

## RULE-MAKING AND ADJUDICATION IN ADMINISTRATIVE POLICY MAKING: *NLRB v. WYMAN-GORDON CO.*

The National Labor Relations Board (NLRB) has been the target of criticism because of the manner in which the Board makes rules and formulates new policies.<sup>1</sup> The National Labor Relations Act empowers the Board "to make . . . , in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."<sup>2</sup> The Administrative Procedure Act<sup>3</sup> (APA) provides the Board with two methods of devising rules and orders, quasi-legislative rule-making and ad hoc adjudication. The rule-making procedure is designed for the promulgation of rules of general or particular applicability and future effect.<sup>4</sup> It requires that an agency (1) publish general notice of the proposed rule-making in the Federal Register;<sup>5</sup> (2) give interested persons the opportunity to participate in the rule-making process through submission of written data and arguments; and (3) incorporate into the rule a concise statement of its basis and purpose, publishing the rule not less than thirty days before its effective date.<sup>6</sup> The adjudicative procedure is applicable when an agency intends to issue an order,<sup>7</sup> i.e., "the whole or part of a final disposition . . . of an agency in a matter other than rule-making . . . ."<sup>8</sup> This procedure requires an adversary proceeding complete with notice of the issues, responsive pleading, hearing and decision.<sup>9</sup> The NLRB has never utilized, however, the Act's rule-making procedures, but has established rules of general applicability and future effect through the process of ad hoc adjudication.<sup>10</sup>

Until recently, courts have only criticized the Board as unwise in promulgating rules by this method, while upholding its right to do so.<sup>11</sup> In *NLRB v. Wyman-Gordon Co.*,<sup>12</sup> however, the Supreme Court

<sup>1</sup> See Peck, Critique of NLRB Performance in Policy Formulation: Adjudication and Rule-Making, 117 Pa. L. Rev. 254 (1968); Shapiro, The Choice of Rule-Making or Adjudication in the Development of Administrative Procedure, 78 Harv. L. Rev. 921 (1965). For a critical analysis of the Board's failure to utilize the rule-making procedures contained in the Administrative Procedure Act when devising general rules of future effect, see Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961). For a strong criticism, see Summers, Politics, Policy-Making, and the NLRB, 6 Syracuse L. Rev. 93, 105-07 (1955).

<sup>2</sup> National Labor Relations Act, 29 U.S.C. § 156 (1964).

<sup>3</sup> Administrative Procedure Act, 5 U.S.C.A. §§ 551-76 (1967).

<sup>4</sup> Administrative Procedure Act, 5 U.S.C.A. § 551(4) (1967).

<sup>5</sup> "unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C.A. § 553(b) (1967).

<sup>6</sup> 5 U.S.C.A. § 553(c), (d) (1967).

<sup>7</sup> 5 U.S.C.A. § 551(7) (1967).

<sup>8</sup> 5 U.S.C.A. § 551(6) (1967).

<sup>9</sup> 5 U.S.C.A. §§ 554, 556, 557 (1967).

<sup>10</sup> See, e.g., *American Potash and Chem. Corp.*, 107 N.L.R.B. 1418 (1954); *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

<sup>11</sup> *NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52 (2d Cir.), cert. denied sub nom. *Dist. Lodge No. 15, I.A.M. v. NLRB*, 389 U.S. 843 (1967); *NLRB v. Majestic*

challenged this method and held invalid the procedure utilized in *Excelsior Underwear, Inc.*,<sup>13</sup> where the Board in an adjudicative proceeding announced a rule requiring an employer, once the Board directs that a representation election be held, to provide the Regional Director of the NLRB with a list of the names and addresses of all employees eligible to vote in the election. The unions competing in the election may then obtain the list from the Regional Director. The rule was made prospective, to take effect thirty days from the date of the order, and was not applied to the parties in *Excelsior*. In *Wyman-Gordon*, the Court stated that the procedures employed in *Excelsior* were inappropriate for the establishment of a rule of general applicability and future effect, and therefore, the rule established therein was invalid. This is the first time the Court has refused to uphold a Board rule on the ground that it was formulated by the improper procedure.

