waive his right to be presently compensated according to the standards set by the act,[20] he should likewise be unable to waive his back pay. Furthermore, subtle forms of coercion difficult to prove[21] may be used by the employer. Even if the employer is financially unable immediately to pay the back wages due, waiver of back pay should not be allowed because the administrator will agree to lenient installment payments in the consent judgment,[22] or the courts, upon proof of financial incapacity, will arrange amicable settlements.[23]

Procedure—Federal Rules of Civil Procedure—Applicability to Enforcement of Administrative Subpoena—[Federal].—The National Labor Relations Board applied to a federal district court for an order requiring the respondent corporation to obey subpoenas duces tecum issued by the board.[1] The company, alleging that the Federal Rules of Civil Procedure govern these proceedings, moved to dismiss for lack of jurisdiction because no complaint had been filed nor summons issued as required by the rules.[2] *Held*, inter alia, that the Federal Rules are inapplicable.[3] *NLRB v. Goodyear Tire & Rubber Co.*[4]

Proceedings to enforce administrative subpoenas are not specifically excepted from the operation of the Federal Rules by Rule 81. Hence, an inference may be drawn that they are within the scope of the rules as "suits of a civil nature . . . . cognizable as cases at law or in equity" under Rule 1.

It may be argued, however, that the enabling act, which empowers the Supreme Court to prescribe rules for "civil actions at law"[5] as well as for "suits in equity,"[6] does not authorize the Court to dictate the practice in these statutory proceedings. The

[20] Cf. Emerson v. Mary Lincoln Candies, Inc., 173 Misc. 531, 17 N.Y.S. (2d) 851 (S. Ct. 1940).

[21] The danger of the widespread use of "kickback" methods has been recognized by the Federal Government (46 Stat. 1494 (1931), as amended by 49 Stat. 1011 (1935), 40 U.S.C.A. § 276(a) (Supp. 1940)) and by New York (N.Y. Cons. Laws (McKinney, 1938) c. 39, § 962). See also Fleming v. North Georgia Mfg. Co., 33 F. Supp. 1005, 1006 (Ga. 1940); Wage & Hour Rel. No. R-99 (Nov. 21, 1938); 2 C.C.H. Lab. Law Serv. ¶ 33,119 (1940); 2 C.C.H. Lab. Law Serv. ¶ 33,253 (1940).

[22] Cf. principal case. See note 16 supra.

[23] Fleming v. Phipps, 35 F. Supp. 627 (Md. 1940); Fleming v. North Georgia Mfg. Co., 33 F. Supp. 1005 (Ga. 1940).

[1] 49 Stat. 456 (1935), 29 U.S.C.A. § 161(2) (Supp. 1940).

[2] Federal Rules 3, 4.

[3] In general see Applicability of the Federal Rules to Enforcement of Administrative Subpoenas, 2 Fed. Rules Serv. 1.511 (1940).

[4] 7 Lab. Rel. Rep. 363 (D.C. Ohio 1940). In issuing the enforcement order the court held also that the evidence demanded relates to the matter under investigation before the board. Cf. Cudahy Packing Co. v. NLRB, 34 F. Supp. 53 (Kan. 1940), aff'd 3 C.C.H. Lab. Law Serv. ¶ 60,242 (C.C.A. 10th 1941); SEC v. Mallory (D.D.C. March 16, 1939), reported in Pike, Cases on New Federal and Code Procedure 31–32 (1939).

[5] 48 Stat. 1064 (1934), 28 U.S.C.A. § 723(b) (Supp. 1940).

[6] 48 Stat. 1064 (1934), 28 U.S.C.A. § 723(c) (Supp. 1940).

enforcement procedure customarily followed involves an application by the administrative agency to a federal court, issuance by the court of an order to show cause, the filing of an answer by the person subpoenaed, and a decision by the court whether to issue an order requiring obedience to the subpoena. A refusal to obey such an order subjects the person subpoenaed to the court's contempt powers.[7] This procedure clearly has none of the characteristics of a "civil action at law"; rather it follows forms customary in equity.[8] But in *ICC v. Baird*,[9] the Supreme Court stated that a proceeding to enforce an ICC subpoena was not a "suit in equity." Thus it may be urged that the instant proceeding does not fall within the scope of Federal Rule 1 as a suit of a civil nature cognizable as a case at law or in equity.[10] A supporting analogy is found in several state codes which distinguish "civil actions" from "special proceedings" to which the codes of civil procedure are inapplicable;[11] "special proceedings" are those actions which were not cognizable as suits at law or in equity before the adoption of the codes.[12]

But the contention that the enabling act does not authorize the Supreme Court to prescribe rules for any proceedings other than "civil actions at law" or "suits in equity" implies that the specific exceptions made in Rule 81(a)(1–7)[13] were unnecessary because, in any event, the Court had no power to govern practice in such proceedings. It may be argued, however, that the Supreme Court has in the past broadly construed the terms of the enabling act to empower it to prescribe rules for all "suits of a civil nature," meaning *all* civil actions as contrasted with criminal proceedings.[14] No distinction is made in the Federal Rules between "civil actions" and "special proceedings";[15] therefore, under this view, it was necessary in the rules to make special exceptions for proceedings to which the rules were inapplicable. But proceedings to enforce admin-

[7] National Labor Relations Act § 11(2), 49 Stat. 456 (1935), 29 U.S.C.A. § 161(2) (Supp. 1940).

