

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,)	
)	
Plaintiff,)	
)	Case No. 2:19-cv-3214-BHH
v.)	
)	
JOHN RING, Chairman, MARVIN KAPLAN, Board Member, WILLIAM EMANUEL, Board Member, and the NATIONAL LABOR RELATIONS BOARD,)	
)	
Defendants.)	

**BRIEF IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendants National Labor Relations Board, Chairman John Ring, and Board Members Marvin Kaplan and William Emanuel (collectively “NLRB” or “the Board”)¹ submit their brief in support of their motion to dismiss the Complaint filed in this action by International Association of Machinists and Aerospace Workers, AFL-CIO (“IAM”). The Complaint should be dismissed because IAM cannot demonstrate that this Court has subject-matter jurisdiction to review the Board’s representation case decision in *The Boeing Company*, 368 NLRB No. 67 (Sept. 9, 2019).

In *Boeing*, the Board dismissed a representation petition filed by IAM to represent certain employees of The Boeing Company (“Boeing”) on the basis that the bargaining unit proposed by IAM was not an appropriate unit under the National Labor Relations Act [29 U.S.C. 151-169]

¹ Chairman Ring and Board Members Kaplan and Emanuel issued the majority opinion in *Boeing*, with Board Member McFerran dissenting. Because Member McFerran’s term expired on December 16, 2019, this Court dismissed her as a party to this action. [ECF 23].

(the “NLRA” or “the Act”). IAM seeks from this Court a declaratory judgment that the Board exceeded its statutory authority under the Act in issuing this decision, and further asks this Court, among other things, to vacate and to enjoin the Board from giving effect to the decision.

IAM’s claims are beyond the jurisdiction of this Court. Congress vested the Board with authority to swiftly resolve questions of union representation and withheld from district courts the power to interfere with or review the Board’s representation proceedings. Further, IAM’s claims do not fall within the exceedingly narrow jurisdictional exception provided by *Leedom v. Kyne*, 358 U.S. 184 (1958). Specifically, IAM has not demonstrated both that the Board has violated a clear and mandatory provision of the Act and that IAM lacks an adequate means of seeking review of the Board’s *Boeing* decision.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The NLRB is an independent agency charged with administering the NLRA. One of the Board’s principal duties is to determine whether employees desire to be represented for collective-bargaining purposes. *See* 29 U.S.C. § 159. The NLRA grants employees the right “to bargain collectively through representatives of their own choosing . . . and to . . . refrain from . . . such activities.” 29 U.S.C. § 157. Sometimes employees and their employer voluntarily agree that an appropriate unit of employees should be represented for purposes of collective bargaining (typically, by a labor union). But when they do not agree, Section 9 of the Act, *id.* § 159, gives the Board authority to conduct a secret ballot election and certify the results. In making bargaining unit determinations, “[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant

unit, or subdivision thereof.” *Id.* § 159(b). The Board has delegated authority to its regional directors (“RD”) to decide representation cases, subject to discretionary Board review. *See id.* § 153(b); Regional Directors—Delegation of Authority, 26 Fed. Reg. 3911, 3911 (May 4, 1961).

Section 9 sets forth only the basic steps for resolving a question of representation. First, a petition is filed with the NLRB by an employee, a labor organization, or an employer. 29 U.S.C. § 159(c)(1). Second, unless the parties waive a hearing and agree to an election, if there is reasonable cause to believe “a question of representation affecting commerce” exists, an appropriate hearing is held on due notice to determine whether such a “question of representation” so exists. *Id.* § 159(c)(1), (4). Third, if the RD directs an election and one is held, the RD then certifies the results. *Id.* § 153(d). The Supreme Court has consistently emphasized that in Section 9, Congress gave the Board “a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

Under the Board’s Rules and Regulations, if a party is dissatisfied with the RD’s decision, it may file a discretionary Request for Review with the Board in Washington, D.C. 29 C.F.R. §§ 102.67(b)-(c), 102.71(a)-(b). If granted, the Board will review the RD’s decision and issue a decision. 29 C.F.R. § 102.67(j). It is well settled, as explained more fully below, that under the NLRA these Board representation decisions are *not* subject to district court review. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 476, 481 (1964).

II. FACTS AND PROCEDURAL HISTORY

Boeing manufactures commercial 787 aircraft at its facility in North Charleston, South Carolina (“the North Charleston facility”). During the time relevant here, Boeing employed approximately 2,700 production and maintenance workers. At the final stage of production,

known as the Flight Line, Boeing’s 178 Flight-Line Readiness Technicians (“FRTs”), and its Flight-Line Readiness Technician Inspectors (“FRTIs”), work on completed planes to ensure flight readiness; these tasks include fueling the aircraft for the first time, conducting preflight checks, reworking tasks completed in prior stages if problems are found, and completing work which was not finished earlier. [ECF 1, pp. 4-5, paras. 9-10; ECF 1-2, p. 1].

On March 5, 2018, IAM filed a representation petition with Region 10 of the NLRB (the “Region”), in Case 10-RC-215878, seeking to become the exclusive collective bargaining representative of the FRTs and FRTIs. [ECF 1, pp. 3-4, para. 4]. The Region conducted an eight-day hearing on the representation petition. Boeing argued that the FRTs and FRTIs were not a unit appropriate for collective bargaining, and that the only appropriate bargaining unit at its North Charleston facility would combine these 178 employees with the remainder of its production workers. IAM responded that the smaller, petitioned-for unit should be recognized as an appropriate subdivision of a plant unit under Section 9(b), 29 U.S.C. § 159(b). [ECF 1, pp. 5-6, para. 15].

On May 21, 2018, the RD of Region 10 issued a decision finding the petitioned-for unit appropriate for collective bargaining. [ECF 1-1]. In the RD’s view, applying the Board’s decision in *PCC Structural*s, 365 NLRB No. 160 (2017),² the FRTs and FRTIs shared a “community of interest”³ based on factors such as the FRTs’ and FRTIs’ separate department

² In *PCC Structural*s, the Board overruled its prior decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), which had held that a petitioned-for unit of employees would be appropriate unless excluded employees shared an “overwhelming” community of interest with those included. *See* 365 NLRB No. 160, slip op. at 1 (Dec. 15, 2017).

