IMPROPER DELEGATION OF DECISION-MAKING RESPONSIBILITY WITHIN THE NLRB

KFC National Management Corp. v. NLRB, 497 F.2d 298 (2d Cir. 1974)

Petitioner corporation sought review by the court of appeals of an adverse decision rendered by the National Labor Relations Board (NLRB) in an unfair practice proceeding.[1] Petitioner asserted that the Board had used improper procedure in denying a request to review the regional director's dismissal of the company's claim that a representation election was invalid. Specifically, the petition alleged that the denials of the request for review were made by a panel composed of one Board member and two staff assistants to whom the power to vote had been improperly delegated.[2] The Second Circuit

1. KFC Nat'l Mgmt. Co., 204 N.L.R.B. No. 69, 83 L.R.R.M. 1534 (1973).

2. KFC Nat'l Mgmt. Corp. v. NLRB, 497 F.2d 298 (2d Cir. 1974). The corporation contested the election on the grounds of pro-union activity by supervisory employees. After an ex parte investigation into the company's claims, the regional director concluded that the claims had "no merit" and that the union should be certified as the duly elected bargaining representative. *Id.* at 299. The company then petitioned the NLRB for review. On September 7, 1972, petitioner was informed by telegram that the request had been denied "as it raise[d] no substantial issues warranting review." *Id.* at 300. A further petition for reconsideration was similarly denied by telegram. Both denials were signed "By direction of the Board." *Id.*

The company refused to bargain with the union, and the union filed an unfair labor practice charge. In its answer to the unfair practice charge, the company for the first time raised the issue of the impropriety of the Board's procedure. The Board held against the corporation, rejecting the procedural objection as an unjustified intrusion into its decision-making process. KFC Nat'l Mgmt. Co., 204 N.L.R.B. No. 69, 83 L.R.R.M. 1534 (1973). In its petition to the court of appeals, the company moved for a supplemental list of materials relating to the procedure followed by the Board in issuing the challenged denials of review. On October 17, 1973, the court denied the motion, "except 'to the limited extent' of requiring 'that the Board shall serve and file a detailed statement showing the extent and date of the participation of members Miller, Fanning and Jenkins in the consideration of the Employer's request and motion. . . .'" KFC Nat'l Mgmt. Corp. v. NLRB, 497 F.2d 298, 301 (1974) (emphasis omitted). The Executive Secretary of the Board forwarded an affidavit stating:

> "Member Jenkins was personally present and Chairman Miller and Member Fanning were each represented by an attorney assistant employed on his respective staff who had been authorized to cast a vote for him at the said agenda. The vote at the agenda was unanimous to deny review."

Id. The court found that the "authorizations referred to were quite general in nature" and that there was "no evidence that the members normally review the votes cast by their staff assistants." *Id.*

Court of Appeals denied enforcement of the decision of the Board, remanded the petition to the Board for review of the action of the regional director, and *held*: The National Labor Relations Act and fundamental concepts of administrative due process require that, when Board members are required to make a quasi-judicial decision, their responsibility not be delegated by issuing to subordinates a general authorization to make that decision.[3]

Courts have in the past been unwilling to hold improper an admin-

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3. KFC Nat'l Mgmt. Corp. v. NLRB, 497 F.2d 298, 306 (2d Cir. 1974).

The procedure to be followed in representation disputes is authorized by the National Labor Relations Act § 3(b), 29 U.S.C. § 153(b) (1970):

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to . . . certify the results [of bargaining elections], except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph . . . . [T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

In 1961 the Board exercised this authority, reserving the right to review on four different grounds. 29 C.F.R. § 102.67 (1974) provides:

> (c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
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> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
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> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
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> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
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> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

In Magnesium Casting Co. v. NLRB, 401 U.S. 137 (1971), the Supreme Court held that the National Labor Relations Act § 3(b), 29 U.S.C. § 153(b) (1970), authorizes discretionary, not mandatory, plenary review by the NLRB of the regional directors' decisions. *See* C. MORRIS, THE DEVELOPING LABOR LAW 825-29 (1971); *id.* at 139 (Supp. 1972).

