

BOOK REVIEWS

STUDIES IN ADMINISTRATIVE PROCEDURE. Attorney-General's Committee on Administrative Procedure. Washington, D. C.: Department of Justice, 1940.

MONOGRAPH NO. 1, THE WALSH-HEALEY ACT.

When it is remembered that the Attorney General's Committee was undertaking a survey of the procedure of all governmental agencies, the inclusion of the Division of Public Contracts is understandable. Why this bureau, which polices the Walsh-Healey Act, was made the subject of Monograph No. 1 remains, however, a question to conjure with. It has been comparatively obscure, a veritable recluse when contrasted with the more illustrious Securities and Exchange Commission or the notorious Labor Relations Board. Its primacy can certainly not be rested upon the fact that it has served as the battleground for litigation. There is no *Jones & Laughlin*,¹ *Electric Bond & Share*,² or *Morgan case*³ to give it immortality. In fact, scrutiny of the federal court reports reveals that the Division of Public Contracts is a judicial anonymity.

How then can we account for its preferred status? Perhaps this is the method adopted by the Committee to pay its respects to the now defunct N. I. R. A., the most spectacular of the government bureaus while it lasted. The Walsh-Healey Act was the first edifice Congress constructed out of the debris left by the *Schechter* case.⁴ More probable is it that the Committee, seeking to commence its endeavors on a quiet plane, selected for a starter an agency which has been free from attack.

It should not be assumed from the foregoing that the Division of Public Contracts does not deal with problems of vital human interest. Briefly stated, the Walsh-Healey Act provides that, in every government contract, involving ten thousand dollars or more, for the purchase of supplies and materials, conditions shall be inserted stating that no individual will be employed for more than eight hours per day or forty hours per week, except as permitted by the Secretary of Labor; that convict labor will not be used; that boys under the age of sixteen years and girls under the age of eighteen will not be employed in work relating to the execution of the contract; that working conditions which are unsanitary, hazardous, or dangerous to the health and safety of employees engaged in performing the contract will not be permitted; and that minimum wages, determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work in the locality, will be paid. Child labor, minimum wages, maximum hours, and working conditions are all affected by the statute. And these are fighting issues.

There are several reasons why the administrators of the Walsh-Healey

1. (1936) 301 U. S. 1.

2. (1937) 303 U. S. 419.

3. (1938) 304 U. S. 1; (1936) 298 U. S. 468.

4. (1935) 295 U. S. 495.

Act have escaped the conventional epithets and consequently also the headlines. Before the statute was passed, the position of the government was paradoxical. On the one hand, it was urging, and for a time attempting to compel, industry to improve working conditions; on the other, it was letting public contracts to the lowest bidder, a practice which, unless minimum standards were prescribed, inevitably hurt labor. The Walsh-Healey Act enabled the government to escape from this anomaly and to save face.

Aside perhaps from the issue of undue delegation of power, opponents of the legislation could not marshal constitutional arguments to support their cause. The question of federalism was not involved. The government was not *qua* government attempting to regulate industry, something which it could not do—at that time; it was merely conditioning its favors, the letting of public contracts, on compliance with specified conditions. Only those who sought the bounty were affected by the restraint. What the government could not do as government, it could always do, just as could any private citizen, as purchaser.⁵ Moreover, there was ample precedent for the Walsh-Healey Act. The use by the government of contracts to effect a measure of control over industry had been employed in the Eight Hour Law of 1892 and the Bacon-Davis Act of 1931.

Equally as important in quieting opposition was the fact that the Walsh-Healey Act emerged, as a result of debate and amendment, a compromise measure whose frame of reference was extremely narrow. But a small segment of industry is affected by the statute. Only those concerns which seek, and are successful in obtaining, government contracts requiring the manufacture and furnishing of supplies come under its terms; and then only for the duration of the contract, while the work for the government is actually in progress. If the sum involved is less than ten thousand dollars, or if the materials are such as can be purchased on the "open market" (a term of as yet uncertain meaning), the act does not apply. Even when it does, the Secretary of Labor is given broad powers to permit deviations from the strict terms of the contract.

It is for this reason that the Act has been labelled innocuous. "Legislation of this type may even be thought to react adversely upon the interests of labor by absorbing political effort which might be more fruitfully directed elsewhere."⁶ In mild contrast, the Attorney General's Committee concludes, however: "The regulative force of the law may not be inconsiderable."⁷

The social and economic implications of the Walsh-Healey Act are not, however, the concern of the Attorney General's Committee. The monograph does not purport to consider the success or failure of this effort at using the leverage of government purchasing power to raise labor standards generally; nor even to record the worth-whileness of the attempt. Given the statute, the Committee limited itself to a study of the procedural frame-

5. *Atkin v. Kansas* (1903) 191 U. S. 207; *Ellis v. United States* (1907) 206 U. S. 246.

