No. 13-35818

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC MARITIME ASSOCIATION,

Plaintiff - Appellee,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant - Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
Case No. 3-12-cv-02179-MO

BRIEF FOR DEFENDANT - APPELLANT NATIONAL LABOR RELATIONS BOARD

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NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court lacked subject matter jurisdiction to review and vacate an interlocutory decision of the National Labor Relations Board ("NLRB" or "Board") issued on August 13, 2012 pursuant to Section 10(k) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(k). The Board timely filed a Notice of Appeal on September 5, 2013 (ER I 69, Dkt. No. 70)[1] from a final order entered on June 17, 2013, by the United States District Court for District of Oregon ("District Court"),[2] which disposes of all parties' claims. This Court accordingly has jurisdiction to review the District Court's Order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in holding that it had subject matter jurisdiction to vacate the Board's interlocutory decision issued on August 13, 2012 pursuant to Section 10(k) of the Act, 29 U.S.C. § 160(k).

RELEVANT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the Addendum at the end of this brief.

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[1] "ER I" and "ER II" refer to the Board's Excerpts of Record, Volumes I and II, respectively, filed together with this brief. "Dkt. No." refers to the District Court's Docket Entry Numbers.

[2] On August 14, 2013, the Board obtained an extension of time to file its notice of appeal until September 16, 2013. (Dkt. No. 69.)

STATEMENT OF THE CASE

Pacific Maritime Association ("PMA") filed a complaint in District Court seeking declaratory and injunctive relief to invalidate the Board's decision issued in *International Brotherhood of Electrical Workers, Local 48*, 358 NLRB No. 102 (Aug. 13, 2012) ("Section 10(k) Decision") on the basis that the Board exceeded its statutory authority in issuing the decision, and that PMA had no other means to remedy the Board's action. (ER II 72, 80.) As its basis for jurisdiction in the District Court, PMA claimed, and the District Court agreed, that although judicial review of such interlocutory Section 10(k) decisions is normally precluded, this case falls within the extraordinarily narrow exception to that rule set forth in *Leedom v. Kyne*, 358 U.S. 184 (1958). On June 17, 2013, the Court ordered that the Board's Section 10(k) Decision is vacated. (ER I 1-2.)

In this appeal, the Board seeks reversal of the District Court's Order, which was based on oral conclusions made at a June 4, 2013 hearing that the Board exceeded its statutory authority in issuing the Section 10(k) Decision and that PMA had no reasonable alternative means to secure judicial review of the Board decision. (ER I 49:14, 54:15.) The interlocutory Section 10(k) Decision has now formed the basis of a portion of a recommended decision and order issued by an administrative law judge in an unfair labor practice case, *International Longshore and Warehouse Union, Local 8 and Local 4 (ICTSI, Inc. and Port of Portland*),

2013 WL 4587186 (NLRB Div. of Judges Aug. 28, 2013) ("ALJ Decision").[3] That decision is now pending review before the Board.[4]

A. Background of the Dispute Over Reefer Work at the Port of Portland

Terminal 6 is a marine cargo terminal at the Port of Portland ("the Port") in Portland, Oregon. Operations at Terminal 6 include the loading and unloading of shipping containers, including refrigerated containers known as "reefers." Reefers run on electricity and must be plugged into electrical outlets and monitored to maintain proper refrigeration. (ER II 90.)

Since 1974, the Port has directly employed employees represented by International Brotherhood of Electrical Workers Local 48 ("IBEW") to perform the work of plugging in, unplugging, and monitoring reefers ("reefer work"). The IBEW-represented employees performed that work under a collective-bargaining agreement between the Port and the District Council of Trade Unions, of which IBEW is a member labor organization ("DCTU Agreement"). (ER II 90.)

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[3] We respectfully request that the Court take judicial notice of this administrative decision, which issued after the District Court's June 17, 2013 Order on appeal. The Board relies upon this decision for administrative facts relevant to the issue on appeal. *See Morales v. Cruse*, 483 Fed. Appx. 375, 376, 2012 WL 4338493 (9th Cir. 2012) (court may take judicial notice of "[r]ecords and reports of administrative bodies") (citation omitted).

[4] In light of the pendency of this appeal, on February 20, 2014, the Board determined to sever, hold in abeyance, and postpone briefing as to the portion of the allegations that are dependent upon on the Section 10(k) Decision, until after a decision is reached by this Court.

In the mid-2000s, the International Longshore and Warehouse Union, Local 8, AFL-CIO ("the ILWU") began making informal claims that the reefer work should be performed by ILWU-represented employees. In 2008, the ILWU filed grievances over this issue against the company then operating Terminal 6. (ER II 91.)

In 2010, ICTSI Oregon, Inc. ("ICTSI") began negotiating with the Port over a lease agreement to take over the cargo handling operations at Terminal 6. (ER II 91.) In May 2010, ICTSI entered into a 25-year lease with the Port to operate Terminal 6. (ER II 90.) The lease states that ICTSI cannot perform any of the work performed by Port employees under the DCTU Agreement, and that Port employees must continue to perform such work. (ER 90-91.)

In or about June 2010, after the lease with the Port was signed and approved, but before commencing operations at Terminal 6, ICTSI became part of the Pacific Maritime Association ("PMA"), a multi-employer association that bargains with ILWU on behalf of member companies. (ER II 91.) As a PMA member, ICTSI became bound by the multi-employer collective-bargaining agreement between PMA and ILWU, known as the Pacific Coast Longshore Contract Document ("PCLCD"), which is effective until July 2014. (ER II 91) After ICTSI became a PMA member, the ILWU demanded that ICTSI assign the reefer work at Terminal 6 to ILWU-represented employees. ICTSI replied that its lease with the Port

required that IBEW-represented Port employees perform that work and that ICTSI did not have authority to control or assign the reefer work. (ER II 91.) In February 2011, ICTSI took over operations at Terminal 6. (ER II 91.)

From March to May 2012, the ILWU filed ten grievances under the PCLCD for lost-work opportunities based on the continued assignment of reefer work to IBEW-represented employees working for the Port. The ILWU filed these grievances against ICTSI and several shipping companies that call on the Port, which are also PMA members and bound by the PCLCD. When the IBEW learned of ILWU's grievances, it threatened to picket ICTSI if the disputed work was taken from IBEW-represented employees and given to ILWU-represented employees. (ER II 91.)

B. ICTSI Files Unfair Labor Practice Charges To Bring the Dispute Before the Board

On May 10, 2012, ICTSI filed an unfair labor practice charge with the Board's Region 19 office in Seattle, Washington against the IBEW. The charge alleged, among other things, that the IBEW violated Section 8(b)(4)(D) of the Act by threatening and/or coercing ICTSI with the object of forcing or requiring ICTSI to assign the work of plugging, unplugging, and monitoring refrigerated containers

at Terminal 6 to employees represented by the IBEW, rather than to employees represented by the ILWU (NLRB Case No. 19-CD-080738).[5] (ER II 90.)

C. The Section 10(k) Proceeding Is Conducted By a Board Hearing Officer

On May 17, 2012, the Board's Region 19 Regional Director issued a Notice of Hearing pursuant to Section 10(k) of the Act. Under that provision, whenever a party has filed a charge alleging a violation of Section 8(b)(4)(D) of the Act, the Regional Director determines whether there appears to be reasonable cause to believe the charge has merit. Upon that determination, Section 10(k) directs the Board to determine who is entitled to the disputed work.[6] On May 24-25 and 29-30, 2012, an administrative Section 10(k) hearing was held before a Board hearing officer in Portland. (ER II 90.) Both before and on the first day of the hearing, PMA moved to intervene, asserting an interest in seeing the reefer work assigned in accordance with its collective bargaining agreement with the ILWU. (ER II 75, 90 n.1, 152.) The hearing officer denied PMA's motion, finding that PMA's interests would be adequately represented by the existing parties to the hearing. (ER II 91, n.4.) On the first day of the hearing, the ILWU also filed a motion to quash the Notice of Section 10(k) hearing. The Hearing Officer received evidence on the motion but left its resolution for the Board. (ER II 90, n.1.)

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[5] For ease of reference, subsections 8(b)(4)(i)(B) and (D), and 8(b)(4)(ii)(B) and (D) of the Act, are referred to herein as "Section 8(b)(4)(B) and (D)," respectively.

[6] *See NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 123-24 (1971).

Two weeks after the hearing closed, in a post-hearing brief submitted to the Board, the ILWU reiterated its claim that the Board should quash the notice of hearing. Among other bases, it argued for the first time that there was no violation of Section 8(b)(4)(D) because the dispute concerned the assignment of work by a public employer to its own employees excluded from coverage by the Act. (ER II 91.) PMA also asserted this argument to the Board in its request for special permission to appeal the denial of its motion to intervene, accompanied by an appeal of the denial of the motion to intervene and a motion to quash the 10(k) hearing. (ER II 91, n.4.)