It is the purpose of this comment to determine the effect of *Wyman-Gordon* on the discretion of administrative agencies to employ adjudicative as opposed to rule-making procedures. It is concluded that *Wyman-Gordon* only minimally restricted agency discretion by holding that once an agency decides to issue a rule of general applicability and future effect, it must utilize the rule-making procedures of the APA. It may not establish such rules in the course of adjudication. If the agency does not feel the need for a rule, it may proceed by ad hoc adjudication. The Court has, in effect, insisted that the NLRB keep clearly in mind the distinction between rule-making and adjudication, while in no way restricting the Board's ability to retain flexibility in policy making by the use of adjudication.

### I. *NLRB v. Wyman-Gordon Co.*

On the petition of the International Brotherhood of Boilermakers, the Regional Director of the National Labor Relations Board for the First Region issued on September 6, 1966, a "Decision and Direction of Election" ordering, pursuant to Section 9 of the National Labor Relations Act,<sup>14</sup> an election among the production and maintenance employees of the Wyman-Gordon Company at its plants in Worcester, North Grafton, and Millbury, Massachusetts. The employees were to choose whether they desired to be represented for collective bargaining purposes by the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, or by the United Steelworkers of America, AFL-CIO, or by neither. The Board ordered the Company to file with the Regional Director, within seven days of the order of the election, a list of the names and addresses of its employees eligible to vote for use by the unions. The Board based

Weaving Co., 355 F.2d 854 (2d Cir. 1966); *NLRB v. A.P.W. Prods. Co.*, 316 F.2d 899 (2d Cir. 1963).

<sup>12</sup> 394 U.S. 759 (1969).

<sup>13</sup> 156 N.L.R.B. 1236 (1966).

<sup>14</sup> 29 U.S.C. § 159(c)(1) (1964).

its order requiring this list on the rule laid down in *Excelsior*.<sup>15</sup> The Company refused to comply with the order and the representation election was held without the list being filed. Both unions were defeated in the election. The Boilermakers filed objections to the election based on the Company's failure to provide the list. The Regional Director upheld these objections, set aside the election, ordered a second balloting, and again directed the Company to comply with the requirement. When the Company again refused to provide the list, the Board issued a subpoena ordering it to file the list or produce its personnel and payroll records showing its employees' names and addresses.<sup>16</sup> The Board filed an action in the United States District Court for the District of Massachusetts seeking to have its subpoena enforced or to have a mandatory injunction issued compelling the Company to comply with its order.<sup>17</sup> The district court directed enforcement of the Board's

<sup>15</sup> 156 N.L.R.B. 1236 (1966). The *Excelsior* rule was prompted when two unions which were both defeated in a representation election contested the validity of the election on the ground, *inter alia*, that the employer's refusal to furnish a list of the names and addresses of those employees eligible to vote deprived the unions of an adequate opportunity to counter the campaign literature circulated by the employer. While the Board in *Excelsior* did certify the results of that election, it announced in its decision that in all future elections refusal to provide this list would constitute grounds for setting aside the election.

<sup>16</sup> Section 11(1) of the National Labor Relations Act (29 U.S.C. § 161(1) (1964)) states:

The Board . . . shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board . . . shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.

<sup>17</sup> Section 11(2) of the National Labor Relations Act (29 U.S.C. § 161(2) (1964)) states:

In case of contumacy or refusal to obey a subpoena issued to any person, any district court . . . upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, . . . there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . .

The Wyman-Gordon Company contended in the present case that a representation election was not an "investigation" within the meaning of the statute, and that the names and addresses subpoenaed did not constitute "evidence" since they would be used for electioneering purposes and not to prove or disprove a fact in issue. 394 U.S. at 768-69. In *Inland Empire Council v. Millis*, 325 U.S. 697 (1945), the Supreme Court stated regarding representation proceedings, "[a] direction of election is but an intermediate step in the investigation, with certification as the final and effective action." *Id.* at 707. As for the Wyman-Gordon Company's contention that the list was not "evidence" according to accepted definitions of the term, the district court answered:

Standard definitions of "evidence" . . . are not very helpful because the "something" at issue in this case is a group preference rather than a demonstrable fact. Also, the Board's function here is far different from that of the traditional, passive fact finder. The Board is conducting an active representation investigation in which the regulation of an election is an integral part. . . . [I]n the context of § 11 of the Act, "evidence" means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation. 270 F. Supp. 280, 284-85 (D. Mass. 1967).

