

LABOR LAW—RECENT DECISIONS ON JURISDICTIONAL PROBLEMS

I. NLRB DECLINATION AND STATE COURT JURISDICTION

The Supreme Court has held that the National Labor Relations Act bestows upon the National Labor Relations Board the fullest power that Congress possesses under the commerce clause of the Constitution.¹ Since its inception, however, the Board has chosen not to exercise that power to its fullest extent. At first on a case-by-case basis² and later under codified jurisdictional standards³ the Board has declined jurisdiction over those labor disputes which affect interstate commerce only slightly. When, in a 1957 series of cases,⁴ the Supreme Court held that section 10(a) of the NLRA⁵ impliedly excluded the states from regulating *any* labor dispute within the jurisdictional power of the Board, there was created a class of cases, aptly characterized as "no-man's land," for which no forum was available. That class included all those cases which affected interstate commerce so slightly that the Board would decline jurisdiction, but which the states were powerless to treat as a result of the Supreme Court's decisions. It has been estimated that a substantial percentage of labor disputes fell free of any labor regulation as a result of the Board's policy of declination and the Court's decisions.⁶

To clarify the Board's power to decline jurisdiction and to reestablish regulation over labor disputes in the no-man's land,⁷ Congress passed section 14(c) of the NLRA in 1959. That section provides:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employees, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction

Nothing in this Act shall be deemed to prevent or to bar any agency or the courts of any State or Territory. . . , from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.⁸

¹ NLRB v. Denver Bldg. Council, 341 U.S. 675 (1951); NLRB v. Fainblatt, 306 U.S. 601 (1939).

² See NLRB v. Denver Bldg. Council, 341 U.S. 675 (1951); 16 NLRB Ann. Rep. 15 (1951).

³ 23 NLRB Ann. Rep. 8-12 (1958).

⁴ Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957).

⁵ 29 U.S.C. § 160(a) (1964).

⁶ Stephens, *The No Man's Land of Labor Relations Remains Unoccupied*, 14 Lab. L.J. 192, 193 (1963).

⁷ See McCoid, *Notes on a "G-String": A Study of the "No Man's Land" of Labor Law*, 44 Minn. L. Rev. 205, 230-37 (1959).

⁸ 29 U.S.C. §§ 164(c)(1), (2) (1964).

Section 14(c) unequivocally establishes the power of the states to regulate when the Board disavows the exercise of jurisdiction because of insubstantial interstate commerce. However, whether an actual declination of jurisdiction by the Board in each case is prerequisite to the assertion of state power is a question which has divided the courts that have passed on it.⁹

In *Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers*,¹⁰ the defendant local union picketed the plaintiff husband and wife's nonunion beer distributorship. The plaintiffs sought an injunction and damages in a Pennsylvania district court. The union argued that the state court was without jurisdiction because the dispute was within the Board's jurisdictional power and the Board had not actually declined jurisdiction. The plaintiffs argued that no actual declination by the Board was necessary under section 14(c)(2), and that the Board, if given the opportunity, would have declined jurisdiction. The district court denied the relief sought. The Pennsylvania Supreme Court assumed that the Board would have declined jurisdiction,¹¹ but nevertheless affirmed the district court. In a four to two decision, the court held that state courts lack jurisdiction over labor disputes which fall well below the Board's jurisdictional standards, but which the Board has not actually declined.

The majority in *Stryjewski* based its holding on the paramount federal interest in the uniform regulation of labor disputes which affect interstate commerce. They felt that disparity in the ascertainment and application of Board jurisdictional standards could be avoided only by investing the Board with authority to make all initial decisions respecting jurisdictional issues.¹² The dissenters, on the other hand, determined that the language and history of section 14(c) and the necessity for speed in finding a forum for the settlement of labor disputes compelled a conclusion that no actual declination by the Board was necessary.¹³

Although the position of the majority in *Stryjewski* is a minority one,¹⁴ it is not without merit. In view of the somewhat complex process by which the Board measures the quantum of interstate activity in many industries,¹⁵ the Board may well be more suited than the state courts to resolve jurisdictional questions. The mere fact that one legal institution, rather than 50, would

⁹ Compare *Russell v. Electrical Workers Local 569*, 64 Cal. 2d 22, 409 P.2d 926, 48 Cal. Rptr. 702 (1966), *Local 227, Amalgamated Meat Cutters v. Fleischaker*, 384 S.W.2d 68 (Ky. 1964), and *Guiliano v. Local 830, Teamsters*, 34 Pa. D. & C. 2d 512 (Delaware County C.P. 1964), with *Barksdale & LeBlanc v. Local 130, Elec. Workers*, 143 So. 2d 770 (La. Ct. App. 1962).

¹⁰ 426 Pa. 512, 233 A.2d 264 (1967), noted in 9 B.C. Ind. & Com. L. Rev. 800 (1968).

¹¹ The Board would have declined jurisdiction either because the plaintiff's only employee was their son, 29 U.S.C. § 152(3) (1964), or because the dollar volume of gross sales of the distributorship per annum was \$270,000 below the Board's applicable jurisdictional standard. *Carolina Supplies & Cement Co.*, 122 N.L.R.B. 88, 43 L.R.R.M. 1060 (1958).

¹² 426 Pa. at 519, 233 A.2d at 268.

¹³ Chief Justice Bell, id., 233 A.2d at 268, and Justice Roberts, id. at 522, 233 A.2d at 269, filed separate dissenting opinions.

¹⁴ See cases cited note 9 supra.

¹⁵ Note, 80 Harv. L. Rev. 1600, 1603-04 (1967).

be invested with initial decisional prerogatives suggests both consistency and uniformity in the development of jurisdictional principles.¹⁶ Furthermore, the availability of the advisory opinion procedure,¹⁷ by which the Board will advise interested parties, state agencies, or state courts on disputed jurisdictional questions, may indicate that the Board itself prefers jurisdictional issues to be submitted initially to it. Finally, the fact that the Board, even after the enactment of section 14(c), possesses the fullest jurisdictional power and may take jurisdiction over cases which fall below its own standards,¹⁸ in order to further some legislative purpose or to reach conscious labor violators in unregulated states, provides another reason for giving to the Board the initial jurisdictional decision.¹⁹

On the other hand, there are compelling reasons which support the dissenting judges in their belief that state courts need not await an actual declination before assuming jurisdiction. The context in which section 14(c) was passed indicates that the statute was intended to eliminate the "no-man's land" created by the 1957 Supreme Court decisions by investing state courts with jurisdiction over labor disputes affecting interstate commerce and either retrospectively or prospectively declined by the Board.²⁰ The language of section 14(c)(1) which permits Board declination either by rules of decision or by published rules,²¹ and the language which allows declination of jurisdiction over any class or category of employers²² is expressly incorporated into section 14(c)(2), which is the state-empowering section of the statute. Moreover, section 14(c)'s purpose of effectively, and hence speedily, settling disputes is inhibited by requiring actual declination. Often a lengthy period of time is required for the processing of disputes through the Board.²³ The processing of jurisdictional questions through the Board, which the actual declination rule mandates, may well "perpetuate the very 'no-man's land' which Congress sought to abolish . . ."²⁴ The advisory opinion procedure

¹⁶ Note, 9 B.C. Ind. & Com. L. Rev. 800, 807 (1968).

