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A PRACTICING LAWYER LOOKS AT THE LABOR BOARD†

by

*Joseph A. Jenkins**

AN attorney in private practice is often perplexed by this question: why do some cases before the National Labor Relations Board take so long to decide? Since the same problem had troubled me before I came to Washington as a member of the Board, I resolved to find out just what happens to a case when it gets up to the Board. This article passes on something of what I have learned since March 28 of this year, when I was sworn in as a member. I intended to demonstrate in some detail the manner and amount of time and attention devoted to cases that are contested up to Board decision.

It is a hoary truism that time is of the first importance in labor-management relations. So, as a point of departure in this look at the Washington operations, it seemed a good idea to check on the time element in a few cases. The writer participated in his first two decisions on March 29th. For that reason those first two cases are chosen as a point of departure in examining Washington operations. While neither of these cases turned out to be "average" cases in the statistical sense, they do seem to be fairly typical of Board operations. One was an election case, and the other a secondary boycott case.

The election case was with the agency 133 days from the time the petition was filed until the Board issued its decision directing an election. However, for 20 days of this time, the case was more or less in cold storage while unfair labor practice charges which had been filed against the employer after the representation hearing were investigated. The charges were dismissed by the General Counsel, so the case rolled on through the mill. But the question of primary interest was: How long was the case before the five-member Board? Counting from the time the case was actually assigned to a Board member (after the charges had been dismissed), 58 days elapsed before the Board's formal decision was mailed to the parties. However, it should be noted that this case reversed an earlier precedent and laid down a new rule on bargaining units in wholesale operations. Breaking these 58 days down a bit further, 45 days were occupied in analyzing the issues in the record, reaching the initial decision by the five members, preparing a draft opinion, and circulat-

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ing the draft among the Board members. Eleven days later, all five Board members had approved the draft and two days later the decision issued.

The secondary boycott case was technically pending before the Board in Washington 133 days. That dates from the day the trial examiner issued his Intermediate Report and Recommended Order. Thirty-one days later the parties had filed their exceptions and brief. The case was then ripe for the process of decision, but it hit a snag. It was 69 days before a Board legal assistant was available to begin work on it. Thereafter, 64 days elapsed between the time the actual work of deciding the case began and the issuance of decision. Of these 64 days, it took 44 days for reading the record, making a decision by the Board members and preparing a draft opinion in accordance with that decision. Twenty days after the draft opinion was circulated among the Board members and the decision issued. In connection with this case, it is an interesting sidelight to note the time which elapsed in the collateral proceeding for the injunction which the statute requires to be sought on secondary boycott complaints. This proceeding in the federal district court extended over 136 days, from the filing of the petition to the court's decision on the issue of whether there was reasonable cause to believe that the union had violated the Taft-Hartley Act.

Of course, neither of these cases is yet closed. The election ordered still must be held. And, it is possible that it might yet spawn a flock of objections. The Board's order in the secondary boycott case has to be compiled with or enforcement sought in the courts. Also, as before mentioned, these are not exactly "average" cases in terms of time. A check of official statistics shows a median average in 1956 for an unfair labor practice case was just a trifle under 365 days from filing of the charge to a Board decision, compared with 281 days for the secondary boycott case discussed above. Moreover, the statute requires that a priority be given to the investigation of boycott cases. On representation cases, the average for 1956 was about 90 days from petition to decision. Of course, both these average figures pertain to contested cases that are carried up to the Board in Washington, not those that are settled or disposed of in the field.

In mentioning these figures of days and months, I would not want to leave you with a picture of the four Board members who were then on the job as sitting around in their swivel chairs waiting for these two cases to come to the boil of decision. For example, they handled a few other matters during the 133 days that the boycott

case was in Washington. They issued decisions in 469 contested cases and in 169 others requiring formal Board decisions—a total of 638 cases in which the litigants had piled up a mere 113,642 pages of transcript, not counting the briefs, exceptions, and such supplemental reading material. Also during this same period, the Board members had their free time to deal with the usual run of motions for reconsideration and the varied procedural matters that counsel, statutory requirements and administrative due process can raise.

Having waded through this swamp of statistics, let us come a few steps more on the dry land of Board case-handling procedure. The grand central station for cases coming to the five-member Board in Washington is the Executive Secretary's office. He is the Board's equivalent of a clerk of the court. But he has more responsibility for getting the cases through to decision than a court clerk ordinarily has. One of his minor jobs is assigning cases—"minor" because cases usually are assigned to the Board members by rotation. But when a case arrives in the Executive Secretary's office, it is seldom, if ever, ready for assignment because of the pending backlog.

