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FEDERAL PROCEDURE

Public Contracts

The exact position in the federal judicial system of the government's numerous contract appeals boards has long been the subject of speculation and controversy.[1] The Supreme Court recently took a major step in defining that position. In *U.S.* v. *Carlo Bianchi and Company*[2] it was held that a government contractor's appeal under the Wunderlich Act[3] from a federal agency's administrative fact finding may not be heard *de novo* in a court of law. It must be accepted as presented by the agency's appeals board.

The plaintiff contracted in 1946 with the Army Engineers to build a 710-foot tunnel. The terms included the standard "disputes" and "changed conditions" clauses.[4] While the specifications called for temporary supports only when necessary for the workers' safety, subsurface conditions encountered were so hazardous that the plaintiff felt completion of the tunnel without permanent steel supports would be impossible. The contracting officer refused any extra compensation under the changed conditions clause for

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1 See, generally, McBride and Wachtel, Government Contracts §§ 6.10-6.250 (1963).

2 373 U.S. 709 (1963).

3 The government's consent to be sued in contract. 41 U.S.C. § 321-322. The Act provides that any department head's decision made final by a government contract clause shall indeed be conclusive unless "fraudulent or capricious or arbitrary or so grossly erroneous as to necessarily imply bad faith, or is not supported by substantial evidence." However, such clauses may not be pleaded if *fraud* is alleged, and clauses making final an administrative decision on questions of *law* are prohibited.

4 The "disputes" clause: ". . .all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal. . .to the head of the department concerned, or his duly authorized representative, [i.e., contract appeals board] whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."
A board decision which is "arbitrary, capricious, fraudulent, or not supported by substantial evidence" is subject to "reversal" by the courts. For *any* claim, a board hearing is a condition—precedent to litigation, since relief may be granted by the board. The "changed conditions" clause authorizes the contracting officer to provide an equitable adjustment for the arising of conditions materially different from those contemplated by the contract originally.

the expenditure. Contractor appealed to the Engineers Appeals Board, and continued meanwhile as required, completing the work with permanent supports. (1948).

The Board considered, in its decision against the plaintiff, a letter acquired by the Board subsequent to the hearing (and unbeknownst to plaintiff) from an Army Engineer to his superior. A New York Mines Bureau expert, said the letter, had stated that the cave-in danger was contractor's fault. The Board, in fact, quoted the letter in its decision, citing its statement that only $9000 was involved—a grossly inaccurate figure, which, like the letter, appeared nowhere in the record. Contractor in the Court of Claims (1954) alleged the decisions were "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or were not supported by substantial evidence", and called the quoted expert. The expert testified in direct contradiction to the alleged statements, his refutations being corroborated by the government's own witnesses.

The government objected to the *de novo* evidence. It argued that on the question of the board decision's freedom from arbitrariness, its support by substantial evidence, etc., the court was restricted to the board's record. The Court of Claims opinion (1959) was that "on consideration of all the evidence, the contracting officer's decision cannot be said to have substantial support," and hence was "not entitled to finality."[5] As for the government's contention, the ruling was that Congressional intent in the Wunderluch Act was otherwise.

The Supreme Court (1963), granting certiorari[6] because of a conflict between the Court of Claims and certain circuits,[7] reversed. It upheld the government's theory that the term "substantial evidence"

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5 144 Ct.Cl. 500, 506; 169 F. Supp. 514, 517 (1959).

6 371 U.S. 939 (1962).

7 The District Courts have concurrent jurisdiction with the Court of Claims over government contract claims under $10,000, 28 U.S.C. § 1346 (a)(2). See Allied Paint, etc., Inc. v. U.S., 309 F. 2d 133 (2d Cir. 1962), and Wells and Wells, Inc. v. U.S., 269 F. 2d 412 (8th Cir., 1959).

> . . .goes to the reasonableness of what the agency did *on the basis of the evidence before it,* for the decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body. (Emphasis in original).

The ruling, as the court points out, is well founded in practical expediency. But it is not one which the court should attempt to explain, for the next step has the peculiar flavor of non sequitur about it: There is, therefore, says the court, "little doubt that the review intended was one confined to the administrative record."