order.<sup>18</sup> In reversing the district court, the Court of Appeals for the First Circuit held that the order to the Company to provide the names and addresses was invalid because it was based on the rule announced in *Excelsior*,<sup>19</sup> a rule which had not been formulated in accordance with the rule-making requirements of the APA.<sup>20</sup> The Supreme Court granted certiorari to resolve a conflict among the circuits on this issue.<sup>21</sup> Following the grant of certiorari several courts of appeal upheld the procedure used in *Excelsior*.<sup>22</sup>

The Supreme Court agreed with the Court of Appeals for the First Circuit that the rule announced by the Board in *Excelsior* was invalid because it was not adopted in compliance with the rule-making provisions of the APA, but held, nevertheless, that the Board's specific direction to the Wyman-Gordon Company to provide a list of names and addresses of employees eligible to vote in the representation election was valid "[b]ecause the Board in an adjudicatory proceeding directed the respondent itself to furnish the list . . . ."<sup>23</sup> The Court pointed out that the Board, in *Excelsior*, purported to establish a rule of general applicability and future effect, and that in precisely such circumstances the APA sets out specific provisions governing the making of such agency rules. The Court noted that the purpose of the rule-making provisions of the APA is "to assure fairness and mature consideration of rules of general application,"<sup>24</sup> and that these procedures "may not be avoided by the process of making rules in the course of adjudicatory proceedings."<sup>25</sup>

In support of this conclusion the Court observed that the notice of hearing required by the APA to be published in the Federal Register must be "general in character," that the terms or substance of the rule

The Supreme Court upheld the district court on this point. 394 U.S. at 768-69. See also, *NLRB v. Hanes Hosiery Div.*, 384 F.2d 188, 191-92 (4th Cir.), cert. denied, 390 U.S. 950 (1968); *British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182, 1184 (9th Cir. 1968); *NLRB v. Rohlen*, 385 F.2d 52, 55-58 (7th Cir. 1967). It is suggested here that once the district court decided that the matter under investigation was "group preference," it would have been reasonable to hold that the list was "evidence" tending to prove or disprove whether the employees desired union representation. "Evidence" could then have been used in its traditional sense.

<sup>18</sup> 270 F. Supp. 280 (D. Mass. 1967).

<sup>19</sup> 397 F.2d 394, 397 (1st Cir. 1968).

<sup>20</sup> 5 U.S.C.A. §§ 552, 553 (1967). In so holding, the court of appeals concluded that the *Excelsior* rule was a "substantive" requirement and not "procedural," and, therefore, not exempt from the APA rule-making requirements. 397 F.2d at 397-98. The APA specifically exempts "rules of agency organization, procedure, or practice," from the requirements of advance notice and public participation applicable to substantive rule-making. 5 U.S.C.A. § 553(3)(A) (1967).

<sup>21</sup> *Howell Ref. Co. v. NLRB*, 400 F.2d 213 (5th Cir. 1968); *NLRB v. Hanes Hosiery Div.*, 384 F.2d 188 (4th Cir. 1967); *NLRB v. Rohlen*, 385 F.2d 52 (7th Cir. 1967).

<sup>22</sup> *NLRB v. Q-T Shoe Mfg. Co.*, 409 F.2d 1247 (3d Cir. 1969); *NLRB v. Beech-Nut Life Savers, Inc.*, 406 F.2d 253 (2d Cir. 1968); *British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182 (9th Cir. 1968).

<sup>23</sup> 394 U.S. at 766.

<sup>24</sup> *Id.* at 764.

<sup>25</sup> *Id.*

must be stated in the notice, and that all interested parties must have an opportunity to participate in the rule-making.<sup>26</sup> The Court stated that the adjudicatory procedure used by the Board in *Excelsior* failed to meet these requirements.<sup>27</sup> Although the Court gave some weight to the fact that the rule formulated in *Excelsior* was not applied to the parties in that proceeding, it indicated that adjudicated cases wherein new policies are *applied* to the parties may serve as precedents, *i.e.*, "a guide to action that the agency may be expected to take in future cases," but "this is far from saying . . . that commands, decisions, or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public."<sup>28</sup> Thus, an order in an adjudicated case may be specifically applied only to the parties to that proceeding. Insofar as the Board is exercising its quasi-legislative power by formulating a policy of general applicability and future effect, however, even though doing so as an incident of a valid adjudication, it must follow the rule-making procedures. Thus, because the direction to Wyman-Gordon to submit a list of the names and addresses of its employees was incorporated in a specific order, the Company was required to obey it regardless of the fact that the direction was explicitly based on the *Excelsior* rule. The disclosure requirement was said to be a legitimate exercise of the Board's broad discretion to insure the fair and free choice of bargaining representatives.<sup>29</sup> The Court, therefore, supported the policy underlying the disclosure requirement, noting that the objections to it were clearly and correctly answered by the Board in its *Excelsior* decision.<sup>30</sup>

