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DISTRICT COURT REVIEW OF NLRB REPRESENTATION PROCEEDINGS

Stephen B. Goldberg†

INTRODUCTION

The National Labor Relations Board performs two separate and dissimilar functions under the National Labor Relations Act. Under section 10 of the act, the Board is charged with the task of deciding whether particular conduct violates the unfair labor practice prohibitions contained in section 8 of the act. The Board's procedures under section 10, which begin with the filing of a charge alleging that an unfair labor practice has been committed, and proceed through the issuance of a formal complaint, answer, hearing before a trial examiner, and a proposed decision and order by the examiner, culminate in a decision by the Board as to whether the person complained against has engaged in any unfair labor practices. If the Board finds that any person named in the complaint has engaged in an unfair labor practice, it is directed by section 10(c) to state its findings of fact and issue an order requiring such person to cease and desist from the unfair labor practice and to take such affirmative action as will effectuate the policies of the act. Conversely, if the Board finds that no unfair labor practice has been committed, it is directed to state its findings of fact and issue an order dismissing the complaint. In either event, the Board's decision and order is subject to judicial review in the appropriate United States Court of Appeals. Section 10(e) provides that the Board may file a petition for enforcement of its order and section 10(f) provides that any person aggrieved may file a petition requesting that the Board's order be modified or set aside. It has long been settled that, save in extraordinary circumstances, the foregoing judicial review procedure is exclusive, and precludes review of unfair labor practice proceedings in the federal district courts.

The Board's other function is that of administering the representa-

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tion provisions of section 9. Section 9(a) provides that a representative selected by a majority of the employees in an appropriate bargaining unit shall be the exclusive representative of all the employees in the unit. Section 9(b) authorizes the Board to determine the "appropriate" unit and section 9(c) prescribes a procedure for determining whether the majority of the employees in that unit wish union representation. Under section 9(c), when a union files a petition with the Board, alleging that a substantial number of employees wish it to be their representative and that the employer declines to recognize that union, the Board is directed to investigate the petition. If, after investigation and hearing, the Board finds that a question of representation exists, it is to direct an election by secret ballot (in the unit found "appropriate") and to "certify" the results of the election, i.e., to inform all parties to the election whether or not the union has been selected as bargaining representative by a majority of the voters. If a majority of employees have chosen union representation, it is the employer's obligation, under section 8(a)(5) to bargain collectively with the chosen representative.

In contrast to section 10, which contains explicit provision, in paragraphs (e) and (f), for direct judicial review of Board orders issued under that section, there is no provision in section 9 for direct review of Board orders directing elections or certifying the results thereof. Section 9 does, however, provide for indirect review of the certification of election results. Thus, section 9(d) provides:

Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

In other words, if a decision of the Board in a section 10 unfair labor practice proceeding rests on the propriety of a decision made by the Board in a section 9 representation proceeding, the latter decision is subject to review by the court of appeals before which a petition to review or enforce the Board's unfair labor practice decision is pending. As a practical matter, the procedure normally works in the following manner: An employer who believes the Board to have erred at some point in the representation proceedings, e.g., by directing an election in an
inappropriate unit, will refuse to bargain with the union that the Board certified as having obtained a majority of the ballots cast in that election. The union involved will then file charges under section 10(b), alleging that the employer is violating section 8(a)(5) by refusing "to bargain collectively with the representative of his employees" as determined by the Board in the section 9 proceeding. The Board's General Counsel will then issue a complaint, and, after following the procedures set out in section 10(b) and (c), the Board will issue a decision rejecting the employer's defense that the Board erred in the section 9 proceeding, finding him to have violated section 8(a)(5), and ordering him to bargain with the union that prevailed in that election.³

It is at this point that the provision for judicial review of the Board's certification becomes meaningful. The Board's order directing the employer to bargain is "based . . . upon facts certified following an investigation pursuant to [section 9(c)]," i.e., the fact that the union represents a majority of employees in a unit appropriate for bargaining. Hence, review of that order under section 10(e) or (f) will encompass the question whether the Board's underlying representation decision was sound.⁴ Only if the reviewing court acquiesces in that underlying representation decision will it enforce the Board's order directing the employer to bargain.

Since the enactment of the National Labor Relations Act, the Board has taken the position that the indirect review of its representation decisions obtainable through section 9(d) and 10(e) and (f) is exclusive—that there is no provision in the NLRA for direct review, either in the courts of appeals or in the district courts. Thus, the Board has asserted that the NLRA not only limits the statutory review procedure to that described above, but also deprives the district courts of any power they might otherwise have under a general jurisdictional grant to entertain actions to review and set aside erroneous Board decisions.⁵

³. The question whether to issue a complaint, albeit discretionary with the General Counsel, will, absent extraordinary circumstances, be resolved in the affirmative, since the employer's defense to the unfair labor practice charge will be that the prior Board representation decision was invalid, and the General Council normally regards himself as bound, in an unfair labor practice case, to follow a Board decision in a related representation proceeding. Letter from Arnold Ordman, General Counsel, NLRB, to the author, April 26, 1967. Similarly, absent a showing that the complaining party has newly-discovered evidence to present, the Board will not reconsider in a refusal-to-bargain proceeding, the merits of questions that were, or might have been, decided in a prior representation proceeding. NLRB v. Air Control Prods., 335 F.2d 245, 250-52 (5th Cir. 1964); United Dairies, Inc., 144 NLRB 153, 154-55 (1963). Hence, the issuance of a complaint by the General Counsel and a bargaining order by the Board are pretty much a foregone conclusion once the union files a refusal to bargain charge.

⁴. See, e.g., NLRB v. Air Control Prods., supra note 3.

⁵. District court jurisdiction of such actions is generally sought to be predicated on 28 U.S.C. 1337 (1964), which provides that: "The district courts shall have original
As has been noted, the exclusivity of the statutory procedure for the review of unfair labor practice decisions was early settled. This was not, however, the case as to representation decisions. To the contrary, both employers and unions (and occasionally employees) have long argued that Congress could hardly have intended that a procedure as cumbersome and unsatisfactory as the foregoing be exclusive. Employers seeking to enjoin the Board from conducting allegedly invalid representation elections have asserted that Congress surely would not have required them to undergo the expense and turmoil of an election, as well as the delay inherent in litigation before a trial examiner and the Board, as a condition precedent to obtaining judicial review of a plainly illegal Board decision. Similarly, unions that have been defeated in representation elections claimed to have been erroneously directed by the Board have argued that the "refusal to bargain" route to judicial review is not open to them (because it is not a violation of section 8 for a union that is not the bargaining representative of the employees involved to refuse to bargain), hence, that there must be an alternative route to insure judicial review of the Board's action. Finally, employees have occasionally sought judicial review of Board representation decisions, alleging, quite correctly, that there is no conceivable way in which they can initiate the statutory review procedure so that, unless an alternative route exists, their interests are totally at the mercy of the employer and the union—neither of whom, for reasons of their own, may be interested in challenging a Board decision prejudicial to particular employees.

It was not until 1958 that the Supreme Court addressed itself to the question whether a federal district court may review a Board representation decision, and, though the Court has twice since dealt with the problem, it is by no means clear that the last word has been spoken. Hence, I should like to review some of the litigation, and the arguments that have been advanced, and make a few suggestions as to the availability, under the NLRA, of district court review of Board representation decisions.

Statutory Arguments

The statute on its face provides some support for the Board's view that judicial review of representation decisions is limited to the indirect route provided in section 9(d). First, it is clear, and was early held that direct review in the courts of appeals under section 10(f) was not

jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

contemplated. Thus, section 10(f) speaks of review of a "final order" of the Board. Wholly apart from the question whether a decision directing an election or certifying the results of that election constitutes a "final order" as that term is generally utilized for purposes of judicial review of administrative orders, it is apparent on close examination of section 9 that the term "final order," or even the term "order," is not to be found in any portion of that section. The Board is to "decide" the appropriate unit, "investigate" representation petitions, "provide" for hearings, "find" whether a question of representation exists, "direct" an election and "certify" the results thereof. The only reference to an "order" of the Board contained in section 9 is in sub-paragraph (d), which refers to orders of the Board issued pursuant to section 10(c) and which is the section providing for the indirect review procedure described previously. From all this, it is evident that in providing for review of a "final order" of the Board, section 10(f) refers only to those orders issued pursuant to section 10(c), not to certifications, directions of elections, or any other Board action taken under section 9.

There is nothing on the face of the NLRA, however, which resolves the question whether Congress intended to preclude district court review of Board representation decisions. On the one hand, it can be argued that if this were Congress' intent it would have so stated; indeed, in view of the manifest inadequacy of the statutory review procedure, only the plainest expression of an intent to preclude district court review should suffice. The contrary argument, again limited to the face of the statute, would be that Congress, having narrowly limited court of appeals review of representation decisions to the situation in which such a decision serves as the basis of an unfair labor practice order, would hardly be willing to permit unlimited district court review of all representation decisions. This viewpoint would find additional support in the fact that the act does confer jurisdiction upon the district courts with respect to other matters. For example, section 11(2) empowers the district court to entertain applications for the enforcement of subpoenas issued by the Board. Furthermore, on amending the act in 1947, Congress added sections 10(j) and (l), which permit the district courts

9. Compare AFL v. NLRB, supra note 8, at 408, with the court of appeals' opinion in that case, 103 F.2d 933, 935-36 (D.C. Cir. 1939).
10. AFL v. NLRB, supra note 9, at 406-10. Nor may a court of appeals review a section 9 representation decision because that decision rests on the same facts as an unfair labor practice decision properly before the court for review. It is only when the unfair labor practice decision is predicated on the representation decision that a court of appeals has jurisdiction to review the latter. See NLRB v. Falk Corp., 308 U.S. 453, 458-59 (1940); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 106 (5th Cir. 1963), and cases cited therein.
to grant temporary injunctive relief against conduct violative of the unfair labor practice sections of the act. Having thus undertaken to assign a role to the district courts in the administration of the act, it could be expected that Congress, had it desired them to play a part in representation proceedings, would have so stated.

THE LEGISLATIVE HISTORY

1935

However one might resolve the question of the availability of district court review on the bare language of the statute, there is in fact a substantial amount of legislative history that should also be considered. One of the questions on which there appears to have been general agreement in the 74th Congress, which enacted the Wagner Act, was that the provisions for judicial review of election orders contained in Public Resolution 44,11 were unsatisfactory. Public Resolution 44, which created the first National Labor Relations Board to administer section 7(a) of the National Industrial Recovery Act,12 empowered the Board to conduct representation elections and provided for immediate judicial review in the courts of appeals of any Board order directing an election. Experience with that resolution quickly showed that some employers would utilize pre-election review as a means to delay the commencement of collective bargaining. This, Congress found, was creating the very industrial unrest that Public Resolution 44 was intended to prevent. The Senate Report on the Wagner Act summarized the situation as follows:

Obstacles to elections—Under Public Resolution 44, any attempt by the government to conduct an election of representatives may be contested ab initio in the courts, although such election is in reality merely a preliminary determination of fact. This means that the government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.13

The House Report was to the same effect:

The weakness of this [Public Resolution 44] procedure is that under the provision for review of election orders employers

12. 48 Stat. 198 (1933).
have a means of holding up the election for months by an application to the circuit court of appeals. . . . At the present time 10 cases for review of the Board's election orders are pending in the circuit court of appeals. Only three have been argued and none have been decided.

The election is but a preliminary determination of fact, and there is no reason why employers should have an opportunity for court review prior to the holding of the election. The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.\(^\text{14}\)

Congress' response to the experience gained under Public Resolution 44 was to omit any provision for direct judicial review of Board decisions in election proceedings. In lieu of the direct, pre-election review available under Public Resolution 44, the Wagner Act provided in section 9(d) that judicial review would be available only after the election had been held, and then only if the Board ordered the employer to do something predicated on the results of the election, \textit{i.e.,} to bargain with the union. Thus, the Senate Report on the Wagner Act stated:

Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is

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based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board. 15

Similarly, the House Report stated:

As previously stated in this Report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part on facts certified following an election or other investigation pursuant to section 9(c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10(e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c). 16

The clear import of the foregoing legislative history would appear to be that the omission of any provision for direct judicial review of Board election proceedings was deliberate, and was intended to prevent


Section 9(d) is a new provision intended to make it clear that when the Board orders an election, persons affected by that order cannot come into court until after the election has been held and the Board directs that the employer take some action based upon the results of that election. At the present time employers are in a position where they can bring court proceedings to enjoin an election even though they have not been directed to take any action based upon the result of a poll. It seems wiser to limit employers as this bill does to complaining about elections only if the elections are made the basis of some order directed against them.
employers from utilizing direct review as a means of delaying representation elections. Employers were not left without judicial review of Board representation decisions, but were restricted to the review provided in section 9(d), "review in the courts only after the election has been held and the Board has ordered the employer to do something predicated on the results of the election." This review, albeit delayed, was characterized by the Senate Report on the Wagner Act as providing "a complete guarantee against arbitrary action by the Board" and by the House Report as providing for "exclusive, complete and adequate remedy."

Although section 9(d) of the Wagner Act allowed employers to obtain review only after the election, it made no provision whatsoever for union review of election orders or certifications. A union dissatisfied with a Board decision in a certification proceeding, e.g., a decision to certify the results of an election lost by the union but which the union claimed had been directed in an inappropriate unit, could not trigger an unfair labor practice charge against itself by refusing to bargain with the employer—there were no union unfair labor practices. While some elections involved two unions, and in those it was conceivable that the employer might refuse to bargain with the union that won the election on the same grounds that formed the basis for the losing union's protest, and that the losing union would be allowed to intervene in the employer's suit, this would hardly be regarded by union as a satisfactory guarantee of judicial review. Two bills were introduced in the 76th Congress to remedy this situation, both of which provided that any labor organization aggrieved by a section 9 certification could obtain direct review of the certification in the courts of appeals. Both bills were the subject of hearings before the Senate Committee on Education and Labor, and the expanded review provisions of both were the subject of adverse testimony by Charles Fahy, General Counsel of the Board. The essence of Mr. Fahy's objections was that:

Whereas prior to the present act employers used this review of certifications or direction of elections as a means of defeating collective bargaining, rival unions would now do so. I do not see how either organization could gain advantages

20. S. 1000, S. 1264, 76th Cong., 1st Sess. (1939). S. 1264 went beyond S. 1000 in providing not only for direct review of certifications, but also for direct review of orders directing elections.
in the long run, and it is obvious the public interest would suffer.

