NLRB-00114397

SENATE JUDICIARY COMMITTEE PRINT, JUNE 1945

NOTE.—*In May 1945 the Committee on the Judiciary of the Senate issued a Committee Print containing in two columns the text of the bill as originally introduced by Senator McCarran, Chairman of the Committee, on January 6, 1945, together with a parallel column consisting of a "revised text developed through informal conferences with interested parties" and some notes explaining shifts of language from one provision to another. This Print was reproduced in the later one of June 1945, to which was added a third column containing an "explanation of provisions with references" and a fourth column of "suggestions and objections of interested parties with reference to revised text".*

The originally introduced text is not reproduced here, since it is the same as the text of H. R. 1203 beginning at page 155 and the explanations and comments relate to the revised text. There is reproduced below, in one column, the revised text in italics followed as to each provision by notes, explanations, and suggestions appearing in the Committee Print of June 1945. First, however, there appear the two explanatory paragraphs in the Print. Editorial inserts, made necessary by the more convenient one-column form used below, are bracketed.

EXPLANATIONS

[Beneath] each paragraph of the revised text as presented [below in italics] is a statement of the purport, derivation, or relation of the provision. References are made to the final report of the Attorney General's Committee on Administrative Procedure and to other authorities. The committee has also had the benefit of the report of the President's Committee on Administrative Management, the monographs issued by the Attorney General's Committee respecting each important Federal agency, the several volumes of hearings by a subcommittee of this committee in 1941, and the current hearings before the House Judiciary Committee.

SUGGESTIONS

[Under this heading, as it appears below in connection with each proposed statutory provision, are] summaries of the objections and suggestions submitted by governmental agencies and others to June 29, after the tentatively proposed revision * * * was published and distributed. Many of the comments received from administrative agencies raise problems of language present in any legislation, which can be clarified in the report accompanying the bill. Agency responses of a very general or nonspecific nature, which are not included in the following summaries, may be grouped as follows:

1. Accord with the purpose of the bill and its specific provisions with stated exceptions.

NLRB-00114398

sole protection remains the civil service system, they may be removed only after a hearing pursuant to the proposed statute. For this purpose it is suggested that the following words be added at the end of the second exception: "other than examiners appointed pursuant to section 11".

(5) Question has been raised whether the sixth exception in the introductory clause of section 5, relating to certification procedure in labor representation cases, should be included and thus remove such cases from the operation of sections 5, 7, and 8. Those who desire the exemption state that such things as intermediate reports, findings, and written decisions are unnecessary because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition. Those who oppose the exemption say that, on principle, the function should be treated as other adjudications and that, so far as the issues are simple, the intermediate report, findings, and decisions may also be simple.

(*a*) *Notice.—Persons entitled to notice of an agency hearing shall be informed of* (*1*) *the time, place, and nature thereof,* (*2*) *the legal authority and jurisdiction under which it is to be held, and* (*3*) *the matters of fact and law in issue. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.*

EXPLANATION

Since this section, and thereby sections 7 and 8 relating to hearings and decisions, applies only where statutes require a hearing, notice of hearing is an obvious and indispensable requisite. The only purpose of subsection (a) is to require adequate notice, because "a * * * prerequisite to fair formal proceedings is that when formal action is begun, the parties should be fully apprised of the subject matter and issues involved. Notice * * * must fairly indicate what the respondent is to meet. * * * Room remains for considerable improvement in the notice practices of many agencies" (*Final Report*, Attorney General's Committee, p. 63). The second sentence requiring a statement of controverted issues is essential because of the general lack of requirement for responsive pleadings in administrative proceedings; without such provision moving parties do not know what issues are controverted.

(*b*) *Procedure.—The agency shall afford all interested parties opportunity for* (*1*) *the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment where time and the nature of the proceeding permits and* (*2*), *to the extent that the parties are unable to so determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.*

NLRB-00114399

Calendar No. 758

79TH CONGRESS 1st Session | SENATE | REPORT No. 752

ADMINISTRATIVE PROCEDURE ACT

NOVEMBER 19 (legislative day, OCTOBER 29), 1945.—Ordered to be printed

Mr. MCCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 7]

The Committee on the Judiciary, to whom was referred the bill (S. 7), to improve the administration of justice by prescribing fair administrative procedure, having considered the same, reports favorably thereon, with an amendment, and recommend that the bill do pass, as amended.

There is a widespread demand for legislation to settle and regulate the field of Federal administrative law and procedure. The subject is not expressly mentioned in the Constitution, and there is no recognizable body of such law, as there is for the courts in the Judicial Code. There are no clearly recognized legal guides for either the public or the administrators. Even the ordinary operations of administrative agencies are often difficult to know. The Committee on the Judiciary is convinced that, at least in essentials, there should be some simple and standard plan of administrative procedure.

I. LEGISLATIVE HISTORY

For more than 10 years Congress has considered proposals for general statutes respecting administrative law and procedure. Figure 1 on page 2 presents a convenient chronological chart of the main bills introduced. Each of them has received widespread notice and intense consideration.

The growth of the Government, particularly of the executive branch, has added to the problem. The situation had become such by the middle of the 1930's that the President appointed a committee

NLRB-00114400

judicial review, through declaratory judgment or other procedures pursuant to section 10.

SEC. 5. ADJUDICATIONS.—*The various subsequent provisions of section 5 relating to adjudications apply only where the case is otherwise required by statute to be determined upon an agency hearing except that, even in that case, the following classes of operations are expressly not affected: (1) Cases subject to trial de novo in court, (2) selection or tenure of public officers other than examiners, (3) decisions resting on inspections, tests, or elections, (4) military, naval, and foreign affairs functions (5) cases in which an agency is acting for a court, and (6) the certification of employee representatives.*

The general limitation of this section to cases in which other statutes require the agency to act upon or after a hearing is important. All cases are nevertheless subject to sections 2, 3, 6, 9, 10, and 12 so far as those are otherwise relevant.

The numbered exceptions remove from the operation of the section even adjudications otherwise required by statute to be made after hearing. The first, where the adjudication is subject to a judicial trial de novo, is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision. The second, respecting the selection and tenure of officers other than examiners, is included because the selection and control of public personnel has been traditionally regarded as a discretionary function which, if to be overturned, should be done by separate legislation. The third exempts proceedings resting on inspections, tests, or elections because those methods of determination do not lend themselves to the hearing process. The fourth exempts military, naval, and foreign affairs functions for the same reasons that they are exempted from section 4; and, in any event, rarely if ever do statutes require such functions to be exercised upon hearing. The fifth, exempting cases in which an agency is acting as the agent for a court, is included because the administrative operation is subject to judicial revision in toto. The sixth, exempting the certification of employee representatives such as the Labor Board operations under section 9 (c) of the National Labor Relations Act, is included because these determinations rest so largely upon an election or the availability of an election. It should be noted that these exceptions apply only "to the extent" that the excepted subject is involved and, it may be added, only to the extent that such subjects are directly involved.

(*a*) NOTICE.—*Persons entitled to notice of an agency hearing are to be duly and timely informed of (1) the time, place, and nature of the hearing, (2) the legal authority and jurisdiction under which it is to be held, and (3) the matters of fact and law asserted. Where private persons are the moving parties, respondents must give prompt notice of issues controverted in law or fact; and in other cases the agency may require responsive pleading. In fixing the times and places for hearings the agency must give due regard to the convenience and necessity of the parties.*

The specification of the content of notice, so far as legal authority and the issues are concerned, does not mean that prior to the commencement of the proceedings an agency must anticipate all developments and all possible issues. But it does mean that, either by the formal notice or otherwise in the record, it must appear that the party

NLRB-00114401

"The rather long crest" of the Mississippi rose slightly overnight from record heights reached yesterday but, with a slight fall noted today, rivermen and United States Army Engineers expressed belief that only further rains would aggravate the situation.

Declines of a fraction of a foot were noted in the river stages at Hannibal and Canton, Mo., and at Quincy, Ill.

Weather forecasters, while predicting a rise of as much as 5 feet at St. Louis and below when the crest is reached in that vicinity, added, however, that in that area "it will hardly be a major flood in the sense of the 1943 and 1944 floods."

With floodwaters now covering 58,000 acres in the upper Missouri-Illinois area, following overtopping of levees at Kissinger and Riverton, Mo., flooding 8,000 acres of rich farm land, volunteers concentrated on the effort to save the soaked levee across the river from here in Pike county, Ill. Failure of the levee there, Army engineers said, would flood 120,000 acres.

Evacuees, removing livestock, stored grain and household effects, cluttered highways along the Illinois side of the river in southern Hancock, northern Adams, and Pike counties.

Red Cross midwestern area headquarters at St. Louis estimated 2,400 persons were driven from their homes in Missouri and 1,800 in Illinois. It placed the homeless from high water in Nebraska at 2,540. In Iowa, where the city of Ottumwa was hard hit, 16,000 were reported forced from their homes.

Army Engineers and the Coast Guard had every available worker on the job in the flood area and the Red Cross had 50 staff workers and about 600 volunteers aiding the homeless.

Water was 8 to 10 feet deep in the village of Alexandria, Mo., near the Iowa line, the result of a levee break, and all residents have been evacuated.

In Hannibal, a city of 20,000, the water covered 9 blocks of the main street after a break last night. Four thousand residents of south Hannibal were partly isolated.