¹⁷ 29 C.F.R. §§ 101.39-.43, 102.98-.110 (1967).

¹⁸ Section 14(c)(1) mandates only that the Board cannot refuse to take cases which it would have taken under its 1959 standards. 29 U.S.C. § 164(c)(1) (1964). The Board cannot, hence, decrease its jurisdiction below the 1959 standards. The Board can, however, increase its jurisdiction to the fullest possible number of cases affecting interstate commerce, if it so chooses. For budgetary reasons, the Board has not so chosen. Summary of Operations of NLRB General Counsel, 60 L.R.R.M. 110 (1966).

¹⁹ The Board may feel that the principle of uniform and consistent development of jurisdictional standards should be sacrificed to afford statutory coverage to a particular labor dispute.

²⁰ See Merrifield, *Federal-State Jurisdiction in Labor Relations Law*, 29 Geo. Wash. L. Rev. 318, 329 (1960).

²¹ 29 U.S.C. § 164(c)(1) (1964) states in pertinent part: "The Board . . . may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act . . ."

²² 29 U.S.C. § 164(c)(1) (1964) states in pertinent part: ". . . decline to assert jurisdiction over any labor dispute involving any class or category of employees."

²³ Beeson, *Boundaries of State-Federal Jurisdiction in Labor-Management Relations Under the New Labor Law—A Federal View*, in N.Y.U. 13th Ann. Conf. on Labor 51, 64 (M. Stein, ed. 1960).

²⁴ 426 Pa. at 522, 233 A.2d at 269 (dissenting opinion, Roberts, J.).

gives little realistic relief to the burden created by the actual declination rule. It too requires time, and, because it lacks legally binding effect, does not constitute an actual declination.²⁵ Finally, in attitude toward section 14(c)(2), the Supreme Court appears to accept initial state court jurisdictional decisions.²⁶

By the careful exercise of state court discretion and Board administrative process, the seemingly polar positions of the majority and dissents in *Stryjewski* can be accommodated, and the dual aims of the NLRA to establish uniform labor jurisdictional law and to provide readily available forums for labor disputes can be satisfied. First, in all cases in which there is any doubt, however slight, that the Board may wish to take jurisdiction, the state courts should defer from deciding the jurisdictional question, even if the Board's standards are not met.²⁷ A nonexhaustive list of such cases includes: (a) cases involving joint employers or integrated industries;²⁸ (b) cases involving the computation of the inflow and outflow of interstate commerce;²⁹ (c) cases involving secondary activity in which the secondary employers may or may not be included in the computation of interstate commerce;³⁰ (d) cases in which the Board has established jurisdictional standards on a case-by-case basis;³¹ (e) cases where the Board's standards are not met, but there is a history of flagrant violations in the industry or by the particular employer. Second, in those cases which the state courts do transfer to the Board, and which require immediate response, the Board should act with speed—either accepting and docketing a case or refusing it. If necessary, an administrative priority should be established by which jurisdictional issues would be given immediate attention.³² Third, in all cases in which there is no doubt that the Board would decline jurisdiction, the time-consuming process of transfer to the Board and actual declination should be eliminated, and the state courts should as a consequence have immediate jurisdiction.

II. FEDERAL DISTRICT COURT JURISDICTION OVER NLRB PROCEEDINGS

A. Federal Commerce Jurisdiction and NLRB Proceedings

Representation hearings and certification elections pursuant to Section 9 of the NLRA are judicially reviewable only if, subsequent to the hearing and election, the party asserting the representational defect commits an unfair labor practice, usually a refusal to bargain, and thereby causes the NLRB to examine the representational matter through the mechanism of the unfair-labor-practice proceeding.³³ Any person aggrieved by the Board's

²⁵ *Hirsch v. McCulloch*, 303 F.2d 208 (D.C. Cir. 1962).

²⁶ *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv.*, 380 U.S. 255 (1965); *Hattiesburg Bldg. & Trades Council v. Broome*, 377 U.S. 126 (1964).

²⁷ See note 18 *supra*.

²⁸ See Beeson, *supra* note 23, at 62.

²⁹ *Raybern Bus. Serv., Inc.*, 128 N.L.R.B. 430 (1960).

³⁰ *Electrical Workers, Local 25*, 148 N.L.R.B. 1560 (1964); 1 CCH Lab. L. Rep. (Lab. Rel.) ¶ 1610.6711 at 5449 (1968).

³¹ *NLRB v. Pease Oil Co.*, 279 F.2d 135 (2d Cir. 1960).

³² Cf. 29 U.S.C. §§ 160(f), (m) (1964).

³³ 29 U.S.C. § 159(d) (1964).

unfair-labor-practice order may then obtain judicial review of the underlying representational question in the appropriate circuit court of appeals.³⁴ The NRLA nowhere gives a party aggrieved by a Board representational decision access to the federal district courts. Nevertheless, three principal cases, *Leedom v. Kyne*,³⁵ *Sociedad Nacional de Marineros de Honduras v. McCulloch*,³⁶ and *Fay v. Douds*,³⁷ have established that in exceptional circumstances the federal district courts may exercise their general federal commerce jurisdiction³⁸ over Board representation and certification decisions.

In *Leedom*, the Board certified a bargaining unit composed of professional and nonprofessional employees without obtaining the polled consent of the professionals required by the statute.³⁹ The Supreme Court endorsed district court jurisdiction to vacate a Board determination which (1) violated the command of the NLRA to poll professionals before including them in a mixed unit with nonprofessionals and (2) could not have been judicially considered by any other procedure within the control of those aggrieved, the professional employees. In *McCulloch*, the Board asserted jurisdiction in a representation case involving the foreign crewmen of a foreign flag-ship with limited American contacts. The Supreme Court again allowed district court jurisdiction, in order to enjoin the Board's statutorily unwarranted assumption of jurisdiction. The Court stated its rationale as follows: "[T]he presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power."⁴⁰ Thus, while the Board's violation of the NLRA was not as clear in *McCulloch* as it had been in *Leedom*, the public interest involved in *McCulloch* was important enough to justify immediate federal court jurisdiction.

In *Fay v. Douds*, the Board denied opportunity to be heard and recognition status on the ballot to an intervening union. The union's petition for injunctive relief in the federal district court, alleging a violation by the Board of fifth amendment due process, was denied. The Second Circuit, speaking through Judge L. Hand, held that "a not transparently frivolous assertion" of constitutional deprivation gives jurisdiction to the district courts and constitutes an exception to the otherwise exclusive review format of the NLRA. Thus, constitutional violations need not be as clear as violations of statutory mandate in order to confer district court jurisdiction. Furthermore, it should be noted that the petitioning union in *Fay* had no other procedural means within its control of raising its constitutional objections.