An unfair labor practice case is transferred to the Board when the trial examiner issues his Intermediate Report. Of course, at that time, it cannot be known whether the case will ever be assigned to the Board members for decision; however, most of them are. Only about 12 percent of the unfair labor practice cases that are carried to a hearing stop with the parties' acceptance of the trial examiner's findings. So, the case has to await assignment until the General Counsel or the other parties file exceptions and supporting briefs. This seldom takes less than the 20 days allowed by the statute and sometimes takes considerably more as extensions of time are sought and granted for valid reasons.

At the first of this month, for example, the Board had 270 cases on assignment to the Board members and an additional 131 cases ready and waiting assignment. Fifty-one more were on hand but not yet ready for assignment, and 15 of these were unfair labor practice cases which were expected to be closed by compliance with the trial examiners' recommendations.

Technically a case goes from the Executive Secretary to a Board member. Actually it goes to a legal assistant of the member. Each member has a staff of legal assistants; currently about 14 are attached to each member. As the rest of the world, they are divided into Indians and chiefs. Each Board member has a chief legal assistant and usually two or three supervisors. The rest are what might

be called the frontline Indians. They are the men and women who have the job of wading through all the pages of transcript and briefs to find the pertinent parts and the essence of the case. As they go along, guided by the supervisors, they sort out the simple and the complex, the hard and the easy, the points that are well settled from those that have never been tackled before. After they have determined the issues of the case, they must seek out the law covering these points. Once in a while in their researches they may find two Board decisions on the same point which might be said to be inconsistent with each other. And, it is told, they are not shy about pointing out these apparent inconsistencies to the Board members.

The fruit of this effort is a case analysis memorandum, usually as short as a brief and similarly interlaced with citations to the record, the briefs and the books. This memorandum, accompanied by the record, the briefs and the other supplemental reading matter, makes its way up through the supervisor and the chief legal assistant to the desk of the Board member. After the Board member has digested this material, there is ordinarily a case conference consisting of the legal assistant, his supervisor, the chief legal assistant and the Board member. The member, if satisfied, approves the memorandum for circulation to the other Board members. It is then that the real job of deciding the case begins.

After the individual members have had time to digest the case, it then goes on the Board's case agenda for concerted consideration. These meetings, customarily called three days a week, are marked by a thorough and exhaustive discussion of the case and its issues and exchange of views. This is the time of decision, and the discussion culminates in the vote of the Board members. The legal assistant assigned to the case and his supervisor and the chiefs are present for this discussion. The legal assistant notes the reasoning upon which the case is decided, and prepares a draft of an opinion accordingly. Occasionally, one or two members may disagree with the majority's decision or its rationale. The dissenting member then has one of his legal assistants prepare a draft of a dissenting opinion for approval. The dissenting opinion, of course, also circulates to all Board members. On some occasions such dissents have been so powerful as to dissolve the original majority into a dissenting minority. But doubtless the dissenting members rarely hope for so much. The great bulk of decisions are unanimous.

This obviously is a time-consuming process. As a consequence, the Board follows it only in cases which present novel, important or

difficult issues. Otherwise, the five-member Board would never be able to keep up with its caseload, which requires it to turn out decisions in more than 110 contested cases every 20 regular working days. One shortcut that the Board employs in cases which appear to be clearly controlled by well-established precedent is to have the legal assistant draft a tentative opinion under his individual member's direction instead of a case analysis memorandum. In representation cases, this has been carried a step further in what Board personnel call the "short form." This is a form on which has been printed the stock language of Board decisions with space provided for typing in the specific data relating to the particular case.

But probably the most important step the Board has taken to expedite cases was the establishment of five three-member panels, as permitted under the National Labor Relations Act. Each member is chairman of a panel. While each panel meets, the two remaining members are free to study cases for the Board's case agenda and his own panel and to carry on other necessary business of his office. Meanwhile, the process of deciding cases goes forward. However, here, as with all the other shortcuts, any Board member has the power in any case to call it up for consideration at an agenda meeting of the full Board. The panels handle most of the cases which are clear-cut enough to be prepared originally in draft form rather than dealt with by the memorandum process.

But even with these aids and shortcuts in paperwork, a Board member has indeed a full day. Not only is it necessary to study the essential papers of the cases with great care and consult frequently with his legal assistants but it is a great necessity to consult informally with fellow Board members in order to understand their points of view and to get the benefit of their thinking on the broad matters of policy and administration.

Board members do not work a 40-hour week. Usually it is necessary to take a briefcase full of papers home at night in order to have an opportunity to go over the Intermediate Reports and various briefs involved. Considering the vastness of the territory covered, the number of cases involved, and the complexities of the issues, the Board is doing a fair job of turning out its cases. Nevertheless, it is constantly seeking ways and means of improving production while at the same time maintaining a high quality of work. Its policy is to turn out cases as fast as time permits, considering the built-in delays in the form of time for filing briefs, etc., and considering the limited funds and personnel at its disposal.