It is better to suffer dissatisfaction with some unit determinations, than to have each bound up in long drawn-out litigation easily initiated by rival or minority groups. You would afford a method for the destruction of collective bargaining by this provision.\textsuperscript{21}

Neither of the proposed amendments (or any other part of the bills involved) was enacted into legislation. Hence there continued to be no statutory method whereby labor organizations could obtain judicial review of election proceedings.

1947

In 1947, when the Taft-Hartley amendments to the National Labor Relations Act were under consideration, the bill that passed the House contained an amendment to section 10(f) which would have permitted any aggrieved person to obtain direct post-election review of a Board certification in the courts of appeals.\textsuperscript{22} The reason for this proposed alteration was stated to be the inadequacy of judicial review under existing law. Thus, the House Committee Report stated:

\textit{Appeals from certification.---} . . . The present act permits appeals from certifications by the Board only by employers, and then only through cumbersome proceedings that always involve risk of strike and of a finding that, by following the only course by which he could appeal, the employer committed an unfair labor practice, no matter how much in good faith he doubted the validity of the certification. This procedure is unfair to everyone; the union that wins, which frequently must wait for many months to exercise its rights; the union that loses, which has no appeal at all no matter how wrong the certification may be; the employees, who also have no appeal; and the employer, for whom an appeal involves grave risk. This bill permits any person interested to appeal from a certification, as from a final order of the Board.\textsuperscript{23}

\textsuperscript{21} Hearing on S. 1000, 1264, 1392, 1550, 1580, and 2123 Before the Senate Committee on Education and Labor, 76th Cong., 1st Sess. 462-63 (1939). See also \textit{id.} at 445-47, 460-62, 583-87.

\textsuperscript{22} H.R. 3020, 80th Cong., 1st Sess. (1947), \textit{1 Legislative History of the Labor-Management Relations Act} 199-200, 350-51 (Gov't Printing Office 1948) (hereinafter cited as \textit{Leg. Hist. LMRA}).

Despite the catalogue of inadequacies spelled out by the Committee Report, the proposed amendment was deleted in conference in favor of the Senate bill, which continued the existing provisions for judicial review without alteration. According to Senator Taft, the reason for the deletion was that the House bill "would permit dilatory tactics in representation proceedings." In view of this history, it would appear plain that Congress' failure in 1947, as in 1935 and 1939, to provide for direct review of Board representation decisions was anything but inadvertent. Rather, the Public Resolution 44 experience seems to have persuaded Congress that whatever the disadvantages of limiting judicial review to the circuitous section 9(d) route, they are, as a general rule, less than the disadvantages of direct review—either before or after an election.

LITIGATION PRIOR TO KYNE: DISTRICT COURT JURISDICTION PREDICATED ON A SUBSTANTIAL CONSTITUTIONAL CLAIM

As previously noted, the Supreme Court early held, in AFL v. NLRB, that section 10(f) of the act did not confer jurisdiction on the courts of appeals to review Board representation proceedings, save as incidental to review of unfair labor practice proceedings. In other words, direct review of representation proceedings could not be had in the courts of appeals. The Court did not, however, decide whether such review was available in the district courts. "That question," the Court stated, "can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy."

9. Review of certifications

Section 10(f) would amend the National Labor Relations Act to permit interlocutory review of Board certifications. If this proposal is enacted into law it would have serious adverse consequences on collective bargaining. It is conservatively estimated that 1 year would be the average time necessary to obtain court review of a Board certification. The same findings would be reviewable twice: First, under the proposed amendment and, second, through later or simultaneous section 8(a)(5) proceedings under the act if the employer refused to bargain. Delay would be piled upon delay, during which time collective bargaining would be suspended pending determination of the status of the bargaining agent. Such delays can only result in industrial strife.

26. No proposals were made at the time of the 1959 amendments to alter the existing statutory provisions for judicial review of representation cases.
29. Id. at 412.
The question whether Congress had foreclosed district court review of Board representation decisions was not answered by the Supreme Court for nearly twenty years, with the lower courts in the meantime going both ways.\(^{30}\) In the interim, the Supreme Court gave a strong indication in *Switchmen's Union v. NMB*\(^ {31} \) that jurisdiction might not be found to exist,\(^ {32} \) but once again avoided the issue in *Inland Empire Dist. Council v. Millis*.\(^ {33} \) In *Inland Empire*, a union that had been defeated in a representation election challenged the Board's proceedings on the ground that the Board had failed to provide the "appropriate hearing" which section 9(c) requires, and that the effect was not only to deny it the statutory right to a hearing but also to deny it due process of law contrary to the guarantee of the fifth amendment. The Court, acting without much regard for logical consistency, reviewed and rejected the union's claims on the merits, then held that since the Board had not been shown to have acted unlawfully, either by departing from statutory requirements or by departing from requirements of due process, it was unnecessary to decide whether the federal courts had jurisdiction to review a Board election proceeding to determine whether it had acted unlawfully. In other words, the Court reviewed, but without deciding whether it had jurisdiction to review.\(^ {34} \)

Perhaps the most significant of the lower court decisions in the interim between *AFL* and *Kyne*, at least in terms of its lasting effect, was *Fay v. Douds*.\(^ {35} \) In *Fay*, an incumbent union which had been denied a place on the ballot in an election to be held on the petition of another union, and which had also been denied a hearing on the question whether an election should be held, brought suit against the Board's regional director to enjoin the election. The complaint alleged that the regional


32. In *Switchmen's*, a case arising under the Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. §§ 151-88 (1964), the Court held (4-3) that a federal district court lacked jurisdiction to review a determination of appropriate bargaining unit by the National Mediation Board, despite the fact that the Railway Labor Act made no alternative provision for judicial review of NMB decisions.


34. See 4 *Davis, Administrative Law § 28.02*, at 4-5 (1959).

35. 172 F.2d 720 (2d Cir. 1949).
director's refusal to hold a hearing constituted a denial of due process of law and that his exclusion of the plaintiff union from the ballot was unauthorized by the act. Injunctive relief was denied by the district court and the complaint was dismissed. In the ensuing election the union which had filed the election petition received a majority of votes and was certified by the Board as the collective bargaining representative of the employees involved.

On appeal, the Second Circuit held that the plaintiff union's assertion that it had been denied due process of law by the regional director's refusal to conduct a hearing was not "transparently frivolous," and that a constitutional claim of this magnitude vested the district court with jurisdiction to consider that claim on the merits. Further, held the court, once having obtained jurisdiction, a district court could, and should, dispose of all other questions raised by the plaintiff, even though, absent their joinder with the constitutional claim, the district court would be without jurisdiction to consider them. In the context of Fay, that meant that the plaintiff was entitled to district court review both of its constitutional claim and its contention that the regional director's refusal to place it on the ballot was unauthorized by the act. On the merits, however, the court of appeals agreed with the district court that both these claims were lacking in substance. Hence the court affirmed the district court's judgment denying injunctive relief and dismissing the complaint.

The decision in Fay is hardly surprising. Whether or not the Constitution requires that federal judicial review of constitutional claims be available,36 it is not likely that a court, absent explicit evidence to the contrary, would hold that Congress intended to bar such review. Congress had, however, as recently as 1947, rejected an amendment providing for judicial review of Board certifications, in the courts of appeals, despite the argument that absent such an amendment, "the union that loses . . . has no appeal at all no matter how wrong the certification may be."37 Nonetheless, the Second Circuit did not regard that as evidence that Congress had intended to deprive the district courts of jurisdiction to review actions of the Board on constitutional grounds.

The holding in Fay v. Douds—that a losing union, with no other means to obtain judicial review, may raise a substantial constitutional question in a district court has not been challenged by the Board in subsequent litigation. Rather, in suits claiming constitutional violations

36. See Switchmen's Union v. NMB, 320 U.S. 297, 301 (1943): "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." See generally Jaffe, Judicial Control of Administrative Action 381-89 (1965).
the Board has defended on the merits. Additionally, where the plaintiff has access to the statutory review procedure, the argument has been made that district court review should not be granted, since it is unnecessary to satisfy the presumed congressional intent that there be some forum available for the litigation of constitutional claims. The argument that where the plaintiff has an alternative review procedure, district court review even of constitutional claims should not be available has met with a mixed reception. On the other hand, the Board has rarely been found, on the merits, to have denied constitutional protections in the course of an election proceeding. In any event, litigation has tended to focus on these issues, especially the latter, and to accept the holding of Fay that, at least where no other judicial review is available, a district court has jurisdiction to review Board representation proceedings on the basis of a claim, not transparently frivolous, that the Board has denied constitutional rights.

One aspect of Fay that would seem open to question is the conclusion that once a district court determines that the plaintiff has made out a colorable claim of constitutional violation, it is then free to decide not only the constitutional claim, but all other questions relating to the Board's decision. While the necessity for judicial review of constitutional errors may outweigh the interest in speedy resolution of questions of representation, it is not apparent why the interest in speedy resolution should be impaired pro tanto by review of non-constitutional claims solely because the latter are joined with a colorable constitutional claim. For example, if the plaintiff can make out a prima facie claim that the Board has denied him a hearing on a crucial factual issue, it is plain that he is


40. The only reported case in which a district court has granted injunctive relief on the grounds that the plaintiff had shown the Board to have violated the Constitution, and which was not reversed on appeal, is Greensboro Hosiery Mills v. Johnston, supra note 39. Some of the cases in which constitutional challenges have been rejected are cited in Boire v. Miami Herald Publishing Co., supra note 39.

41. But see Utica Mutual Ins. Co. v. Vincent, 64 L.R.R.M. 2631, 2635 (2d Cir. 1967). See also the concurring opinion of Wright, J., in Lawrence Typographical Union v. McCulloch, 349 F.2d 704, 709 n.l. (D.C. Cir. 1965): “The Fifth Circuit has recently expressed doubt as to whether a constitutional violation should be a separate ground for jurisdiction. Boire v. Miami Herald Publishing Co., supra, 343 F.2d 21, n.7.” An examination of Miami Herald, however, suggests that the Fifth Circuit's doubts may be limited to the availability of district court jurisdiction where the plaintiff has access to the statutory review procedure. See note 39 supra.
entitled to district court review of that constitutional claim. Now suppose he also asserts that the Board's decision on the factual issue is unsupported by substantial evidence in the record. *Fay* appears to hold that even if the constitutional claim fails on the merits the plaintiff is entitled to review on the factual issue. To permit review on an essentially evidentiary issue, however, may substantially delay judicial decision and final resolution of the question of representation. Nor is review of this issue necessary to insure that the constitutional right to a fair hearing is not infringed. Hence, it is not plain that a colorable constitutional claim should vest a district court with jurisdiction to hear all issues in a case, non-constitutional as well as constitutional.

The Second Circuit relied on *Hillsborough Township v. Crowell* as authority for the proposition that a colorable constitutional claim vests a district court with power to decide all issues in the case. In *Hillsborough*, a suit for a declaratory judgment that certain state taxes violated the constitution, the Supreme Court had held that when a federal district court has jurisdiction of a case because that case presents a substantial constitutional issue, the district court may pass on the whole case including any state law questions that may be involved. The analogy, though superficially apt, does not withstand analysis. The reason a federal court with jurisdiction to decide a constitutional (or other federal) claim may also decide state law issues when it denies the federal claim is to avoid the necessity of a second lawsuit in the state courts on the state claim. Were a federal court, on denying a constitutional challenge to a Board decision to dismiss the case, there would not, however, be a second lawsuit in the state courts or elsewhere, to the contrary, further judicial review would be unavailable. Nor would this result be inadvertent; it would, rather, accord with Congress' intent, as interpreted by the Second Circuit prior to the time *Fay* was decided, that non-constitutional claims should not be subject to judicial review at all, except to the extent they may be raised through the statutory review procedure. In short, while the assertion in *Fay* that the district court had jurisdiction to review constitutional claims may have been sound, the extension of that jurisdiction to non-constitutional claims that would otherwise not have been reviewable is at least questionable.

42. 326 U.S. 620 (1946).
44. Fitzgerald v. Douds, 167 F.2d 714 (2d Cir. 1948).
45. Subsequent expansion of district court review jurisdiction to include claims of statutory violation [see Leedom v. Kyne, 358 U.S. 184 (1958)] does not moot this criticism. There remain some issues not reviewable in the district courts (e.g., issues of fact, Boire v. Greyhound Corp., 376 U.S. 473 (1964), discussed in text accompanying notes 102-09 infra) and review thereof ought not be obtainable simply because a prima facie claim of statutory or constitutional violation has been made out in the complaint.
Finally, in *Leedom v. Kyne*, the Supreme Court addressed itself to the issue of whether, constitutional claims aside, the federal district courts were empowered to review Board representation proceedings. In *Kyne* the Buffalo Section, Westinghouse Engineers Association, a labor organization, petitioned the Board to hold an election among 223 non-supervisory professional employees of a Westinghouse plant. A competing labor organization, which was permitted by the Board to intervene in the representation proceedings, asked the Board to expand the unit to include additional employees who performed technical work and who were thought by it to be “professional employees” within the meaning of section 2(12) of the act. The Board found that none of the additional employees were “professional employees” under the act’s definition of that term. Nonetheless, it held that nine of these employees should be included in the unit because they shared a close community of interests with the professional employees and because their inclusion would not destroy the predominantly professional character of the unit.