³⁴ 29 U.S.C. § 160(f) (1964). See *American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940).

³⁵ 358 U.S. 184 (1958).

³⁶ 372 U.S. 10 (1963).

³⁷ 172 F.2d 720, 23 L.R.R.M. 2356 (2d Cir. 1949).

³⁸ 28 U.S.C. § 1337 (1964).

³⁹ 29 U.S.C. § 159(b)(1) (1964), provides: "the Board shall not (1) decide that any unit is appropriate for (the purposes of collective bargaining) . . . 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."

⁴⁰ 372 U.S. at 17.

Because district court jurisdiction is an exception to the statutory scheme of the NLRA, and because the Supreme Court has indicated the desirability of preserving the narrowness of that exception,⁴¹ the district courts have generally refrained from expansive readings of *Leedom*, *McCulloch*, and *Fay*. It is unmistakably clear that unless a matter of compelling international interest is involved, a federal district court will not exercise general federal commerce jurisdiction absent either clear violation of a statutory mandate or a plausible claim of constitutional violation. In either case, moreover, other avenues of review must be beyond the control of the parties aggrieved by the Board's representation decisions.

Of the many district court jurisdictional cases decided during the past year, only one permitted jurisdiction. *IUE v. NLRB*⁴² concerned the conduct of a Board agent during a certification election. Between the afternoon and evening polling periods of a "split election,"⁴³ the Board agent in charge was observed drinking beer with the petitioning union's representative.⁴⁴ When the union won the election, the employer petitioned the Board to set the election aside. The Board did so, in order to preserve confidence in the "laboratory conditions" of its election process. The Board acknowledged that the conduct of its agent did not and could not have had any adverse effect on the election result or the ballots cast in the evening session, but held that

the commission of an act by a Board agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.⁴⁵

The union then initiated an injunction proceeding in a district court claiming that the court should take jurisdiction because (1) the Board violated section 9(c)(1) of the NLRA,⁴⁶ and (2) there was no other way for the union to obtain redress for the denial of its statutory right to certification. The court took jurisdiction and granted the relief sought.

It is questionable whether the court was correct in asserting jurisdiction. The Board has been given broad discretion to regulate the election procedures of the NLRA. For the court to ground its argument as to violation of the statutory mandate on the claimed imperative mood of the statutory term "shall" is the height of literalism blind to the Board's discretion. The term "shall" in the NLRA has almost unanimously been construed as permissive.⁴⁷

⁴¹ *Boire v. Greyhound Corp.*, 376 U.S. 473, 479, 481 (1964).

⁴² 67 L.R.R.M. 2361 (D.D.C. Jan. 17, 1968).

⁴³ When the period for voting in a representation election is divided into sections in order either to accommodate large numbers of voters or to cover multiple work shifts, the election is called a "split election."

⁴⁴ Among the *cognoscenti*, this case is referred to as "the beer-drinking case."

⁴⁵ 67 L.R.R.M. at 2363, quoting the Board's unreported opinion.

⁴⁶ 29 U.S.C. § 159(c)(1) states in pertinent part: "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." (Emphasis added.)

⁴⁷ *Maritime Union v. NLRB*, 267 F. Supp. 117, 121-24 & nn. 24-41, 65 L.R.R.M. 2065, 2068-69 & nn. 24-41 (S.D.N.Y. 1967).

The court's reading of the statute further exhibits a lack of judicial respect for the Board's expertise in election matters and for the Board's need to preserve the integrity of its election process. Moreover, the union might well have attempted to raise the correctness of the Board's decision in the statutorily prescribed manner.⁴⁸ The case, as it now stands, is an anomaly in a carefully developed jurisdictional scheme and should not be followed.⁴⁹

In *Maritime Union v. NLRB*,⁵⁰ a federal district court took a far less inflexible approach to the language of section 9(c)(1). The union filed a representation petition with the Board seeking certification as the representative of the clerical employees of the United Fruit Company at its terminal in the Panama Canal Zone. The Board assumed the parties were within the Act's definition of commerce but went on to decline jurisdiction, because pending negotiations between the United States and Panama indicated a reasonable probability that Panamanian sovereignty would soon be recognized, thus expressly excluding the Canal Zone from the operation of the NLRA. The union sought injunctive relief to compel the Board to process its representation petition. The union contended that section 9(c)(1) is mandatory, and that if a petition is presented and a question of representation affecting interstate commerce exists, the Board lacks discretion to deny an election. Therefore, the union claimed, the Board's failure to process the representation question violated a statutory mandate. The court went directly to the purported violation of statutory mandate and determined that section 9(c)(1) was discretionary, and that the Board's refusal to process was not a violation of the statute.⁵¹ In addition, the court developed a distinction between statutory prohibitions and statutory commands, as they relate to the requisite violation of the statutory mandate.⁵² Because a statutory prohibition, as for example in *Leedom*, is clear on its face, while a statutory command is susceptible of differing interpretation, it is easier in the case of prohibition than in the case of command to establish the requisite violation of statutory mandate and hence to establish district court jurisdiction. The court in *Maritime* in effect articulated two previously obscure principles with respect to district court jurisdiction: (1) that jurisdiction will not be established when the Board has exercised its discretion, however unwise that

⁴⁸ The union could have requested bargaining with the employer, and if the employer refused to bargain, could have initiated a § 8(a)(5) unfair-labor-practice proceeding. Admittedly, it is highly doubtful whether the general counsel would issue a § 8(a)(5) complaint when confronted with the Board's decision on the petition to set the election aside. Yet, the general counsel could disagree with the Board's interpretation of the section and could issue the complaint. In any case, as a matter of exhausting the usual administrative means of decision-making, the union at least should have made a request for bargaining and, upon refusal of that request, should have filed a charge with the general counsel. If the general counsel did issue a complaint, and the Board found no violation of § 8(a)(5), then the union could have appealed pursuant to § 10(e) of the Act.

⁴⁹ The Board, in an unreported supplemental decision, accepted the court's decision and therefore certified the union. The probable reason for the Board's decision not to appeal the jurisdictional decision is its satisfaction with the actual result of the case, the union's certification.

⁵⁰ 267 F. Supp. 117, 65 L.R.R.M. 2065 (S.D.N.Y. 1967).

⁵¹ Id. at 121-24 & nn. 24-41, 65 L.R.R.M. at 2068-69 & nn. 24-41.

⁵² Id. at 121 & n. 23, 65 L.R.R.M. at 2067 & n. 23.

exercise may be; (2) that the negative or affirmative nature of the statute is an important factor in deciding whether to establish jurisdiction.

