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DETERMINATION OF THE APPROPRIATE UNIT FOR
COLLECTIVE BARGAINING

JEROME ACKERMAN *

LAWRENCE A. SULLIVAN **

The provisions of Section 9 of the National Labor Relations Act, as amended, establish a procedure for ascertaining the identity of the representatives of employees with whom an employer will be required to engage in collective bargaining. The ultimate issue of identity involves two component questions of fact: (1) What is the appropriate unit and (2) What union, if any, do a majority of employees within that unit prefer? While the latter issue is resolved through the relatively simple process of an election, the former is more complex. It requires the NLRB to appraise a wide variety of evidential materials in order to comply with the statutory mandate that "The Board . . . decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by (the) Act, the unit appropriate for collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof. . . ."

Since our national labor policy is based on the principle that a representative selected by a majority of employees is the representative of all, the appropriate unit is of great significance. From the standpoint of a union, under the majority-rule principle, victory or defeat in a representation election might turn upon the definition of the unit. Further, union bargaining power might be materially enhanced or weakened by the inclusion or exclusion

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3 But it is not necessary that NLRB representation proceedings be invoked in order for the employer's duty to become operative. The duty exists whenever a labor organization represents a majority of employees in an appropriate unit, and the question whether the unit is appropriate may be determined after the employer is charged with a refusal to bargain.
5 "Perhaps no other phase of Board policy approaches so closely the heart of the collective bargaining system upon which the edifice of American industrial relations exists." Hoover Commission, Committee on Independent Regulatory Commissions, Staff Report on the NLRB I-5 (1948).
6 See Brooks, Unions of Their Own Choosing 88-90 (1939).
COLLECTIVE BARGAINING

of certain types of employees. Moreover, unit determinations are of major importance to employers. Whether an employer must deal with one representative or many, whether the danger of a strike in connection with contract negotiations must be faced once or several times each year, and whether a strike will totally or partially cripple plant operations, may depend largely on whether employees are grouped in a single unit or in several. Finally, the cleavage between the CIO and AFL on political and economic ideology as well as on labor organization structure indicates that NLRB unit determinations also have a political and economic impact that transcends the narrow interests of the parties to the bargaining relationship and becomes a matter of importance to the public at large.

The purpose of this study is to examine the procedure under which this important finding is made, to inquire into the manner in which the Board has evaluated variant factors in making the determination and to appraise the extent to which unit designations are subject to judicial review.

I. NLRB Procedures in Unit Cases

A. Investigation and Informal Processes

When a representation petition is filed in one of the NLRB regional offices, it is investigated by a field examiner. This investigation has two aspects: discovery of facts which may bar the unit determination, and inquiry into the basis for the unit proposed.

Before the Board can set its administrative machinery in motion, it must be established that the petitioning labor organization is in compliance with the filing requirements of the statute, and, of course, the NLRB must have and be willing to assert

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7 For example, inclusion of a small group of strategically situated employees, such as powerhouse workers, might greatly increase union bargaining power. On the other hand, a union might readily seek to exclude a large group of female employees because they had never shown pro-union sympathy. See Pacific Gas & Elec. Co., 3 NLRB 835 (1937).

8 61 Stat. 145, 146 (1947), 29 U.S.C. §159 (f) (g) (h) (Supp. 1950). These include the filing of a statement identifying the organization's officers and outlining salaries, dues, and certain union constitutional provisions, together with a yearly financial statement which has been distributed to all union members. In addition, all the officers must file annually with the NLRB an affidavit denying affiliation with or membership in the Communist party or belief in the overthrow of government by force or illegal means. If the employer petitions for an election, a union must, nevertheless, be in compliance in order to appear on the ballot.
jurisdiction. Even if these matters present no obstacle, it is still possible that the Board will not proceed. If, within twelve months prior to the filing of the petition, a valid NLRB election has been held among employees in the same unit described in the petition, the statute bars a redetermination of the unit. Further, if a valid collective bargaining agreement exists covering employees in the unit sought by the petition and the agreement will expire within two years, the Board, in the interest of stability, will refuse to process the representation petition of a rival union. Ordinarily, these questions can be settled by the Regional Director on the basis of the investigator's report. If they are resolved adversely to the party seeking dismissal of the petition, he may have an opportunity to submit evidence and argument on his objections at the formal hearing.

Assuming that all of the possible initial barriers are inapplicable, the second aspect of the investigation may include on-the-spot observation of the business or manufacturing operations, interviews with workers, union officials and representatives of management, and examination of various documentary data relevant to determination of the appropriate unit. Such inquiries may be conducted even if all the interested parties are in accord as to the appropriateness of the unit proposed in the petition; for agreement of the parties is not a controlling criterion for the NLRB finding. On the basis of this investigation, a report is made to the Regional Director as to whether the composition of the unit is such that the Board is likely to find it appropriate.

If the proposed unit is regarded as inappropriate and the union seeking certification is unwilling to amend the petition, the

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9 NLRB jurisdiction extends to businesses "affecting [interstate] commerce", but the Board has adopted a policy of discretionary refusals to assert jurisdiction in industries which have a relatively slight effect on interstate commerce. See Note, 64 Harv. L. Rev. 781, 783-85 (1951).


11 The term "valid", as here used, is a word of art. It requires that the agreement (a) be in writing, Eicor, Inc., 46 NLRB 1035 (1943); (b) not be restricted in coverage to members of the union, Ball Bros. Co., 54 NLRB 1512 (1944); (c) cover an appropriate unit, Dolese & Shepard Co., 56 NLRB 532 (1944); (d) provide substantive terms of employment, Corn Products Refining Co., 52 NLRB 1324 (1943); (e) be executed without notice of another union's conflicting claim to bargaining rights, General Electric X-Ray Corp., 67 NLRB 997 (1946).

12 See e.g., Reed Roller Bit Co., 72 NLRB 927 (1947). But the Board will allow a longer period if such contracts are customary in the industry. See e.g., Trailer Co., 51 NLRB 1106 (1945); Owens-Illinois Pacific Coast Co., 36 NLRB 990 (1941).

13 For example, prior contracts and correspondence.
Regional Director may dismiss the petition without a hearing. An appeal to the NLRB from such a dismissal may be taken, and if the Board is doubtful about the ruling of the Regional Director, an order that the matter proceed to a formal hearing will be issued. In general, however, since the Regional Director is likely to dismiss only where inappropriateness appears clearly evident, it is rare that his rulings are reversed.

When the investigation reveals that the unit is probably appropriate, it may be that one of the parties will wish to contest that issue. In such cases it is not uncommon for the field examiner to arrange joint conferences with all of the interested parties in an effort to reach agreement on a unit which is likely to meet with Board approval. If an agreement can be reached, it may be embodied in stipulations as to the unit only, but often there is also an agreement consenting to the holding of an election without a formal NLRB order. It is particularly important that the stipulation be unambiguous as to which employees are to be included in the unit and it is not considered overly cautious, in addition, to describe carefully, those who are to be excluded. Clarity on these items eliminates the principal basis for challenging ballots, thus avoiding delay and disagreements when the election is conducted. Although stipulations of the parties would not be binding on the Board, such agreements are normally framed with the advice of regional office personnel. Consequently, where stipulations are feasible, the unit issue is normally settled without further serious consideration by the Board, and the finding is tantamount to a mere formality.

B. Formal Hearing

If no accord on the unit issue is reached, the matter must be set for a formal hearing. In contrast to an unfair labor practice hearing, the representation hearing is not accusatory in nature. The Board does not take an adversary position, and the presiding officer may be an attorney on the regional staff, a trial examiner or a field examiner. His sole function is to develop a record upon which the Board can later base its finding.

