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DECLARATORY ORDERS AND THE NATIONAL LABOR RELATIONS BOARD

Robert John Hickey*

I. The Nature of a Declaratory Order

Section 5(d) of the Administrative Procedure Act provides: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."¹

In order to establish a point of departure, the declaratory order must be defined. Basically, it is a procedure whereby an administrative agency in its sound discretion makes a noncoercive, definite, binding, and reviewable adjudication declaring actual, present, substantive rights of adverse parties on a question of law. The adjudication determines the question of law in advance of affirmative action by the parties that would normally entail legal sanctions.² This administrative action, while it does not affirmatively order a party to take specific action, is an effective remedy for many disputes since it relieves a party of the risk of transgressing the law in order to determine his rights.

The purpose of this article is to demonstrate the potential and unique suitability of the declaratory order for achieving stability in labor-management relations. Specifically, the declaratory order should be a very useful tool of the National Labor Relations Board in determining jurisdictional, representation, and unfair labor practice issues.

As the administrative process with its pervasive power has attempted to regulate the dynamic and complex area of labor relations, a staggering volume of litigation and accompanying administrative decisions has been generated. Synergistically, the morass of opinions, administrative decisions, and regulations itself begets areas of uncertainty, producing more litigation and more administrative decisions. Unfortunately, the end of this cycle is nowhere in sight. While the administrative process may be uncontrollable, the uncertainty created by it is not. In dealing with administrative arms of the government, every citizen should be able to know, by the most expeditious and most economical method, what is expected of him. It is the duty of the ad-

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1 Administrative Procedure Act § 5(d), 5 U.S.C. § 554(e) (Supp. III, 1968). Every tribunal having the power to adjudicate necessarily has the power to render a binding declaratory order, for declaratory orders are merely a form of adjudication. Therefore, any agency with adjudicative powers should be able to grant declaratory relief, whether or not the statute expressly authorizes it. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4:10, at 268 (1958).

2 See generally W. ANDERSON, *DECLARATORY JUDGMENTS* (1941); E. BORCHARD, *DECLARATORY JUDGMENTS* (1941); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4:10 (1958); Borre, *The Advantages of the Declaratory Judgment in Administrative Law*, 18 *MODERN L. REV.* 138 (1955); Goldner, *Declaratory Actions*, 2 *CATHOLIC U. L. REV.* 1 (1951); Russel & Prather, *Declaratory Judgment Before Administrative Procedure*, (pt. 1), 43 *ILL. B.J.* 936 (1955), (pt. 2), 44 *ILL. B.J.* 58 (1955); Vogeler, *Declaratory Rulings in Administrative Agencies*, 31 *Ky. L.J.* 20 (1942); Note, *Administrative Declaratory Orders*, 13 *STAN. L. REV.* 307 (1961); Note, *Basic Misconceptions of the Declaratory Judgment Law*, 12 *Wyo. L.J.* 66 (1957).

ministrative agency to interpret the law and regulations it administers so that each citizen can carry on his activities without fear of future reprisal.

The National Labor Relations Board, as an important medium for the smooth functioning of government in the sphere of labor relations, must afford employers, unions, and employees assistance in determining in advance whether a proposed course of conduct will, if pursued, violate the law. This goal may be accomplished by many means, including well-reasoned and well-written decisions, decisions with prospective sanctions, and rulemaking. More liberal use of the declaratory order would be especially helpful in achieving this goal.

The distinctive advantage of a declaratory order is that irreparable injury need not be incurred before doubts about the effects of projected activity may be removed. By enabling the legal question to be raised and decided at the inception of the controversy, rather than in proceedings to redress a violation committed, the declaratory order brings important legal issues (which might not otherwise be litigated) to the attention of the administrative agency and also permits legal controversies to be settled without destroying the status quo. This process meets the growing need of the industrial world for a means of settling controversies promptly without a disruption of the economy. The demands of commerce require a stability in the industrial equilibrium that can be maintained only by adjudicating disputes before they ripen into violence or full-grown battles with their accumulation of bitterness and impaired relations. Such stability is essential to facilitate long-range economic planning. For such planning to be effective, all participants must be able to ascertain the legal effects of their future activities; the declaratory order will often be the surest and most economical method of obtaining the requisite assurance.

The declaratory order further serves to narrow the issues of a controversy by removing the side issues that often infect labor-management disputes. By so narrowing the issues before the law is transgressed, the parties can focus on the point in dispute and perhaps settle it. Thus, preventive law is encouraged.

Unfortunately, under what appears to be the Board's present approach to the declaratory process, a party is often faced with the dilemma of assuming the risk of acting upon his view of an uncertain area of the law or not acting at all. A dynamic application of the declaratory order, where a justiciable controversy exists, would often resolve this dilemma.

For a declaratory order to issue under section 5(d) of the Administrative Procedure Act [APA], the matter in controversy must be authorized by statute to be determined on the record by an agency, which, after an opportunity for hearing, will issue an order.³ Any true adjudication is a process of formulating,

3 Administrative Procedure Act § 5, 5 U.S.C. § 554 (Supp. III, 1968), provides in part:

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
- (2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;
- (3) proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent for a court; or

after an opportunity for hearing, an order that is a final, binding, authoritative disposition precisely defining the jural relationship of the parties to the controversy. An adjudication need not purport to lay down any general rule beyond the normal incidents of *res judicata* and *stare decisis* that the decision will have. All of these characteristics are found in a declaratory order.⁴ The order is binding, and thus reviewable in a court of law,⁵ differing from other judgments only in that it lacks a coercive element. Rather than imposing penalties or commanding the parties to do or abstain the declaratory order declares rights. It cannot be enforced against anyone unless the issuing agency believes that a party has acted contrary to the law as it has been declared in the order. Only then, in separate proceedings, can the agency enforce its declaration. It is, therefore, apparent that the declaration itself constitutes the order.⁶

Since the declaratory order is by nature remedial and procedural, it can neither create any substantive right or duty nor can it augment or diminish the agency's jurisdiction. As a remedial device, it merely authorizes a new form of relief, not a new form of action. As a procedural device that partakes of properties both legal and equitable, the declaratory order affords the agency a flexible and straightforward method of determining the rights of parties.

