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Labor Law--Choice of An Appropriate Bargaining Unit--Craft Severance

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anything better.25 This produced a clear conflict between the First Circuit and the Sixth Circuit. If either the Commissioner appeals Correll or the taxpayer appeals Bagley it is likely that the Supreme Court would review in order to reconcile the conflict between the circuits.

If the Supreme Court declines to take action or is not given the opportunity to do so, then the problem will have to be remedied by Congress. A suggested draft for Code revision has been advanced by the American Law Institute.26 It advocates the elimination of the words “away” and “home” so as to adhere to the essential principle that an expense of travel in order to be deductible, must have been incurred in pursuit of business. There is no emphasis on the overnight aspect; probably, because the overnight requirement was introduced by the Commissioner and is not to be found in the legislative history of the statute.27

Regardless of whether the “overnight rule” is deemed desirable or not, it is imperative that the problem which exists in this area be recognized. Definitive action must be taken so that the rule will be unequivocally accepted or rejected. If it is rejected, additional consideration should be given to the formulation of some test by which the taxpayer will be able to determine whether the cost of his meals in pursuit of business is deductible. Otherwise the taxpayer will be required to litigate in order to ascertain whether the cost of meals on a business trip on which he did not stay overnight is deductible.

Jacob Michael Robinson

Labor Law—Choice of An Appropriate Bargaining Unit—Craft Severance

The National Labor Relations Board recently announced a policy change concerning union petitions for recognition of a bargaining unit which would be separated from other plant workers.

25 Commissioner v. Bagley, 19 Am. Fed. Tax R.2d Para. 67455 (1st Cir. 1967). In deciding this case the court said that its previous decision in Chandler v. Commissioner, 226 F.2d 467 (1st Cir. 1955), was an instance of a hard case making bad law and that it was wrongly decided.
26 ALI. FED. INCOME TAX STAT. § X 151(b)(5) (Feb. 1954 Draft).
The new policy was announced in three separate decisions. In the lead case the petitioning union sought to sever 12 instrument mechanics from a production and maintenance unit of 280 employees. Severance was denied. Mallinckrodt Chemical Works, Uranium Division, 162 NLRB No. 48 (1966). The second case involved a petition by a union seeking to represent 25 tool and die workers by severing them from a production and maintenance unit of 75 employees. Severance was also denied in this case. Holmberg, Inc., 162 NLRB No. 53 (1966). In the third case the petitioning union sought an election in a separate unit of 40 electricians. The entire production and maintenance force numbered 950 employees who were not represented by a union. The petition for election was granted. E. I. Dupont De Nemours and Co., May Plant, 162 NLRB No. 49 (1966).

The Board's policy on craft severance has changed many times since passage of the Wagner Act in 1935. The fluctuation has been due in part to the incompatibility of two of the basic objectives of our national labor relations policy, i.e., the stability of industrial relations and the right of employees to choose their own bargaining representative.¹

The Board gave precedence to the self determination of the employees in Globe Mach. & Stamping Co.² in 1937. In this case the craft employees were permitted to decide by separate election whether they wanted to be represented separately as a craft unit or be included in a broader industrial unit. Two years later, however, the Board refused to sever a craft from an existing production and maintenance unit in American Can Co.³ Under the doctrine of this case, craft units would not be served where broader industrial units were already well established.

The Board had already eased away from this rigid rule⁴ before the Taft-Hartley Act introduced the 9(b)(2) proviso which precluded the Board from deciding that any unit was inappropriate on the ground that a different unit had previously been determined by the

² 3 NLRB 294 (1937).
³ 13 NLRB 1252 (1939).
⁴ General Electric Co., 58 NLRB 57 (1944).
Board. In *National Tube Co.*, the Board refused to sever a unit of bricklayers in the basic steel industry. As a basis for its refusal the Board stressed the pattern of bargaining and the integration of the operations of the industry. This doctrine, which shut out any possibility of craft severance in the basic steel industry, was extended to three other industries as well. The Board changed its policy again in *American Potash and Chem. Corp.* in 1954. In that case the Board held that in the future severance would depend on whether the unit sought to be represented was a true craft or departmental unit and whether the petitioning union was one which had traditionally represented this type of craft or departmental unit. However, the Board stated that it would continue to disallow severance in the four industries where the *National Tube* doctrine had been applied.

The *American Potash* doctrine represented the general administrative policy of the Board until the three decisions under discussion overruled it. In *Mallinckrodt* the Board listed several factors which it considered in making its decision. These factors were basically: (1) whether the unit being sought was a true craft or departmental unit; (2) the history of bargaining at the plant involved, and whether this has produced stability in labor management relations; (3) the extent to which the employees have maintained a separate identity while being included in a broader bargaining unit; (4) the history and pattern of bargaining in the industry involved; (5) the degree of employee integration in the plant production processes; and (6) the qualifications of the petitioning union, including the union's experience representing employees like those it seeks to sever. The Board stated that in the future these factors and any other pertinent ones which might arise would be used in determining on a case-by-case basis whether the unit sought to be severed is an appropriate one. This method of determination is to be applied to all industries. The controlling question in every case

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6 76 NLRB 1199 (1948).  
8 107 NLRB 1418 (1954).  
9 162 NLRB No. 48 (1966).
will be whether severance will effectuate the policies of the Act. It is clear that this question can be more easily answered on a case-by-case basis rather than by trying to follow general rules and guidelines. By extending the new policy to all industries, the Board modified the National Tube doctrine. However, the fact that an industry is highly integrated will still weigh heavily against severance.

