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WORK ASSIGNMENT RESOLUTIONS: SECTION 10(k) "FINALITY" AND EMPLOYERS' ABILITY TO SECURE JUDICIAL REVIEW

*Mack Allen Player**

I. INTRODUCTION

The issue of whether an employer can secure judicial review of work assignment awards made by the National Labor Relations Board pursuant to section 10(k) of the National Labor Relations Act¹ has never been fully resolved. Two recent decisions have made the need to define the employer's right to judicial review more critical. In *International Telephone & Telegraph Corp. v. Local 134, IBEW*,² the United States Supreme Court held that a section 10(k) determination

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1. Section 10(k), 29 U.S.C. § 160(k) (1970), provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1970), defines an unfair labor practice as

forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work

2. 419 U.S. 428 (1975). In this case the losing union had appealed to the Seventh Circuit Court of Appeals to have the § 8(b)(4)(D) cease and desist order set aside. The court of appeals refused to enforce the order, ruling that the Board had not complied with § 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (1970), because the § 10(k) hearing officer had participated in both the § 10(k) and § 8(b)(4)(D) proceedings. 419 U.S. at 606-07. See notes 18-25 *infra* and accompanying text. The Supreme Court reversed, holding that § 5 of the APA does not govern proceedings conducted under § 10 of the National Labor Relations Act. 419 U.S. at 443-44. The Court reasoned that a § 10(k) determination is not a final order within the meaning of § 2(d) of the APA because although practical consequences might flow from a § 10(k) proceeding, the Board did not order any party to do anything at the proceeding's conclusion. *Id.* at 444-46.

was not an "order" or "final disposition" subject to court of appeals review.³ The Ninth Circuit, in *NLRB v. Longshoremen's Local 50*,⁴ ordered the Board to formulate and articulate relevant criteria to be used in making section 10(k) awards. The court also indicated that the judiciary would no longer blindly defer to the Board's determinations.⁵ The vast majority of prior Board decisions upheld the employer's preference, usually without articulating their emphasis on this factor.⁶ Thus while the *International Telephone & Telegraph* decision seems to preclude the right to judicial review, the Ninth Circuit decision may make it imperative that employers secure this right. Although the statute itself and the legislative history are silent, the conventional wisdom has been that the employer could not secure review either of section 10(k) awards themselves or of decisions by the Board not to make awards.⁷ Conventional wisdom should be reexamined in light of practical realities.

II. JUDICIAL REVIEW OF THE SECTION 10 (k) WORK ASSIGNMENT AWARD

A. *The Employer as a "Person Aggrieved" by a Work Assignment Award*

To secure court of appeals review an employer must establish that

3. 419 U.S. at 443-44.

4. 504 F.2d 1209 (9th Cir. 1974). This case involved a longstanding dispute between longshoremen and operating engineers over which union had the right to operate barge-mounted floating whirly cranes. See *Henderson v. Longshoremen's Local 50*, 457 F.2d 572 (9th Cir.), cert. denied, 409 U.S. 852 (1972); *Henderson v. Operating Engineers Local 701*, 420 F.2d 802 (9th Cir. 1969). In this latest litigation, the Board determined that the Engineers were entitled to the work. 504 F.2d at 1212. The Longshoremen's Union failed to notify the Board of its intent to comply with the determination, and therefore a § 8(b)(4)(D) unfair labor practice complaint was issued against them. *Id.* The appellate court reversed on the grounds that it was "unable to conclude . . . that the Board's work assignment to the Engineers [was] not arbitrary and capricious." *Id.* at 1222.

5. 504 F.2d at 1220-22. The court stated that the Board's failure to announce the standards and principles on which cases were decided made "judicial review virtually impossible, because the decision[s] [were] totally unprincipled." *Id.* at 1220. The court pointed out that while "[t]he courts could be expected to give greater deference to Board decisions during the period in which the Board's decisionmaking process was developing . . . , " this practice should no longer be followed because neither "Congress [n]or the Supreme Court intended that judicial review should be such a paper tiger." *Id.*

6. See *id.* at 1221; Player, *Work Assignment Disputes Under Section 10(k): Putting the Substantive Cart Before the Procedural Horse*, 52 TEXAS L. REV. 417, 444-46 (1974).