A. Justiciable Controversy

To maintain an action for declaratory relief, all the usual procedural and substantive requirements of the ordinary action must be exhibited except, of course, that a completed violation need not be shown. Unless these requirements are met, the moving party is not seeking a decision that will fix his legal rights, and declaratory relief should not be granted. Therefore, to obtain a declaratory order it is necessary to show the existence of a justiciable controversy.⁷

In order to constitute a justiciable controversy, there must be sufficient legal interest in a party capable of being substantially affected. "Sufficient in-

(6) the certification of worker representatives.

(e) The agency . . . may issue a declaratory order . . .

4 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4:10, at 270-71 (1958).

5 *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 160 (1957). See K. DAVIS, *supra* note 4, at 271.

6 The term *declaratory order* appears to be a misnomer, since no formal order need be given.

7 The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2 (1964), does not modify the requirements for invoking federal jurisdiction. The Supreme Court initially made this clear in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937), when it stated:

The Declaratory Judgment Act of 1934, in its limitation to "cases of actual controversy," manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. . . . Thus the operation of the Declaratory Judgment Act is procedural only.

It should be noted however, that the constitutional limitation to "case and controversy" applicable to the federal courts is not strictly imposed upon an administrative agency. Section 5(d) of the APA expressly authorizes agencies to grant declaratory relief not only to terminate a controversy but also to "remove uncertainty." Administrative Procedure Act § 5(d), 5 U.S.C. § 554(e) (Supp. III, 1968). As a matter of statutory interpretation, the only possible meaning that can be given to the words "remove uncertainty" is that Congress intended to expand the availability of declaratory relief beyond its application to orthodox controversies. How far an agency should go in lessening the justiciability requirement should be determined on a case by case basis.

terest," however, has proved difficult to define. Generally the movant for declaratory relief must show that he has some legally protected interest that has been placed in jeopardy or uncertainty by an adverse claim.⁸ Whether a party will be substantially affected by the act of another will depend on both the nature of the act and the manner in which it will affect the party; both factors must be reflected in the pleadings and the evidence. In order to insure that a substantial interest will be reflected in the case file, it is necessary that the parties be adverse, though not necessarily hostile.⁹ This requirement insures that all relevant facts, issues, and arguments will be refined to the same extent that is required to assure competent advocacy in an ordinary case. There should be no doubt that one party's acts are sufficiently definite to constitute a threat to the other party. A mere difference of opinion as to a point of law is not sufficient to justify agency action, since administrative bodies are not created for the purpose of resolving hypothetical or academic disputes. Only when the facts underlying a dispute show a real threat to a party's interest can an agency be satisfied that the antagonistic claims presented by the parties indicate imminent and inevitable litigation.

Judicial machinery must be conserved for problems that have sufficiently matured to be ripe for final determination.¹⁰ If a controversy is not ripe, the parties cannot adequately present the issues involved with the factual fullness necessary for an intelligent decision. The problem of ripeness is particularly troublesome in the area of declaratory relief since the declaratory mechanism permits an action before the controversy would have been ripe for adjudication under the normal postviolation test. As a general rule, an issue is ripe for declaratory relief when the adverse interests of the parties have crystalized so as to be clearly reflected in existing facts; when the threat of interference with a protected right is present, immediate, and substantial; and when it is relatively certain that action and litigation would ensue if the declaratory order were refused.¹¹

B. Judicial Review

Under section 10(c) of the APA, a declaratory order issued by an administrative agency is subject to judicial review in the same manner as any other adjudication.¹² As stated by the Supreme Court in *Pennsylvania R.R. v. United*

8 *Ohio Gas. Ins. Co. v. Marr*, 98 F.2d 973, 975 (10th Cir.), *cert. denied*, 305 U.S. 652 (1938).

9 *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 242 (1952).

10 *Barker Painting Co. v. Painters Local 734*, 281 U.S. 462, 463-64 (1930). Thus the dilemma that is prejudicing a party's position must be present, not remote or speculative. *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 242 (1952). In this regard, the Board should not declare either contingent rights until they have become fixed under an existing state of facts or future rights in anticipation of contingent events that may not occur. The Board will, however, declare a present right where the infringement of such right may not arise until a future time. *Klinker v. Klinker*, —, Cal. App. 2d —, 283 P.2d 83, 87 (Dist. Ct. App. 1955). This is grounded on the theory that an interest is present when it is being threatened by a future event certain to occur were it not for the Board's declaration.

11 *Klinker v. Klinker*, —, Cal. App. 2d —, —, 283 P.2d 83, 87 (Dist. Ct. App. 1955). It must be noted that under section 5(d) the Board grants declaratory relief in its "sound discretion." In determining whether to utilize this device, the Board must consider such factors as time, personnel and budget.

12 Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (Supp. III, 1968).

States, "an order that determines a 'right and obligation' so that 'legal consequences' will flow from it is reviewable."¹³

While a declaration granted by an agency is reviewable, it is uncertain to what extent, if any, a refusal to grant a declaration is reviewable. Since, under section 5(d), the agency may grant relief "in its sound discretion," the issue is whether this discretion is absolute. The addition of the word *sound* before *discretion* indicates that Congress intended that this discretion be reviewable if the agency arbitrarily withholds relief. Still, *United Gas Pipe Line Co. v. Federal Power Commission*,¹⁴ the only case considering this question, held that this discretion is unreviewable. The court indicated that since plaintiff was not required to do or refrain from doing anything he was not aggrieved by the commission.¹⁵ This type of reasoning once supported the discredited "negative order" doctrine abolished in *Rochester Telephone Corp. v. United States*.¹⁶ In that case the Court noted that distinctions between action and nonaction did not meet the real considerations involved in these problems.¹⁷ In this light, the decision in *United Gas Pipe Line Co.* is very questionable.

C. Res Judicata

If declaratory orders are to fulfill their function of affording the parties dependable guidance for the conduct of their affairs, a party must be able to rely on an order's finality. This is accomplished by the doctrine of res judicata,¹⁸ insofar as it is applicable to administrative adjudications. Res judicata enables a party to rely on an order's finality, thus affording dependable guidance for future decisions. The doctrine, however, has no blanket application to administrative determinations since the party's interest in a final settlement does not always outweigh the public's interest in the flexibility of administrative agencies.¹⁹ Where an agency changes its policy following the issuance of a declaratory order, the protection afforded by the order should extend to action taken in reliance on the order but preceding the promulgation of the policy change. While an agency

¹³ 363 U.S. 202, 205 (1960).