If an employer wishes to challenge the representation decision in court, he must wait until the Board seeks enforcement of an unfair labor practice order. Magnesium Casting Co. v. NLRB, *supra* at 139. *But cf.* Leedom v. Kyne, 358 U.S. 184 (1958) (district court held to have jurisdiction to grant union's motion to set aside Board unit determination). The representation decision accompanies the unfair labor practice charge to the Board and to the court of appeals. Magnesium Casting Co. v. NLRB, *supra* at 142-43. Although the Board need not consider the unit determination when deciding the unfair practice charge, *id.* at 139, the court will consider the case as a whole and determine whether the findings of the Board and/or regional director are supported by substantial evidence, *id.* at 143-44.

istrator's delegation of quasi-judicial responsibility.[4] This unwillingness stems from a practical appreciation of the heavy burden borne by an administrator in this capacity, and from a desire to protect from judicial inquiry the privacy of the administrator's decision-making process.[5]

In 1936 the Supreme Court held in *Morgan v. United States*[6] *(Morgan I)* that the Secretary of Agriculture, in fixing rates under the Packers and Stockyards Act, was exercising powers that were in their nature judicial and that fundamental procedural requirements had to be followed. Among these was the requirement that an order pursuant to the statute be based on evidence and arguments heard and considered by the Secretary himself. When the Secretary's assistant alone heard the evidence and arguments, an order resulting therefrom would be invalid.[7]

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4. *See* Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967); Utica Mutual Ins. Co. v. Vincent, 375 F.2d 129 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967); Great Lakes Airlines, Inc. v. CAB, 291 F.2d 354 (9th Cir. 1961); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949); Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 867 (1948).

5. In Braniff Airways, Inc. v. CAB, 379 F.2d 453, 461, 462 (D.C. Cir. 1967), the court stated:

> We agree with Professor Davis, 2 ADMINISTRATIVE LAW § 11.07 at 66 (1958), that "despite its immediately appealing quality, the broad ideal that agency heads should do personally what they purport to do is for many functions impractical and unworkable . . . ." The use of assistants in the administrative process is indispensible to the orderly and efficient expedition of great volumes of work and the reconciliation of divergent responsibilities. . . .
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> . . . The general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize. "Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected."

See cases cited note 4 *supra*. *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.07 (1958).

6. 298 U.S. 468 (1936).

7. *Id.* at 481. On remand, the district court decided that the statutory requirements had been met. Morgan v. United States, 23 F. Supp. 380 (W.D. Mo. 1938). The decision was again appealed and the order of the Secretary was held invalid because of other procedural defects. Morgan v. United States, 304 U.S. 1 (1938). While the Secretary was drafting a new order, the case was again brought to the Supreme Court on an unrelated issue. United States v. Morgan, 307 U.S. 183 (1939). Finally, the Secretary issued a new order which was held invalid by a district court. Morgan v. United States, 32 F. Supp. 546 (W.D. Mo. 1940). On appeal, the Supreme Court upheld the order in United States v. Morgan, 313 U.S. 409 (1941). *See* text accompanying notes 8-9 *infra*.

Following protracted litigation, the same dispute again came before the Supreme Court in *United States v. Morgan*[8] (*Morgan IV*), in which the Court limited the holding of *Morgan I*. Holding that the Secretary had been improperly subjected to questioning regarding the internal processes of the Department, the Court established the principle that a court cannot inquire into the mental processes of an administrator.[9] *Morgan IV* has curtailed the power of courts to inquire into the propriety of administrative procedures, including the extent to which responsibility is delegated.[10] No circuit, since *Morgan IV*, has

8. 313 U.S. 409 (1941).

9. *Id.* at 422, *quoting* Morgan v. United States, 298 U.S. 468, 480 (1936), *and* Morgan v. United States, 304 U.S. 1, 18 (1938):

> But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." . . . Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." . . . Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected.

10. In National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141 (2d Cir. 1974), petitioners' motion to take the deposition of the Commissioner of Food and Drugs was denied. The court stated:

> It is plain enough that if this motion had come before us in the period between the first *Morgan* case . . . holding that in administrative proceedings "The one who decides must hear" and that a court seized of a review proceeding must inquire whether he had, and the fourth and last appearance of the *Morgan* case in the Supreme Court . . . we would have been obliged to grant it. But the life of this aspect of *Morgan I* was extremely brief. In *Morgan IV* Mr. Justice Frankfurter, writing for a Court unanimous on this point, took back most or all of what the first decision had given . . . .

Id. at 1144 (footnote omitted).