D. The Board Issues the Section 10(k) Decision Awarding the Disputed Reefer Work to the IBEW-Represented Employees

On August 13, 2012, the Board issued a Decision and Determination of Dispute ("Section 10(k) Decision"), determining that "this is a jurisdictional dispute proceeding under Section 10(k)." (ER II 90.)

The Board found that on the record before it, there was reasonable cause to believe that Section 8(b)(4)(D) had been violated, as required for the Board to decide a dispute pursuant to Section 10(k). (ER II 92.) The Board found without merit ILWU's contention that there was no violation of Section 8(b)(4)(D) because the dispute concerned the assignment of work by a public employer, the Port, to its own employees, who are excluded from coverage by the Act. (ER II 92.) The Board reasoned that it "need have jurisdiction only over the employer that is the

target of a respondent union's unlawful conduct," and that ICTSI, a statutory employer, was the target of IBEW's threats, not the Port. (ER II 92.) It also affirmed the hearing officer's denial of PMA's motion to intervene and denied the motion to quash the 10(k) hearing, noting that the record and briefs adequately presented the issues that PMA sought to argue and the positions of the parties, where PMA made the same claims as the ILWU and had not proffered any additional facts that might affect the outcome. (ER II 91 n 4.)[7]

The Board then made its determination, relying on the applicable collective-bargaining agreements, employer preference, and past practice. (ER II 93.) Based on these considerations, the Board determined that the employees represented by the IBEW were entitled to perform the reefer work. (ER II 94.)

On August 20, 2012, PMA filed with the Board a motion for reconsideration as to the denials of its motion to intervene and quash the hearing, which the Board denied on August 29. (ER II 77-78.)

[7] The Board also rejected ILWU's other defense that there was no unlawful conduct because it had a "work preservation" claim to the reefer work. Emphasizing that IBEW-represented electricians had performed this work since 1974, the Board concluded that "[w]here, as here, a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition." (ER II 91.)

E. The Board's Regional Director Issues an Unfair Labor Practice Complaint Against the ILWU Based on Additional Charges filed by ICTSI and Relying on the 10(k) Decision

Meanwhile, on June 5 and August 17, 2012, ICTSI filed additional unfair labor practice charges, alleging that the ILWU violated Section 8(b)(4)(D) of the Act by engaging in an escalating series of actions to coerce ICTSI and other parties to assign the reefer work to employees represented by the ILWU, rather than to employees represented by IBEW, during the time periods both before and after the Section 10(k) Decision issued (NLRB Case Nos. 19-CD-082461 and 19-CD-087505). *Int'l Longshore and Warehouse Union, Local 8 and Local 4 (ICTSI, Inc. and Port of Portland*), 2013 WL 4587186 at 2-3 (NLRB Div. of Judges Aug. 28, 2013) ("ALJ Decision").[8] Based on these charges and on the ILWU's refusal to abide by the Board's Section 10(k) Decision, the Regional Director, on behalf of the Board's Acting General Counsel, issued an administrative Consolidated Complaint against the ILWU alleging that the ILWU violated Sections 8(b)(4)(i) and (ii)(B), and 8(b)(4)(D). (ALJ Decision, 2013 WL 4587186 at 3.) A hearing on the Consolidated Complaint was held before an administrative law judge on

[8] ICTSI also filed unfair labor practice charges alleging that the ILWU had violated Section 8(b)(4)(B) of the Act by using proscribed means to enmesh neutral entities into the labor dispute (NLRB Case Nos. 19-CC-082533 and 19-CC-087504). The Port of Portland filed a similar charge (NLRB Case No. 19-CC-082744). (ALJ Decision, 2013 WL 4587186 at 2-3.)

various dates between July 31 and August 29, 2012.[9] (ALJ Decision, 2013 WL 4587186 at 1.)

While PMA sought to intervene in the Section 10(k) proceeding, it did not attempt to intervene in the unfair labor practice case.

F. PMA Files District Court Complaint to Invalidate the Board's Section 10(k) Decision

On September 7, 2012, PMA commenced an action in District Court seeking immediate judicial review of the Board's Section 10(k) Decision.[10] (ER II 72-81.)

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[9] While the administrative proceeding was pending, the Board's Regional Director petitioned the United States District Court for the District of Oregon for interim injunctive relief under Section 10(l) of the Act, 29 U.S.C. § 160(l). On November 21, 2012, the District Court (Simon, J.) enjoined the ILWU from filing or processing grievances or lawsuits against ICTSI and certain carriers which conduct business at the Port, or otherwise threatening or coercing those employers, where the object of such conduct was to have the employers force the Port to assign the disputed work in contravention of the Board's Section 10(k) award, which conduct was asserted in the Consolidated Complaint to be in violation of Section 8(b)(4)(ii)(D) of the Act. *Hooks v. ILWU*, 905 F. Supp.2d 1198, 1209 (D. Ore. 2012).

The District Court also enjoined the ILWU from filing or processing grievances or lawsuits against ICTSI and the carriers where the object was to force ICTSI and the carriers to cease doing business with the Port, which conduct was asserted in the Consolidated Complaint to be in violation of Section 8(b)(4)(ii)(B) of the Act. *Id.* at 1212. On September 30, 2013, this Court upheld the injunction with respect to the Section 8(b)(4)(ii)(B) violation. However, this Court vacated the portion of the injunction directed at conduct in violation of Section 8(b)(4)(ii)(D), in light of the District Court's June 17 Order, at issue in the instant appeal, vacating the Section 10(k) award. *Hooks v. International Longshore and Warehouse Union*, *Locals 8 and 40*, No. 12-36068, 2013 WL 5422527 (9th Cir. Sept. 30, 2013) (mandate issued Nov. 25, 2013).

PMA claimed that it satisfied the two-part conjunctive test to obtain extraordinary district court review set forth in *Leedom v. Kyne*, 358 U.S. 184 (1958): that "the Board acted in excess of its delegated powers and contrary to specific statutory language in Section 8(b)(4)(D) that is clear and mandatory" and that "[w]ithout this Court's jurisdiction, PMA would be wholly deprived of any means within its control to remedy the Board's *ultra vires* action." (ER II 80.)[11] The Complaint sought declaratory and injunctive relief. (ER II 80-81.) In response to the motion for summary judgment filed by PMA on October 16, 2012, the Board filed a motion to dismiss for lack of jurisdiction, and opposed the motion for summary judgment. (Dkt. Nos. 19, 20.)[12]

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[10] PMA originally filed its complaint in the District Court for the District of Columbia, but the Board successfully moved to transfer the case to the District of Oregon, where the dispute was occurring and related cases involving the parties were pending (*Pacific Maritime Ass'n v. NLRB*, 905 F.Supp.2d 55 (D.D.C. Nov. 20, 2012). (ER II 72, Dkt. No. 21, 24.)

[11] PMA's complaint also relied on *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). While briefed by the parties, the District Court did not address that argument.

[12] PMA subsequently submitted to the District Court a notice of supplemental authority asserting the Section 10(k) Decision was also invalid because it was issued by a Board that lacked a lawful quorum, relying on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). The District Court ordered the parties to file supplemental briefs on the issue. Dkt. Nos. 45. 46, 47, 48. In response, the Board asserted that PMA had waived this challenge by not raising it in its complaint, motion for summary judgment, or response to the Board's motion to dismiss; that the Court lacked jurisdiction to review such a challenge to an interlocutory order; that the Court was not bound by *Noel Canning*; and that precedent from other

G. The District Court Issues an Order Vacating the Board's Section 10(k) Decision

On June 4, 2013, U.S. District Judge Michael Mosman held a hearing, and issued an oral ruling from the bench denying the Board's motion to dismiss and granting PMA's motion for summary judgment. (ER I 54:17-18; 55:14-15.) At the outset, the Court indicated that it did not need the parties to address the question whether there was a violation of a clear statutory mandate. (ER I 6.) At the conclusion of the hearing, the District Court declared:

> [I]f Congress says, for example, the NLRB only has jurisdiction when there are two employee groups, and that doesn't count if one of them are public employees, then violating that . . . means that Congress intended for the otherwise general jurisdiction over such question – questions in the district court to exist. . . . The agency's decision did in fact violate a clear statutory mandate . . . . [ER I 48-49.]

In considering whether there was an alternative means for PMA to vindicate its statutory right, the District Court focused on three potential avenues of judicial review, all of which it found inadequate. (ER I 49-54.) First, the Court rejected the Board's argument that PMA could seek to intervene in the unfair labor practice proceeding in which the Section 10(k) Decision is subject to review. The Court found that if the intervention standard for the pending Section 8(b)(4)(D) unfair labor practice proceeding is the same as the standard for intervention in the Section

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circuits, including the Ninth Circuit, conflicted with that case. Dkt. No. 48. The District Court did not address this issue in its determination to vacate the Board's award. Consequently, this contention is not at issue in this appeal.