The Association then requested the Board to take a vote among the 223 professional employees to determine whether a majority of them wished to be included in a unit with non-professionals. This request was made pursuant to section 9(b)(1), which provides that, in determining the unit appropriate for collective bargaining purposes, “the Board shall not . . . decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.” The Board, however, denied the request, on the theory that section 9(b)(1) was intended to provide professional employees with a veto over their inclusion in the same unit with non-professionals only when the professionals constituted a minority in the proposed bargaining unit. An election was then held among the employees in the combined unit. The Association received a majority of the ballots cast and was certified by the Board as the collective bargaining agent for the entire unit, professionals and non-professionals alike.

Thereafter, the Association brought suit against the Board in the District Court for the District of Columbia, alleging that the Board had

46. *Supra* note 45.

47. The Board's view was that the purpose of § 9(b)(1) was to prevent it from submerging a small number of professional employees into a large bargaining unit in which their distinctive interests might be ignored. This danger would not be present where the professionals, as in *Kyne*, constituted a substantial majority of the proposed unit. Hence, the Board concluded, it need not conduct an election among the professionals in such cases. See Continental Motors Corp., 77 N.L.R.B. 345, 347-48 (1948); see also Brief for the NLRB in *Leedom v. Kyne*, 358 U.S. 184 (1958), pp. 33-37.
violated section 9(b)(1) by including professional employees in a unit with non-professionals without the consent of the former. The district court, over the Board's objection that it lacked jurisdiction and that, in any event, the Board had acted properly, held both that it had jurisdiction and that the Board had violated section 9(b)(1) by failing to afford the professional employees a self-determination election. Accordingly, the court ordered the Board's certification set aside.

On appeal to the Court of Appeals for the District of Columbia, the Board did not contest the trial court's conclusion that it had violated section 9(b)(1), but argued that nonetheless the district court lacked jurisdiction to entertain the Association's action. In part, the Board's argument that the district court was without jurisdiction rested on the fact that the Association could obtain judicial review via the section 10 route. Thus, the Board pointed out, just as section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with the union that is the representative of his employees, section 8(b)(3) makes it an unfair labor practice for that union to refuse to bargain with the employer. Accordingly, the Association, contending that the Board's certification of a combined unit of professional employees and non-professionals violated the act, could insist that Westinghouse bargain with it solely as the representative of the professional employees. Such a refusal would subject the Association to a charge, filed by either the employer or the non-professional employees, that it had violated section 8(b)(3). Should the Board then find a violation and issue an order directing the Association to bargain for all the employees in the certified unit, the Association could obtain review of that order and the underlying certification in the court of appeals, pursuant to sections 9(d) and 10(e), just as the employer could if he were contesting the certification.

The court of appeals affirmed the district court, finding that the Board had violated a statutory requirement with resulting injury to the Association. As to the Board's argument that the Association could obtain section 10 review, the court stated:

Whether, granting the availability of a § 10 remedy, the injury flowing from the violation of § 9(b)(1) would support equitable relief need not be decided. Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy. . . . Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals,

he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

The Supreme Court affirmed. The Court’s reasoned that initially the Board’s inclusion of professionals in the same unit with non-professionals was an attempted exercise of power that had been specifically withheld by Congress in enacting section 9(b)(1). Thus, this was not a suit to “review” a decision of the Board made within its jurisdiction, but one to strike down an order of the Board made “in excess of its delegated powers and contrary to a specific prohibition in the Act.”50 Furthermore, the Board’s action deprived the professional employees of a “right” assured them by Congress—the right not to be included in a bargaining unit with non-professionals without their consent. Finally, the Court had stated in Switchmen’s51 that when the absence of federal court jurisdiction would leave congressionally created rights unenforceable, the inference might legitimately be drawn that Congress intended the district courts to have jurisdiction under the general jurisdictional grants. That was precisely the situation here, said the Court, for the professional employees had no “other means, within their control . . . to protect and enforce” their right to a self-determination election. Hence, the inference of district court jurisdiction would be drawn.

Analysis of Kyne might appropriately begin with the Court’s characterization of that suit as not one to “review” a decision of the Board made within its jurisdiction, but one to strike down an order of the Board in excess of its powers. As Professor Cox long ago pointed out52 this is sheer word play. The Board had “jurisdiction” of the parties and of the subject matter. Additionally, it was empowered to determine what constituted an appropriate bargaining unit. The error with which it had been charged, and which it had conceded, was simply that it had misconstrued section 9(b)(1). Thus, what the Court was really holding, albeit thinly disguised in “jurisdictional” terms, was that the district

50. 358 U.S. at 188.
51. 320 U.S. 297 (1943).
courts are authorized to set aside representation decisions of the Board that rest upon errors of statutory construction—at least in a situation in which, as the Court saw it, review under the statutory procedure was unavailable.

This holding presents two questions: (1) Was the Court right in viewing *Kyne* as a case in which statutory review was unavailable to the Association; (2) Assuming so, was it right in its conclusion that district court review was therefore available? Let us consider first the Court's conclusion that statutory review was unavailable to the Association. Admittedly, the professional employees, or their representative, the Association, could not file a section 10(f) petition in the court of appeals to review the contested certification. *AFL v. NLRB* settled that. But why could not the Association simply refuse to bargain for the non-professionals, as the Board had argued in the court of appeals (and in the Supreme Court, although without much conviction in the latter), and thus provoke a section 8(b)(3) unfair labor practice charge, which would, if sustained by the Board, enable the Association to obtain review under sections 10(f) and 9(d) of both the unfair labor practice finding and the underlying certification? The obvious answer to this argument, the one given by the court of appeals, was that the likelihood of anyone filing a charge against the Association was too remote for the section 10 review procedure to constitute an adequate remedy. Neither the employer nor the non-professionals were likely to file an unfair labor practice charge to compel the Association to bargain for the non-professionals.

But if the Association, as a practical matter, were free to decline to bargain for the non-professionals, since no one would seek to compel it to bargain for them, how was the Association, or the professional employees it represented, injured by the Board's certification of it to represent the non-professionals? The mere fact of the certification, standing alone, and unsupported by any order directing the Association to comply with it would result in no injury to the Association or the professional employees, who would be free to ignore the non-professionals in formulating their bargaining demands and dealing with the employer. If the Association were to ignore the non-professionals in bargaining with the employer, then as a practical matter the bargaining unit would be composed solely of professionals, just as the Association wished. And, if the non-professionals were subsequently to file a charge, and seek to compel bargaining on their behalf, section 10 review would be available. Thus I have some difficulty in accepting the Court's conclusion that

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53. 308 U.S. 401 (1940).
54. See Brief for the NLRB, pp. 21-22 n.12.
absent district court review the professional employees would have had no means of protecting their right not to be in a mixed unit of professionals and non-professionals.\textsuperscript{55}

But even assuming that the Court was correct in its conclusion that district court review was necessary to protect the rights of the professional employees, the question remains whether it follows that district court review was available. The Court answered the question by quoting from \textit{Switchmen's}, wherein the “controlling principles” were stated: “If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the general jurisdictions of those courts to control. That was the purport of the decisions of this Court in \textit{Texas & New Orleans R.R. v. Brotherhood of Clerks}, 281 U.S. 548, and \textit{Virginian Ry. v. System Federation}, 300 U.S. 515.\textsuperscript{56,57}

The Court’s reliance on the “sacrifice or obliteration” concept enunciated in \textit{Switchmen’s} was, however, misplaced. For, as Mr. Justice Brennan pointed out in his dissent,\textsuperscript{58} what that language referred to, in context, was the situation in which Congress had created a “right,” but no tribunal, judicial or administrative, was explicitly empowered to enforce that right. It was in that situation, as exemplified by both \textit{Texas & New Orleans R.R.}\textsuperscript{58} and \textit{Virginian Ry.}\textsuperscript{59} that the Court had indulged in the inference that, despite its silence on the matter, Congress intended that the federal courts should have jurisdiction to enforce the right created by it, since otherwise the right created would be unenforceable.\textsuperscript{60}

\textsuperscript{55} One possible argument to support the Court’s conclusion, albeit one that appears not to have been considered by the Court, is that while the non-professionals might not file charges with the NLRB seeking to compel the Association to bargain for them, they might file a suit for damages against the Association if it did not do so, claiming that the Association had breached its duty under the NLRA to represent all employees in the bargaining unit fairly. See Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Syres v. Oil Workers, 350 U.S. 892 (1955) (per curiam), reversing 223 F.2d 739 (5th Cir.); Vaca v. Sipes, 386 U.S. 171 (1967). While the Association would presumably be free to assert the invalidity of the Board’s certification of the bargaining unit in such a suit, the danger of a money judgment if it did not prevail on that contention might lead one to conclude that it should have an opportunity to challenge the certification without running that risk.

\textsuperscript{56} 358 U.S. at 190.
\textsuperscript{57} Id. at 199-201.
\textsuperscript{58} 281 U.S. 548 (1930).
\textsuperscript{59} 300 U.S. 515 (1937).
\textsuperscript{60} In \textit{Texas & New Orleans R. R. v. Brotherhood of Clerks}, 281 U.S. 548 (1930), the employer sought to prevent the organization of its employees in violation of § 2, Third, of the Railway Labor Act, 45 u.s.c. § 152 Third (1964), which provided that employees were to be free to select representatives “without interference, influence or coercion” by the employer. Congress had not designated any administrative tribunal for enforcement of this provision, nor had it explicitly provided for judicial enforcement. Unless the courts had jurisdiction under grants of general jurisdiction, there would thus be no protection of the employees’ right to self-organization. Similarly, in \textit{Virginian Ry. v. System Federation}, 300 U.S. 515 (1937), the Court held the federal courts had jurisdiction to order an employer to obey the command of § 2, Ninth, of the Railway Labor Act, that it “treat with”
On the other hand, in *Switchmen's*, where Congress had provided an administrative agency to protect the right created by it, the Court declined to infer that Congress intended the federal courts to be open for review of that agency's action. For, while there might be dissatisfaction with the agency's interpretation of the right involved, it could not be said in *Switchmen's*, at least in the sense in which it had been said in the *Texas* and *Virginian* cases, that absent federal court jurisdiction there would be a "sacrifice or obliteration" of the right. In *Kyne* also, Congress had created an administrative agency to protect the rights created by it, including the right of professional employees to be free from involuntary inclusion in a unit with non-professionals. Hence, it could not be said in *Kyne*, any more than in *Switchmen's*, that an absence of jurisdiction would mean a "sacrifice or obliteration" of rights created by Congress—at least not in the sense in which the "sacrifice or obliteration" language had been used in *Switchmen's*.

But, one might respond, this is too narrow a view. While there may have been an agency created to enforce the right involved in *Kyne*, as in *Switchmen's*, in the latter case the agency was at least making a bona fide effort to enforce the right committed to it for protection. That is, the NMB, in *Switchmen's*, had construed the Railway Labor Act as compelling the unit determination made by it.61 On the other hand, the NLRB, in *Kyne*, was making no effort to protect the professional employees' right to a self-determination election; indeed, it conceded that it was failing to abide by the statutory requirement that it do so. Thus, absent judicial review in *Kyne* there would be a "sacrifice or obliteration" of the professional employees' rights in the very sense in which that term had been used in the *Texas* and *Virginian* cases, i.e., no administrative agency was protecting that right, so that if the courts were not available, the right would go unprotected.

The foregoing reasoning is unpersuasive. Initially, the Board's position in *Kyne* was not that it was ignoring the protections afforded professional employees by the act. Rather, the Board had simply not contested, in the court of appeals, the trial court's conclusion that it had erred in its construction of section 9(b)(1). Thus *Kyne* was not a case of an agency's refusal to take action to protect a right entrusted to that agency, but rather a case of an agency's erroneous construction of the nature of the right involved. And, while the Board had not contested the proposition that its construction was erroneous, it was plain that this

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61. *320 U.S. at 309* (Reed, J., dissenting).
was only a matter of litigation tactics, designed to elicit the Court’s view on the question whether judicial review was available to test decisions made by it in the course of section 9 proceedings. Thus, the real question before the Court in *Kyne* was simply whether Congress had intended to permit the district courts to review representation determinations made by the Board, the agency to which Congress had primarily entrusted the administration of the act.

The legislative history of the NLRA would appear to cut rather strongly against the view that Congress intended to permit district court review of Board representation determinations. As has been shown earlier in this article, the experience with Public Resolution 44, which provided for judicial review in the courts of appeals of orders directing elections, and which enabled employers to delay substantially the holding of such elections, with consequent industrial strife, persuaded Congress that the Wagner Act should contain no provision for pre-election review. Accordingly, section 9(d) was written to provide “for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.” Furthermore, the section 9(d) review procedure was described as providing an “exclusive, complete and adequate remedy.” Finally, when it was proposed to Congress in both 1939 and 1947 that the statutory review procedure was inadequate, and that direct post-election review of Board certifications should be available in the courts of appeals, those proposals were rejected because, as Senator Taft stated in 1947, “such provision would permit dilatory tactics in representation proceedings.” Direct review of Board certifications in the district courts would be equally productive of delay in the commencement of collective bargaining. Hence, the inference to be drawn from the legislative history would appear to be that to permit district court review would be contrary to the congressional intent. Indeed, the Fourth Circuit observed prior to *Kyne* that: “It is hardly possible that Congress should have intended to permit review by district courts of 9(c) proceedings while so carefully limiting review of such proceedings in the circuit courts of appeals to cases in which an order under 10(c) has been entered.”