7. See *Shell Chem. Co. v. NLRB*, 495 F.2d 1116 (5th Cir. 1974), cert. denied, 95 S. Ct. 1951 (1975); *Henderson v. Longshoremen's Local 50*, 457 F.2d 572 (9th Cir.), cert. denied, 409 U.S. 852 (1972); 3 J. JENKINS, LABOR LAW § 18.10 (1974).

he is a "person aggrieved by a final order of the Board."⁸ One good, but theoretical, reason for denial of section 10(k) review is that the employer is not legally a "person aggrieved" by the award. The ostensible purpose of section 10(k) is to protect "the neutral employer from loss due to conflicting demands by competing unions that the employer is powerless to satisfy."⁹ It could be asserted that the employer has no cognizable interest in which competing union secures the award, but only that an award be made, so he need deal with but a single employee representative. If the employer has economic reasons for not wishing to award the work to the winning union, this may be viewed as an economic dispute between the employer and the union, for which section 10(k) resolution was not designed. Since the employer has no legal interest in the *merits* of the dispute between the unions, he could not be "aggrieved" by any award.¹⁰

Despite the logic of this argument, the Board and the Supreme Court have categorically rejected the notion that the employer is an unconcerned neutral. In *NLRB v. Plasterers' Local 79*,¹¹ the Court recently emphasized the substantial economic interest of the employer in the outcome of work assignment disputes.¹² Given this recognition

8. Section 10(f), 29 U.S.C. § 160(f) (1970), provides in pertinent part:

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 . . . by filing in such a court a written petition praying that the order of the Board be modified or set aside [T]he court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section

9. *Henderson v. Longshoremen's Local 50*, 457 F.2d 572, 577 (9th Cir.), *cert. denied*, 409 U.S. 852 (1972) (citations omitted).

10. *See Plasterers' Local 79 v. NLRB*, 440 F.2d 174 (D.C. Cir. 1970), *rev'd*, 404 U.S. 116 (1971).

11. 404 U.S. 116 (1971).

12. *Id.* Section 10(k) provides in part that if "the two parties to such dispute . . . have . . . agreed upon methods for the voluntary adjustment of . . . the dispute . . ." the Board will quash the § 10(k) adjudication. The issue before the Court in *Plasterers'* was whether the agreement of the two disputing unions to a method of adjustment was sufficient to deprive the Board of § 10(k) jurisdiction. The Board's position was that the employer was a necessary party to the "method of adjustment." The court of appeals held that "parties to such dispute" referred only to the disputing unions seeking the work, and thus the unions' agreement to a method of settlement was sufficient, in itself, to deprive the Board of § 10(k) jurisdiction. 440 F.2d at 180-81. The Supreme Court reversed the court of appeals and accepted the Board's position that to deprive the Board of § 10(k) jurisdiction the "method of adjustment" must be agreed upon by the unions *and* the employer. 404 U.S. at 135-36. The Court relied extensively on the real economic interest the employer had in the adjudication of work assignment disputes. For a critical comment on the Supreme Court's decision in *Plasterers'* see Player, *supra* note 6, at 455-57. *See also* Comment, *The Employer as a Necessary Party to Voluntary*

of the employer's interest in the merits of a resolution, while denial of the employer's petition for review could at one time be supported by the idea that the employer was not "aggrieved" because he had no legal interest in section 10(k) awards, that analysis must now be rejected.