³ The Board has traditionally utilized a multi-factor “community of interest” analysis to determine whether a petitioned-for unit of employees constitutes an appropriate unit under Section 9. *See, e.g., Overnite Transp. Co.*, 322 NLRB 723, 725 (1996). These factors are: “[W]hether the employees are organized into a separate department; have distinct skills and

from the rest of the facility; their special licenses and internal training; their higher pay; and the unique work that the FRTs and FRTIs perform together. [ECF 1-1, pp. 25-31]. The RD then directed that an election be held on May 31, 2018. [*Id.*, p. 34].

Boeing filed a motion to stay the election or, in the alternative, to impound the ballots, contending that "the Regional Director directed an election in an artificially gerrymandered subset of employees," but the Board denied Boeing's motion. [ECF 1, p. 7, paras. 18-19]. The Region conducted the election and the employees voted 104-65 in favor of IAM representation. In the absence of objections to the conduct of the election, the RD certified IAM as the representative on June 12, 2018. [*Id.*, para. 20]. On June 26, 2018, pursuant to Section 102.67 of the Board's Rules and Regulations, Boeing filed a timely request for review with the Board, contending that the certified unit of FRTs and FRTIs was inappropriate for collective bargaining. [*Id.*, para. 21].

On September 9, 2019, the Board issued its decision agreeing with Boeing that the petitioned-for unit was inappropriate. [ECF 1-2]. There, the Board noted that although *PCC Structurals* had made "clear that the Board will consider 'both the shared and the distinct interests of petitioned-for and excluded employees'" the Board still needed to clarify *how* the shared and distinct interests should be weighed. [*Id.*, p. 3] (quoting *PCC Structurals*, 365 NLRB No. 160 (slip op. at 11)). Thus, the Board articulated a three-step process to determine an appropriate bargaining unit:

First, the proposed unit must share an internal community of interest. Second, the

training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." [ECF 1-2, p. 2] (citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved.

[*Id.*, p. 3].

Applying this analysis, the Board determined that although the FRTs and FRTIs “share nearly identical terms and conditions of employment,” have frequent daily contact, and share many of the same skills and training, the FRTs and FRTIs have “significantly different interests in the context of collective bargaining.” [*Id.*, p. 4]. The Board explained that these two classifications belong to separate departments, do not share any supervision with each other, have fundamentally different job functions from each other, and have lacked any employee interchange. [*Id.*, pp. 4-5]. At the second step, the Board noted the high degree of functional integration between the petitioned-for classifications and the excluded employees, namely, their shared overall supervision, personnel policies and benefits, and many similar job functions. The Board therefore found that the interests of the excluded employees are not meaningfully distinct from the interests of the employees in the petitioned-for unit. Finally, the Board saw no industry-specific guidelines applicable to its analysis. [*Id.*, pp. 5-6]. Consequently, the Board vacated the June 12, 2018, certification of representative, and dismissed the petition.⁴ [*Id.*, p. 7].

Member McFerran dissented from the Board's decision. [*Id.*, pp. 7-19]. She opined that the second step of the majority's analysis departed from the Board's traditional community of interest principles and therefore violated “fundamental policies underlying the National Labor Relations Act.” [*Id.*, pp. 8, 11-14, 19]. Moreover, she argued that even under the Board's new

⁴ In dismissing IAM's petition, the Board explicitly declined to pass on the question whether the smallest appropriate unit would be a plant-wide unit encompassing all production and maintenance employees, citing IAM's lack of interest in representing employees outside the area where the FRTs and FRTIs worked. [*Id.* at 7 n.10].

test, the petitioned-for unit should have been found to be appropriate. [*Id.*, pp. 14-19].

IAM filed the instant Complaint against the Board on November 13, 2019. [ECF 1]. IAM alleges that the first two steps of Board’s *Boeing* decision independently violated the NLRA. First, IAM complains the Board’s application of the first step—that the petitioned for employees share a community of interest with each other—was incorrect; IAM asserts that the Board should have found the requisite shared community of interest because the petitioned-for unit of employees enjoy “nearly identical terms and conditions of employment.” [*Id.*, pp. 12-13, paras. 34-39]. In this regard, IAM alleges that the Board failed to give proper weight to these employees’ common “rates of pay, wages, [and] hours of employment.” *See* 29 U.S.C. § 159(a). [*Id.*, p. 12, paras. 37-38]

Second, IAM argues that *Boeing*’s second step is incorrect as a matter of law. By weighing the appropriateness of the petitioned-for unit against the “shared and distinct interests of those excluded from the unit,” the Board is necessarily selecting “a more appropriate unit” rather than “an appropriate unit,” as Section 9 requires. [*Id.*, pp. 13-14, paras. 40-47].

As stated above, IAM asks this Court, among other things, to vacate and enjoin the NLRB from giving effect to the *Boeing* decision. On November 22, 2019, Boeing filed a Motion and Memorandum in Support of Motion to Intervene, regarding which the Board took no position. [ECF 12].

ARGUMENT

WELL-ESTABLISHED LEGAL PRECEDENT DEPRIVES THIS COURT OF SUBJECT-MATTER JURISDICTION TO CONSIDER THE UNION’S CLAIMS

Federal courts are courts of limited jurisdiction, possessing “only that power authorized by the Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “It is to be presumed that a cause lies outside this limited jurisdiction.” *Id.* Accordingly,

the burden of proving the asserted basis for jurisdiction falls on the plaintiff. *Smith v. Wash. Metro. Area Transit Auth.*, 290 F.3d 201, 205 (4th Cir. 2002). IAM does not meet this burden.