6. *Legislation* (1937) 37 Col. L. Rev. 102, 121.

7. P. 3.

work set up by it. Suggestions are advanced in aid of more effective administration.

From the moment when a government investigator sends in his report, or an employee or rival of the contractor communicates his grievance to the Division, until the time when the Secretary of Labor has finally rendered his decision, few details escape the Committee's searching gaze. Thus, the adequacy of the present sanctions which implement the statute is questioned. The Committee places the stamp of approval upon a pending amendment permitting the recovery of double or treble damages, as being the sorely needed intermediate sanction between the extremely lenient remedy of restitution and the ruinous, and hence rarely used, penalty of blacklisting. The standard type of complaint drafted by the Division is criticized. Being too general, it fails to apprise the respondent of the acts or omissions which allegedly constitute violations of the Act. Better results would be achieved by the use of a more detailed complaint subject to later amendments. "As matters stand, a respondent may be forced to submit to the expense and publicity of a hearing in order to ascertain the scope of accusations which, if detailed in advance, might have been disposed of by conference or by admission of guilt."⁸ The Committee is on the alert even to point out the possibility of reducing costs. Transcripts must be purchased at the rate of thirty cents per page from the official reporter. Since respondents already have copies of the complaint and answer in their possession, savings might be obtained by eliminating these documents from the transcript.

A high standard of objectivity is maintained throughout the monograph. A few examples will suffice. The Division has adopted a very liberal practice with regard to the participation in the hearings of interested parties. Notices are sent to all the employees of the contractor who is being investigated and to the unions which represent them; they may testify or file briefs. The Committee takes the position that "the Division's broad and informal invitation to all-comers to appear" makes for the "intrusion of irrelevancies."⁹ Formal applications to intervene should be required. Immediately, however, it is admitted that the suggested procedure is superior in theory only; that no abuse has been discernible in the present method, because of the fact that potential witnesses have always communicated with the Division in advance of the hearing, and there has been an opportunity at a conference to discourage the attendance of those who have no useful information to offer testimonially. Finally, it is conceded that some loss might ensue upon adoption of the Committee's proposal, since the addition of formalities might tend to discourage the participation of the legally untutored.

In connection with the proposal that a more detailed complaint should be used, the Committee notes that even under the present practice the issues are formulated before the hearing. This is accomplished by means of a pre-trial conference at which frank disclosure is made of the case the Division expects to prove. Although the Committee adheres to the belief

8. Pp. 17-18.

9. P. 15.

that the change it advances would be beneficial, it takes pains to point out that the Division has in general fashioned a rough sort of procedure, on the whole well adapted to solve its problems and to afford fullest expression to the persons who appear before it. In no instance does the Committee erect a straw man who can be undermined at the proper time.

What prevents the monograph from being a real contribution, however, is the failure of the Committee to localize the Division of Public Contracts, to define its relationship to the other governmental agencies and to the courts. The impression is gained that the administrative procedure of this bureau has been broken down into bits and separately considered. Thus, the laxity in permitting interventions is found likely to prove embarrassing; or more detail in the complaint is thought desirable. But generalization in terms of a process is wanting.

It is not that the Committee has evaluated the practices of the agency according to judicial standards. The method of having a trial attorney sift the record for the Administrator on an appeal from the decision of the trial examiner is criticized, it is true. The Administrator, it is suggested, would be better advised by a neutral assistant. But, techniques are not denounced merely because they may deviate from the norm of the courtroom. For example, the Committee notes that trial examiners have been advised by their superiors not to grant a motion to dismiss. Justification for the mandate is found in the costly duplication of effort entailed if the trial examiner were to halt proceedings only to be reversed by the Administrator's later ruling that the case must be heard on its merits. Chitty and Shipman to the contrary notwithstanding, in not one instance in the history of the Division has this rule been flouted. To do so would (to use the Committee's words) "be an act of heroism—and very probably an improvident exercise of discretion."¹⁰ Or, to cite another instance, it is urged that, on review from a decision of the Administrator to the Secretary of Labor where the penalty of blacklisting has been imposed, the latter might well consult with the former even though "a judge's exercise of discretion in imposing sentence will be considered by an appellate court only in exceptional circumstances."¹¹

It is rather that too many important questions are left unanswered. Is the same type of hearing required of this agency as of the others by the second *Morgan* case? Should not the fact that, on resort to the courts, a decision of the Division is only conclusive—even on the facts—if it is supported by a "preponderance of the evidence" ("substantial evidence" is not enough) affect our answer? Apparently, a trial *de novo* in the Courts is contemplated. Is the fact that Congress could conceivably make the Division the final arbiter of a violation of the terms of a public contract of importance? Such legislation might well be upheld as a proper use of contractual conditions. Finally, what significance should be attached to the fact that functionally the bureau resembles a police agency rather than a department with affirmative regulatory powers?