15 See Silverberg, How to Take a Case Before the NLRB 56 (1949).
16 Cf. Richards-Wilcox Mfg. Co., 2 NLRB 97 (1936); Benjamin Fainblott, 1 NLRB 864 (1936); Segall-Maigin, Inc., 1 NLRB 749 (1936).
Evidence introduced at such a hearing is both testimonial and documentary, and covers a wide range of subjects. For example, the employer may testify in considerable detail as to the nature of plant operations, the departmental structure and the extent to which job classifications allow interchangeability of employees. Union officials may offer in evidence prior collective bargaining agreements which reveal the historical patterns in the industry or the particular plant. And occasionally individual employees may testify as to their preferences. At the conclusion of the hearing the parties may argue orally and submit briefs. Representation proceedings are unusual, if not unique, in that the presiding officer makes no recommendations or decision on the merits. He merely transmits to the Board in Washington the record together with an analysis of the facts in the case, the issues presented, the pertinent evidence on the issues and a brief statement of any unusual or important procedural questions. The hearing officer's analysis is not made available to the parties.

This fact-finding technique, used by the NLRB only in representation proceedings, was not adopted by the Board as a matter of choice, but was made mandatory by the 1947 amendments to the National Labor Relations Act. In limiting the function of hearing officers, Congress was apparently motivated by a feeling that the Board should carefully consider and be strictly responsible for each unit case without being subject to any influence from the lower echelons of the agency. That this is a sound approach to the administrative problem involved seems highly doubtful, particularly in view of the non-accusatory character of the proceeding. It appears to be generally recognized that it is a physical impossibility for top members of an agency to give detailed consideration to all cases. The obvious effect of this requirement is to impair the efficiency of the NLRB as a fact-finding body, since the hearing officer, the one person who has had an opportunity to evaluate the evidence at first hand, is completely insulated from the Board.

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19 "Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto." 61 Stat. 144 (1947), 29 U.S.C. §159(c) (Supp. 1950).
21 Id. at 34.
22 Hoover Commission, Committee on Independent Regulatory Commissions, Staff Report on the NLRB IV-6, 9 (1948).
Even though the hearing officer makes no decision or recommendation, responsibility for the development of a highly informative record and a sound analysis of the factual issues makes his function an important one. Effective execution of his task is by no means simple. He must frequently rule on the admissibility of evidence23 and on procedural motions that may be made during the course of the hearing. Often it will be necessary for him to suggest the order in which evidence on various issues should be introduced, or that counsel for the participating parties explore more fully certain lines of inquiry. Sometimes the hearing officer himself will interrogate witnesses or even call other witnesses to testify.24 It is apparent, therefore, that the hearing officer must be thoroughly conversant with the general problems involved in unit determinations and with the criteria which the Board regards as basic to that issue. Moreover, an ability to understand and analyze complex factual materials is essential. Thus the qualifications necessary for this type of "trier" indicate the desirability of utilizing members of the legal staff for this function; this was recently suggested by the General Counsel of the agency.25

In the vast majority of appropriate unit cases the NLRB does not permit the parties to argue orally before it, but decides the issue solely on the basis of the record, the hearing officer's analysis and the briefs.26 The few cases in which the Board allows or requests oral argument involve fundamental questions of policy or situations so likely to recur that the finding will have important precedent setting value. Occasionally, the Board desires oral argument because of inadequacies in the record. In instances other than these, the need for oral argument seems doubtful, at best, and is clearly outweighed by the expeditious handling of representation petitions that is possible under the current procedure. Thus, the lack of opportunity for counsel to exercise direct persuasion, apart from briefs, on the actual trier of fact has not been regarded as a deficiency in the unit determination process.27

23 Common law rules of evidence are inapplicable, NLRB Rules and Regulations, 29 Code Fed. Regs. §102.58 (a) (1949), but some rulings are necessary.
27 Presumably, Congress would have made oral argument mandatory if it were so regarded.
II. Factors Relevant in Determining the Appropriate Unit

Beyond the mention in the statute of a few situations where the NLRB is absolutely\textsuperscript{28} or conditionally\textsuperscript{29} precluded from finding a unit appropriate, there is no precise guide which will unerringly lead the Board to the determination that a particular unit is or is not appropriate. But it would seem that implicit in the term "appropriate unit", is the general notion of a grouping of employees whose attitudes, problems and economic interests are substantially the same, and among whom competition, in offering essentially similar services, might be most destructive were individual bargaining practiced.\textsuperscript{30} Such a notion is closely associated with effectuation of the national labor policy embodied in the statute which envisions and encourages the successful prosecution of collective bargaining. The NLRB's task in determining what groupings satisfy this standard may involve either comparative or descriptive characterization, for the Board is frequently called upon to choose between the unit proposals of competing parties as well as to pass on a unit definition that is uncontested. Since the finding must be made to facilitate future bargaining relationships, the element of prediction is also intertwined. Obviously, inference, as contrasted with mere observation, is the keynote of this finding.

A. Scope of the Unit in the Absence of Disagreement Among Unions

Desire of Interested Employees.—Although the terminology, "appropriate unit", is of relatively recent vintage, the underlying idea has been present in patterns of collective bargaining from their inception. Even before the government took an active role in labor relations, the idea was evidenced in the groupings chosen by skilled workers for the purposes of maximizing their bargaining power vis-à-vis the employer, and maintaining economic differentials between themselves and the rank and file of labor. Recognizing

\textsuperscript{28} Section 9(b)(3) prohibits the finding that a unit is appropriate if plant guards are combined with other employees. Since supervisors are not included in the definition of employees within the meaning of the Act, see Section 14(a), it would seem that a unit would be inappropriate if supervisors were within it.

\textsuperscript{29} Section 9(b)(1) conditions the combination of professional and non-professional employees in the same unit upon a vote in favor of such inclusion by the professionals. Section 9(b)(2) conditions denial of the appropriateness of craft units. See p. 26 supra. See also Section 9(c)(2) which requires equal treatment for unions regardless of whether they are independent or affiliated. Cf. 47 Yale L.J. 122 (1937).

\textsuperscript{30} See Note, 48 Harv. L. Rev. 630, 634 (1935).
the importance of such volitional groupings, the Board generally finds appropriate the unit requested where employee representatives are in agreement as to the proper scope of the unit.\textsuperscript{31} Objections by the employer are seldom availing. The Board has consistently recognized that organization by employees in a given pattern indicates that they constitute a sufficiently homogeneous group to bargain successfully as a unit. Thus, the desire of interested employees is, in and of itself, highly probative evidence which the Board may often consider controlling.\textsuperscript{32} The opinion of an employer, on the other hand, is not, of itself, a relevant factor.\textsuperscript{33}

Yet, the unit sought by employee representatives is always subject to Board scrutiny\textsuperscript{34} and in some instances employers have succeeded in inducing the Board to rule adversely to unions. In one of the Board's earliest unit cases, \textit{Richards-Wilcox Mfg. Co.},\textsuperscript{35} for example, the employer convinced the Board that a unit limited to the company's permanent production employees was inappropriate since a relatively stable group of temporary workers were regularly drawn upon during intermittent periods of high production. Similarly, when an industrial union sought to be certified as bargaining representative in each of the \textit{El Paso Electric Co.'s}\textsuperscript{36} five departments, apparently hoping to be certified in some departments even if it could not muster the support of a majority in the entire plant, the Board dismissed the petition on the basis of the employer's showing that the five departments were functionally interrelated and that employees were often interchanged among them.