The *Kyne* majority did not respond at all to the Board’s legislative history argument. The Association’s response was this: True, the legislative history shows an intent to prevent such judicial review as would

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65. Madden v. Brotherhood of Transit Employees, 147 F.2d 439, 442 (4th Cir. 1945).
permit dilatory tactics in representation proceedings. It does not, however, show that Congress' concern over delay reached the point of precluding such limited review as would be necessary to prevent the Board from violating a plain statutory limitation on its powers. Indeed, it is inconceivable that Congress would have written into the act explicit limitations on the Board's powers—such as the section 9(b)(1) limitation on mixing professionals with non-professionals without the consent of the former—and then have left it to the Board's untrammeled discretion whether or not it would abide by those limitations.66

The foregoing argument is not without force. On the other hand, it is far from inconceivable that Congress would have thought that the delay inherent in permitting a losing union to contest its rival's certification by means of district court review, even review limited to ascertaining whether the Board had violated any statutory limitation on its powers, outweighed the benefits of such review. In the first place, there is no significant likelihood that a majority of the five-man Board would intentionally flout the commands of Congress as enunciated in the act. At worst, there is some danger that the Board will misinterpret or improperly apply the act, or certain portions of it. Indeed, that is arguably what occurred in Kyne. Judicial review is not, however, a guarantee against statutory misinterpretation. Furthermore, if the district courts are to be free to set aside Board action in those cases in which the Board has acted contrary to a statutory prohibition, it would follow that those courts would have jurisdiction to entertain any action in which a colorable claim is made that the Board has so erred.67 And, once the district courts have jurisdiction to decide whether the Board has violated the act, two dangers are present. Initially, there is the danger that the district courts, faced with novel questions under a complex and unfamiliar statute, might tend to find error and grant injunctive relief in a substantial number of cases that would later be reversed on appeal, but not until the plaintiff had obtained the delay in commencement of collective bargaining that frequently is the underlying reason for challenges to Board election determinations. Secondly, as Mr. Justice Brennan pointed out in his dissent, "even when the Board wins such a case on the merits, . . . while the case is dragging through the courts the threat will be ever present of the industrial strife sought to be averted by Congress in providing only drastically limited judicial review under section 9(d)."68 Hence, it is not at all inconceivable that Congress would have precluded district court review altogether, even to a party lacking any statutory procedure for

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68. 358 U.S. at 196.
review and claiming a violation of the act by the NLRB. Nevertheless, the legislative history did not explicitly resolve this question. Under these circumstances, it is not surprising that the Court, consistent with its growing inclination to find a congressional intent to permit judicial review, held that the Board’s decision in *Kyne*, which, as the Court saw it, would not have been subject to review under the statutory review procedures, was subject to review under the general jurisdiction of the district courts.

Whether or not the Court’s decision in *Kyne* was correct as a matter of statutory interpretation, that decision left open a number of questions, the answers to which would substantially determine the impact of *Kyne* on the administration of the NLRA. Initially, what decisions of the Board would be subject to review in the district courts and what would the scope of that review be? Second, may a party with access to the statutory review procedure obtain review in the district courts? Third, may the district courts review decisions directing elections as well as the post-election certification reviewed in *Kyne*?

**Questions Left Open By Kyne**

*The Scope of District Court Review*

In *Kyne*, the Court characterized its action as not “reviewing” a decision of the Board, but as “[striking] down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.” Section 9, however, contains a number of limitations and prohibitions directed to the Board’s exercise of its delegated powers. For example, the Board may direct an election only when a question of representation exists (section 9(c)(1)); the election must take place in a unit appropriate for collective bargaining (section 9(b)); and may not be directed within twelve months of a valid election in the same unit (section 9(c)(3)). If a district court, in a suit to enjoin a Board election, were to find that no question of representation existed, that the unit in which the election was directed was not appropriate for collective bargaining, or that a prior election, set aside by the Board as invalid, was in fact valid, that court could conclude, in the language of *Kyne*, that the Board’s order directing an election was “in excess of its delegated powers.” And, while only the prohibition against two valid elections within twelve months is “specific,” it is at least arguable that a court should be as free to enjoin the Board from exceeding the clearly implied limitations of the act—that it shall not direct elections in inappropriate units or where

70. Cox, *supra* note 52.
71. 358 U.S. at 188.
no question concerning representation exists—as to enjoin the Board from exceeding explicit limitations. Hence, the extent to which *Kyne* made available district court injunctive relief whenever the Board erroneously directed a representation election is not at all plain from a reading of that decision.

Nor can the importance of this question be overestimated. While the administration of the NLRA would perhaps not be significantly hindered were the courts to grant injunctive relief only in truly extraordinary circumstances, such as a perfectly plain violation of a clear statutory command, a tendency to issue injunctions—temporary or permanent—because the district court disagreed with the Board’s unit finding, or with its determination that a question of representation existed, would be serious. Not only are such questions contested in a great many election proceedings, but they involve complex, labor relations concepts with which most district judges are unfamiliar. Hence, misunderstanding of, and disagreement with, the Board’s conclusions would probably be frequent. And, were injunctive relief available in every case in which the district court disagreed with the Board’s decision, a party dissatisfied with the Board’s decision or, even more important, merely seeking delay in the implementation of that decision for tactical reasons, would be tempted to seek district court review, on the theory that the potential gains, even if the suit were ultimately reversed on appeal, justified the expense of litigation. Indeed, the fear that the *Kyne* exception to the general rule of non-reviewability could not be confined within tolerable grounds was explicitly adverted to by Justice Brennan in his dissent in that case.²²

In fact, however, as Judge Friendly has so colorfully pointed out:

"... [D]issenting opinions are not always a reliable guide to the meaning of the majority; often their predictions partake of Cassandra’s gloom more than of her accuracy."²³ This has, at least, been true of Justice Brennan’s fears as to the probable effects of *Kyne*. For, since *Kyne*, the lower courts have placed an extremely narrow construction on the scope of district court review under that case. Thus the United States Court of Appeals for the District of Columbia, in a series of cases decided soon after *Kyne*, held that Board representation decisions were not to be overturned solely because the Board might have erred in exercising its statutory authority to determine the unit appropriate for collective bargaining²⁴

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²² *Id.* at 195-96.
²³ Local 1545, Carpenters Union v. Vincent, 286 F.2d 127, 132 (2d Cir. 1960).
or the existence of a question of representation. In other words, an unsound or unwise decision by the Board, at least on matters as to which the Board was vested with discretion under the act, was not to be viewed as a decision in excess of the Board's delegated powers within the meaning of Kyne; rather, the only question for the district court to decide was whether the Board had violated a "clear statutory command" or a "clear and mandatory statutory command." Nor would it be enough to sustain district court jurisdiction that the plaintiff could point to a specific command in section 9, for example the command of section 9(c)(5) that in determining whether a unit is appropriate for bargaining purposes, "the extent to which the employees have organized shall not be controlling," and show that the Board's action would be held invalid under that language if the question arose under the judicial review provisions of section 10. A different standard of review was to be applied by the district court, one under which the Board need show no more than that "the statutory language itself and the legislative history sufficiently support its position to eliminate the essential requirement for district court jurisdiction, namely a showing that the Board violated a 'clear and mandatory' statutory prohibition. . . ." Finally, the District of Columbia Circuit held, unwise exercise of Board discretionary powers was insufficient to make out a denial of due process of law insufficient to vest a district court with jurisdiction.

77. International Ass'n of Tool Craftsmen v. Leedom, 276 F.2d 514, 516 (D.C. Cir. 1960); Leedom v. IBEW, 278 F.2d 237, 244 (1960).
78. International Ass'n of Tool Craftsmen v. Leedom, supra note 77, at 516; see also Leedom v. IBEW, supra note 77, at 244.
79. Leedom v. IBEW, supra note 78, at 243-44; see also Milk Drivers Union v. McCulloch, 306 F.2d 763 (D.C. Cir. 1962).
80. The tests developed in the foregoing cases are occasionally said to define the extent of district court jurisdiction to review a Board decision. See, e.g., Machinery Chauffeurs v. Madden, 343 F.2d 497, 499-500 (7th Cir.), cert. denied, 382 U.S. 822 (1965), affirming on different grounds, 57 L.R.R.M. 2284, 2285 (N.D. Ill. 1964); Miami Newspaper Printing Pressmen's Union v. McCulloch, 322 F.2d 993, 996 (D.C. Cir. 1963). It is more accurate, however, to describe these cases as defining the circumstances under which a district court has jurisdiction to enjoin a Board decision. See, e.g., Boire v. Miami Herald Publishing Co., 343 F.2d 17, 24 (5th Cir.), cert. denied, 382 U.S. 824 (1965); Empresa Hondurena de Vapores, S.A. v. McLeod, 300 F.2d 222, 226-27 (2d Cir. 1962), vacated and remanded, 372 U.S. 10 (1963); Consolidated Edison Co. v. McLeod, 202 F. Supp. 351, 354-55 (S.D.N.Y.), aff'd, 302 F.2d 354 (2d Cir. 1962); Navajo Tribe v. NLRB, 288 F.2d 162, 165 n.6 (D.C. Cir.), cert. denied, 366 U.S. 928 (1961). For as previously noted once it was determined by Kyne that a district court might enjoin a Board decision that met certain standards, the district courts of necessity had power to entertain any action presenting a prima facie claim that those standards had been violated. The only question in such a case was whether injunctive relief should be granted. Cf. Note, 74 Yale L.J. 1282, 1291 n.58 (1965). It was to this question, or more specifically to the criteria to be utilized in resolving this question, that the District of Columbia Circuit addressed itself in the cases immediately following Kyne.
The restrictive interpretation of district court jurisdiction to enjoin representation decisions under *Kyne* enunciated by the District of Columbia Circuit in these early cases, consistently adhered to by that court, and followed by the other circuits that have considered the question, has resulted in few injunctions being granted by the district courts and even fewer being sustained by the courts of appeals. In the eight years since *Kyne* was decided, there are only 14 reported cases in which injunctions have been issued by federal district courts in cases involving Board representation elections. At the court of appeals level, injunctive relief has been granted in only three cases, *Greyhound Corp. v. Boire*, *Empresa Hondurena de Vapores, S.A. v. McLeod* and *Miami Printing Pressmen's Union v. McCulloch*.

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82. See Surprenant Mfg. Co. v. Alpert, 318 F.2d 396 (1st Cir. 1963); Local 1545, Carpenters Union v. Vincent, 286 F.2d 127 (2d Cir. 1960); McLeod v. Local 476, United Bhd. of Indus. Workers, 288 F.2d 198 (2d Cir. 1961); Consolidated Edison Co. v. McLeod, 302 F.2d 354 (2d Cir. 1962); Rock-Hills-Uris, Inc. v. McLeod, 344 F.2d 697 (2d Cir. 1965); Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625 (3d Cir. 1965); Boire v. Miami Herald Publishing Co., 343 F.2d 17 (5th Cir.), cert. denied, 382 U.S. 824 (1965); Eastern Greyhound Lines v. Fusco, 323 F.2d 477 (6th Cir. 1963); Uyeda v. Brooks, 365 F.2d 326 (6th Cir. 1965); Machinery Chauffeurs v. Madden, 343 F.2d 497 (7th Cir. 1965); Department Store Employees v. Brown, 284 F.2d 619 (9th Cir. 1960), cert. denied, 366 U.S. 934 (1961); Teamsters Union v. NLRB, 64 L.R.R.M. 2662 (9th Cir. 1967); Boiles Galvanizing Co. v. Waers, 291 F.2d 791 (10th Cir. 1961).


The most complicated of the three cases holding that injunctive relief should be granted was *Miami Pressmen's*. In that case, the Board's Regional Director had ordered an election in July 1962 among pressroom employees of the Miami Herald Publishing Company, who, at the time, were engaged in a valid economic strike. The election had been challenged by the employer before a district court in Florida, on the ground, *inter alia*, that the employer's request for review of the Regional Director's decision, which had been denied, had been considered by only one member of the Board, contrary to section 3(b), which authorizes delegation by the Board "to any group of three or more members any or all of the powers which it may itself exercise." The Florida district court had declined to enjoin the election, but had ordered the ballots cast therein to be impounded pending final determination of the proceedings before it. Prior to any further action by the court, the Board, which subsequently conceded that the original order denying the employer's request for review had been passed on by only one member of the Board, vacated that order, granted the employer's request for review, and set aside the election. The district court then dismissed the employer's action as moot, since the Board had set aside the very election the employer sought to enjoin.

Subsequently the Board, this time acting by a three-member panel, affirmed the original direction of election by its Regional Director, thus finding that the employer's challenge to the election order was without merit. The Board did not, however, reinstate the original election. Rather, it ordered the Regional Director to conduct a second election,—despite the fact that the Board had found no error in the direction of the first election.

At this point, the union, which had not been a party to the Florida litigation, brought suit in the United States District Court for the District of Columbia to enjoin the second election and to compel the Board to certify the results of the first election. The union's theory was that since the Board had found no defect in the original election, it was under a

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89. The basis for the employer's challenge to the merits of the direction of election had been that it permitted economic strikers to vote despite the fact that the Board had adopted no formal regulations governing voting eligibility. The Board's practice of ruling on the voting eligibility of strikers in its adjudicative process (see *W. Wilton Wood, Inc.*, 127 N.L.R.B. 1675 (1960); *Tampa Sand & Material Co.*, 129 N.L.R.B. 1273 (1961)) was claimed by the employer to be violative of that portion of § 9(c)(3) which provides that "Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike." *Miami Newspaper Printing Pressmen's Union v. McCulloch*, 322 F.2d 993, 995 n.3 (D.C. Cir. 1963).
duty to certify the results of that election by virtue of section 9(c)(1),
which provides that if the Board finds that a question of representation
exists, "it shall direct an election by secret ballot and shall certify the
results thereof." The district court, applying Kyne standards, as they
had previously been articulated by the Court of Appeals for the District
of Columbia, denied the relief requested on the ground that the union
had not shown that the Board had violated a mandatory provision of the
act or that it deprived the union of due process of law. Rather, it found
that the Board's actions were an exercise of its broad discretionary authority under the act and therefore not subject to district court review.