10(k) proceeding, it would make little sense for PMA to attempt to intervene again, when it was unsuccessful previously in the Section 10(k) proceeding. (ER I 49:23-51:6.) Second, regarding an opportunity for PMA to obtain review in the then-pending appeal of the Section 10(l) injunction obtained by the Board against the ILWU in this Circuit (*see* n.9, *supra*), the Court found that the parties agreed that PMA could not intervene in that proceeding. (ER I 51:8-51:19.) Third, the Court considered whether PMA could be an "aggrieved person" within the meaning of Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides for judicial review of final Board orders, even if PMA does not intervene in the pending Section 8(b)(4)(D) unfair labor practice case. Although finding that PMA could be an "aggrieved person," (ER I 51:20-52:13), the Court nevertheless focused on a hypothetical settlement by the current parties in that proceeding, and found that it would not be within PMA's control whether such a settlement would result in a final, reviewable Board order. (ER I 54:1-54:11.) These oral findings as to an alternative avenue of review, together with the District Court's determination that the Board "violate[d] a clear statutory mandate" (ER I 49:14-15), served as the basis for the Court's finding that "*Leedom v. Kyne* applies to this case" to provide it with jurisdiction to vacate the Section 10(k) Decision. (Tr. 52:15-16.) On June 17, 2013, the Court entered its written Order, declaring that the Board "exceeded

its statutory authority" and that the Board's Section 10(k) Decision is vacated. (ER I 1-2.)

On July 15, 2013, ICTSI and the Port of Portland filed motions with the District Court seeking leave to intervene in the case (Dkt.Nos. 55, 60), and to file motions for reconsideration. (Dkt. No. 62.) On August 2, 2013, the District Court denied those motions as untimely. (Dkt. No. 66.)

H. The Administrative Law Judge Issues a Decision and Recommended Order in the Unfair Labor Practice Proceeding, and the Case Is Now Before the Board

Meanwhile, in the unfair labor practice case, on June 25, 2013, the ILWU filed a motion with the administrative law judge to reopen the record, seeking dismissal of the Section 8(b)(4)(D) allegations, in reliance on the District Court's Order. ALJ Decision, 2013 WL 4587186 at 2. The judge denied the motion, but took official notice of the District Court's Order and of any (future) Board decision to appeal the Court's Order. ALJ Decision, 2013 WL 4587186 at 2.

On August 28, 2013, the administrative law judge issued a decision and recommended order. *Int'l Longshore and Warehouse Union, Local 8 and Local 4 (ICTSI, Inc. and Port of Portland*), 2013 WL 4587186 (NLRB Div. of Judges Aug. 28, 2013). The judge concluded, at the outset, that in the absence of a definitive decision by the Board to appeal the Court's decision, he was "obligated to apply the Board's Section 10(k) decision for purposes of this administrative

adjudication." 2013 WL 4587186 at 2. The judge proceeded to conclude that the ILWU violated Section 8(b)(4)(ii)(B) by filing and prosecuting grievances or lawsuits, or threatening to engage in that conduct, against ICTSI and the carriers in order to force them to cease doing business with the Port. The judge also found that the ILWU violated Section 8(b)(4)(ii)(D) by engaging in the same conduct in order to force the Port to assign the reefer work to ILWU-represented employees instead of employees represented by the IBEW. He concluded that the ILWU lacked a valid work preservation claim with respect to the reefer work and that the Port, rather than ITCSI or the carriers, has the right to control the assignment of the reefer work.[13]

On October 30, 2013, the ILWU filed exceptions to the administrative law judge's decision pursuant to Section 102.46 of the Board's Rules and Regulations, which are now pending before the Board for decision. However, briefing and resolution of the 8(b)(4)(D) allegations have been held in abeyance until a decision is reached in this appeal (*see* n.4, *supra*).

[13] The judge also concluded in related Cases 19-CC-082744 and 19-CC-082533 that the ILWU had threatened ICTSI management and engaged in work slowdowns and stoppages at Terminal 6 in violation of Sections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B). ALJ Decision, 2013 WL 4587186 at 36. This ILWU conduct found unlawful by the administrative law judge had previously formed the basis of a Section 10(l) injunction entered by District Judge Simon in July 2012 barring the ILWU from engaging in work slowdowns or stoppages at Terminal 6 and from otherwise violating Section 8(b)(4)(B). *Hooks v. Int'l Longshore and Warehouse Union*, 2012 WL 2994056 (D. Ore. July 20, 2012). Judge Simon's injunction was not appealed.

I. The NLRB Files the Instant Appeal

On September 5, 2013, the Board filed a Notice of Appeal to this Court. (ER II 69.)

SUMMARY OF ARGUMENT

The District Court erred in asserting jurisdiction to review and vacate an interlocutory decision of the Board issued pursuant to Section 10(k) of the Act. Section 10(f) of the Act describes the exclusive procedure that aggrieved persons must follow to obtain judicial review in unfair labor practice cases. As the Supreme Court and this Circuit have held, the *only* Agency decisions that are subject to judicial review are "final order[s] of the Board," and then *only* in an appropriate "United States court of appeals." *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 51 (1938); *AMERCO v. NLRB,* 458 F.3d 883, 888-90 (9th Cir. 2006). It is undisputed that Board assignment of work decisions issued pursuant to Section 10(k) are interlocutory rulings, and accordingly, are not normally directly reviewable by the courts.

The District Court erred in asserting jurisdiction in this case based on the narrow exception to the general rule precluding judicial review set forth in *Leedom v. Kyne*, 358 U.S. 184 (1958). Under *Leedom*, district courts may exercise jurisdiction "to strike down an order of the Board," *id.* at 188, 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. The Supreme Court confirmed that the absence of alternative judicial review was critical to the decision in *Leedom* that jurisdiction could be asserted. *See Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32 (1991).

Here, PMA has an opportunity to challenge the Section 10(k) Decision in the unfair labor practice case that is now pending before the Board. In this unfair labor practice case, the Board can address and reconsider any arguments challenging the Section 10(k) Decision. Yet, PMA has refused to attempt to participate in this ongoing proceeding, relying on past denials of its requests to intervene in the Section 10(k) proceeding and an assumption that any request to intervene in the unfair labor practice proceeding would be futile. This assumption does not support the District Court's assertion of jurisdiction to strike down an interlocutory Board decision.

Moreover, assuming that it is aggrieved by a final order of the Board in the unfair labor practice case, PMA will have an adequate alternative path to the statutorily-provided Section 10(f) judicial review *even if PMA is not a party* in the case. The District Court erroneously concluded that PMA might be foreclosed from having its statutory rights redressed in a Section 10(f) appeal of a final Board order because a future settlement among the current parties (without PMA's participation) might preclude the entry of a final Board order. No evidence before

the District Court supported that such an agreement was likely; and in fact, any settlement at this time is just as capable of resulting in a Board order that is judicially reviewable. Accordingly, because PMA has alternative means of judicial review, the Court need not reach the second conjunctive *Leedom* requirement – that there be a "strong and clear" showing that the Board violated a clear statutory mandate.

Nevertheless, the District Court further erred in concluding, with little explanation, that the Board acted in excess of its delegated powers and contrary to a clear and mandatory statutory prohibition. Section 10(k) of the Act does not condition the holding of a 10(k) hearing or the Board's work assignment determination on the actual finding of the elements of a Section 8(b)(4)(D) unfair labor practice violation. Moreover, the Board has broad discretion in defining what constitutes a jurisdictional dispute warranting resolution under Section 10(k). The Board acted well within this broad discretion in asserting jurisdiction and making its 10(k) determination here. In the absence of language precluding the application of Section 10(k), there can be no strong and clear demonstration that the Board "disregarded a specific and unambiguous statutory directive" in issuing the Section 10(k) decision. Accordingly, the District Court erred in asserting extraordinary jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW

The issue on appeal is whether the District Court had subject matter jurisdiction to vacate the Board's Section 10(k) Decision in *Int'l Bhd. of Elec. Workers, Local 48*, 358 NLRB No. 102 (Aug. 13, 2012). This Circuit applies a de novo standard of review to questions of subject matter jurisdiction, including a dismissal for failure to exhaust administrative remedies. *Kildare v. Saenz,* 325 F.3d 1078 (9th Cir. 2003).

II. THE DISTRICT COURT LACKED JURISDICTION TO DIRECTLY REVIEW AN INTERLOCUTORY SECTION 10(K) DECISION

The jurisdiction of federal district courts is limited, extending only to those subjects over which Congress has granted jurisdiction by statute. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). The Supreme Court long ago held that Congress did not grant federal district courts jurisdiction over administrative unfair labor practice proceedings under the Act. *Myers v. Bethlehem Shipbuilding Corp*., 303 U.S. 41, 48, 51 (1938). Rather, Congress provided exclusive jurisdiction initially to the Board to administer unfair labor practice provisions of the Act. *Id. See* 29 U.S.C. §§ 153(a), 160(a), (c).

