations).

[15] 29 C.F.R. § 102.48 (1965) (NLRB rules and regulations).

[16] *Ibid.*

[17] 29 U.S.C. § 160(f) (1964). See also American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953) and Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

[18] 29 C.F.R. § 102.18 (1965) (NLRB rules and regulations).

[19] Marine Eng'rs Beneficial Ass'n v. N.L.R.B. 202 F.2d 546 (3d Cir. 1953); Shenandoah-Davies Mining Co., 11 NLRB 885 (1939).

[20] For a discussion of the settlement agreement procedure see CCH LAB. L. REP. § 5630 (1966).

agreement results in the issuance of a final Board order and can be enforced by a court decree. An informal settlement agreement is a gentlemen's agreement, and no formal order or court decree issues. The agreement itself is contingent on strict compliance by the accused party. If there is no compliance with an informal settlement the agreement is nullified, and the Regional Director proceeds as he normally would in prosecuting the complaint.

II. Objections to Settlement Agreements

Since settlement agreements may give the charging party less than it sought, it might object to withdrawal of the complaint and demand an evidentiary hearing on its objections. On objections to formal settlement agreements, section 10(f) of the NLRA[21] allows the charging party to take the case to a circuit court of appeals for a decision on whether a right to a hearing exists. The question of the charging party's right to a hearing on its objections to a formal settlement agreement has been adjudicated with different results in the federal circuits.[22] The problem was initially considered by the Third Circuit in *Marine Eng'rs Beneficial Ass'n v. NLRB.*[23] The court ruled that after a complaint issues on an unfair labor practice charge, if a settlement is negotiated, a charging party is entitled to a hearing. Support for the ruling was found in section 5(b) of the Administrative Procedure Act,[24] enacted in 1946 for the purpose of regulating the procedure of administrative agencies.[25] Another reason given by the court was that a hearing would create a record which would allow an intelligent review of the propriety of the Board's action. Eight years later in *Textile*

[21] 29 U.S.C. § 160(f) (1965):

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.

[22] An analysis of the rights of the charging party before the Board is presented in Comment, 32 U. Chi. L. Rev. 786 (1965). See also Recent Decision, 65 Colum. L. Rev. 1104 (1965); Recent Decision, 26 U. Pitt. L. Rev. 642 (1965).

[23] 202 F.2d 546 (3d Cir. 1953), *cert. denied*, 346 U.S. 819 (1953).

[24] 5 U.S.C. § 1004(b) (1964):

> The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of the title.

[25] The act regulates administrative agencies in four distinct ways: (1) by requiring that public information be given; (2) by prescribing a procedure for administrative rule-making; (3) by prescribing a procedure for administrative adjudication; (4) by regulating judicial

Workers v. NLRB[26] the Court of Appeals for the District of Columbia allowed the Board an alternative. The court held that a charging party was entitled either to a hearing or to a statement of the Board's reasons for supporting the formal settlement agreement—but not necessarily to both.[27]

In 1964 the Second Circuit completely rejected the idea that a charging party should have a right to an evidentiary hearing. In *Local 282, Teamsters Union v. NLRB*[28] that court reasoned that a charging party is not entitled to the procedural protection of the APA. The court felt that in order to qualify under the APA, the right sought to be enforced must be a private right;[29] and, since the National Labor Relations Act enforces only public rights,[30] the charging party could not qualify.[31] However, the issue of public versus private rights was recently discussed in *United Auto Workers v. Scofield*,[32] where the United States Supreme Court granted a charging party the right of intervention at the appellate level. Classing this as a private right, Mr. Chief Justice Warren stated, "In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interest,' however, is not to imply that the public right excludes recognition of parochial private interests."[33] Mr. Chief Justice Warren went on to say that the statutory pattern of the act does not dichotomize "public" as opposed to "private" interest, but that the two interblend in the intricate statutory scheme.[34]

III. Analysis of Leeds & Northrup Co. *v.* NLRB

Initially the Third Circuit had to determine whether the rule of *Marine Eng'rs* applied to an informal settlement agreement, *i.e.*, whether the informality of the settlement agreement excluded the court's jurisdiction under section 10(f) of the NLRA. The union con-

review of administrative action. Brown, *The Federal Administrative Procedure Act*, 1947 Wis. L. Rev. 66. The legislative history of the Administrative Procedure Act is set forth in S. Doc. No. 248, 79th Cong. 2d Sess. (1946).

[26] 294 F.2d 738 (D.C. Cir. 1961), 315 F.2d 41 (D.C. Cir. 1963).

[27] *Id.* at 741.

