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The Necessity for a "Standard" in Federal Wage and Hour Legislation

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Judicial recognition of state wage and hour legislation has received turbulent and stormy treatment in the courts.[1] State legislation directed toward wage and hour control has been held constitutional by the courts because it is said to have direct relation to the public health and general well-being.[2] The United States Supreme Court laid violent hands on the first federal attempt to control wages and hours by the same act in the *Schechter Corp. v. United States*.[3] The late Mr. Justice Cardozo, in a concurring opinion which was indorsed by Mr. Justice Stone, characterized the delegation of authority in the Schechter case as "delegation running riot."[4] He further declared that the "wages and hours of labor are essential features of the plan, its very bone and sinew."[5] Chief Justice Hughes dealt the NIRA a final crushing blow when he stated that the Industrial Recovery Act supplied no standard for administrative rule making, but instead prescribed the making of codes, which codes themselves provided for the making of standards. This the Chief Justice described as a legislative function[6]

In the opinion of the Court, Chief Justice Hughes said:

> "We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the Panama Company Case that the Constitution has never been regarded as denying practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rule within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity

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[1] *Muller v. Oregon*, 208 U. S. 416 (1908); *Lochner v. New York*, 198 U. S. 45 (1904); *Bunting v. Oregon*, 243 U. S. 426 (1917); *Adkins v. Children's Hospital*, 261 U. S. 525 (1922); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1936); *Associated Industries of Okla. v. Ind. Welfare Comm'n*, 90 Pa. (2nd) 899 (1939) (the court in this case held the statute met constitutional tests, but was unconstitutional on other grounds.)

[2] *West Coast Hotel Co. v. Parrish, supra*, note (1), page 393.

[3] 295 U. S. 495 (1934).

[4] *Id.*, 553.

[5] *Id.*

[6] *Id.*, 541, 542.

of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitation of the authority to delegate, if our constitutional system is to be maintained." Pp. 529-530.

It is to be remembered that the states have reserved to themselves a police power, and it is upon this jurisdiction that they have based the control of wage and hour legislation. The federal government having no such power has invoked its jurisdiction over interstate commerce as a jurisdiction upon which to predicate the control of wages and hours. In the Schechter case, *supra*, Congress attempted to delegate to the President an authority to regulate industry which was purely intrastate, thereby obscuring "the limitation of the authority to delegate," and thus the NIRA fell into the unconstitutional category.

In certain types of legislation the necessity of providing a standard is absolutely imperative. In some instances the standard is almost capable of definition; in other types any attempt at definition would result in violation of due-process concepts. The Court has said that in cases where the delegation is broad it is enough to declare the policy of the legislature, require the administrative order to be bolstered by findings of fact, provide for a fair hearing, and a review by a judicial tribunal.[7]

Where the matter to be delegated requires broad discretionary powers and the subject matter is complex or varying with circumstances, the Court has said that a wide latitude to "fill in the details" may be delegated.[8]

The Fair Labor Standards Act of 1938 underwent the most bitter and hard-fought struggle to enactment of all the New Deal legislation. The focal point of the struggle centered around the issue of setting a standard.[9] Ardent proponents of the bill, anxious to see the bill emerge from congressional debate and the silent intrigues of committee systems, fought rigidity in setting a standard; while opposition forces, apprehensive since the Schechter case, *supra*, of an unconstitutional delegation

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[7] *Interstate Commerce Comm'n v. Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Florida v. United States*, 282 U. S. 194; *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454. "The authority conferred has direct relation to the standards prescribed for service of common carriers and can be exercised only upon findings, based on evidence, with respect to particular conditions of transportation."

[8] "But when Congress has legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill in the details' by establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress . . ." *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 48 (1911).