Two other cases handed down during the past year illustrate the immunity of Board discretionary decisions from district court power. In *Hughes v. Getreu*,⁵³ an election which resulted in the establishment of a broad production and maintenance unit was held invalid and set aside by the Board. The union and the employer then consented to an election of a considerably smaller unit, which excluded many of those employees included in the original invalid unit. Subsequent to the voting in the second election, which the union won, but prior to formal certification, eight employees included in the original unit but excluded from the new unit, initiated a class action in a federal district court seeking an injunction prohibiting the Board from certifying the results of the election. The court assumed that the complaining employees had no other means of obtaining judicial consideration of the Board's endorsement of the smaller unit as appropriate for collective bargaining. Nevertheless, the court refused to assert jurisdiction, because the approval of a consent election agreement shaping a bargaining unit was clearly a matter of Board expertise and discretion.

In *Teamsters Local 690 v. NLRB*,⁵⁴ the Board refused to sever an alleged craft unit of lumber truckers and mechanics from a broader production and maintenance unit of lumbermen. The craft union petitioned the federal district court for an order setting aside the Board's decision and directing the Board to conduct a representation election among the employees for whom the craft unit was sought. The court refused to assert jurisdiction. The Ninth Circuit assumed sub silentio that the complaining union had no other means of judicial review within its control but nevertheless affirmed the court below. The basis for the craft union's claim of violation of statutory mandate was that the Board had made its prior determination of the appropriateness of the broader unit a basis for the refusal to sever the craft, in express contravention of the applicable portions of section 9(b)(2) of the NLRA.⁵⁵ The Ninth Circuit reviewed the Board-evolved principles of craft severance⁵⁶ and determined that section 9(b)(2) could be violated only if the Board's previous appropriateness determination was its *sole* basis for refusal to sever. Because the Board did not reject the craft unit sought based alone on the previous determination, there could be no violation of the statutory mandate.

⁵³ 266 F. Supp. 15, 64 L.R.R.M. 2678 (D. Ohio 1967).

⁵⁴ 375 F.2d 966, 64 L.R.R.M. 2662 (9th Cir. 1967).

⁵⁵ 29 U.S.C. § 159(b)(2) (1964) states in pertinent part:

The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not . . . (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation

⁵⁶ See *Mallinckrodt Chem. Works*, 162 N.L.R.B. No. 48, 64 L.R.R.M. 1011 (1966); *American Potash & Chem. Corp.*, 107 N.L.R.B. 1418, 33 L.R.R.M. 1380 (1954); *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 1076, 25 L.R.R.M. 1173 (1949); *National Tube Co.*, 76 N.L.R.B. 1199, 21 L.R.R.M. 1292 (1948).

Both the *Hughes* case and the *Teamsters* case graphically demonstrate that a claim of abuse of discretion by the Board fails to satisfy the clear violation of the NLRA requisite to the assertion of district court jurisdiction.

Since the decision of the Second Circuit in *Fay v. Douds*⁵⁷ not a single district court has grounded its exercise of jurisdiction over Board representational proceedings on the broad base of a "not transparently frivolous assertion of constitutional violation." Both the *Hughes* case and the *Teamsters* case indicate that the broad language of *Fay* continues to be read narrowly. In both cases the plaintiffs asserted constitutional abuses. In *Hughes*, the excluded employees claimed that the Board's refusal to hear their complaint was a violation of due process. While the Board's refusal to grant a hearing is probably not a violation of the fifth amendment,⁵⁸ the employees' claim is not frivolous; many cases have considered the question whether an administrative agency's refusal to grant a hearing is a violation of due process.⁵⁹ The language of the *Hughes* case reflects a jurisdictional approach qualitatively different from that of the Second Circuit in *Fay*, for the *Hughes* court states that there must be "a fairly substantial allegation of denial of constitutional rights before jurisdiction [will be] . . . assumed."⁶⁰ In the *Teamsters* case, the Ninth Circuit rejected as frivolous the petitioning craft union's assertion that a Board distinction between the lumber industry and other industries for craft severance purposes was so arbitrary as to violate due process. The union's assertion of arbitrariness was not transparently frivolous. The Supreme Court has overturned as arbitrary other Board industrial classifications.⁶¹ The fact that valid differences between the various industries may, upon consideration, be found to exist does not reduce an arguable question of classification to prima facie absurdity. Here again, the broad test of *Fay* was mitigated in application.

Another recent case has substituted an even more narrow standard for the assertion of constitutional violations. In *Greensboro Hosiery Mills v. Johnston*,⁶² the Board scheduled an election at the employer's plant. When the regional director discovered that the employer had posted anti-union notices, he directed their removal. The employer refused to remove them, and the regional director thereupon rescheduled the election for a week later than previously scheduled and off the employer's premises. The employer instituted an action in a federal district court seeking an injunction against the holding of the election on the ground that the regional director's order infringed the employer's statutory and constitutional right to speak freely. The district court took jurisdiction and granted the relief sought.⁶³ The Fourth Circuit reversed. In reversing, the court stated that district court

⁵⁷ 172 F.2d 720, 23 L.R.R.M. 2356 (2d Cir. 1949).

⁵⁸ NLRB v. Simplot Co., 322 F.2d 170 (9th Cir. 1963); NLRB v. O.K. Van Storage, Inc., 297 F.2d 74 (5th Cir. 1961).

⁵⁹ See K. Davis, Administrative Law 135-68 (1965 ed.).

⁶⁰ 266 F. Supp. at 17, 64 L.R.R.M. at 2679.

⁶¹ Hotel Employees v. Leedom, 358 U.S. 99 (1958); Office Employees Int'l Union v. NLRB, 353 U.S. 313 (1957).

⁶² 377 F.2d 28, L.R.R.M. 2299 (4th Cir. 1967).

⁶³ The decision is unreported.

jurisdiction could be found only if there was a "plain violation of a clear constitutional limitation upon the conduct of the Board or the Regional Director."⁶⁴ Hence, the Fourth Circuit has chosen a standard of jurisdiction for constitutional violations equivalent to the Supreme Court's standard of jurisdiction for statutory violations and has rejected the Second Circuit's "not transparently frivolous" standard. Realistically, this represents a recognition of the jurisdictional restraint unanimously exercised by the courts under the "transparently frivolous" rubric. It also suggests that the additional requisite established in *Leedom*—that there be no other mode of review within the control of the petitioning party—may be extended to jurisdictional assertions involving alleged constitutional deprivations. For example, in *Greensboro*, the court might have refused jurisdiction because the employer could have refused to bargain with the union and then could have defended a section 8(a)(5) refusal-to-bargain charge on constitutional and statutory free speech grounds.