District courts generally lack jurisdiction to review rulings in NLRB representation cases. A very limited exception permits district courts to strike down Board orders in such matters, but only when a ruling by the Board violates a clear statutory command and would otherwise escape judicial review. This is because Congress made the deliberate decision to allow judicial review of representation case rulings only by an appropriate court of appeals and only if a subsequent unfair labor practice proceeding results in a final Board order that “is based in whole or in part upon facts certified” in the representation case. 29 U.S.C. § 159(d).

I. DISTRICT COURTS GENERALLY LACK JURISDICTION TO REVIEW REPRESENTATION CASES

The text, structure, purpose, and legislative history of the NLRA indicate a congressional intent to limit judicial review of representation decisions. Section 10(e) and (f) provides for review, in an appropriate court of appeals, only of “a final order of the Board” entered in an unfair labor practice proceeding under Section 10. 29 U.S.C. § 160(e), (f). In *American Federation of Labor v. NLRB*, 308 U.S. 401, 409-11 (1940), the Supreme Court held that the Board’s certification of the results of an election in a representation case does not constitute a reviewable “final order of the Board” within the meaning of Section 10(e) and (f). *See Greyhound Corp.*, 376 U.S. at 476-77, 481-82; *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 633 F.2d 1079, 1081 (4th Cir. 1980); *see also Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1310 (D.C. Cir. 1984) (“The cases are legion holding that, as a general rule, Board orders emanating from representation proceedings are not directly reviewable in court.”).

Instead, the Act provides an indirect method for judicial review of Section 9 representation proceedings. Specifically, Section 9(d) provides that when a representation

certification has become the basis for a subsequent final order in an unfair labor practice case, and that order is before an appropriate court of appeals under Section 10(e) or (f), the certification itself is also open to review. 29 U.S.C. § 159(d); *see Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 471 n.1 (D.C. Cir. 1996).⁵ Although this limited and “indirect method of obtaining judicial review imposes significant delays upon attempts to challenge [representation rulings,] . . . it is . . . obvious that Congress explicitly intended to impose precisely such delays,” *Greyhound*, 376 U.S. at 477-78, in order to provide a speedy resolution to questions of employee choice and bargaining obligations. *See Newport News*, 633 F.2d at 1081.

II. THE JURISDICTIONAL EXCEPTION CARVED OUT IN *LEEDOM V. KYNE* IS VERY NARROW AND NEARLY IMPOSSIBLE TO SATISFY

IAM candidly explains in its complaint that challenges to Board orders concerning representation proceedings are generally not directly reviewable by the courts. [ECF 1, p. 1]. IAM pins its hopes on an extremely narrow exception to this rule of non-reviewability, established by the Supreme Court in *Leedom v. Kyne*, 358 U.S. 184 (1958). There, the Supreme Court held that district courts may exercise jurisdiction under 28 U.S.C. § 1337 “to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act,” 358 U.S. at 188, but only “[i]f the absence of jurisdiction of the federal courts [would] mean[] a sacrifice or obliteration of a right which Congress has created,” *id.* at 190 (internal quotation mark omitted) (quoting *Switchmen’s Union v. Nat’l Mediation Bd.*, 320 U.S. 297, 300 (1943)). To obtain jurisdiction under *Kyne*, a plaintiff must satisfy two conjunctive requirements: first, it must make a “strong and clear demonstration that a clear, specific and

⁵ Unlike representation determinations, which are not considered appealable final orders under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f), the Board’s adjudication of unfair labor practice proceedings is directly reviewable in the federal courts of appeals. *See NLRB v. UFCW, Local 23*, 484 U.S. 112, 122 (1987); *AFL v. NLRB*, 308 U.S. 401, 407-08 (1940).

mandatory statutory provision has been violated,” and second, it must establish that “the absence of federal court jurisdiction over an agency action would wholly deprive [the plaintiff] of a meaningful and adequate means of vindicating its statutory rights.” *Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth., Inc.*, 844 F.3d 414, 421 (4th Cir. 2016) (internal citations and quotation marks omitted).⁶

This exception is indeed so circumscribed, it has been described by the Fourth Circuit as applying only under “extraordinary circumstances.” *Purdue Farms, Inc., v. NLRB*, 108 F.3d 519, 521 (1997); *see also U.S. Dep’t of Justice v. FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993) (conjunctive *Kyne* test is “nearly insurmountable”); *Russell v. Nat’l Mediation Bd.*, 714 F.2d 1332, 1340 (5th Cir. 1983) (describing *Kyne* standard as “narrow and rarely successfully invoked”). No such extraordinary circumstances are presented by the instant case.

III. LEEDOM V. KYNE DOES NOT SUPPORT DISTRICT COURT JURISDICTION IN THIS CASE

For the reasons explained below, IAM has failed to surmount *Kyne*’s conjunctive requirements because it cannot satisfy either of them, much less both. Accordingly, this Court lacks jurisdiction to grant IAM’s request for declaratory, injunctive, and other relief, and its complaint should be dismissed.

A. IAM has failed to demonstrate that the Board has violated a clear statutory command

The thrust of IAM’s claims in this case is that the Board exceeded its statutory authority when it announced and applied an analytical framework that led to its determination that the unit of employees IAM petitioned to represent was not appropriate for collective bargaining. IAM’s

⁶ *See Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991); *Newport News*, 633 F.2d at 1081.

argument is fatally flawed. To establish jurisdiction under *Kyne*, IAM must show that the Board contravened a “clear, specific and mandatory statutory provision.” *Scottsdale Capital Advisors Corp.*, 844 F.3d at 421. But nothing in the Act required the Board to find that the bargaining unit proposed in IAM’s petition was an appropriate unit. To the contrary, Congress firmly vested the Board with broad discretionary authority under Section 9 to determine what constitutes an appropriate bargaining unit in each case.

1. Because Congress delegated substantial discretion to the Board to determine if a bargaining unit is appropriate, a dispute over the legal correctness of such a determination does not constitute a violation of a clear and mandatory provision of the Act.