[9] "Not only were personal, economic and social viewpoints involved but difficult constitutional issues were encountered. Those in favor of flexible standards pointed out that rigid standards would run into serious due-process problems. Those favoring rigid standards contended the flexible standard involved unconstitutional delegation of powers." Forsythe, *Legislative History of Fair Labor Standards Act*, 6 Law & Con. Prob. 478.

of power, fought the flexible standard.[10] The present act is a studious attempt to innoculate the lifeless "bone and sinew" of the Blue Eagle with constitutional serum. The tentative draft, led an oscillatory carrier to enactment during its course through the House and Senate due to the American Federation of Labor and the CIO pressure forces, as well as by the maze of legislative objections due to the prevailing standard of living in the different sections of the country.[11]

The act provides that one hundred and twenty days after the enactment every employer subject to the provisions of the act shall be required to pay his employees a twenty-five cent an hour minimum wage during the first year and not less than thirty cents an hour thereafter for the next six years, not less than forty cents an hour every year thereafter. Variations of the forty-cent rate may be made by the Administrator with the aid of the industry committees. At no time may the minimum be lower than thirty cents after the first year. Section 6 (a) further provides that the Administrator, with the assistance of the industry committee, may, at any time after the effective date of the act, establish a minimum wage scale for any industry covered by the act, which shall not exceed forty cents an hour. Thus the Administrator, four months after the effective date of the act, may require an employer to pay his employees a forty cent an hour wage.[12]

The hour provisions under Section 7 (a) provide that no employer subject to the act shall employ his employees for a work-week longer than forty-four hours for the first year after the effective date of the act; for longer than forty-two hours during the second year from such date; and for longer than forty hours thereafter.

With the foregoing standards set up providing for a floor for wages and a ceiling for hours, leaving the administrative "details" to be "filled in" by the Administrator and the industry committees, it would seem from the due-process standpoint and the delegation angle the problem has been met. In the event the Administrator with the aid of the industry committees does issue a contested order, any person aggrieved thereby may appeal to the United States Circuit Court of Appeals.[13]

Over a period of years there has been considerable discussion and writing on the advisability and necessity for requiring Congress to estab-

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[10]"The problem was much more basic than merely a disagreement over flexible or inflexible standards. In the final analysis the argument was one involving different theories of political science. Those in favor of the flexible standards believed that the legislation could be best handled by an administrative body of experts who could devote their whole time to the problem. They argued that Congress did not have the time or facilities to intelligently cope with the situation. On the other hand the persons favoring rigid standards argued that Congress could, and should, set standards which would be fair to all concerned. The same problem is at the heart of all government through administrative agencies." *Id.*, note 79.

[11]*Id.*, 479.

[12]Section 6 (a).

[13]Section 10.

lish a standard in matters of public interest where the regulation and control is complex and fluctuating with circumstances. This becomes even more conjectural when we consider the wide degree of control delegated to the Interstate Commerce Commission,[14] Federal Radio Commission,[15] and the Customs Commission.[16] One noted author points out that liberal delegative authority is usually found in safety and health regulations, or in other words, "where there are no controversial issues of policy or of opinion."[17] The same author states that:

> "Even here, direct statutory regulation may be preferred, if the subject matter touches class interests or otherwise has a strong public appeal . . . Practically equivalent to the absence of controverted issues is their obscurity or non-recognition or non-formulation in the public mind or in the minds of the parties affected. This applies particularly to economic regulation. It would be almost inconceivable that the fixing of hours of adult female labor should be left to administrative regulation, in view of the sharp conflict of interests and of opinion. On the other hand, the factors of rate regulation are so obscure that delegation suggests itself as an acceptable solution, even where regulation assumes a distinctly legislative character . . . it cannot be regarded as other than an anomaly that Congress should have left it to the Interstate Commerce Commission to determine for future percentage rate of fair return, tempered though the delegation was by the initial fixing of the rate by Congress itself, thus setting a standard for the guidance of the Commission."[18]

The author continued to point out that with the expansion of utilities regulation and railroad control it may become preferable to liberally delegate complex problems rather than indulge in the "perils of sectionally influenced legislative intervention."[19] This continued expansion will no doubt obviate the impending fears of delegative unconstitutionality. In view of the fact that any rigid formulization of wage scales would be unsatisfactory due to the maze of sectional factors entering into the field, it seems inescapable that the Wage and Hour Administrator with the aid of an expert body of industry committees which are comparably as efficient as the Interstate Commerce Commission experts, should be capable of conducting an equally efficient wage and hour administration.

