RECENT CASES

Administrative Law—Appealability of National Labor Relations Board Directions of Election; Labor Law—Propriety of Run-off Elections to Determine Exclusive Bargaining Agent—[Federal].—The National Labor Relations Board directed an election among employees of the Consumers' Power Company to determine whether they wished to be represented by the International Brotherhood of Electrical Workers (AFL), the Utility Workers Organizing Committee (CIO), or neither. The UWOC won a plurality,[1] but not a majority of votes. The board, under its "majority" rule,[2] directed a run-off election to determine whether or not the employees wished to be represented by the UWOC. The IBEW sought review of this direction as a "final order"[3] which denied them full freedom of choice of bargaining representatives. *Held*, the direction of election is a "final order" and hence presently reviewable by the Circuit Court of Appeals. The "order" is unfair to the appellant and is set aside. *International Brotherhood of Electrical Workers et al. v. NLRB.*[4]

Under Section 10(f) of the Wagner Act a "person aggrieved" may complain only of a "final order"[5] of the National Labor Relations Board. The terms "order" and "such order" in Section 10 refer exclusively to board orders against employers in unfair labor practice proceedings. While the appellations given to administrative acts do not necessarily bind courts in their determination of what constitutes an "order,"[6] yet the absence of the term "order" from Section 9(c), which deals with representation proceedings, and its appearance only in Section 10, which deals with unfair labor practices,

[1] Total Eligible Voters 2977
Total Ballots Cast 2806
For the IBEW 1072
For the UWOC 1164
For neither 506
Challenged 52
Void 11
Blank 1

[2] National Labor Relations Act, § 9(a), 49 Stat. 449 (1935), 29 U.S.C.A. § 159(a) (1935).

[3] Section 10(f) provides: "*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 Circuit Court of Appeals of the United States in the circuit *wherein the unfair labor practice in question* was alleged to have been engaged in . . . ." (Italics added).

[4] 105 F. (2d) 598 (C.C.A. 6th 1939).

[5] E.g., orders to cease and desist certain practices, to reinstate employees, etc. Cf. Handler, Affirmative Orders of the NLRB, C.C.H. Lab. Law Comment No. 3 (1938).

[6] Cf. Shannahan et al. v. United States, 303 U.S. 596 (1938); American Sumatra Tobacco Co. v. SEC, 93 F. (2d) 236 (App. D.C. 1937); Brady v. ICC, 43 F. (2d) 847, (D.C. W.Va. 1930); United States v. Los Angeles & S. L. R., 273 U.S. 299 (1927); Brooklyn Eastern Dist. Terminal v. United States, 28 F. (2d) 634 (D.C. N.Y. 1927). See Feller, Prospectus for the Further Study of Administrative Law, 47 Yale L. J. 647, 671 (1938).

indicates that Congress contemplated that the board would issue orders only under Section 10. This conclusion is justified by observing that while proceedings under Section 9 are merely investigatory in character, culminating in certifications, which are essentially mere statements of fact,[7] those under Section 10 are adversary in character, more naturally culminating in orders. Congress may, therefore, have felt that the absence of a case or controversy in representation proceedings precluded appellate jurisdiction of the Circuit Court of Appeals. Thus, review of representation proceedings is provided for by Section 9(d)[8] only after a final order has been issued in an unfair labor practice case.[9]

The jurisdiction of the Circuit Court of Appeals to review board proceedings and to enforce board orders is derived from Section 10 (f).[10] Such jurisdiction depends on the filing of a full transcript of all proceedings before the board, including the certification and record of the investigation upon which the order complained of was entered.[11] This requirement cannot be met when a direction of election, prior to which there would be no certification, is sought to be reviewed. That certifications are included merely as part of the transcript on appeal is a strong indication that they too are excluded from the class of appealable orders.[12]

Congressional reports indicate a legislative purpose to prevent review of board directions for election at the instance of either employers or employees until after a final order based on the board's investigation has been issued in an unfair labor practice case. It was felt that the provision for review at that time afforded sufficient protection to any party aggrieved.[13] The unforseeability of the AFL-CIO schism when the

[7] Cf. Influence of NLRB on Interunion Conflicts, 38 Col. L. Rev. 1243, 1253 (1938).

