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Labor Law - Collective Bargaining - Jurisdiction of District Court to Vacate an "Unlawful" Order of the NLRB

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LABOR LAW—COLLECTIVE BARGAINING—JURISDICTION OF DISTRICT COURT TO VACATE AN “UNLAWFUL” ORDER OF THE NLRB—Respondent, representing a labor organization, petitioned the National Labor Relations Board for certification as the exclusive bargaining agent of a group of professional employees pursuant to section 9 of the amended National Labor Relations Act.¹ After a hearing the Board ordered that nine non-professional employees be included in the bargaining unit.² Section 9(b)(1)³ expressly prohibits the inclusion of non-professional employees in a professional unit unless a majority of the professional members vote for inclusion in such unit. The Board refused to take a vote among the professional employees, and proceeded directly to order an election to determine if respondent’s organization was the preferred bargaining agent. Respondent’s organization was elected, and the Board gave its certification. Respondent then brought this suit in the district court, asking that the Board’s certification be set aside because of the inclusion of the professional employees in the bargaining unit without their consent. The members of the Board moved to dismiss for want of jurisdiction. The district court denied the motion,⁴ and this action was affirmed by the court of appeals.⁵ On certiorari to the United States Supreme Court, *held*, affirmed, two justices dissenting. A federal district court has jurisdiction of an original suit to vacate an order of the NLRB made in excess of its delegated powers and contrary to a specific prohibition in the act. *Leedom v. Kyne*, 358 U.S. 184 (1958).

A party aggrieved by an order of the Board has two possible courses of action open to him. He may seek review under section 10(f) of the act by filing a petition in a United States court of appeals, or he may, in some types of cases, obtain review by an independent suit in a United States district court.⁶ It is well settled that orders of the Board under

¹ 61 Stat. 143 (1947), 29 U.S.C. (1953) §159.

² Principal case at 186.

³ Section 9(b) provides in part: “. . . That the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such employees vote for inclusion in such unit. . . .” 61 Stat. 143 (1947), 29 U.S.C. (1953) §159(b).

⁴ *Kyne v. Leedom*, (D.C. D.C. 1956) 148 F. Supp. 597.

⁵ *Leedom v. Kyne*, (D.C. Cir. 1957) 249 F. (2d) 490.

⁶ See 158 A.L.R. 1339 (1945) for an exhaustive review of the authorities prior to 1946 with respect to these two modes of review.

section 9(b) of the act certifying collective bargaining agents may not be reviewed under section 10(f).⁷ A fortiori, review of orders of the Board which are preliminary steps to the certification of a bargaining representative may not be obtained under section 10(f).⁸ This result has been explained on the ground that neither certifications nor orders preliminary to certification are final orders.⁹ A more thorough explanation would be that Congress intended to subordinate the interests of aggrieved parties in piecemeal review to the higher value of preventing delay in the collective bargaining process.¹⁰ On the other hand, it is also well settled that the validity of certifications or preliminary rulings may be reviewed as an incident of an appeal under section 10(f) from an order of the Board requiring a party to cease and desist from engaging in an "unfair labor practice."¹¹

The question whether review of NLRB certification orders or preliminary rulings may be had in an independent suit in a federal district court had not been authoritatively examined by the Supreme Court prior to the principal case.¹² Some lower courts have answered this question in the negative on the ground that the provisions for review in section 10(f) are complete and exclusive,¹³ while others have upheld the jurisdiction of the district court.¹⁴ The impact of the principal case on these lower court decisions is open to debate. Although the relief asked by the plaintiff in the instant case was that the district court set aside the order of the Board, this question concerning district court jurisdiction usually arises in the setting where an injunction is sought.¹⁵ It would seem, however, that the difference in the relief asked in these cases reflects only the stage

⁷ *AFL v. NLRB*, 308 U.S. 401 (1940). See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 at 151 (1941).

⁸ Cf. *NLRB v. International Brotherhood of Electrical Workers*, 308 U.S. 413 (1940).