The Board may also reject the unit proposal advanced by a union in the interest of protecting individual employees. Thus, in \textit{American Tobacco Co.},\textsuperscript{37} a plant wide unit was held inappropriate on the basis of testimony that membership in the union was not open to all of the employees. The Board reasoned that collective

\textsuperscript{31} See e.g., Pelican Bay Lumber Co., 23 NLRB 650 (1940).
\textsuperscript{32} 12 NLRB ANN. REP. 18 (1947).
\textsuperscript{33} But cf. Douglas Aircraft Co., Inc., 13 NLRB 1194 (1939) (employer's opinion on whether there ought to be an employer-wide unit or single plant unit given weight when union indifferent.).
\textsuperscript{34} See e.g., R. J. Reynolds Tobacco Co., 33 NLRB 647 (1941); United Aircraft Products, Inc., 41 NLRB 501 (1942).
\textsuperscript{35} 2 NLRB 97 (1936).
\textsuperscript{36} 15 NLRB 219 (1939); cf. Tovrea Packing Co., 12 NLRB 1063 (1939) (union which attempted to organize all departments could not have some excluded from the unit).
\textsuperscript{37} 2 NLRB 198 (1936).
bargaining must remain a democratic institution if it is to function advantageously, and that employees should not be subject to terms of employment negotiated by a union when they are accorded no opportunity to participate in shaping union policy.

This general policy that requires union membership to be open to all the employees the union seeks to represent, in conjunction with another Board policy prohibiting units drawn on racial lines, might have been a most effective weapon against "Jim Crow" unionism. However, the Board has not been firm in these two policies and has permitted Negroes to be included in units although ineligible for union membership when the union averred that it would represent them fairly.

Where a union attempts to have the employees of a parent and its subsidiary corporation grouped together in a single bargaining unit, the employer may raise the objection that the most extensive unit contemplated by the Act is an employer unit, and that the two corporations are separate employers. Although the Board has refused to combine parents and subsidiaries which lack common management and engage in distinct operations, when a union introduces evidence showing that the companies are engaged in a single continuous production operation, are under the control of a common management, and pursue an identical employment policy, the NLRB normally refuses to regard the corporate veil as impenetrable and finds the integrated unit appropriate.

Extent of Organization.—Section 9 (c) (5) of the Act, which prevents the NLRB from giving controlling weight in unit determinations to the extent to which employees have organized, is an important limitation on the Boards' fact-finding power in cases where unions are not in disagreement. Before the 1947 amendments to the Act, if a union had organized only the employees in a single department, the Board would often find that unit appropriate.

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40 E.g., Sloss Sheffield Steel & Iron Co., 14 NLRB 186 (1939).
42 E.g., Union Premier Food Stores, Inc., 11 NLRB 270 (1939); Shenango Penn Mold Co., 19 NLRB 328 (1940); Farmers Feed Co., 36 NLRB 650 (1941).
in order not to deprive those employees of the benefits of collective bargaining.\textsuperscript{44} This was done despite the presence of other factors, such as functional interrelation with other departments, which militated against such a finding.\textsuperscript{45} Although the Board had refused to find departmental units appropriate when the employer introduced evidence that the union had attempted to organize the rest of the plant and had obtained members in other departments,\textsuperscript{46} Congress regarded the other line of decisions as indicating that the Board was willing to gerrymander units to assure union success in representation elections.\textsuperscript{47}

The NLRB has not construed Section 9 (c) (5) as forbidding consideration of the fact that a dismissal of a petition for a departmental unit would delay bargaining rights for a group of organized workers.\textsuperscript{48} Thus, extent of organization has continued to be a basis for approval of departmental units.\textsuperscript{49} However, the Board now requires the union to make a considerably stronger showing that departmental bargaining is feasible. Increased emphasis has been placed on the necessity of separate supervision,\textsuperscript{50} and physical segregation from other employees.\textsuperscript{51} Moreover, a rather rigid requirement has been established that the work done in the unionized department differ materially from the work of other employees.\textsuperscript{52}

The decision in \textit{Mandell Bros., Inc.}\textsuperscript{53} reveals the extent to which Board policy has been altered as a result of 9 (c) (5). In this case a department store refused to continue bargaining with the

\textsuperscript{44} 12 NLRB Ann Rep. 20 (1947).
\textsuperscript{45} \textit{E.g.}, May Dept' Store Co., 50 NLRB 669 (1943); Armour & Co., 63 NLRB 1214 (1945); Garden State Hosiery Co., 74 NLRB 318 (1947).
\textsuperscript{46} \textit{E.g.}, Tovrea Packing Co., 12 NLRB 1063 (1939).
\textsuperscript{47} The House Report was critical of "a practice of the Board by which it has set up as a unit appropriate for bargaining whatever group or groups the petitioning union has organized at the time." \textit{H.R. REP. No.} 245, 80th Cong. 1st Sess. 37 (1947). Senator Taft declared that "the extent of organization theory has been used where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units." \textit{93 CONG. REC.} 6860 (1947).
\textsuperscript{48} The Board's interpretation of the section as permitting continued consideration of extent of organization is supported by legislative history indicating that the factor was to be given "little weight". \textit{H.R. REP. No.} 245, 80th Cong. 1st Sess. 37 (1947).
\textsuperscript{49} Thalhimler Bros. Inc., 83 NLRB 664 (1949).
\textsuperscript{52} \textit{Compare} Thalhimler Bros., Inc, \textit{supra}, note 49, \textit{with} Mandell Bros., Inc., 77 NLRB 512 (1948).
\textsuperscript{53} 77 NLRB 512 (1948).
union which had been certified under the pre-1947 Act as the representative of the mens' clothing alteration employees. The unit determination in the earlier proceeding having been based largely on the factor that those employees were the only ones organized, the NLRB held that the certification should no longer be given effect. Perhaps, in similar cases, a union might avoid the disruption of established departmental bargaining patterns by introducing testimony to show that bargaining on the departmental basis had been successful during the term of the prior certification. If the union could establish, first, that collective agreements had been negotiated, and grievances had been successfully handled, and, second, that the fractional unit had not seriously inconvenienced the employer in the operation of his business or prejudiced his relationship with nonunion employees, the departmental unit might be found appropriate on the basis of its successful history without reliance on the extent of organization.

