No. 01-1569

In the Supreme Court of the United States

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, LOCAL 1922, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked subject-matter jurisdiction over petitioner's lawsuit against the National Labor Relations Board, which arose out of a Board representation proceeding.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is unreported, but the judgment is noted at 31 Fed. Appx. 930. The opinion of the district court (Pet. App. 3a-11a) is reported at 144 Lab. Cas. (CCH) ¶ 11,120. The decision of the National Labor Relations Board in the representation proceeding (Pet. App. 36a-40a) is reported at 327 N.L.R.B. 556. The decision of the Board's Acting Regional Director (Pet. App. 12a-34a) and the supplemental decision of the Board's Regional Director (Pet. App. 41a-82a) in the representation proceeding are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2002. The petition for a writ of certiorari

was filed on April 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 25, 1997, petitioner filed a representation petition with Region 12 of the National Labor Relations Board (Board). Petitioner sought to represent a bargaining unit consisting of 17 workers employed by Seaboard Marine, Ltd. (Seaboard), which transports cargo at the Port of Miami, Florida. Pet. App. 4a, 14a-15a. Petitioner sought to represent employees in only three of Seaboard's numerous job classifications—trailer interchange clerks, vehicle and equipment receiving clerks, and equipment control clerks. *Id.* at 4a, 13a-14a. Seaboard, however, contended that the only appropriate bargaining unit would be a "wall-to-wall" unit comprising approximately 198 workers in 15 job classifications. *Id.* at 4a, 14a, 16a.

After a hearing, the Board's Acting Regional Director (ARD) found that the 17 employees in the unit proposed by petitioner shared a community of interest sufficient to make that unit appropriate for purposes of collective bargaining under Section 9(b) of the National Labor Relations Act (Act), 29 U.S.C. 159(b), which provides, in pertinent part, that "[t]he 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." Pet. App. 4a, 29a-30a, 32a. The ARD directed that an election be held among the employees in that unit. *Id.* at 33a-34a.

Seaboard filed with the Board a timely request for review of the ARD's decision, as permitted by the Board's procedural rules. Pet. App. 4a, 34a n.18, 37a. On February 4, 1998, the Board granted Seaboard's

request for review. *Id.* at 4a, 35a. The Board explained that it was granting Seaboard's request because the ARD's decision "raises substantial issues warranting review." *Id.* at 35a. See *id.* at 4a, 9a n.2; 29 C.F.R. 102.67(c)(1)(ii) (Board may grant a request for review where "a substantial question of law or policy is raised because of * * * a departure from, officially reported Board precedent"). The next day, February 5, 1998, the Board conducted an election in the smaller unit deemed appropriate by the ARD and impounded the ballots. Pet. App. 42a.

On February 5, 1999, the Board issued a decision addressing the merits of Seaboard's request for review. Pet. App. 36a-40a. The Board found that "the unit in which the [ARD] has directed an election is not appropriate" for collective bargaining. *Id.* at 37a. The Board noted its "well established" policy of "not approv[ing] fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis." *Ibid.* Applying that policy, the Board concluded that "the petitioned-for employees do not share a sufficiently distinct community of interest from other employees to warrant a separate unit and, therefore, that the unit grouping sought by [petitioner] is an arbitrary one." *Ibid.* The Board therefore reversed the ARD's decision, vacated the February 5, 1998 election, and remanded the proceeding for "further appropriate action, including the determination of an appropriate unit for collective bargaining." *Id.* at 39a-40a.

On remand, after a further hearing, the Board's Regional Director (RD) determined that "[Seaboard's] operations and functions are such as to warrant a finding that only an overall unit is appropriate." Pet. App. 78a. The RD advised petitioner that, under

established Board policy, an election would not be conducted among the employees in the overall unit unless petitioner "submit[ted] an adequate showing of interest." *Id.* at 79a-80a n.30.[1] Because petitioner was unable to meet that requirement, its representation petition was administratively dismissed.

2. Petitioner subsequently filed a lawsuit against the Board in the United States District Court for the Southern District of Florida. Pet. App. 5a. Petitioner sought a declaratory judgment that the Board "violated its own rules and regulations and statutory directives by reviewing and/or reversing a decision by the [ARD] in a representation case," and that the Board "violated [petitioner's] and Seaboard employees' constitutional due process rights by denying Seaboard's employees the right to select a bargaining representative." *Ibid.* As relief, petitioner requested that the district court reinstate the ARD's original unit determination and "recognize the ballots" cast in the February 15, 1998, election as "the true expression of the unit members' will." *Id.* at 6a.

The district court dismissed petitioner's suit for lack of subject-matter jurisdiction. Pet. App. 10a. The district court explained that "[i]t is settled law that NLRB decisions regarding representations are generally directly non-reviewable by district courts except in certain limited circumstances." *Id.* at 7a-8a. The two limited exceptions relied on by petitioner, the court noted, are situations "where the NLRB has violated a constitutional right of the complaining party," *ibid.*

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[1] The Board generally will not conduct a representation election unless the petitioning union demonstrates that it has been designated as the bargaining representative of "at least 30 percent of the employees" in the appropriate unit. 29 C.F.R. 101.18(a).