¹⁴ 203 F.2d 78, 79 (5th Cir. 1953). The right to review an agency's dismissal of a petition for a declaratory order is further indicated by the legislative history of the APA. The Senate Judiciary Committee suggested the need for review stating:

Private parties object to leaving the issuance of declaratory orders to agency discretion. However, the phrase "sound discretion" means a reviewable discretion and will prevent agencies from either giving improvident declaratory orders or arbitrarily withholding such orders in proper cases. ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S.Doc. No. 248, 79th Cong., 2d Sess. 25 (1946).

¹⁵ *United Gas Pipe Line Co. v. Federal Power Comm'n*, 203 F.2d 78, 79 (5th Cir. 1953).

¹⁶ 307 U.S. 125 (1939).

¹⁷ *Id.* at 141.

¹⁸ Res judicata prevents a second litigation of the same issues between the same parties. The rationale for the doctrine lies in preventing harassment by an opposing party who has had his day in court.

¹⁹ That the res judicata doctrine has some application to administrative rulings has been made clear by the Supreme Court in *United States v. Utah Constr. Co.*, 348 U.S. 394, 422-23 (1966):

Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it . . . the courts have not hesitated . . . to enforce repose.

may change its policy to the detriment of the decision holder (in that he may no longer rely on the old order to justify his future actions), judicial sanction of this practice will usually depend on the form, purpose, and effects of the change.²⁰

The finality of the declaratory order is the quality that most recommends it over the use of advisory opinions in the field of labor relations. As distinguished from a declaratory order, an advisory opinion is not binding²¹ and thus not judicially reviewable. From the parties' viewpoint, the most serious shortcoming of an advisory opinion is the absence of *res judicata* effect. Thus, while an advisory opinion eliminates some uncertainty, it does not provide the predictability afforded by the declaratory order.²² The party accepting the advice still faces the possibility that the agency, after a change in policy or administration, will analyze the same problem in an altogether different light and dismiss, modify or ignore its prior ruling.²³ Hence the individual with only an advisory opinion in hand is faced with a serious dilemma. On the one hand, he may act upon the agency's advice; but if the agency's policy should change, he will not be able to claim reliance on the opinion in the courts. On the other hand, he may disregard the advisory opinion; but any large investment he might make in reliance on his own interpretation of the law will be at risk, and he may ultimately incur legal sanctions for his action.

On the other hand, advisory opinions are not totally unreliable. In the usual case the agency feels some obligation to consistency, considers itself informally bound by its former opinions, and will not often revise its original rulings or alter its standards to the detriment of an opinion holder. For this reason, an agency will carefully consider all questions before rendering an advisory opinion. Moreover, the courts appear to be broadening the area in which an

20 *Res judicata* tends to be applied more often in cases involving heavy liabilities than in those instances where only a cease and desist order is sought. Compare *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335 (1945) with *FTC v. Raladam Co.*, 316 U.S. 149 (1942).

The doctrine of *res judicata* is also affected by the ability of a tribunal to reopen, rehear, or reconsider a case. The problem here is that a continuation of jurisdiction through the use of such powers might in fact amount to commencement of a new proceeding. In this regard, Mr. Justice Roberts laid down the following rules to govern the Board in *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 341 (1945):

Until the transcript . . . is filed in court, the Board may, after reasonable notice, modify any finding or order in whole or in part. After the case has come under the jurisdiction of the court, either party may apply . . . for remand to the Board. There is no dearth of discretion . . . for its exercise, but opportunities should not be unlimited. If the petitioners are right, it must follow that in any case in which the court refuses to remand, the Board need merely wait until the "final" decree is entered and then proceed to resume jurisdiction, ignore the court's decree, and come again to it, asking its imprimatur on a new order.

21 In *City Line Open Hearth, Inc.*, 141 NLRB 799, 801 (1963), the relative impotence of the advisory opinion as compared to the declaratory order was pointed out:

Nor does the issuance of the Advisory Opinion herein constitute a declaratory order within the meaning of Section 5(d) of the Administrative Procedure Act. Section 5(d) envisages final adjudications binding upon the parties. On the other hand, the Board's Advisory Opinions do not contemplate such binding adjudications, but are merely advisory in nature . . .

22 See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1096 (1960), which criticizes Board advisory opinions rendered pursuant to that act.

23 In *Couzens v. Commissioner*, 11 B.T.A. 1040, 1173 (1928), the Commissioner of Internal Revenue changed a stock valuation made by his predecessor and assessed an additional \$9,500,000 tax. See also *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

agency may be estopped.²⁴ In view of this trend, the line of distinction between declaratory orders and advisory opinions is becoming more difficult to locate. As the line disappears, the distinction necessarily becomes one of degree. Nevertheless, since the legal distinction remains even as the practical becomes blurred, it is important to the party that the ruling be declaratory.

II. The Use of Declaratory Orders in NLRB Proceedings

A. Jurisdiction

The National Labor Relations Board has expressly provided for declaratory orders in the determination of jurisdictional questions. Section 102.105 of the Board's rules and regulations states:

Whenever both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a regional office of the Board, and the general counsel entertains doubt whether the Board would assert jurisdiction over the employer involved, he may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the cases. Such petition may be withdrawn at any time prior to the issuance of the Board's order.²⁵

Section 102.110 provides in part:

The Board shall thereupon proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that it would or would not assert jurisdiction over them. Such determination shall be made by a declaratory order, with like effect as in the case of other orders of the Board and shall be served on the parties.²⁶

In *Stor-Ad Printers, Inc.*,²⁷ where the first declaratory order was issued under these rules, the General Counsel filed a petition requesting a declaration whether the Board would assert jurisdiction over an employer engaged in the intrastate printing and distribution of mail advertising circulars. Upon determining that the employer's operation was not such that jurisdiction would attach, the Board

24 In *Planet Constr. Corp. v. Board of Educ.*, 7 N.Y.2d 381, 385, 165 N.E.2d 758, 760-61, 198 N.Y.S.2d 68, 72 (1960), the court unequivocally announced that "[e]stoppel may apply to a municipality as well as to an individual." In *Gruber v. Mayor & Township Comm.*, 39 N.J. 1, 13, 161 A.2d 489, 495 (1962), the court referred favorably to legal writings and judicial decisions which indicate the strong recent trend towards the application of equitable principles of estoppel against public bodies where the interests of justice, morality and common fairness dictate that course.

For an extensive discussion of the potential of the doctrine of estoppel in administrative law, see Newman, *Should Official Advice Be Reliable? Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953).