In *LaPlant v. McCulloch*,⁶⁵ the Third Circuit engrafted a still more narrowing interpretation onto the *Leedom* jurisdictional prerequisite that there be on other means of review within the control of the party seeking adjudication of an alleged deprivation of statutory right. An understanding of the decision in *LaPlant* requires consideration of a companion case, *ITT v. NLRB*.⁶⁶ In 1951, the Board, pursuant to its pre-*Leedom* practice, certified a mixed unit of a predominantly professional composition without the statutorily required polled consent of the professionals within the unit.⁶⁷ During the years after 1951, and even after the *Leedom* decision in 1958, the union and the employer bargained collectively and reached agreement. In 1964, however, negotiations failed, and the union went out on strike. At this juncture, the professional employees filed a decertification petition with the Board, and the employer withdrew recognition of the union and filed election petitions for both the mixed unit and the professionals. The union thereupon initiated section 8(a)(1) and (5) unfair-labor-practice charges. The Board dismissed both the employer's and the professionals' election petitions, on the ground that they could not be considered pending the resolution of the unfair-labor-practice charges. However, the Board's trial examiner invited the professionals to intervene in the unfair-labor-practice proceeding against the company. The professionals declined and initiated the *LaPlant* litigation by filing a complaint in a federal district court, seeking a declaratory judgment that the 1951 certification was void because it violated section 9(b)(1), or, in the alternative, an order directing the Board to hold the petitioned-for decertification election. The district court denied the relief sought, and the Third Circuit affirmed.

⁶⁴ 377 F.2d at 32, 65 L.R.R.M. at 2302 (4th Cir. 1967).

⁶⁵ 382 F.2d 374, 65 L.R.R.M. 3049 (3d Cir. 1967).

⁶⁶ 382 F.2d 366, 65 L.R.R.M. 3002 (3d Cir. 1967).

⁶⁷ 29 U.S.C. § 159(b)(1) (1964) was enacted in order to protect minority groups of professionals against unwanted inclusion in broader production and maintenance units. The Board, therefore, did not require the polled consent of the professionals when they were in the majority. *Leedom v. Kyne*, of course, brought this practice to a halt.

In view of the fact that appellants had an available forum, the National Labor Relations Board, in which to litigate the matter of which they complained, with a right to review by this court, the Supreme Court's decision in *Leedom v. Kyne*. . . , upon which the appellants rely, does not support the claimed jurisdiction of the district court to entertain this complaint.⁶⁸

The unfair-labor-practice forum would have been so unsuited to a fair consideration of the professionals' claim that its availability should not have foreclosed district court jurisdiction. The primary issue before the Board in the unfair-labor-practice proceeding was whether for section 8(a) (5) purposes the mixed unit was illegally formed. If the professionals had accepted the invitation to intervene, their claim of illegal certification would have been decided under the cloud of the employer's alleged refusal to bargain. The Board could not be expected to conclude that the unit was legal for purposes of the unfair-labor-practice proceeding but illegal for purposes of the professionals' representational rights. The probability is that the professionals' statutory rights would have been sacrificed rather than the union's bargaining rights.

The Supreme Court spoke in *Leedom* of a meaningful mode of review within the control of the party aggrieved by a Board representation decision. The Court's emphasis was on the protection of congressionally created rights, not on the mere availability of some forum. "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 statutory provisions governing the general jurisdiction of the courts to control."⁶⁹ It is submitted that the administrative forum afforded the professionals in *LaPlant* is as meaningless a mode of review as the complete denial of forum to the professionals in *Leedom*. For this reason, the rationale of the Third Circuit is erroneous and should not be followed.

Since the decision in *Leedom v. Kyne*, the Supreme Court has indicated the desirability of narrow district court jurisdiction over Board proceedings.⁷⁰ At the same time, even though having had the opportunity to do so and having been urged to do so, the Court has refrained from eliminating such jurisdiction.⁷¹ Thus, the Court has indicated the proper balance to be struck between administrative and judicial power in the labor law area. During the past year a good number of cases were added to the corpus of labor jurisdictional law, almost all of which preserved the jurisdiction of the district courts while narrowing it still further. Such a course of judicial conduct appears to comport with the Supreme Court's conception of the interplay of administrative and judicial law-making in the labor law field.

⁶⁸ 382 F.2d at 375, 65 L.R.R.M. 3049 (3d Cir. 1967).

⁶⁹ 358 U.S. at 190, quoting *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 300 (1943).

⁷⁰ *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). See also *Maritime Union v. NLRB*, 267 F. Supp. at 121 & n.20, 65 L.R.R.M. at 2067 & n.20.

⁷¹ *Leedom v. Kyne*, 358 U.S. at 191 (dissenting opinion, Brennan, J.).

B. *The Three-Judge Federal Court and NLRB Proceedings*

In *Utica Mut. Ins. Co. v. Vincent*,⁷² a Board representation proceeding pursuant to section 9(c)(1) was sought to be enjoined by the procedure of a three-judge district court in accordance with section 2282 of the Judicial Code.⁷³ Subsequent to the initiation of a Board representation hearing, petitioned for by the bargaining representatives of Utica's employees, Utica brought action in a federal district court under Sections 1337⁷⁴ and 2282 of the Judicial Code, seeking declaratory and injunctive relief, and claiming that the provision in section 9(c)(1) that the hearing officer "shall not make any recommendations [to the Board] with respect to [facts gathered by him in representation proceedings]. . ."⁷⁵ deprived Utica of a full and fair hearing under the fifth amendment due process clause. The district court determined that the complaint raised no substantial constitutional question and declined to convene a three-judge court.⁷⁶ The Second Circuit affirmed.

Section 2282 of the Judicial Code is a procedural, not a jurisdictional statute. The initial inquiry in every section 2282 proceeding is whether there is federal jurisdiction.⁷⁷ In most cases, jurisdiction is alleged under Section 1337 of the Judicial Code. Should the district court decide, as it often does, that the alleged constitutional violation is not a substantial federal question, it must refuse to convene the three-judge panel and dismiss the complaint.

In *Utica*, the employer made the argument that fifth amendment due process required the Board either to have actually seen the witnesses in a representation proceeding or to have been provided with a report as to their credibility by one who has seen them. The employer contended that because section 9(c)(1) states that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations thereto. . .,"⁷⁸ it violates the fifth amendment.

The Second Circuit based its conclusion that the employer's constitutional argument was insubstantial on two alternative rationales. First, even if labor representational hearings do require trial-type hearings, due process does not require an administrative subordinate to make recommendations, but rather mandates only that "the officer who makes the determinations must consider and appraise the evidence which justifies them."⁷⁹ Second, labor representational hearings are not trial-type hearings in a functional sense, but rather are

⁷² 375 F.2d 129, 64 L.R.R.M. 2631 (2d Cir.), cert. denied, 389 U.S. 839 (1967).

⁷³ 28 U.S.C. § 2282 (1964) states:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

⁷⁴ 28 U.S.C. § 1337 (1964).

⁷⁵ 29 U.S.C. § 159(c)(1) (1964).

⁷⁶ The decision is unreported.

⁷⁷ *California Water Serv. Co. v. City of Redding*, 304 U.S. 252, 254-55 (1938); *Ex parte Poresky*, 290 U.S. 30 (1933); *Wicks v. Southern Pac. Co.*, 231 F.2d 130, 37 L.R.R.M. 2725 (9th Cir.), cert. denied, 351 U.S. 946 (1956).