Guests at the Mark Twain and Windsor Hotels were rowed to the doorways and climbed over the sandbag barricades into the lobbies. Main street merchants sandbagged their stores and hastily moved their merchandise to shelves above the highwater mark.

All night long an electric pump pushed 7,000 gallons of cold water an hour out of the Mark Twain Hotel basement. A bellboy in rubber boots unloaded luggage. Most of the hotel's employees were at work when the levee broke.

At Canton, Mo., 30 miles upstream, the river had reached a stage of 19.92 feet, a record. Although half of the town is under water and a third of the 2,200 residents are homeless, relief work was reported well in hand. No trains or busses are operating out of the town and only one highway is open. Ironically, the ice plant was still running and deliveries were being made in dry areas.

A Riverland district levee, 2 miles north of Louisiana, broke yesterday, flooding 3,000 acres. Sixty families in Louisiana were evacuated.

Rail traffic between St. Louis and Burlington, Iowa, remained halted.

In central Missouri, additional thousands of acres of cropland were inundated as floodwaters of the Grand and Chariton Rivers joined the Missouri River. One levee broke above Boonville yesterday, flooding 5,000 acres of bottom land, and others were expected to fail. Missouri highway patrol closed United States Highway 40 at Boonville.

The Grand and Chariton Rivers fell from 1 to 2 feet overnight, while the crest of the Missouri River flood passed Boonville this morning, the weather bureau in Kansas City reported.

The stage at Boonville was 28.3 or 7.3 feet above flood level and was expected to remain stationary there for about 24 hours. This compared with a crest there of about 30 feet in the 1944 flood.

Jefferson City, farther down the Missouri River, had a stage of 26.2 or 3.2 above flood level. A crest of 28.5 or 29 feet was forecast for tonight. At Hermann the stage was 24.2 with a top of 27 feet predicted for Thursday.

On the Grand River, the stage at Chillicothe was 29.5, a drop of nearly 2 feet in the last 24 hours. At Sumner the stage was 35.6, also a fall of about 2 feet. At Brunswick, near the mouth of the Grand, the stage was 23.4, a drop of 2 feet.

The Missouri Division of Health urged immunization against typhoid of residents in the flooded areas and reported that ample supplies of vaccine have been supplied to local health officers or to special clinics set up in threatened communities.

The State highway patrol, meanwhile, stood ready to fly food or medicines to any point in need of aid. Col. Hugh H. Waggoner said the patrol's two planes would answer any emergency calls.

ILLINOIS LEGISLATURE IS ASKED FOR $2,000,000 FLOOD RELIEF

SPRINGFIELD, ILL., June 10.—The Illinois Legislature was asked yesterday to provide $2,000,000 for emergency flood relief in the State.

The bill, introduced by Senator Frank Dick (Republican), Quincy, would make the funds available for prevention and suppression of disease in the flood areas; repairing highways, bridges, and State-owned buildings damaged by floods, and for advancing money to drainage and levee districts to enable them to acquire rights-of-way for repairing and rebuilding existing levees.

The bill was referred to the senate appropriations committee, which set a hearing for this afternoon.

VALLEY RESIDENTS URGE COMPLETION OF LEVEE PROJECTS

WASHINGTON, June 10.—A House Appropriations Subcommittee yesterday heard Mississippi Valley residents urge early completion of main-line Mississippi levees and increased bank stabilization to protect a $500,000,000 Government investment in levees. They asked for funds to complete the last 30 percent of a lower Mississippi flood-control project started in 1928.

ADDRESS BY FLEET ADMIRAL NIMITZ, RECORD OF VICE ADM. C. H. McMORRIS, AND LIST OF NAVAL VESSELS NAMED FOR ALABAMIANS

[Mr. HILL asked and obtained leave to have printed in the RECORD an address delivered by Fleet Adm. Chester W. Nimitz, United States Navy, at the graduation exercises of the University of Alabama, Tuscaloosa, Ala., on June 9, 1947; a summary of the record of Vice Adm. Charles H. McMorris, United States Navy; and a list of ships in the Navy named for Alabamians; which appear in the Appendix.]

IMPLICATIONS OF INVASION OF SINKIANG—EDITORIAL FROM THE WASHINGTON NEWS

[Mr. McCLELLAN asked and obtained leave to have printed in the RECORD an editorial entitled "Choice of Doctrines," from the Washington Daily News of June 12, 1947, which appears in the Appendix.]

AMERICAN ECONOMIC SYSTEM ON TRIAL—ADDRESS BY GEORGE W. ROCHESTER

[Mr. MORSE asked and obtained leave to have printed in the RECORD a radio address entitled "American Economic System on Trial Against Russian," delivered by George W. Rochester on April 28, 1947, which appears in the Appendix.]

DEVELOPMENT OF COLUMBIA BASIN WATER RESOURCES

[Mr. MORSE asked and obtained leave to have printed in the RECORD a letter addressed to him by Theron D. Weaver, Chairman of the Columbia Basin Interagency Committee on May 29, 1947, which appears in the Appendix.]

FEDERAL AID TO EDUCATION—EDITORIAL COMMENT

[Mr. FULBRIGHT asked and obtained leave to have printed in the RECORD three editorials dealing with Federal aid to education, which appear in the Appendix.]

POSTMASTER OF HARTFORD, CONN.—EDITORIAL FROM HARTFORD TIMES

[Mr. McMAHON asked and obtained leave to have printed in the RECORD an editorial entitled "Mr. Dillon Fills the Bill," from the Hartford Times of June 6, 1947, which appears in the Appendix.]

SUPPLEMENTARY ANALYSIS OF LABOR BILL AS PASSED

Mr. TAFT. Mr. President, in the course of the debate on the conference agreement on H. R. 3020 a number of arguments directed at specific provisions of the bill were made on the floor which were not justified by either the text of the bill or the background of statutes and decisions against which it was written. In addition, numerous completely erroneous statements were made with respect to the effect of certain portions of the bill. In order to make clear the legislative intent, I placed in the CONGRESSIONAL RECORD last Thursday an analysis of its provisions. As I stated at the close of debate on Friday, I consider it advisable to supplement that analysis to cover some additional subjects and to correct mistaken statements made on the floor.

I therefore ask unanimous consent to have printed in the RECORD at this point as a part of my remarks a supplementary analysis.

There being no objection, the analysis was ordered to be printed in the RECORD, as follows:

Section 2 (2): One amendment to the Wagner Act which was adopted in conference excludes Federal Reserve banks from coverage of the statute. The objection has been made to this provision that there was no more reason for exempting Federal Reserve banks than national banks. It seems a complete answer to say that Federal Reserve banks are essentially public in character and are operated for public or governmental purposes. They issue the currency. They are the instruments of the Government's open-market policy in purchasing and selling Government bonds. All of their operations are under the supervision of the Board of Governors of the Federal Reserve System, who are appointed by the President and confirmed by the Senate, and the compensation of all of the officers and employees of the member banks are subject to the Board's approval. Consequently, these member banks are prevented by law from making any binding collective agreement with representatives or their employees on the most controversial topic of collective bargaining, namely, wages, since a determination of the wage scale is reserved by law to the United States Government.

Section 2 (2), 2 (13), and 301 (e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner Act "anyone acting in the interest of an employer" and inserted in lieu thereof the word "agent." The term agent is defined in section 2 (13) and section 301 (e), since it is

HeinOnline -- 93 Cong. Rec. 6858 1947

NLRB-00114402

used throughout the unfair labor practice sections of title I and in sections 301 and 303 of title III. In defining the term the conference amendment reads "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This restores the law of agency as it has been developed at common law.

These amendments are criticized in one breath as imposing too harsh a liability upon unions for the acts of their officers or representatives and as too mild with respect to the liability of employers for the acts of their managerial and supervisory personnel. Of course, the definition applies equally in the responsibility imputed to both employers and labor organizations for the acts of their officers or representatives in the scope of their employment.

It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of United States against United Brotherhood of Carpenters placed upon section 6 of the Norris-La Guardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed that the ordinary law of agency should apply to employer and union representatives. Consequently, when a supervisor acting in his capacity as such, engages in intimidating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless of whether or not the company officials approved or were even aware of his actions. Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair-labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct.

Section 3 (d): In order to make an effective separation between the judicial and prosecuting functions of the Board and yet avoid the cumbersome device of establishing a new independent agency in the executive branch of the Government, the conferees created the office of general counsel of the Board, to be filled by appointment of the President, subject to Senate confirmation. We invested in this office final authority to issue complaints, prosecute them before the Board, and supervise the field investigating and trial personnel. It is asserted that this is inconsistent with the Administrative Procedure Act and that it places a tremendous amount of unreviewable power in the hands of a single official.

The Board itself has been sensitive to the reproach that it acts as judge, jury, and prosecutor, and in recent years has promulgated regulations which have delegated the power of issuing complaints to the various regional directors. Presumably the General Counsel would keep these regulations in effect, except that the regional directors would act pursuant to his general instructions rather than those of the Board. The present regulations permit a person aggrieved by the refusal of a regional director to issue a complaint to appeal the matter to Washington. This is not an adversary proceeding but simply a review, based upon the confidential report of the field staff which conducted the investigation. Presumably, under the conference agreement such appeals would be routed to the General Counsel's office rather than to the Board. The assumption that the Board itself presently reviews these appeals, however, is utterly erroneous. According to the testimony of the chairman of the Board these appeals are considered by an anonymous committee of subordinate employees. What the conference amendment does is simply to transfer this "vast and unreviewable power" from this anonymous little group to a statutory officer responsible to the President and to the Congress. So far as having unfettered discretion is concerned he, of course, must respect the rules of decision of the Board and of the courts. In this respect his function is like that of the Attorney General of the United States or a State attorney general.