25 29 C.F.R. § 102.105 (1969).

26 29 C.F.R. § 102.110 (1969). The binding nature of such an order is clearly set out in section 101.43 of the Statements of Procedure: "The declaratory Board order will be binding on the parties . . ." 29 C.F.R. § 101.43(f) (1969).

27 131 NLRB 556 (1961). For the effect of res judicata on Board jurisdictional decisions, see *Jefferson Lincoln-Mercury, Inc.*, 90 NLRB 1911, 1916 (1950), where the Board held that the employer was engaged in commerce since the jurisdictional issue had been resolved in a prior proceeding, and the employer presented no new evidence in the subsequent proceeding.

declared that it would not assert jurisdiction over the employer's operation.²⁸

Notwithstanding the declaratory order's potential role in determining jurisdictional questions, the Board has self-imposed restrictions upon its use. In two recent declaratory order cases,²⁹ where the question concerned the Board's jurisdiction over foreign-flag ships, the Board refused to grant the requested declarations. Since foreign-flag vessels are clearly within commerce, and since the volume of their operations normally meets the Board's discretionary standards, they would appear to come within the Board's jurisdiction. But, since a decision in this matter would have affected our national foreign policy, and since the Supreme Court had not addressed the question,³⁰ the Board proceeded cautiously. The Board ultimately dismissed the petitions for declaratory orders with the following statement:

The Board has duly considered the matter. It has decided that its declaratory order rules, like those for advisory opinions, are designed primarily to determine questions of jurisdiction by the application of the Board's discretionary standards to the "commerce operations" of an employer. However, there are situations where, because of the complex nature of the operation involved, or because of the inadequacy of the record, the procedures contemplated by the Board's rules for declaratory orders and advisory opinions are difficult or impossible to apply. . . . Where, as here, there apparently are complicated factual and legal issues, it is desirable first to secure a complete record, based upon a full hearing. At that hearing all interested parties would have the opportunity to introduce evidence, to examine and cross-examine witnesses, to file briefs, to argue orally, and to participate to the extent necessary to present their positions. The Board is of the view that in this particular case these procedures are necessary to enable it to make an informed judgment on the jurisdictional issue which has been raised.³¹

Significantly, the Board did not continue the application for the declaratory order pending the outcome of a hearing. There is nothing inherent in a declaratory order that demands that it be granted upon facts presented in a petition rather than upon facts determined at a hearing. Nor is the use of the hearing to determine questions of jurisdiction novel in Board law. Hearings are often conducted to determine whether particular employees come within the scope of the National Labor Relations Act. The purposes served by the declaratory order would be

28 *Stor-Ad Printers, Inc.*, 131 NLRB 556, 557 (1961). Under section 3(d) of the Act, the General Counsel has final authority with respect to the issuance of unfair labor practice complaints. A question could be raised whether, under a declaratory order proceeding, the Board could order dismissal of both the representation case and the unfair labor practice complaint, since this might infringe upon the General Counsel's power under section 3(d). As a legal matter, however, the General Counsel, by filing the petition for a declaratory order, consents to be bound by the Board's determination. Also, as a practical matter, it would be a waste of agency resources for the General Counsel to disregard the Board's ruling and to proceed with the case only to have it later dismissed by the Board. In the *Stor-Ad* case the General Counsel did dismiss both the representation case and the unfair labor practice charge, and it can be expected that this procedure will be followed in similar cases.

29 *National Bulk Carriers, Inc.*, 134 NLRB 1186 (1961); *Reynolds Metal Co.*, 134 NLRB 1187 (1961).

30 Two years later, in *McVulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963), the Court held the Act inapplicable to foreign vessels.

31 *National Bulk Carriers, Inc.*, 134 NLRB 1186, 1186-87 (1961); *Reynolds Metal Co.*, 134 NLRB 1187, 1187-88 (1961).

significantly advanced by the application of the hearing procedure to requests for declaratory orders. By deciding the above cases as it did, however, the Board substantially limited the potential usefulness of the declaratory order in determining jurisdictional questions.

Another very important restriction on the use of the declaratory order has flowed from these same two cases. In them the Board "decided that its declaratory order rules, like those for advisory opinions, are designed primarily to determine questions of jurisdiction by the application of the Board's discretionary standards to the 'commerce operations' of an employer."³² On its face, this statement would seem to absolutely preclude the use of neither the declaratory order nor the advisory opinion when the Board's statutory ("nondiscretionary") jurisdiction is in issue, but such has been the result. The cases concerning advisory opinions uniformly indicate that declaratory orders and advisory opinions are to be treated equally on this score, and these cases do not hesitate to dismiss applications for advisory opinions on the Board's statutory jurisdiction.³³ Hence it appears that the Board will not entertain petitions for declaratory orders concerning statutory jurisdiction.

The origin of this rule, then, is traceable to the complexity and difficulty of the foreign-flag ship cases, where the Board felt unjustified in resolving the issue without a full and complete record. Yet, as we have seen, there is no reason why a declaratory order could not be granted pursuant to a factual hearing. While the Board's position is defensible with respect to advisory opinions (where the merits of the case are before a state court or board), there is no merit in refusing an application for a declaratory order simply because the issue presented concerns the Board's statutory, rather than its discretionary, jurisdiction.

This restriction on the use of the declaratory order seems especially strange since the declaratory order has been used to clarify questions involving status. In *Shields v. Utah Idaho Central Railing Co.*, the Supreme Court recognized the binding effect of declarations of status.³⁴ Certainly, a mechanism capable of dealing with questions of status is capable of determining discretionary jurisdiction issues.

B. Representation Cases

In the representation area, the Board has three major functions: (1) initial

32 National Bulk Carriers, Inc., 134 NLRB 1186 (1961); Reynolds Metal Co., 134 NLRB 1187 (1961). The Board in these cases nevertheless refused to use the declaratory order to determine the discretionary jurisdiction question presented. The reason was that the cases were complex and the Board did not have a full record before it. National Bulk Carriers, Inc., 134 NLRB 1186 (1961); Reynolds Metal Co., 134 NLRB 1187 (1961). See also W. WILSON, LABOR LAW HANDBOOK ¶ 104, at 11 (1963). In Upper Lakes Shipping, Ltd., 138 NLRB 221 (1962), an advisory opinion case, the inadequacy of the record was similarly cited as a ground for dismissing the petition. *Id.* at 222. Other advisory opinion cases, however, dismiss petitions with the simple statement that statutory, rather than discretionary, jurisdiction is in issue. Cases cited note 33, *infra*.