Since *Morgan IV*, courts have been unwilling to allow discovery concerning the decision-making processes of an administrator. *See, e.g.*, Bank of Commerce v. City Nat'l Bank, 484 F.2d 284 (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600 (5th Cir. 1966); Air Line Pilots Ass'n v. Quesada, 286 F.2d 319 (2d Cir. 1961); North Am. Airlines, Inc. v. CAB, 240 F.2d 867 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 941 (1957). *See generally* 2 K. DAVIS, *supra* note 5, § 11.05.

The "mental process" rule of *Morgan IV* has been held inapplicable in certain situations. It is generally asserted that when a prima facie showing of impropriety has been made, the court may inquire into the decision-making process. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (dictum); National Nutritional Foods Ass'n v. FDA, *supra* at 1145 (dictum); S.D. Warren Co. v. NLRB, 342 F.2d 814 (1st Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

In Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200, 208 (4th Cir. 1964), the court stated:

> It is our opinion, therefore, that the mental process rule is but "one facet of the general presumption of regularity" which attaches to decisions of administrative bodies . . . . Thus, we conclude, where a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable.

held a delegation of administrative responsibility to be improper. In such areas as the hearing of evidence,[11] the sifting and organizing of information,[12] and the formation of preliminary decisions,[13] the courts have consistently held that assistants can exercise primary responsibility. The Second Circuit has gone so far as to hold that members of administrative boards need not cast their own votes.[14] These same decisions, however, have uniformly acknowledged in dicta that when a statute delegates to an administrator quasi-judicial responsibilities, "the decision in the ultimate must be that of the administrator."[15]

Prior to *KFC National Management Corp. v. NLRB*,[16] the extent to which the principles of administrative procedure enunciated in *Morgan I* had withstood the limitations on judicial review imposed by *Morgan IV* had not been clearly defined.[17] Addressing this issue, the court in *KFC* began its analysis with an examination of the enabling statute, noting that the National Labor Relations Act specifically requires the Board to decide whether or not to review an action of a re-

See 78 HARV. L. REV. 655 (1965); note 25 *infra*.

The mental process rule has also been found to be inapplicable when an administrative decision is unaccompanied by adequate findings. *See* Camp v. Pitts, 411 U.S. 138 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, *supra, noted in The Supreme Court, 1970 Term,* 85 HARV. L. REV. 40, 315 (1971).

11. NLRB v. Duval Jewelry Co., 357 U.S. 1 (1958); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); NLRB v. McKay Radio & Tel. Co., 304 U.S. 333 (1938); Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129 (2d Cir.), *cert. denied,* 389 U.S. 839 (1967); NLRB v. Stocker Mfg. Co., 185 F.2d 451 (3d Cir. 1950); Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689 (D.C. Cir. 1947), *cert. denied,* 333 U.S. 867 (1948); Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622 (D.C. Cir. 1941).

12. Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967); Great Lakes Airlines, Inc. v. CAB, 291 F.2d 354 (9th Cir. 1961); Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689 (D.C. Cir. 1947), *cert. denied,* 333 U.S. 867 (1948); NLRB v. Baldwin Locomotive Works, 128 F.2d 39 (3d Cir. 1942).

13. Great Lakes Airlines, Inc. v. CAB, 291 F.2d 354 (9th Cir. 1961).

14. Eastern Airlines, Inc. v. CAB, 271 F.2d 752 (2d Cir. 1959) (Board members had instructed their assistants to cast specific votes after two days of discussion by Board with all members present).

15. Braniff Airways, Inc. v. CAB, 379 F.2d 453, 461 (D.C. Cir. 1967); *see* cases cited notes 10-14 *supra*.

16. 497 F.2d 298 (2d Cir. 1974).

17. In NLRB v. Duval Jewelry Co., 357 U.S. 1 (1958), the NLRB delegated to hearing officers authority to hold a preliminary hearing on a motion to revoke a subpoena duces tecum. The Supreme Court refused to circumscribe the limits of permissible delegation:

> That degree of delegation seems to us wholly permissible under this statutory system. We need not go further and consider the legality of the more complete type of delegation to which most of the argument in the case has been directed.