Where a union seeks to represent all of the employees of a company which operates two or more plants, in the absence of opposition to the proposed unit by other unions, the NLRB normally finds the company-wide unit appropriate on the ground that true equality of bargaining power can only be achieved when the scope of the employees' organization is coextensive with that of the employer. When the employees in several plants stand united, the employer is unable to resist the demands of those at one plant by transferring struck work to another plant. Yet, prior to the Taft-Hartley amendments, when a union had organized only one of a company's several plants, the NLRB would usually find the single plant unit appropriate in order to facilitate the institution of collective bargaining for those employees. A paucity of legislative history makes it difficult to determine the extent to which Section 9 (c) (5) was intended to negate such findings, and

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54 Mandell Bros., Inc., 72 NLRB 857 (1947).
55 Successful bargaining history has always been an important factor in unit determinations.
56 Kansas Milling Co., 15 NLRB 71 (1939); Sears Roebuck & Co., 34 NLRB 224 (1941); Goldblatt Bros., Inc., 86 NLRB No. 105 (1949).
57 E.g., New Eng. Spun Silk Co., 11 NLRB 852 (1939); Standard Overall Co., 53 NLRB 960 (1943); Bailey Co., 66 NLRB 899 (1946); May, McEwen, Kaiser Co., 66 NLRB 1541 (1946).
58 There is no explicit discussion indicating objection to single plant certification. However, the Board's certification in New Eng. Spun Silk Co., supra note 57, was disapproved. In that case, one of an employer's two plants (functionally related) at the same location was found to constitute a separate unit on the basis of extent of organization. H.R. REP. No. 245, 80th Cong. 1st Sess. 37 (1947).
guidance must be sought from the words of the statute. Recent NLRB findings\textsuperscript{59} that a unit limited to one plant is inappropriate when employees are often interchanged with another functionally related plant in the immediate area which is operated by the same managerial staff, seem clearly justified. In such a situation the limited extent of organization is the only evidential fact upon which a contrary finding might be justified. But other cases suggest that the Board may regard 9 (c)(5) as forbidding a finding that a single plant unit is appropriate even where the employer's unorganized branches are in different geographical areas.\textsuperscript{60} Granting that a multi-plant unit, if feasible, would be ideal for the employees of such a company, the statutory term "appropriate unit" has never been construed as demanding a clearly superlative grouping of employees. Wide geographical separation may often entail varying economic needs and stimulate group ethnocentrism. Hence, the statute would not seem to foreclose the possibility of introducing sufficient evidence, such as statistics demonstrating area variations in wage and price levels which, apart from the limited extent of organization, would provide a basis for finding that a single plant unit is appropriate.\textsuperscript{61}

B. Scope of the Unit Where Unions Disagree

Where two or more unions, each having a substantial following among the employees disagree as to the appropriate unit, the NLRB's task is more difficult. Unable to rely upon divergent and inconsistent employee preferences, the Board must evaluate many complex socio-economic factors in order to make its determination. Principally, the Board has been concerned with the following contentious problems: (1) Whether to accord craftsmen, working within an industrial unit, a right to separate representation, (2) Whether to require dissident employees at one of an employer's several plants to remain within an employer-wide unit, and (3) Whether to encourage industry-wide bargaining by denying separate representation to the employees of one employer who has joined with his competitors to pursue a common labor policy. The

\textsuperscript{59} Amer. Relay & Controls, Inc., 81 NLRB 178 (1949).
\textsuperscript{60} E.g., Brown Express, 80 NLRB 758 (1948) (appropriate unit for freight trucking company's terminal employees is system-wide; extent of organization cannot be used to justify a smaller grouping). Compare Home Beneficial Life Ins. Co., 89 NLRB No. 59 (1950), with Washington National Ins. Co., 57 NLRB 1657 (1944). But cf. Central Wis. Motor Co., 85 NLRB No. 54 (1949).
\textsuperscript{61} Cf. Union Electric Co. of Missouri, 64 NLRB 39 (1945).
Board has sought to establish generally applicable standards, reflecting the policy of the Act, to guide decision in each of these classes of cases. Yet, reappraisal of past experience has frequently led to changes in the standards established. Moreover, the evidential facts in each particular case are, to a certain extent, unique. Hence, rigid adherence to inflexible standards has never been feasible. Here, then, is an opportunity to evaluate the broad policy orientation of an important administrative fact-finding function, and beyond this, to investigate, with emphasis upon the advocate's role in developing evidence, the area within which particularized situations are accorded special treatment.

Craft or Industrial Unit.—When the CIO-AFL fission became clearly permanent in 1937, the power to determine appropriate units for collective bargaining took on an aspect that was unforeseen at the time the Wagner Act was passed. Apart from its statutory consequences, the Board's power became an administrative instrument for establishing permissible bounds for the battle that the two federations were so bitterly waging on the organizational front. It is against this background of interunion conflict on a national scale, which has continued, though in a less vigorous fashion, to the present, that the Board's decisions must be viewed.

Perhaps the most significant of the early interunion conflict cases was *Globe Machine & Stamping Co.*

The facts developed before the hearing officer were typical in many industries. Three AFL craft unions had been bargaining for the employees within their respective jurisdictions for a considerable period of time when a newly formed CIO union succeeded in organizing a majority of employees in all departments and negotiated a plant-wide contract with the employer. If the Board found the plant-wide unit appropriate, only the name of the industrial union would appear on the craftsmen's ballot and their choice would have been either to support that union or forego the benefits of collective bargaining. On the other hand, if the craft unit were found appropriate, only the name of the craft union would appear and the craftsmen would not be included in the industrial unit even if a majority of them voted against craft representation. Hence, the craft unions would still have a fertile field for further organizational activities even if they lost the election.

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62 3 NLRB 294 (1937).
Finding that the factors indicating the appropriateness of a craft unit were substantially equal to those which suggested industrial unionism, the Board adopted a compromise solution. The names of both unions were placed on the craft workers’ ballots. If they voted for craft representation, craft units would be found appropriate. If they voted for industrial unionism, they would be included in a plant-wide unit.

Thereafter, *Globe* elections became standard when a unit determination would prejudice the interest of one of two or more competing unions, each of which was seeking a unit that would have been appropriate but for opposing claims. Where, as in the *Globe* case, the Board might infer from past experience at a plant that either craft or industrial organization would result in stable collective bargaining, and there is no showing that unskilled workers have a strong interest in having the craftsmen included in the industrial unit, predetermining unit determinations upon the vote of the craftsmen might be regarded as an application of the familiar doctrine that the wishes of interested employees constitute persuasive evidence in unit cases. The use of self-determination elections, however, was not limited to such situations. In *Allis-Chalmers Co.*, the NLRB, with one member dissenting, extended the *Globe* doctrine by allowing a small group of power house employees and other fractional groups to sever from an industrial unit despite uncontroverted evidence that the interests of the craftsmen had been adequately protected during a long period of successful bargaining on an industrial basis, and that the small group of craftsmen, if allowed to sever, would have the power to close the entire plant by a strike.

Even during this early period, however, the *Globe* doctrine was not applied without deviation to all of the varying fact situations in which the craft-industrial unit conflict was latent. Thus, in *Wheeling Steel Corp.*, the Board refused to allow engineers and

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63 Globe elections are an uncommon type of fact-finding technique. In effect, the agency allows the interested parties to make the finding themselves. One court held this to be an unlawful delegation of NLRB authority. Marshall Field & Co. v. NLRB, 135 F.2d 391 (7th Cir. 1943), 56 HARV. L. REV. 1330 (1943). But the case has not been followed in any other circuit, and it seems clear that the Taft-Hartley Act does not approve it. Section 9 (b) (1) and (2) sanction such elections.


65 See note 31 supra.

66 4 NLRB 159 (1937).

67 8 NLRB 102 (1938).
brakemen who operated an extensive company-owned railroad to sever themselves from a production unit. This and a few similar exceptions8 were rationalized on the ground that the employees seeking separate representation were not considered as craftsmen, and were engaged in work which was not functionally different from that of production employees. Yet, these operating railroad men would seem to have as clear a claim to the title "craftsmen" as did the power house employees in Allis-Chalmers whose work required a much shorter training period and who performed a diverse group of tasks. Moreover, work on a company railroad differs as extensively from production jobs as work in a power house. Perhaps the Wheeling case can be attributed largely to the effective manner in which the industrial union developed its evidence. Testimony was adduced to the effect that both before and after the plant was unionized, the employer had never differentiated between railroad and production employees as to method of payment and employee benefits, and that the company railroad was not a separate department in the company's organizational setup, but was under the direction of production officials. Furthermore, company records were offered which tended to establish that brakemen and engineers had been recruited from the company's regular work force and were furloughed to production jobs during slack periods rather than being laid off. Although similar evidence might have been available in cases where the Globe doctrine was applied, it was infrequently developed to such a high degree.