Section 7. In this section guaranteeing the right of employees to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, there has been inserted the language "and shall also have the right to refrain from any and all of such activities * * ." It is contended that the inclusion of the new language destroys collective bargaining and legalizes the device of the yellow-dog contract. Nothing could be further from the truth. There is similar language in the Norris-La Guardia Act, a statute outlawing the yellow-dog contract. Moreover, the Board itself has held that a right to refrain from the exercise of the rights guaranteed in section 7 was always implicit in the Wagner Act. (See Pittsburgh Plate Glass Co., 66 NLRB 1083.) The new language therefore, merely makes mandatory an interpretation which the Board itself had already arrived at administratively. The reason for its inclusion was that similar language had appeared in the House bill and since section 8 (b) (1) of the Senate bill, which was retained by the conferees, made it an unfair labor practice for labor organizations to restrain or coerce employees in the rights gauranteed them in section 7, the House conferees insisted that there be express language in section 7 which would make the prohibition contained in section 8 (b) (1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line.

Section 8 (a) (3): Criticism of this section has not been directed at any amendment made by the conferees, but to a proviso of both the Senate and House bills. It is argued that the requirement of "a majority of the employees eligible to vote" rather than a majority of those voting creates insurmountable difficulties in obtaining a contract requiring compulsory union membership. Elections conducted by the Board differ from political elections in that ordinarily they are conducted on company time and property. The employees' alternative is to go to the poll or continue at work. An average of over 90 percent of the eligible employees participate in such elections and a 100-percent vote is not unusual.

Section 8 (b) (4), relating to illegal strikes and boycotts, was amended in conference by striking out the words "for the purpose of" and inserting the clause "where an object thereof is." Obviously the intent of the conferees was to close any loophole which would prevent the Board from being blocked in giving relief against such illegal activities simply because one of the purposes of such strikes might have been lawful. It has been asserted on the Senate floor, however, that if even one of the strikers had an improper motive he would thereby make the union liable for an unfair labor practice and to an action for damages brought by the employer, even though the demands made upon the employer were perfectly lawful. This is a ridiculous construction. In any strike an employer is informed as to what demands he must submit in order to get the strikers to return to their work. Consequently, the strikers cannot ask him to do anything which would achieve the objectives prohibited by this section. The hidden motives of the union or the employees would be immaterial.

Section 8 (b) (5). Initiation fees: This section was taken in part from the House bill and makes it an unfair labor practice for a union to charge excessive or discriminatory initiation fees with respect to employees covered by a compulsory union membership agreement. It has been argued that the effect of this section is to give the Board vast discretion in regulating the dues and initiation fees of all labor organizations and thereby putting the Government in charge of the internal affairs of unions. The express language of this subsection shows how unfounded such an argument is, for it is only in cases in which the employees affected are covered by union-shop or maintenance-of-membership agreements that the Board has any jurisdiction. Even then it is limited to initiation fees and does not cover dues. It was the opinion of the conferees that unless such a provision was inserted, the restrictions on the union shop in section 8 (3) could be easily circumvented.

Section 8 (b) (6): This is a section taken from the elaborate prohibitions in the House bill with respect to featherbedding. All that it does is to make it an unfair labor practice to cause or attempt to cause employers to pay money in the nature of an exaction for services which are not performed or not to be performed. A number of Senators have contended that this means that union requests for payment to employees of wages for lunch and rest periods or for waiting periods when machinery is being repaired will be illegal. It has also been stated that it would be a breach of this section for employees who are asked to report for work so as to be available as a relief squad in the event of emergency or need, to demand any money for their time. Of course this section does not affect such industrial practices, as such activities are done at an employer's request and for valuable consideration incident to the employment itself. The use of the words "in the nature of an exaction" make it quite clear that what is prohibited is extortion by labor organizations or their agents in lieu of providing services which an employer does not want.

Section 8 (c). Free speech: During the conference the provisions in the Senate bill relating to the right of free speech were rewritten to conform to the House bill so that this subsection now reads as follows: "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit."

Several Senators have assailed this section on the ground that the words "shall not contribute or be evidence of an unfair labor practice" would prevent the Board from applying ordinary rules of evidence in unfair labor practice cases. The purpose of the conferees, as said in the statement I placed in the RECORD at the opening of the debate, was to make it clear that the Board is not to construe utterances containing neither threats nor promises of benefit as an unfair labor practice standing alone or as making some act which would otherwise be legal an unfair labor practice. The conferees had in mind a number of Board decisions in which because of the fact that an employer has at some time committed an unfair labor practice a speech by him, innocuous in itself, has been held not to be privileged. The conferees did not believe that past misconduct should deprive either employers or labor organizations of the privilege of exercising constitutional rights. There have also been a number of decisions by the Board in which discharges of employees, even though there was no evidence in the surrounding circumstances of discrimination, have been deemed

HeinOnline -- 93 Cong. Rec. 6859 1947

NLRB-00114403

unfair labor practices simply because at one time or another the employer has expressed himself as not in favor of unionization of his employees. The object of this section, therefore, is to make it clear that decisions of this sort cannot be made under the conference bill.

It has been argued, however, that the prohibition against using expressions of opinion as evidence goes much further than the rules with respect to admissibility in a criminal or civil trial. Senators making this argument overlook the fact that the privilege of this subsection is limited to expression of "views, arguments, or opinion." It has no application to statements which are acts in themselves or contain directions or instructions. These, of course, could be deemed admissions and hence competent under the well-recognized exception to the hearsay rule.

Numerous comparisons with criminal and civil trials have been made. Consider a more exact comparison. A man is on trial for selling liquor illegally. The fact that he had argued against adoption of the Volstead Act would scarcely be permitted to be used in evidence against him. In a murder trial in which defendant is accused of killing a Republican Senator his political views or opinions would not be competent testimony. Yet the Board has permitted employers' expressions of opinion on unionism to be used to sustain the theory that he was guilty of violations of the National Labor Relations Act.

Section 8 (b) (4) (D): In the conference the paragraph making strikes to bring about the assignment of work tasks to a particular labor organization was amended to read as follows: "* * * forcing or requiring any employer to assign particular work to employees in a particular labor organization or a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft, or class." It is contended that the addition of the condition "another trade, craft, or class" has transformed this subsection into what started to be a prohibition of jurisdictional strikes into a prohibition preventing one union from striking even though no other union was in the picture. I have no hesitation in saying that this subsection applies not only to strikes over the assignment of particular work to one union rather than another, but also to the assignment of work to one union rather than another group of employees. It is submitted, however, that this is not a proper criticism of this section since under the Labor Relations Act at the present time an employer would be violating subsection 8 (3) if he discharged or discriminated against some employees merely to provide work to members of a union. Under existing law, employers have no right to accede to such union demands unless there is a closed or union-shop agreement in effect. If an employer discriminates in the assignment of work so as to encourage a non-union group by assigning them work which properly should be performed by union employees, it would be an unfair labor practice under the provisions of existing law and the conference bill. In other words all that this amendment to the Senate bill does is to make it illegal for unions to coerce employers into doing something which an employer is already prevented from doing by the operation of section 8 (3) of the present Wagner Act.

Section 8 (d): The amendment to this subsection providing that the duty to bargain collectively should not be construed as requiring either party to discuss or agree to any modification of the terms of a contract if such modification is to become effective before the contract may be reopened has been construed on the floor to mean "parties will be bound by contract without an opportunity for further collective bargaining." The provision has no such effect. It merely provides that either party to a contract may refuse to change its terms or discuss such a change to take effect during the life thereof without being guilty of an unfair labor practice. Parties may meet and discuss the meaning of the terms of their contract and may agree to modifications on change of circumstances, but it is not mandatory that they do so.

Section 9 (C) (4): The conferees dropped from this section a provision authorizing prehearing elections. That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. It is the function of hearings in representation cases to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote. During the last year the Board has tried out a device of holding the election first and then providing the hearing to which the parties were entitled by law. Since its use has been confined to an inconsequential percentage of cases, and more often than not a subsequent hearing was still necessary and because the House conferees strenuously objected to its continuance it was omitted from the bill.

Section 9 (C) (5): This amendment was contained in the House bill. It overrules the "extent of organization" theory sometimes used by the Board in determining appropriate units. Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of public utilities insurance companies and other businesses whose operations are widespread. It is sufficient answer to say that the Board has evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical considerations, etc., any one of which may justify the finding of a small unit. The extent-of-organization theory has been used where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units. Its use has been particularly bad where another union comes in and organizes the remainder of the unit which results in the establishment of two inappropriate units.

Section 9 (h): This provision making the filing of affidavits with respect to Communist Party affiliation by its officers a condition precedent to use of the processes of the Board has been criticized as creating endless delays. It was to prevent such delays that this provision was amended by the conferees. Under both the Senate and House bills the Board's certification proceedings could have been infinitely delayed while it investigated and determined Communist Party affiliation. Under the amendment an affidavit is sufficient for the Board's purpose and there is no delay unless an officer of the moving union refuses to file the affidavit required.