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[14] *Supra*, note 7.
[15] *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266 (1922).
[16] *Hampton & Co. v. U. S.*, 276 U. S. 394 (1927).
[17] Freund, *Administrative Powers Over Persons and Property*, 1928, p. 218. Then see, Goodnow, *Principles of Administrative Law in the United States* (1905), 324, et seq.; Cheadle, *The Delegation of Legislative Functions*, 27 Yale Law Jor., 898.
[18] *Id.* Freund at 219.
[19] *Id.* Freund at 219.

There seem to be but two exceptions outlined by the Supreme Court to the "delegata potestas non potest delegari" rule: (1) when the Congress is legislating in a very complex matter in which it outlines its policy and sets out a standard for the commission or executive to follow and allows the executive or commission to "fill in the details;" and, (2) where the Congress enacts the law and includes the details merely delegating the time the law shall go into effect according to circumstantial need at the discretion of the commission or executive. There has apparently never been any clear cut definition or requisite rule whereby such policies or standards are known to be adequate, thus supplying assurance that the delegation will be valid.[20] One author has pointed out an exception to the general rule against delegation of legislative power that has gone unchallenged by the courts despite the constitutional prohibition based upon the fundamental doctrine of separation of powers. State legislatures have universally delegated complete and autonomous powers to municipalities without fixing standards or declaring policies, when the constitutions of the respective states clearly proclaim that legislative powers shall be vested in the general assemblies.[21] This is clearly a delegation of legislative power contrary to established constitutional principles. The rate making cases[22] formerly referred to show clearly how liberal administrative regulation of industry affected with public interest, coupled with the added factor of convenience, is desirable and entirely practical. Judge Brewer, very early, in *Chicago & N. W. R. Co. v. Dey*, stated:

> "There is no inherent vice in such delegation of power; nothing in the nature of things which would prevent the state, by constitutional enactment at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the federal constitution . . . the reasonableness of a rate change with the changed conditions of circumstance. That which would be fair and reasonable today, six months or a year hence may be too high or too low . . ."[23]

Such may well turn out to be the case in the administration of the Fair Labor Standards Act. What is fair and adequate in regard to wages and hours may change with the circumstances—political, economic and general living conditions. The necessity of providing a standard, other than a specific declaration of policy, might likely prove to be of little value, and might even prove to be a handicap in providing effective

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[20]Ray and Wienke, *Uncharted Seas of Delegated Power*, 29 Ill. L. R. 1027, 1028.
[21]Foster, *Delegation of Legislative Power to Administrative Officers*, 7 Ill. L. R., 398.
[22]See note (7), *supra*.
[23]35 Fed. 866 (1888).

administration in view of the declared policy to . . . "correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power," these conditions referred to by Congress having been said to be, labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers."[24] It is conceivable that a basic floor for wages and a ceiling for hours might be Procrustean in the most objectionable sense. An economic slump might drive some of the industries out of existence. If administrative discretion could be exercised upon a finding of fact that such circumstances did exist, an administrative order might preserve the industries through a critical period. True, the Administrator does have the power to fluctuate the wage and hour scale between the statutory limits, but this may at times prove inapplicable.