Section 9(a) of the Act, upon which IAM chiefly relies [ECF 1, pp. 11-13, paras. 35-38, 41-42], provides in pertinent part that

[r]epresentatives designated or selected for the purposes of collective bargaining by the *majority of the employees in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a) (emphasis added). The Act’s very next provision, also cited in IAM’s complaint [ECF 1, p. 13, para. 43], delegates to the Board the responsibility to determine, whenever a proper petition is filed, whether the unit of employees referenced in Section 9(a) is appropriate. 29 U.S.C. § 159(b) (“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 . . .”). Additionally, Section 9(c) directs the Board to “hold an appropriate hearing,” 29 U.S.C. § 159(c)(1), to determine whether a question of representation exists “concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative,” *Representation—Case*

Procedures, 79 Fed. Reg. 74,308, 74,398 n.423 (Dec. 15, 2014). What is clear from the statutory language discussed above is that nothing in the text imposes any “specific, clear and mandatory” obligation on the Board regarding how to decide if a proposed bargaining unit is appropriate. See *Scottsdale Capital Advisors Corp.*, 844 F.3d at 421.

By its very terms, “[t]he task of decision on the facts of each case is assigned to the National Labor Relations Board and in making that [representation] decision the Board exercises its informed discretion.” *Physicians Nat’l House Staff Ass’n v. Fanning*, 642 F.2d 492, 496-97 (D.C. Cir. 1980) (recognizing Board’s discretion to determine the meaning of “professional employees” in Section 9(b)(1)). The Board’s bargaining unit determinations are rarely disturbed, in light of its expert role in deciding such matters. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944) (“Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter.”); *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1579-80 (4th Cir. 1995) (finding “the Board’s discretion reflects both its acknowledged expertise in such matters and its need for flexibility in shaping the bargaining unit to the particular case”) (cleaned up); *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978) (observing that “the Board possesses broad discretion in determining the appropriate unit”).

The Court’s role at this juncture is a limited one; to answer the jurisdictional question, “a cursory review of the merits” is required to determine if the Board is “acting clearly beyond the boundaries of its authority.” *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 234 (4th Cir. 2008) (quoting *Champion Int’l Corp. v. EPA*, 850 F.2d 182, 186 (4th Cir. 1988)). As further discussed below, a run-of-the-mill dispute over the proper interpretation of a statute will not meet this high bar. See *American Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999)

(noting that “the [*Kyne*] exception allowing review of an agency action allegedly in ‘excess of authority’ must not simply involve a dispute over statutory interpretation”) (quotation marks omitted). Accordingly, any “plausible” statutory support for the agency’s action serves as a jurisdictional barrier to review under *Kyne*. *Hanauer v. Reich*, 82 F.3d 1304, 1311 (4th Cir. 1996). *Cf. Hartz Mountain*, 727 F.2d at 1313 (noting that “any colorable support for the Board’s ruling should be treated as a jurisdictional defect dictating dismissal”) (quoting Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining*, 64-65 (1976)) (italics in original).

Even an error of law or fact is insufficient to confer jurisdiction where the Board did not act in violation of a specific statutory command. *Greyhound*, 376 U.S. at 481 (*Kyne* jurisdiction does not obtain “whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law”); *Physicians Nat’l*, 642 F.2d at 496. For these same reasons, jurisdiction does not exist to consider allegations of arbitrary Board action or an abuse of discretion. *Id.*; *Bays v. Miller*, 524 F.2d 631, 633 (9th Cir. 1975); *Local Union No. 714, IBT v. Madden*, 343 F.2d 497, 499 (7th Cir. 1965). Nor is “jurisdiction . . . conferred on the district courts to consider the wisdom of a particular board policy” when, as here, there is a “disagreement with the Board on a matter of policy or statutory interpretation.” *Cihacek v. NLRB*, 464 F. Supp. 940, 943 (D. Neb. 1979) (cleaned up).

Consistent with *Greyhound*, the Fourth Circuit and other courts have strictly construed *Kyne*’s threshold requirements and refused to find jurisdiction to review the Board’s representation determinations. This is true even where those determinations are alleged to have resulted in an error of law, an abuse of discretion, or arbitrary or unauthorized Board action. *See, e.g., South Carolina State Ports Auth. v. NLRB*, 914 F.2d 49, 52 (4th Cir. 1990) (no jurisdiction

to enjoin representation hearing concerning dispute over whether employer was a political subdivision and therefore not within the Board’s statutory authority); *Newport News*, 633 F.2d at 1082-83 (reversing a district court order directing the NLRB to conduct a hearing in a representation case previously dismissed by the agency where plaintiff alleged inadequate investigation of the election petition); *Greensboro Hosiery Mills, Inc. v. Johnston*, 377 F.2d 28, 32 (4th Cir. 1967) (no district court jurisdiction to review an NLRB regional director’s decision to reschedule and relocate a representation election in response to anti-union notices posted by employer); *Bays*, 524 F.2d at 633 (district court lacked jurisdiction to review the Board’s representation case decision that trucking owner-operators were employees and not independent contractors); *Road Sprinkler Fitters Local 669 v. NLRB*, 324 F. Supp. 3d 85, 92 (D.D.C. 2018) (finding no jurisdiction to review NLRB election proceedings where union argued that the election should have been barred by contractual language establishing its status as a majority representative).⁷

Kyne itself is illustrative of the “extraordinary circumstances” that must be present for a court to find that the Board has clearly violated a statutory mandate. In that case, the Board flatly refused to take a vote among a group of professional employees despite an express prohibition contained in Section 9(b)(1) providing that “the Board shall not (1) decide that any unit is appropriate . . . 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.” 29 U.S.C. § 159(b)(1). It was the Board’s clear violation of “a specific prohibition in

⁷ In *Purdue Farms*, above, the Fourth Circuit found that the district court had found *Kyne* jurisdiction prematurely, because the Board was still considering the plaintiff’s fraud allegations. 108 F.3d at 521-22 (but directing dismissal of the complaint without prejudice, permitting plaintiff to refile its complaint “should further Board proceedings fail to resolve the company’s complaint”).

the Act” that allowed for district court jurisdiction to be exercised in *Kyne*. 358 U.S. at 188. Indeed, so clear was the statutory violation that “[t]he Board conceded . . . that it had acted in excess of its powers.” *Boire*, 376 U.S. at 480 (internal quotation mark omitted) (quoting *Kyne*, 358 U.S. at 187).

