

into the mouths of witnesses which they had not said; intimated that statements had been made to him personally out of court in respect of which no proof was offered; pretended to understand that a witness had said something which he had not; bullied and argued with the witnesses; and committed other offenses. This Court properly declared that his conduct called for stern rebuke by the trial judge, for repressive measures, and "perhaps, if these were not successful, for the granting of a mistrial."

A prosecutor must draw a careful line. On the one hand, he should be fair; he should not seek to arouse passion or engender prejudice. On the other hand, earnestness or even a stirring eloquence cannot convict him of hitting foul blows.⁴

MARSHALL FIELD & CO. v. NATIONAL LABOR RELATIONS BOARD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 453. Argued February 3, 1943.—Decided March 1, 1943.

1. Benefits received under the Illinois Unemployment Compensation Act were not "earnings" within the meaning of an order of the National Labor Relations Board requiring an employer to pay to certain discharged employees sums equal to what they normally would have earned, less their "net earnings," during the prescribed period. P. 255.
2. Since it does not appear from the record that the question of the National Labor Relations Board's authority to award back pay

⁴"To shear him [the prosecutor] of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials, except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted." *Di Carlo v. United States*, 6 F. 2d 364, 368.

without deduction of benefits received under the Illinois Unemployment Compensation Act was, at any stage of the proceedings before the Board, presented to the Board or to any member or agent thereof, or that there were any "extraordinary circumstances" which would excuse such failure, its consideration on review was precluded by § 10 (e) of the National Labor Relations Act. P. 255.

3. Assuming that the requirements of § 10 (e) may with the consent of the court be waived, the reservation in the consent decree of "jurisdiction" to consider the question in this case was not a waiver, but left the matter to be determined according to law. P. 256.

129 F. 2d 169, affirmed.

CERTIORARI, 317 U. S. 617, to review a decree ordering enforcement of an order of the National Labor Relations Board.

Mr. Ralph E. Bowers, with whom *Mr. Preston B. Kavanaugh* was on the brief, for petitioner.

Mr. Robert W. Watts, with whom *Solicitor General Fahy* and *Messrs. Valentine Brookes* and *Ernest A. Gross*, and *Miss Ruth Weyand* were on the brief, for the respondent.

PER CURIAM.

In this case the Labor Board ordered petitioner to compensate certain of its employees for loss of pay suffered as a result of their discriminatory discharge in violation of the National Labor Relations Act. Paragraph 2 (b) of the order directed that petitioner "make whole" the employees by payment to them of a sum "equal to that which they would normally have earned as wages" during the specified period, less their "net earnings" during the period (34 N. L. R. B. 1, 21). On consent of the parties, the Circuit Court of Appeals for the Seventh Circuit enforced the other provisions of the Board's order, and reserved "jurisdiction" to determine whether Paragraph 2 (b) permitted petitioner to deduct benefits received by the em-

ployees under the Illinois Unemployment Compensation Act, and, if not, whether to that extent the order was within the power of the Board. On consideration of the questions reserved, the court construed the order as not permitting such a deduction, and held that so construed it was within the Board's authority. 129 F. 2d 169. An appropriate enforcement decree was entered, and we granted certiorari. 317 U. S. 617.

We agree with the court below that the benefits received under the state compensation act were plainly not "earnings" which, under the terms of the Board's order, could be deducted from the back pay awarded. And upon examination of the record we think the Board's order should be enforced without considering the question whether such a provision is within the Board's authority.

Section 10 (e) of the Act, 29 U. S. C. § 160 (e), provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." We do not find that, at any stage of the proceedings before the Board, the objection now urged as to the Board's lack of power was presented to it or to any member or agent of the Board, or that there are any "extraordinary circumstances" which would excuse such failure.

Paragraph 2 (b) of the Board's order is in substance the recommendation of the intermediate report of the trial examiner. Yet petitioner's only objection to this part of the examiner's report was that the examiner had erred "in making each and every recommendation." Such a general objection did not apprise the Board that petitioner intended to press the question now presented, and may well account for the Board's failure to consider this question in its decision and to make findings with respect to it.

The present case gives emphasis to the salutary policy adopted by § 10 (e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order. In objecting to Paragraph 2 (b) for its want of support in the Board's findings, petitioner contends that the Illinois unemployment compensation fund is in substance an unemployment insurance fund built up wholly from tax contributions by employers; that the benefits received from the fund by the employees cannot under state law be reclaimed or refunded; and that the eligibility of these employees for future benefits from the fund has not been impaired because of the benefits already paid to them. Findings with respect to these contentions are an appropriate if not indispensable basis for judicial review of the question sought to be raised. We think § 10 (e) makes its presentation to the Board a prerequisite to judicial review.

The reservation in the consent decree of "jurisdiction" to consider this objection was not a waiver by the Board or the court of conformity to the requirements of § 10 (e). Assuming that such a waiver might be made with the assent of the court, we cannot read in the consent decree anything more than a reservation of the court's jurisdiction to decide the question according to law.

For the reason that the record does not show compliance with § 10 (e) with respect to the question raised as to the Board's authority, the decree is

Affirmed.

MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.