The *Panama Refining Co. v. Ryan*[25] added little or nothing to the former decisions on the question of providing a standard: but did serve the purpose of showing the needlessness of requiring a standard in certain cases. In that case the President was authorized to limit and prohibit the transportation in interstate commerce of petroleum products in excess of limitations prescribed by the authorities, whether it be by a board, commission or an executive order. This was declared void because the Court said that Congress could not delegate its legislative power without reference to a standard. And secondly that the administrative order or executive order must contain a factual statement to justify the order. Again in this case there is no standard specifically set out, nor is there need for one. The President either prohibits or allows the transportation of petroleum products in interstate commerce. If he finds the oil is "hot" he prohibits it; if not, he does not interfere. Mr. Justice Cardozo found a standard implied in the act. And it is pointed out that specific phrases in the act do not constitute a standard taken separately, and they are self-contradictory if taken *literally* together.[26]

In *Mahler v. Eby*[27] the Court held an alien ruling invalid merely because the Secretary of Labor in rejecting aliens according to the statute did not add the surplusage that the aliens were "undesirable." The Court declared that such a determination of fact is a prerequisite to deportation, and that by not including the finding of fact the statute was not complied with.

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[24]Section 2 (a) and 2 (b). See also Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 Law & Con. Prob. 368.

[25]55 Sup. Ct. 241 (1935).

[26]Cousens, *Delegation of Legislative Power*, 33 Mich. L. R. 539, 540, 541, 542.

[27]264 U. S. 32 (1934).

The effect of the *Mahler v. Eby* case and the *Panama Refining Co. v. Ryan*[28] decisions is to require a standard which is not real and useful, but merely formal—better stated:

> "A standard must be imposed by legislation delegating regulatory power, but how real must the standard be? If the *United States v. Chemical Foundation*[29] is to be followed it will not extend further than to require the addition of a few vague words to federal statutes and presidential proclamations . . . A standard must be set, but previous cases teach how vague such a standard may be and there is certainly nothing here irreconcilable with those cases. The court has indeed set a limit but it is formal rather than substantial and the slightest care in drafting will avoid infringing it."[30]

The Supreme Court of Oklahoma in a recent decision[31] presents an enlightened view of wage control by an administrative body. Although the Oklahoma law[32] was held to be unconstitutional because the Oklahoma State Constitution provided that every act of the legislature may only embrace one subject, which subject shall be expressed clearly in the title,[33] the statute met constitutional tests in regard to delegation of powers to the Industrial Commission. It is interesting to note that the legislature granted very broad powers to the Industrial Commission. The Commission, after investigation, was given the power to establish wages to be paid to workers in any industry or trade, with the exception of those specifically excluded.[34] This decision is indicative of a clean break from the atrophied fetters of the police power theory as a basis for wage and hour control: economic considerations are equally weighty. The Oklahoma Court, discussing one of its formerly adjudicated cases,[35] confirmed that generally the legislative powers cannot be delegated, but there are certain well defined exceptions to this rule.

> ". . . the Legislature is authorized to outline by general law the general scope and purpose of the laws and delegate to an administrative commisison the power to promulgate administrative rules and regulations. These rules may be and are in many instances legislative in character. . . . The United States Supreme Court and inferior federal courts have at all times recognized that while

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[28]55 Sup. Ct. 241 (1935).

[29]272 U. S. 1 (1926). (Note—This case held that a public sale under the Trading with the Enemy Act (40 Stat. 459 at 460) was valid because the president authorized the sale of enemy properties according to vague and broad general standards set out in the act.)

[30]*Id.*, note 26, at 543, 544.

[31]*Associated Industries v. Industrial Welfare Comm'n*, 90 P. (2nd) 899 (1939).

[32]Oklahoma Laws, 1936-1937, c. 52.

[33]See section 57, article 5.

[34]Section 3 and 5.

[35]*Sterling Refining Co. et al. v. Walker et al.*, 165 Okla. 45, 25 P. (2nd) 312.

> it is contrary to the Federal Constitution to delegate legislative powers, strictly speaking, yet when the legislative power sought to be delegated is in defined limits and for the purpose of accomplishing the proper administration of the law, the general effect of which has been stated in appropriate legislative provisions, the delegation is not contrary to the provisions of the Constitution." p. 904.