Section 10 (b): The conferees amended this section to require that proceedings before the Board be conducted, so far as practicable, in accordance with the rules of evidence applicable in the United States district courts. This provision has been attacked as one completely strait-jacketing administrative procedure. As I stated on the floor, this is more a preventive measure than one to cure existing abuses. The Board's earlier habit of accepting literally anything into the record was indefensible. I am informed that now the trial examiners conduct their hearings pretty much in conformity with the practice of the courts in the locality where the hearing is being held. Then, too, the limitation "so far as practicable" gives to the trial examiner considerable discretion as to how closely he will apply the rules of evidence.

Section 10 (c): In an effort to lessen the work load of the Board and facilitate its disposition of cases this subsection was amended to give finality to recommended orders of trial examiners without Board review if no exceptions were taken within 20 days. It has been stated that this permits an unsuccessful litigant to stand idly by while an erroneous report of a trial examiner becomes the order of the Board and then embarrass the Board when the case goes into the courts for enforcement. Several checks would prevent this happening. Section 10 (c) provides, "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court." In addition, the attorney trying the case would presumably file exceptions to such a report and the General Counsel in any event would not go forward with enforcement if the order was erroneous.

Section 11: It has been stated that in modifying the procedure for obtaining a subpena we have dispensed with the requirements of materiality and relevancy. Such statements ignore the remainder of paragraph (1) which provides that the Board shall revoke its subpena on a motion to quash if the evidence required is not relevant or not described with sufficient particularity.

Section 206: In the Senate bill the injunction procedures created in national emergencies became applicable in a strike affecting substantially an entire industry. In conference this was amended to read, "affecting an industry or a substantial part thereof." The statement has been made that this amendment would subject a strike of the employees of one automobile manufacturing company to an injunction. Here again the speaker ignored the remainder of the paragraph which imposes the additional requirement that such strike imperil the national health or safety, a condition which, it is anticipated, will not often occur.

COMMENTS OF THE PRESIDENT AT OTTAWA ON ST. LAWRENCE RIVER DEVELOPMENT

Mr. AIKEN. Mr. President, in his speech in Ottawa yesterday Mr. Truman said:

> Gratifying as the volume of our trade now is, it is capable of even further expansion to our mutual benefit. Some of our greatest assets are still to be developed to the maximum. I am thinking of one particularly that holds tremendous possibilities, the magnificent St. Lawrence-Great Lakes system, which we share and which we must develop together.
>
> The St. Lawrence project stirs the imagination of men long accustomed to majestic distances and epic undertakings. The proposal for taking electric power from the river and bringing ocean shipping 2,400 miles inland, to tap the fertile heart of our continent, is economically sound and strategically important.
>
> When this program is carried out, the waterway that is part of our boundary will more than ever unite our two countries. It will stimulate our economies to new growth and will speed the flow of trade.

This enunciation of President Truman should stir our country to do its part without delay. As the President says, the St. Lawrence River project "is economically sound and strategically important." This assertion is supported by the greatest men of this country, men who have a broad outlook on national and international affairs, and are not restrained by the charge of self-interest or provincialism being presented. Only 2 weeks ago ex-President Hoover and Secretary of State George Marshall urged the development of this great waterway for the same reasons that President Truman urged it at Ottawa yesterday.

HeinOnline -- 93 Cong. Rec. 6860 1947

NLRB-00114404

Mr. KENNEDY. In its present form, as reported by the committee, this bill represents a sound basis for obtaining effective labor reform legislation this year. In its present form, it is capable of receiving the support of members of both Houses from both parties, the administration and the responsible leaders of both labor and management. In its present form, this bill can and should become law in 1959—and the Jimmy Hoffas and their ilk will be on their way out.

But if we embark upon a series of amendments—some wanting to change this provision, some another, some feeling that it is too soft and some that it is too tough, some wanting more Taft-Hartley amendments added and some wanting more of them deleted—once we begin on that course, there is no certainty as to where we will emerge, no certainty that we will still have a broadly acceptable, workable bill, and no certainty that we will in the end have any bill at all that will become law in 1959.

I respect the sincere concern of those who seek further amendments, additions or deletions. This is a subject matter on which every Senator is bound to have his own ideas, his own favorite amendments and his own approach to the problem. But this measure has been carefully worked out, drafted and redrafted a hundred times by those closest to the problem. Whatever complaints may be raised, whatever imperfections may occur to some, we know that this bill will do the job. I say let us pass this bill and do that job—or stand in danger of letting it go undone for another critical year, or in fact, forever, because this represents our last opportunity to secure passage of an effective labor reform bill.

The most fertile field for amendment—by way of either addition or deletion—is, of course, the Taft-Hartley Act. The most difficult decision facing the committee in its deliberations was where to draw the line between those Taft-Hartley amendments which could properly be included in this bill, and those Taft-Hartley amendments which should properly await the recommendations of our panel of 12 experts established for this very purpose. Some of the Taft-Hartley amendments considered were directly related to racketeering, some only indirectly or not at all. Some were extremely controversial and threatened to bog down the entire bill—others were not controversial at all. Some were approved by the Senate last year—others were new, and more likely to delay action on the bill. Taking into consideration these factors, the requests of the administration and the testimony of expert witnesses and spokesmen for labor and management, the committee proceeded to draw this line—and, in my opinion, drew it wisely and well. I earnestly urge the Senate to support the committee in its determination as to where the line should be drawn. The alternative, in my opinion, could lead to chaos, confusion, and finally no bill at all.

No one who examines S. 1555 can doubt that the measure before us is a strong and effective deterrent to the abuses perpetrated by a relatively few in labor and management. All can agree that the standards prescribed by this bill will lead to more democratic and honest procedures in all trade unions and will create an atmosphere for harmonious labor-management relations. The provisions of this bill insure, as far as it is possible to do so by statute, that the internal affairs of unions and management are conducted honestly and that criminals and racketeers will be denied positions of power and trust in trade unions.

As I see it, the solution of our problems in the labor-management area has three distinct facets.

First. There is the problem of more effective enforcement of criminal law at the local and State level. Scarcely a single abuse in the labor or management field has come to the attention of the McClellan committee which did not have associated with it some violations of the criminal law. The crimes of violence, arson, assault, and so forth with which we are all familiar, are essentially problems of enforcement of criminal laws at the local level. Correction of this kind of activity is and should remain a function of police authorities at the local and State level. I do not believe, and I think this opinion is shared by my colleagues in the Senate, that the Federal Government should get into the business of exercising the police power which has traditionally and properly been the function of local authority. I regret to say that in many cases local police officials and law-enforcement authorities have not been as diligent as they might have been in apprehending and punishing those who have committed barbarous, antisocial acts. Society cannot tolerate the continued use of violence and force in labor-management relations. Therefore, I submit that State and local law enforcement authorities have a duty to step up the prosecution of those who in the name of trade unionism indulge in the most heinous criminal activity.

The second aspect of labor-management abuse which can be distinguished is the area of labor-management relations which is regulated basically by the National Labor Relations Act and the Railway Labor Act. Both of these statutes prescribe certain standards and procedures for the resolution of disputes between labor and management. The National Labor Relations Act which is our basic statute regulating labor-management relations has not been changed in any significant degree since its passage more than 12 years ago. Certainly any legislation of this type after 12 years needs to be revised in the light of changing conditions. In recognition of this fact and the many abortive attempts which have been made by the Congress to legislate in this complex area in the last decade, the Senate Committee on Labor and Public Welfare has established an advisory panel of distinguished experts in the labor law field to advise it concerning appropriate revisions in the statute. This advisory panel has been working assiduously since its appointment early in February at its task of making suggested revisions in the act. I might say at this point that the Senate and the people of the United States owe a debt of gratitude to the men who are serving on this panel for the diligent effort which they have put into developing recommendations for the Senate Labor Committee. I am confident that based upon their recommendations, the Senate Committee on Labor and Public Welfare will be able to report legislation to the Senate which will correct defects in the Taft-Hartley Act, but I emphasize that revisions in the Taft-Hartley Act are but one aspect of the problem of labor-management abuse.

S. 1555 contains six amendments to the Taft-Hartley Act. With but one exception these changes in the act have been recommended by the administration and were debated on the floor of the Senate last year. Each represents a modification of the act upon which there is broad consensus. None would radically affect the balance between labor and management.

These amendments to the Taft-Hartley Act either, first, modify the law to adjust it to existing and long established practice—as for example the building trades amendment; second, are responsive to the recommendations of the McClellan committee, the no man's land amendment, section 602, or third, make it possible to administer the act more easily—the Acting General Counsel amendment and the prehearing election amendment.

All of these amendments to the Taft-Hartley Act are necessary; all will contribute to more effective and expeditious handling of labor disputes and will contribute to industrial stability.

Because the prehearing election issue precipitated sharp debate in the Senate last year, I would like to point out that the amendment in S. 1555 dealing with this problem is entirely new. It was worked out very carefully with management and labor attorneys and after careful and painstaking debate in the committee was put into the bill by a unanimous vote.

As it stands in the bill now this provision would permit a representation election 30 days after a petition is filed by either management or labor if there are no substantial issues of fact or law which require a hearing by the NLRB. The full rights of all parties to due process are protected and even after an election is held a full hearing may be had before the Board on any unresolved issues. The 30-day waiting period is an additional safeguard against rushing employees into an election where they are unfamiliar with the issues.

All of the other provisions of title VI are fully discussed in the analysis which I will insert in the RECORD at the close of these remarks and are treated in the committee report. I single out this amendment because of the interest which the Senate showed in it last year and because I believe it typical of the salutary changes which have been made in this legislation since it was debated here last year.