Because the complaint in this matter raises no violation of any clear and mandatory provision of the Act, this action should be dismissed for want of subject matter jurisdiction.

2. IAM disputes the Board’s interpretation of Section 9, as well as its application of legal standards to the facts here, but neither dispute demonstrates a clear and mandatory violation of Section 9.

As shown below, IAM’s complaint is based on its disagreement with the Board’s statutory interpretation and its formation and application of policy. [ECF 1, paras. 33-49]. Such disputes do not meet the high jurisdictional bar imposed by *Kyne*. IAM asks this Court to perform exactly the kind of re-weighing of facts and legal conclusions forbidden by long-established case law.

Nothing on the face of Section 9(a) or (b) requires the Board to find that the petitioned-for unit here is an appropriate unit. *See Rhino Nw., LLC v. NLRB*, 867 F.3d 95, 99 (D.C. Cir. 2017) (confirming the Board’s discretion to select an appropriate unit); *see also Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489, 494 (4th Cir. 2016) (observing that “[i]n making this determination, the Board exercises the widest possible discretion”) (quotation marks omitted). Far from violating a clear statutory command, the Board reasonably relied on a “plausible” interpretation of the Act when it reviewed the Regional Director’s decision. *See Hanauer*, 82 F.3d at 1311. The Board carefully reviewed the record, applied the facts, and concluded the petitioned-for unit was inappropriate.

As noted above, at the first step of *Boeing*, the Board found that the petitioned-for unit did not share an internal community of interest, because the FRTs and FRTIs belong to separate departments and do not share any supervision with each other at any level below the Chief Executive Officer. [ECF 1-2, p. 4]. The Board further found the two petitioned-for groups to have “fundamentally different job functions,” as the FRTs do mechanical work and FRTIs are inspectors who assure quality. [*Id.*, pp. 4-5]. Finally, the Board noted that there has never been job interchange between the FRTs and the FRTIs. [*Id.*, p. 5].

At *Boeing*’s second step, the Board compared the interests of the petitioned-for unit and the excluded employees, and found specifically that although the FRTs and FRTIs have higher wages and special licenses [*Id.*, p. 5], and work in a physically separate area [*Id.*, p. 6], the interests that the petitioned-for groups “share with excluded employees are far more significant than those that differentiate them.” [*Id.*]. Thus, the petitioned-for unit and the excluded employees are fully functionally integrated, share departments and supervision, perform a significant portion of the same job functions, share most terms and conditions of employment, and most of the same skills and training. [*Id.*, p. 6]. Nothing in this reasoning is contrary to a mandatory provision of the Act.

a. IAM’s complaint regarding *Boeing*’s first step shows no violation of Section 9(a); IAM essentially disputes the weight to be given to certain factors in the “community of interest” analysis.

IAM initially asserts that *Boeing*’s first step violated Section 9(a), because the Board relied “only on non-statutorily defined aspects” of unit members’ employment [ECF 1, p. 13, para. 39]. IAM is presumably referring to the Board’s reliance upon the FRTs and FRTIs belonging to different departments, as well as their lack of shared supervision below the CEO level, intrinsically different job functions, and lack of job interchange, in finding a lack of shared

interests between these two groups in the petitioned-for unit. IAM then argues that “[t]he NLRA mandates that a unit appropriate for the purposes of collective bargaining is a unit that is appropriate ‘for the purposes of collective bargaining *in respect to rates of pay, hours of employment, or other conditions of employment*’” [ECF 1, pp. 11-12, para. 35].

IAM implies that this italicized phrase requires the Board to consider these factors above all others in deciding if a unit is appropriate. [ECF 1, pp. 11-12, paras. 35-38]. But IAM has conflated the determination of an appropriate unit at the beginning of the representation process with duties of the union and employer after certification; as explained below, the quoted phrase refers only to the latter, not the former. In this respect, the language simply echoes the description of the obligation “to bargain collectively” contained in Section 8 of the NLRA, which proscribes unfair labor practices by unions and employers.⁸

Accordingly, the language in Section 9(a) emphasized by IAM stands for the basic proposition that *after* a union becomes a majority representative under the statute, it has the exclusive authority to represent employees in a defined unit with respect to their working conditions. The provision does not, as IAM suggests, impose any mandate on the Board when deciding whether a unit of employees is appropriate *prior* to a certification. As the D.C. District Court recently held, “Section 9(a) does not place a “clear and mandatory” duty upon the Board. In fact, Section 9(a) does not impose *any* obligation on the Board at all. Instead, it imposes on the *employer* a negative duty to treat with no other. . .” *Road Sprinkler Fitters Local 669*, 324 F. Supp. 3d at 93 (emphasis original) (internal quotation marks omitted). The Fourth Circuit has

⁸ “For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith *with respect to wages, hours, and other terms and conditions of employment.*” 29 U.S.C. § 158(d) (emphasis added).

made similar observations. *See Newport News*, 633 F.2d at 1083 (noting that the NLRA’s “general goals of free choice and majority rule do not contain a grant of federal jurisdiction; nor does the arguable contravention of those goals permit jurisdiction under *Kyne*”). In essence, IAM is arguing that the *Boeing* decision contravenes these general goals of free choice and majority rule.

Thus, IAM’s argument fundamentally misapprehends the nature of the Board’s unit appropriateness analysis. Although the Board considers many factors in determining whether employees share a community of interest (see n.3, above), “no single factor is conclusive.” *I.T.O. Corp. of Baltimore*, 818 F.2d 1108, 1113 (4th Cir. 1987); *see also Skyline Distrib. v. NLRB*, 99 F.3d 403, 407 (D.C. Cir. 1996). These factors are the product of the Board’s accumulated experience in adjudicating such matters. The lack of “per se rules” in making unit determinations, *Skyline*, 99 F.3d at 407, not to mention any applicable statutory command in this regard, renders this case wholly unsuitable for *Kyne* jurisdiction.