33 International Air Serv., Inc., 1967 CCH NLRB Dec. 28,027; Mayo Clinic, 1967 CCH NLRB Dec. 27,956; Mt. Pleasant Pub. Util., 156 NLRB 79 (1965); James M. Casida, 152 NLRB 526 (1965); Broward County Port Authority, 144 NLRB 1539 (1963); Interlake S.S. Co., 138 NLRB 576 (1962).

34 305 U.S. 177, 182 (1939). *Accord*, Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939), which held a declaratory order determining the status of a telephone company binding and therefore subject to judicial review.

determination of an appropriate unit; (2) clarifying or amending the unit description as necessary; and (3) conducting an election among the employees in the appropriate unit to determine whether they desire a particular union as their bargaining representative.³⁵

1. *Determining an Appropriate Unit*

A role for the declaratory order is not required in making this initial determination since the Board's representation procedures are similar in function to a declaratory order. Thus, the Board's determination of an appropriate unit does not carry with it any sanction. Punitive measures are not taken until the employer refuses to recognize the union chosen, after election, by employees in the appropriate unit, or until a rival union pickets the employer with a recognitional intent. In these circumstances, the Board will file unfair labor practice complaints against the offending party.³⁶ The problem here lies not so much in the representation procedures, but in the failure of the Act to provide for a direct appeal to the courts from the Board's determination.

2. *Clarifying or Amending Unit Descriptions*

In the past, the Board has often been asked to determine, through a motion to clarify or amend a certificate, the placement (inclusion or exclusion from a unit) of employees whose status had been originally established through Board certification but which is now in dispute. The Board has assumed that it has authority to clarify its original bargaining unit determination and certification, without holding a new election, even though there is no specific authority for this in the National Labor Relations Act.³⁷ The rendering of a declaratory clarifica-

35 As noted earlier, one of the characteristics of a declaratory order is its binding finality. There is some question, however, as to the applicability of the res judicata doctrine to representation questions. In *Thalhimer Bros. Inc.*, 93 NLRB 726, 727 (1951), the Board held that res judicata did not bar redetermination of a bargaining unit. One court has held that res judicata has no application to the determination of an appropriate unit for collective bargaining. *District 50, UMW v. NLRB*, 234 F.2d 565, 568 (4th Cir. 1956). But the Board must respect the parties' need for stability. Thus, a more realistic analysis is that res judicata has only limited application to representation cases.

36 The employer would be in violation of section 8(a)(5) of the Act, which, in pertinent part, provides:

It shall be an unfair labor practice for an employer —

(5) to refuse to bargain collectively with the representatives of his employees....

National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

The union would be in violation of section 8(b)(7) of the Act, which, in pertinent part, provides:

It shall be an unfair labor practice for a labor organization or its agents —

(7) to picket . . . any employer where an object thereof is forcing . . . an employer to recognize . . . a labor organization . . . unless such labor organization is currently certified . . .

National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) (1964).

37 In *Clarostat Mfg. Co.*, 105 NLRB 20, 22 (1953), the Board clarified its original bargaining unit determination after a further hearing. The Board rejected the employer's claim that it was error to reopen the case when the union could have pursued its remedy in a complaint proceeding. *Id.*

tion "flows from the Board's statutory authority to administer the Act and is an incident of the Board's responsibility under the Act."³⁸

The Board has had more difficulty with a motion to clarify an uncertified unit. The first case involving this issue came before the Board in *Lake Tankers Corp.*³⁹ There the employer had for some time recognized the International Longshoremen's Association [ILA] as the bargaining representative of its unlicensed, nonsupervisory personnel. When a dispute arose over the supervisory status of watchmen, a petition was filed. Since the employer did not question the majority status of ILA, the Board found that no question concerning representation existed and dismissed the petition. In a footnote, however, the Board, after reciting the duties of the watchmen, stated that it was "of the opinion that the watchmen are supervisors within the meaning of the Act."⁴⁰ Thus it obliquely resolved the point in dispute. This technique of resolving the dispute while dismissing the petition was followed in a series of cases.⁴¹

In *Bell Telephone Co.*,⁴² however, the Board reversed this policy. There the employer had recognized the union as the exclusive bargaining representative of various categories of employees for more than fifteen years. The basis of this relationship was contractual, without benefit of Board certification. During negotiations for an amended contract, the employer filed a petition with the Board requesting a declaratory order concerning the supervisory status of certain employees. The petition stated that the union did represent a majority of the employees and that neither the employer nor the union desired an election.

While the Board noted that there was precedent for making such a determination, it concluded that such action exceeded the power conferred upon the Board by Congress. The Board stated:

Were the Board to decide this case on its merits, such a determination could not possibly be a declaratory judgment binding on the parties. A declaratory judgment is a creature of the statute which authorizes it. There is no statute authorizing the Board to render declaratory judgments in representation cases. Consequently, at best a decision herein would be an advisory opinion binding on no one. Nowhere in the Act is the Board, either expressly or by necessary implication, empowered to give advisory opinions on matters of this type.⁴³

The Board's conclusion that it did not possess the statutory powers to make such a determination was based on the following reasons:

Section 9 of the Act is the source of Board authority in representation proceedings. Section 9(c) (1) provides, in part, that "Whenever a petition shall have been filed . . . the Board shall investigate such petition. . . .

³⁸ City Line Open Hearth, Inc., 141 NLRB 799, 801 (1963), which involved the Board's power to issue advisory jurisdictional opinions.

³⁹ 79 NLRB 442 (1948).

⁴⁰ *Id.* at 442 n.2.

⁴¹ Hershey Estates, 122 NLRB 1300 (1955); Humble Pipe Line Co., 107 NLRB 892 (1954); Houston Terminal Warehouse & Cold Storage Co., 107 NLRB 290 (1953); Luper Transp. Co., 92 NLRB 1178 (1951); Librascope, Inc., 91 NLRB 178 (1950); York Motor Express Co., 82 NLRB 801 (1949); W.K.B.H., 81 NLRB 63 (1949); Deep Rock Oil Corp., 81 NLRB 10 (1949); Merrill-Stevens Dry Dock & Repair Co., 79 NLRB 962 (1948).

⁴² 118 NLRB 371 (1957).

⁴³ *Id.* at 374.