HeinOnline -- 105 Cong. Rec. 5984 1959

NLRB-00114405

86TH CONGRESS
1ST SESSION

S. 1555

IN THE SENATE OF THE UNITED STATES

APRIL 25, 1959
Ordered to be printed as passed

AN ACT

To provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations, to provide standards with respect to the election of officers of labor organizations, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Labor-Management Re-
4 porting and Disclosure Act of 1959".

5 DECLARATION OF FINDINGS, PURPOSES, AND POLICY

6 SEC. 2. (a) The Congress finds that, in the public in-
7 terest, it continues to be the responsibility of the Federal

NLRB-00114406

1 end thereof, as follows: ": *Provided*, That this term shall not
2 be construed to include service assistants in the communica-
3 tions industry."

4 SEC. 705. Paragraph (4) of subsection 9(c) of the
5 National Labor Relations Act, as amended, is amended to
6 read as follows:

7 "(4) Notwithstanding the provisions of paragraph (1)
8 of this subsection, the Board through its designated represent-
9 ative, if there is reasonable cause to believe that a question of
10 representation affecting commerce exists, may call an informal
11 conference of the parties upon due notice. If at such con-
12 ference no agreement is reached for a consent election, and
13 there are no substantial issues of fact or law which should
14 be resolved by a preelection hearing, the Board, through its
15 designated representative, may conduct an election in an
16 appropriate unit but not before the expiration of forty-five
17 days following the date of the receipt of notice of the filing
18 of the petition. Any party aggrieved by such proceeding
19 may file a motion for hearing with the Board, but such mo-
20 tion shall not, unless specifically ordered by the Board, oper-
21 ate as a stay of the election. Unless such motion is granted
22 prior to the election or is withdrawn, the Board shall afford
23 the moving party an opportunity for hearing prior to certi-
24 fying the results of such election."

25 SEC. 706. Section 3(d) of the National Labor Relations

NLRB-00114407

From the foregoing it appears that, if enacted into a law, the legislation would not substantially affect the National Aeronautics and Space Administration or its activities. Accordingly, this agency has no objection to its enactment.

This report has been submitted to the Bureau of the Budget which has advised that, from the viewpoint of the program of the President, there is no objection to the submission of this report to the Congress.

Sincerely yours,

RICHARD L. CALLAGHAN.
Assistant Administrator for Legislative Affairs.

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., May 11, 1965.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: In reply to your request we wish to take this opportunity to express the views of the National Labor Relations Board on some of the proposed amendments to the Administrative Procedure Act, embodied in S. 1336 of the 89th Congress. As section 3 of S. 1336 is virtually identical with S. 1160 of this Congress, the comments herein directed specifically to section 3 of S. 1336 are also to be considered as applicable to S. 1160 and no separate report on S. 1160 will be submitted.

Since its enactment in 1946, the APA has worked well at the National Labor Relations Board, and our practices and procedures thereunder during the nearly 20 years of its existence have become well established in consonance with the interpretations of the Attorney General and the Federal courts. Any major revisions of the APA necessarily would have an immediate drastic impact on the capacity of the Board to fulfill its obligations under the National Labor Relations Act and on the understanding by labor and management of the precise procedural requirements for the protection of their rights. Despite many compensating benefits that may be derived from material revisions of the APA, substantial uncertainties in many well-established administrative areas would result, and extended court litigation would be required to clarify the atmosphere and to reestablish certainty.

Time is of the essence in labor-management controversies, and the elimination of industrial strife is a major objective of our organic statute. Perhaps of greatest concern to us, therefore, is the proposal to remove the present exemption of proceedings for "the certification of employee representatives" contained in section 5 of the APA; and in consequence to apply to such proceedings the full panoply of the manifold procedures contained in sections 5, 7, and 8 of S. 1336. So to judicialize these nonadversary election cases and to add unneeded steps to their processing would result in delay injurious to labor relations peace, not to mention the additional costs inherent in the new, formal procedures. Such action, moreover, would undo the historic policy of the Congress since 1935 to retain the essence of their informality and investigatory quality and to encourage their expeditious resolution by speedy balloting.

It is estimated that during fiscal year 1966, 2,415 hearings in representation cases will be conducted and 2,077 decisions issued. In view of the basic investigatory nature of these proceedings, it has been our practice to use employees of our field offices as hearing officers to develop a factual record but without authority to recommend. This practice is pursuant to congressional authorization in section 9(c)(1) of the National Labor Relations Act, which provides that "such hearing[s] may be conducted by an officer or employee of the regional office, who shall not make any recommendation with respect thereto." The elimination of the representation case exemption would now appear to require this agency to utilize only hearing examiners qualified under section 11 of the APA for these informal investigatory proceedings. This would create an additional financial burden of approximately $2,375,000 and require the hiring of 86 more APA hearing examiners, or about double the present complement of Board hearing examiners, who are in grade GS-16, assuming that this number of qualified examiners would be available. If we are unable to hire additional qualified examiners, we would be forced to use our present staff of APA hearing examiners, required by law for unfair labor practice case hearings, thereby

NLRB-00114408

imposing further delay upon the processing of unfair labor practice cases, as well as representation cases.

As we now show, elimination of the exemption would formalize, encumber, and slow down proceedings which are fundamentally investigatory in character and have been deliberately streamlined to enable the Board to determine with dispatch, by means of an election, questions concerning the representation of employees, and in that manner to avert or dispel labor unrest. At the very least, election case handling would be newly freighted and greatly retarded by:

1. Formal pleadings (sec. 5(a)(2)) and the necessity to deal with technical motions addressed to the pleadings;
2. Rather strict rules of evidence unsuitable to nonadversary representation proceedings (sec. 7(c));
3. Submission to the hearing examiner of proposed findings of fact and conclusions of law (sec. 8(b));
4. A formal opinion and decision of the hearing examiner prior to the holding of any election (sec. 8(b));
5. A further time-consuming procedure for the filing of exceptions to the hearing examiner's decision prior to the holding of any election (sec. 8(c)(1));
6. And, finally, an appeal to an appellate body, other than the agency itself, which would in simple cases result in de novo review upon the filing of artful exceptions and in difficult cases interpose de novo review as an intermediate step before the agency itself would review and dispose of the issues (sec. 8(c) (2) and (4); see also our comments on sec. 8(c)(2), *infra*.)

All of the foregoing would occur before directing an election. After an election has been held, objections may be filed to conduct which occurred prior to or during the election and which affected the election. Once again, in the objection phase, all of the procedures listed above would have to be followed, and still further delay would be involved.

Prior to the delegation of authority to regional directors authorized by Congress in 1959 under section 3(b) of the National Labor Relations Act (see infra), the median time for disposition of a representation petition from filing to direction of election was 113 days. During the first 6-month period of fiscal 1965, our regional directors under the delegation directed elections in representation cases in the drastically reduced median time of 44 days. During the same period, in unfair labor practice cases, the median time from the filing of a complaint to the issuance of a hearing examiner's decision was 136 days; and where exceptions were taken to the decision, there was an additional median time of 251 days before the Board made its determination. It is thus apparent that, applying unfair labor practice procedures to representation cases, as this bill proposes, would, even if allowances were made for the greater complexity of unfair labor practice cases, substantially lengthen the time necessary to process a representation case to the point of a direction of election. Obviously, this does not include the additional time that would be required to determine objections to the election under the provisions of this bill.

Such burdensome procedures and delays in election cases would undercut the purposes of the National Labor Relations Act and negate longstanding congressional policy. So far as we know, no valid reasons have been put forth to justify these radical changes, which would inordinately delay the processing of election cases.

The legislative histories of both the National Labor Relations Act and the Administrative Procedure Act are clear with respect to the need for expediting election cases. In its report on the bill which later went to conference and ultimately became the National Labor Relations Act of 1935, the House Committee on Labor had this to say about representation elections (H. Rept. No. 1147, pp. 22–23, 74th Cong., 1st sess.):

"*Elections.*—Section 9(c) makes provision for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged * * *.

"The committee adheres, with the present National Labor Relations Board, to the common belief that the device of an election in a democratic society has, among other virtues, that of allaying strife, not provoking it. Obviously the Board should not be required to wait until there is a strike or immediate threat of strike. Where there are contending factions of doubtful or unknown strength,

NLRB-00114409

or the representation claims of the only organized group in the bargaining unit are challenged, there exists that potentiality of strife which the bill is designed to eliminate by the establishment of this machinery for prompt, governmentally supervised elections.

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) [sec. 10 deals with unfair labor practice proceedings] is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c)." [Insert ours.]

The specific exemption of election proceedings from section 5, and therefore from sections 7 and 8, of the APA, was granted in 1946 only after careful consideration by the Congress. It was inserted in section 5 because the Board's "determinations rest so largely upon an election or the availability of an election." (S. Rept. No. 7052, p. 6, 79 Cong., 1st sess.; H. Rept. No. 1980, p. 26, 79th Cong., 2d sess.; remarks of Congressman Walter, Congressional Record, vol. 92, No. 98, p. 5756.) Congress also paid heed to the arguments that "intermediate reports, findings, and written decisions are unnecessary because of the simplicity of the issues, the great numbr of cases, and the exceptional need for expedition" (see p. 7, Senate committee comparative print on revision of S. 7 June 1945 (79 Cong., 1st sess.)).