Id. at 8.

gional director in a representation dispute.[18] The court then concluded that since the statute clearly requires the Board to make this decision, and since an action taken by the Board requires a quorum of two members, the issue was whether or not this responsibility to decide could be delegated to subordinates.[19] Looking to legislative history, the court found that in enacting the Taft-Hartley Act,[20] Congress was concerned with the significant role played by staff attorneys in the decision-making process,[21] and thus provided for more personal adjudication by the Board.[22] Congress, the court concluded, would not have approved of the blanket proxies issued by the Board members to their attorney assistants.[23]

The court then established a broader scope for its decision. Reasserting the principles set forth in *Morgan I*, the court stated that, as a fundamental concept of administrative due process, "those legally responsible for a decision must in fact make it . . . ."[24] According to the court, this principle had not been overruled by *Morgan IV*; rather *Morgan IV* had merely established that in the absence of a prima facie showing of improper procedure, a court will not inquire into an administrator's decision-making process.[25] Since the relevant

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18. 497 F.2d at 302; *see* note 3 *supra.*

19. 497 F.2d at 302.

20. Act of June 23, 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-58, 159-87 (1970, Supp. III, 1973)).

21. *See* note 27 *infra* and accompanying text.

22. 497 F.2d at 302-03. The particular provision referred to was National Labor Relations Act § 4(a), 29 U.S.C. § 154(a) (1970), which states in part:

> The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations.

The court in *KFC* also pointed out that the Taft-Hartley *Conference Report* discussed the allocation of the Board's administrative, prosecutorial, and adjudicative functions. No suggestion was made that the Board members should be permitted to delegate their "quasi-judicial" function to their staff assistants beyond the reviewing of transcripts or the preparation of draft opinions. 497 F.2d at 303, *citing* H.R. REP. No. 510, 80th Cong., 1st Sess. 36-38 (1947).

23. 497 F.2d at 303; *see* note 27 *infra.*

24. 497 F.2d at 304.

25. Although the court never so stated, this concept is very much like the "presumption of regularity" interpretation of *Morgan IV* adopted by the court in Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200 (4th Cir. 1964). As stated in United States

facts in *KFC* had been admitted by the Board, the court felt free to review the propriety of the challenged procedure, deciding that it was, in fact, improper.[26]

In its reasoning, the court seems to have confused principles of statutory interpretation with those of administrative due process. A careful examination of the legislative history of the Taft-Hartley Act shows that Congress was indeed concerned with excessive institutional decision making on the part of the Board. The committee reports indicate the desire that the NLRB begin to act more in the manner of an appellate court, each member independently arriving at his own conclusions.[27] In its affirmation of the principles enunciated in *Morgan I*,

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v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926):

> The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.

See also Ross v. Stewart, 227 U.S. 530, 535 (1913). *See generally* 2 K. DAVIS, *supra* note 5, § 11.06. The Board argued that the mental process rule required the court to presume

> that administrative officials will insure that the agency decisions reflect their views . . . . Where a Board member has designated a trusted senior attorney to cast his vote on a matter, this presumption supplies a strong inference that the member has taken adequate steps to insure that the designee will cast the vote in accordance with the member's wishes.

Brief for Respondent at 26, KFC Nat'l Mgmt. Corp. v. NLRB, 497 F.2d 298 (2d Cir. 1974).

26. 497 F.2d at 305.

27. H.R. REP. No. 245, 80th Cong., 1st Sess. 25 (1947): "[T]he members of the Board will be expected to do their own deciding, not permitting trial examiners to attend executive sessions of the Board to defend their reports, as the Board has done in the past." S. REP. No. 105, 80th Cong., 1st Sess. 8-9 (1947):

> One of the major criticisms of the Board's performance of its judicial duties has been that the members themselves, except on the most important cases, have fallen into the habit of delegating the reviewing of transcripts of the hearings and findings of trial examiners to a unit of the general counsel's office called the Review Section. . . .
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> . . . [T]he Board, instead of acting like an appellate court where the divergent views of the different justices may be reflected in each decision, tends to dispose of cases in an institutional fashion. To that extent, the congressional purpose in having the act administered by a Board of several members has been frustrated.

The *Senate Report* then goes on to assert its concurrence with the principles established in *Morgan I*, quoting the following passages from the case:

> "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given . . . . The one who decides must hear.
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> This necessary rule does not preclude . . . obtaining the aid of assistants."