⁹ *United Employees Assn. v. NLRB*, (3d Cir. 1938) 96 F. (2d) 875 at 876. See also *Ames Baldwin Wyoming Co. v. NLRB*, (4th Cir. 1934) 73 F. (2d) 489.

¹⁰ See *Madden v. Brotherhood and Union of Transit Employees*, (4th Cir. 1945) 147 F. (2d) 439 at 443-444; *New Bedford Loomfixers' Union v. Alpert*, (D.C. Mass. 1953) 110 F. Supp. 723 at 726.

¹¹ *Pittsburgh Plate Glass Co. v. NLRB*, note 7 supra; *NLRB v. Whittier Mills Co.*, (5th Cir. 1940) 111 F. (2d) 474.

¹² See *Inland Empire Council v. Millis*, 325 U.S. 697 at 699 (1945); *AFL v. NLRB*, note 7 supra, at 412. *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943), which was cited by both the majority and dissenting opinions in the principal case, involved judicial review of a National Mediation Board order of certification under the Railway Labor Act.

¹³ E.g., *Millis v. Inland Empire Council*, (D.C. Cir. 1944) 144 F. (2d) 539, *affd.* on other grounds, 325 U.S. 697 (1945); *Zimmer-Thomson Corp. v. NLRB*, (S.D. N.Y. 1945) 60 F. Supp. 84.

¹⁴ E.g., *Farmer v. United Electrical, Radio & Machine Workers*, (D.C. Cir. 1953) 211 F. (2d) 36, *cert. den.* 347 U.S. 943 (1954); *Klein v. Herrick*, (S.D. N.Y. 1941) 41 F. Supp. 417; *A.F.L. v. Madden*, (D.C. D.C. 1940) 33 F. Supp. 943.

¹⁵ See cases cited in notes 13 and 14 supra.

which has been reached by the Board in supervising the collective bargaining process, and does not introduce any materially different considerations in regard to the question of the propriety of district court jurisdiction.¹⁶ In this light, it is reasonably to be anticipated that the principal case will be interpreted to allow district court review only of such orders of the Board as are "unlawful"¹⁷ and such as work "irreparable injury" to the plaintiff.¹⁸ The crucial question left open, however, is what substantive content should be attributed to these standards. The term "unlawful" may be given a meaning broad enough to include all actions of the Board in excess of its delegated powers. Yet all the limitations imposed on review in the circuit courts under section 10(f), as well as the underlying reasons for them, would be rendered ineffectual if an aggrieved party need only file its petition in a district court to avoid them.¹⁹ On the other hand, the term "unlawful" may be taken to include actions by the Board in direct contravention of express statutory prohibition. Indeed, the facts of the principal case would directly support this construction.^{19a} It would seem that the term "unlawful" could properly be extended to include orders of the Board which are otherwise patently in excess of its delegated powers.²⁰ Although the "unlawful" action of the Board, as thus defined, may by its very nature give rise to an "irreparable injury," no matter how strictly the latter term is construed, it should not be supposed that this will always be so. It is no doubt implicit in the concept of "irreparable

¹⁶ Thus, for example, if the bargaining process had advanced to a point where the Board was holding a hearing on an alleged unfair labor practice by the wrongfully certified labor union, the same questions as to the propriety of district court jurisdiction would have arisen as were involved in the principal case.

¹⁷ Limiting review in the district court to cases involving "unlawful" Board action has been suggested by the Supreme Court in *Inland Empire District Council v. Millis*, 325 U.S. 697 at 700 (1945); *AFL v. NLRB*, note 7 *supra*. This limitation has been applied in a number of lower court decisions. See, e.g., *De Pratter v. Farmer*, (D.C. Cir. 1956) 232 F. (2d) 74; *Farmer v. United Electrical, Radio & Machine Workers*, note 14 *supra*.

¹⁸ See, e.g., *Pratt v. Stout*, (8th Cir. 1936) 85 F. (2d) 172; *AFL v. Madden*, note 14 *supra*; *Precision Casting Co. v. Boland*, (W.D. N.Y. 1936) 13 F. Supp. 877.