⁷⁸ 29 U.S.C. § 159(c)(1) (1964).

⁷⁹ *Morgan v. United States*, 298 U.S. 468, 482 (1936).

investigatory hearings and hence require less by way of a due process hearing.⁸⁰

The Second Circuit commented on but did not reach the Board's additional argument against jurisdiction in *Utica*.⁸¹ The Board argued that even if the plaintiff employer's argument was well founded constitutionally, sections 1337 and 2282 should be read together with the review procedures of Section 9(d) of the NLRA.⁸² Thus, the narrowing construction placed on section 1337 in *Leedom v. Kyne* would also be placed on that section when it is a jurisdictional basis for a section 2282 proceeding. Therefore, if a complainant asserts a constitutional defect in the NLRA relating to Board representational proceedings, he must, in order to convene a three-judge district court, show not only a substantial constitutional violation but also a lack of other procedural means within his control to obtain judicial consideration of the alleged violation. Such an integrated interpretation of Section 9(d) of the NLRA and Sections 1337 and 2282 of the Judicial Code continues the tradition established in *Leedom v. Kyne* of limited judicial involvement in Board representational matters.

III. COLLATERAL ATTACK ON STATE VIOLATIONS OF FEDERAL LABOR SUPREMACY

The availability of the federal forum collaterally to attack state proceedings which threaten the supremacy of federal labor law is limited by two Supreme Court decisions construing Section 2283 of the Judicial Code,⁸³ the federal anti-injunction statute. In *Capital Serv., Inc. v. NLRB*,⁸⁴ an employer sought a state court injunction against union secondary and informational picketing⁸⁵ and at the same time applied to the Board for an unfair-labor-practice complaint against the union because of alleged violations of Section 8(b)(4) of the NLRA.⁸⁶ The state court enjoined all of the union's picketing.⁸⁷ Shortly thereafter the Board issued a complaint charging the union with illegal secondary picketing but refused to issue a complaint against that portion of the union's picketing which sought merely to appeal to customers and the general public. As required by Section 10(1) of the NLRA,⁸⁸ the Board petitioned a federal district court for an injunction against the union's purportedly illegal secondary picketing, pending final

⁸⁰ *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 706 (1945).

⁸¹ 375 F.2d at 134, 64 L.R.R.M. at 2635.

⁸² 29 U.S.C. § 159(d) (1964).

⁸³ 28 U.S.C. § 2283 (1964) states: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

⁸⁴ 347 U.S. 501 (1953).

⁸⁵ The statutory distinction between secondary and informational picketing may be discovered by comparing 29 U.S.C. § 158(b)(4)(B) (1964) with the second proviso to 29 U.S.C. § 158(b)(4) (1964).

⁸⁶ 29 U.S.C. § 158(b)(4) (1964).

⁸⁷ 347 U.S. at 502.

⁸⁸ 29 U.S.C. § 160(l) (1964).

decision by the Board on the merits of the section 8(b)(4) charge.⁸⁹ At the same time, the Board filed a second suit in the same federal district court seeking to enjoin the employer from enforcing the state court injunction.⁹⁰ In this second litigation, the Board argued that the district court had jurisdiction under section 1337 of the Judicial Code⁹¹ to enjoin the state court's violation of the Board's exclusive section 8(b) jurisdiction and of the federal district court's exclusive section 10(1) jurisdiction. The employer argued that section 2283 was a bar to the injunctive relief sought by the Board. The district court found jurisdiction, dispelled the section 2283 defense, and granted the relief sought.⁹² The Ninth Circuit affirmed.⁹³ The Supreme Court granted certiorari limited to the jurisdictional issues⁹⁴ and held (1) that section 1337 conferred jurisdiction on the district court, and (2) that an express exception to section 2283 permitted the injunction to be granted. Section 2283 permits an injunction to issue against state court proceedings when "in aid of" the federal court's jurisdiction. The Supreme Court reasoned that the district court could enjoin the enforcement of the state court injunction "in aid of" its section 10(1) jurisdiction to enjoin the union's picketing.

The state court injunction restrains conduct which the District Court was asked to enjoin in the § 10(1) proceeding brought in the District Court by the Board's Regional Director against the union. In order to make the section 10(1) power effective the Board must have authority to take all steps necessary to preserve its case. If the state court decree were to stand, the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully it must first remove the state decree. When it did so, it acted "where necessary in aid of its jurisdiction."⁹⁵

In *Amalgamated Clothing Workers v. Richman*,⁹⁶ an employer obtained state court injunctive relief against organizational picketing conducted by a union.⁹⁷ The employer's state court complaint stated facts which constituted violations by the union of either Section 8(b)(1)(a)⁹⁸ or Section 8(b)(2)⁹⁹ of the NLRA. The union, complaining that the Board had

⁸⁹ 347 U.S. at 502-03.

⁹⁰ *Id.* at 503.

⁹¹ 28 U.S.C. § 1337 (1964) states: "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."

⁹² 347 U.S. at 504.

⁹³ 204 F.2d 848 (9th Cir. 1953).

⁹⁴ 346 U.S. 936 (1953).

⁹⁵ 347 U.S. at 505-06.

⁹⁶ 348 U.S. 511 (1955).

⁹⁷ 51 Ohio Op. 145, 116 N.E. 2d 60 (Cuyahoga County C.P. 1953).

⁹⁸ 29 U.S.C. § 158(b)(1)(a) (1964).

⁹⁹ 29 U.S.C. § 158(b)(2) (1964).

exclusive jurisdiction over the conduct complained of in the state court action, instituted a suit in a federal district court to enjoin the state court proceedings.¹⁰⁰ The union argued that district court jurisdiction existed under section 1337, and that section 2283 was not a bar.¹⁰¹ The federal district court held that section 2283 was a bar to the requested injunctive relief, and that the union's action did not come within the "in aid of" jurisdiction exception to section 2283.¹⁰² The Sixth Circuit¹⁰³ and the Supreme Court affirmed.¹⁰⁴ In response to the union's argument that the district court should be able to enjoin the state court proceeding "in aid of" federal jurisdiction, the Supreme Court stated:

In no lawyerlike sense can the present proceeding be thought to be in aid of the District Court's jurisdiction. Under no circumstances has the District Court jurisdiction to enforce rights and duties which call for recognition by the Board. Such non-existent jurisdiction therefore cannot be aided.¹⁰⁵

Reading *Capital Service* and *Richman* as a composite exposition of federal district court jurisdiction in the labor preemption context, several propositions must be taken as established. First, an action to prohibit a state from regulating labor disputes arguably within the NLRA is a "civil action or proceeding arising under an act of Congress regulating commerce."¹⁰⁶ Hence, the federal district courts always have original jurisdiction of such suits under section 1337 of the Judicial Code. Second, section 2283 is applicable and may operate as a bar to the exercise of injunctive relief, as in *Richman*. The *Richman* decision rejected the argument that section 2283 ought not to be applied where the federal jurisdiction over the subject matter in question, here the regulation of labor disputes affecting commerce, was exclusive of and not concurrent with state jurisdiction.¹⁰⁷ Third, the prohibition of section 2283 can be avoided only if there exists federal district court jurisdiction to enforce rights and duties created by the NLRA,¹⁰⁸ which jurisdiction is aided by an injunction against the state proceeding. The *Richman* court rejected an argument by analogy from Section 1651 of the Judicial

¹⁰⁰ 348 U.S. at 513.