Id. at 9, *quoting* Morgan v. United States, 298 U.S. 468, 480-81 (1936) (*Report*'s ellipsis).

however, the *KFC* court also declared that the delegation of authority was violative of administrative due process.[28] This was an unfortunate choice of words, for it implies a constitutional dimension which probably does not exist. Although the issue of delegation of administrative responsibility has been discussed in terms of due process,[29] *Morgan I* did not do so. While the language used by Chief Justice Hughes in *Morgan I* may imply a constitutional argument, the Court merely held that the statutory "full hearing" requirement "has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts."[30] The holding in *Morgan I* was based not upon due process, but upon the statute, and upon what Congress must have intended by requiring a "full hearing." That the court in *KFC* may actually have intended to base its holding strictly on the statutory language may be inferred from its suggestion in a footnote that Congress might relieve the burden on the NLRB by amending section 9(c) of the National Labor Relations Act to make the regional directors' decisions final, or by reducing the quorum requirements by one member for purposes of granting or denying review by a three-member panel.[31] Unless the courts are prepared to hold that Congress does not have the sole power to specify *who* shall make administrative decisions, judicial inquiry into whether or not decisions are in fact being made by the proper persons should be limited to examination of the enabling statutes.[32]

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28. 497 F.2d at 306.

29. *See, e.g.*, NLRB v. Stocker Mfg. Co., 185 F.2d 451 (3d Cir. 1950); NLRB v. Baldwin Locomotive Works, 128 F.2d 39 (3d Cir. 1942). *But cf.* NLRB v. McKay Radio & Tel. Co., 304 U.S. 333 (1938).

30. 298 U.S. at 480.

31. 497 F.2d at 306 n.14.

32. Except for the requirement of impartiality, there are necessarily no due process restrictions on the power of legislatures to choose who is to do the administrative decision making. *Cf.* Tumey v. Ohio, 273 U.S. 510 (1927); *In re* Claasen, 140 U.S. 200 (1891); Missouri v. Lewis, 101 U.S. 22 (1879). In contrast, constitutional limitations do exist on Congress' power to define the nature and extent of administrative authority. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

Even assuming a constitutional right to the particular hearing involved in *KFC*, the failure of the NLRB to accord petitioner such a hearing should not be constitutionally fatal. A court of appeals, in a proceeding to enforce an order of the NLRB, can provide the same review of the regional director's determinations as could the Board under its regulations. *See* note 3 *supra*. Since the order of the NLRB must be enforced by the court of appeals, the corporation would probably suffer no hardship as a result of the delay in a final decision of the issue.

The NLRB has for years handled representation disputes by the procedures held improper in *KFC*.[33] It is unlikely, however, that the added duties necessarily imposed by this decision will prove to be a significant burden.[34] The extent of delegation previously held proper will still allow Board members to escape hearing the arguments, sifting the evidence, and writing the decisions. Their presence during the vote, or a specific authorization to a subordinate to cast a specific vote, is all that is required.[35]

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33. This case will alter a firmly established Board procedure. Murphy, *The National Labor Relations Board—An Appraisal*, in PROCEEDINGS OF THE THIRTEENTH ANNUAL LABOR LAW INSTITUTE, SOUTHWESTERN LEGAL FOUNDATION 113, 132-33 (1967):

> Each request for review [of the regional director's representation decisions] is studied carefully by a legal assistant and a supervisor, and an oral presentation is made to a three-man panel which decides whether or not to grant review. This panel is composed of one Board member and a senior attorney from the staff of two other Board members. The Board members rotate this assignment every two months. The head of the unit notifies the Board member when he has a group of cases ready for reporting, and the panel meets two or three afternoons a week at the convenience of the Board member.

34. In terms of pure numbers of cases, the burden on the NLRB is already quite substantial. In fiscal 1972, it received 41,000 new cases. The Board members themselves were called upon to decide over 2,000 cases, 176 of which were representation cases. 37 NLRB ANN. REP. 1, 19-20, 240 (1972).

35. *See* cases cited notes 10-14 *supra*. The mental process rule and the presumption of regularity, *see* notes 10 & 25 *supra*, would in effect allow a Board member who had received from his assistant a summary of the evidence and a recommendation on how to vote, but had not read the summary, to authorize his assistant to cast the recommended vote. Since the court would be required to presume that the Board member had read the summary, judicial inquiry into his participation in the decision-making process would be precluded.