After citing numerous cases and authorities the Oklahoma Court states:

> "From the foregoing authorities it is apparent that the power to determine the policy of the law is primarily legislative, and cannot be delegated whereas the power to make rules of a subordinate character in order to carry out that policy and apply it to varying conditions although partaking of a legislative character, is in its dominant aspect administrative and can be delegated." p. 904.

The Oklahoma legislature did not prescribe any specific standards for wages in this case. It did not set a minimum wage, but merely outlined its policy and left the wage standard to be set by the Commission.

> "The employment of wage earners at inadequate wages or under conditions of labor detrimental to health is by the terms of the act made unlawful. The administrative board is empowered to determine upon investigation what are adequate minimum wages and wholesome conditions of employment and to promulgate rules for the creation and maintenance of such wages and conditions. These are essential characteristics of the Washington, Oregon and Minnesota acts upheld in the cases cited, *supra*. We are impressed by the reasoning in those cases. A different conclusion could not be announced in this case except upon consideration of an unsound distinction or an unnatural interpretation of the act." p. 906.

Who knows better than the body of experts in the Interstate Commerce Commission, Federal Radio Commission, Federal Trade Commission, or the Administrator with the aid of expert industry committees, what standards are fair and necessary? Certainly not the courts which have neither the time nor the facilities for making such a study. The Fair Labor Standards Act[36] provides for an appeal to the Circuit Court of Appeals. With the guarantee against an arbitrary or unreasonable order from the Administrator, it is difficult to see why a rigid standard should be necessary in this type of administration.

If setting a standard means a specific declaration of policy, there can certainly be no quarrel with that: but on the other hand, if setting a standard means a detailed wage standard, one that of necessity must pre-

[36]Section 10.

scribe a limit beyond which the commission has no province, and those limits confine and hamper the proper administration of the declared policy, then we are defeating the very policy of the act by useless constrictions.[37] Fixing wage and hour standards is one of those functions which can best be determined by an expert body. When Congress attempts to do the rule making by setting up confining limits which cannot expand and contract adequately to the needs, the advantages as well as the very function of administrative law are not being utilized. Professor Cheadle brought this point home with great force:

> "The administrative field includes all acts legislative in nature beyond the adoption of the broad policy, so that in this sense the legislature too performs essentially administrative functions when it works out details in the application of the policy.
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> "Thus, the legislative power, while concerning itself with new rules for the future, has as its true and proper subject-matter the broad policy which it declares. *All details in the application of the policy may be delegated, though these details may involve the exercise of discretion and a choice between policies subordinate to the broad policy of the legislature.* Therefore, if Article I, section I stood alone as an expression of the duty of Congress, that body need only indicate the policy to be pursued, and it will have exercised the power conferred upon it. The further legislative acts of laying down in detail the rule to be followed might well be done by Congress, or at its option, delegated to any person or body whose possible activities are not expressly or impliedly circumscribed by the Constitution. For instance, these legislative functions and duties could not be conferred upon the courts provided for in the Constitution, but they might well be conferred upon some part of the executive branch because historically the executive has always had some legislative duties to perform and the Constitution puts upon him the duty of participating in certain legislative matters. The executive is more interested than any other branch of the government in the form, the machinery and the details of the law, because these matters have a bearing upon its practical and efficient execution. *Especially may the legislative power be vested in other functionaries or boards anomalous in character, brought into being to give expertness and length to the legislative arm in the application of its policies through detailed rules.* Such bodies would not be prohibited from exercising their duties and functions through any implied inhibition growing out of the doctrine of the separation of powers. This construction is strengthened by consideration of the provisions of Article I, section 8, paragraph 18 of the Con-

[37]Cheadle, *supra*, 27 Yale L. Jor., 897.

stitution and the construction placed thereon by the Supreme Court of the United States. That paragraph provides:

" 'The Congress shall have the power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.'