Indeed, IAM’s disagreement with the Board’s interpretation of Section 9 and its application of the community of interest factors is reminiscent of a D.C. Circuit case decided shortly after *Kyne*. In *Int’l Ass’n of Tool Craftsmen v. Leedom*, 276 F.2d 514 (D.C. Cir. 1960), different groups of craft employees petitioned to be represented in separate bargaining units, despite the existence of plant-wide units with long-standing collective bargaining history. *Id.* at 515. The Board denied the craft employees’ petition, finding that the proposed units were not appropriate, largely because of that history. *Id.* In their *Kyne* complaint, the craft employees argued that by giving controlling weight to collective bargaining history, the Board had contravened both Section 9(b) and 9(c)(5) of the NLRA, which prohibits extent of organization

from being the controlling factor in deciding unit appropriateness.⁹ The D.C. Circuit disagreed, noting that “the question of an appropriate bargaining unit falls within the wide area of determinations which depend on the Board's expertise and discretion, and the statute does not specify any matters pertinent here which the Board must consider What factors the Board considered and what weight it accorded to them are questions which may only be raised in a judicial review proceeding under [Section] 10 [of the NLRA].” *Id.* at 516. (quotation marks and citation omitted). So too here, *Kyne* jurisdiction is unavailable for IAM’s sought-for review of “[w]hat factors the Board considered and what weight it accorded to them.” *See id.*

b. IAM has not shown that comparing the interests of a petitioned-for unit with those of employees excluded from that unit violates Section 9(a) or (b).

IAM next charges that *Boeing*’s second step violates Section 9(a) and (b) of the Act, because it requires comparing the interests of the employees in the proposed unit with those employees excluded from that unit. [ECF 1, pp. 13-14, paras. 40-48]; IAM asserts that this comparison violates the NLRA principle that, “while the Board’s chosen unit must be appropriate, it need not be the only [nor] even the most appropriate unit.” *See Dunbar Armored Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) (citing *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991)) (“*AHA*”). [*Id.*, p. 13, para. 47]. In support, IAM points to the language of Section 9(a) that “[r]epresentatives designated or selected for the purposes of collective bargaining by a majority of the employees in *a* unit appropriate . . . shall be the exclusive bargaining representatives of all the employees in such unit.” IAM also quotes Section 9(b): “the unit

⁹ *See infra* pp. 20-21. The craft employees had also argued to the district court that the Board contravened an express proviso in Section 9(c)(2) of the NLRA, but this argument was not pressed on appeal or considered by the D.C. Circuit. 276 F.2d at 515 n.1.

appropriate . . . shall be the employer unit, craft unit, plant unit, *or subdivision thereof.*” [*Id.*, p. 13, paras. 41, 43].

As noted above, Section 9(a) does not place any duty on the Board, let alone a “clear and mandatory” one. *Road Sprinkler Fitters Local 669*, 324 F. Supp. 3d at 93. Indeed, the Supreme Court observed in *AHA* that “[t]his section, read in light of the policy of the Act, *implies* that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language *suggests* that employees may seek to organize ‘a unit’ that is ‘appropriate’—not necessarily *the* single most appropriate unit.” 499 U.S. at 610 (emphases added). The Court makes expressly clear that Section 9 creates almost no hard and fast rules; IAM cannot, by its own volition, turn the wide grant of discretion in Section 9 into the specific and mandatory language necessary for *Kyne* jurisdiction.

IAM’s Section 9(b) argument fares no better. Section (b) provides in pertinent part:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .

29 U.S.C. § 159(b). Here too, there is no “clear, specific and mandatory” language requiring the Board to decide a representation case in a particular manner. *See Scottsdale Capital Advisors Corp.*, 844 F.3d at 421. Far from imposing prohibitions on the Board, the Fourth Circuit has described Section 9(b) as “grant[ing] to the Board the power to determine ‘the unit appropriate for the purposes of collective bargaining.’” *Lundy Packing Co.*, 68 F.3d at 1579; *I.T.O. Corp. of Baltimore*, 818 F.2d at 1112.

Indeed, with the exception of express provisos of the type at issue in *Kyne* itself, the only direction Congress made to the Board when deciding if a unit of employees is appropriate for collective bargaining is contained in Section 9(c)(5), noted above, which instructs: “In

determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling.” 29 U.S.C. § 159(c)(5). Section 9(c)(5) thus prohibits “the extent of union organization [from being] the *dominant* factor in the Board's determination of the bargaining unit.” *Arcadian Shores*, 580 F.2d at 120 (emphasis original). The Board appropriately considered this statutory instruction in the instant case. [See ECF 1-2, pp. 3, 7].

IAM’s argument that the Board is seeking to determine the most appropriate unit—as opposed to an appropriate unit—is a straw man because the Board’s analysis is consistent with the long-standing NLRA principle that a proposed unit need not be the most appropriate one. [ECF 1-2, pp. 3, 6 n. 9]; see also *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), *enf’d*, 190 F.2d 576 (7th Cir. 1951). The Board did not, as IAM suggests, determine the “most appropriate unit.” It simply determined that the petitioned-for unit was inappropriate, both because the two groups of employees within the petitioned-for unit did not share a sufficient community of interest, and because the interests of the excluded employees were not meaningfully distinct from the interests of the employees in the petitioned-for unit. [*Id.*, pp. 1, 7].

IAM’s argument must then be that Section 9 forbids the Board to examine the interests of excluded employees, in order to determine the degree of difference between them. This is simply not the case. As the Fourth Circuit explained a few years ago, “the Board at the very least must ensure that employees are not excluded on the basis of ‘meager differences.’” *Nestle Dryer’s Ice Cream Co.*, 821 F.3d at 500 (quoting *Lundy Packing Co.*, 68 F.3d at 1581). Unit determinations are an exercise of the Board’s policy judgment, and while it may be “tempting for a court to second-guess the Board with respect to the judgments that it has made in the representation proceeding, . . . this is precisely what the Supreme Court cautioned against in *American*

Federation of Labor, Leedom v. Kyne and *Boire v. Greyhound.*” *Hartz Mountain*, 727 F.2d at 1313.