Initially, *Wyman-Gordon* seems to place severe restrictions on the discretion of the NLRB to decide whether it should promulgate rules by the rule-making procedure, or by adjudication. The failure of the Court to remand, however, even though the Board based its order on the discredited *Excelsior* rule, suggests the possibility that

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<sup>26</sup> *Id.* at 764-65. Instead of giving all interested parties the opportunity to participate in the policy making, the Board invited certain groups to submit briefs in the *Excelsior* case. Considering the value of such amicus curiae briefs as opposed to those opinions which may have been generated were the rule-making procedure followed, Peck wrote:

[I]t is doubtful that an amicus brief, the arguments of which have been oriented to the problems presented in the factual context of a particular case, could approach in value the critical analysis which might have been given to a set of rules . . . which would have been proposed by the NLRB if it had complied with the Administrative Procedure Act. . . . Moreover the experience and vantage point of private parties might have enabled them to point out defects in the detail of the proposed rules, or unforeseen or undesirable consequences likely to result from them. . . . In addition, parties filing amicus curiae briefs may well feel themselves restricted to the record compiled by others and thus refrain from introducing additional data bearing on the question.

Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, *supra* note 1, at 756-57.

<sup>27</sup> 394 U.S. at 764.

<sup>28</sup> *Id.* at 765-66.

<sup>29</sup> *Id.* at 767.

<sup>30</sup> *Id.*

the Board can enforce rules improperly promulgated in adjudicatory proceedings, and thus, as a practical matter, avoid the newly defined restrictions. The Court's apparent application of the invalid rule to the parties makes a determination of the effects of *Wyman-Gordon* on the rule-making practices of the Board particularly difficult. Actually, the decision does not restrict agency discretion by forcing an agency to employ the rule-making procedures whenever it formulates policies. It does require utilization of such procedures, however, when the policy is purportedly a rule. Furthermore, there are practical differences between precedents set in adjudicated cases and formal rules of general applicability and future effect, and such differences are likely to prompt the Board to employ rule-making procedures.<sup>31</sup>

## II. RULE-MAKING VS. ADJUDICATION

The APA does not provide agencies with specific guidelines for utilizing the rule-making and adjudicatory processes. The Supreme Court in *SEC v. Chenery Corp.*<sup>32</sup> concluded that the choice between proceeding by adjudication or by rule-making "lies primarily in the informed discretion of the administrative agency."<sup>33</sup> In that case, the Court upheld the Commission's order approving a plan for the reorganization of a holding company. As part of its order the Commission required for the first time that preferred stock, purchased by the management of the company without fraud or concealment while plans of reorganization were before the Commission, should not be eligible for conversion into stock of the reorganized company, but should be surrendered at cost plus interest. The Court rejected the contention that the Commission was precluded from announcing and retroactively applying a new principle in an adjudicatory proceeding, stating that "any rigid requirement" dictating the Board's choice of one manner of promulgation over another "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . To insist upon one form of action to the exclusion of the other is to exalt form over necessity."<sup>34</sup> With the existence of such broad administrative discretion, the NLRB has consistently utilized the adjudicative procedure, even when it was probably more appropriate to employ the rule-making procedure. In *American Potash*

<sup>31</sup> The projected effects of the name and address requirement on the solicitation and distribution of campaign material during an NLRB election campaign are beyond the scope of this comment. For a discussion of this topic generally, see 45 North Carolina L. Rev. 785 (1967); 19 Vand. L. Rev. 1395 (1966); 80 Harv. L. Rev. 459 (1966); for background on NLRB election campaigns generally, see Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964); Drotning, *Employer Free Speech: Two Basic Questions Considered by the NLRB and Courts*, 16 Lab. L.J. 131 (1965); Gould, *Union Activity on Company Property*, 18 Vand. L. Rev. 73 (1964).