"Thorough investigations by Congress through its committees, and the working out of minute details of laws are administrative functions which Congress has heretofore largely assumed,—and not improperly so long as it can effectively handle them. But Congress can as properly delegate these functions, retaining to itself only the control and direction of policies. In fact this becomes the duty of Congress whenever it finds that these functions can be more efficiently performed by some other person or body. In such case under the provisions of Article I, section 8, paragraph 18, it becomes the duty of Congress to delegate the making of detailed rules to an expert board or to an individual having the necessary skill and information. In doing this Congress is 'making laws which shall be necessary and proper for carrying into effect the foregoing powers.' And this is the true point of connection between 'necessity' and the power to delegate legislative functions.

". . . Congress may not delegate the choosing of policies nor the duty of formally enacting the policy into law, *but it may formulate that policy as broadly and with as much or as little detail as it sees proper and it may delegate the duty of working out the details and the application of the policy to the situation it was intended to meet.* The rule, therefore,—so far as there may be said to be a rule against the delegation of legislative powers—is not a prohibition against delegations of legislative functions or of the duty to do acts legislative in their nature after Congress has laid down the broad rule; but it is a prohibition of the attempted subdelegation of the very power itself or the duty of meeting in annual session and declaring the national will in some form of enactment in the general laws. As to when the necessity for delegation exists, the decision rests with the legislative body—a discretion not to be disturbed by the courts except in clear cases of abuse. The very fact of the separation of powers should make courts more careful in this respect."[38]

In applying these thoughts to the administration of the Fair Labor Standards Act, one is presented with a vexing question. There seems to be no necessity for prescribing wage and hour limits which are to be determined in any case by a finding of fact; i.e., by making a survey of living conditions, industrial conditions, prices, markets, and in general by securing a composite cross-section of the factors entering into the problem, and then setting a wage and hour standard accordingly.

[38] *Id.*, 899, 900, 901. (Italics supplied.)

If we come to the conclusion that the courts require a standard, that is, merely a formal standard, without reference to its usefulness and pragmatic results, then we are surely becoming arithmetic in our application of administrative law, the very essence of which is discretion delegated because of convenience and necessity due to complexity.

DISCIPLINE OF ATTORNEY BY ADMINISTRATIVE BOARD
(The Steady Reach for Power)

A recent amendment of the rules of practice of the Federal Trade Commission deserves attention by the bar. On December 22, 1939, a new paragraph of Rule XIII was promulgated dealing with the power of a trial examiner with relation to the conduct of counsel. The trial examiner is directed to note on the record any disregard by counsel of his rulings and, where he deems it necessary, to make special written report thereof to the Commission. "In the event that counsel for the Commission or for any respondent shall be guilty of disrespectful, disorderly, or contumacious language or conduct in connection with any hearing, the Trial Examiner may suspend the proceeding and submit to the Commission his report thereon, together with his recommendations as to whether any rule should be issued to show cause why such counsel should not be suspended or disbarred pursuant to Rule IV or subjected to other appropriate action in respect thereto." The new Rule further provides that a copy of the trial examiner's report shall be furnished to counsel and that the Commission will take disciplinary action only after an opportunity for hearing has been given to such counsel.

The adoption of this Rule raises the question whether a trial examiner or a member of the Commission should possess the power to discipline members of the bar. Under the Federal Trade Commission Act neither the members of the Commission nor the trial examiners are required to be members of the bar, nor are they in any sense of the word to be regarded as judges. While no one should condone an attorney's language or conduct which is disorderly, it is open to serious question whether any layman, or, for that matter, any fellow-member of the bar should be empowered to discipline an attorney for language which the former considers "disrespectful." An attorney is often required to defend the rights of his client with vigor. Such vigor may easily be deemed disrespectful by a prejudiced trial examiner or commissioner. Reference may be made in this connection to the recent opinion of the Circuit Court of Appeals for the Seventh Circuit in the case of *Inland Steel Company v. National Labor Relations Board*, where the conduct of the trial examiner was found to compare most unfavorably with the conduct of counsel.

(Lawyer Service Letter, N. Y. State Bar Assn., Jan. 31, 1940.)