[8] Section 9(d): "Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon the 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 subsection 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." (Italics added).

[9] NLRB Ann. Rep. 105 (1937). United Employees Ass'n v. NLRB, 96 F. (2d) 875 (C.C.A. 3d 1938); cf. Commercial Telegraphers' Union v. Madden (App. D.C. 1937), C.C.H. Lab. Law Serv. ¶ 18048 (1937).

[10] Ford Motor Co. v. NLRB, 305 U.S. 364, 369 (1939).

[11] In the Matter of the NLRB, 304 U.S. 486, 493 (1937).

[12] Cf. Appealability of Administrative Orders, 47 Yale L. J. 766, 773 (1938).

[13] S. Rep. 573, 74th Cong. 1st Sess. (1935). This report states at page 5 that one of the defects of Section 7(a) of the National Industrial Recovery Act and of Public Resolution 44 was that governmental attempts to conduct elections were contestable in the courts with the result that the efficiency of the board was distinctly impaired. Compare Ames Baldwin Wyoming Co. v. NLRB, 73 F. (2d) 489 (C.C.A. 4th 1934) with Guide Lamp Co. v. NLRB, 76 F. (2d) 370 (C.C.A. 7th 1935).

At page 14 the report states: "Sec. 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 a mere determination of a preliminary fact, and in itself has no 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*

act was passed[14] justifies speculation as to the desirability of amendment to permit employee appeals at an earlier stage.[15] But this fact bolsters the proposition that Congress intended no appeals before elections.

Judicial review of administrative actions prior to the recent *Rochester* case[16] extended only to those acts which both finally disposed of a controversy,[17] and *affirmatively* commanded or directed a particular thing to be done. In regard to the first requirement, the *Rochester* case reaffirmed application of the "final judgment" rule to administrative actions and specifically declared administrative rulings made "during the incomplete process of administrative adjudication"[18] to be non-reviewable until a "final order" is entered.[19] The National Labor Relations Act recognizes this judicial limitation by confining review to "final orders."

Applying this rule to the principal case, it seems clear that a direction of election, far from being a final *order*, is not even a final administrative act of any kind but is merely an interlocutory step in investigation proceedings. A direction of election simply enables the board's regional director to question the employees by means of a se-

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bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based and is fully reviewable by any aggrieved party in the Federal Courts in the manner provided in sec. 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" (italics added). H.R. Rep. 1147, 74th Cong. 1st Sess. (1935) is substantially similar.

The above reports were both before the court at the hearing but are not mentioned in the opinion. The court says: "We cannot think that Congress overlooked this important matter." IBEW et al. v. NLRB, 105 F. (2d) 598, 600 (C.C.A. 6th 1939).

[14] The suggestion is contained in brief of counsel for the International Longshoreman's Association in AFL et al. v. NLRB, 103 F. (2d) 933 (App. D.C. 1939).

[15] Cf. Amendments to the NLRA proposed by the AFL at the 58th annual convention (approved by the executive council, 1939). In the proposed amendment to Section 9(f), the AFL merely proposes that certifications, not directions of election, be treated as appealable final orders.

[16] Rochester Tel. Co. v. United States, 307 U.S. 125 (1939). The court held that an order by the Federal Communications Commission that a telephone carrier was subject to the Communications Act of 1934 and hence to all affirmative duties imposed by that act was an appealable order.

[17] Myers et al. v. Bethlehem Shipbuilding Co., 303 U.S. 41 (1938); Chamber of Commerce of Minneapolis et al. v. FTC, 280 Fed. 45 (C.C.A. 8th 1922); compare Mallory Coal Co. v. Nat'l Bituminous Coal Com'n, 99 F. (2d) 339 (App. D.C. 1938) with Fed. Power Com'n v. Metropolitan Edison Co., 304 U.S. 375 (1938). Cf. 14 Indiana L. J. 173 (1938).

[18] Rochester Tel. Co. v. United States, 307 U.S. 125, 143 (1939). See Reviewability of "Negative" Administrative Orders, 53 Harv. L. Rev. 98 (1939).