The American Can9 decision, decided after a change in Board personnel, was the first clear modification in the policy of according craftsmen a privilege of self determination. The majority found that successful bargaining on a plant-wide basis for a substantial period of time under a valid agreement precluded the severance of a craft group. Board Member E. Smith, reiterating his Allis-Chalmers dissent, stated that successful bargaining on an industrial basis indicated the inherent appropriateness of the broad unit. Board Member Leiserson voted with Board Member Smith, but on the ground that the NLRB had no authority to abrogate the unit established by a valid collective agreement.

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8 E.g., Southport Petroleum Co., 8 NLRB 792 (1938); Electric Auto Lite Co., 9 NLRB 147 (1938).
9 13 NLRB 1252 (1939).
American Can operated as a significant precedent for a period of about four years. Even during this period, however, severance elections were occasionally allowed, despite successful industrial bargaining when the petitioning craftsmen developed substantial evidence indicating that they had been continually dissatisfied with the representation afforded them by the industrial union. The suggestion in these cases that the Board was willing to examine evidence of stable industrial bargaining with a critical eye was more clearly articulated in 1944. The petition of the patternmakers to break away from the United Electrical Workers' industrial unit of General Electric employees was made the occasion for a new policy pronouncement. If craftsmen could establish that they maintained a separate identity, notwithstanding inclusion in an industrial unit, they would be entitled to separate representation. Evidence indicating that they had customarily handled their own grievances, had refused to take part in the activities of the industrial union and had maintained membership in the craft union would be probative of separate identity.

The Board became progressively more lenient in administering this policy. By mid-1946 the right to sever was regularly granted except in cases where active participation by craftsmen in industrial bargaining processes indicated that their dissatisfaction was temporary rather than the result of abiding antipathy to industrial unionism. Globe elections were often ordered in cases where the evidence established that craftsmen had been diligently represented by the industrial union and had shared equally with others in the benefits of the bargaining process.

During the year before the 1947 amendments became effective, the Board became even more lenient in granting severance elec-

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70 For cases where the American Can doctrine was applied, see e.g. Roberts & Manders Stove Co., 16 NLRB 943 (1939); Staley Mfg. Co., 31 NLRB 946 (1941); Michigan Alkali Co., 40 NLRB 480 (1942).

71 Bendix Aviation Corp., 39 NLRB 81 (1942); Aluminum Corp. of America, 42 NLRB 772 (1942). Globe elections were also allowed where bargaining history had been inconclusive, Magnolia Petroleum Co., 18 NLRB 55 (1939).

72 E.g., Crosley Corp., 66 NLRB 349 (1946); Corona Corp., 66 NLRB 583 (1946).

73 E.g., Willys Overland Motors, Inc., 68 NLRB 15 (1946); Monsanto Chemical Corp., 67 NLRB 476 (1946); Goodyear Synthetic Rubber Corp., 66 NLRB 992 (1946).

74 E.g., Crosley Corp., 66 NLRB 349 (1946); General Tire & Rubber Co., 66 NLRB 453 (1946); E. I. du Pont de Nemours Co., 66 NLRB 545 (1946).
tions, regardless of the plant-wide bargaining history, and the American Can policy was almost completely abandoned. Craft unions seeking to represent employees already covered by bargaining agreements negotiated on an industrial basis were uniformly successful. Typically, the NLRB ordered self-determination elections as a basis for decision despite bargaining on an industrial basis which had been carried on for substantial periods. The minimum essentials necessary to obtain severance were a showing by the craft unions that the employees they sought to represent were within their traditional jurisdiction, and were working in an industry where similar units could be found. In cases where the craft unit was found inappropriate, the finding was predicated on the Board's inability to perceive facts differentiating the employees involved from other employees in the broad unit.

Literally, the craft unit proviso in the 1947 legislation forbade the Board to find that a craft unit was inappropriate on the ground that a different unit had been established pursuant to a prior Board determination, unless a majority of the craftsmen voted against it. Although an examination of legislative history indicates that Congress may have intended to forbid revival of the American Can policy of denying self-determination on the basis of bargaining history, the NLRB has refused to extend the proviso beyond the demands of the statutory language. Since very few Board decisions had been based solely on prior determinations, the proviso has not extensively limited the agency's discretion. The NLRB first

70 The change in Board policy was clearly evident in the opinion in International Minerals & Chemical Corp., 71 NLRB 878 (1946). Compare the Board's earlier treatment of a petition by substantially the same employee group, International Minerals & Chemical Corp., 52 NLRB 666 (1945).

77 International Minerals & Chemical Corp., 71 NLRB 878 (1946); General Electric Co., 71 NLRB 1192 (1947); Allied Chemical Co., 71 NLRB 1217 (1947); Pittsburgh Stopper Co., 71 NLRB 1416 (1947); Russell Electric Co., 72 NLRB 278 (1947); Food Machine Co., 72 NLRB 483 (1947); John Deere Dubuque Tractor Co., 72 NLRB 656 (1947); Kaiser Co., 73 NLRB 109 (1947); York Corp., 74 NLRB 934 (1947).


79 G. B. Peck Co., 71 NLRB 1211 (1947); Paul Jones Co., 74 NLRB 1004 (1947).


81 Although there had been no "prior determination" in the American Can case, the Senate Report states that the proviso was intended to "overrule the American Can rule." Sen. Rep. No. 105, 80th Cong. 1st Sess. 25 (1947). However, Senator Taft, during the floor debate, stated that 9 (b) (2) "simply provides that the Board shall have discretion and shall not bind itself by a previous decision, but that the subject shall always be open for further consideration by the Board." 93 Cong. Rec. 9352 (1947).

82 E.g., Bendex Prod., 15 NLRB 965 (1939).
took notice of the new provision when considering a petition by the Pattern Markers League which sought to carve out from an existing industrial unit, a small group of *Westinghouse Electric Corp.* employees. A *Globe* election was ordered on the basis of evidence that the pattern makers were a highly skilled craft group well recognized in the industry. A footnote was appended pointing out that the new Act precluded a finding based upon the Board's earlier determination that the industrial unit was appropriate. Another NLRB decision the same day, indicated that the result would have been the same regardless of the craft unit proviso. For, on similar facts in the *Harnischfeger* case, the Pattern Makers League was again granted a severance election without mention of the proviso. By placing great emphasis on the "true craft character" of pattern makers however, these cases presaged a change in Board policy not necessarily attributable to the new legislation. This suggestion that craft purity was essential became the basis for decision in the *Pacific Car & Foundry* case where the NLRB, refusing to order a *Globe* election for the first time since the new Act became effective, was impressed by evidence that production-line painters required no apprentice training and did work which was closely integrated with that of other production employees. The importance of proving whether particular employees are true craftsmen may often tax the ingenuity of counsel for the parties. Thus, in *Link-Belt Co.*, despite evidence that foundry workers were physically segregated from other employees, worked under separate supervision and performed tasks functionally unrelated to the work of other employees in the plant, the industrial union persuaded the Board to find that they were not true craftsmen by adducing evidence that an exceedingly wide range of skills and specialties was required for the performance of their job operations.