B. The Section 10(k) Award as a "Final Order"

Section 10(f), however, further requires that the employer be aggrieved by a "final order."¹³ Under the NLRA, "order" has customarily been construed to mean only unfair labor practice orders.¹⁴ The Supreme Court has held that certification and the steps necessary to obtain it are not "orders" within the meaning of the Act.¹⁵ Lower courts, analogizing to certification, have reached the same conclusion in regard to section 10(k) awards.¹⁶ Although dicta from the 1971 *Plasterers'* decision reflected the Court's belief that section 10(k) awards were not final,¹⁷ it was not until the 1975 decision of *International Telephone & Telegraph Corp. v. Local 134, IBEW*¹⁸ that the Court positively stated that section 10(k) awards were not "final orders."¹⁹ The decision, however, cannot be viewed as dispositive of the question of an employer's right to immediate review, since the Court did not address that precise issue. *International Telephone & Telegraph* involved the applicability of the procedural protections of section 5 of the Administrative Procedure Act to section 10(k) hearings.²⁰ Section 5 of the APA applies to every "adjudication,"²¹ which is defined in the APA as the "process for the formulation of an order."²² "Order"

Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA, 38 U. CHI. L. REV. 389 (1971).

13. 29 U.S.C. § 160(f) (1970).

14. See *AFL v. NLRB*, 308 U.S. 401, 409 (1940); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

15. *AFL v. NLRB*, 308 U.S. 401, 406-09 (1940).

16. *Shell Chem. Co. v. NLRB*, 495 F.2d 1116, 1120 (5th Cir. 1974), *cert. denied*, 95 S. Ct. 1951 (1975); cf. *Henderson v. Longshoremen's Local 50*, 457 F.2d 572 (9th Cir.), *cert. denied*, 409 U.S. 852 (1972); *NLRB v. Longshoremen's Union*, 378 F.2d 33 (9th Cir. 1967).

17. "[T]he § 10(k) decision standing alone binds no one. No cease and desist order against either union or employer results from such a proceeding." *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 126 (1971).

18. 419 U.S. 428 (1975).

19. *Id.* at 443-44.

20. 5 U.S.C. § 554 (1970). See note 2 *supra*.

21. 5 U.S.C. § 554 (1970).

22. 5 U.S.C. § 551(7) (1970).

is in turn defined as "the whole or part of a final disposition."²³ The Court concluded that a section 10(k) decision was not a "final disposition" and thus not an "order." Consequently, the procedures required for an "adjudication" were not applicable to section 10(k) proceedings.²⁴

The Court's conclusion that a section 10(k) hearing does not produce a "final order" is abstractly correct when applied to the usual situation in which the losing labor organization seeks immediate and direct review of the award. The losing union can continue its economic pressure and the NLRB will process a section 8(b)(4)(D) complaint against it.²⁵ The union so charged is free to defend the complaint on the grounds that the section 10(k) award to the other union was erroneous. Although the Board ordinarily will not rehear the underlying section 10(k) dispute,²⁶ the court of appeals, on review of the unfair labor practice order, is free to examine the propriety of the section 10(k) award.²⁷ Thus the union that loses the section 10(k) contest may secure indirect review of the award at a later stage by the commission of an unfair labor practice. The Supreme Court was therefore correct in holding that a section 10(k) award is not a "final order," at least as between the disputing unions.

The employer, however, is not guaranteed any similar, indirect review of the award, although it is conceivable that the employer could secure review through commission of a section 8(a)(5) unfair labor practice.²⁸ If a section 10(k) award were viewed as a clarification of a prior Board certification, the employer's refusal to recognize the valid beneficiary of the section 10(k) award might be construed as an unlawful refusal to bargain with a certified representative.²⁹ In deciding on the propriety of the section 8(a)(5) complaint, triggered by the employer's refusal to assign the work according to the award, the courts

23. See 5 U.S.C. § 551(6) (1970).

24. 419 U.S. at 443.

25. See 29 U.S.C. § 158(b)(4)(D) (1970); note 1 *supra*.

26. See *Stereotypers Local 22*, 160 N.L.R.B. 184 (1966); *cf.* *International Typographical Union*, 125 N.L.R.B. 759 (1959).