¹⁹ While the Taft-Hartley Act was in its committee stage the House Bill, which made provision for review of certifications in the circuit courts, was prevailed over by the Senate Bill, which omitted any such provision. H. Rep. 510, 80th Cong., 1st sess., pp. 56-57 (1947). The reason why the Senate Bill prevailed is undoubtedly because allowing review of certifications would bring intolerable delays which could only result in industrial strife. See *Minority Report*, H. Rep. 245, 80th Cong., 1st sess., p. 94 (1947).

^{19a} See *Connecticut Light & Power Co. v. Leedom*, (D.C. D.C. 1959) 27 U.S. LAW WEEK 2517, where the district court held in an injunction action by the employer that it had no jurisdiction to review the NLRB's determination in representation proceedings that certain workers were not supervisors. One of the grounds upon which the court distinguished the principal case was that there the "unlawful" action of the Board was in contravention of an express statutory prohibition, while in the case under consideration the alleged unlawful action merely involved a matter of statutory interpretation.

²⁰ As, for example, orders of the Board which constitute a departure from due process of law. *International Brotherhood v. NLRB*, (E.D. Mich. 1940) 41 F. Supp. 57. See also *Inland Empire District Council v. Millis*, note 17 *supra*.

injury" that the plaintiff is unable to obtain review under section 10.²¹ This being so, the argument advanced by the principal case is appealing that a party aggrieved by the patently unlawful actions of the Board should not be left without a remedy.²² But it hardly seems possible that the unavailability of review in the circuit courts, of itself, justifies the inference, tacitly drawn by the Court in the principal case, that Congress intended that the district courts would retain jurisdiction. Such reasoning ignores the alternative conclusion that it may have been the intention of Congress to withhold the right to review by refusing to make provision for it. The considerations which led Congress to omit from section 10 provision for review of certifications would clearly indicate that the major objectives of the NLRA were thought to be best served by avoiding as much as possible litigious interference with the collective bargaining process.²³ It would seem, therefore, that the proper inference to be drawn solely from the unavailability of review in the circuit courts is not that Congress intended review in the district courts, but rather that Congress intended that the rights which it created should remain inchoate until a later stage in the bargaining process. On the other hand, if "irreparable injury" means, in addition to the unavailability of review under section 10, that the aggrieved party must be deprived of a substantial or crucial right,²⁴ then it would seem that the undoubted policy of preventing delay becomes more obscured as the right of which the aggrieved party is deprived increases in substantiality. Adopting this stricter construction of "irreparable injury," it could be argued more convincingly that Congress in enacting the act remained silent in a belief that the district courts would retain jurisdiction. But notwithstanding the foregoing analysis, the Supreme Court seems to have adopted the view that "irreparable injury" means little more than the unavailability of review when there has been a patently unlawful deprivation of a right, whether substantial or unsubstantial.

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²¹ See, e.g., *Heller Bros. Co. v. Lind*, (D.C. Cir. 1936) 86 F. (2d) 862, cert. den. 300 U.S. 672 (1937). It is probably true that an employer could seldom be "irreparably injured," since he could merely refuse to bargain and thereby elicit a cease and desist order which is reviewable under §10. An uncertified union clearly has no opportunity to obtain review under §10, since it may not be guilty of an "unfair labor practice." A certified union is probably in the same position for the reason that, even if it were to refuse to bargain, it is unlikely that an employer will petition the Board to make a finding of an "unfair labor practice," since it is presumptively to the employer's advantage to deal with nonrepresented employees individually.

²² It has been suggested that the majority opinion in the principal case opens the door to district court review upon the allegation that the Board's action is based upon a "misinterpretation" of the statute. Principal case, dissenting opinion at 194, 195. It would seem, however, that the description as a "misinterpretation" of a refusal to heed an express statutory prohibition is exceedingly charitable.

²³ See note 19 supra.

²⁴ See *Farmer v. United Electrical, Radio & Machine Workers*, note 14 supra.