Section 10(f) of the NLRA, 29 U.S.C. § 160(f), describes the procedure that aggrieved persons must follow to obtain judicial review in unfair labor practice

cases. Pursuant to that provision, the *only* Agency decisions that are subject to judicial review are "final order[s] of the Board," and then *only* in an appropriate "United States court of appeals." *Id.* As the Supreme Court has noted, Congress designed Section 10(f) to give aggrieved persons "a full, expeditious, and *exclusive* method of review . . . after a final order is made. Until such final order is made the [person] is not injured, and cannot be heard to complain." H.R. Rep. No. 74-1147, at 24 (1935) (emphasis added) (quoted in *Myers*, 303 U.S. at 48 n.5); *AMERCO v. NLRB,*458 F.3d 883, 888-90 (9th Cir. 2006) (the NLRA review process "is the exclusive mechanism for federal court review of decisions made in unfair labor practice hearings"); *E.G. & H., Inc. v. NLRB*, 949 F.2d 276, 277 (9th Cir. 1991) (district court lacked jurisdiction to enjoin NLRB unfair labor practice case because review was available through the court of appeals)).

In *Myers*, the company argued it was entitled to interlocutory review because the Board lacked authority over it and the Board's very exercise of jurisdiction was unlawful from the start. 303 U.S. at 47-48, 50. Nonetheless, the Supreme Court rejected that argument, holding that even in such cases, appellate review of the Board's final order at the conclusion of the administrative proceeding pursuant to Section 10(f) afforded "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Id*. at 48. Indeed, the *Myers* Court emphasized the comprehensive nature of appellate court

review available at the conclusion of Agency unfair labor practice cases: "'*all questions of the jurisdiction of the Board* and the regularity of its proceedings and *all questions of constitutional right or statutory authority* are open to examination by the court.'" *Id.* at 49 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)).

Since *Myers,* "the courts have, without exception, ruled that . . . interlocutory rulings of the Board in the course of such [unfair labor practice] proceedings may not be considered by federal District Courts." *United Aircraft Corp. v. McCulloch*, 365 F.2d 960, 961 (D.C. Cir. 1966). As this Court has held, the exclusive Section 10(f) "review procedure is consistent with the policy of administrative exhaustion, which enables agencies to correct their mistakes before courts intervene and allows agencies to create a complete administrative record for judicial review." *AMERCO*, 458 F.3d at 888 (citation omitted). *See also J.P. Stevens Employees Educ. Comm. v. NLRB*, 582 F.2d 326, 328-29 (4th Cir. 1978) (affirming district court's conclusion that it lacked jurisdiction to review NLRB's refusal to allow the plaintiff to intervene in a pending unfair labor practice case); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 363 F.2d 667, 671 (5th Cir. 1966) ("[A]ny effort by the Federal District Courts to review or supervise unfair labor practice proceedings prior to the issuance of the Board's final order 'is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a

supposed or threatened injury until the prescribed administrative remedy has been exhausted'") (quoting *Myers*, 303 U.S. at 50-51). This long-settled rule "has been repeatedly acted on in cases where . . . the contention is made that the administrative body lacked power over the subject matter." *Myers*, 303 U.S. at 51. There is no reason to depart from this rule here.

The parties here have not disputed, and the District Court initially acknowledged, that Board assignment of work decisions issued pursuant to Section 10(k) of the Act, 29 U.S.C. § 160(k), are interlocutory rulings, and accordingly, are not normally directly reviewable by the courts. (ER I 5:19-21.) This is because Section 10(k) proceedings are not "adjudications" like the Board's unfair labor practice proceedings. *Int'l Tel. & Tel. Corp. v. Local 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 443 (1975) ("*ITT*"). The Board's special authority under Section 10(k) to award disputed work arises when an unfair labor practice charge is filed alleging a violation of Section 8(b)(4)(D) of the Act. The Supreme Court explained the Section 10(k) process in *NLRB v. Plasterers' Local Union No. 79*:

> Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to strike or threaten or coerce an employer or other person in order to force or require an employer to assign particular work to one group of employees rather than to another . . . . When a § 8(b)(4)(D) charge is filed and there is reasonable cause to believe that an unfair labor practice has been committed, issuance of the complaint is withheld until the provisions of § 10(k) have been satisfied. That section directs the Board to "hear and determine" the dispute out of which the alleged unfair labor practice arose; the Board is required to decide which union or group of employees is entitled to

> the disputed work in accordance with acceptable, Board-developed standards, unless the parties to the underlying dispute settle the case or agree upon a method for settlement. Whether the § 8(b)(4)(D) charge will be sustained or dismissed is thus dependent on the outcome of the § 10(k) proceeding.

404 U.S. at 123-24.

Accordingly, it is only the Board's final determination in the subsequent Section 8(b)(4)(D) unfair labor practice proceeding that is a "final order" subject to judicial review. By contrast, "[t]he Board does not order anybody to do anything at the conclusion of a § 10(k) proceeding." *ITT,* 419 U.S. at 443. The Section 10(k) determination is "not unlike an advisory opinion, since the matter may well end there" if the charged union complies with the award. *Id.* at 446.

Consistent with *Myers* and the text of the NLRA, courts repeatedly have held that direct judicial review is not available for interlocutory Section 10(k) determinations made by the Board awarding work to one of two competing groups. *See, e.g., Foley-Wismer & Becker v. NLRB*, 682 F.2d 770, 773 (9th Cir. 1982) (limited en banc) ("[T]o allow appeals to be taken from § 10(k) awards would involve the courts in a direct interference with the normal operation of the § 8(b)(4)(D) machinery."); *id.* at 776 (dissenting opinion) ("[I]t is well established that an employer has no avenue of review from an adverse section 10(k) award."); *Henderson v. ILWU Local 50*, 457 F.2d 572, 577 (9th Cir. 1972) ("the section 10(k) award is an interlocutory order reviewable only in the course of review of

any subsequent final [unfair labor practice] order under section 8(b)(4)(D)"); *NLRB v. ILWU*, 378 F.2d 33, 35 (9th Cir. 1967) ("[T]here is no independent review of a Section 10(k) work assignment dispute . . . ."); *NLRB v. Local 991, Int'l Longshoremen's Ass'n*, 332 F.2d 66, 71 (5th Cir. 1964) (same).

PMA knows this. In *NLRB v. ILWU Local No. 50*, 504 F.2d 1209, 1212 n.1 (9th Cir. 1974), "PMA urge[d this Court] to hold that § 10(k) decisions are directly reviewable." This Court flatly refused to do so: "Twice before we have rejected this suggestion on the ground that no final order results from a § 10(k) hearing. . . . The decisions of this court in *Waterway Terminals Co. v. NLRB*, 9 Cir., 1972, 467 F.2d 1011, and of the Supreme Court in *NLRB v. Plasterers' Union* . . . only serve to reinforce our holding that §10(k) decisions are not directly reviewable." *Id.* Moreover, in *Henderson*, PMA petitioned this Court for review of the Board's refusal to stay a Section 10(k) determination. 457 F.2d at 577. Relying on the "interlocutory" nature of a Section 10(k) award, the Court dismissed PMA's petition for lack of jurisdiction. *Id*.

Nevertheless, PMA is attempting to bypass the Act's normal statutory procedures and obtain review of an interlocutory Section 10(k) decision assigning work to IBEW employees. As shown below, the District Court erroneously permitted such extraordinary review.

III. THE BOARD'S SECTION 10(k) DECISION DOES NOT FALL WITHIN *LEEDOM v. KYNE*'S NARROW EXCEPTION TO THE RULE PRECLUDING DISTRICT COURT REVIEW

A. Under *Leedom v. Kyne*, District Court Jurisdiction May Only Be Invoked When There Is Both a Violation of a Clear Statutory Mandate and There Is No Alternative Means for Judicial Review

In *Leedom v. Kyne*, 358 U.S. 184 (1958) ("*Leedom*"), the Supreme Court recognized an extraordinarily narrow exception to the general rule precluding district court jurisdiction under *Myers*. Pursuant to *Leedom*, district courts may exercise jurisdiction under 28 U.S.C. § 1337 "to strike down an order of the Board," *id.* at 188, 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 (quoting *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297, 300 (1943)). Thus, in order to justify the exercise of *Leedom* jurisdiction, a plaintiff must satisfy a rigorous two-part conjunctive requirement: the "plaintiff must show, first, that the agency has acted 'in excess of its delegated powers and contrary to a specific prohibition' which 'is clear and mandatory,' and, second, that barring review by the district court 'would wholly deprive [the party] of a meaningful and adequate means of vindicating its statutory rights.'" *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (alteration in original) (citation omitted). *See also AMERCO*, 458 F.3d at 888-89.