<sup>32</sup> 332 U.S. 194 (1947).

<sup>33</sup> Id. at 203. See also, *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 371 (1965); *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 421 (1942).

<sup>34</sup> 332 U.S. at 202.

and *Chem. Corp.*,<sup>35</sup> for example, the Board admitted adopting, in a clearly adjudicatory proceeding, a "new rule" regarding future cases of craft severance. Similarly, in *Peerless Plywood Co.*,<sup>36</sup> the Board stated: "[a]ccordingly, we now establish an election rule which will be applied in all election cases. . . . Violation of this rule will cause the election to be set aside whenever valid objections are filed."<sup>37</sup>

In the light of *Chenery*, the courts have criticized the Board as unwise because of its repeated failure to promulgate rules of general applicability and future effect in accordance with the rule-making provisions of the APA, but generally have upheld its *right* to establish such rules in adjudicatory proceedings. For example, in *NLRB v. A.P.W. Prods. Co.*,<sup>38</sup> although the Court of Appeals for the Second Circuit criticized the Board for failing to use rule-making procedures, it sustained the Board's action in announcing, in an adjudicatory proceeding, a reversal of its prior practice of tolling back pay for the period between the trial examiner's dismissal of an unfair labor practice charge and the Board's decision to the contrary. The court stated:

[M]uch can be said . . . in favor of an agency's invoking the rule-making procedure when it wants to make rules. . . . But our question is not of wisdom but of authority. Congress can not have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to "rules" which may apply for the past, for the future, or more generally, for both. . . . The short of it would seem to be that when an administrative agency makes law as a legislature would, it must follow the rule-making procedure . . . and when it makes law as a court would, it must follow the adjudicative procedure . . . ; whether to use one method of law-making or the other is a question of judgment, not of power.<sup>39</sup>

Similarly, in *NLRB v. Penn Cork & Closures, Inc.*,<sup>40</sup> the court, although disturbed by the Board's continued failure to make use of APA's rule-making procedures, and stating that it would have been more administratively proper to conduct a rule-making proceeding, concluded that, on the facts of the case, they could not hold that the choice to proceed by adjudication was beyond the Board's power.<sup>41</sup>

It is not surprising, then, that courts faced with the enforcement of the *Excelsior* rule generally approved it. In *NLRB v. Beech-Nut*

<sup>35</sup> 107 N.L.R.B. 1418, 1422-23 (1954).

<sup>36</sup> 107 N.L.R.B. 427 (1953).

<sup>37</sup> *Id.* at 429.

<sup>38</sup> 316 F.2d 899 (2d Cir. 1963).

<sup>39</sup> *Id.* at 905.

<sup>40</sup> 376 F.2d 52 (2d Cir. 1967).

<sup>41</sup> *Id.* at 57. See also *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

*Life Savers, Inc.*,<sup>42</sup> the Court of Appeals for the Second Circuit, in holding that the *Excelsior* rule was properly formulated in a valid adjudicative proceeding, stated that it was within the discretion of the Board to decide how to deal with the problems encountered in the administration of federal labor laws. The court reasoned that, while the Board might issue general rules in quasi-legislative proceedings, if the same issue arises before the Board in an adjudicative proceeding, the Board can resolve it by decision in the case, and this decision might then give rise to a rule to be applied in the future.<sup>43</sup> The *Beech-Nut* court also rejected the contention that the *Excelsior* rule, because it was not applied to the parties in the latter case, was not formulated in a valid adjudicative proceeding, stating that the rule was substantially related to the facts, issues, and arguments of the *Excelsior* case, and that it was not a fatal defect that the rule extended beyond those facts.<sup>44</sup>

The Supreme Court in *Wyman-Gordon*, however, places a more stringent limitation on the Board's discretion. The prevailing opinion stated that the only question to be considered was whether "the Board purported to make a rule: *i.e.*, to exercise its quasi-legislative power,"<sup>45</sup> and that the issue of the validity of the proceeding was not relevant. Insofar as the Board purports to make a rule, whether or not it applies the rule to the parties, it must use rule-making procedures. The Court based its decision on the distinction between rule-making and adjudication appearing in the APA. The Court also distinguished rule-making in the sense used in the APA from what is often called a "rule," *i.e.*, a precedent. The Court recognized the legitimate use of decided cases, wherein new policies are *applied* and announced, as precedents which serve as "a guide to action that the agency may be expected to take in future cases."<sup>46</sup> Thus, under no circumstances may a rule of general applicability and future effect be established in an adjudication even if the requirements for a valid adjudication have been met. Furthermore, the Court implies that new policies may not be established as precedents unless they are applied to the parties to the proceeding.