27. See *NLRB v. Longshoremen's Local 50*, 504 F.2d 1209, 1218 & n.3 (9th Cir. 1974).

28. Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1970), provides: "It shall be an unfair labor practice for an employer—

* * *

to refuse to bargain collectively with representatives of his employees. . . ."

29. See *Sussman, Section 10(k): Mandate for Change?*, 47 B.U.L. REV. 201, 211-12 n.56 (1967).

could focus on the underlying section 10(k) award.³⁰ The Board, however, believing in the "non-finality" of the section 10(k) order, has refused to accept the basic premise of this argument.³¹ Section 10(k) awards are not binding on the employer and therefore action by the employer cannot activate Board processes.³²

Thus, whether a section 10(k) award will be subject to judicial review is entirely beyond the employer's control since the only source of review is based on a section 8(b)(4)(D) complaint, triggered by a union's refusal to accede to the section 10(k) award. The employer plays no role in the union's decision to challenge the section 10(k) award by continuing to apply economic pressure.³³ It would seem that as to the employer, the section 10(k) award is a "final disposition," and therefore an "order" subject to section 10(f) review by a court of appeals. The employer's economic interest in which group should perform work for him has been resolved by the Board. Nothing remains to be done. If he is to secure review, and it must be presumed that he so desires,³⁴ it must be granted at this stage.³⁵

30. Although providing the employer with review of the § 10(k) award, this approach has the disadvantage of subjecting the employer who disagrees with the award to Board remedies. Affirmative enforcement against the employer would sacrifice economic self-determination of purely economic disputes between a union which had been awarded the work and the employer who, for economic reasons, desired to assign the work to a competing group.

31. *Machinists Lodge 68*, 81 N.L.R.B. 1108 (1949); *Petitioner's Brief for Certiorari at 18*, *NLRB v. Plasterers' Local 79*, 404 U.S. 116 (1971).

32. *See* 404 U.S. at 126. *See also* *International Tel. & Tel. Corp. v. Local 134, IBEW*, 419 U.S. 428 (1975). Some early discussion by Congress concerning the appointment of an arbitrator to resolve work assignment disputes tends to support the idea that the employer was to be bound by a § 10(k) award. The weight of the legislative history, however, indicates that the employer per se did not have to abide by the award under penalty of an unfair labor practice remedy. *See Farmer & Powers, The Role of the National Labor Relations Board in Resolving Jurisdictional Disputes*, 46 VA. L. REV. 660, 694-95 (1960).

33. The decision of the General Counsel not to issue a complaint is an act of discretion not subject to judicial review. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *ILGWU Local 415-475 v. NLRB*, 501 F.2d 823, 830 (D.C. Cir. 1974).

34. *Cf. Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 336 (1965).

35. It is possible that direct review of the § 10(k) award could be secured via an action filed in the federal district court, utilizing as a jurisdictional basis 28 U.S.C. § 1337 (1970) (original jurisdiction in commerce and antitrust area), or perhaps § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1970). *See Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389, 443-46 (1970). Such extraordinary review, however, would apparently be available only if the National Labor Relations Act expressly, or by implication, does not preclude that review. Absent patent illegality, the Supreme Court has indicated that the

C. *The Standard of Review*

Until recently the problem of an employer securing review of section 10(k) awards was largely academic. First, work assignments were almost automatically awarded in accordance with the employer's preference. In less than one case out of twenty did the Board fail to follow the employer's initial assignment.³⁶ Very few employers either needed or wished to seek review. Secondly, the scope of review of section 10(k) awards was limited to a consideration of whether the Board's decision was "arbitrary and capricious."³⁷ For example, the Fifth Circuit determined that Congress did not intend the courts "to consider the relevant factors and to weigh and evaluate the evidence adduced with respect to each."³⁸ In applying this narrow standard of review the courts sustained the Board's section 10(k) awards in fourteen consecutive cases from 1962 through 1973.³⁹ Since section 10(k) awards received rubber-stamp approval, any objecting party had little hope of obtaining judicial relief.

