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Labor Relations - Judicial Review - Failure of NLRB to Certify Representation Election because of Infirmity in Its Own Procedure Is Reviewable by District Court

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practical means of delivery, it is doubtful that the courts would go so far as to deny federal power over what is clearly jurisdictional gas.

In conclusion, it can be said that *Lo-Vaca* represents a return to the view expressed by the Supreme Court prior to the passage of the Natural Gas Act. Ultimately a ruling by that Court will be necessary in this area to provide a uniform rule throughout the United States. However, it can be safely said that the instant case represents a practical and rational approach to the problem—an approach which the Supreme Court, based on its prior holdings, should follow.

Vedder J. White

LABOR RELATIONS—JUDICIAL REVIEW—FAILURE OF NLRB TO CERTIFY REPRESENTATION ELECTION BECAUSE OF INFIRMITY IN ITS OWN PROCEDURE IS REVIEWABLE BY DISTRICT COURT.

Miami Newspaper Printing Pressmen's Union v. McCulloch
(D.C. Cir. 1963)

The Union sought certification as bargaining agent for the employees of Miami Herald Publishing Company. The Board had directed that an election be held on July 25, 1961, and Herald requested NLRB review of the election order. This request was denied by the Board acting through only one of its members. Herald brought suit, and the Board, realizing that its order denying Herald's request did not conform to section 3(b) of the act,[1] vacated the order and set aside the July 25th election. The NLRB then directed that a rerun election be held.[2]

Meanwhile, the Union had instituted proceedings in the district court claiming that the Board, in ordering a rerun election and in refusing to certify the July 25th election, was acting contrary to section 9(c)(1), the mandatory provision of the NLRA requiring the Board to certify.[3] The

1. Herald's contention was that the Board's denial of its request to review the election order was invalid because its request was passed upon by only one Board member. Herald relied upon § 3(b) of the act, 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." 73 Stat. 542 (1959), 29 U.S.C. § 153(b) (Supp. IV, 1963). (Emphasis added.)

2. The rerun election was held on December 5, 1962. Neither of the election results was disclosed in the case.

3. The Union's argument was that where a question of representation exists, and an election is held, § 9(c)(1) imposes a mandatory duty on the Board to certify. The pertinent portion of the statute is as follows: "If the Board finds upon the record of such hearing that such a question of representation exists, it *shall direct* an election by secret ballot and *shall certify* the results thereof." 61 Stat. 143 (1947), 29 U.S.C. § 159(c)(1)(B) (1958). (Emphasis added.)

Union further asserted that this procedure would deny employees voting rights guaranteed by the act. The district court decided that it had no jurisdiction, that the Board's action was not in violation of a mandatory provision, and that this was merely the Board's exercise of its broad discretionary power.

On appeal, the Circuit Court disagreed, stating that federal courts could assume jurisdiction under the general jurisdictional statutes[4] in two situations: (1) if Board action results in the denial of a constitutional right[5] or (2) if the Board acts in excess of its delegated powers and contrary to a specific prohibition of the act.[6] As the second exception applied here, the court reversed the district court, *holding* that where a question of representation exists, and a valid election is held, the certification procedure provided for in section 9(c)(1)[7] is mandatory. *Miami Newspaper Printing Pressmen's Union v. McCulloch,* 322 F.2d 993 (D.C. Cir. 1963).

The instant case is evidence that courts no longer display their initial reluctance to review the actions of administrative bodies in cases where there is no specific provision for review.[8] This trend toward increased judicial intervention in the administrative processes has been condemned as being especially harmful in the area of labor relations. Critics base their comments on the legislative history of the Wagner Act[9] and the Taft-Hartley Amendments;[10] they contend that Congress, seeking to avoid the delay often caused by judicial participation, attempted to preclude judicial review of common NLRB representation actions.[11] Opponents of judicial review in this area also advance the argument based upon statutory interpretation that since Congress has specifically provided for review in some portions of the act and has omitted it in others, the inference is strong that they intended no extension of this function.

This discussion of legislative intent and judicial policy serves as a background for an examination of the problem with which the court in the instant case was primarily concerned: the availability of the remedy of judicial review with regard to certification orders entered in representation proceedings. This question is of special importance due to the determinative role these orders have now assumed in the bargaining process.

4. "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 62 Stat. 931 (1948), 28 U.S.C. § 1337 (1958).

5. Fay v. Douds, 172 F.2d 720 (2d Cir. 1949).

6. Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180 (1958).

7. 61 Stat. 143 (1947), 29 U.S.C. § 159(c)(1)(B) (1958).

8. "Tolerance of judicial review has been more and more the rule as against the claim of administrative finality." Union Pac. R.R. Co. v. Price, 360 U.S. 601, 619, 79 S.Ct. 1351, 1361 (1959) (dissenting opinion of Douglas, J., with whom Warren, C.J., and Black, J., concurred). See also Leedom v. Kyne, 358 U.S. 184, 190, 79 S.Ct. 180, 184-85 (1958); Harmon v. Brucker, 355 U.S. 579, 581-82, 78 S. Ct. 433, 435 (1958); Stark v. Wickard, 321 U.S. 288, 309-10, 64 S.Ct. 559, 571 (1944); Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177, 183, 59 S.Ct. 160, 163-64 (1938).

9. 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958).

10. 61 Stat. 136 (1947), 29 U.S.C. § 141 (1958).