The gravamen of IAM’s complaint is that the Board should have given greater weight to certain facts and policy considerations in reaching its decision, and that its failure to do so violated the statute. [ECF 1, pp. 11-15; paras. 33-49]. The authorities cited above at pp. 15-21, establish that such a dispute does not equate to the Board contravening clear and mandatory statutory language. As noted above, the Fourth Circuit has instructed that an agency’s “decision to adopt one interpretation over [an]other does not constitute a violation of a clear statutory mandate.” *Hanauer*, 82 F.3d at 1309. Accordingly, the absence of any violation of mandatory language in the statute is fatal to IAM’s claim of subject-matter jurisdiction here.¹⁰

B. IAM has not shown that it has been denied the opportunity for judicial review of the Board’s representation decision

As the Supreme Court explained in *MCorp*, 502 U.S. at 43, there can be no “sacrifice or obliteration” of a right under *Kyne* where “a meaningful and adequate opportunity for judicial review” is available, as is the case under Sections 9(d) and 10(e) and (f) of the Act. *See Detroit*

¹⁰ This lack of jurisdiction is made more evident by IAM’s request for relief, which seeks to have the *Boeing* decision set aside and the bargaining unit members made whole. IAM would essentially have this Court determine for itself the appropriate bargaining unit, contrary to the command of the statute, which vests such decisions solely with the Board. 29 U.S.C. § 159(b). Even assuming arguendo that the Board had contravened a mandatory provision of the statute, the appropriate remedy would be to remand the decision to the agency for proceedings consistent with the statute. *See, e.g., NLRB. v. Tito Contractors, Inc.*, 847 F.3d 724, 734 (D.C. Cir. 2017) (denying enforcement of a final Board order under Section 10 of the Act based on the Board’s earlier certification of a “wall-to-wall” bargaining unit and remanding the case for further Board proceedings consistent with the court’s opinion). Moreover, the request that the Board “mak[e] bargaining unit members whole” is also jurisdictionally barred by the doctrine of sovereign immunity. *See Dugan v. Rank*, 372 U.S. 609, 620 (1963) (finding “a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act”) (cleaned up).

Newspaper Agency v. NLRB, 286 F.3d 391, 398 (6th Cir. 2002) (noting that the Supreme Court “rested its decision in *MCorp* solely on the basis that MCorp had available to it review in the appellate courts, thus making district court jurisdiction improper under *Leedom*[*v. Kyne*]”); *see also Scottsdale Capital Advisors Corp.*, 844 F.3d at 421.

Taken together, Sections 9(d) and 10(e) and (f) provide both employers and unions an adequate means of obtaining indirect review of Board representation decisions. Employers may contest a Board election by refusing to bargain with a duly certified union in violation of Section 8(a)(5), 29 U.S.C. § 158(a)(5), and then pressing their position before a court of appeals on review of a final bargaining order issued by the Board. *See Hartz Mountain*, 727 F.2d at 1311 (“Congress declared that the person aggrieved by a Board representation decision is obliged to precipitate an unfair labor practice proceeding as a means of securing review in the appellate courts.”) (internal quotation mark omitted) (quoting Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining*, 60 (1976)).

Aggrieved unions likewise possess a path to review Board representation case decisions. Indeed, as alluded to by IAM, [ECF 1, p. 15, para. 51], several courts have concluded or suggested that Section 8(b)(7) —which prohibits certain union picketing for the purpose of seeking to represent employees—provides this path¹¹. *See United Fed'n of Coll. Teachers, Local 1460 v. Miller*, 479 F.2d 1074, 1079 (2d Cir. 1973) (finding “no reason . . . why this approach would not provide an adequate vehicle for eventual review of the Board's determination”); *Distillery, Rectifying, Wine & Allied Workers Int'l Union v. Miller*, No. 7069, 1972 WL 867, at

¹¹ Two subsections of Section 8(b)(7) are relevant here: Section 8(b)(7)(B) prohibits non-incumbent unions from picketing, or threatening to picket, for employer recognition within twelve months of a valid NLRB election; Section 8(b)(7)(C) prohibits such unions from picketing (or threatening to picket) without filing an election petition within a reasonable amount of time not to exceed 30 days from the commencement of picketing. *See* 29 U.S.C. § 158(b)(7).

*3 (W.D. Ky. June 29, 1972) (“[T]he proceedings pursuant to Section 8(b)(7)(B) of the Act constitute, in the eyes of the law, an equivalent unfair labor practice with that which an employer must entail in order to exhaust its administrative remedies, and such proceedings are a necessary prerequisite to the invocation of any court review, as construed by administrative law.”); *see also Lawrence Typographical Union v. McCulloch*, 349 F.2d 704, 708 & n.8 (D.C. Cir. 1965) (observing that a union may present evidence regarding the representation case proceedings in an unfair labor practice proceeding subject to judicial review); *NLRB v. Local 182, Int’l Bhd. of Teamsters*, 314 F.2d 53, 60 (2d Cir. 1963) (noting that in an 8(b)(7)(B) unfair labor practice case, all questions as to the validity of a preceding election are open to the Board and judicial review), *discussed with approval in United Food & Commercial Workers Int’l Union Local No. 576, v. NLRB*, 675 F.2d 346, 356 (D.C. Cir. 1982) (“*UFCW Local 576*”) (holding that a union is entitled to present evidence that it is the proper representative of employees of the picketed employer in defense to an 8(b)(7)(C) charge)). *But see Interstate Dress Carriers, Inc.*, 610 F.2d 99, 108-09 (3d Cir. 1979) (finding that district court lacked jurisdiction to enjoin Board election but expressing skepticism, in dicta, as to the adequacy of Section 8(b)(7)(B) as a vehicle for judicial review of Board representation decisions).