In *Leedom*, the Board directed an election in what the Board conceded was a mixed bargaining unit of professional and non-professional employees without first having "a majority of such professional employees vote for inclusion in such unit" as expressly required by Section 9(b)(1) of the Act.[14] 358 U.S. at 186-87. The president of the union that represented the professional employees brought suit alleging that the Board had exceeded its statutory power in including the professional employees in the mixed bargaining unit over their objections and without their consent. *Id*. at 186. The Supreme Court held that "in the circumstances of this case" the district court had jurisdiction over the suit. *Id*. at 191.

The *Leedom* Court identified two elements critical to its holding. The first was that the Board had plainly violated an express statutory mandate. The professional employee provision of Section 9(b)(1) imposed a "clear and mandatory" statutory obligation on the Board. *Id.* By including in the bargaining unit non-professional employees without first holding a vote of professional employees, the Court found that the Board "deprived the professional employees of a 'right' assured to them by Congress." *Id*. at 189. The Court accordingly concluded that the Board's order was one "made in excess of its delegated powers and contrary to a specific prohibition of the Act." *Id*. at 188.

[14] "[T]he 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).

Under this first requisite *Leedom* element, the agency action cannot "simply involve a dispute over statutory interpretation," *American Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999) (citing *Kirby Corp. v. Peña*, 109 F.3d 258, 269 (5th Cir. 1997)), or an assertion that the Board made an error of law. *Boire v. Greyhound Corp*., 376 U.S. 473, 481 (1964)*; Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 (D.C. Cir. 1980) (quoting *Chicago Truck Drivers v. NLRB*, 599 F.2d 816, 819 (7th Cir. 1979)). Jurisdiction is also not conferred on the district courts under *Leedom* to consider allegations of arbitrary or unauthorized Board action or an abuse of its discretion. *Bays v. Miller*, 524 F.2d 631, 633 (9th Cir. 1975). "[*Leedom v.*] *Kyne* and [*Boire v.*] *Greyhound* teach us that disagreement with the Board on a matter of policy or statutory interpretation is not a sufficient basis for assertion of jurisdiction . . . ." *Nat'l Maritime Union v. NLRB*, 375 F. Supp. 421, 434 (E.D. Pa.), *aff'd*, 506 F.2d 1052 (3d Cir. 1974). Rather, there must be "a violation by the Board of a clear, specific, and mandatory provision of the Act," *Lawrence Typographical Union v. McCulloch*, 394 F.2d 704, 706 (D.C. Cir. 1966), and the showing of such violation must be "strong and clear." *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968).

The second element essential to the grant of district court jurisdiction in *Leedom* was the absence of an alternative means for the professional employees to secure judicial review of the Board's election certification order. 358 U.S. at 190.

Previously, in *AFL v. NLRB*, 308 U.S. 401 (1940), the Supreme Court held that a Board certification order at the end of a union election proceeding is not a final Board order and thus is not subject to direct judicial review in the federal courts. *AFL*, 308 U.S. at 409-11. As the Court in *AFL* observed, a Board certification order may only be judicially reviewed if specifically raised as an issue in a petition for review or enforcement of a final Board unfair labor practice order under Section 10, 29 U.S.C. § 160. *Id*. at 409.[15] Citing *AFL*, the Supreme Court in *Leedom* found that the professional employees had no means within their control to obtain judicial review in order to protect their right to a separate vote mandated in Section 9(b)(1). *Leedom*, 358 U.S. at 190-91. Because the Board's decision was reviewable by a court only at the conclusion of an unfair labor practice proceeding precipitated by the *employer's* refusals to bargain with the certified union, and because no parallel proceeding was ongoing or contemplated, the Court concluded that the professional employees possessed, "no other means, within their control . . . to protect and enforce" the clear and unequivocal right that Congress afforded them to not be included without their

[15] Appellate review would be available if the employer refuses to bargain with the certified union, precipitating the General Counsel of the Board to issue an unfair labor practice complaint alleging such conduct violates Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), and the Board subsequently issues a final unfair labor practice decision. The employer could then obtain appellate review of that decision and order, which would include review of the certification of the union, as well as any challenge to the Board's authority to issue the certification. *See* 29 U.S.C. § 159(d).

consent within a bargaining unit that included non-professional employees. *Leedom,* 358 U.S. at 190.[16] This absence of a statutory means to obtain "judicial protection" of a right granted by Congress led to the Court's holding that district court jurisdiction was appropriate. *Id.* Since *Leedom*, the Supreme Court has reaffirmed that "central to our decision in *Kyne* was the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights." *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 43 (1991).

As shown below, the Court should reverse the District Court as this case is readily distinguishable from *Leedom* and neither *Leedom* requirement is satisfied.

B. The District Court Erred When It Concluded that PMA Does Not Have an Alternative Means of Review, Within Its Control, to Vindicate Its Statutory Rights

The absence of the District Court's jurisdiction in this case, unlike in *Leedom*, would not mean "a sacrifice or obliteration" of PMA's rights because there are means within PMA's control to vindicate those statutory rights. *Leedom*,

[16] Thus, "[a]s a labor organization, it did not have the option, available to an employer, to seek indirect judicial review of the Board's action." *Goethe House N.Y., German Cultural Ctr. v. NLRB,* 869 F.2d 75, 80 (2d Cir. 1989). This is because, as a practical matter, few employers will file a refusal-to-bargain charge against a union. *See Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch*, 322 F.2d 993, 997 n.7 (D.C. Cir. 1963). In addition, a union risks losing employee support if it refuses to bargain, especially in the initial period after certification. *But see Lawrence Typographical Union v. McCulloch*, 349 F.2d at 708-09 (Bazelon, C.J., concurring) (union can precipitate unfair labor practice case after losing an election by picketing within a year of its loss).

358 U.S. at 190. PMA's characterization of those means as "more theoretical than real" (ER I 17, 19) does not supply jurisdiction, as this Court has refused to extend *Leedom* jurisdiction "from situations in which judicial review is not available *at all* to situations [like this] in which judicial review simply is not available *yet*." *AMERCO*, 458 F.3d at 890.

PMA, unlike the professional employees in *Leedom*, has an opportunity to challenge the Section 10(k) Decision in the unfair labor practice case that is now pending before the Board on the parties' exceptions to the administrative law judge's August 28, 2013 decision and recommended order finding that the ILWU violated Section 8(b)(4)(D) of the Act as alleged. In that proceeding, the Board can address and reconsider arguments challenging the Section 10(k) Decision.[17] Such reconsideration of the Section 10(k) award is consistent with Board precedent. The Board concluded in *Warehouse Union Local 6, ILWU (Golden Grain Macaroni Co.),* 289 NLRB 1, 2 (1988), that a respondent may relitigate elements of a Section 8(b)(4)(D) violation that it disputes, even when the same issues were previously raised in the underlying 10(k) proceeding. There, the respondent renewed a "work preservation" defense in its answer to the unfair labor practice complaint that it previously raised, but that had been rejected by the

[17] Of course, the Board may reaffirm the validity of the Section 10(k) award only after there is a reversal of the District Court's order invalidating it.

Board, in the underlying Section 10(k) proceeding. Nonetheless, the Board refused to grant summary judgment against the respondent. *See also Plasterers' Local Union No. 79*, 404 U.S. at 122 n.10 ("The findings and conclusions in a § 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination."); *Architectural Metal Workers Local 513 (Custom Contracting)*, 292 NLRB 792, 793 (1989). Here, because PMA challenges an essential element of the Section 8(b)(4)(D) violation – that is, whether Section 8(b)(4)(D) requires that the underlying work dispute involve competing claims by two groups of statutory employees as defined in the Act and whether that requirement was met – it can raise this issue before the Board for its consideration in the unfair labor practice proceeding.

However, PMA has refused to attempt to participate in this ongoing proceeding. PMA, like the District Court, relies on past denials of its requests to intervene in the Section 10(k) proceeding and an assumption that any request to intervene in the unfair labor practice proceeding would be futile. As we show below, however, this assumption is just that, and does not supply the District Court with jurisdiction to strike down an interlocutory decision of the Board. Nor can jurisdiction be supplied by the District Court's additional rationale: that a hypothetical settlement between the current parties to the unfair labor practice

proceeding might preclude the Board from issuing a final order subject to judicial review. (ER I 34:12-15; 54:1-6.)

1. Prior denial of PMA's intervention requests in the Section 10(k) proceeding does not support the District Court's conclusion that PMA does not have available means for judicial review through the pending Board case.

The District Court erred in concluding that *Leedom* jurisdiction was appropriate because PMA's requests to intervene in the Section 10(k) proceeding were denied by the Board. The Court focused only on the standards applied for intervention in the two administrative proceedings and the absence of any showing that the standards were different between the proceedings. (ER I 31-32.) The District Court concluded that PMA's opportunity to intervene in the unfair labor practice proceeding in which the Section 10(k) Decision is at issue was "more chimerical than real." (ER I 51:4.) Such speculation does not support the District Court's assertion of jurisdiction.