The recent Ninth Circuit decision in *NLRB v. Longshoremen's Local 50*⁴⁰ may represent the demise of this phenomenon and employer pressure for review of section 10(k) awards may develop. Though still purporting to apply the "arbitrary and capricious" standard, the Ninth Circuit ordered the Board to establish relevant criteria for choosing between the competing unions and to apply those criteria to the facts of each case.⁴¹ The court indicated that in the future it would examine the factors involved and the Board's action based thereon, and would dismiss the section 8(b)(4)(D) complaint if the section 10(k) award was "arbitrary and capricious" in its failure to apply the proper standards. Thus it can be expected that courts will begin to examine more closely the merits of section 10(k) awards. Review of the award

review provided within the National Labor Relations Act is exclusive. See *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Leedom v. Kyne*, 358 U.S. 184 (1958). It can be assumed that § 10(k) resolutions are judgment decisions not so patently illegal as to meet the stringent standard of *Leedom*. Therefore, the inquiry herein is whether review should be granted, not extraordinarily through district court actions, but through regular § 10(f) court of appeals review on petitions of persons aggrieved by final Board orders.

36. Empirical studies indicate that 90-98% of § 10(k) awards are made according to employer preference. See *Player*, *supra* note 6, at 435 n.8.

37. See, e.g., *NLRB v. Pressmen's Local 6*, 385 F.2d 956 (8th Cir. 1967).

38. *Typographical Union Local 17 v. NLRB*, 368 F.2d 755, 765 (5th Cir. 1966), quoting *NLRB v. Operating Engineers Local 825*, 326 F.2d 213, 218 (3d Cir. 1964).

39. *NLRB v. Longshoremen's Local 50*, 504 F.2d 1209, 1218 n.3 (9th Cir. 1974).

40. *Id.*

41. *Id.* at 1220. See note 5 *supra*.

will thereby become a meaningful right, not only for unions, but also for employers.

In addition, despite the great weight given the employer's preference by the Ninth Circuit, which in this writer's view is erroneous, it can be anticipated that employer preference will not continue to have the almost conclusive weight that it once commanded. Close judicial analysis will disclose that section 10(k) awards may be arbitrary and capricious if undue weight is given to employer preference to the exclusion of more relevant criteria, such as area custom and third-party awards. If the Board does adopt a more balanced view toward employer preference, the number of employers seeking judicial review should increase greatly. Although the review they might receive would probably be more meaningful than it has been in past years, the more central issue of their *right* to review is still in question, particularly in light of *International Telephone & Telegraph*.⁴²

D. *Finality: A Suggested Analysis*

Although it may appear that *International Telephone & Telegraph* has irreversibly closed off any avenue of appeal for employers, the problem of review cannot be satisfactorily resolved by resorting to the sweeping assertion of that decision that section 10(k) orders are not "final." Rather, a more searching analysis must be made of three questions relevant to finality. First, does the agency action substantially affect a recognized right or interest? Second, is any further agency action possible for the evaluation of the asserted interest? Third, does the statute itself, or any policy underlying the statute, preclude review of the agency action? If the answer to the first question is "yes," and the answer to the last two "no," review should be granted.

Applying these standards to section 10(k) awards wherein the union is seeking review, it is obvious that the section 10(k) award is not final. Although the resolution does affect an interest of the union, further agency action is possible through an unfair labor practice proceeding precipitated by the losing union. Furthermore, delay of that unfair labor practice proceeding by court of appeals review of the award would bifurcate the proceeding, frustrate the interrelationship between section 10(k) and section 8(b)(4)(D), and delay final resolution of the dispute.