The *Chenery* principle that the choice of proceeding by adjudication or by rule-making "lies primarily in the informed discretion of the administrative agency"<sup>47</sup> remains unchanged, although it is clarified by *Wyman-Gordon*. The courts have generally interpreted *Chenery* as holding that an agency may choose to make a rule by either the rule-making procedure or the adjudicatory procedure. *Wyman-Gordon* states that the agency's choice is whether to make a rule by the rule-making procedure or to adjudicate the issues between the parties. If adjudication is selected, the decision may serve only as precedent and may not

<sup>42</sup> 406 F.2d 253 (2d Cir. 1968), cert. denied, 394 U.S. 1012 (1969).

<sup>43</sup> Id. at 257-58.

<sup>44</sup> Id. at 258.

<sup>45</sup> 394 U.S. at 765.

<sup>46</sup> Id. at 765-66.

<sup>47</sup> 332 U.S. at 203.

be viewed as a rule of general applicability and future effect. Thus, in cases such as *American Potash*,<sup>48</sup> *Peerless Plywood*<sup>49</sup> and *Excelsior* where the Board clearly purported to make such rules, *Wyman-Gordon* now requires the Board to follow the rule-making procedures. Conversely, the type of "rules" which the courts upheld in *A.P.W. Products*<sup>50</sup> and *Penn Cork*<sup>51</sup> is limited to the function of precedent in subsequent adjudications, not binding on others except insofar as made part of specific orders to particular parties.

*Wyman-Gordon* clearly respects the distinctions appearing in the APA between rule-making and adjudicatory procedures. The Act on the one hand establishes a procedure for making rules of general applicability and future effect. Then it specifically establishes an adjudicatory procedure to be used in matters other than rule-making. The two procedures are clearly distinct and mutually exclusive. The Court noted that the basic purpose for the distinction is to allow all parties who might be affected by a new policy an opportunity to present their views on it before it is adopted. However, since the *Excelsior* rule, invalidated in *Wyman-Gordon*, was clearly of general applicability and future effect, and yet only the parties to the proceeding and invited amici curiae had the opportunity to be heard, the Court concluded that the Board has ignored this distinction. The fact that the rule was only applied prospectively made its legislative character particularly apparent.

The decision also emphasizes the substantial differences between judicial and administrative proceedings. The Court noted that the effect of stare decisis is more limited in agency proceedings.<sup>52</sup> Precedents arising from agency adjudicatory proceedings are not "rules of law" in the same sense as court decisions are. Administrative decisions are guidelines which are far less binding and more easily overruled. The *Beech-Nut* court's conclusion that the Board can issue general rules in both quasi-legislative proceedings and adjudicative proceedings fails to recognize this distinction.

In effect, the rule-making provisions of the APA enable agencies to exercise quasi-legislative powers similar to those exercised by the courts in precedent-setting decisions. As the Supreme Court noted in *Chenery*, there is less reason for an agency to issue general rules in an adjudicatory proceeding than there is for courts in view of the availability to the agencies of this rule-making procedure.<sup>53</sup> Furthermore, while the Court suggests that the APA precludes an agency from establishing precedents through decisions applied only prospectively, nothing inherent in the adjudicatory process prevents precedents from being established in such a manner. Courts have long been upheld in

<sup>48</sup> 107 N.L.R.B. 1418 (1954).

<sup>49</sup> 107 N.L.R.B. 427 (1953).

<sup>50</sup> 316 F.2d 899 (2d Cir. 1963).

<sup>51</sup> 376 F.2d 52 (2d Cir. 1967).

<sup>52</sup> 394 U.S. at 766.