Under the Board's own Rules and Regulations, neither the administrative law judge (if PMA had attempted to intervene in the now-concluded unfair labor practice hearing), nor the Board (if PMA attempts to do so now) would be bound by the prior intervention rulings issued in the Section 10(k) proceeding. Both the administrative law judge and the Board are afforded broad discretion in determining requests to intervene. *See* 29 C.F.R. § 102.29 (upon a motion, the Regional Director or administrative law judge may permit intervention "deem[ed]

proper"); Section 10(b), 29 U.S.C. § 160 ("[i]n the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony").[18] Nor would the prior denials of intervention be "law of the case" in the unfair labor practice case, contrary to PMA's (and the District Court's) presumptions. (ER I 13:19-20; 50.) The Board has recognized that nothing in the law of the case doctrine prevents a presiding judge from revisiting earlier rulings before final judgment or decision. *See D.L. Baker*, *Inc.*, 351 NLRB 515, 528-29 (2007) ("law of the case is an 'amorphous concept' – it 'directs a court's discretion, it does not limit the tribunal's power'").[19]

[18] Further, when considering motions to intervene, the Board considers Section 554(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(c), which provides that the "agency shall give all interested parties an opportunity for . . . the submission and consideration of facts, arguments . . . when time, the nature of the proceeding, and the public interest permit . . . ." *See Camay Drilling Co.*, 239 NLRB 997, 998 (1978).

[19] This Circuit also recognizes that the law of the case doctrine is discretionary. In *In re Benny*, 81 F.3d 91, 94-95 (9th Cir. 1996), this Court refused to apply the law of the case doctrine to a prior decision denying a party's intervention, holding that "persons prematurely, and incorrectly, as it turns out upon full consideration of all the facts, denied leave to intervene can be retroactively granted Rule 24(b) leave in order to preserve their rights under the EAJA." *See also Disimone v. Browner*, 121 F.3d 1262, 1267 (9th Cir. 1997) (doctrine "does not rigidly bind a court to its former decisions, but is only addressed to its good sense."); *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984)("Law of the case is an equitable doctrine . . . .").

By focusing its inquiry solely on whether the agency's *test* for intervention was the same or different in the two administrative proceedings, the District Court failed to appreciate the distinctions between the proceedings that could warrant different considerations for deciding a new intervention request. (ER I 13:10; 31:24; 32:6.) Critically, it is well-settled that the nature of a Section 8(b)(4)(D) unfair labor practice proceeding adjudicated before an administrative law judge and ultimately the Board, is distinct from the initial Section 10(k) proceeding conducted before a hearing officer in a regional office. *See ITT*, 419 U.S. at 443-46. The principal object of a Section 10(k) proceeding is to settle jurisdictional disputes quickly and permanently by encouraging voluntary settlement or compliance. *Henderson*, 457 F.2d at 576 (citing *NLRB v. Radio & Television Broadcast Engineers (Columbia Broadcasting System)*, 364 U.S. 573, 579, 583 (1961)). As shown above, *supra* pp. 22-23, the 10(k) proceeding is not an adjudication, and the determination is not a final order of the Board. *ITT*, 419 U.S. at 443-44. Indeed, the Supreme Court in *ITT* recognized that the procedures of a Section 10(k) proceeding are "quite different" from those under Section 8(b)(4)(D): "Streamlined procedures were both designed and justified because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section . . . ." *Id.* at 439-40 (citations omitted). *See also* 29 C.F.R.

§ 101.34 ("The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board."). In contrast, the 8(b)(4)(D) unfair labor practice proceeding is an adjudication of a violation of the Act, resulting in a final, reviewable Board order. *See Shell Chemical Co. v. NLRB*, 495 F.2d 116 1122 (5th Cir. 1974); *NLRB v. Local 991, ILWU*, 332 F.2d 66, 69-71 (5th Cir. 1964); *ITT*, 419 U.S. at 446-47.

Because the focus and consequences of the Section 10(k) and Section 8(b)(4)(D) proceedings are fundamentally different, the Board could well conclude that PMA's intervention in the latter proceeding is warranted, despite its previous conclusion that PMA's intervention in the 10(k) proceeding was not. The Board's prior denials of PMA's intervention requests were based on its view that the record and briefs adequately presented the issues and the positions of the parties. In particular, the Board found that PMA raised the same claims as ILWU. (ER II 91, n.4.) However, given PMA's claims that the Board's Section 10(k) award in favor of the IBEW and against the ILWU will prejudice PMA's contractual rights, PMA may persuade the Board that PMA has a significant interest in the outcome of the unfair labor practice case that warrants intervention.[20] Notably, other entities

[20] Further supporting PMA's intervention is the fact that Counsel for the General Counsel has represented that he would not oppose an intervention request by PMA in the unfair labor practice proceeding. (ER I 37:7-12.)

seeking to protect contractual interests have been permitted to intervene as interested parties in Board proceedings. *See Camay Drilling Co.*, 239 NLRB 997, 998 (remanding to ALJ to permit trustees of pension trust fund to intervene in unfair labor practice proceeding); *Int'l Union of Operating Eng'rs, Local 12* (*Griffith Co.*), 212 NLRB 343, 345 (1974), *rev'd and remanded on other grounds sub nom. Griffith Co. v. NLRB,* 545 F.2d 1194 (9th Cir. 1976). For these reasons, it was error for the District Court to assume that the Board would make the same conclusion regarding PMA's participation and to base its assertion of jurisdiction on such an assumption.[21]

District courts previously have rejected extraordinary jurisdiction under *Leedom* where the plaintiff could have sought to participate in the relevant administrative proceeding. In *Steamboaters v. Federal Energy Regulatory Commission*, 572 F. Supp. 329 (D. Ore. 1983), the district court dismissed a *Leedom* action, requiring the plaintiff to first seek to exhaust its remedies before Federal Energy Regulatory Commission. The district court held that "Congress

[21] Even if the Board were to deny a request by PMA to intervene in the Section 8(b)(4)(D) case, that denial would be subject to judicial review in the court of appeals after the Board has concluded the unfair labor practice case and issued its final order. *See J.P. Stevens Employees Educ. Comm. v. NLRB*, 582 F.2d at 329; *Semi-Steel Casting Co. of St. Louis*, 160 F.2d 388, 393 (8th Cir. 1947)(court considered petition for review of a Board bargaining order filed by employees opposed to the union who had been denied the right to intervene in the unfair labor practice proceeding against their employer).

did not intend to create a 'system of bifurcated jurisdiction' with parties [in administrative proceedings] filing in the courts of appeals and non-parties filing in the district courts, only to have the district court decisions appealed to the courts of appeals." *Id.* at 331*; see also Potter v. Castle Constr. Co.*, 355 F.2d 212, 216 (5th Cir. 1966) ("Having failed to avail itself of its rights under the regulations and statute, Baker is in no position to complain now. Nothing in the statute gives a choice of forum to the employer affected."). *Cf. Ashley v. NLRB*, 255 Fed. Appx. 707, 709 (4th Cir. 2007) ("[A] plaintiff may not bypass a seemingly adequate administrative process and then complain of that process's constitutional inadequacy in federal court.").

Accordingly, the District Court erred in asserting *Leedom* jurisdiction where PMA has an available means, through the pending unfair labor practice case, for obtaining judicial review, but chooses not to seek to intervene in it.

2. Even if PMA is not a party in the pending Board unfair labor practice case, PMA can be "aggrieved" by a final Board order and obtain Section 10(f) judicial review.

The District Court correctly acknowledged there was a means for PMA to obtain judicial review of its claims: "if [PMA] can get to the Ninth Circuit and get in front of them with a petition for review, and then make [the] argument that the

whole thing is ultra vires, then there's your review. You don't need the district court." (ER I 17:4-8; 41:18-20.)[22]

It follows that assuming PMA is aggrieved by a final order of the Board in the unfair labor practice case, it will have an adequate alternative path to the statutorily-provided Section 10(f) judicial review *even if PMA is not a party* in the case. Section 10(f) of the Act permits "any person" – rather than "any party" – who is "aggrieved" by the Board's final order to seek judicial review in an appropriate circuit court. 29 U.S.C. § 160(f). To be "aggrieved" within the meaning of Section 10(f), a litigant must demonstrate that the Board's order has an "'adverse effect in fact.'" *Oil, Chem. & Atomic Workers v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982) (quoting *Retail Clerks Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965)). Accordingly, courts have entertained petitions for review filed by aggrieved "persons" that were not parties in the underlying administrative proceedings. *See Brentwood at Hobart v. NLRB,* 675 F.3d 999, 1005 (6th Cir. 2012) (parent company established that Sixth Circuit was appropriate venue for petition for review of Board order, where parent company was directly involved in operations of respondent nursing home, and was thus "aggrieved"); *Hamilton v. NLRB*, 160 F.2d 465 (6th Cir. 1947) (deciding nonparty discriminatee's Section

[22] At the hearing, counsel for the Board and PMA agreed, and the District Court found, that PMA did not have an avenue to this Circuit as a nonparty in the then-pending appeal of the Board's Section 10(l) injunction. (ER I 51:7-14.)