When applied to the objecting employer, the finality analysis produces a contrary result. In *Plasterers'* the Supreme Court explicitly

42. See note 2 *supra*.

recognized that the employer has a cognizable economic stake in work assignment awards.⁴³ In addition, although the Board does not apply *stare decisis*,⁴⁴ past Board awards under similar circumstances, and the custom that such awards create, will undoubtedly influence future Board awards arising under similar circumstances. Thus an employer, or class of employers similarly situated, may be locked into an arbitrary and economically disastrous work assignment pattern. Certainly this interest warrants judicial review. Furthermore, unless the losing union joins the employer, the employer has no further agency review of his claim. There is no indirect method by which the employer, acting alone, can trigger further Board or eventual court adjudication. Finally, there is no countervailing policy sufficiently compelling to deny review. The agency action is complete. Competing claims have finally been resolved. There is no unfair labor practice charge pending. The union winning the section 10(k) award is legally free to exert economic leverage to secure the assignment.⁴⁵ The employer is free to comply with the award pending any judicial review or to resist the award without legal liability until final review. No party is frustrated or delayed in the assertion of his rights. Neither the statutory scheme nor the administrative process has been undermined.

In light of this analysis, the analogy drawn by the lower courts between section 10(k) awards and employee objections to the certification process is conceptually unsound with respect to reviewability.⁴⁶ Unless an employer refuses to bargain with the certified union, questions concerning the process of certification will never be reviewed by a court. The NLRA emphasizes the need for rapid resolution of certification questions and prompt movement toward a collective bargaining relationship.⁴⁷ If individual objections to the certification process were entertained by courts, collective bargaining would often be substantially delayed. Therefore, except in cases of patent illegality, the possible incursion on individual employee rights is more than offset by the need to avoid delay in the certification and bargaining process.⁴⁸

43. 404 U.S. at 124.

44. *Machinists Lodge 1743*, 135 N.L.R.B. 1402 (1962).

45. *Sears, Roebuck & Co. v. Carpet Layers Local 419*, 397 U.S. 655 (1970); *Henderson v. Longshoremen's Local 50*, 457 F.2d 572 (9th Cir.), *cert. denied*, 409 U.S. 852 (1972).

46. See text accompanying notes 15 & 16 *supra*.

47. See 29 U.S.C. § 159 (1970).

48. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Leedom v. Kyne*, 358 U.S. 184 (1958).

No similarly strong countervailing policy, however, justifies denial of review to an employer following an adverse section 10(k) resolution.

III. REVIEW OF THE ORDER QUASHING THE SECTION 10 (k) HEARING PRIOR TO A RESOLUTION

Disagreement has arisen among the courts of appeals as to whether a Board decision to quash a section 10(k) hearing before any award is made and may be reviewed.⁴⁹ Upon a charge that a union is utilizing proscribed pressure to secure a work assignment,⁵⁰ the Board schedules a section 10(k) proceeding to hear and determine the dispute.⁵¹ A number of findings uncovered in the preliminary investigation may prompt the Board to quash the section 10(k) hearing: facts may disclose that the union has an object other than work assignment;⁵² it may appear to the Board that the disputing unions have themselves resolved the dispute;⁵³ or the Board may find that the "parties" to the dispute have agreed upon a private method of resolution.⁵⁴ Although the General Counsel takes no part in the decision to quash, he will thereafter automatically dismiss the section 8(b)(4)(D) unfair labor practice charge without a complaint ever being issued. The General Counsel's decision not to issue a complaint is discretionary and is not subject to review.⁵⁵ The decision by the Board to dismiss a complaint that has issued, however, is a "final order" subject to judicial review.⁵⁶ Generally that distinction works well, but when literally and technically applied to the unique area of work assignment disputes it can deprive an employer of judicial review of actions substantially affecting his economic interests.

The decision to quash the section 10(k) hearing is actually based

49. Compare *Waterway Terminals Co. v. NLRB*, 467 F.2d 1011 (9th Cir. 1972) (reviewable), with *Shell Chem. Co. v. NLRB*, 495 F.2d 1116 (5th Cir. 1974), cert. denied, 95 S. Ct. 1951 (1975) (unreviewable).