It is plausible that the Wunderlich Act standard, "goes to the reasonableness of what was done on. . .the evidence before it." But the terms equated are not synonymous: It does not follow that court review looks only to the board record, for this logic ignores that very class of cases of which Bianchi's is a fine example: Here, the board's administrative *record* is obviously not the same thing as "the evidence before it." If "the evidence before it" is to be the thing reviewed, it must include not just the record, but the ex-parte communication which was in fact before the board, and on which the finding there was based.

Clearly, to say the one is not to say the other. To quote again, the subject of review is:

> . . .*the evidence before it,* (emphasis original) for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was *not* presented to the decision-making body. (Emphasis supplied).

But what we are concerned with in Bianchi's case is evidence that *was* presented to the decision-making body. To say that a determination whether or not there is fraud or abuse must be limited to the record, is a bit absurd in cases where that fraud or abuse can lie in giving a false appearance to the record. It is even more so when the decision-maker is himself a party. In short, it means there

is no remedy. As Douglas (dissenting) points out, if a citizen is not going to get relief from fraud or arbitrariness in the courts, indeed where *will* he get it?[8]

The court goes on to cite some practical grounds for their position. The first, at least, is eminently practical: The new rule will eliminate the "needless duplication of evidentiary hearings and a heavy additional burden in time and expense required to bring litigation to an end," the Jarndyce-like record of the present case from '46 to '63 being the most obvious example.

Second, the substantial-evidence test will, they say, as the Legislature intended, "remedy the practice in many departments of failing to acquaint the contractor with the evidence in support of the government's position."

Tortuous logic indeed, if this non-acquaintance is to be discouraged by a decision so expressly condoning it.

And quoting Congress in favor of limitation to "the evidence before it"—

> It would not be possible to justify the retention of the finality clause in government contracts unless the hearing procedures were conducted in such a way as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal.[9]

But obviously the standard adopted in *Bianchi* will do nothing of the sort. Its effect indeed will be just the opposite—and the instant case is again exemplary. The irony in that quotation must have added to the plaintiff's injury an insult that was excruciating. Obviously the Congressional reasoning quoted was advanced in favor of the "substantial evidence" requirement as a minimum—that is, as opposed to *no* requirement.[10] The court treats it as justifying a *limitation to* "substantial evidence" as a maximum, as supporting the finality of substantial evidence.

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[8] On the constitutional point, see Ex Parte Young, 209 U.S. 123, 147 (1908).

[9] H. R. Rep. No. 1380, 83d Cong., 2d Sess. 5 (1954).

[10] See, Hearings before the House Judiciary Committee on H. R. 1839 *et al.*, 83rd Cong., 1st Sess. 79-80, section quoted in the instant case, 83 S.Ct. at 1414.

This faux pas shows all too clearly what the majority have done: they have gotten dangerously away from the facts of the case at hand. This ineluctable conclusion is reinforced by the fact that the whole matter of the Engineer-expert letter is noticed only in the dissent. The majority blithely ignores it. Current talk in Washington has run more to the impact than to the intrinsic wisdom of the holding. And this, perhaps, is as it should be, for it is in *effect* that the decision is salient. The effect of what judges do lives after them, and we must live with it. Regardless of the soundness or unsoundness of the decision's logic, it alters drastically the status of the several departmental and agency appeals boards.[11]

This necessitates a word on the nature of these boards. When the appeals boards "represent" the busy Secretary in his claims-reviewing function, they represent his fairest self—his conscience, just as the chancellors of old were conscience to the king. Hence, the boards, though of varying "judiciality" are nearly all composed of lawyers, and in the more sophisticated boards this "judging" may be that lawyer's only job. But the fact remains that the board is the representative of a party.

The court reasons in *Bianchi* that in normal practice, after all, an appellate judge looks only at the record, and it treats the Court of Claims as unqualifiedly appellate. So by analogizing them to inferior courts, the Court has raised to the status of a judicial forum, these deciding bodies which are representatives—albeit the conscientious representatives—of a party to the litigation.