Nor does the present NLRB policy always entitle true craftsmen to establish a fractional unit. In the *National Tube* case,

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83 75 NLRB 638 (1947).
84 75 NLRB 642 (1947).
85 Pattern makers had long been recognized by the Board as the arch-type of craft group, and had accorded them special consideration even during the American Can period. See e.g., General Electric Corp., supra note 77.
86 76 NLRB 32 (1948).
87 E.g., Firestone Tire & Rubber Co., 76 NLRB 226 (1948); C.V. Hill Co., 76 NLRB 158 (1948).
88 76 NLRB 427 (1948).
89 76 NLRB 1199 (1948), 61 Harv. L. Rev. 1457 (1948).
the AFL Bricklayer's petition to sever from the CIO Steel Worker's comprehensive unit in the steel industry was denied, as was petitioner's contention that the craft unit proviso made severance elections for true craftsmen mandatory. The finding that a craft unit would be inappropriate was based primarily upon the Steel Worker's showing that bricklayers in this industry worked hand-in-hand with production workers, rebuilding furnaces that were actually in use. Also significant was evidence that the company and the CIO union had recently completed a long-term program of job evaluations, designed to eliminate intra-plant wage inequities. This gave color to the CIO argument that craft interests had been adequately protected through industrial bargaining. Another factor which might well have been developed by CIO counsel is that since basic steel is characterized by numerous groups who might make persuasive claims to craft status, allowing severance in this industry might prove extremely disruptive.

Critics have charged that the NLRB does not make an independent effort to determine whether craft or industrial units would, in given situations, be the most appropriate, but rather subordinates the public interest in the establishment of the most ideal employee groupings by directing its policy to the placation of the inconsistent demands of the CIO and the AFL. This view regards the technique of self-determination elections as a political compromise designed to appease the leaders of AFL organizations without unduly affronting CIO unionists. Perhaps the Board, in unit cases, has consciously sought to evolve a pattern of decision which would not be offensive to either of the labor federations. The distinction drawn between true craftsmen and groups too skilled to be regarded as craftsmen can hardly be explained except as an effort to strike a reasonable balance by establishing a limitation upon the right of the AFL to carve out fractional units wherever a group of workers performing functionally distinctive jobs could be organized. Yet, such a characterization of the Board's efforts to resolve craft-industrial problems appears to be an oversimplification. The Board has regularly made a sincere effort to

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80 There is no mention of this factor in the opinion, but it seems unlikely that it was not argued in the briefs.
81 See e.g., Harris, Labor's Civil War 200 (1949); Hearings before Senate Committee on Labor and Public Welfare on S. 249, Part IV, 81st Cong., 1st Sess. 1902 (1949) (Testimony of AFL President Green).
82 The Board has frequently been charged with favoring one group or the other. See e.g., Fortune 79, 96 (Feb. 1939).
evaluate complex evidential materials in complying with the statutory mandate. Moreover, according some recognition to the CIO-AFL conflict when formulating Board policy would seem justified. It would be disingenuous for the Board, in unit determination cases, to ignore the reality that the politics of American unionism are an integral part of the American labor movement. Forcing workers into patterns of organization which would engender the unrest and resentment consequential to inter-union disputes would hardly facilitate stable and harmonious bargaining relationships.93 Today, the AFL and the CIO are closer to mutual accord than ever before. While this may not be attributable to Board policy, certainly unit determinations which consistently frustrated what one group or the other regarded as its legitimate interest would have done much to retard the growth of amicable inter-union relationships.

Single Plant or Employer-Wide Unit.—Similar to the craft versus industrial unit question is the problem whether a single plant which has been organized by a different union than the one chosen by a majority in each of their employer's other plants should be found to constitute a separate unit or included within the employer-wide unit. Yet, here the issues have been more sharply drawn. In occasional cases evidence has been introduced which strongly points to the appropriateness of a single plant unit. Such a result is likely to be reached if, for example, it can be shown that single plant bargaining is traditional in the industry,94 or that the employer's operations are completely decentralized and individual plant managers have unrestricted control over local labor relations.95 More typically, however, multi-plant corporations are found to have centralized management, integrated operations, and a bargaining history that is inconclusive. In these cases the determination must depend on whether, if fractional units are established, the danger of inter-plant competition is deemed sufficiently great to negate a finding that a single plant unit is appropriate.

In the early period of its operation, the NLRB refused to allow the employees at one plant to sever themselves from the wider unit.96 The policy of majority rule embodied in the statute

94 Industrial Rayon Corp., 7 NLRB 878 (1937).
96 E.g., Pittsburgh Plate Glass Co., 10 NLRB 111 (1938), aff'd 313 U.S. 146 (1941).
was thought to require that these employees be granted no greater right to self-assertion than a dissident minority within a single plant or craft.\textsuperscript{97} In 1939, however, a change in Board personnel precipitated a new general policy which was first announced in the \textit{Libbey-Owens-Ford}\textsuperscript{98} case. The new majority regarded the same statutory policy of majority rule as demanding that a majority of workers within so large and distinct a subdivision as an entire plant be allowed the right to self-determination.\textsuperscript{99} As previously, aberrational fact situations may warrant exceptions from the general policy. For instance, a union, arguing that the Board should not limit a unit of oil well drillers to one of the many fields where the employer operated, might show that drilling crews were customarily shifted between fields so that a field-wide unit would be wholly unstable.\textsuperscript{100} Similarly, a union seeking to maintain its employer-wide unit might prevail by showing that the union petitioning for a smaller grouping had also sought to organize on the employer-wide basis,\textsuperscript{101} or that the wider form of organization was clearly entrenched within the industry.\textsuperscript{102} Further, the Board has consistently refused to allow fractional groups within one plant to break away from an employer-wide unit.\textsuperscript{103} And, in order to sever from a multi-plant unit, craft groups must do so on the basis of a multi-plant craft unit coextensive with the existing multi-plant production unit.\textsuperscript{104} Apart from such situations, however, the Board has continued to allow a union with substantial support in a single plant to obtain an election there.

Board decisions dealing with the question of single plant or employer-wide units reveal the conflicting policy considerations which are involved in the resolution of the question. On the one hand, there has been recognition of the undesirability of completely submerging fairly distinct and individualistic groups into units of extensive proportions. On the other hand, the existence of single plant units which give the multi-plant employer considerable leverage during strikes, due to inability of all the employees

\begin{itemize}
  \item \textsuperscript{97} See Comment, \textit{51 Yale L. J.} 155 (1941).
  \item \textsuperscript{98} 31 NLRB 243 (1941).
  \item \textsuperscript{99} E.g., Marietta-Harmon Chem., Inc., 66 NLRB 1157 (1946); Standard Oil Co. of Calif., 67 NLRB 132 (1946).
  \item \textsuperscript{100} Cf. American Republics Corp., 78 NLRB No. 138 (1948).
  \item \textsuperscript{101} Cf. Tovrea Packing Co., 12 NLRB 1063 (1939).
  \item \textsuperscript{102} Libbey-Owen-Ford Glass Co., 78 NLRB 1170 (1948); Schenley Dist. Corp., 80 NLRB 124 (1948); Northern States Power Co. of Wis., 37 NLRB 991 (1941).
  \item \textsuperscript{103} E.g., Joseph E. Seagram & Sons, Inc., 83 NLRB 167 (1949).
  \item \textsuperscript{104} E.g., American Viscose Corp., 79 NLRB 958 (1948).
\end{itemize}
to act in concert, may bar a majority from the full benefit of their right to bargain collectively. Yet, the latter analysis focuses exclusively on collective bargaining at the negotiation stage. Mature collective bargaining, however, encompasses more than this. In many respects, it is a social institution for the daily government of the plant community. Employee grievances and other local problems must be adjusted through the continuous cooperation of the employer, the union and the worker. A stable and mutually beneficial relationship at this level would hardly be possible if a majority of workers within a plant happened to be opposed to the particular union upon whom they were forced to depend. Hence, present Board policy seems justified.