11. Leedom v. Kyne, 358 U.S. 184, 192, 79 S.Ct. 180, 186 (1958).

In 1940, the case of *AFL v. NLRB*[12] decided that such review could not be obtained under section 10[13] of the act. There, a labor union, whose claims concerning the appropriate bargaining unit had been rejected by the Board, petitioned the Court of Appeals for review under section 10. The petition was dismissed on the ground that a certification was not a "final" order within the meaning of that section and as such was not reviewable by a court of appeals. The opinion also stated that an order directing an election would meet the same fate. This case failed to decide whether review could be obtained under the general jurisdictional statutes.[14]

After much uncertainty on this point, the Supreme Court finally provided the answer in *Leedom v. Kyne*,[15] a case involving a Board determination of the proper membership of a collective bargaining unit. The Board's action was attacked in a federal district court as being violative of the NLRA in that it failed to follow the procedure outlined in section 9(b) of the act. The district court granted the relief; this was later affirmed by the Circuit Court of Appeals.[16] The Supreme Court also upheld the Union's contention, saying that the NLRB's failure to obey was an unlawful action in excess of delegated authority and that the federal courts could exercise their general equity power[17] whenever such a violation occurs. The Court did not characterize the lower court's intervention as being review in the sense of the term as used in the act—a decision of the NLRB made within its jurisdiction—but rather characterized it as the striking down of an order outside the scope of the Board's authority granted in the act. An important distinction which should be drawn is that the Court in allowing general jurisdiction was enforcing a right given to professional employees, a group specifically mentioned in the NLRA. The Board had no discretionary power, and its action contrary to the statutory provision was clearly a violation of a right guaranteed employees by the act.

The result reached by the Supreme Court has had a marked effect upon the entire area of labor relations. It has demonstrated not only that federal courts will utilize their general power to obtain jurisdiction, but also that courts have adopted a theory often voiced by commentators, that there is a presumption of judicial review.[18] One important question which

12. 308 U.S. 401, 60 S.Ct. 300 (1940).

13. Section 10(f) of the act contains the following language: "Any person aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals. . . ." 49 Stat. 453 (1935), as amended, 72 Stat. 945 (1958), 29 U.S.C. § 160(f) (1958). (Emphasis added.)

14. 62 Stat. 931 (1948), 28 U.S.C. § 1337 (1958).

15. 358 U.S. 184, 79 S.Ct. 180 (1958). The Court interpreted § 9(b)(1) of the act which provides, ". . . .the Board *shall not* (1) 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. . . ." 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(1) (1958). (Emphasis added,)

16. Kyne v. Leedom, 148 F. Supp. 597 (D.D.C. 1956), *aff'd*, 249 F.2d 490 (D.C. Cir. 1957).

17. 62 Stat. 931 (1948), 28 U.S.C. § 1337 (1958).

18. 73 HARV. L. REV. 84, 217 (1959).

was raised by *Leedom v. Kyne* is whether *all* orders in representation proceedings are now open to judicial scrutiny. The instant case supplies a partial answer, for it clearly rules that the exception established by *Leedom v. Kyne* is not limited to those sections of the NLRA which are prohibitive in nature. This is not a startling development of the doctrine, since it would have been impossible for the courts to draw any type of reasonable distinction between those provisions which are worded in a prohibitive manner and those which are worded in terms of requirement.

Another notable aspect of the decision is that the court was involved with a NLRB order involving certification and has shown that under certain circumstances these orders are now subject to review. The court undoubtedly realized that in so doing it was interfering with the selection of a union as a representative, but here, as is often the case, the outcome of the rerun election was foreseeable. If it had not passed upon the Board's order, the Union would have been irreparably injured, since a large number of the employees who had voted in the July 25th election could not vote in the rerun election. The court weighed the imminent harm against the policy of non-interference with the election process. In so doing it extended the *Leedom* rule. While reinforcing the authority of the Board to set aside elections in which coercion is present or where there is a mechanical defect in the process, the court ruled that this power cannot be exercised where the defect is caused by the Board itself. The election which was held on July 25th was not in any way impaired by the NLRB's failure to pass upon Miami Herald's request for review, and the Board was bound to certify the results. Failure to do so denied the Union a right guaranteed by the NLRA thereby giving the district court jurisdiction over the Union's action. Unions then are considered to have a right to certification of election results just as the professional employees were considered to have a right to select a bargaining unit in *Leedom v. Kyne.* It must be remembered, however, that this type of judicial review is limited in its availability; it is not as available as the review of a final order provided for in section 10 of the act. The principle set out in *AFL v. NLRB,* that orders in certification proceedings pursuant to section 9 do not qualify for judicial review under section 10, is still in effect.[19]

Finally the instant case is additional evidence that the federal courts are more inclined to intervene in NLRB activity. The arguments advanced by those who opposed the extension of judicial review seem to have been rejected, and the view espoused by the majority in *Leedom v. Kyne* now appears to be favored. Judicial review is a basic right, a traditional power, and the intention to exclude it must be made specific.[20] This does not mean, however, that courts are now seeking to override the authority delegated to administrative bodies by the legislature. Rather, the current tendency is to limit the *Leedom* exception to situations where there is a

19. Connecticut Light & Power Co. v. Leedom, 174 F. Supp. 171, 175 (D.D.C. 1959).
20. Jaffe, *The Right To Judicial Review I,* 71 HARV. L. REV. 401, 432 (1958).