If the Board finds . . . that . . . a question of *representation exists*, it shall direct an election by secret ballot and shall certify the result thereof." Thus, the Act mandates a direction of election by the Board if a question concerning representation is found to exist

....
We cannot believe that Congress, saving specifically provided an effective procedure for definitive resolution of unit issues in Section 9(c) (1), at the same time intended to authorize the Board to derogate from that procedure in cases of this type by giving an advisory opinion which is not binding upon the parties or the Board, and where if one of the parties is dissatisfied with the Board's view, it could file a petition at an appropriate time covering all employees in the unit or a refusal-to-bargain charge seeking to obtain a redetermination of the status of the employees involved. One of the fundamental purposes of Congress in Section 9(c) of the Act was to devise a method whereby the scope of the entire unit involved would be before the Board so that most, if not all, of the possible unit problems could be resolved at one time and a certification could issue which would be binding on the parties. We do not think that Congress wished to place the Board in the position of dissipating its funds and energies in the capacity of arbitrator, mediator, or conciliator by providing a forum for parties to submit their questions on a piecemeal basis without any reasonable assurance that the Board's determination will thereby finally resolve even the specific problem presented by the parties.⁴⁴

The Board's position in *Bell Telephone* assumed: (1) that the issuance of a declaratory order was beyond the scope of its delegated powers; and (2) that the determination of representation questions, which would not be binding on the parties and which could resolve such questions only on a piecemeal basis, was contrary to the Act's policy. The first assumption is based on the following syllogism: the declaratory judgment is a creature of statute; there is no statute authorizing the Board to issue a declaratory order in representation cases; hence, the Board has no power to issue a declaratory judgment in this area. While there is no specific provision in the Act authorizing the utilization of a declaratory process in representation cases, this power is inherent in the Board's power to adjudicate since a declaratory order is just another form of adjudication. Thus, as a general proposition, an agency with the power to adjudicate has the power to declare, absent a statutory restriction on this power.⁴⁵ The issue, therefore, is whether there exists such a restriction, either explicitly in the National Labor Relations Act, or implicitly through the limitations placed on such power by the administrative process.

As for the Act itself, section 9,⁴⁶ which controls the representation process,

44 *Id.* at 373-74. The Board followed this position in *American Stores Co.*, 130 NLRB 678, 679 (1961). There the employer sought a determination from the Board as to the appropriateness of a single or separate unit of its grocery store employees. The parties stipulated that each union involved represented a majority of employees in the respective units they sought that one of the unions represented a majority of all the employees if a single unit was found appropriate. Neither union was certified or sought an election. On the basis of *Bell Telephone*, the Board dismissed the petition. Chairman Leedom, who dissented in *Bell Telephone*, joined the majority in dismissing the petition. He distinguished *Bell Telephone* on the ground that in that case the declaratory order determination went solely to the eligibility of certain employees, while in the *American Store* case the declaratory order would go to the basic appropriateness of two separate units.

45 1 K. DAVIS, *supra* note 4, at 268.

46 National Labor Relations Act § 9, 29 U.S.C. § 159 (1964).

can be divided into three general categories of language: mandatory language, which commands the Board to do something; prohibitory language, which forbids the Board from acting in a particular manner; and operative language, which explains when the mandatory or prohibitory language becomes relevant. Since the specific language of the Act neither commands nor forbids the Board to do anything relative to the use of a declaratory order, there is no specific restriction.

Would use of the declaratory order to resolve representation questions conflict with essential elements of the administrative process entrusted to the Board? The rationale of the *Bell Telephone* decision is that since the Act provides a specific statutory scheme consisting of elections and certifications for resolving representation issues, such a scheme was intended by Congress to be exclusive. Thus, for the Board to undertake clarification of a noncertified unit would be to act contrary to Congressional intent. As noted earlier, however, the Board has often determined the placement of employees in a unit through the clarification or amendment procedures, neither of which is specifically provided for in the statutory scheme. Since there is no significant difference between clarification of a certified unit and clarification of a noncertified unit, to require that dissimilar techniques be applied to each is irrational. Thus, although section 9(c)⁴⁷ provides a specific scheme for the handling of certain types of representation issues, this should not bar the use of other procedures where different issues are involved. It follows from this analysis that the Board has discretionary power to use declaratory relief, where appropriate, in representation cases.

Whether the Board should exercise this discretionary power remains to be treated. The use of the declaratory order is in harmony with the expressed purpose of the Act. Section 1 of the Act states, in pertinent part:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁴⁸

The purpose of the Board, then, is to eliminate industrial strife and to encourage collective bargaining through positive procedures. Where a dispute cannot be settled by the parties themselves, it will lead to industrial strife unless a third party intervenes promptly to settle the controversy. It is likely that parties who are seeking a unit determination without protracted litigation will turn to the Board, which has acquired an expertise in these matters. If the Board does not intervene and make a determination of the unit, this would exacerbate the dispute and compel the parties and the Board to engage in the needless expense of fruitless litigation — even though there is no question of the union's majority status.

Further, section 9(b), which empowers the Board to make a unit determi-

47 *Id.*, § 9(c), 29 U.S.C. § 159(c) (1964).

48 *Id.*, § 1, 29 U.S.C. § 151 (1964).

nation, places only one restriction on this power — namely, that the determination be such as will assure the employees “the fullest freedom in exercising the rights guaranteed” by the Act.⁴⁹ It was argued in the *Bell Telephone* case that if a unit determination were made of an uncertified unit without affording a self-determination election, the employees would be denied their rights under the Act.⁵⁰ But the absence of a self-determination election does not, per se, deny any rights guaranteed by the Act. If an employee doubts the union’s majority, he can file a decertification petition asking for an election⁵¹ or an unfair labor practice charge alleging that the employer is illegally recognizing a minority union. Moreover, if the Board were to make a determination without an election and certification, an aggrieved employee could sometimes obtain review under the doctrine of *Leedom v. Kyne*.⁵²

In *Brotherhood of Locomotive Firemen*,⁵³ the Board reconsidered the *Bell Telephone* decision and concluded that there was ample statutory support for determining the status of employees in a unit that had never been formally found appropriate by the Board.⁵⁴ The Board squarely rejected any distinction between clarifying a certified or uncertified unit, stating:

The Board has often determined the placement of employees whose status is in dispute through the procedure of clarifying and modifying unit determinations when circumstances have changed. We see no legally significant difference in applying similar techniques to facts such as are present in this case, even though no certification exists.⁵⁵

As a result of this decision, the Board amended its rules by adding section 102.60(b), which provides that “[a] petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer.”⁵⁶

The clarification procedures have opened the door for the settlement of certain disputes that previously might have resulted in unfair labor practices.