**Single Employer or Multi-Employer Unit.**—The question whether the appropriate unit should be confined to employees of a single employer or be extended to the employees of several competing employers has arisen less frequently than the other major problems with which the Board has been concerned. Bargaining which covers a large segment of an industry can be regarded as a natural outgrowth of industrial organization. Where a single industrial union has organized the employees of a number of competing companies in a monopsonistic industry, both the union and the employers will have an interest in standardizing the terms of collective bargaining agreements in order to eliminate labor costs as a competitive factor. A single master agreement negotiated by representatives of the international union and representatives of an employer association is, of course, the most efficient means of achieving the desired standardization. While industry-wide bargaining creates a risk of work stoppages so extensive that the national economy may be seriously impaired, negotiations on a broad basis often lead to more intelligent and responsible bargaining which may be advantageous to the community as a whole, and the NLRB has not sought to impede its development.

In considering whether a multi-employer unit is appropriate, the Board is faced at the outset with the question whether such a unit is authorized by the Act. The relevant statutory language speaks only of the “employer unit, plant unit, craft unit or subdivision thereof.” But since the term “employer” is defined in Section 2 of the Act as including any person “acting in the

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105 See NLRB v. Lund, 103 F.2d 815 (8th Cir. 1939).
interest of an employer", the Board has not felt precluded from finding a multi-employer unit appropriate if there was an existing employer association which could be said to have acted in the interest of the employers in labor relations matters. However, the terms "acting in the interest" have been construed to embody an agency concept; even if an employer association exists, multi-employer units are denied if a showing can be made that the association was not authorized to act for the employers. Hence, evidence that the individual employers retained and exercised "direct control over essential employer functions" has been found to bar a finding that a multi-employer unit is appropriate.\textsuperscript{108} Similarly, nonmember employers are never included in an association-wide unit even if they have consistently followed the bargaining pattern established by the association, and have settled with the union on those terms without further individual bargaining.\textsuperscript{109} On the other hand, where evidence establishes a history of negotiations through an employer association and otherwise indicates the feasibility of a multi-employer unit, there is some indication that the Board will not scrutinize too carefully the "authorization" question,\textsuperscript{110} and will normally refuse to allow the employees of a single employer to bargain separately.

In the first Pacific Coast Shipowner's Association\textsuperscript{111} case, the Board's basic policy was formulated. The CIO union's contention that a coast-wide unit was appropriate for longshoremen was unanimously accepted despite objections by an AFL union which established that a majority at four ports wanted separate representation. Evidence that longshoremen had been unable to achieve successful collective bargaining agreements when bargaining was on a local scale was deemed persuasive. The CIO group showed that unions organized on a single port basis had been incapable of coping with coast-wide employer organization while coast-wide bargaining had been quite successful. Efforts to obtain satisfactory agreements through concerted action at single ports had been met by inter-port employer cooperation which facilitated loading and unloading at open ports during

\textsuperscript{108} E.g., Sebastian Stuart Fish Co., 17 NLRB 362 (1939); Bulk Sales Dept., Gulf Refining Co., 21 NLRB 99 (1940); California State Brewers Inst., 72 NLRB 665 (1947). \textit{But cf.} George F. Carleton & Co., Inc., 54 NLRB 222 (1947).

\textsuperscript{109} E.g., Advance Training Co., 60 NLRB 923 (1945); Assoc. Shoe Corp., 81 NLRB 224 (1949).

\textsuperscript{110} See e.g., New Bedford Cotton Mfrs. Ass'n, 47 NLRB 1345 (1943).

\textsuperscript{111} 7 NLRB 1002 (1938).
strike periods. When the employees finally organized on a coast-
wide basis, collective bargaining was considerably more effective.

The Board view that multi-employer units are more appro-
priate than smaller groupings even when a majority of a single em-
ployer's workers were opposed to such a unit has often been re-
emphasized. Perhaps the *New Bedford Cotton Manufacturers' Ass'n*\(^1\)\(^2\) case is typical. The employers' association, representing
nine of the eleven cotton mills in the city, petitioned the NLRB
for an election on the ground that the Textile Workers, AFL
claimed conflicting bargaining rights for the employees of associa-
tion plants. The association and the AFL urged that the multi-
employer unit was appropriate, but the CIO, which had a sub-
stantial following in several plants, sought to have single employer
units designated. The employers and the AFL presented evidence
that the association had for some time assisted members in the
settlement of grievances and in arbitration proceedings, and had
also negotiated and signed collective agreements with the AFL
during the past three years. The CIO attempted to minimize the
significance of this history of city-wide bargaining by showing
that the association representatives were instructed by the individ-
ual employers prior to the commencement of negotiations, that
the association could not conclude the collective agreement until
it had been approved by the individual employers, and that the
individual employers were also signatory parties to the final con-
tract. Nevertheless, the Board found the broad unit appropriate.

Yet, the general NLRB policy does not foreclose the possibil-
ity of persuading the Board to find a smaller unit appropriate or
grant a self-determination election. In *Union Electric Co.*,\(^3\)\(^4\) for
example, a union succeeded in establishing the appropriateness
of single employer units in the utility industry by producing
statistical evidence of extreme wage and price differentials in the
widespread communities covered by the association. In this case,
the fact that a single employer in such an industry would be un-
able to fight union demands by contracting out struck work may
also have been influential on the Board.

Moreover, even a prior board determination that the broad
unit is appropriate may not be adhered to when a dissident group
shows that bargaining experience under such a unit has been un-

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\(^{112}\) Note 110 *supra*.
\(^{113}\) 64 NLRB 39 (1945).
successful. Thus, in the second Pacific Coast Shipowners' Association\textsuperscript{114} case, the dissident employees at three of the ports were granted severance elections. Their evidence showed that for three years following the first decision, longshoremen in these ports had continued to support the AFL union, had settled their own grievances and had been excepted from important provisions of the CIO's coast-wide contract, including the provision which gave employment preference to CIO members. The Board found, in effect, that despite the theoretical advantages of coast-wide bargaining, the system had not been practical due to the recalcitrance of the men at these three ports.

This decision would seem to invite members of dissident groups which the Board has found do not constitute separate appropriate units, to continue disruptive tactics in the hope that at a later date the Board will accede to their contentions. Yet, if groups in other cases should be cohesive enough to be able to accept the NLRB invitation to persist in efforts to obtain separate representation, such activities seem to be clear indication that the prior determination was incorrect, and warrant its reversal. The Board could not have forced the longshoremen at these ports to remain a part of the coast-wide unit without ignoring the teaching of three years' experience. In these decisions, as in other unit cases, the NLRB has sought to develop guiding criteria sufficiently generalized to resolve the majority of conflicts. But the Board has wisely recognized that complex and variant facts demand that standards of evaluation remain flexible and that many cases be approached in an ad hoc manner.