The Board's recent change of policy was not unforeseen. The policy followed by the Board since American Potash has been criticized as being arbitrary because it precluded severance in four industries and granted it in others whenever a true craft or departmental unit was sought by a traditional representative. The Fourth Circuit, in NLRB v. Pittsburgh Plate Glass Co., refused to enforce the Board's order requiring the employer to bargain with a union which had won a severance election. The court's premise was that the Board had been directed by statute to decide the appropriate bargaining unit on a case-by-case basis. By this view the National Tube doctrine was wrong because it was based on the Board's prior determination of a more appropriate bargaining unit. Furthermore, even if the National Tube doctrine were acceptable, the Board's refusal to extend it to the highly integrated plate glass industry was discriminatory. Under the court's interpretation of the Act, the American Potash doctrine also must fail because the Board had improperly delegated its statutory duty to the employees by allowing them to choose the appropriate bargaining unit. In subsequent cases the Fourth Circuit has adhered to this viewpoint. In Mallinckrodt the Board accepts the Fourth Circuit's view and quotes from the opinion of the Pittsburgh Plate Glass Co. case.

The Board indicated some of the factors which it would consider in determining the appropriate bargaining unit. An analysis of the facts of each case, however, indicate that the real deciding factor was the history of bargaining. In all of the cases the Board found the unit sought to be separated to be a true craft or departmental unit. Only in Mallinckrodt did the Board find the petitioning

12 Rohm & Haas Co. v. NLRB, 362 F.2d 410 (4th Cir. 1966) (dictum); Royal McBee Corp. v. NLRB, 302 F.2d 330 (4th Cir. 1962); NLRB v. Industrial Rayon Corp., 219 F.2d 809 (4th Cir. 1961).
union not to be a traditional representative of the craft sought. However, the Board under its new policy, said this factor is not controlling and is considered with regard to whether the petitioning union is qualified to represent the employees of the craft. The petitioning union in Mallinckrodt was not found by the Board to be unqualified, and the language in the decision tends to show it had the proper qualifications. The history and pattern of bargaining in the industry were not discussed. This leaves the factors of the history of bargaining in the plant, the separateness of identity, and the integration of the workers into the plant processes. In Dupont, where there was no previous bargaining history, the factors of separateness of identity and the integration of the workers into the plant processes were decided in favor of severance. Yet on essentially the same fact situations the Board decided these two factors in favor of no severance in the Mallinckrodt and Holmberg decisions. There was a 25 year history of bargaining in the former decision and a 24 year history of bargaining in the latter. The amount of integration between the two units and the separateness of identity retained by them are not distinguishable on the facts of these cases. Aside from the fact that the petitioning union was found not to be a traditional one in Mallinckrodt, the only real difference upon which these cases can be distinguished is the history of bargaining. This was the viewpoint of the dissent in Mallinckrodt and Holmberg.

In subsequent decisions by the Board severance has not been allowed where there was history of bargaining in the broader industrial unit. In North American Aviation, Inc. severance of a unit of welders was not allowed where there was a previous two year bargaining history. Severance of a unit of maintenance workers was allowed in Charles Pfizer & Co., Inc. where there was no previous bargaining history. Severance was not allowed a unit of tool room employees in Universal Form Clamp Co. where there was a twenty year bargaining history.

It would appear that the Board will stress any facts, no matter how trivial, to show there was no separateness of identity and that the workers in question were integrated into the plant processes

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13 162 NLRB No. 111 (1967).
14 162 NLRB No. 137 (1967).
15 163 NLRB No. 23 (1967).
whenever there is a previous history of bargaining. However, when there is no history of bargaining, these factors will be regarded more realistically and severance will be more likely.

There is no question that the Board has the discretion to determine the appropriate bargaining unit in a severance case. The only limitation is that their decision cannot be based on the fact that a previous determination in favor of a broader unit had been made.\textsuperscript{16} Courts will not overrule the Board’s determination unless it is arbitrary or unreasonable.\textsuperscript{17} It is when the Board follows the tendency of any administrative body which is overloaded with work to lay down general rules and guidelines that it is in danger of being reversed by the courts. These general rules do not always give reasonable results when applied to the facts of a particular case. The Board has stated that it will proceed on a case-by-case basis in deciding what is the appropriate bargaining unit. However, if the Board’s actions in these three cases and subsequent ones are any indication, it is in danger of returning to a doctrine not unlike that of American Can. The Board is in danger of establishing a rule that severance will not be granted where there is a history of bargaining in the production and maintainance unit.

Jerry David Hogg

Torts—Effect of a Release of an Original Tort Feasor
Upon the Malpractice of Attending Physician

\( P \) suffered severe injuries as a result of an automobile accident. \( D \), a specialist in plastic surgery, was engaged by \( P \) for treatment of his facial injuries. \( P \) commenced an action against the original tort-feasor which was settled by the entry of a consent judgment.\textsuperscript{1} Subsequently \( P \) discovered that the series of reconstructive opera-

\textsuperscript{17} NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167 (4th Cir. 1959); Hotel Employees Local No. 255 v. Leedom, 358 U.S. 99 (1958).

\( ^1 \) The court considered the consent judgement the same as a release. This comment will likewise treat it as a release without discussion and consider only the problems connected with releases as a bar to an action against negligent physician.