49 *Id.*, § 9(b), 29 U.S.C. § 159(b) (1964).

50 *Bell Telephone Co.*, 118 NLRB 371, 374 (1957).

51 *Burry Biscuit Corp.*, 76 NLRB 640, 641 (1948). Further, the challenged union cannot assert the representative interest of the petitioner. *Id.*

52 358 U.S. 184 (1958). There the Board included professional and nonprofessional employees in the same unit without holding an election to determine the position of the professional employees on the inclusion. The Court asserted its jurisdiction over this type of matter holding:

It [unit determination without a vote] deprived the professional employees of a “right” assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given. *Id.* at 189.

53 145 NLRB 1521 (1964).

54 *Id.* at 1523-24. The Board clearly recognized the need for determination of the appropriate unit stating:

If we were to refuse to determine the unit placement of the contested employees, we would be exacerbating a dispute which reached us in the first place because the parties could not settle it themselves. We do not regard it as our function to compel the parties . . . to engage in the expense of a needless election procedure when there is no serious doubt of the Union’s majority position. Accordingly, the *Bell Telephone* decision is hereby reversed to the extent inconsistent herewith.

Id. at 1524.

55 *Id.* at 1524.

56 29 C.F.R. 102.60(b) (1969).

Thus, in a jurisdictional dispute there exists no reason why an employer should have to wait until one or both unions commit some prohibited conduct before having the situation resolved. In these circumstances, it is obvious that the controversy is ripe as soon as two or more unions claim the disputed work. If the employer has contracts with either or both unions, or if either or both are certified, then the contracts or certificates can be amended to include the disputed work. While there has been some confusion on this point in the past,⁵⁷ the Board has granted motions to clarify in order to determine work assignment disputes.⁵⁸

3. *Employee Elections*

The Board's third function in representation procedure is to supervise employee elections. In any election there are competing interest groups seeking to attract the loyalty of the voter, and employee elections are no exception. Both the employer and the union are attempting, through various devices, to win the support of the employee. Here the Board's role is to establish the election machinery and to guarantee that neither employer nor union tactics interfere with the right of the employee to cast an uncoerced vote. If either side interferes with this right, the Board will set aside the election and direct a new one. Preelection conduct, which may include speeches, leaflets, posters, campaign materials of every sort, promises, or threats, may also furnish grounds for an unfair labor practice complaint.

Because the parties' preelection campaign conduct may have such serious legal consequences, the declaratory order should be available to test the permissibility of contemplated action before it is taken. But this proposal has not been unopposed. On the one hand, it is argued that the Board should not assist a party in trimming his pattern of conduct to the minimum legal requirements, for this would work to the detriment of the employees. There is also the feeling that those who strain to tiptoe as close to the brink of the legal precipice as possible are not deserving of the Board's assistance. Under this approach, it is feared, an employer or a union bringing a particular piece of election propaganda to the Board for approval will soon have the Board as a partner in the actual writing of the propaganda. There may also be a social interest in keeping the borderline between the permissible and the prohibited imprecise, as doubt itself will act as a deterrent to parties approaching the center of the line.

On the other hand, there is a countervailing need for the parties to know precisely where the line is drawn. The social commitment to maximum individual freedom compels the Board to prescribe as clearly as it can the limits it imposes on employer and union activity. The parties have a legitimate right to convey their election platforms to the employees without fear that a certain phrase or sentence will result in voiding the election. The fear that the Board will end up preparing a party's organizational campaign is unreal, for there will always be

⁵⁷ Hickey, *Government Regulation of Inter-Union Work-Assignment Disputes*, 16 S.C. L. Rev. 333, 364-75 (1964).

⁵⁸ McDonnell Co., 1968 CCH NLRB Dec. 25,413; Hayer Aircraft Corp., No. 10-RC-1670 (1963); Kennecott Copper Corp., No. 20-RC-3838 (1963). If the employees are covered by neither contract nor certificate, their placement must be determined by an election. News Syndicate Co., 141 NLRB 573, 577 (1963).

variations in propaganda from plant to plant, and the Board possesses the discretion to refuse a case if it believes a party is abusing this procedure.

The question is admittedly close, but this author would tip the scale in favor of allowing the declaratory order. While the above considerations were discussed with regard to election propaganda, the same factors must be considered whenever the issue involves questionable legality of prospective conduct. In each situation, all factors should be considered before making a determination.

C. Unfair Labor Practice Cases

In one sense, certain of the Board's orders in unfair labor practice matters resemble declaratory orders. For example, when a party is found guilty of an unfair labor practice, he is usually forbidden to further engage in the practice found illegal by the Board. The cease and desist order, though based on a violation of the Act, involves no penalty unless the violator refuses to comply with the Board order. (These orders, of course, are not strictly declaratory since they contain a characteristic coercive element — they command that certain activity not be done.) A fortiori, a decision by the Board in favor of the accused party would also be quasi-declaratory. Another example of quasi-declaratory procedure is the section 10(k)⁵⁹ proceeding, which resolves a jurisdictional question by affirmatively awarding disputed work to one of the contesting groups. In this proceeding the Board adjudicates the rights of the parties to the work, but it does not issue a cease and desist order enforceable in the courts. The Board, however, has never issued a declaratory order based on an *anticipated* unfair labor practice. Nor will the declaratory procedure normally be used in discrimination cases due to complex factual patterns and a lack of ripeness.

Plagued with uncertainty, the statutory duty to bargain in certain labor disputes poses a constant threat of disruption in industrial stability. Judicious application of the declaratory order in this area would replace uncertainty with clarity. Section 8(a)(5)⁶⁰ and section 8(b)(3),⁶¹ when interpreted in conjunction with section 8(d),⁶² make it unlawful for an employer or union to refuse to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." This statutory obligation encompasses the duty to recognize a duly selected bargaining representative, to negotiate with that representative on mandatory subjects of bargaining, and to refrain from terminating or modifying a contract during renegotiation without serving advance notice on the other party.⁶³

Where a union is certified by the Board subsequent to an election, the employer will seldom have difficulty in determining his duty to recognize and

59 National Labor Relations Act § 10(k), 29 U.S.C. § 160(k) (1964).

60 *Id.* § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

61 *Id.* § 8(b)(3), 29 U.S.C. § 158(b)(3) (1964). Section 8(b)(3) reads as follows:
It shall be an unfair labor practice for a labor organization or its agents —

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title.