10(f) petition for review of Board order partially dismissing unfair labor practice complaint against respondent employer). Given PMA's assertions of injury suffered from the Section 10(k) Decision awarding the work to the IBEW-represented employees (Dkt. No. 14-1, at 14), if the Board upholds the Section 10(k) award in the unfair labor practice proceeding, PMA should be able to establish that it is an aggrieved person entitled to obtain judicial review under Section 10(f).[23]

Despite this additional avenue of judicial review for PMA even as a nonparty, the District Court erroneously concluded that *Leedom* jurisdiction existed because PMA might possibly be foreclosed from obtaining Section 10(f) review of a final Board order *if* a settlement occurs among the current parties, without PMA, that would preclude the entry of an appealable order. (ER I 54:1-11.) The District Court's extension of *Leedom* to such hypothetical circumstances where a settlement *might* preclude a means of review is an "analytical leap" that the district courts of this Circuit are not at liberty to take. *AMERCO,* 458 F.3d at

[23] On the other hand, if, in a subsequent petition for review, PMA cannot establish that it has been aggrieved "under section 10(f)'s broad standard of aggrievement," *Oil, Chem. & Atomic Workers*, 694 F.2d at 1295, then it is highly doubtful that PMA had standing to bring the *Leedom* action in the first place, which similarly requires a plaintiff to demonstrate an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

890.[24] For such exercise of jurisdiction essentially allows the exception to swallow the rule, as this extraordinary exception would be available whenever a plaintiff asserts an interest in an unfair labor practice proceeding to which it is not already a party and fears settlement of the administrative proceeding without the plaintiff's participation.[25]

Moreover, there is no evidence here that a settlement of the unfair labor practice case that would preclude Board and court review was being considered by the parties. Indeed, none of the District Court's inquiries at the hearing about the scope of any settlement could be definitively answered by the parties. (ER I 24-26; 34:12-19.) Nevertheless, on the basis of pure speculation, the District Court concluded that a settlement possibly might deprive PMA of an alternative avenue of review.

In fact, any future settlement among the parties at this time, when the unfair labor practice case is now pending before the Board upon exceptions to the

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[24] *Cf. Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011)(district court's assertion of subject-matter jurisdiction on the basis that a wholly speculative event might occur held to be "manifest error[] of law or fact upon which the judgment rests.").

[25] While PMA is not a party to the unfair labor practice case, parties often settle amongst themselves. Such non-Board settlements may include participation by a non-party and may lead to the withdrawal or dismissal of Board proceedings. *See* NLRB Case Handling Manual Sec. 10140 ("Non-Board Adjustments") (*available at* http://www.nlrb.gov/sites/default/files/documents/44/master-2011-ulp.pdf).

administrative law judge's decision, *would* likely be subject to Board approval and court review. Indeed, the parties to the unfair labor practice proceeding may agree to a "formal" settlement that, by definition, requires Board approval and often contains the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order. *See* 29 C.F.R. § 101.9(b)(1). Alternatively, the charging party in the case, upon a "non-Board" (private) settlement agreement with the respondent, may file a request with the Board to withdraw its charge based on the settlement, which could result in a final Board order. *See Int'l Longshoremen's Ass'n (Amstar Sugar Corp.)*, 301 NLRB 764, 764 (1991) (upon request by charging party to withdraw a charge following a judge's decision and recommendation that a violation of the Act be found, Board approved a private settlement over the NLRB General Counsel's opposition). Such Board approval of a settlement, secured after the opening of the administrative law judge hearing, is itself a final order that is subject to judicial review. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 121 (1987) ("Judicial review is authorized from the Board's decision" to approve a settlement that occurs once the hearing on the complaint begins); *see also Bloom v. NLRB*, 153 F.3d 844, 849 (8th Cir. 1998) (holding that Bloom was entitled to review of a Board order approving a settlement between his employer and union), *vacated on other grounds*, 525 U.S. 1133 (1999).

Thus, a settlement among the parties to the unfair labor practice could easily result in a reviewable Board order. If PMA is aggrieved by that order, it will have its day in court consistent with the Act's Section 10(f) statutory review procedures. *See Int'l Longshoremen's & Warehousemen's Union, Local 50*, 504 F.2d at 1211-13 (accepting PMA's argument, on review of a final Board order in a section 8(b)(4)(D) case, that an underlying section 10(k) award was not sustainable). In these circumstances, PMA failed to satisfy its burden to demonstrate jurisdiction on the basis that it lacked an alternative means to obtain judicial review of the Board's Section 10(k) Decision. *See Chandler v. State Farm Mut. Auto Ins. Co.,* 598 F.3d 1115, 1122 (9th Cir. 2010) (party asserting federal subject matter jurisdiction bears the burden of proving its existence).

In short, PMA has alternative means of obtaining judicial review, and on this basis alone, *Leedom* jurisdiction was inappropriate. Consequently, the Court need not reach the second conjunctive *Leedom* requirement – that there be a "strong and clear" showing that the Board violated a clear statutory mandate. *See Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002). Nevertheless, as we show below, the Board did not violate a clear statutory mandate.

C. The District Court Erred When It Declared that the Board Violated a Clear Statutory Mandate

The District Court further erred in concluding, with little explanation, that the Board's decision "did in fact violate a clear statutory mandate . . . ." (ER I

49:14-15.) As shown below, the Board appropriately exercised its discretion to make a determination where a statutory employer was the subject of unlawful conduct.

Under the Act, upon the filing of ICTSI's charge alleging a violation of Section 8(b)(4)(D), the Board is directed to suspend proceedings on the charge until the provisions of Section 10(k) were satisfied. *NLRB v. Plasterers' Local Union No. 79,* 404 U.S. at 116. Thus, "[w]henever it is charged" that a violation under Section 8(b)(4)(D) has occurred, Section 10(k) directs the Board to "hear and determine" which of competing groups of employees is entitled to the disputed work, absent evidence that all the parties have adjusted the dispute or have agreed to be bound by a voluntary method of adjustment. *Id*. at 123-24. Critically, before the Board proceeds with determining a dispute pursuant to Section 10(k), the Board need only find that there is "reasonable cause to believe" that Section 8(b)(4)(D) of the Act has been violated. *ITT*, 419 U.S. at 446 n.16, 447. This standard requires finding that there is reasonable cause to believe that: (i) there are competing claims to the disputed work among rival groups of employees, (ii) a party has used proscribed means to enforce its claim to the work in dispute, and (iii) the parties have not agreed on a method of voluntary adjustment of the dispute. *See Int'l Union of Operating Engineers Local 150* (*Thomas Indus. Coatings, Inc.*), 345 NLRB 990, 991 (2005); *Local 3, Int'l Bhd. of Electrical Workers (Slattery*

Skanska, Inc.), 342 NLRB 173, 174 (2004).

The Act does not condition the holding of a Section 10(k) hearing, or the Board's work assignment determination under that section, on the actual finding of the elements of a Section 8(b)(4)(D) violation. Indeed, the Act provides that the Section 10(k) proceeding *precede* the issuance of any administrative unfair labor practice complaint on the Section 8(b)(4)(D) charge. As the Supreme Court has stated: "[t]he Board's attention in the § 10(k) proceeding is not directed to ascertaining whether there is substantial evidence to show that a union has engaged in forbidden conduct with a forbidden objective. Those inquiries are left for the § 8(b)(4)(D) proceeding." *ITT*, 419 U.S. at 445. Rather, "[the] § 10(k) proceeding is a comparative proceeding aimed at determining which union is entitled to perform certain tasks." *Plasterers' Local Union No. 79*, 404 U.S. at 135. And, as noted above, the 10(k) determination "is not itself a 'final disposition.'" *ITT*, 419 U.S. at 444.

Section 10(k) grants the Board "powers which are broad and lacking in rigid standards to govern their application." *NLRB v. Radio & Television Broadcast Engineers (Columbia Broadcasting System)*, 364 U.S. at 579, 583. While the Supreme Court has noted the lack of standards in Section 10(k), it recognized that "[e]xperience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." *Id.* at 583. Thus, the Board has

rejected the formulation of "general rules" for making jurisdictional awards and instead, adopted a policy of deciding each case "on its own facts," with due consideration for all relevant factors. *Int'l Ass'n of Machinists, Lodge No. 1743 (J.A. Jones Constr. Co.)*, 135 NLRB 1402, 1410-11 (1962).[26] "Every decision will have to be an act of judgment based on common sense and experience rather than on precedent." *Id.* at 1411. In so exercising its judgment and resolving work disputes, the Board "is afforded considerable leeway." *Int'l Longshoremen's and Warehousemen's Union, Local 14 v. NLRB,* 85 F.3d 646, 648 (D.C. Cir. 1996) ("*ILWU, Local 14*").