50. 29 U.S.C. § 158(b)(4)(D) (1970) makes it an unfair labor practice for a labor organization to use proscribed pressure with the object of "forcing or requiring any employer to assign particular work to employees in a particular labor organization"

51. See *Ironworkers Local 595*, 112 N.L.R.B. 812, 814 (1955). For a more complete discussion of the procedural interplay between § 8(b)(4)(D) and § 10(k) see *Player*, *supra* note 6, at 422-26, 450-63.

52. See, e.g., *Sheetmetal Workers Local 420*, 198 N.L.R.B. No. 173 (1972), in which the union asserted that the object was "informational." In *Carpenters Local 1229*, 194 N.L.R.B. 640 (1972), the union argued that the picketing was to protest an "unfair labor practice."

53. *Highway Truckers Local 107*, 134 N.L.R.B. 1320 (1961).

54. See, e.g., *Bricklayers Local 17*, 199 N.L.R.B. 182 (1972).

55. See note 24 *supra*.

56. *Laundry Workers Local 22 v. NLRB*, 197 F.2d 701 (5th Cir. 1952).

on findings by the Board, not decisions by the General Counsel. Yet conventional reasoning would deprive the employer of judicial review in these situations on the grounds that no "final order" has issued from the Board. All that has technically transpired is an election by the General Counsel not to issue a complaint—an action not subject to review.⁵⁷ Therefore, by applying what seems to be an overly technical analysis, ill fitted to the unique characteristics of a section 10(k) proceeding, the employer is deprived of the opportunity to secure judicial review of assertions that were rejected by the Board.

The Ninth Circuit, recognizing the anomaly, has ruled that the quashing of the section 10(k) hearing is tantamount to the dismissal of a complaint and therefore is subject to judicial review.⁵⁸ In a section 10(k) proceeding the Board, not the General Counsel, makes a detailed analysis of the jurisdictional prerequisites to a section 10(k) determination. The resolution of the jurisdictional issue results in a Board decision to dismiss or not to dismiss the underlying unfair labor practice charge. In reality it is not a General Counsel decision against issuing a complaint. When the Board quashes a section 10(k) hearing this is a decision directing that a complaint *cannot* be issued. The General Counsel has no discretion to act or not to act. Furthermore the determinations of the Board in quashing section 10(k) hearings go far beyond the General Counsel's threshold determination of whether a complaint shall issue. The Board frequently makes sophisticated determinations with respect to motive.⁵⁹ The Board may be forced to make legal evaluations of whether an employer has "agreed" to a private method of settlement.⁶⁰ These findings are binding on the General Counsel. This action by the Board is thus closely analo-

57. *Shell Chem. Co. v. NLRB*, 495 F.2d 1116, 1120-21 (9th Cir. 1974), *cert. denied*, 95 S. Ct. 1951 (1975).

58. *Waterway Terminals Co. v. NLRB*, 467 F.2d 1011 (9th Cir. 1972). The court held that the Board's decision to quash a § 10(k) hearing was a final order subject to judicial review because it permitted picketing and precluded a § 8(b)(4)(D) complaint. *Id.* at 1016-18. The court carefully distinguished its holding in *Henderson v. Longshoremen's Local 50*, 457 F.2d 572 (9th Cir. 1972), *cert. denied*, 409 U.S. 852 (1972), that the General Counsel's refusal to issue a § 8(b)(4)(D) complaint after an actual § 10(k) hearing was unreviewable. It reasoned that denial of the "review of a refusal to proceed to award under a Section 10(k) proceeding [would] nullify the effectiveness of Section 8(b)(4)(D)." 467 F.2d at 1016. Presumably, denial of review of agency action after a full hearing would not have such a dire effect.

59. *See Painters Council 9*, 183 N.L.R.B. 78, 80 (1970); *Player*, *supra* note 6, at 450-52.