The court of appeals reversed. Initially, the court noted the Board's
reasons for refusing to certify the results of the first election:

... [T]he Board concedes its reason for refusing to certify the
early election to be its serious doubt of the validity of its own
procedures, specifically its use of the single-member Board to
pass upon the Herald's request for review of the direction of
election. Having in mind the practical aspects of labor rela-
tions, the Board anticipated that the Herald would refuse to
bargain on the basis of the July election, on the ground that it
was invalid; that, upon subsequent judicial review of a probable
unfair labor practice charge, a court of appeals might uphold the
Herald's position; that a new election would then be ordered;
and that, as a result, labor relations would remain unsettled for
an extended period of time. To obviate this possibility, the
Board sought to hold a second election which would be free of
the possible infirmity of the first.90

But, the court held, these reasons were insufficient to warrant the
denial of an injunction. Although section 9(c)(1) is not mandatory in
all instances, and the Board is free to set aside elections that have been
unfairly conducted, because of employer or union action affecting em-
ployee free choice or a defect in the election machinery itself, which, for
example, improperly deprives an employee of his vote, there was here no
such unfairness. The only possible defect in the election procedure was
that only one Board member passed on the employer's request for review,
and that was cured by the subsequent three-member review. On these
facts, the court held that section 9(c)(1) does impose a mandatory
duty on the Board to certify the results of the election. Nor is it
relevant that section 9(c)(1) does not contain a negative prohibition of
the type involved in Kyne; a failure to comply with an affirmative com-

90. 322 F.2d at 996.
mand is as much in excess of the Board's powers as a failure to comply with a negative command. "A party would be as aggrieved by such a failure as by an act of the Board contrary to an express prohibition." 91

The court's conclusion that the rationale of Kyne applies when the Board ignores an affirmative command to the same extent as when the Board flouts a negative prohibition would seem unexceptionable. 92 Nevertheless, the decision is troublesome. For, once the court conceded that the Board was under no obligation to certify the results of every election, the only question before it was whether the Board had erroneously declined to certify the results of this election. For the court to decide that question, it was necessary to review the Board's exercise of its concededly discretionary authority to determine under what circumstances it will certify the results of an election. Nor was this a case such as Kyne in which the Board failed to provide any reason for its failure to comply with a statutory command. To the contrary, the court had conceded that the statutory direction to certify election results was subject to certain exceptions, and the Board had come forward with a rational basis for declining to certify in this case—that a certification would surely be challenged by the employer through the refusal to bargain procedure, that it would probably be set aside, and that labor relations would be unsettled for a lesser period of time were the Board, under these circumstances, to decline to certify the results of the challenged first election. It is thus arguable that in ordering the Board to certify the election results, despite its argument for not doing so, the District of Columbia Circuit, contrary to its previously developed principles, set aside a decision made by the Board in the exercise of its discretionary authority under section 9, simply because the court believed that the Board, on the facts before it, had abused that discretion.

Were Miami Pressmen's broadly construed to permit district courts to review the Board's exercise of its discretionary authority to decline to certify representation elections regarded by the Board as invalid, it would open a substantial hole in the wall keeping district courts from passing on the wisdom or lack of it of Board decisions. However, the case is capable of a narrower reading. Thus, as the court noted, there was no conduct by the employer or the union that in the Board's view affected the results of the election. Nor were there any defects in Board procedure that the Board claimed might affect the results of the election. Thus, the decision may be read as announcing a rule of law—that the Board has no discretion under any circumstances to decline to certify the results of

91. Id. at 997.
what it concedes to be a fairly conducted election. So to hold is not to review a Board determination as to whether or not the election was fairly conducted, a review that would go significantly beyond \textit{Kyne}, but rather to interpret section 9(b)(1) as requiring certification in a particular category of cases—those in which the Board has found no conduct which, in its own view, would tend to affect the results of the election.\textsuperscript{93}

As so read, \textit{Miami Pressmen's} does not go as far beyond prior decisions interpreting \textit{Kyne} as a first reading might suggest. It is, however, inconsistent with prior decisions in one respect—it finds district court jurisdiction to enjoin a Board election order where there was no clear violation of a plain statutory command. There is nothing on the face of section 9 that deprives the Board of power to decline to certify the results even of a concededly “fair” election when it determines that the overall objectives of the act will be furthered thereby, nor is there anything in the legislative history of the act that deprives the Board of this power. True, there is nothing on the face of the statute or in the legislative history which affirmatively vests the Board with power to refuse to certify a “fair” election, but at least prior to \textit{Miami Pressmen's} that had not been decisive.\textsuperscript{94} Thus, \textit{Miami Pressmen's} suggests that under some circumstances at least, the courts will go beyond enforcing those congressional commands that are plain either on the face of the statute or in its legislative history. On the other hand, it would be wrong to view the case as indicating a trend towards a more liberal standard of review in the District of Columbia Circuit. For, at least to this point, that court has interpreted \textit{Miami Pressmen's} as an example of “flat disregard of [a] statutory requirement”\textsuperscript{95} rather than as justifying a more searching examination of Board representation decisions challenged in the district courts.\textsuperscript{96}

Another case in which a court of appeals held that a district court had jurisdiction to enjoin a Board election despite the absence of any plain violation of a statutory command was \textit{Empresa Hondurena de Vapores, S.A. v. McLeod.}\textsuperscript{97} In that case, the Board’s order directing an election aboard a Honduran-flag vessel was challenged by the shipowner in the District Court for the Southern District of New York. Although the district court declined to issue an injunction,\textsuperscript{98} the Second

\textsuperscript{94} See, e.g., Leedom v. Norwich Printing Union, 275 F.2d 628, 631 (D.C. Cir. 1960); Local 1545, Carpenters Union v. Vincent, 286 F.2d 127 (2d Cir. 1960); McLeod v. Local 476, United Bhd. of Indus. Workers, 288 F.2d 198 (2d Cir. 1961).
\textsuperscript{95} Local 130, IUEW v. McCulloch, 345 F.2d 90, 96 (D.C. Cir. 1965).
\textsuperscript{96} \textit{Ibid.} See also Lawrence Typographical Union v. NLRB, 349 F.2d 704 (D.C. Cir. 1965).
\textsuperscript{97} 300 F.2d 222 (2d Cir. 1962).
\textsuperscript{98} 200 F. Supp. 484 (S.D.N.Y. 1961).
Circuit reversed. Judge Friendly, writing for the court, conceded that the Board's action had not denied constitutional rights, nor had the Board acted in plain contravention of a specific mandate of the act. Nonetheless, he stated:

However, the failure of the complaint to come within either of the categories of actions to enjoin representation orders that have heretofore been sustained is not fatal; the book has not been closed for all time. Leedom v. Kyne, supra, must be taken to have determined that, whatever may be the case with respect to orders of the National Mediation Board as to bargaining units, . . . representation orders of the NLRB have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41 (1938). Once that step has been taken, the courts must make up their minds, as best they can, whether in a particular type of case Congress would or would not have wished them to intervene against "agency action taken in excess of delegated powers," 358 U.S. at 190. The considerations as to delay from judicial intervention, persuasively marshalled in Mr. Justice Brennan's dissent for Mr. Justice Frankfurter and himself in Leedom v. Kyne, supra, at 191-196, argue for a negative answer in the usual case, having purely domestic significance, where the Board is alleged to have acted wrongly, although not plainly so; hence we gave such an answer in the Local 1545 case and in McLeod v. Local 476, 288 F.2d 198 (2 Cir. 1961), as the Court of Appeals for the District of Columbia has done in numerous cases cited in the Local 1545 opinion. An altogether different situation is presented when, as here, there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a friendly foreign government; we cannot believe Congress would have wished to limit the role of the courts in that situation to cases where the Board had violated a "clear statutory command," . . . as against a command not so clear. 98a

While it is difficult to criticize Judge Friendly's conclusion that the Board's incursion into the field of foreign relations made prompt judicial review eminently desirable, his suggestion that the courts must determine the availability of injunctive relief untrammelled by the narrow Kyne standards theretofore delineated opens up disturbing prospects of judicial

98a. 300 F.2d at 228-29.
delay (if not an increase in injunctions issued), if the district courts are to be free to resolve, on a case-by-case basis, whether "Congress would or would not have wished them to interfere against 'agency action taken in excess of delegated powers.'" It is possible, however, to read Judge Friendly's opinion in *Empresa* not as recommending a case-by-case determination, in which the extent to which the Board erred would be weighed against the dangers of extensive district court review, but rather as suggesting that in a particular type of case—that in which international considerations are involved—prompt district court review is warranted. Indeed, it was essentially on this basis—that the Board's decision had international ramifications—that the Supreme Court sustained the exercise of district court jurisdiction to review the Board's decision in *Empresa*.99 The court explicitly stated that its decision was not to be understood as an enlargement of the *Kyne* exception,100 and it has not been treated as such by the lower courts. Rather, *McCulloch v. Sociedad Nacional de Marineros de Honduras*101 has been read as creating a third exception to the general rule of non-reviewability—an "international ramifications" exception to go along with the "constitutional rights" exception of *Fay v. Douds* and the "plain statutory violations" exception of *Leedom v. Kyne*.

The final court of appeals decision sustaining a district court injunction subsequent to *Kyne*, and the most significant of the three, in terms of its ultimate result, was *Greyhound Corp. v. Boire*.102 In *Greyhound*, the union filed a petition with the Board requesting an election among certain maintenance employees working at Greyhound bus terminals in four Florida cities. The employees in question were nominally employed by Floors, Inc., a corporation engaged in the business of providing cleaning and maintenance services. Greyhound and Floors contended, in a hearing before the Board, that Greyhound was not the emp-
ployer of the employees in question, but that Floors was, and thus that
the appropriate bargaining unit was either all Floors' employees in the
four cities in which the terminals were located or all Floors' employees
in each of the cities in separate groupings. The Board, however, found
that Floors and Greyhound were joint employers of the employees in
question and directed an election in the unit requested by the union.

Shortly before the election was to take place, Greyhound filed suit
in the United States District Court for the Southern District of Florida,
seeking to enjoin the election. The district court, after hearing, granted
an injunction. The court held that the Board's factual findings were,
as a matter of law, insufficient to create a joint employer relationship with
respect to the employees involved; that those findings established as a
matter of law that Floors was the sole employer; and that the Board
had acted in excess of its delegated power in directing a representation
election where no employment relationship existed between the employees
and the purported employer.

The court of appeals affirmed, per curiam, but the Supreme Court
reversed. After noting the legislative history, which established that
Board representation proceedings are normally not subject to direct re-
view in the courts, the Court stated that its decisions had recognized
only two exceptions to the general rule of non-reviewability, "each char-
acterized by extraordinary circumstances." The first exception was
Kyne, the second Sociedad. Greyhound made no claim that its case
fell within the Sociedad exception, and the Court held it did not fall
within the Kyne exception.

The reasons Greyhound did not fall within the Kyne exception were
two-fold. First, the lower court had "misconceive[d] . . . the import
of the substantive federal law . . ." by viewing the independent con-
tractor relationship of Floors to Greyhound as dispositive of the question
whether Floors' employees were, for purposes of the NLRA, employees
of Greyhound. The latter question turned on the relationship between
Greyhound and the employees involved, not the relationship between
Greyhound and Floors. Second, and more important for our purposes,
the district court had misconceived the "painstakingly delineated pro-
cedural boundaries of Kyne." Thus the Court stated:

[W]hether Greyhound possessed sufficient indicia of control
to be an "employer" is essentially a factual issue, unlike the
question in Kyne, which depended solely upon construction of
the statute. The Kyne exception is a narrow one, not to be ex-

103. 376 U.S. at 479-80.
104. Id. at 481.
105. Ibid.
tended 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 Court of Appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.106

The Court's separation of the lower court's substantive error from its procedural one is, of course, highly significant. For it indicates that even if the Board was wrong on the "employer" status of Greyhound, the district court nonetheless was without power, under Kyne, to set aside the Board's decision. The reason, as the Court stated in Greyhound, is that Kyne does not 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." And, in determining the importance of Greyhound, it is important to note what type of "factual" issue was involved in that case. It was not a factual issue that turned on a disagreement as to what the facts were. That is, the district court had not disagreed with the Board's findings of fact as to the relationship between Greyhound, Floors, and the employees. Rather, the district court had held that on those findings, the Board could not, as a matter of law, conclude that Greyhound was an employer for purposes of collective bargaining. Thus what was really involved in Greyhound was a decision by the district court, on essentially undisputed facts, that the Board had misapplied a statutory standard and had erroneously determined the circumstances under which an employer-employee relationship may exist under the act. Stated differently, what Greyhound presented was a so-called mixed question of law and fact involving the application of a generally formulated statutory standard to the particular facts of the case.