When the National Labor Relations Act was amended in 1947, provision was made in section 9(c) that preelection representation case hearigs "may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto." Our continuing practice has been to have regional office personnel conduct preelection hearings and make no recommendations.

Recognizing the need for even greater expedition in the handling of these cases, the Congress in 1959 amended section 3(b) of our act, prescribing as follows:

"The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearigs, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) of (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board and by interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director."

Pursuant to this enabling provision the Board by its rules has delegated to its regional directors its own powers with respect to election cases and has established standards which must be met for review of their decisions. In the normal preelection situation, therefore, a qualified employee of the regioanl office hears the representation case, making no recommendations after completing the record upon which the regional director bases his decision. That decision will be reviewed by the Board in Washington only if the appellant makes the showing demandde by the agecny's rules. In the overwhelming majority of cases the regional director's decision becomes final and can be effectuated with little loss of time.

The delegation has worked exceedingly well. It has permitted the acceleration of election case handling and resulted in a reduction of the Board's backlog. Rapidity and not cumbersome delay is even more acutely needed today in the fiscal year 1946, during which th Administrative Procedure Act was passed and representation election cases received their exemption, 8,445 representation cases were filed with the Board; by the fiscal year 1964, the number of such filings had increased to 11,685; and, for the fiscal year 1965, these filings are running at a rate of 3.3 percent higher than in fiscal 1964.

NLRB-00114410

Speaking in 1945 of the election proceeding, including the hearing, envisaged in section 9(c) of the Natinal Labor Relations Act, the Supreme Court, in language that is equally apt today, remarked:

"Obviously great latitude concerning procedural details is contemplated. Requirements of formality and rigidity are altogether lacking. The notice must be 'due,' the hearing 'appropriate.' These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an 'investigation,' essentially informal, not adversary. *Inland Empire Dist. Council* v. *Millis*, 325 U.S. 697, 706 (1945)."

The reason, the imperative, for informality and flexebility was explained by the Court as follows (325 U.S. at 708):

"* * * under Public Resolution 44, which preceded section 9(c), the right of judicial hearing was provided. The legislative reports cited above showed that this resulted in preventing a single certification after nearly a year of the resolution's operation and that on purpose of adopting the different provisions of the Wagner Act was to avoid these consequences. [Footnote omitted.] In doing so Congress accomplished its purpose not only by denying the right of judicial review at that stage but also by conferring broad discretion upon the Board as to the hearing which section 9(c) required before certification."

In fact, the need for expediting election cases reflected in the legislative history of the Wagner and Taft-Hartley Acts has recently been reemphasized by the Supreme Court in *Boire* v. *Greyhound*, 376 U.S. 473.

After Congress has done so much to help speed the processing of election cases to avoid the dangers of delay, this would hardly be the time to inaugurate procedural changes which serve dilatory ends and have the potential to cause the very bottleneck Congress and the Board have for years been attempting to prevent. Need we add that if the Board is bogged down in the handling of representation cases, unfair labor practice proceedings are also sure to suffer. Since the delegation of authority to regional directors, our backlog of both kinds of proceedings has decreased. To superimpose upon or substitute for the delegation the additional procedures required by the bill would reverse this trend and have serious consequences for labor, management, and the public. For all these reasons we earnestly request that the specific election case exemption be retained.

We turn now to an examination of the individual sections of the bill and offer the following comments on some ambiguous and, we believe, ill-advised sections.

Section 3—Public information

We do not challenge the general purposes of section 3 to assure access by the public, to the fullest extent practicable, to information concerning the operations of administrative and other governmental agencies. In our view, however, the proposal contains a number of serious deficiencies which, if enacted into law, would hamper this agency in carrying out its functions effectively and in the best interests of the public.

Subsection (b)—Agency opinions and orders

The proposed subsection (b) (C) adds a requirement not contained in previous bills that "staff manuals and instructions to staff that affect any member of the public" shall be available for public inspection and copying. Such a provision would require an agency to publish instructions to its staff dealing with matters of internal management—matters which may "affect" the public but only indirectly and remotely in that they do not involve substance and policy underlying rulemaking or adjudication where the public interest requires publication. Most modern businesses have similar internal manuals and instructions for their personnel, and no one would seriously suggest that they should be published. We recommend that this provision be deleted.

Subsection (c)—Agency records

The proposed subsection (c) would require agencies to make their records "available to any person." The phrase "any person" is unduly embracive and could lead to a disruption of the Government's business by opening the door to unjustified requests for information by curiosity seekers and irresponsible persons. (See testimony of Prof. Kenneth C. Davis, hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 88th Cong., 2d sess. on S. 1663, July 23, 1964, pp. 247–248.) Consideration should be given to some words of limitation, such as "persons properly and directly concerned" (as presently contained in sec. 3 of the Administrative Procedure Act, 5 U.S.C. 1002), or "persons with a legitimate interest."

NLRB-00114411

The district court procedure set out in subsection (c) to restrain the withholding of agency records provides for a de novo determination by the court. However, where the alleged withholding has taken place in an administrative proceeding it would appear that the normal procedure for judicial review of final agency orders should be followed and would provide an adequate remedy. In the case of this agency, section 10(f) of the National Labor Relations Act provides that any party aggrieved by a final order of the Board may obtain review of such order in an appropriate U.S. Court of Appeals.

Subsection (c) also provides that in suits to compel disclosure of records "the burden shall be upon the agency to sustain its action." This is contrary to the ordinary civil discovery procedure: rule 34 of the Federal Rules of Civil Procedure provides that a court may order production of books and papers upon motion of "any party showing good cause therefor." There would appear to be no good reason to reverse the procedure when an agency of the Government is the holder of the records sought by a litigant.

Subsection (d)—Agency proceedings

Subsection (d) requires a record of the "final votes of each member in every agency proceeding." If "final votes" is interpreted to mean votes on final decisions and not on interlocutory matters and the like we would have no objection. However, it would be preferable if the words "not interlocutory in nature" were added after "every agency proceeding."

Subsection (e)—Exemptions

Subsection (e)(2) excepts from the provisions of subsection (c) matters that are "related solely to the internal personnel rules and practices of an agency." The language of this exception appears to be unduly restrictive. We see no good reason for departing from the exception now provided in section 3 of the Administrative Procedure Act—i.e., "any matter relating solely to the internal management of an agency," and this language should be substituted.

Subsection (e)(3) excepts matters that are "specifically exempted from disclosure by statute." The use of the narrow term "statute" fails to take into account the law in this area created by sound judicial decisions. The substitution of "law" for "statute" would preserve the carefully considered principles established in such landmark cases as *U.S.* v. *Morgan*, 313 U.S. 409, 422; *Hickman* v. *Taylor*, 329 U.S. 657; *Kaiser Aluminum Co.* v. *U.S.*, 157 F. Supp. 939 (Ct. Cl.); and *Roviaro* v. *U.S.*, 353 U.S. 53, 59–62.

Subsection (e)(4) excepts matters that are "trade secrets and commercial or financial information obtained from the public and privileged or confidential." The phrase "commercial or financial" unnecessarily limits this exception. The equivalent exception in S. 1666, 88th Cong., 2d sess., as passed by the Senate (110 Cong. Record 17080), contained preferable language, i.e., "trade secrets and other information obtained from the public and customarily privileged or confidential."

Subsection (e)(5) excepts "interagency or intra-agency memorandums or letters dealing *solely* with matters of law or policy." [Emphasis added.] Since there is infrequent occasion to deal with abstract legal or policy questions, most agency internal communications relate to legal or policy issues based upon a specific set of facts or to mixed questions of law, policy, and fact. In view of the limited nature of the exception provided by (5), an agency would thus be required to make available virtually all of its internal documents, since most of them would deal to some extent with facts. This would include internal staff memorandums containing advice and recommendations relative to pending cases, working papers, tentative draft decisions, etc. All of these documents tend to reveal the mental processes of decision makers and their staffs in arriving at determinations in specific cases and are entitled to be privileged against disclosure. See *Morgan* v. *U.S.*, *supra*, and *Kaiser Aluminum Co.* v. *U.S.*, *supra*. In sum, if internal reports are to be worth anything, they must be based on facts rather than abstractions, and they must be free expressions of those who prepare them and not something "cleared for publication." As the Supreme Court said in *Hickman* v. *Taylor*, *supra*, "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." This is to say nothing of the mental processes of the decision-makers themselves. It is suggested, therefore, that this exception be broadened to read as follows: "interagency or intra-agency memorandums, letters, or other papers."

NLRB-00114412

Subsection (e)(6) excepts "personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." While there is some ambiguity here, we construe this as providing an unqualified exception for personnel and medical files, the limiting phrase "the disclosure of which, etc.," modifying only "similar matters." There is no reason why only personnel and medical files should be generally excepted. In any event, the requirement of a "*clearly unwarranted* invasion of personal privacy" would appear to be unduly restrictive and to offer insufficient protection to a right highly valued in our democratic society. Consideration should be given to the deletion of the underlined phrase.