[28] 339 F.2d 795 (2d Cir. 1964).

[29] *Id.* at 799.

[30] The court cited as authority Amalgamated Workers v. Consolidated Edison Co., 309 U.S. 261, 264-65 (1940). For a further discussion of this subject by the Supreme Court in a later decision see, Garner v. Teamsters Union, 346 U.S. 485, 493 (1953).

[31] For a discussion of public and private rights see Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 Harv. L. Rev. 720 (1946).

[32] 382 U.S. 205 (1965).

[33] *Id.* at 218.

[34] *Ibid.*

tended that such discretionary actions of the Regional Director and the General Counsel were not final Board orders and thus were not reviewable. The company insisted that this would be improper because choice of a certain form of agreement could foreclose judicial review. The court ruled that informal agreements are reviewable under section 10(f) of the NLRA[35] and under section 10(c) of the APA.[36] It added that any distinction between formal and informal final disposition of the case confuses incidence with substance, and the actual need for review rather than the formalities of Board procedure must control. In explaining its position the court quoted from *Columbia Broadcasting Sys. Inc. v. United States*:[37] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings."[38]

The court stated that in dismissing a complaint, the Regional Director acts on behalf of the Board and not on behalf of the General Counsel. Once the complaint issues, the proceeding passes from the investigatory stage to the adjudicative stage, and control changes from the General Counsel to the Trial Examiner and the Board.[39] Therefore, the Regional Director's disposition of the complaint is as final as direct action by the Board. While recognizing the valuable function the Board serves in promoting expertise in the labor field and unburdening the judiciary, the court refused to acknowledge that Congress intended to give the Board power to foreclose judicial review in this area. The court also cited section 3(d) of the NLRA,[40] which, read in conjunction with section 101.9 of the Board's regulations,[41]

[35] See note 21 *supra*.

[36] "Judicial Review of Agency Action. Except so far as (1) statutes preclude judicial review or (2) action is by law committed to agency discretion." 5 U.S.C. § 1009 (1964):

> (a) Right of Review
>
> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (c) Acts Reviewable
>
> Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary procedural or intermediate agency, action or ruling not directly reviewable shall be subject to review of the final agency action.

[37] 316 U.S. 407 (1942).

[38] *Id.* at 425.

[39] At this point the Regional Director must obtain the consent of the adjudicative officer of the Board before he can withdraw, settle, or dismiss a complaint. General Maintenance Eng'rs Inc., 142 N.L.R.B. 295 (1963); United Aircraft Corp., 91 N.L.R.B. 215 (1958).

[40] See note 8 *supra*.

[41] C.F.R. § 101.9 (1965) (NLRB rules and regulations):

> Settlement after issuance of complaint. . . .
>
> (a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and

indicates that neither Congress nor the Board intended to vest in the Regional Director and the General Counsel the power to settle complaints after their issuance without the consent of all the parties.

Heavy reliance was placed on the Supreme Court's decision in *Scofield*,[42] which recognized that a charging party has certain private as well as public rights before the Board. There the Court had commented that the issuance of a complaint formally recognizes the charging party as a party to the action. It had added "if the Board dismisses the complaint, . . . [a charging party] can obtain review as a person aggrieved."[43]

Having determined that the Board could not arbitrarily impose an informal settlement agreement, the Court ruled that any adjudicatory phase of the administrative process necessitates appropriate avenues of review, both administrative and judicial.[44] Therefore, a charging party is entitled to an evidentiary hearing, in accordance with the scheme contemplated by the NLRA and APA. This evidentiary hearing is a necessary part of the appropriate avenue of administrative review which was set up by the procedure of the Board.[45] The Court felt that there must be more than a mere consideration of the charging party's objections[46] as contended by the Board. Moreover, once the administrative remedies, which include an evidentiary hearing, are exhausted by the complaining charging party then the matter can be taken to the appellate court for judicial review of the settlement agreement. The evidentiary hearing allows a reviewing court to consider intelligently the contentions of the parties through the hearing record and thus satisfies the requirement of an appropriate avenue of judicial review.

IV. Conclusion

Leeds & Northrup indicates the trend in present decisions toward a presumption of reviewability.[47] Since the presumption was not rebutted by a showing of legislative intent to preclude review or by a

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in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

[42] 382 U.S. 205 (1965).

[43] *Id.* at 219 (1965).

[44] 357 F.2d at 535.

[45] See note 41 *supra*.

[46] 357 F.2d at 536.

[47] United States v. ICC, 337 U.S. 426, 433-34 (1949); Board of Governors of the Fed. Reserve Sys. v. Agnew, 329 U.S. 441 (1947).