[8] See Robertson v. Railroad Labor Board, 268 U.S. 619, 621 (1925).

[9] 194 U.S. 25, 38 (1904).

[10] 1 Moore and Friedman, Federal Practice 49 (1938).

[11] Cal. Code Civ. Proc. (Deering, 1937) §§ 22, 23; N.Y. Civ. Prac. Ann. (Gilbert-Bliss, 1926) §§ 4, 5.

[12] Boggs v. North American Bond & Mortgage Co., 20 Cal. App. (2d) 316, 66 P. (2d) 1253 (1937); In re Central Irrigation District, 117 Cal. 382, 49 Pac. 354 (1897); State v. Steeley, 21 Ohio App. 396, 153 N.E. 285 (1926).

[13] E.g., proceedings in admiralty, bankruptcy, copyright, admission to citizenship, habeas corpus, arbitration of railway labor disputes.

[14] 1 Moore and Friedman, Federal Practice 40, 48 (1938). The term "suit of a civil nature," which appears in § 24 of the Judicial Code (Rev. Stat. § 563 (1875), 28 U.S.C.A. § 41(1) (1927)) and in the removal statute (18 Stat. 470 (1875), 28 U.S.C.A. § 71 (1927)), has been broadly construed. Milwaukee County v. White, 296 U.S. 268 (1935) ("suit of a civil nature" contrasted with criminal action); Boom Co. v. Patterson, 98 U.S. 403 (1878); In re Chicago, M., St. P. & P.R. Co., 50 F. (2d) 430 (D.C. Minn. 1931).

[15] Most courts draw no such distinction in proceedings against the United States under the Tucker Act (24 Stat. 505 (1887), 28 U.S.C.A. § 41(20) (1927)): Sherwood v. United States, 112 F. (2d) 587 (C.C.A. 2d 1940); Boerner v. United States, 26 F. Supp. 769 (N.Y. 1939). Contra: Lynn v. United States, 110 F. (2d) 586 (C.C.A. 5th 1940). But Federal Rules 4(d)(4) and 12(a) refer specifically to procedure in actions against the United States.

istrative subpoenas, which have been referred to as "civil actions"[16] and "direct civil proceedings,"[17] were not so excepted.

Even conceding, however, that subpoena-enforcement proceedings are suits of a civil nature as defined in Rule 1, a reasonable interpretation of the Federal Rules does not require their application to proceedings to enforce administrative subpoenas. The Advisory Committee's note to Rule 45 states: "This rule applies to subpoenas .... issued by the district courts. It does not apply to the enforcement of subpoenas issued by administrative officers .... pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes [listing nineteen statutes including Section 11(2) of the National Labor Relations Act]." The respondent contended in the instant case that the note refers only to Rule 45 but does not relate to the applicability of the Federal Rules, in general, to these proceedings.[18] But it may be argued that the note, particularly the third sentence therein, is pointless if it is not interpreted as intending to exclude these proceedings from the operation of all the rules.[19]

Furthermore, Rule 81(a)(5), which excepts Sections 9[20] and 10[21] of the National Labor Relations Act from the procedure prescribed in the rules, provides that "in respects not covered by those statutes, the practice .... shall conform to these rules *so far as applicable*."[22] It may be argued that the procedure prescribed by the Federal Rules is not conducive to the end sought in the judicial enforcement of administrative subpoenas—to secure the most rapid and effective disposal of the matter before the board consistent with the least possible inconvenience to the private person.[23] It seems apparent that the application of the Federal Rules to the instant proceeding would afford additional opportunity to delay the court's decision whether an enforcing order should issue. The filing of complaint,[24] the service of summons,[25] the twenty days

[16] Robertson v. Railway Labor Board, 268 U.S. 619, 621 (1925).

[17] ICC v. Brimson, 154 U.S. 447, 470 (1894).

[18] Brief of Goodyear Tire & Rubber Co., at 21.

[19] The fact that the note to Rule 45 did not appear before the final draft of the Federal Rules may be significant. Cf. preliminary draft, Rules of Civil Procedure (May 1936) note to Rule 51 (subpoenas).

[20] 49 Stat. 453 (1935), 29 U.S.C.A. § 159 (Supp. 1940).

[21] 49 Stat. 454 (1935), 29 U.S.C.A. § 160(e), (f), (g)(Supp. 1940).