<sup>53</sup> 332 U.S. at 202.

applying rulings prospectively.<sup>54</sup> But the APA defines administrative adjudication as "agency process for the formulation of an order."<sup>55</sup> This can be interpreted as a statutory limitation on agencies, an adjudication being valid only insofar as it results in the issuance of an order to the parties involved. Henceforth, an agency in the course of adjudication may decide that a new policy it considers desirable may not be equitably applied to the parties before it, but if it wishes to make that policy a rule with future effect it will be necessary to institute rule-making procedures.

The effect of *Wyman-Gordon* is ambiguous because the Court enforced the Board's order against Wyman-Gordon while holding that the rule upon which the order was based was invalid. Both the concurring and dissenting opinions criticize the prevailing opinion for being inconsistent and in effect negating the rule-making requirements of the APA. Justice Black suggests that the Court is, in fact, enforcing the disclosure requirement "adjudicated" in *Excelsior* without regard to whether it was adopted as an incident to the decision of the case, and enforcing the *Excelsior* rule regardless of whether it had been adopted according to rule-making requirements.<sup>56</sup> An examination of the opinion indicates, however, that the Court did not enforce the disclosure requirement as "adjudicated" in *Excelsior*. Rather, having invalidated the *Excelsior* rule, the Court then had to decide whether to enforce the specific order issued to the Wyman-Gordon Company. Thus, it had to consider, not whether *Excelsior* had been a valid adjudication, and not whether the requirements for rule-making had been followed, but whether the requirements for issuing an order in an adjudicatory proceeding had been met in *Wyman-Gordon*.

Justice Harlan contended that because the order was based on the invalid *Excelsior* rule, the first *Chenery*<sup>57</sup> decision required a remand.<sup>58</sup> There the Court refused to enforce the same order of the Commission that it later upheld. It did so because the grounds upon which the order was based were invalid. The Court held that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its

<sup>54</sup> In *Waring v. Colpoys*, 122 F.2d 642 (D.C. Cir. 1941), for example, the court stated:

Traditionally, he who questioned the law or the best evidence of it is given the benefit of the new law or the better evidence of it. This is not always the case. There has arisen, for example, when contract rights or property rights growing out of contracts are involved, the exception that the one who argued against the established law is not given the benefit of the change he helped bring about inasmuch as his adversary relied upon the previous law. Such decisions apply the old law to the case at hand while establishing new law for the future. The Supreme Court has found no constitutional limitation on state courts proceeding in this manner. Federal courts have proceeded similarly.

Id. at 645.

<sup>55</sup> Administrative Procedure Act, 5 U.S.C.A. § 551(7) (1967).

<sup>56</sup> 394 U.S. at 770.

<sup>57</sup> 318 U.S. 80 (1943).

<sup>58</sup> 394 U.S. at 782.

action can be sustained."<sup>59</sup> But in *Chenery* the Commission had not, prior to the decision, considered any other basis upon which the order could be upheld. The Court refused to search for such a basis, concluding that this was the proper function of the Commission.<sup>60</sup> The Supreme Court has since affirmed that *Chenery* requires only that a reviewing court not sustain an agency's action on the basis of a principle which the agency itself might not entertain, the aim being "not to require the tedious process of administrative adjudication and judicial review to be needlessly dragged out while the court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings."<sup>61</sup> It has also been held, in *Phillips v. SEC*,<sup>62</sup> that *Chenery* does not compel a remand when the agency's counsel urges upon the court an interpretation of the law which the agency would provide as the basis for its decision, stating that to remand under such circumstances would be "an exercise in futility."<sup>63</sup> Thus, where the court knows with reasonable certainty what grounds the agency will supply for its action upon remand, it would serve no practical purpose to remand. The court, however, will not assume such valid grounds. In *Wyman-Gordon* the Court upheld the substantive validity of the disclosure requirement for reasons stated by the Board in its *Excelsior* decision. It is reasonable to assume that these same bases would be cited by the Board on remand.

The Court's refusal to remand, therefore, is not inconsistent with its interpretation of the APA. The Act allows the Board to make rules by the rule-making procedures and to issue orders in adjudicatory proceedings. Here the Court simply upheld an order issued in an adjudicatory proceeding.