Subsection (e)(7) excepts from availability "investigatory files compiled for law enforcement purposes except to the extent they are available by law to a private party." This provision would appear to permit a Board respondent to obtain the affidavits taken from employees and other persons in the course of the preliminary investigation of an unfair labor practice case, even though those persons may never be called as witnesses in the proceeding. For, "to the extent * * * available by law to a private party," could well encompass the discovery procedures of the Federal Rules of Civil Procedure, and such affidavits would be obtainable under those procedures, which are incorporated in section 6(h) of the bill (depositions and discovery). To permit the disclosure of pretrial statements of persons who may never be called as witnesses would unduly interfere with the administration of the National Labor Relations Act, for these persons, who are generally employees, would be reluctant to give statements if they knew that their statements could be revealed to a hostile employer or union in a position to take retaliatory action affecting their economic welfare, even though they may not be called to testify. Over the years about 90 percent of unfair labor practice cases filed with the Board are settled, withdrawn, or administratively dismissed and never go to hearing. In recognition of the intimidatory effect on employees, the courts have held that it is an interference with employee rights under the act for an employer to ask employees for copies of statements which they have given to Board agents, and about the matters contained in those statements. *Texas Industries* v. *N.L.R.B.*, 336 F. 2d 128 (C.A. 6); *Suprenant Mfg. Co.* v. *N.L.R.B.*, 341 F. 2d 756 (C.A. 6); *N.L.R.B.* v. *Winn Dixie*, 341 F. 2d 750 (C.A. 6). Under the more limited *Jencks* rule, which is applicable to Board proceedings, pretrial statements are made available, but only in the cases of those persons who have been called as witnesses in the board proceeding. Accordingly, it is suggested that the exclusion in (7) be amended as follows: "(7) investigatory files, including statements of agency witnesses until such witnesses have been called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross-examination."

Section 4—Rulemaking

Subsection (b)—Notice

Under this subsection the Administrative Procedure Act would be amended to delete the exemption from notice requirements of proposed changes in Board procedures and practices, so that a notice of rulemaking change in those areas would now have to be published in the Federal Register. The Board customarily has not given notice in the Federal Register of proposed changes in its procedures and practices, although interested persons have generally been given the opportunity to express their views or to submit their comments before extensive or important amendments are promulgated. It seems unnecessary to require a formal rulemaking procedure when only such changes in procedure are contemplated, especially since rules of agency organization continue to be exempt from the advance notice requirements.

Section 5—Adjudication

This section wipes out the exemption of representation election cases and consequently subjects them to the operative provisions of sections 5, 7, and 8. As we have hereinabove indicated, elimination of the exemption would formalize, encumber and slow down proceedings which are fundamentally investigatory in character and have been deliberately streamlined to enable the Board to determine with dispatch, by means of an election, questions concerning the representation of employees, and in that manner to avert or dispel labor unrest.

49-772—65——32

NLRB-00114413

Section 6—Ancillary matters

Subsection (a)—Appearance

This subsection grants everyone appearing before an agency the right to counsel. Additionally, every party is given the right to appear by or with counsel at any agency proceeding or investigation. Although no one can quarrel with the basic purposes of this susbection, by the inclusion of the word "investigation" the Board would be unable to investigate the merits of a charge prior to the issuance of a complaint without giving each potential respondent the right to participate at all stages of the investigation. For example, a respondent employer or union would be able to insist upon being present when a potentially adverse witness—an employee or union member—is being interviewed to determine preliminarily whether any formal proceedings should be instituted. Such a provision would severely hamper the NLRB in the performance of its investigatory duties imposed by Congress. We accordingly recommend that the word "investigation" be eliminated.

Subsection (d)—Investigations

This subsection requires the Board to give a copy of the data or evidence submitted by a person if he asks for it and eliminates the present exception for nonpublic investigatory proceedings. Although we normally give potential witnesses copies of their statements if they desire them, our experience has shown that there are situations when an individual gives a statement to a Board agent which he does not wish his employer or his union to have. The elimination of the present exemption would subject an individual, at a time when it is not even clear that he will be called as a witness, to unwarranted employer or union pressure to secure a copy of his statement. (See discussion of the problem of disclosure of pretrial statements under sec. 3(e)(7), supra.) Accordingly, it is suggested that the final clause of section 6(b) of the present Administrative Procedure Act excepting nonpublic investigatory proceedings, be retained.

Subsection (g)—Computation of time

This subsection sets forth the standards for the computation of time. Section 102.114 of the Board's rules and regulations contains the following statement: "When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation." Since the Board only allows 5 days for a party to file objections to the conduct of the election or conduct affecting an election, if Saturdays [holidays if the Board office is closed] and Sundays are not excluded, the proposed subsection might be construed, under certain circumstances, to allow the parties only 3 working days within which to file objections. We would therefore suggest that a provision like that contained in our rules and regulations be expressly included in this subsection to obviate this possible interpretation.

Subsection (h)—Depositions and discovery

This provision makes depositions and discovery available to the same extent that it would be in a U.S. district court, unless an agency promulgates a rule finding such conformity to be impracticable. To the extent that discovery would be mandatory rather than discretionary with the Board, we find this provision objectionable. While admittedly, the conformity proviso makes this section more palatable, it would appear to be desirable to let each agency promulgate its own deposition and discovery rules to meet its own particular problems. This is especially true in most Board proceedings, where discovery is not necessary and would only delay the administrative process. (See discussion under sec. 3(e)(7), supra.) It is noted that the last Administrative Conference's recommendation No. 30 conforms to our views.

Section 8—Decisions

Subsection (c)—Appeal and review

"Except to the extent that the establishment of an agency appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed or that agency appellate procedures have been otherwise provided by Congress," subsection (c)(2) requires the establishment of appeal boards. Since the number of unfair labor practice proceedings in which exceptions are filed is substantial and Congress has not provided for agency appellate procedures in unfair labor practice proceedings (see sec. 10(c) of the National Labor Relations Act), this would require the establishment of appeal boards for unfair labor practice

NLRB-00114414

cases. (See further discussion, infra.) Insofar as representation proceedings are concerned, section 3(b) of the National Labor Relations Act authorizes the Board to delegate to the regional directors its powers with respect to representation proceedings subject to discretionary review by the Board upon request for review by any interested party. If this be construed as an agency appellate procedure "otherwise provided by Congress," the regional director in reviewing the opinion and decision of the hearing examiner required under section 8(b) (see supra), would be considered to be an appellate body, otherwise the Board would be required to establish an agency appeal board between the hearing examiner or the regional director and itself in representation proceedings. As indicated above, proceeding under any of these interpretations would unduly burden and delay the handling of election cases and nullify the congressional intention to expedite the processing of such cases reflected in the 1959 Amendments to the National Labor Relations Act permitting the Board to delegate its authority in representation cases to its regional directors.

Nor do we believe that the appeal procedures proposed would be an advantage to parties appearing before the Board in unfair labor practice cases. On the contrary, they would interpose another decisional level, thereby causing additional delay in the resolution of labor disputes, at least, in difficult cases.

We also note that the General Counsel of the Board is a litigant before the Board in unfair labor practice cases. Yet the proposed subsection (c)(2) would limit direct appeal to the agency to a "private party" and would not, therefore, allow the General Counsel to seek direct agency review. The General Counsel functions in the public interest. He should have the same right of appeal granted to any other party.

The last Administrative Conference of the United States considered in depth the entire question of delegation of decisionmaking authority and recommended in its recommendation No. 9 that (*a*) agencies be authorized to accord administrative finality to hearing examiners' initial decisions without agency review, unless the party seeking review makes a certain specified showing, and (*b*) agency decisions to accord or not to accord administrative finality to the hearing examiners' initial decisions should not be subject to judicial review. Recommendation No. 9 accords more nearly with the Board's views than the current proposal establishing an intermediate step of appellate boards in the processing of unfair labor practice cases.

Section 9—Sanctions and powers

In subsection (a), the last sentence states "no sanction shall be imposed, *investigation commenced*, or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." [Emphasis added.] The National Labor Relations Act applies only to employers "engaged in commerce." The Board's processes are not self-activating but can only be invoked by the filing of a petition or a charge; a preliminary step in every investigation is the informal development of facts to establish to the Board's satisfaction that an employer's activities sufficiently affect commerce to warrant the assertion of jurisdiction by the Board. The quoted sentence implies that statutory jurisdiction must be formally established prior to the commencement of an investigation and therefore the very investigation concerning "commerce facts" might be subject to prior judicial challenge. This would be contrary to the settled principle that the agency has broad power to investigate matters within the general orbit of its authority and that specific challenges to its jurisdiction can only be raised when, and if, the investigation has culminated in a final order which is reviewable in the courts under the statutory procedure. See *Myers* v. *Bethlehem*, 303 U.S. 41; *Oklahoma Press Publishing Co.*, v. *Walling*, 327 U.S. 186. (See also discussion under sec. 10, infra.) Accordingly, we recommend that the words "investigation commenced" be deleted.

Subsection (b)—Publicity

This subsection is objectionable because the word "publicity" is overly broad and might be interpreted to include merely the release of information concerning the filing of charges, the issuance of complaints or decisions, or any other agency action relating to an investigation or agency proceeding. Since there are no standards set forth as to what is meant by "to discredit or disparage," any release might be found to violate this subsection. If so, the subsection appears to be in direct conflict with the purposes of section 3 and would mean that an agency could never safely disseminate information to which the public may be entitled.

NLRB-00114415

Section 10—Judicial review

The opening clause of section 10 of the Administrative Procedure Act excepts therefrom "agency action [which] is, by law, committed to agency discretion." Under S. 1336 this clause has been stricken and would be replaced by "judicial review of agency discretion is precluded by law." Under section 3(d) of the National Labor Relations Act, the General Counsel has been given "final authority, on behalf of the Board," to investigate and prosecute unfair labor practice cases. This language vests the General Counsel with discretionary authority to refuse to prosecute, and the exercise of this discretion has been held to be nonreviewable. To change the language may unnecessarily cause confusion where none now exists. Accordingly, we prefer that the present language of the Administrative Procedure Act be retained.

