

## **APPELLATE REVIEW/ENFORCEMENT**

### **I. Statutory Authority Under The NLRA.**

Section 10(c) of the National Labor Relations Acts, as amended, provides as follows with respect to Board Orders:

“(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state the findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . .”

If the party or parties against whom a Board order has been issued refuse(s) to obey, the Board has no inherent authority to enforce the order. To secure enforcement of its order, the Board must apply to an appropriate United States Court of Appeals pursuant to Section 10(e) of the Act:

“(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. . .”

Until the order is enforced by the Appeals Court, the respondent does not incur any penalty for failing or refusing to comply with the order of the Board.

Section 10(f) provides that any person aggrieved by a final order of the Board has the right to petition the appropriate Court of Appeals for a review of such order:

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.”

## **II. NLRB Rulings Subject To Review And Enforcement.**

The only final orders of the Board within the meaning of Sections 10(e) and (f) are those entered by the Board in unfair labor practice cases. Thus, decisions of the General Counsel not to issue an unfair labor practice complaint; jurisdictional dispute awards under Section 10(k); denial by the Board of a request for a subpoena; etc. are not final orders subject to review. The United States Supreme Court in **Vaca v. Sipes, 386 U.S. 171, 182 (1967)** declared that “the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint” and to determine the validity of a post complaint, prehearing, settlement.

**A. Parties Entitled To Enforcement And Review.**

In Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261

(1940) the Supreme Court held that the Board alone is exclusively vested under Section 10(e) with the power and duty to enforce the Act. The Court held that a labor union could not petition the Court of Appeals for an order adjudging an employer in contempt for failing to comply with certain requirements of the court's decree enforcing the Board's order as modified. The Court stated (l.c. 309 U.S. 265):

“[I]t is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or agency, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstacles to interstate commerce.”

While only the Board may take action to enforce its orders, Section 10(f) provides that “any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought” may petition the appropriate Court of Appeals for an order setting aside the Board order. When the Board enters a final order against a respondent; the respondent is a “person aggrieved” and thus entitled to seek immediate review in the Court of Appeals. If the Board determines that the complaint should be dismissed, the charging party is a “person aggrieved” with the corresponding statutory right to seek judicial review. If the Board dismisses certain portions of the complaint but issues an order on the other portions, the respondent is “aggrieved” as to the portion that results in a remedial order, and the charging party is “aggrieved” with respect to the portion of the decision dismissing the complaint.

**B. Intervention.**

In Auto Workers Local 283 (Wisconsin Motor Corp.) v. Scofield and Auto Workers Local 133 v. Fafnir Bearing Co., 382 U.S. 205 (1965) the Supreme Court interpreted the NLRA as conferring intervention rights upon both a successful charged party [respondent] and a successful charging party.

**C. Procedure.**

The Act does not provide any time limits within which the Board must apply for enforcement of its orders; and the Act is also silent as to when petitions for review must be filed. Delay by the Board in seeking enforcement of its orders does not provide a defense to opposing parties; nor does the Board order lose its legal efficacy by reason of the passage of time. In NLRB v. Pool Mfg. Co., 339 U.S. 577 (1950) the Supreme Court enforced the Board's order even though the Board waited two and one-half years before seeking enforcement of its order in the Court of Appeals. The Court held that the Board's order should be enforced notwithstanding that the respondent had bargained with the union after the Board's decision, there had been no effort by the union to bargain for the period of a year prior to the Board's seeking enforcement of its order, and the respondent questioned whether the union still retained the majority of the employees. The Supreme Court noted that the respondent could have filed a petition for review during the period after the Board's decision and prior to the Board seeking enforcement of its order.

### **III. Scope of Review.**

#### **A. Questions of Fact.**

Section 10(e) of the Act states that “[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.” Section 10(f) contains the same standard for scope of review, i.e., “if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive”.

In **Universal Camera v. NLRB, 340 U.S. 474 (1951)** the Court laid down the following guidelines for determining whether the Board’s findings of fact were supported by substantial evidence:

- A reviewing court may set aside a Board decision “when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view” (340 U.S. at 488).
- A reviewing court cannot set aside a Board decision based on a “choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” Id.
- The right of a reviewing court to test Board findings of fact on the basis of the whole record does not empower the court to discount the weight to which the Board findings are entitled by reason of the Board’s experience in the specialized field of labor-management relations. Id.
- The reviewing courts are not bound by the Board’s rejection of an ALJ’s findings but may consider the ALJ’s decision.

**B. Questions of Law.**

In **NLRB v. Curtin Matheson**, 494 U.S. 775, 786-87 (1990) the Court restated its position on judicial review of Board orders (i.c. 786, 787):

“This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy. See, e.g., Beth Israel Hospital v. NLRB, 437 U.S. 483, 500-501 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957).

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This Court therefore has accorded Board rules considerable deference. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. at 42; NLRB v. Iron Workers, 434 U.S. 335, 350 (1978). We will uphold a Board rule as long as it is rational and consistent with the Act, Fall River, *supra*, at 42, even if we would have formulated a different rule had we sat on the Board, Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404, 413, 418 (1982). Furthermore, a Board rule is entitled to deference even if it represents a departure from the Board’s prior policy. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-266 (1975). (‘The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board’s earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking’). Accord, Iron Workers, *supra*, at 351.”

**IV. Review Of Representation Or Certification Action.**

In **American Federation of Labor v. NLRB**, 308 U.S. 401 (1940) the Supreme Court held that a Board certification was not a “final order” within the meaning of Section 10(f) and that “the conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from review by the federal appellate courts . . . except in the circumstances specified in Section 9(d).” Employers desiring to contest a certification must refuse to bargain and then assert its position by way of defense in an unfair labor practice proceeding and subsequently on judicial review. See **NLRB v. Kentucky River**, 532 U.S. 706 (2001).

In **Leedom v. Kyne**, 358 U.S. 184 (1958) suit was brought by a professional employees' union in a federal district court, alleging jurisdiction under Section 1337 of the Judicial Code, to set aside a certification on the ground that the Board had exceeded its authority under Section 9(b) (1), by certifying the union as the representative of a unit composed of both professional and non-professional employees, without affording the professionals a separate election to determine whether they desired to be included in the unit. The Supreme Court held that the certification was subject to the equity jurisdiction of the federal district courts and that such courts could entertain suits to set aside certification orders **when the Board had plainly exceeded its statutory authority and there was no other adequate remedy (358 U.S. 189).**

The **Kyne** exception was applied in **McCulloch v. Sociedad Nacional de Marineros de Honduras**, 372 U.S. 10 (1963), where the Board attempted to exercise its jurisdiction over alien employees who were represented by a foreign union on a foreign ship sailing under a foreign flag. However, in **Boire v. Greyhound Corp.**, 376 U.S. 473 (1964) the Court held that a district court was without jurisdiction to enjoin a representation election in an action in which the moving party alleged that the Board had erroneously determined that two separate enterprises were joint employers. The Court stated (l.c. 376 U.S. at 481, 482):

“The **Kyne** exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in Section 9(d) of the Act.”

See also **Detroit Newspaper Agency v. Schaub**, 286 F.3d 391, 398 (6<sup>th</sup> Cir. 2002); **Titan International, Inc. v. Wells**, 168 LRRM 2283 (S.D. Miss. 2001).

### **Endnote**

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