¹⁰¹ Also, the union argued the merits of its preemption complaint. Because of their disposition of the case on the jurisdictional question, none of the courts ever reached the preemption issue. All of the courts did assume *arguendo*, however, that the union's preemption argument was correct.

¹⁰² 348 U.S. at 513. See Note, 54 Mich. L. Rev. 426 (1956).

¹⁰³ 211 F.2d 449 (6th Cir. 1954).

¹⁰⁴ 348 U.S. 511 (1955).

¹⁰⁵ *Id.* at 519.

¹⁰⁶ 28 U.S.C. § 1337 (1964). *Amalgamated Clothing Workers v. Richman*, 348 U.S. at 521 (dissenting opinion, Warren, C.J.); *Capital Serv., Inc. v. NLRB*, 347 U.S. at 504; *International Union of Elec. Workers, CIO v. Underwood Corp.*, 219 F.2d 100 (2d Cir. 1955).

¹⁰⁷ 348 U.S. at 521 (dissenting opinion, Warren, C.J.). *Id.* at 524 (dissenting opinion, Douglas, J.). See Kochery, *Conflict of Jurisdiction: 28 U.S.C. § 2283 and Exclusive Federal Jurisdiction*, 4 Buffalo L. Rev. 269 (1956); Note, *The Supreme Court, 1954 Term*, 69 Harv. L. Rev. 119, 180 (1955).

¹⁰⁸ 29 U.S.C. §§ 160(j), (l) (1964).

Code that the federal district court could issue an injunction in aid of the potential jurisdiction either of the Board to enforce rights and duties created by the NLRA or of the circuit courts of appeals to enforce, upon petition by the Board¹⁰⁹ or by any aggrieved party,¹¹⁰ rights and duties created by the NLRA.¹¹¹ Furthermore, *Richman* recognized sub silentio that section 1337 jurisdiction to prohibit state court interference with the supremacy of federal law cannot be jurisdiction to be aided within the meaning of the exception to section 2283, because such a reading would render section 2283 meaningless.¹¹²

During the past year, the United States District Court for the District of Delaware was presented with a case of the *Capital Service-Richman* variety. In *Delaware Coach Co. v. Public Serv. Comm'n*,¹¹³ the employer, a public transportation company in the city of Wilmington, was unable to reach agreement with the union representing its employees. The union struck, and Wilmington lost its only mass transit facilities. After a lengthy period of time, during which more than 50 fruitless bargaining sessions occurred, the state's public utilities commission issued an order to Delaware Coach to show cause why its operating certificate should not be revoked. The company entered a limited appearance to challenge the Commission's jurisdiction on the ground that such jurisdiction was violative of the federal preemption doctrine. The Commission denied the company's motion to dismiss, and the company immediately sought injunctive relief in the federal district court. The Commission, now defendant in the district court suit, moved to dismiss on the basis that section 2283 was a bar. The court denied the motion to dismiss and held that section 2283 was not a bar¹¹⁴ because (1) an administrative decision to revoke a certificate of operation is not a state court proceeding within the meaning of section 2283,¹¹⁵ and (2) even if section 2283 is applicable to state administrative proceedings, the injunction should issue "in aid of" the court's implied section 1337 jurisdiction¹¹⁶ to protect the

¹⁰⁹ 29 U.S.C. § 160(e) (1964).

¹¹⁰ 29 U.S.C. § 160(f) (1964).

¹¹¹ We have been referred by petitioner to decisions in the lower federal courts under 28 U.S.C. § 1651 and its antecedents holding that the Court of Appeals may resort to writ of mandamus or prohibition "in aid of its jurisdiction" to prevent a district court from acting in a manner which would defeat the Court of Appeals' power of review. These decisions might be more relevant had the injunction been sought from the Court of Appeals. Only that court has power to review decisions of the Board. In any event, it has never been authoritatively suggested that this example of injunctive aid to a potential jurisdiction, which finds roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system, has any relevance where the offending action sought to be enjoined is insulated by two intervening and essentially unrelated systems, one of an administrative rather than judicial nature, the other the manifestation of a distinct sovereign authority.

¹¹² 348 U.S. at 519 n.5.

¹¹³ Kochery, *supra* note 107, at 279 & n.60.

¹¹⁴ 265 F. Supp. 648, 64 L.R.R.M. 2635 (D. Del. 1967).

¹¹⁵ The court, therefore, reached the merits of the company's preemption argument. 265 F. Supp. at 654, 64 L.R.R.M. at 2640.

¹¹⁶ *Id.* at 651-53, 64 L.R.R.M. at 2638-39.

It should be noted that this § 1337 jurisdiction is in addition to the § 1337 juris-

federal rights created by the NLRA but not given expressly to the Board to protect.

In order to reach its alternative holding on the jurisdictional question, the court was called upon to distinguish *Richman's* rationale that exclusive jurisdiction to enforce the NLRA was given in both explicit and limited terms to the Board¹¹⁷ and the federal courts,¹¹⁸ and that in the absence of a specific grant of federal jurisdiction, section 2283 was a bar to district court injunctive relief. To distinguish *Richman*, the court read it narrowly. In *Richman*, said the court, the complaining union was seeking protection against a section 8(a)(1) unfair labor practice—the employer's filing of a state court suit in order to harass the union's organizational efforts. No jurisdiction existed in the federal court in *Richman*, because only the Board has power to remedy unfair labor practices. Thus, *Richman's* rationale extended only to cases in which a party to a labor dispute tried to substitute federal court jurisdiction for Board jurisdiction to deal with unfair labor practices. Because the instant case concerned not an unfair labor practice but only a "possible interference with collective bargaining,"¹¹⁹ by a third party state agency not within the NLRA, the Board's exclusive jurisdiction to deal with unfair labor practices could not be violated. At the same time, collective-bargaining rights guaranteed by the Act, such as the right to bargain to an impasse in good faith,¹²⁰ clearly exist and require protection. The court, therefore, determined that the section 1337 jurisdiction of the federal courts could be the basis for enforcing rights created by the NLRA, if the Board lacked express authority to protect those rights.¹²¹ Once having established that jurisdiction, the court held that it was jurisdiction exclusive in the federal court which could and should be aided by an injunction against state interference, and which, therefore, fell within section 2283's exception.¹²²

The Delaware court's use of section 1337 federal jurisdiction to enforce rights created by the NLRA but not explicitly protectable by the Board or

diction which supported the preemption jurisdictional arguments in *Capital Service* and *Richman*. That § 1337 jurisdiction was jurisdiction to prohibit a state from regulating labor disputes arguably within the NLRA. See note 106 *supra* and accompanying text. It can never be jurisdiction to be aided within the meaning of § 2283. See note 112 *supra* and accompanying text. This § 1337 jurisdiction is jurisdiction to treat substantive labor matters covered by the NLRA, but not given to the Board to regulate.