### III. AGENCY RULE-MAKING AFTER *Wyman-Gordon*

*Wyman-Gordon* should not be interpreted as forcing agencies to select either rule-making or adjudication in any given case. The Court in no way interfered with an agency's discretion to choose between the two processes. Nor did it specify circumstances under which an agency must choose one or the other. Rather, it clarified what Justice Black called "the plurality's conception of proper administrative practice."<sup>64</sup>

This is probably no more than the Court could do under the provisions of the APA since the Act leaves the discretion entirely with the agencies. Moreover, in *Chenery* the Court recognized the wisdom of leaving the agencies in the position of being able to judge on the circumstances of each case the proper procedure to use.

<sup>59</sup> 318 U.S. at 95.

<sup>60</sup> *Id.* at 94-95.

<sup>61</sup> *Erie-Lackawanna R.R. v. United States*, 279 F. Supp. 316, 354-55 (S.D.N.Y.), *aff'd sub nom. Penn-Central Merger Cases*, 389 U.S. 486 (1968).

<sup>62</sup> 388 F.2d 964 (2d Cir. 1968).

<sup>63</sup> *Id.* at 971.

<sup>64</sup> 394 U.S. at 770.

[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.<sup>65</sup>

Nevertheless, in terms of administrative practice, the Court has provided the agencies with additional incentive to utilize the APA's long neglected rule-making procedures.

There appears to be a clear administrative preference for adjudication. One writer notes three reasons for this: (1) "rules" decided in adjudicatory proceedings are better able to withstand judicial scrutiny; (2) such decisions can be overruled by the agency itself more easily than the agency can repeal a regulation; (3) they can be made retroactive in operation.<sup>66</sup> Adjudication, that is, offers more administrative flexibility than rule-making. However, the Court in *Wyman-Gordon* has emphasized the often equally important advantages of the rule-making process, indicating that agencies should balance these considerations in deciding between rule-making and adjudication.

Engaging in such a balancing process will probably result in more frequent use of the rule-making procedures by the NLRB. The Board will have to decide in each case whether to establish a rule of general applicability and future effect, in which case rule-making would be employed, or whether to issue an order binding only on the parties and having the effect of precedent in future cases, in which case the adjudicatory process would be used. As the Court noted, a so-called "rule" established in an adjudicatory proceeding will have no binding effect on others without a specific direction to the parties in each case.<sup>67</sup> The Board announced in *Excelsior*, for example, that in the future an employer's refusal to furnish the name and address list would be grounds for setting aside an election.<sup>68</sup> If there had not been a specific direction to the Wyman-Gordon Company in the present case, however, the Board would not now be able to invalidate the election despite the Company's refusal to provide the list. Similarly, the *Peerless Plywood* rule that employers and unions are prohibited from making election speeches on

<sup>65</sup> 332 U.S. at 202-03.

<sup>66</sup> Shapiro, *supra* note 1, at 942-47. See also 1 Davis, *Administrative Law*, § 105, 37-44 (1958). Contrary to the contention that rules announced in adjudications can better withstand judicial scrutiny is the case of *NLRB v. E & B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960).

<sup>67</sup> 394 U.S. at 766.

<sup>68</sup> 156 N.L.R.B. at 1236, 1239-40.

company time to massed assemblies of employees within 24 hours of an election<sup>69</sup> should not be binding and should not be grounds for setting aside an election unless the parties are specifically directed by the Board to refrain from such activity. Thus, in the absence of formal rules the Board will have to include in each order it issues to particular parties specific directions as to each requirement it wishes to impose on the parties. With the number of requirements in each election, this is likely to prove to be cumbersome. In the interest of simplifying its procedures the Board may find it desirable to formalize its well-established policies by rule-making.

#### CONCLUSION

The rule-making provisions in the Administrative Procedure Act are intended to allow all parties likely to be affected by policies established by administrative agencies an opportunity to express their views to the agency on proposed rules. Should the National Labor Relations Board continue to avoid rule-making procedures entirely, it will further limit the participation of interested parties in the formulation of general labor policy. Recognizing that agency flexibility is often desirable, the Court in *Wyman-Gordon* was wise in not restricting agency discretion to decide whether to establish a rule or issue an order. Only after the Board decides that a rule of general applicability and future effect is necessary must the rule-making procedures be employed. Nevertheless, the Board should begin to utilize the rule-making provisions of the Administrative Procedure Act to give the interested public notice of proposed policy changes and to afford them the opportunity to be heard on the proposals. The *Wyman-Gordon* decision may provide some impetus for it to do so.

EDWARD R. LEAHY

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<sup>69</sup> See p. 70 supra.