Once it is recognized that the issue in Greyhound was not a "pure" factual issue, but rather involved the alleged misapplication of a statutory standard to essentially undisputed facts, the significance of that decision is apparent. The great majority of contested Board decisions under section 9 involve precisely such issues—when does a question of representation exist, what is a unit appropriate for bargaining, who is an employee, when was an election validly conducted, etc. If such decisions are removed from the purview of district court review, along with the

106. Id. at 481-82.
"pure" questions of fact, the range of issues on which the Board can be challenged before the district courts is extremely narrow. That is, apart from those cases which contain international ramifications, a problem not likely to arise again after the Board’s defeat in Empresa, and those cases presenting constitutional questions, the only question open to a district court today would appear to be whether, wholly apart from the facts of the case before it, and solely as a matter of pure statutory construction, the Board has acted "in excess of its delegated powers and contrary to a specific prohibition in the Act."\(^{108}\) In other words, once it is determined that a party seeking to obtain district court review of a Board representation decision is raising an essentially factual issue, as that term was used in Greyhound, i.e., to include the application of general statutory standards to particular undisputed facts, injunctive relief should be denied and the complaint should be dismissed.\(^{109}\)

There is, of course, nothing startling about the view that district courts, under Kyne, are without power to set aside a Board decision solely because the Board may have erred in its application of a general statutory term to the particular facts before it. This is essentially the view which the courts of appeals, especially the District of Columbia Court of Appeals, have enunciated in a series of cases since Kyne, albeit phrased slightly differently, i.e., that a district court lacks jurisdiction to set aside a Board decision made in the exercise of the Board’s discretionary powers. Greyhound simply sharpens the test of those cases and makes it plain, in terms of those cases, that a failure to apply a statutory term properly on the facts of a particular case is within the area of the Board’s discretion. The Availability and Timing of District Court Review to a Plaintiff Who Has Access to the Statutory Revied Procedure

Employers. One element leading to the Court’s conclusion in Kyne that the district court had jurisdiction to review the Board’s decision was that, in the absence of such jurisdiction, the plaintiff union would have been without judicial protection against the Board’s unlawful action. The Court stated that "absence of jurisdiction of the federal courts would mean 'a sacrifice or obliteration of a right which Congress has given professional employees, for there is no other means within their


\(^{109}\) See Potter v. Castle Constr. Co., 355 F.2d 212 (5th Cir. 1966); Ertel Mfg. Co. v. Little, 59 L.R.R.M. 2337 (S.D. Ind. July 13, 1965); Vergeer v. McCulloch, 56 L.R.R.M. 2635 (D. Ore. May 20, 1964). The fact that an issue of "pure" statutory construction is raised does not, however, mean that injunctive relief should be granted. What it does mean is that the problem presented is one which the court may consider on the merits. Injunctive relief is available only "where the fact of a statutory violation cannot seriously be argued." Boire v. Miami Herald Publishing Co., 343 F.2d 17, 23 (5th Cir. 1965); see also Local 130, IUEW v. McCulloch, 345 F.2d 90, 95 (D.C. Cir. 1965).
control . . . to protect and enforce that right' and that 'this Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.'"110 This raises the question whether the existence of an opportunity for judicial protection of statutory rights under the review provisions of the NLRA would render inapplicable the *Kyne* exception to the general lack of district court jurisdiction to review Board representation proceedings. In other words, may a plaintiff who could obtain review of his claims through section 10 of the act successfully invoke the protection of a district court against a Board decision otherwise meeting the *Kyne* standards, *i.e.*, a decision plainly inconsistent with a mandatory provision of the NLRA? This question arises most frequently in district court suits by employers so it will be first considered in that context.

Initially, it is clear that an employer who believes that the Board has erred at some point in the representation proceedings does have a procedure, under the statute, for challenging the Board's action. As pointed out previously section 9(d) provides that when a representation determination forms the basis of a Board unfair labor practice order, and that order is before a court of appeals for review under sections 10(e) or (f), the record in the representation case shall be filed in the court of appeals and the representation determination may be reviewed at that time. Thus, an employer who wishes to contest a Board election decision may allow the election to proceed, and, if the participating union receives a majority of the votes cast and is certified by the Board as the representative of his employees, refuse to bargain on the ground that the underlying election was beyond the Board's power. Such a refusal would undoubtedly trigger a section 8(a)(5) unfair labor practice charge, followed by a Board decision finding an unfair labor practice and ordering the employer to bargain. Review of the Board's bargaining order, and of the election on which it was based, could then be obtained in the court of appeals under sections 10(e) or (f). In short, an employer has available a statutory procedure for full judicial review of Board election proceedings prior to his being placed under any enforceable obligation based on the election.

The availability to employers of section 10 judicial review of Board representation proceedings, coupled with the legislative history indicating Congress' intent to confine employer litigation to that route,111 would appear to provide strong arguments against extending to employers the district court review procedure made available to unions by *Kyne*. Thus, the Court of Appeals for the District of Columbia, which fashioned the

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110. 358 U.S. at 190.
111. See note 15 supra and accompanying text.


The Kyne exception, has repeatedly turned back employer challenges to Board representation decisions without consideration of their merits, simply calling attention to the fact that the plaintiff employer had available a statutory review procedure. Indeed, the court explicitly stated, albeit in dictum, that "the Leedom v. Kyne remedy was not devised for the benefit of an employer." Despite the foregoing, by far the greater number of district court suits seeking to obtain review under Kyne are brought by employers. Additionally, the Second Circuit, in Empresa, indicated an unwillingness to accept the argument that the availability of statutory review to an employer is an absolute bar to district court review. Finally, the Fifth Circuit, in Miami Herald Publishing Co. v. Boire, explicitly rejected this argument. Hence the question of employer access to the district courts would appear to be both "live" and significant.

The Second Circuit's decision in Empresa, which permitted the employer plaintiff to obtain district court review of the Board's election decision in preference to the more circuitous route of triggering a reviewable unfair labor practice order by refusing to bargain, rested partially on the international ramifications of the Board's action in that case. The court also sought, however, to justify its holding on more conventional grounds. Thus, the Second Circuit noted, "the possibility of the plaintiff's precipitating an unfair labor practice charge was present in

114. Of the 67 reported cases since Kyne in which district court review of Board representation decisions has been sought, 43 were filed by employers, 20 by unions, and 4 by employees. While the reported cases are but a fraction of the total suits filed (see 29, 30 NLRB ANN. REP. table 21 (1964, 1965), there is no reason to suppose they are not representative.
115. 300 F.2d 222 (2d Cir. 1962).
116. 343 F.2d 17 (5th Cir. 1965).
117. The only other court of appeals decision that has plainly rejected the contention that employer resort to the district courts is wholly precluded was Greyhound Corp. v. Boire, 309 F.2d 397 (5th Cir.) (per curiam), rev'd, 376 U.S. 473 (1964). In all other suits reaching the courts of appeals, relief was denied the employer on the ground he had failed to show that the Board had violated a plain statutory command. Surprenant Mfg. Co. v. Alpert, 318 F.2d 396 (1st Cir. 1963); Consolidated Edison Co. v. McLeod, 302 F.2d 354 (2d Cir. 1962); Rock-Hills Uris v. McLeod, 344 F.2d 697 (2d Cir. 1965); Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625 (3d Cir. 1966); Potter v. Castle Constr. Co., 355 F.2d 212 (5th Cir. 1966); American Metal Prods. Co. v. Reynolds, 332 F.2d 434 (6th Cir. 1964); Urethane Corp. v. Kennedy, 322 F.2d 564 (9th Cir. 1964); Waers v. Sprecher Drilling Corp., 329 F.2d 646 (10th Cir. 1964); Leedom v. Fitch Sanitarium, Inc., 294 F.2d 251 (D.C. Cir. 1961); Kingsport Press, Inc. v. McCulloch, 336 F.2d 753 (D.C. Cir.), cert denied, 379 U.S. 931 (1964).
118. "If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the best time to stop it is before the offense occurs, not somewhere along the line." 300 F.2d at 229.
KYNE itself; yet the Court evidently did not deem this fatal.\textsuperscript{119}

Whatever the merit of the "international ramifications" aspect of Empresa, an aspect peculiar to that case, the latter argument is hardly persuasive. True, the plaintiff union in Kyne could have refused to bargain for the non-professional employees, but, as the court of appeals opinion in that case pointed out, the likelihood that such a refusal would provoke an unfair labor practice charge by either the employer or the non-professionals was minimal. The employer would have no reason to file a charge, since he would be quite content to deal with the non-professionals individually; the non-professionals would be reluctant to file a charge since the outcome, if the charge were sustained, would be to place their fate in the hands of a reluctant bargaining agent.\textsuperscript{120}

On the other hand, a certified union will almost invariably institute unfair labor practice proceedings against an employer who refuses to bargain with it. In the first place, unions are in the business of bargaining. If an employer refuses to bargain with a certified union, the union must take steps to compel bargaining or forfeit its very \textit{raison d'être}. Filing an unfair labor practice charge with the Board sets in motion, at no cost to the union, machinery that will, if the Board's order is sustained, lead to a court order directing the employer to bargain. Additionally, if the union wishes to call a strike to compel the employer to bargain, a successful unfair labor practice charge will protect the strikers against losing their jobs to replacement at the conclusion of the strike.\textsuperscript{121} Accordingly, the employer who refuses to bargain with a certified union because of an asserted defect in the Board's election decision is, as a practical matter, assured of obtaining judicial review of that decision.\textsuperscript{122} Thus, to say that the bare possibility of union access to the statutory review procedure in Kyne was not fatal to the union's ability to obtain district court review is hardly to say that the employer's assured access should be equally irrelevant to his ability to obtain such review. To the contrary, the difference in degree of access to the statutory route is so

\textsuperscript{119} Ibid.

\textsuperscript{120} 249 F.2d 490, 492 (D.C. Cir. 1957).

\textsuperscript{121} Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956).

\textsuperscript{122} See NLRB v. Air Control Prods., Inc., 335 F.2d 245, 247 n.1 (5th Cir. 1964).

The only potential disadvantage to the union in filing § 8(a)(5) charges would be that if those charges were ultimately rejected by a reviewing court, the union would presumably be in the same position as an uncertified union (since its certification had been declared invalid) and subject to the limitations on picketing imposed on an uncertified union by § 8(b)(7) of the act. As a practical matter, however, the only burden imposed by § 8(b)(7) in this situation would be that the union, which had already won one election, would be forced to go to another election, which it would have to win, in order to continue picketing. Balancing this potential disadvantage of filing § 8(a)(5) charges against the potential advantages—a bargaining order and guaranteed reinstatement for strikers—there would be few occasions in which a union would be unlikely to file the § 8(a)(5) charges.
different as to make the two situations wholly distinguishable.\textsuperscript{123}

The only other court of appeals decision explicitly rejecting the argument that \textit{Kyne} is inapplicable to employer suits because of the availability of the statutory review procedure was \textit{Miami Herald}. Initially, the Fifth Circuit made the point, already discussed in the context of \textit{Empresa}, that the union in \textit{Kyne} had won the election, and hence could theoretically obtain judicial review of the Board’s decision by refusing to bargain for the non-professionals. The court then noted that the employer’s ability to obtain judicial review under the statute depends on the occurrence of at least two contingencies: (1) the union must decide to file an unfair labor practice charge, and (2) the Board must sustain the charge and petition for enforcement of its order. The first of these contingencies, as has been pointed out, is close to a certainty. The second is equally certain. The employer who refuses to bargain with a certified union need have no fear but that the General Counsel will issue a complaint predicated on the union’s charge or that the Board will find his refusal to bargain an unfair labor practice and order him to bargain.\textsuperscript{124} And, in the unlikely event that the Board would not seek judicial enforcement of its bargaining order, the employer could initiate judicial review proceedings under section 10(f).

The next argument made by the court in support of its conclusion that the statutory review procedure did not exclude the possibility of district court review was that the statutory route “places a manifest hardship on the employer, for he must run the risk of incurring a meritorious unfair labor practice charge in order to challenge the validity of the election.”\textsuperscript{125} The court did not spell out the precise nature of the “hardship” involved in incurring a meritorious unfair labor practice charge, but from a footnote reference to the fact situation in \textit{Miami Herald},\textsuperscript{126}

\begin{footnotesize}
\begin{enumerate}
\item[123.] One comment on \textit{Kyne}, pointing to the Court’s statement that the professional employees there had no means “within their control” (358 U.S. at 190) to protect their rights, other than a suit in the district court, suggested that the employer, too, should have access to the district court, since he has no means within his control to protect himself from an erroneous Board decision. Thus, the argument goes, the employer’s ability to obtain review is dependent on the filing of charges by the union with which he refuses to bargain and is not “within [his] control.” Note, \textit{The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 219-20 (1959)}. This argument, while technically accurate, ignores the spirit of \textit{Kyne}—that district court review was available because the absence of jurisdiction would mean “a sacrifice or obliteration of a right which Congress [had] given professional employees. . . .” (358 U.S. at 190). So long as absence of district court jurisdiction would not mean a sacrifice of congressionally-created rights, as it quite plainly would not in the case of the employer with his easy access to the courts of appeals through the refusal to bargain route, it is difficult to see why the technicality of how the employer gets to the court of appeals—through a charge filed by him or by a union—should be significant.
\item[124.] See note 3 \textit{supra}.
\item[125.] 343 F.2d 17, 22 (5th Cir. 1965).
\item[126.] Id. at 22 n.10.
\end{enumerate}
\end{footnotesize}
it appears to have had in mind the employer's obligation, under the NLRA, to reinstate employees who strike in protest against a refusal to bargain that is ultimately found to constitute an unfair labor practice. It would not seem, however, that district court review should be available for the purpose of enabling the employer to avoid the application of a rule of law that is designed, inter alia, to discourage unjustified refusals to bargain by protecting employees who strike in protest against such a refusal.

The Fifth Circuit itself appears to have found the "manifest hardship" argument less than conclusive, for immediately after setting it out, it stated: "However, it must be assumed that Congress was aware of these obstacles to a challenge of election procedures and that it intentionally made it difficult for the employer to challenge election procedures in order to insure that frivolous complaints were not utilized to bring about a postponement of collective bargaining." The foregoing assumption is sound, as the legislative history shows, but the use of it here leaves the court with little in the way of an articulated basis for rejecting the Board's argument that district court review is barred to an employer. Nor does the court set out any further analytical basis for its conclusion. Rather, it concludes by stating simply that the Supreme Court did not make the distinction (between suits by employers and those by unions) in either Sociedad or Greyhound, "which were both suits instituted by an employer."