[19] The problem of finality is inherent where statutes merely provide appeal from "orders" or "any order" of boards or commissions. See, e.g., Urgent Deficiencies Act of 1913, 38 Stat. 219 (1913), 28 U.S.C.A. § 41 (27) (1926); Public Utility Holding Co. Act, 49 Stat. 834 (1935), 15 U.S.C.A. § 79(x) (1935); Federal Power Act, 49 Stat. 860 (1935), 16 U.S.C.A. § 825(b) (1935); Nat'l Bituminous Coal Act, 50 Stat. 85 (1937), 15 U.S.C.A. § 836(d) (1937); Securities Exchange Act of 1934, 48 Stat. 926 (1934), 15 U.S.C.A. § 78(y) (Supp. 1938).

cret ballot. Action by the board, after it has scrutinized the balloting, is necessary before the results of an election become conclusive.[20]

Even certification, though admittedly the final step in representation proceedings, is clearly not a final determination which might "aggrieve" employers.[21] Whether or not this may be true regarding employees is the issue currently pending in *American Federation of Labor v. NLRB*.[22] If employees may not appeal after certification, their only possible subsequent opportunity would depend upon the employer's refusal to bargain with the certified union followed by a board order that he do so. The inadequacy of a right of review which is thus dependent upon a contingency beyond the appellant's control may indicate the desirability of amendment of the act to permit employee appeals from certifications.

In the *Rochester* case, the court drastically altered the second requirement for review of administrative acts—that they must *affirmatively* command or direct a particular thing to be done. The court now subjects to judicial review, in the absence of statutory restriction, such formerly non-appealable "negative" orders as (1) those complained of because they refuse to relieve the complainant of statutory burdens, (e.g., an order of the Interstate Commerce Commission denying a carrier permission to depart from the long-short haul clause), and (2) those complained of because they do not require or forbid conduct by a third person (e.g., an order of the Interstate Commerce Commission denying a shipper's request for an order compelling the carrier to adopt certain rates or practices). In other words, the *Rochester* case now subjects to review orders which, although not in terms commanding or directing any particular action, affect the complainant adversely and immediately. The National Labor Relations Act achieves the identical result by providing for appeal from orders "denying"[23] relief.

The type of administrative act which affects complainants adversely only on contingency of future administrative action is *still* not reviewable. This category includes certain "orders" and also seems to include administrative acts which do not command

[20] The board may either accept or reject the results and may even completely disregard an election, and change the unit which was found to be appropriate for the election, In the Matter of Int'l Nickel Co., 7 NLRB 46, and 11 NLRB Nos. 19, 19(a) (1938).

[21] Matter of Wallach's Co. v. Boland et al., 253 App. Div. 371, 2 N.Y.S. (2d) 179 (1938), aff'd 277 N.Y. 345, 14 N.E. (2d) 381 (1938). In Libby-Owens-Ford Glass Co. v. NLRB, C.C.A. 6th May 10, 1939, the court held a certification to be a final order allowing an employer to appeal. In the instant case, however, the same court says that a certification though final is not an order. This would indicate that the court now numbers certifications among *non-orders*. Note 24 infra. Cf. 18 Ore. L. Rev. 51 (1938).

[22] 103 F. (2d) 933 (App. D.C. 1939), cert. granted Oct. 9, 1939. The board certified the CIO as the exclusive bargaining agent for longshoremen on the west coast. The court held, applying one of the rules limiting reviewability, that since the certification did not direct something to be done; i.e., since it was not a mandate, it was not an "order" and hence not appealable. The same result was reached in United Employees Ass'n v. NLRB, 96 F. (2d) 875 (C.C.A. 3d 1938), but the court based its decision upon the theory that Congress limited review to orders issued in unfair labor practice cases. Cf. Appealability of Administrative Orders, 47 Yale L. J. 766 (1938); 52 Harv. L. Rev. 1171 (1939); Rice, Determination of Employee Representation, 5 Law & Contemp. Probs. 188 (1938); see A Redefinition of Judicial Review of Administrative Orders, 48 Yale L. J. 1257, 1261 (1939); Cohen, The "Appropriate Unit" under the National Labor Relations Act, 39 Col. L. Rev. 1110, 1144 (1939).