IAM asserts that the Section 8(b)(7)(B) route is unavailable here, because that provision prohibiting picketing only applies within twelve months of a valid election, and the Board’s decision was issued fifteen months following the election. However, IAM ignores that Section 8(b)(7)(C) of the NLRA provides an alternate method for obtaining review and does not have the twelve-month limitation contained in Section 8(b)(7)(B).

Accordingly, IAM could begin picketing and continue, or threaten to do so, for 30 days, which may precipitate an unfair labor practice charge being timely filed pursuant to Section

10(b) of the NLRA.¹² This would permit IAM to seek judicial review of the representation case proceedings, pursuant to Section 10(e) or (f) of the Act. *See* 29 U.S.C. § 160(b), (e), and (f).¹³

Thus, if a charge is filed, nothing would prevent IAM from arguing to the General Counsel (and potentially to the Board and a court of appeals), that because the *Boeing* decision was in error, IAM is the properly certified representative of the petitioned-for unit. While the recognitional picketing described above may be an indirect path to judicial review, IAM has failed to show that it lacks any “meaningful and adequate means of vindicating its statutory rights.” *Scottsdale Capital Advisors Corp.*, 844 F.3d at 421. Moreover, as the Ninth Circuit has explained, even if a potential path to judicial review may not come to fruition because of future events outside a challenging party’s control, this does not mean that such an alternative is not viable until it has been exhausted. *Pac. Mar. Ass’n v. NLRB*, 827 F.3d 1203, 1211–12 (9th Cir. 2016). “Since the union may thus protect its interest[, ...] judicial intervention under the narrow doctrine of *Leedom v. Kyne*, is not appropriate.” *Lawrence Typographical Union*, 349 F.2d at 708-09 (Bazelon, C.J., concurring) (citation omitted). For this reason too, this Court lacks jurisdiction to decide this case under *Kyne*.

¹² Although Boeing may choose not to file an unfair labor practice charge in response to recognitional picketing, [ECF 1, p. 10, para. 31], an employee, another labor organization, or any other person or entity could file a charge invoking the Board’s procedures. *See* 29 C.F.R. § 102.9 (“*Any person* may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce . . .”) (emphasis added); *see also* *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17-18 (1943) (even a “stranger” may file a NLRB charge); *Castle Hill Health Care Center*, 355 NLRB 1156, 1190 (2010) (anyone may file a charge with the NLRB).

¹³ As previously noted, *supra* at pp. 8-9, pursuant to Section 9(d) of the NLRA, the record of the prior representation case proceeding becomes part of the record required to be filed with the court after a petition for enforcement or review of a final order in a related unfair labor practice case. *See* 29 U.S.C. § 159(d).

C. Congress intended to circumscribe review of the Board’s representation proceedings

Even assuming arguendo that IAM lacks the means to seek judicial review of the challenged Board order, Congress never intended to extend a *right* of judicial review over every Board election proceeding.¹⁴ The rights defined in the NLRA are public rights, which the Board is charged with enforcing in the public interest. *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 364, 366 (1940). And there is no absolute requirement that review by an Article III tribunal be available to every adjudication involving a public right. *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 587-89 (1985). As the Supreme Court noted when discussing representation proceedings under the Railway Labor Act, “it is for Congress to determine how the rights which it creates shall be enforced.” *Switchmen’s Union of N. Am. v. Nat’l Mediation Bd.*, 320 U.S. at 301.

This feature of the NLRA was remarked upon early in the Act’s history:

It seems to be thought that this failure to provide for a court review [of representation proceedings] is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected. But these are arguments to be addressed to Congress and not the courts.

AFL, 308 U.S. at 411-12. Seven years later, when Congress passed the Taft-Hartley Act in 1947, it considered a proposed amendment to the NLRA that would have allowed immediate review of Board certification decisions. *See* H.R. Rep. No. 80-245, at 43 (1947) (noting that the proposal would have permitted “any person interested to appeal from a certification”), *reprinted in* 1 *NLRB, Legislative History of the Labor-Management Relations Act, 1947*, at 334 (2d prtg.

¹⁴ Indeed, the NLRA did not define any unfair labor practices by labor organizations from 1935 to 1947. *See* Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining*, 7 (2004). As such, recognitional picketing was lawful during his time and would not have been a basis for a proceeding leading to judicial review under the NLRA.

1985). However, the proposed amendment was eliminated in conference as it “would permit dilatory tactics in representation proceedings.” 93 Cong. Rec. 6602 (daily ed. June 5, 1947) (statement by Senator Taft, architect of the Taft-Hartley Act), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 1542.

From this history, it is evident that Congress made the affirmative choice to limit judicial review in order to provide a speedy resolution to questions of employee choice and bargaining obligations. *See Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 267 (D.C. Cir. 1993); *Nat’l Mar. Union v. NLRB*, 375 F. Supp. 421, 436-39 (E.D. Pa.), *aff’d*, 506 F.2d 1052 (3d Cir. 1974) (unpublished table decision). As the D.C. Circuit recognized in *Physicians Nat’l*:

It may well be that the occasional injustice which results from this statutory scheme is too high a price to pay for expediting the vast majority of representation elections. It may also be that the Act should permit judicial review when unions are not certified under [Section] 9(c). But . . . ‘these are arguments to be addressed to Congress and not the courts.’”

622 F.2d at 499. (quoting *AFL*, 308 U.S. at 411-12). Consistent with this history, “Congress has considered the likelihood that some Board decisions in representation proceedings may evade all judicial review. Nevertheless, it has rejected attempts to provide review in such cases.”

Physicians Nat’l, 642 F.2d at 499; *see also Perdue Farms*, 108 F.3d at 521 (lack of direct review “reflects conscious policy judgment by Congress that the benefits of more immediate review are outweighed by the likelihood that the delays resulting from such review would frustrate the purposes of the NLRA.”). Thus, IAM’s quarrel that Congress has failed to provide judicial review cannot be resolved by this Court.

CONCLUSION

Since IAM fails to meet either of the conjunctive requirements of *Kyne*, much less both, the instant complaint should be dismissed.

Respectfully submitted,

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