(citing *Milk & Ice Cream Drivers Union, Local 98* v. *McCulloch*, 306 F.2d 763 (D.C. Cir. 1962)), and where the Board "clearly acted 'in excess of its delegated powers and contrary to a specific prohibition in the Act,'" *ibid.* (quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)).

The district court concluded that neither exception applied here. Pet. App. 8a-10a. The court found that petitioner had failed to show that the Board violated any constitutional right of petitioner in the representation proceeding. *Id.* at 8a-9a. The court found that petitioner "failed to meet [the] *Leedom* v. *Kyne* exception" because Section 9(b) of the Act grants the Board discretion in defining appropriate bargaining units. *Id.* at 9a. The court further found that "the NLRB complied with its rules and regulations" when, in granting Seaboard's request for review, the Board determined that the ARD's initial decision "raises substantial issues warranting review" and was "contrary to established law." *Id.* at 10a.

3. Petitioner appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. Pet. App. 1a. The court of appeals summarily affirmed the district court's order of dismissal in an unpublished decision. *Id.* at 1a-2a.

ARGUMENT

The district court correctly concluded in this case that it lacked subject-matter jurisdiction over petitioner's lawsuit against the Board. The court of appeals' summary affirmance of that decision does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore not warranted.

1. It is well settled that a party (such as petitioner) that disagrees with a decision of the Board in a representation proceeding generally cannot obtain direct review of that decision in the federal courts. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964). Rather, to obtain judicial review of a Board representation decision, the party seeking review must first commit a pertinent unfair labor practice. *Id.* at 477; *AFL* v. *NLRB*, 308 U.S. 401, 409 (1940). Upon entry of a final order by the Board in the unfair labor practice proceeding, the aggrieved party (whether an employer or a union) may then obtain judicial review of the underlying representation decision by filing a petition for review of the Board's final order in a court of appeals. See 29 U.S.C. 159(d), 160(f); *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 139 (1971) (unlawful refusal to bargain by employer to obtain judicial review of Board's definition of the appropriate bargaining unit); *Boire*, 376 U.S. at 477 (same); *Union de la Construccion de Concreto y Equipo Presado* v. *NLRB*, 10 F.3d 14, 16 (1st Cir. 1993) (Breyer, J.) (explaining that union may obtain judicial review of a Board representation decision by engaging in picketing that "amounts to an unfair labor practice"); *Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 71* v. *NLRB*, 553 F.2d 1368, 1371-1372 (D.C. Cir. 1977) (unlawful recognitional picketing by union to obtain judicial review of Board's dismissal of union's representation petition).[2]

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[2] In light of the decisions discussed in the text, petitioner errs in asserting (Pet. 4, 7-8) that, under the National Labor Relations Act, only employers, but not unions, are able to seek judicial review of unfavorable Board representation decisions.

This Court has recognized a narrow exception to the general rule that Board representation decisions are not subject to direct judicial review. See *Leedom* v. *Kyne*, 358 U.S. 184 (1958). In *Leedom*, the Court held that federal district courts have jurisdiction to review Board representation decisions "made in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act." *Id.* at 188. Some courts of appeals have also concluded that district courts possess jurisdiction to review Board representation decisions where the challenging party asserts a constitutional due process claim. See *Milk & Ice Cream Drivers Union, Local 98* v. *McCulloch*, 306 F.2d 763, 765 (D.C. Cir. 1962); *Fay* v. *Douds*, 172 F.2d 720, 723 (2d Cir. 1949) ("not transparently frivolous" constitutional claim).

In this case, petitioner did not seek judicial review of the Board's rulings in the representation proceeding—as would have been the ordinary statutory course—by committing an unfair labor practice (for example, by engaging in unlawful recognitional picketing at Seaboard's premises) and then filing a petition for review of a final Board cease-and-desist order in a court of appeals. See *Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 71*, *supra*. Rather, relying on exceptions set forth by this Court in *Leedom* and by the Second Circuit in *Fay* to the general rule of non-direct judicial review of Board representation decisions, petitioner filed a lawsuit against the Board in federal district court. See Pet. App. 3a-6a, 8a. The district court, however, dismissed petitioner's lawsuit for lack of subject-matter jurisdiction because petitioner failed to establish that, in the representation proceeding, the Board had violated either petitioner's constitutional rights, a clear statutory mandate, or its own rules and

regulations. *Id.* at 9a-10a. The district court's fact-bound ruling, which was summarily affirmed by the court of appeals, raises no issue warranting this Court's review.