Similarly, the Board has broad discretion in defining what constitutes a jurisdictional dispute warranting resolution under Section 10(k). *Id.* Parties previously have made challenges to the Board's authority to decide work disputes "that do not precisely fit the model . . . ." *Id.* Thus, in *ILWU, Local 14*, the union argued that no jurisdictional dispute existed because rather than the typical dispute between two competing unions with an employer disinterested in the outcome, the employer "instigated this dispute" by changing its operations (cutting out a middleman), which resulted in the union losing the work to the employer's own,

[26] These factors include, but are not limited to: the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. *Id.*

unrepresented employees. The D.C. Circuit nonetheless enforced the Board's decision to assert jurisdiction and find a violation of Section 8(b)(4)(D), despite that the dispute was not between two competing unions. *Id.* at 652. The court noted that "this issue, like a number of others arising under the NLRA, is one in which the Board must use its expertise to determine, on a case-by-case basis, how to apply the law," and accordingly applied *Chevron* deference to the Board's determination. *Id.* at 652.[27] This decision echoed prior opinions where other courts upheld the Board's determination of jurisdictional disputes that were not between competing unions. *See, e.g., Local 978, United Bhd. of Carpenters and Joiners v. Markwell*, 305 F.2d 38, 47 (8th Cir. 1962) (under Section 8(b)(4)(D), an employer's assignment of work to his own unrepresented employees is entitled to the same statutory protections and dispute-settling procedures as an assignment to a union).

Accordingly, the Board acted well within this broad discretion in asserting jurisdiction and making its 10(k) determination here. Initially, no party sought to quash the notice of 10(k) hearing on the grounds that the Board did not have jurisdiction to determine the dispute because one group of employees claiming the disputed work was employed by a public entity; it was only after the Section 10(k) hearing was conducted that ILWU and PMA, as an intervenor-movant, raised this

[27] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

argument. (ER I 91.) Thus, after the conduct of the hearing, the Board proceeded to decide the dispute upon the parties' stipulation that (i) both the ILWU and the IBEW claimed the work in dispute on behalf of the employees they represented, and (ii) IBEW used proscribed means to enforce its claim to the work in dispute. (ER II 92.) In response to the ILWU's argument raised after the hearing regarding the Port's status as a public entity, the Board concluded that "Section 8(b)(4)(D) is applicable because in a 10(k) case, the Board need have jurisdiction only over the employer that is the target of a respondent union's unlawful conduct." (ER I 92.) The Board reasoned that the language of Section 8(b)(4)(D) "shows the clear intent of Congress to protect not only employers whose work is in dispute from such [proscribed] activity, but *any* employer against whom a union acts with such a purpose." (ER I 92 n.5.) Here, the Board concluded, "there is reasonable cause to believe that IBEW threatened to picket ICTSI with an object of forcing ICTSI not to cause reassignment of the disputed work from employees represented by IBEW to employees represented by ILWU." (ER I 92.) It relied on two prior Board decisions in which it decided jurisdictional disputes where, similarly, the employer that was the object of the unlawful conduct did not actually control the disputed work.[28] It found distinguishable a prior Board decision quashing a notice of 10(k) hearing, relied upon by ILWU, where, unlike here, work stoppages were directed

[28] *Int'l Longshoremen's Ass'n, Local 1911 (Cargo Handlers, Inc.*), 236 NLRB 1439, 1440 (1978); *Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484 (1985).

at a non-statutory employer (the New York City Board of Education), and no threats or other unlawful conduct were directed at a statutory employer. *Id.* (distinguishing *Electrical Workers Local 3 (Eugene Iovine, Inc.)*, 219 NLRB 528 (1975)). This prior Board decision thus left unresolved the question whether the Board would have jurisdiction over the dispute if threats had been directed at the statutory employer. Indeed, the Board had historically adjudicated jurisdictional disputes at the Port of Portland, where the Port employed one group of employees. *See, e.g.*, *ILWU, Local 8 and Local 40* (*Port of Portland*), 233 NLRB 459, 461-62 (1977) (awarding work to employees of statutory employer rather than to ILWU-represented employees of Port). In these circumstances, the District Court erred in concluding that the Board acted in excess of its delegated powers and contrary to a clear and mandatory statutory prohibition when it proceeded to resolve a very real labor dispute between two competing unions for the assignment of work.

Moreover, as explained above (*supra* p. 44), the Section 10(k) Decision is not the Board's final decision on the merits of the dispute. Rather, in the pending unfair labor practice proceeding, the Board will be able to address and reconsider any arguments challenging the Section 10(k) Decision (*see supra* pp. 30-31). The Board may reverse its prior decision and conclude, in its discretion, to quash the Section 10(k) proceeding and award. Alternatively, the Board might further respond to the arguments being presented or expand its rationale in support of the

Section 10(k) award. Clearly, before the Board decides the unfair labor practice case, any judicial review of the Section 10(k) decision is premature. And at this time, "the § 10(k) decision standing alone, binds no one." *Plasterers' Local Union No. 79*, 404 U.S. at 126.

In any event, no mandatory language in the Act addresses whether the Board may proceed with a Section 10(k) hearing and decide a jurisdictional dispute where a statutory employer is threatened about the assignment of work, but employees performing the disputed work are directly employed by a public employer. In the absence of language precluding the application of Section 10(k), there can be no strong and clear demonstration that the Board "disregarded a specific and unambiguous statutory directive" in issuing the Section 10(k) decision. Rather, the Board's initial determination to assert jurisdiction in the Section 10(k) proceeding upon its finding reasonable cause to believe that Section 8(b)(4)(D) was violated in these circumstances is surely "plausible," precluding jurisdiction under *Leedom*. *See Staake v. Dep't of Labor*, 841 F.2d 278, 282 (9th Cir. 1988) (rejecting application of *Leedom*, and finding that "where, as here, the statute is capable of two plausible interpretations, the . . . decision to adopt one interpretation over another cannot constitute a violation of a clear statutory mandate"); *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 235 (4th Cir. 2008) (*Leedom* jurisdiction is appropriate only where there is a "'strong and clear demonstration'

of a violation of a clear, specific and mandatory statutory provision, or whether the agency's view, while perhaps not compelling beyond cavil, is nevertheless 'plausible.'").

Moreover, the Board's construction of the Act's provisions is entitled to deference, which this Court has recognized even where the "seemingly clear language" of the statute provided otherwise. In *Marriott Corp. v. NLRB*, 491 F.2d 367 (9th Cir. 1974), this Court enforced a Board order finding a violation of the "hot cargo" provision of Section 8(e) of the Act, 29 U.S.C. § 158(e), which prohibits certain agreements between "any labor organization" and "any employer" in which the employer agrees to refrain from, *inter alia*, doing business with any other person. The Board voided such an agreement between an airline employer, which is subject to the Railway Labor Act rather than the National Labor Relations Act, and a union that represented the airline's catering employees. The Court noted that the Board was required to decide whether Section 8(e) was limited to agreements between statutory labor organizations and employers, or whether the ban was intended to be broader and apply to "any person," as provided for in Section 8(b)(4)(B) of the Act. *Id.* at 370. In enforcing the Board's decision to apply Section 8(e) to "any person," the Court examined "the reasoning of the majority of the Board" in light of statutory language, legislative history, and caselaw, and "found it convincing." *Id.* at 370. It also noted that "[w]hether the

issue involves a jurisdictional determination or a substantive application the experienced judgment of the Board is entitled to great weight." *Id*. *See also City of Arlington v. FCC*, -- U.S.--, 133 S. Ct. 1863, 1871 (U.S. May 20, 2013) (an agency's determination of its own jurisdiction is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984)).

Accordingly, for the foregoing reasons, the Court should reverse the District Court and find that the Board did not violate a clear statutory mandate.

CONCLUSION

As shown, the District Court erred in asserting jurisdiction to review and vacate an interlocutory decision of the Board. *Leedom* is a very limited exception intended to be rarely applicable, and not where judicial review has been specifically provided by statute and is available to the plaintiff. *MCorp*, 502 U.S. at 43. In these circumstances, PMA has available means through the unfair practice proceeding to obtain judicial review. Moreover, PMA has failed to make a "strong and clear" showing that the Board violated a clear, statutory mandate of the Act. Accordingly, the Board respectfully requests this Court to reverse the District Court's Order vacating the Board's Section 10(k) Decision for lack of subject matter jurisdiction.

STATEMENT OF RELATED CASES

Board counsel is unaware of any related cases currently pending in this Court.

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