[23] Note 3 supra.

or direct *any* particular thing to be done.[24] The term *non-orders* might be a convenient category to indicate all of that class of administrative actions which remain not reviewable.[25]

Board-ordered elections seem clearly to fall within this group.[26] Indeed, the similarity between a final valuation for rate-making purposes and a certification by the board almost compels classification of the latter as "non-orders." Both are final stages of investigatory proceedings; both may become bases for future adversary administrative action; yet neither of itself, requires or forbids any conduct. It has been argued, however, that since a certification in effect requires an employer *not* to bargain with the union *not* certified, it might be considered as a "negative" order appealable since the *Rochester* case.[27] But it is clear that certification of itself does not immediately require or forbid conduct; nor is it intended to do so. Certifications as well as directions of election seem therefore to be non-reviewable administrative acts, or "non-orders," which adversely affect the rights of a complainant only after future administrative action.

Even if the court's position on jurisdiction in the instant case be conceded, its disposition on the merits seems questionable. The only proper judicial inquiry, assuming that the court had jurisdiction, can be whether or not the board's procedure is a rational[28] exercise of the broad discretionary authority conferred upon the board by Section 9(c).[29] The challenged procedure results from recognition by the board of the

[24] In Shannahan v. United States, 303 U.S. 596 (1938) it was held that a determination that a carrier is within the Railway Labor Act is a mere finding of fact and as such not an order either commanding or directing anything to be done. In support of its position the court quotes United States v. Los Angeles & S. L. R., 273 U.S. 299, 310 (1927) where a final valuation by the Interstate Commerce Commission was held to be "merely preparation for possible action in some proceeding which may be instituted in the future." Cf. Shields v. Utah Idaho Central R., 305 U.S. 177, 182 (1938). The Circuit Court of Appeals in AFL v. NLRB, 103 F. (2d) 933 (App. D.C. 1939) applied the "restrictive definition" supplied in the Shannahan case in holding that a certification is not an order.

[25] Examples of these still not appealable actions cited in the Rochester case are ". . . . orders of the Interstate Commerce Commission in setting a case for hearing despite a challenge to its jurisdiction, or rendering a tentative or final valuation under the Valuation Act, 49 U.S.C.A., sec. 19(a), although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act, 45 U.S.C.A., sec. 151 et seq. and therefore amenable to the National Mediation Board . . . ." 307 U.S. 125, 130 (1939).

[26] So held under the National Labor Relations Act, Combustion Engineering Co. v. NLRB, 95 F. (2d) 996 (C.C.A. 6th 1938); N.Y. Handkerchief Co. v. NLRB, 97 F. (2d) 1010 (C.C.A. 7th 1938); Cupples Co. Mfrs. v. NLRB, 103 F. (2d) 953 (C.C.A. 8th 1939). Cf. In re Lowell Cab Co., 11 N.Y.S. (2d) 497 (N.Y. 1939) (so held under the New York Labor Relations Act which contains similar review provisions).

[27] A Redefinition of Judicial Review of Administrative Orders, 48 Yale L. J. 1257, 1262 (1939).

[28] Rochester Tel. Co. v. United States, 307 U.S. 125, 146 (1939); cf. Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282 (1934); Swayne & Hoyt Ltd. v. United States, 300 U.S. 297 (1937).

[29] Section 9 (c) provides: "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon

"majority" rule and of the corollary right of a majority to have no exclusive agent for collective bargaining if it so desires. The board by a "for-or-against" run-off ballot affords an opportunity for breaking the deadlock by determining whether or not a majority desires that representative which obtained a plurality of the votes on the first ballot.[30] The New York Labor Relations Act, in providing for a run-off between the two leaders in such cases,[31] partially disregards this right. If board member Edwin S. Smith's view were followed,[32] that candidate of three or more achieving a plurality on the first ballot would be certified immediately, without any run-off at all. The board rejected Mr. Smith's suggestion because it would result, in effect, in election by a minority. There is nothing in the act to indicate which approach is most desirable.[33]

The run-off procedure adopted does not assure election to the union appearing on the ballot. It is hence not a final disposition of the status of either contesting organization.[34] The board, furthermore, is not depriving the non-participating union of any "right," because the act nowhere confers the *right* to an *election*. The act merely seeks to eliminate employer interference with autonomous choice of employee representatives.[35] It gives employees no rights against the board except to request its aid in fulfilling this purpose. Use of the run-off procedure in twelve previous cases, five times used at the instance of AFL[36] affiliates, suggests its adequacy. Had the IBEW obtained a plurality on the first vote, it would have been the only union appearing on the run-off ballot.[37] The board's run-off procedure seems both reasonable and appropriate

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due notice, either in conjunction with a proceeding under section 10 or otherwise, and *may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives*" (Italics added).