2. Petitioner primarily contends that this Court should grant the petition in order to establish that federal district courts possess jurisdiction "to render declaratory relief to an aggrieved party when the Board disregards its own rules, thereby violating a party's due process rights." Pet. 5; see Pet. i (Question 1), 13-16. The district court, however, did not hold that it would lack jurisdiction in such a case. To the contrary, following *Fay* and its progeny, the district court stated that it would have jurisdiction to review a Board representation decision if "the NLRB has violated a constitutional right of the complaining party." Pet. App. 8a. The court also ruled, however, that that principle did not vest it with jurisdiction in this case because the Board had not violated petitioner's constitutional rights and had "complied with its rules and regulations." *Id.* at 9a-10a.

Petitioner further contends (Pet. 17-18) that this Court should grant review to establish that, under *Leedom*, federal district courts have jurisdiction to review Board representation decisions if the Board has violated its own procedural rules, as distinguished from a mandatory provision of the Act. Again, however, the district court did not disagree with petitioner on that point. The district court considered whether jurisdiction might be proper on this basis under *Leedom*, but resolved that question in the negative because the Board had "complied with its rules and regulations" in the representation proceeding. Pet. App. 9a-10a.

Petitioner repeatedly suggests (*e.g.*, Pet. 3, 6, 16) that the district court should have asserted jurisdiction in

this case because the Board in fact violated its procedural rules when it granted Seaboard's request for review of the ARD's initial bargaining unit determination. The courts, however, "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). Here, petitioner fails to make any substantial showing that the Board's granting of Seaboard's request for review was "plainly erroneous or inconsistent with the [relevant] regulation," *ibid.* (internal quotation marks omitted), much less that this procedural issue is sufficiently important to warrant this Court's review.

Petitioner further argues (Pet. 3, 16) that the Board's rules prohibited the Board from granting Seaboard's request for review of the ARD's ruling and from disturbing that ruling. Petitioner is mistaken. The Board's rules specifically provide that the Board may grant a request for review of a Regional Director's decision in a representation proceeding where "a substantial question of law or policy is raised because of * * * a departure from, officially reported Board precedent." 29 C.F.R. 102.67(c)(1)(ii). That was precisely the basis upon which the Board granted Seaboard's request for review. See Pet. App. 35a. In setting aside the ARD's unit determination, the Board found that the truncated bargaining unit defined by the ARD (and proposed by petitioner) was contrary to officially reported Board precedent prohibiting "fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis." *Id.* at 37a. Accordingly, as the district court held in dismissing petitioner's suit (*id.* at 10a), the Board's action in this case was fully consistent with the relevant procedural rules. See *NLRB* v. *Sav-On-Drugs, Inc.*,

709 F.2d 536, 541 (9th Cir. 1983) (Board properly reviews Regional Director's decision under 29 C.F.R. 102.67(c)(1)(ii) where Regional Director "applied the wrong standard and departed from Board precedent.").[3]

3. Finally, petitioner contends (Pet. 18-19) that unions (but not employers) generally should be free to seek direct review of Board representation decisions in federal district courts because suits by unions do not implicate concerns about the use of litigation for "dilatory tactics." That argument is unpersuasive. As a case cited by petitioner explains (Pet. 19), unions as well as employers may pursue litigation in district court for purposes of delay. See *Florida Bd. of Bus. Regulation* v. *NLRB*, 686 F.2d 1362, 1369 (11th Cir. 1982) (general rule of non-direct judicial review is designed "to prevent attempts by an employer or a rival union to use the district court merely as a weapon

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[3] Although, as we have explained, the district court correctly dismissed petitioner's lawsuit for lack of jurisdiction, we do not agree with the district court's suggestion that a plaintiff's allegation that the Board violated its rules and regulations in a representation proceeding would be a sufficient basis for the assertion of jurisdiction by a district court. The better view is that an allegation that the Board has violated one of its own rules, but not a statutory mandate, is not sufficient to vest the district court with jurisdiction under the *Leedom* exception. See *United Food & Commercial Workers, Local 400* v. *NLRB*, 694 F.2d 276, 278-279 (D.C. Cir. 1982) (per curiam); *Catalytic Indus. Maint. Co.* v. *Compton*, 333 F. Supp. 533, 536-537 (D.P.R. 1971). In addition, it is questionable whether *Fay* was correctly decided. See *Blue Cross & Blue Shield* v. *NLRB*, 609 F.2d 240, 244-245 (6th Cir. 1979); *J.P. Stevens Employees Educ. Comm.* v. *NLRB*, 582 F.2d 326, 329 (4th Cir. 1978). This case, however, does not present the Court with an occasion to resolve either of those issues, for, as the district court observed, petitioner's allegations of violations of Board rules and procedural due process are without substance.

to delay a Board-ordered election"). Contrary to petitioner's suggestion (Pet. 19-20), moreover, nothing in *Florida Board* supports its argument that district courts may generally review Board representation decisions when the party seeking review is a union rather than an employer. See 686 F.2d at 1370 (noting that lawsuit in that case "does not seek review of a [Board] representation order * * * or the certification of election results").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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