10. P. 28.

11. P. 43.

Nowhere is the Committee's sin of omission more evident than in the description of the relationship between trial attorney and trial examiner—prosecutor and judge—when they are sent on the road to try a case. Both, it should be remembered, are taken from the Division's legal roster of fourteen men. The two are answerable to a common superior. They have perhaps shared the same office in Washington. At the very least, the extent of their contacts must have been considerable. But once they are assigned to duty, the relationship is "turned off" by administrative order. For reasons of economy, they may, to be sure, use the same long distance telephone connection to report to their chief. But, the Division's rules require the trial examiner and trial attorney to hold no conferences during the course of a hearing unless a representative of the respondent is present. They may not lodge at the same hotel, "and this requirement is not relaxed even when the hearing is held in places boasting only one reasonably comfortable hostelry."¹² Whether the rule of first come first served in such a case has received the stamp of administrative approval, we are not told. Perhaps the negative answer is to be inferred from the statement that the bureau has succeeded in surrounding the trial examiner at the hearing with "an aura of judicial respectability."¹³ On another day, the trial attorney will have his chance to play the role of judge and to gain the comfortable lodging.

Plainly there is much of the farcical in this process. If the assumption is that objectivity can be induced by the simple expedient of separating, for one or two days, men who work in close proximity all year round, it is based on poor psychology. If such squirming is thought required for due process, it is probably now based also on poor law. The crudity of the procedure seems to imply either a misunderstanding of the second *Morgan* case or the adolescent stage of administrative organization. Yet, the Committee, after describing the practice in the Division disavows any intention of implying that the "separation of the trial examiner from the trial attorney during the course of the hearing is a mere humbug."¹⁴ And, it is later averred that no attempt will be made here to determine whether, in the circumstances of an administrative organization like the Division of Public Contracts, there are elements which render inapposite the transplanting of the traditions and the customs associated with the judiciary.

That the Committee recognized the existence of the problem is clear. That it did not deal with it is unfortunate. Perhaps it was felt that such a subject could be best treated in a unifying volume after the separate agencies were first discussed. Since the solution of this question is basic and furnishes the key to the problems of detail encountered in the procedure of each agency, rendering apt or inept the suggestions of the Committee, the problem would have been better handled in this and in every other monograph.

With the hot breath of the Supreme Court on their shoulders, the mem-

12. P. 31.

13. P. 31.

14. P. 32.

bers of the Attorney General's Committee should not be blamed unduly for refusing to venture an opinion. In times of change, the prophet's role is a thankless one. That the answers to the questions we have raised will shortly be forthcoming, if not from the Committee then from the Supreme Court, seems apparent from the significant utterance of that body in *Federal Communications Comm. v. Pottsville Broadcasting Co.*¹⁵: "These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."

Already several of the proposals made by the Committee have been put into effect by the Division of Public Contracts. At a time when other critics would radically alter the structure or personnel of the various governmental departments, or both, the path followed by the Attorney General's Committee seems to be the one best designed to further the cause of intelligent administration.

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MONOGRAPH NO. 3, FEDERAL COMMUNICATIONS COMMISSION.

That in the series of monographs prepared by the Attorney-General's Committee on Administrative Procedure, the only one which runs to two volumes should be the one dealing with the Federal Communications Commission, is perhaps a tribute not so much to the importance of that Commission in the administrative scheme (although it is of the first importance), as to the variety and complexity of the matters which have been committed to its jurisdiction by Congress. It is apparent also that the monograph is more extended than it would have been had the Commission and its procedure in the past not been the subject of sharp public criticism.

The monograph is divided into two parts, the first dealing with licensing and adjudication, the second with rule-making. Subject to this division, the monograph treats separately the diverse and often quite unrelated fields over which the Commission has jurisdiction. These include broadcast stations (standard, relay, international, facsimile, high frequency, experimental and non-commercial educational); safety and common carrier radio services (embracing marine, aviation, emergency, fixed public and fixed public press services, the latter two being engaged in the common carriage of communications for hire, either by means of radio-telephone or radio-telegraph); commercial radio operators; amateur stations and operators; and telephone and telegraph carriers.

The history of the regulation of communications by wire dates back to the Post Roads Act of 1866, which related simply to the fixing of rates for Government telegrams. The Act of August 7, 1888, commenced, to a very limited extent, the regulation of telegraph carriers, the application of the Act being restricted to subsidized carriers. The jurisdiction was placed in the Interstate Commerce Commission.

15. (1940) 60 S. Ct. 437.

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