Subsection (a)—Right of review

This subsection states "any person adversely affected in fact by any reviewable agency action * * *" may obtain judicial review. The words "in fact" replace "or aggrieved" presently contained in the Administrative Procedure Act." Since the concept of a "person aggrieved" has a well-defined meaning in administrative law and under the National Labor Relations Act, the substitution of a new concept would lead to confusion and to unwarranted litigation. We recommend, therefore, that the wording of the present Administrative Procedure Act be retained.

Subsection (b)—Jurisdiction, venue, and form of action

Subsection (b)(2) would confer upon U.S. district courts jurisdiction to protect "the substantial rights of any person in any agency proceeding." This language could be construed to permit wide inroads to be made upon the doctrine of *Myers* v. *Bethlehem, supra,* which requires the exhaustion of administrative remedies. And it could also be interpreted to allow unwarranted interference with and direct review of election case proceedings in situations unlike *Leedom* v. *Kyne,* 358 U.S. 184, where agency action was considered on its face clearly to contravene an unambiguous statutory mandate and where no adequate means other than judicial action existed for redressing that wrong. In *Boire* v. *The Greyhound Corporation, supra,* the Supreme Court, in ruling that a U.S. district court had no jurisdiction to enjoin the Board action in an election case, indicated that *Leedom* v. *Kyne,* should be confined very closely to its facts and should be considered a very narrow exception. As the language in question is much too broad, it should be deleted.

In summary, we believe that, since its enactment in 1946, the Administrative Procedure Act has worked well in tandem with the National Labor Relations Act, enabling the Board to carry out substantive labor policies formulated by the Congress. We could not and do not have any reaon to protest procedural changes which would assist in the effectuation of those policies. But we do object to changes, such as the proposals we have criticized, which would or could have demonstrably harmful effects. Furthermore, we think changes in a statute should not be made solely because it has been on the books for 19 years. Time alone does not raise a presumption that there is need for something new. And change for the sake of change, especially when uncertainty, confusion, and litigation may be engendered, is plainly unwarranted. We are certain you and your committee will agree with these general observations. There is, we submit, a heavy burden which rests on those who ask the Congress for large-scale overhauling of the Administrative Procedure Act, a burden which requires them to justify their positions, fully and in each and every respect.

Finally, we note that a permanent Administrative Conference of the United States was established by legislative enactment last year and soon will be activated for the purpose of studying the entire administrative process and making recommendations for its improvement. It would be much more desirable to utilize the conference machinery to recommend changes, where the need for change has been demonstrated, rather than proceeding at this time to attempt to make such sweeping, radical, and comprehensive revisions in the administrative process as are proposed in S. 1336.

We would appreciate having this report included in the record of the hearings on this bill. Further, our comments on section 3 should be considered as a report on S. 1160 and included in the record of any hearings on that bill.

The Bureau of the Budget has no objection to the submission of this report to your committee.

Sincerely yours,

WILLIAM FELDESMAN, *Solicitor.*

NLRB-00114416

Calendar No. 1194

89TH CONGRESS, 2d Session } SENATE { REPORT No. 1234

AMENDING THE ADMINISTRATIVE PROCEDURE ACT

JUNE 9, 1966.—Ordered to be printed

Mr. LONG of Missouri, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1336]

The Committee on the Judiciary, to which was referred the bill (S. 1336) to amend the Administrative Procedure Act, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

AMENDMENTS

Amendment No. 1: On page 1, line 7, strike "1965" and insert in lieu thereof "1966".

Amendment No. 2: On page 2, line 4, strike "Territories" and insert in lieu thereof "territories".

Amendment No. 3: On page 5, line 17, after "rules", insert "of general applicability".

Amendment No. 4: On page 6, line 1, strike "by," and insert in lieu thereof "by".

Amendment No. 5: On page 6, line 14, after "(C)", insert "administrative".

Amendment No. 6: On page 7, line 11, after "RECORDS.—", insert "Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made".

Amendment No. 7: On page 7, line 14, strike "Every agency shall,".

Amendment No. 8: On page 7, line 15, after "place,", insert "fees to the extent authorized by statute,".

Amendment No. 9: On page 7, line 16, strike "all its" and insert in lieu thereof "such".

Amendment No. 10: On page 7, line 22, strike "and information" and line 23 strike "or information".

50-010

NLRB-00114417

can no longer be justified. The same observation can be made to a large degree with respect to the exercise of what the present act described as "foreign affairs functions"—by the Department of State, by the Treasury and by the other agencies of the Federal Government having such functions.

For the same reason the exemption of rulemaking relating to "public property, loans, grants, benefits, or contracts" has been discarded. The importance of the Government's activity in this area is now enormous, involving, as it does, tens of billions of dollars of expenditures yearly and vast properties. The rules regulating this activity are consequently of vital concern to the public and it is only reasonable that it be informed and allowed to take part when rules relating to public property, loans, grants, benefits, or contracts are made. It should be emphasized that the actual negotiations leading to a particular contract, for example, will not be subject to a rulemaking proceeding. Such is not rulemaking. Only the rules relating to the general principles of handling contracts, property, etc., will be subject to a rulemaking proceeding.

The exceptions written into section 4(a) of the 1946 act have been in part kept and in part modified. The exception for rules of agency organization has been kept. The internal arrangements of an agency are in the committee's view a matter of its management and should be left to the agency's choice. The same is true of its internal personnel rules and practices; namely, its rules as to leave, promotion, and similar matters.

The exemption for interpretative rules is also continued, but restated as one for "advisory interpretations and rulings of particular applicability." Plainly once the agency has made and published its rules after public notice and opportunity for public participation, it should not be expected to provide notice to the public and public participation when it interprets and applies the rules as to each issue that rises.

The basis for the exemption for "minor exceptions from, revisions of, or refinements of rules which do not affect protected substantive rights" is self-evident. The key to this exemption is that the changes contemplated are ones that will not affect "protected substantive rights."

It should be noted that the section, as revised, applies to the making of procedural rules, rules of practice, and such general statements of policy as the agency regards as having the effect and force of a rule.

Section 5. Adjudication.—The section on adjudication has been changed to bring about procedures which are in the committee's opinion desirable in the light of developments in the character and importance of administrative adjudication over the past 20 years.

To begin with, the section now applies not only to agency adjudications that are required by statute to be determined on the record but those which the Constitution requires to be determined in that way as well. The committee's judgment is that cases of the latter kind should be conducted with the same procedural safeguards as those in which a decision on the record is required by statute.

The numerous exceptions from section 5 of the present act have been dropped. They have been examined and found either redundant or unnecessary. It should be noted however, that nonadversary, investigative proceedings which Congress may have specified must be conducted with a hearing, are not to be construed as coming within

NLRB-00114418

the provisions of section 5 (a) because of the deletion of the exemptions. An example of such a proceeding would be certification of employee representatives proceedings conducted by the National Labor Relations Board.

Section 5(a) (1). Notice.—The notice requirements are in substance those of the present act but they have been set out somewhat more precisely.

Section 5 (a) (2). Pleadings and other papers.—This is a new provision. It requires the agencies to establish rules of practice and to conform them "to the extent practicable" to the rules of the district courts of the United States in civil and criminal cases. The provision balances the need for some definite guidelines in this important area with the need of the individual agencies for sufficient flexibility.

Section 5(a) (3). Prehearing conferences.—This is another new provision. Prehearing conferences have been developed as a means of expediting and simplifying the decision of cases. A prehearing conference will not be used in every adjudicatory proceeding but the agencies are to provide by rule for such conferences and the agency or the presiding officer may require such a conference in any proceeding subject to this section. The expectation of the committee is that the agency prehearing conference properly used will prove itself effective in reducing the time and costs of complex administrative proceeding.

Section 5(a)(4). Regular hearing procedure.—As under the present act, adjudication, if not otherwise disposed of, is to be heard and decided in accordance with sections 7 and 8.

Section 5(a)(5). Modified hearing procedure.—This provision is new and is intended to be used to speed up the disposition of cases covered by this section by allowing the agencies to design and offer attractive, simplified hearing procedures acceptable to the parties. The modified hearing proceeding must, of course, be on the record. It can be employed only with the consent of all the parties to the proceeding—including intervenors. It can be used, obviously, only with the consent of the agency since only the agency can order its use. The presiding officer in such a modified proceeding need not be a section 11 hearing examiner but he must be a person of "appropriate ability." Presumably the agencies will use discretion in exercising this option and will designate as hearing officers only people with the requisite skill and experience. This is especially important inasmuch as the person who conducts the hearing is also to make the decision in the case—subject to the terms of section 8, the section governing the making of decisions.

Modified or abridged procedures of the kind this subsection contemplates are now used, notably by the Interstate Commerce Commission, and are reported to have been effective in reducing the time and expense of certain administrative proceedings.

Section 5(a)(6). Separation of functions.—The opening sentence of the provision on "Separation of Functions" in the present act has been moved to the beginning of section 8(a) of the bill where it more properly belongs.

The bill's provision on "Separation of Functions" is in two paragraphs. Paragraph A insulates the officer who presides at the reception of evidence from the supervision or direction of any officer, employee, or agent of the agency that performs the functions of investigating, prosecuting or advocating. The addition of the ad-