¹¹⁷ 29 U.S.C. §§ 158(a), (b), 159(a), (b), (c), (d), (e), 160(a), (c), (e) (1964).

¹¹⁸ 29 U.S.C. §§ 160(j), (i) (1964).

¹¹⁹ 265 F. Supp. at 654, 64 L.R.R.M. at 2639.

¹²⁰ See *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

¹²¹ The parties to a labor dispute have a right, indeed a duty, to engage in collective bargaining, under the federal statutes. The protection of collective bargaining is not entrusted to the NLRB as is jurisdiction over unfair labor practice charges. Therefore, the federal courts have jurisdiction to protect the rights accorded the parties by federal statutes.

265 F. Supp. at 654, 64 L.R.R.M. at 2640.

¹²² Essential to the protection of the right to free and unfettered collective bargaining in this case is an injunction against further proceedings before the Delaware Public Service Commission. Therefore, the injunction sought is necessary in aid of the jurisdiction of this court, and the prohibition of § 2283 does not apply.

265 F. Supp. at 654, 64 L.R.R.M. at 2640.

the federal courts should be carefully considered.¹²³ Because the NLRA sets out specific administrative and judicial means by which rights and duties established by the Act are to be enforced, the inference is strong that rights created by the Act were intended to be enforced solely by those means.¹²⁴ This is especially so in light of the general policy against the enforcement of labor rights by federal court injunction.¹²⁵ Moreover, the *Richman* case was not limited to the situation where the rights sought to be protected were explicitly given to the Board or to the federal courts to protect.¹²⁶ *Richman* goes further. Its clear suggestion is that the enforcement of the federal act is allocated to a specialized administrative body, and that rights created by the NLRA are better left unprotected than protected by many other nonspecialized tribunals. The fact that the various federal courts will be defining and describing rights to be protected by the NLRA does increase the probability that there will be conflicting decisions on the same substantive laws.¹²⁷ But conflict between various lawmaking bodies over the nature and scope of legislatively created rights is not necessarily an evil.¹²⁸ This is especially so when the substantive law to be so disparately evolved is no more suited to the administrative law-making of a single body than to the judicial law-making of many bodies,¹²⁹ and when a single supreme body exists which has the power and the competence to resolve any truly serious conflict.¹³⁰ And when the risk of incongruity in the law, resulting from allegedly conflicting decisional development is weighed against the lack of protection of a clearly recognized and fundamental federal right, it seems correct to give preference to the right and exercise the federal commerce jurisdiction in its behalf.¹³¹ It is submitted, therefore, that on balance the Delaware court was quite correct in establishing section 1337 jurisdiction to protect the company's right to engage in collective bargaining free of coercion, and in aiding that jurisdiction by enjoining the state commission.

The significance of *Delaware Coach* is not solely that the court created section 1337 jurisdiction to protect rights established by the NLRA, but that it did so in order to circumvent *Richman* and avoid section 2283's prohibition. The anti-*Richman* animus, implicit in *Delaware Coach* and explicit in some

¹²³ The court treated this question scantily.

¹²⁴ *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183 (4th Cir. 1948).

¹²⁵ 29 U.S.C. §§ 101-15 (1964). See Note, *supra* note 25, at 184.

¹²⁶ 348 U.S. at 520 & n.6 (1955).

¹²⁷ For example, there has been and is conflict among the circuits and between the various circuits and the Board concerning the interpretation and application of many sections of the NLRA.

¹²⁸ Cf. H.M. Hart & A.M. Sacks, *The Legal Process* 1177-417 (Tent. Ed. 1958).

¹²⁹ The NLRA itself assumes the competence of the various federal courts in defining, describing, and protecting labor rights and duties, for it both sets up a scheme of judicial enforcement of Board decrees, 29 U.S.C. §§ 160(e), (f) (1964), and grants original jurisdiction to the federal district courts to treat labor questions. 29 U.S.C. §§ 160(j), (l), 185, 187 (1964).

¹³⁰ One important basis for the Supreme Court's certiorari policy is a conflict between the circuits. See Rule 19(1)(b), Rev. Rules of the Supreme Court of the United States, 388 U.S. 927, 948 (1967).

¹³¹ See *Leedom v. Kyne*, 358 U.S. 184 (1958); *Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548 (1930).

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court decisions¹³² and legal commentaries¹³³ rests on a pragmatic consideration: if a state court or agency violates the supremacy of federal labor law, by the time relief can be obtained through the usual appellate procedures,¹³⁴ relief is useless.¹³⁵ It was just this consideration that moved Mr. Chief Justice Warren and Mr. Justice Douglas in their separate dissenting opinions in *Richman* to suggest that section 2283 is simply inapplicable where state proceedings infringe upon exclusive federal jurisdiction.¹³⁶ As long as that view retains its minority status, federal courts, like the *Delaware Coach* court, will continue to stretch to establish some federal jurisdiction over rights created by the NLRA and will continue to aid that jurisdiction, thus avoiding section 2283.¹³⁷

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¹³² See *International Union of Elec. Workers, CIO v. Underwood Corp.*, 219 F.2d at 103.

¹³³ E.g., Kochery, *supra* note 107; Note, 41 U. Va. L. Rev. 815 (1955).

¹³⁴ The usual appellate procedures involve appeals to the intermediate and highest state courts, followed by an application to the Supreme Court for a writ of certiorari, which may or may not be granted, followed by Supreme Court litigation.

¹³⁵ See *International Union of Elec. Workers, CIO v. Underwood Corp.*, 219 F.2d at 103.

¹³⁶ 348 U.S. at 521 (dissenting opinion, Warren, C. J.). *Id.* at 524 (dissenting opinion, Douglas, J.). See Kochery, *supra* note 107.

¹³⁷ Whether the right of parties to a labor dispute, arguably within the federal labor laws, to be free from state labor regulation is a right within the meaning of 42 U.S.C. § 1983 (1964) has never been decided. See *American Fed'n of Labor v. Watson*, 327 U.S. 582, 590-91 (1946). Nor has the question of whether 42 U.S.C. § 1983 (1964) is an exception to 28 U.S.C. § 2283 (1964) ever been decided. See *Cameron v. Johnson*, 390 U.S. 611, 613-14 n.3 (1968). If it were decided that a right to be free from state labor regulation is a right within the meaning of § 1983 and that § 1983 is an exception to § 2283, then state courts or agencies could be enjoined from violating the preemption doctrine.