The mention of policy leads into another topic which is the subject of much discussion in Washington. That is the matter of the Board's jurisdiction. There is a good deal of interest and concern among labor lawyers as to the impact and implication of the Supreme Court's recent decisions in the case of *Guss v. Utah Labor Relations Bd.*¹ and its companion cases.² This is no less true in Washington.

As to the scope of these preemption decisions, attention is called to the first appraisal of them by a state court. The opinion was that of a trial court in Illinois, where the judge said in a picketing case involving a retail automobile dealers' association:

It is my opinion from a reading of these cases that the entire field is preempted by Congress; it is preempted and the state courts lack jurisdiction. I think that the National Labor Management Act provides a comprehensive system for dealing with labor relations and dealing with unfair labor practices affecting interstate commerce.³

The Judge went on to say:

I think the National Labor Relations Board, either directly or indirectly, controls all the alleged unfair labor practices that are alleged here and has exclusive jurisdiction to determine the issues in controversy. The questions of picketing, boycott activities, secondary boycott, consumer pressure and economic pressure for the purpose of obtaining recognition or union shop agreements, are, in my opinion, either directly or indirectly recognized and dealt with by the national act.⁴

From some experience in dealing with the uncertainties of legal interpretation, the writer will not undertake at this time to say whether this state court's reading of the *Guss* case defines with precision either way the reaches of the Supreme Court's opinion. Also, in delving into this highly controversial field, it is not intended to speak in any way for the other members of the National Labor Relations Board. This discussion will be confined merely to mentioning some of the possible avenues of dealing with the "no man's land" which the Supreme Court found to exist between the present federal field of activity and the limits of state power to act.

There appear to be four major alternatives:

1. Congress can act to reduce the area of federal preemption.
2. The Board itself can lower its jurisdictional standards to extend its field of action.

¹ 77 Sup. Ct. 598 (1957).

² *Amalgamated Meat Cutters & Butcher Workmen, AFL v. Fairlawn Meats, Inc.*, 77 Sup. Ct. 604 (1957); *San Diego Bldg. Trades Council v. Garmon*, 77 Sup. Ct. 607 (1957).

³ *Puckett Buick Co. v. International Brotherhood of Teamsters*, 39 LRRM 2753, 2754 (Ill. Cir. Ct., Knox County, April 8, 1957).

⁴ *Id.*

3. The "no man's land" can continue pending legislative or administrative action.

4. The States can act to fashion statutory machinery so that the Board can, within the limitations of the existing federal law, cede jurisdiction.

The Supreme Court made it amply clear in the *Guss* opinion that the only thing decided in these cases was that Congress had occupied and thereby preempted the field of labor-management activities covered by the Taft-Hartley Act when such activities affect interstate commerce. The Court also made it equally clear that Congress could, if it chose, reduce the extent of its preemption. The Court noted that "Congress is free to change the situation at will." In this situation, it seems to me that Congress, if it wishes to act, has at least four choices:

First, it could declare the states free to act whenever the national Board declines to assert jurisdiction.

Second, it could permit such state action if consistent with the federal law.

Third, Congress could empower the national Board to cede jurisdiction to the states in certain cases without the current requirement of consistency.

Fourth, it could define the federal jurisdiction more precisely, and expressly leave the remainder of the field to the states.

If there is no action by Congress, the national Board must ultimately decide whether or not it should take any action. The Board, of course, could lower its standards for asserting jurisdiction. However, this might raise one of two problems, or perhaps both of them: the Board's handling of cases would be slowed down by the influx of new cases; or it would be necessary for the Board to go to Congress for additional funds to handle the added load of cases.

One of the principal evils of delay in law administration, of course, is that it actually weakens the force of the law. One party or another in effect often loses his rights by the long delay in their vindication. So, if delay in adjudication were the only problem arising from a lowering of the Board's jurisdictional standards, it has been suggested that this might be counteracted by wider use of the Board's discretionary power to seek federal court injunctions against conduct which the General Counsel has denominated an unfair labor practice in a formal complaint.

Which of these four major alternatives will be followed is not known. However, this much is certain: to some managements and

employees of companies which are too big for state and simultaneously too small for federal coverage the current situation may well prove unbearable. For example, the Illinois case referred to earlier involved 10 retail automobile dealers and two labor organizations which have been embroiled in a labor dispute marked by picketing since May, 1956.

If the Board lowers its jurisdictional standards, will it be able to act on time to extend the benefits of the statute to small employers plagued by secondary boycotts, or act on time to guard the rights of employees guaranteed by Section 7 of the Act?

The jurisdictional problem is one of grave national concern, and it is important that it be worked out satisfactorily, as its solution will have a profound and lasting impact upon the lives of the citizens of these United States.