62 *Id.* § 8(d), 29 U.S.C. § 158(d) (1964).

63 *Id.*

bargain with it. Where an employer doubts the majority status of an incumbent bargaining representative, however, he should be able to obtain a judgment from the Board as to his obligations vis-à-vis the union.

At present, the employer faces a dilemma. If he continues to recognize a union that is later found to lack the support of a majority of employees, he risks a section 8(a)(2)⁶⁴ charge. If he does not recognize the union that is in fact entitled to recognition, he faces a possible section 8(a)(5) violation,⁶⁵ unless he can demonstrate a good faith doubt as to the union's majority status.⁶⁶ The issuance of a declaratory order where present procedure is inadequate would accommodate the needs of both labor and management.

The declaratory order would also be extremely useful in determining the status of a subject of bargaining. Under the Act, subjects of bargaining are divided into three classes: mandatory, permissive, and illegal. Only mandatory subjects can be safely bargained to an impasse.⁶⁷ Because the statute does not classify the subjects of bargaining in detail, the parties do not always know into which class a particular subject will fall. Rather than be forced to reach a deadlock in negotiations, the parties should be able to file with the Board a petition seeking to clarify whether a subject in dispute is mandatory, permissive, or illegal. This issue arose in the *Mobil Oil Co.* case.⁶⁸ There the parties had entered into twelve prior contracts, each containing a clause allowing supervisors to retain their seniority in the unit. During negotiations for a new contract, the union demanded a paragraph under which a supervisor would lose his seniority if during a strike he performed work normally performed by an employee in the unit. The company refused to yield on this point. Both parties agreed that the issue should not obstruct the signing of the contract. The union agreed to sign the contract under protest with the understanding that it would file an unfair labor practice charge. It was further agreed that the supervisory seniority clause would be deleted from the contract if the Board declared it to be a nonmandatory

64 *Id.* § 8(a)(2), 29 U.S.C. § 158(a)(2) (1964). Section 8(a)(2) in pertinent part states:

It shall be an unfair labor practice for an employer —

(2) to dominate or interfere with the formation . . . of any labor organization

That the employer in good faith thought the union to be the representative of a majority of employees is irrelevant. *Garment Workers v. NLRB*, 366 U.S. 731, 739 (1961).

65 National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964). This dilemma is somewhat relieved by section 9(c)(1)(B), which permits an employer to file a petition seeking an election among his employees when faced with a claim for recognition by a union. The employer must "demonstrate by objective considerations" that he has reasonable grounds for believing that the union has lost its majority status before the Board will act on the petition. *United States Gypsum Co.*, 161 NLRB 601 (1966).

66 *Fort Smith Broadcasting Co. v. NLRB*, 341 F.2d 874, 880 (8th Cir. 1965).

67 *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Further, there has been a tendency to require the employer to furnish the union with data concerning mandatory subjects of bargaining. In *NLRB v. Whittin Mach. Works*, 108 NLRB 1537, 1539, *enforced*, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955), an employer was required to provide wage rates of particular employees. In *Montgomery Ward & Co.*, 90 NLRB 1244, 1246-47 (1950), the Board found an 8(a)(5) violation where the employer refused to disclose names and merit ratings of employees, production standards, and prospective changes in benefit plans. Finally in *Dixie Mfg. Co.*, 79 NLRB 645, 658 (1948), the employer was required to produce information concerning employee production requirements and methods used to calculate individual earnings.

68 147 NLRB 337 (1964).

subject of bargaining. Conversely, if the Board held the clause to be a mandatory subject of bargaining, it would remain in the contract.

The Board held the supervisory seniority clause to be a mandatory subject of bargaining.⁶⁹ The interesting point about the case is that the employer contended that if the Board held the clause to be a permissive subject of bargaining, it would be issuing a declaratory judgment beyond its authority, for under the circumstances, no sanction could be imposed. Rather than face the issue head-on, the Board merely observed in a footnote that in view of its disposition of the case it need not reach this issue.⁷⁰ It would certainly have been preferable for the Board to treat the case as one for a declaratory order. But in view of the Board's action, it seems unlikely that it will allow parties to utilize the declaratory process to determine the status of subjects of bargaining.⁷¹

The third possibility for the utilization of the declaratory order in this area arises where an employer contemplates changes during the contract term. An employer cannot unilaterally change a condition of employment unless the union has waived its right to be consulted about the change. In these circumstances, questions arise as to whether the union has waived its rights and, if not, what the particular obligation of the employer may be. In order to conduct business in a modern society, it is important for an employer to be able to effectuate change (i.e., mergers, acquisitions, and subcontracting) without fear that unfair labor practice charges will be filed against him. Even where a party believes that he will ultimately prevail, defending an unfair labor practice charge exposes the employer to unwarranted cost and delay. A declaratory order would permit an employer to protect his investment against further expenditures. Additionally, if the employer has erroneously evaluated the situation, the declaratory process allows him to take whatever steps are necessary to conform to the Board's decision without a further outlay of money.

Conclusion

This article has attempted to demonstrate how the declaratory process could be used to further promote industrial stability. It is clear that the deterrent effect of prospective prohibitions will prevent the needless infliction of industrial unrest upon the community. Nevertheless, the Board has been extremely reluctant to allow the industrial community to take full advantage of this process. In certain areas, such as unfair labor practices, the procedure is nonexistent; in other areas, such as jurisdiction and representation, it is severely limited in scope. Thus, the Board should reevaluate its thinking and establish declaratory order procedures to adequately meet the needs of the community.

69 *Id.* at 340.

70 *Id.* at 340 n.4.

71 Under a memorandum of agreement signed by Local 12 of the Operating Engineers and the Southern California Chapter of the Associated General Contractors, Engineering & Grading Contractors Association, and the Building Industry Association, all parties agreed to abide by a Board determination of the bargainability of strike insurance. If the Board determines that this is not a bargainable issue, the subject is closed. If the Board decides that it is a mandatory subject of bargaining, negotiations on the issue will open within sixty days. The Board determination is being made pursuant to an unfair labor practice charge filed by the three associations. BNA, Construction Labor Report No. 726, Aug. 20, 1969.