While the court of appeals was wrong in asserting that Sociedad was an employer-instituted suit, Greyhound was such a suit. And, although the Board had argued in its brief in Greyhound that the lower court's decision should have been reversed on the grounds, inter alia, that the Kyne exception was inapplicable to employers, the Supreme Court did not go off on those grounds, but on the essentially factual nature of the employer's challenge. One inference that can be drawn from the Supreme Court's failure to decide Greyhound on the grounds that the employer's statutory review procedure precluded resort to the district court is that the Court has rejected that distinction. Indeed, that was the inference drawn by the Fifth Circuit in Miami Herald. Another possible inference is that since the Court found no violation of a specific statutory command such as would warrant the grant of injunctive relief under Kyne, it simply did not reach the question considered here—whether Kyne applies to

128. 343 F.2d at 22.
129. Ibid.
130. See note 99 supra.
132. See text accompanying note 106 supra.
employer suits. Neither inference is compelling and in view of the arguments against applying *Kyne* to employer suits, one would hope that the lower courts would not read the Supreme Court’s silence as resolving the question, but as leaving it open for future resolution.

If the question of employer access to the district courts is to be regarded as still open after *Greyhound*, one argument yet to be considered in favor of permitting such access is that the statutory procedure, which cannot be invoked until after election and certification, provides no protection against the harmful effects of the election itself. That is, even if the employer is ultimately successful in defending against a section 8(a)(5) charge, he will have had to undergo the expense and turmoil of the election. Additionally, an election in which a union is shown to possess majority status will arguably encourage the union to utilize the strike weapon against an employer who chooses to follow the statutory review procedure rather than grant recognition. A court of appeals decision a year or two after the election holding that it was invalid will not relieve the employer of the expenses incurred in going through the election or defending against a strike caused by a union victory in the election. Finally, the argument continues, to permit a district court to grant injunctive relief when the employer shows *Kyne* standards to have been violated involves no serious danger of unwarranted delay, with which Congress was concerned in its general preclusion of pre-election review of Board representation proceedings, since the granting of injunctive relief under *Kyne* is limited to the situation in which the Board’s error is plain. In sum, an employer might argue, the potential injury in being compelled to undergo an unwarranted election is sufficiently great, and the likelihood of unjustified delay sufficiently small, that Congress would not wish to preclude injunctive relief against an election found to fall within the *Kyne* standards for the granting of injunctive relief.

The foregoing argument is not without appeal. On the other hand, no matter how the standard is formulated for the grant of injunctive relief, some district courts will err, injunctions will be improperly issued, and unjustified delay in the resolution of questions of representation will occur. Indeed, of the reported cases since *Kyne* in which injunctive relief was granted at the behest of an employer, and in which the court applied *Kyne* standards as it understood them, a substantial number have

133. See Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625, 627 (3d Cir. 1966).
134. In this context the employer could also argue that as compared to the union in *Kyne* he is injured even if no unfair labor practice charge is filed, since the injury of which he complains is not limited to that of having to bargain on the basis of an invalid election.
been reversed on appeal.\textsuperscript{135} Additionally, so long as pre-election review is available, some employers will resort to it for purely tactical purposes, \textit{i.e.}, not with the expectation of ultimately prevailing in the litigation, but solely to delay the holding of an election that they fear will result, if held on schedule, in a union victory. Thus the crucial question is whether the harm to an employer that may result from requiring him to follow the statutory route, with its lack of protection against the injury that may flow from an improperly directed election, is sufficient, when balanced against the possibility of unwarranted delay in the conduct of valid elections, to justify pre-election review in the district courts even under \textit{Kyne} standards.

In response to this question, the extent of the employer's injury in being compelled to undergo an election that ultimately is found to have been improperly directed is surely relevant. One respect in which the employer may claim to be injured, \textit{i.e.}, the expenses flowing from an unwarranted election, appears on examination to be of little substance. For, to the extent the employer's claim is based upon the decreased efficiency of operations flowing from the election campaign itself, the campaign is usually just about over by the time the suit to enjoin the election is brought. Thus, while there are normally some 30 days between the direction of election and the scheduled election date,\textsuperscript{136} most suits challenging representation elections are not filed until a week or two prior to the election.\textsuperscript{137} Additionally, the fact of an employer suit to enjoin the election is likely to intensify employee interest, with a resultant drop in efficiency, rather than to diminish that interest. Finally, the few minutes necessary to permit an employee to cast his ballot, even if on working time rather than before or after working hours, hardly seems a substantial economic burden on the employer.\textsuperscript{138}

Nor, on examination, can one say that the likelihood of strike action


\textsuperscript{136} See, \textit{e.g.}, M. V. Dominator, 162 N.L.R.B. No. 134 (64 L.R.R.M. 1215) (Feb. 13, 1967); E. I. Dupont de Nemours, 162 N.L.R.B. No. 49 (64 L.R.R.M. 1021) (Dec. 30, 1966).


\textsuperscript{138} Indeed, it is the Board's practice, at least in the Chicago area, to arrange voting times to permit all employees to vote on non-working time unless the employer consents to employees taking time off from work to vote. Conversation between the author and Martin M. Schneid, Assistant to the Regional Director, 13th Region, NLRB, April 10, 1967.
is significantly enhanced by proof of majority status flowing from a Board election. To the contrary, the experience under Public Resolution 44, which provided for pre-election review, as compared to that under the statutory review procedure, indicates that the likelihood of strikes is greater if resolution of the underlying representation question is delayed by district court suits than if the representation proceeding is allowed to run its course. In sum, the potential economic injury to an employer flowing from a representation election that may turn out to have been wrongfully directed would not appear sufficiently great to justify the risks of unwarranted delay flowing from an improper grant of injunctive relief, even as limited by narrow Kyne standards.

One situation in which the employer's claim to pre-election review may be somewhat stronger is where the Board has set aside one election as invalid and directed another election shortly thereafter. For, it may be argued, whatever the strength of an employer's interest in being free of the disruption and expense of one election, section 9(c)(3), which prohibits the Board from holding more than one valid election in a twelve-month period, provides explicit evidence of Congress' intent to protect an employer from the burden of two elections within a twelve-month period, at least where the first election was valid. Such protection cannot be effectuated by judicial review of a refusal to bargain charge after the second election; even if the employer prevails he will have had to undergo the second election. Thus, it may be argued that pre-election district court review of a Board order directing a second election within twelve months of the first should be available.

On the other hand, Congress' primary concern in passing section 9(c)(3) appears to have been to prevent the Board from repeatedly directing elections in a situation in which employees rejected unionization, not to protect the employer from the occasional case in which the Board directed a second election in the erroneous belief that the first was invalid. Compare H.R. Rep. No. 972 (on S. 1958), 74th Cong., 1st Sess. 5-6 (1935), 2 Leg. Hist. NLRA 2960-61, quoted in text accompanying note 14 supra, with Hearings on S. 1000, 1264, 1392, 1550, 1580 and 2123 Before the Senate Committee on Education and Labor, 76th Cong., 1st Sess. 462-63 (1939). Nor might a district court enjoin a strike to compel an employer to recognize a union precluded from demonstrating its alleged majority status by virtue of an injunction against a Board election. Both the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964) (cf. United States v. Building & Constr. Trades Council, 313 U.S. 539 (1941) (per curiam), affirming 37 F. Supp. 191 (N.D. Ill. 1941)), and the primary jurisdiction of the NLRB over peaceful strikes (see Garner v. Teamsters Union, 346 U.S. 485, 490-91 (1953); cf. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)) would preclude such an injunction.

See Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625, 628 (3d Cir. 1965); Norris, Inc. v. NLRB, 177 F.2d 26, 28 (D.C. Cir. 1949).

Section 9(c)(3) provides: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."
The employer's interest in being free of an erroneously directed second election is no greater than his interest in being free of an erroneously directed first election, and absent explicit evidence to the contrary, not present in the legislative history of section 9(c)(3), it should not be assumed that Congress was willing to permit pre-election district court review in the former situation, but not in the latter. 143

If the potential injury flowing from an improperly directed election is insufficient to justify pre-election district court review at an employer's behest, post-election review would appear barred a fortiori. Whatever injury may be thought to flow from the bare fact of the election having been held is complete. The only question at this point is whether the election has imposed a legally binding obligation on the employer, i.e., whether he must bargain with the winning union. This question can be promptly resolved through the statutory review procedure. Indeed, if speedy review of the underlying election is what the employer desires, he may stipulate his case directly to the Board and be assured of a reviewable order to bargain within a few months from the date of his refusal to bargain. 144 Furthermore, review through the statutory procedure insures the union involved that if the underlying election was properly conducted, the Board's bargaining order will be enforced, placing the employer under a judicial decree compelling him to bargain. If, on the other hand, the employer has obtained review in the district court, a judicial determination that the election was properly conducted will result solely in the dismissal of his complaint, placing him under no bargaining obligation until the Board proceedings, which may have been stayed by the district court pending its decision, or deferred by the Board out of deference to the district court, 145 are completed. In sum, post-election district court review advances no legitimate employer interest, since if the Board's election order was invalid, prompt statutory review is available. And, if the election order was valid, district court review served only to delay the issuance of a bargaining order and the commencement of collective bargaining. 146

146. It has been suggested that post-election review in a district court at the behest of an employer adds little to the delay involved in the commencement of bargaining since it merely substitutes review in the district court and the court of appeals for review before the Board and the court of appeals. Note, The Supreme Court, 1958 Term, 73 Harv. L.
One argument sometimes made in favor of permitting an employer to challenge the Board’s election proceedings without awaiting a reviewable bargaining order is that such an order may provide the basis for a judicial compulsion of bargaining absent full-scale review of the validity of the underlying election. Thus, the Board on occasion proceeds under section 10(j) to obtain injunctive relief compelling an employer who challenges the validity of the Board’s certification to bargain with the certified union pending the conclusion of unfair labor practice proceedings before the Board. In such section 10(j) proceedings, the court does not normally resolve the merits of the employer’s challenge to the underlying certification, but decides only whether there is reasonable cause to believe that the employer’s refusal to bargain was an unfair labor practice and whether injunctive relief would be just and proper. Hence an employer might, under section 10(j), be required to bargain with a union ultimately found to have been improperly certified.

It is argued that in order for an employer to protect himself against the irreparable injury of being compelled to bargain with an improperly certified union, he must be able to obtain district court review of the certification prior to the commencement of unfair labor practice proceedings before the Board.
The short answer to this argument is that an employer against whom the Board seeks section 10(j) relief compelling him to bargain with a certified union prior to review on the merits in the court of appeals may arguably have a legitimate claim that the Board is acting contrary to Congress' intent, at least in those cases in which the refusal to bargain is not accompanied by independent unfair labor practices.\textsuperscript{150} This should not, however, mean that every employer, including those against whom section 10(j) relief is not sought, is free to bypass the statutory review procedure in favor of direct review in the district courts. Indeed, in view of the relative infrequency with which the Board seeks section 10(j) relief against an employer whose refusal to bargain is predicated on the alleged invalidity of the underlying certification, it is almost frivolous to argue that the risk of being compelled to bargain without full judicial review of the validity of the Board's certification if the Board seeks section 10(j) relief justifies an employer in obtaining district court review immediately on the issuance of a certification. Finally, while the asserted reason for seeking district court review would be to obtain full judicial review prior to coming under an obligation to bargain, rather than the truncated section 10(j) review, the standards of review in the district court proceedings, would, under \textit{Kyne}, appear to be even less searching than these in a section 10(j) proceeding. Hence, the possibility that the Board will seek a section 10(j) injunction compelling an employer to bargain with a certified union prior to completion of the statutory review proceedings furnishes no substantial justification for a district court to entertain an employer's suit to enjoin or set aside the certification.

To summarize, while the narrow bases on which district court review is available to any plaintiff after \textit{Greyhound} makes the problem of employer suits somewhat less pressing than it was prior to that case,\textsuperscript{151} the better rule would appear to be that employers, who have a congressionally-prescribed and reasonably adequate statutory procedure for obtaining judicial review of NLRB representation proceedings, should not be free to invoke district court jurisdiction for that purpose. Or, at very


\textsuperscript{151} But see Bullard Co. v. NLRB, 253 F. Supp. 391 (D.D.C. 1966); Greensboro Hosiery Mills, Inc. v. Johnston, 60 L.R.R.M. 2060 (M.D.N.C. 1965); Potter v. Castle Constr. Co., 355 F.2d 212 (5th Cir. 1966); Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625 (3d Cir. 1966), in all of which injunctive relief was granted by a district court at the behest of employer plaintiffs subsequent to \textit{Greyhound}. 
least, district court review should be limited to those cases, such as Empresa, in which there are interests involved (such as the maintenance of good relations between the United States and another nation) that might not be adequately protected by statutory review after election and certification.\textsuperscript{152}

**Unions.** Assuming that the availability of the statutory review procedure to an employer should bar employer recourse to the district courts, the next question is whether union access to the statutory review procedure should also serve as a bar. In \textit{Kyne} this problem did not have to be decided since, as a practical matter, the plaintiff union had no access to the statutory review procedure. Nor, at the time \textit{Kyne} was decided, was a union likely, under any circumstances, to have such access to the statutory review procedure as would warrant a denial of district court review, at least on the grounds that an alternative review procedure existed under the statute. For, while the union plaintiff in \textit{Kyne} had won the election which it sought to contest, and so could at least theoretically have triggered a reviewable refusal-to-bargain charge against itself, the normal situation in which a union would wish to challenge a Board election proceeding would be that in which the union had lost (or was likely to lose) the election. A union that had lost an election could not, of course, obtain review of that election by refusing to bargain, since it would not have been certified as a bargaining representative and would be under no statutory duty to bargain.