[22] Italics added.

[23] Miller, A Judge Looks at Judicial Review of Administrative Determinations, 26 A.B.A.J. 5, 7 (1940).

[24] Federal Rule 3. It may be argued that, if the Federal Rules apply to these proceedings at all, Rule 7(b)(1) should govern. It states that "an *application* to the court for an *order* shall be by motion," language which is similar to that of § 11(2) of the National Labor Relations Act (49 Stat. 456 (1935), 29 U.S.C.A. § 161 (2)(Supp. 1940)), providing that "any district court .... upon *application* by the Board shall have jurisdiction to issue an *order*." See NLRB v. Cudahy Packing Co., 34 F. Supp. 53, 60 (Kan. 1940). On the other hand, it may be urged that Rule 7(b)(1) applies only to motions made to the court after the court has obtained jurisdiction through compliance with Rules 3 and 4. This view is supported by the fact that "order" in Rule 7(b)(1) includes non-appealable interlocutory orders of the court while the "order" sought by the board is "an order from which an appeal lies." Rule 54(a) (defining "judgment"); ICC v. Brimson, 154 U.S. 447 (1894).

[25] Federal Rule 4.

allowed within which to answer,[26] the privilege of amending pleadings,[27] the procrastinating possibilities of the deposition-discovery procedure,[28] the examination of witnesses,[29] the court's entry of findings of fact and conclusions of law,[30] and the motion to amend such findings[31] provide avenues for dilatory tactics by counsel. Nor does the provision for summary judgment[32] appear to balance this disadvantage.

Refusal to apply the Federal Rules to the instant proceeding does not deprive the respondent of an adequate hearing upon the issue before the court. Under the enforcement procedure followed prior to[33] the promulgation of the Federal Rules, the respondent could file pleadings in answer to the court's order to show cause, move for extensions of time, request oral argument, and appeal.[34] In fact, the delay implicit in resort to the courts for enforcement of administrative subpoenas[35] has led to the imposition of fines for refusal to comply,[36] severe penalties for not keeping records available to the regulating agency,[37] and the suggestion that the administrative tribunals be granted contempt powers with which to enforce their own subpoenas.[38] Nevertheless, despite the possible delay under present practice, it must be noted that the procedure is, in large degree, summary within the discretion of the court;[39] it is not crystallized by formal rules of practice.

[26] Federal Rule 12(a). Compare this rule with the five to ten days allowed to answer an order to show cause why the subpoena should not be enforced. The respondent who has failed to comply with the NLRB subpoena cannot complain that he is injured by the shorter period. He has had notice that the subpoena was issued prior to the court's service of the order to show cause, and, indeed, his refusal to comply should imply an adequate defense to an application to the court for enforcement.

[27] Federal Rule 15. [28] Federal Rules 26–37. [29] Federal Rule 43.

[30] Federal Rule 52(a). Findings of fact and conclusions of law have apparently never been entered by courts enforcing administrative subpoenas in cases involving the NLRB, SEC, FTC, and Wage and Hour Division. See the NLRB's Opposition to Entry of Findings of Fact and Conclusions of the Law (in the instant litigation).

[31] Federal Rule 52(b).

[32] Federal Rule 56. This rule provides that either party to a civil action, which is already under the court's jurisdiction, may move for judgment at any time after the pleadings are filed.

[33] Reply Memorandum of the NLRB, at 2.

[34] Administrative Sanctions—Power of Federal Commissions to Compel Testimony and the Production of Evidence, 51 Harv. L. Rev. 312, 316 (1937).

[35] An extreme case is the seven-year period between the issuance of an FTC subpoena in an investigation of bread prices and the court order compelling witnesses to testify. FTC v. Millers' Nat'l Federation, 47 F. (2d) 428 (App. D.C. 1931).

[36] E.g., Interstate Commerce Commission, 27 Stat. 443 (1893), 49 U.S.C.A. § 46 (1929); Federal Trade Commission, 38 Stat. 723 (1914), 15 U.S.C.A. § 50 (1927); Securities and Exchange Commission, 48 Stat. 900 (1934), 15 U.S.C.A. § 78u(c) (Supp. 1940).

[37] Commodity Exchange Act, 42 Stat. 998 (1922), 7 U.S.C.A., §§ 1–17 (1939); Securities Act of 1933; 48 Stat. 77, 84, 87 (1933), 15 U.S.C.A. § 77(e)(l)(x) (Supp. 1940); Fair Labor Standards Acts, 52 Stat. 1066, 1068–69 (1938), 29 U.S.C.A. §§ 211, 215, 216 (Supp. 1940).

[38] Albertsworth, Administrative Contempt Powers: A Problem in Technique, 25 A.B.A.J. 954 (1939).

[39] SEC v. Mallory (D.D.C. March 16, 1939), reported in Pike, Cases on New Federal and Code Procedure 31–32 (1939).