Douglas writes an eloquent dissent, pointing up the majority's meandering tendencies. He cannot avoid the obstinately patent facts on record. Reminding the majority that the statutory wording is "unless. . .fraudulent *or* capricious *or* arbitrary *or* so grossly erroneous . . .*or* not

[11] The party which seems to have drawn the broadest inferences from the case so far is the Government. See the memorandum filed by Department of Justice in Stein Bros. Mfg. Co. v. U.S., Ct.Cl. #389-59. Stein Bros. provided a surprise for the Government, however. At least so far as the Court of Claims is concerned, it limits the Bianchi exclusion to cases where timely objection is raised by the U.S.

supported by substantial evidence" (emphasis added), he declares:

> I think the decision was "capricious or arbitrary" because evidence was considered by the Appeals Board in making its decision which the claimant did not see and which he had no opportunity to refute.

In addition, it seems to the dissenters that there is something fundamentally wrong when litigation-preventive negotiation is given the dignity of proceedings before an impartial tribunal. Also, they find *Bianchi's* implications disturbing in view of the actual character of these appeals boards. Douglas quotes Judge Madden's Court of Claims opinion:

> The so-called "administrative record" is in many cases a mythical entity. There is no statutory provision for. . . making them. . .no power to put witnesses under oath. . . There may or may not be a transcript. . .[12]

One fact emerges clearly here: It is obvious that Madden and Douglas were thinking of one sort of administrative hearing, and the majority of another. Neither, of course, is accurate—and it is this very failure to distinguish which may be the real fault of the decision: The boards hereby affected range in "judiciality" from the austerely disassociated ASBCA (Armed Services Board of Contract Appeals), where a transcript is *d'obliggio* and "ex-parte procedure" is anathema, to boards far more informal than the one involved in *Bianchi.* The board members may have no other administrative function, or they may practice as government procurement attorneys. Of the diverse boards coming under *Bianchi's* mandate three or four have decisions reported fully, formally and regularly (ASBCA, Interior's, and NASA's do), while others are picked up sporadically by loose-leaf services, or not at all. *Stare decisis* may count for all or nothing. They may come under the

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[12] Volentine and Litton v. U.S., 136 Ct.Cl. 638, 641-42; 145 F. Supp. 952, 954, followed in Bianchi v. U.S., *supra*, note 5 (1956).

Administrative Procedure Act, or may, like the ASBCA and Engineers Board, be specifically excluded.[13]

The point should be clear. Even under the court's new ruling, the abuses here would probably never happen before the boards that sit at the Pentagon or Interior—but they are only too likely to recur in many agencies. In short, it seems that the boards are far from ready for this blanket grant of power. Until Congress sees to it that some established measure of uniform judiciality in board proceedings is guaranteed, we can ill afford to have their status exalted by such a ruling.

> Perhaps not everyone agrees with Douglas that—
> When the agency making the decision relies on evidence that the claimant has no chance to refute, the hearing becomes infected with a procedure that lacks the fundamental fairness the citizen expects from his government.

Nevertheless, it seems too clear for argument that what happened to plaintiff Bianchi here should not happen again if it can be expediently avoided, for it has the stigmata of manifest injustice upon it.

It is upon expediency that the majority has justified its decision. In view of the chronic plethora of legal paperwork in Washington, this is a consideration of near-overwhelming import. Moreover, the claimant himself will be spared the expense of lengthy court hearings with witness presentation. But contrapose to this the salutary reasoning that "no man ought to be judge in his own cause",[14] and that if he is, his findings at least should not be so sacrosanct as not to be reviewable. Anglo-Saxon though this attitude may be, it is as well founded in practicality as in traditions.

The merits are hopelessly debatable, but the fact that for better or worse there has been a substantial increase of power on the part of the boards is undeniable.

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[13] U.S.C. §§ 1004, 1006. See especially thereunder, A.P.A. § 7, making mandatory the right of cross examination. Douglas' comment on this express omission: "We are dealing, in other words, with subnormal administrative procedures."

[14] Bonham's Case, 8 Co., 114a, 118a (1610). It seems that the principle may be considerably older, however. See *Mirror of Justices* (c. 1287) Selden Society Republications Vol. 7, (London, 1893) 44, 45.