The only method even theoretically open to a losing union to obtain review under the statutory procedure at the time \textit{Kyne} was decided was to induce or encourage a work stoppage among the employees involved for the purpose of compelling the employer to grant recognition to it. For, if another union had been certified as the representative of those employees (but only in that situation), the union's conduct would subject it to a charge of having violated section 8(b)(4)(C).\textsuperscript{153} If such a charge had been filed, the union could defend before the Board on the

\textsuperscript{152} Another class of cases in which employers should perhaps be free to invoke district court jurisdiction is that in which the employer seeks to compel the Board to assert jurisdiction over his business. In this situation, the employer cannot invoke the statutory review procedure, so that, absent district court review, he is without any means to enforce such rights as he may have under the NLRA. \textit{Compare} Leedom v. Fitch Sanitarium, Inc., 294 F.2d 251 (D.C. Cir. 1961), examining (albeit dismissing) a suit of this nature under \textit{Kyne} standards, \textit{with} General Cable Corp. v. Leedom, 278 F.2d 237 (D.C. Cir. 1960), and Atlas Life Ins. Co. v. Leedom, 284 F.2d 231 (D.C. Cir. 1960), dismissing employer suits on the sole ground that there existed an alternative review procedure under the act.

\textsuperscript{153} Section 8(b)(4)(C) makes it an unfair labor practice for a union to induce work stoppage to compel an employer to bargain with it as the representative of certain employees "if another labor organization has been certified as the representative of such employees under the provisions of section 9."
ground that the underlying certification was invalid. Should the Board overrule that contention and issue a cease and desist order, that order together with the underlying certification would appear subject to review in the court of appeals under section 9(d).154

It would have been an extremely risky procedure, however, for a union to seek review in this manner. For, if it were not to prevail in its contention that the underlying certification was invalid, it would have been liable under section 303(a)(3) for any damages found to have resulted from its picketing. Nor could one discount this risk as equivalent to the risk of being found to have committed a violation of section 8(a)(5) which an employer must run in order to obtain review under the statutory procedure. For, in contrast to the monetary penalties imposed for a violation of section 303(a)(3), the employer who is found to have violated section 8(a)(5) is subject only to the issuance of an order directing him to bargain. Furthermore, while an employer's refusal to bargain might possibly trigger a strike, with its attendant financial loss to all parties, the union could not obtain review, if at all, except by triggering a strike. In short, at the time Kyne was decided there was no adequate statutory procedure for review of Board representation decisions to which a union could be remitted as an alternative to district court review.

Subsequent to the Court's decision in Kyne, however, Congress added section 8(b)(7) to the Act. Under section 8(b)(7)(B), a union that has lost a representation election, whether or not another union was certified, violates the act if it pickets for recognition within twelve months of a "valid" election. The question whether the election was valid may be raised in the statutory review of a Board decision finding the union to have violated section 8(b)(7)(B).155 Nor is a union liable in damages for having violated section 8(b)(7)(B). Thus, a union that believes the Board to have erred in proceedings under section 9 now has available to it a practicable method of challenging the Board's action under the statutory review procedure. This presents the question whether a union seeking to obtain district court review of representation proceedings should be remitted to the statutory route.

Initially, there is no evidence that Congress intended, when it passed section 8(b)(7), to modify or overrule Kyne by providing a method under the statute whereby unions may obtain judicial review of Board

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155. NLRB v. Local 182, Teamsters Union, 314 F.2d 53, 60 (2d Cir. 1963).
representation decisions. This need not be conclusive of the problem, however. If a court were to find that compulsory resort to the statutory review procedure, by way of section 8(b)(7), would further a general congressional intent in favor of restricting judicial review to the statutory procedure, where available, it would presumably be free to require resort to that procedure. Alternatively, since the relief sought in district court suits challenging representation proceedings is invariably equitable in nature, a court that found the statutory review procedure to be adequate might decline to review a Board representation decision on the ground that equity will not intervene where there exists an adequate remedy at law.\footnote{Cf. Atlas Life Ins. Co. v. Leedom, 284 F.2d 231 (D.C. Cir. 1960).}

On the merits of the question, however, it is unlikely that the courts would find it appropriate to require a union to resort to provoking section 8(b)(7) charges against itself as a means to obtain judicial review of Board representation decisions. The advantage of limiting unions to this procedure would be that all litigation challenging representation proceedings would be deferred until after the election. The use of this procedure avoids the temptation to use pre-election litigation as a tactical device to delay the election until a more favorable time for the plaintiff and advances the goal of prompt resolution of representation questions. On the other hand, a section 8(b)(7) charge must be predicated on either picketing or a threat of picketing. If the employer were satisfied with the outcome of the election (as, for example, he might be if his employees chose no union or one of two or more competing unions with which he preferred to deal), a mere threat of picketing would probably be insufficient to induce him to file a section 8(b)(7) charge. Thus, as a practical matter, a union might have to engage in picketing with a significant economic impact before the employer would file a section 8(b)(7) charge. It would hardly seem in the best interests of employers, unions, or the general public to force an economic confrontation of this nature solely as a means to regulate the timing of a union’s challenge to a Board election. Furthermore, it would be wholly inconsistent with Congress’ purpose in enacting section 8(b)(7)—to limit recognitional picketing—to hold that one effect of that enactment was to require a union to engage in recognitional picketing in order to secure judicial review which it could previously have obtained by wholly peaceful means.\footnote{Although occasional decisions since the passage of § 8(b)(7) have noted the opportunity which that section provides for statutory review of Board representation decisions, no court has yet suggested that this opportunity precludes a union from seeking review in a district court. See Local 130, IUEW v. McCulloch, 345 F.2d 90, 95 n.5 (D.C. Cir. 1965). \textit{But cf.} Lawrence Typographical Union v. McCulloch, 349 F.2d 704, 708 (D.C. Cir. 1965); Livingston v. McLeod, 209 F. Supp. 606, 612 (S.D.N.Y. 1962).}
Hence, it is not likely that the possibility of statutory review made available by the passage of section 8(b) (7) will be held to preclude union resort to the district courts as a means to challenge Board representation decisions.

Assuming that the availability of statutory review through provoking a section 8(b) (7) charge is not a sufficient basis on which to bar union access to the district courts, the next question is whether the advantage of the section 8(b) (7) route—precluding pre-election litigation for the purpose or with the effect of delaying an election—might not be achieved simply by permitting only post-election suits. The argument against precluding district court review prior to an election, from the union viewpoint, would be that the election itself may injure it in a way that cannot be undone by a subsequent order setting aside that election. Thus, a union might argue, an election defeat may cause irreparable injury to its standing among the employees involved or among other employees whom it is trying to organize. Additionally, if there were more than one union participating in the election, and the employer were to commence bargaining with the victorious union while the loser were challenging the election in the district court, the loser might, even if ultimately successful in overturning the election, find itself at a substantial disadvantage in a subsequent election.

The task of striking a balance between these conflicting interests is not an easy one. Nor has much light been shed on the problem by litigation since Kyne. Suits brought by unions to enjoin Board elections have generally been resolved on the merits without discussion of whether the plaintiff union should be required to await the outcome of the election prior to challenging the Board's decision. Although the failure to consider this argument, uniformly raised by the Board, may indicate that it has been rejected sub silentio, the fact that few injunctions against elections have been granted at the district court level, so that cases coming to the courts of appeals have not generally required a consideration of the propriety of pre-election relief, makes this inference something less than compelling. In fact, there are only three reported cases

158. See, e.g., Livingston v. McLeod, supra note 157.
160. In Kyne itself the union waited to sue until after the election had been completed and a certification issued. Thus, the question whether pre-election litigation was permissible was not presented.
161. See, e.g., Milk Drivers Union v. McCulloch, 306 F.2d 763 (D.C. Cir. 1962); McLeod v. Local 476, United Bhd. of Industrial Workers, 288 F.2d 198 (2d Cir. 1961).
since Kyne in which injunctive relief has been granted against the conduct of an election at the behest of a union: Norwich Printing Union v. Leedom,\textsuperscript{162} in which the district court's grant of injunctive relief against an election was reversed on the merits by the court of appeals; Local 1545, Carpenters Union v. Vincent,\textsuperscript{163} in which the court of appeals granted a stay of election pending appeal, but later noted, in dismissing the union's suit on the merits, that it might be better to require a union to await the election and the certification of another union before challenging the Board's decision,\textsuperscript{164} and Sociedad,\textsuperscript{165} in which the international ramifications of the Board's decision provided a compelling basis for prompt resolution of the union's claim. Thus, there would not appear to exist any articulated judicial consensus as to whether a union's interest in protecting itself from such injury as may flow from an election itself outweighs the interest in speedy resolution of questions of representation.

One resolution of these conflicting interests that has from time to time been adopted by a court faced with a union suit to enjoin an election is to permit the election to take place, but to order the Board to impound the ballots, uncounted, until the court shall have passed on the merits of the union's claim.\textsuperscript{166} If the court decides that the union's claim is well-founded, the Board may subsequently be permanently enjoined from counting the ballots;\textsuperscript{167} if it decides in the Board's favor, the Board is free to count the ballots and certify the results.\textsuperscript{168} The effect of this procedure is to prevent a union from utilizing district court litigation as a means to delay the conduct of the election until a time more favorable to it. At the same time the union is protected against any harm that might be thought to flow from an improperly directed election. Impounding would thus seem a sensible resolution of conflicting interests, and one that should be considered by any district court faced with a substantial

\textsuperscript{163} 286 F.2d 127 (2d Cir. 1960).
\textsuperscript{164} Id. at 132 n.7. But cf. Empresa Hondurena de Vapores, S.A. v. McLeod, 300 F.2d 222, 229 (2d Cir. 1962).
\textsuperscript{165} 372 U.S. 10 (1963).
\textsuperscript{167} Miami Newspaper Printing Pressmen's Union, supra note 166; IBEW v. Leedom, supra note 166.
claim by a union that a scheduled Board election should be enjoined as unlawful.

Employees. While the vast majority of district court actions to review Board representation proceedings are instigated either by employers or labor organizations, an occasional suit is brought by one or more employees. Such suits have, without exception, been brought by employees whose interests in the particular case were the same as those of the employer involved. In other words, in each of these cases, the employee-plaintiffs have been opposed to representation by the union seeking collective bargaining rights. Thus, it is difficult to avoid the suspicion that at least one reason for the litigation having been instituted by employees, rather than the employer, was to avoid the limitations on an employer's freedom to obtain district court review that flow from the availability to him of a statutory review procedure. For, it is plain, employees have no statutory method whereby to obtain review of representation decisions.

A court "not anxious to open the back door to a litigant denied the front door, or to open any door to 'subterfuges for hampering and delaying a final determination of a bargaining representative,'" accordingly might dismiss a suit brought by employees whose interests are the same as those of their employer on the ground that those interests can be fully protected by the employer through the refusal to bargain route. Furthermore, if the employees wish independent representation of their interests, they are free to seek intervention in the unfair labor practice proceedings that will follow the employer's refusal to bargain. On the other hand, absent evidence that the employee-plaintiffs are merely

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170. H.R. Rep. No. 245 (on H.R. 3020), 80th Cong., 1st Sess. 43 (1947), 1 Leg. Hist. LMRA 334 (set out in text accompanying note 23 supra). Since unions normally have no access to the statutory review procedure either, there is no tactical advantage to having suits which would further union interests brought by individual employees. Perhaps as a result of this, there are no reported cases in which individual employees whose interests coincided with those of the union brought suit to challenge a Board representation decision. Occasional suits by union officials, proceeding in both their individual and official capacities, have been treated by all parties as brought on behalf of the union. See, e.g., the Kyne case.

171. Shoreline Enterprises v. NLRB, 262 F.2d 933, 943 (5th Cir. 1959).

"fronting" for the employer, it would seem harsh to deny them review in the district courts solely because their interests coincide with those of the employer and the employer might trigger unfair labor practice proceedings in which the employees could intervene.\textsuperscript{173} For, if the employer were not to refuse to bargain, the employees would have no judicial review at all, however erroneous the Board's decision and however seriously it may have affected their interests.

Perhaps the most satisfactory resolution of this problem is for the district court to entertain an employee-instituted suit without regard to the fact that the employee interests involved are the same as those of the employer, but only on condition that the employer has not refused to bargain with the union. If he has, the suit should be suspended, or dismissed without prejudice, while the employees seek to intervene in the unfair labor practice proceedings that will undoubtedly follow (or may already have followed) the employer's refusal to bargain. If intervention is granted, the employees will have full opportunity to assert their rights, both in proceedings before the Board and in any subsequent proceedings for judicial review of the Board's order directing the employer to bargain with the certified union. In the unlikely event intervention were denied, the court could proceed to hear the employees' claims if it were persuaded that the employees' interests might not be adequately protected by the employer in the unfair labor practice proceedings.

This procedure, if followed by the district courts, would both insure full protection of employee rights and discourage employers from instigating employee suits to advance the interests of the employer. For, knowing that the price of guaranteed employee access to the district court was employer waiver of the refusal to bargain route, the employer would presumably prefer the more searching review available under the statutory procedure. Hence, any employee suits would be likely to be bona fide, and should be entertained and decided on \textit{Kyne} standards, except to the extent the employees were allowed to intervene in a pending unfair labor practice proceeding.\textsuperscript{174}

One further point should be made in this analysis of employee suits to challenge Board representation proceedings. Employees who are opposed to union representation would appear to have no significant interest

\textsuperscript{173} Cf. Shoreline Enterprises v. NLRB, \textit{supra} note 172, at 943.

\textsuperscript{174} Cases in which employee-plaintiffs were denied district court review, at least in part because of the possibility of statutory review through intervention in Board proceedings, include LaPlant v. McCulloch, \textit{supra} note 173, and Vergeer v. McCulloch, 56 L.R.R.M. 2635 (D. Ore. May 20, 1964). The pendency of unfair labor practice proceedings against the employer as a means of obtaining judicial review of asserted Board errors was also noted in Uyeda v. Brooks, 365 F.2d 326, 331 (6th Cir. 1966). Cf. Potter v. Castle Constr. Co., 355 F.2d 212, 216 (5th Cir. 1966).
in preventing the Board from holding an election, but only in preventing certification as the result of an invalid election. Hence, employee suits should not be entertained under any circumstance until after election and certification, if any, of a bargaining representative.\textsuperscript{175}

\textsuperscript{175} Vergeer v. McCulloch, \textit{supra} note 174.