60. *See Operating Engineers Local 701*, 182 N.L.R.B. 77, 79 (1970); *Laborers Local 42*, 182 N.L.R.B. 862, 864 (1970); *Laborers Local 663*, 181 N.L.R.B. 380, 381-82 (1970).

gous to decisions under other sections of the Act that complaints should be dismissed. It is far removed from the discretionary decision of the General Counsel not to issue a complaint. In the opinion of the Ninth Circuit, this unique Board action is a "final order" subject to judicial review. This decision, in recognizing the unique realities of a section 10(k) proceeding, employs a sophisticated analysis that should be followed by the other courts of appeals.

The Ninth Circuit could have arrived at the same result by way of a finality analysis. The decision of the Board to quash a section 10(k) hearing does affect employer interests by determining whether he must suffer economic pressure from a union. The decision may determine whether or not he has agreed to be bound by private dispute resolution machinery, waiving his statutory right to a Board resolution of the work assignment dispute. The decision of the private machinery will, in turn, determine the rightful claimant to the disputed work as surely as will a section 10(k) resolution.⁶¹ There is no further method by which the employer may receive additional administrative review. There is no technique to secure indirect judicial review. The action by the Board in quashing the section 10(k) hearing and dismissing the charge will generally remove the Board from further consideration of the matter.⁶² At this point, there appears to be no reason why review should not be granted, since the administrative process is neither delayed nor frustrated. No fundamental policy of the Act, such as encouragement of prompt collective bargaining, would be frustrated by such review. This is clearly distinguishable from the discretionary power of the General Counsel not to issue complaints even though rights are also adjudicated in that action. The dual policies of protecting administrative discretion in the enforcement of the statute and conservation of enforcement resources favor denial of review of such decisions.

IV. CONCLUSION

At one time, a persuasive argument could be made that the em-

61. The union which wins the award in the private tribunal may assert economic pressure against the employer to secure the work assignment. The General Counsel, or regional director acting in that capacity, in spite of a literal violation of § 8(b)(4)(D), will not entertain an unfair labor practice charge. 29 C.F.R. §§ 101.33 & 102.93 (1975). See *Player*, *supra* note 6, at 431-32.

62. Should the union losing the private award seek to use pressure against the employer to secure the assignment notwithstanding the award, the Board will issue a § 8(b)(4)(D) complaint. *Wood, Wire and Metal Lathers Union*, 119 N.L.R.B. 1345 (1958). See also *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 127 (1971).

ployer's rights in a section 10(k) adjudication did not relate to the merits of the resolution, only to the fact of resolution itself. Nonetheless, the Supreme Court has recognized the economic importance of section 10(k) proceedings to employers. It seems, therefore, that the employer should enjoy judicial review of agency action that has an adverse impact on these economic interests. The normal unfair labor practice route cannot guarantee such review. There is no sound policy reason for denial of review and section 10(f) should be interpreted to grant this right to review. Simply stating that a section 10(k) adjudication is not "final" is not the answer but merely begs the question.

The Ninth Circuit at one time followed the dogma that section 10(k) decisions are not final.⁶³ In *Waterway Terminals Co. v. NLRB*,⁶⁴ however, that court held that the quashing of a section 10(k) hearing is a "final order." The court attempted to distinguish this from a section 10(k) resolution. As far as an employer is concerned, however, the situations are practically identical. A section 10(k) adjudication accepted by the unions results in a dismissal of the section 8(b)(4)(D) charge and finally establishes the employer's rights. The decision to quash the section 10(k) hearing results in a similar dismissal of the charge and equally fixes the employer's rights. No further administrative avenues are open. In neither situation do there appear to be compelling reasons to deny the employer review of the action that has fixed his interests. The employer in both situations should be entitled to court of appeals review via section 10(f).

63. *Henderson v. Longshoremen's Local 50*, 457 F.2d 572 (9th Cir.), cert. denied, 409 U.S. 852 (1972).

64. 467 F.2d 1011 (9th Cir. 1972).

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