[30] NLRB Ann. Rep. 149 (1938).

[31] New York Labor Relations Act, §705.5. Yet if the "or neither" group has the second largest number of votes the run-off ballot would presumably be a "for-or-against" ballot. Thus the right may be somewhat protected.

[32] Presented in In the Matter of Interlake Iron Co., 4 NLRB 55 (1937), when the present board procedure was decided upon.

[33] Cf. Rice, op. cit. supra note 22, at 221. The procedure employed in elections under a system of proportional representation might possibly be used in such situations. Where there are three choices on the ballot, the voters could be asked to express first and second preferences. The second choices of the lowest group (as determined by a count of first choices) would then be distributed and a majority thereby obtained.

[34] In six of the twelve such elections held by the board, the union on the ballot lost. See, e.g., In the Matter of Little & Ives Co., 6 NLRB 411 and 7 NLRB 12 (1938); In the Matter of Shell Oil Co., 7 NLRB 417 and 10 NLRB 719 (1938).

[35] NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 33 (1937): ". . . . The statute *goes no further* than to safeguard the rights of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their *employer*" (italics added).

[36] Brief of counsel for the NLRB before the Circuit Court of Appeals for the Sixth Circuit.

[37] The suggestion that estoppel may bar a petitioner from contesting a run-off election is made by the Court of Appeals for the Sixth Circuit in In the Matter of the Aluminum Company of America, C.C.A. 6th, Sept. 7, 1939. But the instant case is distinguishable on the facts in that the petitioner in the Aluminum case had participated in a former run-off election in which it was accorded a plurality and so had derived benefit from a procedure of which it later complained.

and hence beyond the scope of judicial interference. If it is not satisfactory in the long run, the only proper recourse is to amend the act or to change the composition of the board.

Administrative Law—Licenses—Right of Securities and Exchange Commission to Make Public Investigatory Findings in Advance of Hearing—[Federal].—A corporation, attempting to register shares of its capital stock under Sections 12(b) and 13(a) of the Securities Exchange Act of 1934,[1] filed a registration statement with the Securities and Exchange Commission, including with its application balance sheets, profit and loss statements and financial information pertaining to its principal subsidiary, a national bank. To facilitate the usual examination of the application, the commission requested and received from the Secretary of the Treasury authorization to study and make "public official use" of reports of the national bank examiners to the Comptroller of the Currency. Upon examination of all available information, including bank examiners' reports, the commission concluded that it had reasonable grounds to believe that the registration statement contained numerous false and misleading statements of fact and issued an order directing that a hearing be held to determine whether a stop order should issue suspending or withdrawing the effectiveness of the registration. The order enumerated specific "false and misleading statements" in the application, and, more particularly, in the balance sheets and profit and loss statements of the corporation and its subsidiaries. Although the corporation's principal subsidiary was not named in the order for a hearing, subpoenas duces tecum were issued to two of its officers. On the morning of the day set for the commission's hearing the corporation's principal subsidiary applied to the federal district court for a declaratory judgment and an injunction restraining the commission from securing information from national bank examiners' reports and from enforcing the subpoenas. The trial court dismissed the complaint. On appeal, *held*, that the commission had power to investigate a national bank; the Secretary of the Treasury had authority to deliver bank examiners' reports to the commission; such reports should be treated as confidential by the commission; the subpoenas were unreasonable in the form drawn because of the amount of material demanded to be brought to Washington. The judgment of the district court was affirmed in part, reversed in part, and the cause was remanded. *Bank of America National Trust & Savings Association v. Douglas et al.*[2]

Section 21(a) of the Securities Exchange Act of 1934 provides that, in order to detect violation of the act, the Securities and Exchange Commission may exercise extensive powers of investigation.[3] In the present case, the court held that by virtue of Sec-

[1] 48 Stat. 881 (1934), 15 U.S.C.A. § 78a (1934).

[2] 105 F. (2d) 100 (App. D.C. 1939).

[3] "The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates." During the year ending June 30,