III. JUDICIAL REVIEW

A. Method of Review

Relatively early in the administration of the Wagner Act it was established that the statutory provisions for judicial review were inapplicable to Section 9 representation proceedings. In 	extit{AFL v. NLRB},\textsuperscript{115} the Supreme Court so held by reasoning that since the judicial review provisions of the Act were in a section dealing with the prevention of unfair labor practices, and since no express mention of review of representation proceedings was contained in the statute except in connection with unfair labor

\textsuperscript{114} 32 NLRB 668 (1941).
\textsuperscript{115} 308 U.S. 401 (1940).
practices, a unit finding without more was not the type of final order for which the statute provided review. Apart from the structure of the statute, the Court relied on legislative history which revealed congressional dissatisfaction with experiences of the first NLRB under the short-lived National Industrial Recovery Act.\footnote{116} Judicial review of representation proceedings provided for under that Act had been effectively used by employers as a dilatory tactic.\footnote{117}

Thus, the only statutory method of review is in conjunction with unfair labor practice proceedings. An employer might attempt to defend against the unfair labor practice charge of refusal to bargain by showing that the unit in which the union sought to bargain was inappropriate.\footnote{118} Such a defense might be asserted if the union had demanded bargaining without ever having petitioned for certification, or even if the NLRB had previously approved the particular unit. If, in spite of the employer's defense, the NLRB found him guilty of a refusal to bargain, he could then take a court appeal, and in the appellate proceeding the unit finding could be reviewed. Similarly, it now seems possible for a vanquished union to obtain judicial review of the unit obtained by its rival. If the defeated union strikes for recognition in the face of the NLRB certification, it is subject to unfair labor practice charges under the Taft-Hartley amendments,\footnote{119} and it would seem able to defend by attacking the incumbent union's certification on the ground that the unit was inappropriate.

However, in the Supreme Court opinion holding that an appropriate unit finding was not reviewable by the statutory method, there was an indication that review of certifications and unit determinations might be obtained by a bill in equity brought in a district court. Yet, in \textit{Switchmen's Union v. National Mediation Board},\footnote{120} this issue was raised under the Railway Labor Act,\footnote{121} and the Court held that district courts were without jurisdiction to review a unit finding and certification of that Board. The question was again presented in \textit{Inland Empire District Council, etc. v. Millis},\footnote{122} a case which involved alleged procedural unfairness by

\footnotesize{\begin{itemize}
  \item \footnote{117} See Note, 28 Geo. L.J. 666 (1940).
  \item \footnote{118} E.g., Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941).
  \item \footnote{119} 61 Stat. 141, 142 (1947), 29 U.S.C. §158 (b) (4) (c) (Supp. 1950).
  \item \footnote{120} 320 U.S. 297 (1943).
  \item \footnote{122} 325 U.S. 697 (1945).
\end{itemize}}
the NLRB. The Supreme Court held that the district court should not review. But in order to reach this result the Court examined the record to determine if there had been such unlawful action by the NLRB as would require the Court to pass upon whether the petitioner was entitled to district court review. Thus, the Court, in effect, granted review at least to the extent that it looked into questions of procedural fairness. Perhaps the Inland Empire case viewed with the Switchmen’s Union case indicates that only questions of procedural fairness are reviewable by a bill in equity, and these only if the petitioner can make a strong showing on such matters.

In the light of the legislative history which the Court relied on in the AFL case, it would seem inconsistent for district court review to be permitted in a wider area than that suggested in the Inland Empire case. Nevertheless, it might be argued that it is unfair to require that an employer or a union subject itself to the stigma of an unfair labor practice charge in order to secure review of a questionable unit determination. It may be that this objection to postponed review and the congressional objection to immediate review could be overcome by allowing immediate review with the limitation that there would be no interlocutory stay of the NLRB election procedure or suspension of the employer’s duty to bargain pending disposition of the appeal. Of course, if this approach were adopted and a unit determination reversed, the expenses incurred in the NLRB election proceeding would have been wasted. But this is equally true if a unit determination is reversed in an unfair labor practice proceeding, and, in addition, the expenses incurred by the Board in the latter proceeding are also wasted. Possibly, a more valid objection to the suggested approach is that it might result in broadening the scope of review currently accorded to unit findings and thus give unsympathetic courts an opportunity to undermine the administrative process. If a court reviews the correctness of a unit determination at a time before the parties have acted extensively in reliance upon it, the court, undeterred by fears of disrupting established relationships, might be less reluctant to reverse.

B. Scope of Review

Under the Wagner Act, judicial review of NLRB unfair labor practice orders was limited by the provision that findings of fact
were conclusive "if supported by evidence". Supreme Court decisions interpreted this to require substantial evidence from which the Board could have rationally drawn its inferences.\textsuperscript{123} Since there was nothing in the statute to indicate otherwise,\textsuperscript{124} it would seem that when an appropriate unit finding was an issue in the review of unfair labor practice order, the same statutory test should have been applied. Yet, the appropriate unit issue was apparently viewed as being distinctly different from other unfair labor practice issues for the courts held that unless the unit finding was arbitrary, it would not be disturbed.\textsuperscript{125} This was clearly a lesser degree of review than the substantial evidence test afforded.

Perhaps this ostensible departure from the statutory mandate might be explained or justified in conceptual terms. It might be argued that the finding of an appropriate unit is merely an evidential fact leading to the finding of the ultimate fact: commission or noncommission of an unfair labor practice. And since reviewing courts traditionally do not regard it as their function to examine evidential facts de novo, it is understandable that they should refuse to disturb the unit finding in the absence of arbitrariness. But such an analysis of the result reached rests on highly artificial manipulation of fuzzy labels. Plainly, it does not provide much assistance for comprehension of the process.

A more enlightening analysis would seem to require comparison of the finding of an unfair labor practice with the finding of an appropriate unit in an effort to determine whether a rational basis for the differentiation in scope of judicial review is implicit in the decisions. The various aspects of the NLRB's task in unit determinations, which have been previously described, indicate the extent to which expert inference and formulation of policy are critical. Although unfair labor practice proceedings also involve these elements, inference and policy judgments do not seem to reach as high a degree as in the unit cases. For example, unfair labor practice cases do not involve problems of comparative char-


\textsuperscript{124} But see Sen. Rep. No. 573, 74th Cong. 1st Sess. 14 (1935) (indicating a congressional expectation that judicial review of unit findings would "guarantee against arbitrary action by the Board").

\textsuperscript{125} See e.g., NLRB v. Jones & Laughlin Steel Corp, 331 U.S. 416 (1947); NLRB v. Lettie Lee, Inc., 140 F.2d 245, 247 (9th Cir. 1944); NLRB v. Carlisle Lumber Co., 94 F.2d 1318, 143 (9th Cir. 1937) cert. denied, 304 U.S. 575 (1938); Mueller Brass Co. v. NLRB, 160 F.2d 402, 404 (D.C. Cir. 1949).
acterization, and only seldom require careful prediction of the consequences of NLRB action. For, once conduct has been found to be within the proscriptions of the Act, the proscription itself indicates the expected consequences. And since unfair labor practice proceedings are concerned with past conduct the effects of which are often readily visible, it is frequently unnecessary for the Board to predict the consequences of the conduct which is being measured against the statutory prohibitions. Perhaps the commonest type of inference the Board engages in for resolving unfair labor practice cases is the determination of the motivation for particular conduct. Thus, in general the functions of the Board in unfair labor practice proceedings are not unlike those with which judges are familiar in court proceedings. On the other hand, the appropriate unit finding involves a type of evaluation with which judges would rarely be conversant. Therefore, comparison of the two findings would seem to afford some explanation for the great degree of finality given to unit determinations.

Another factor which may also induce judicial hesitance to overturn unit findings is that the case may arise after collective bargaining has been carried on for a considerable period of time. In such a situation, not only would reversal of the unit finding disrupt established bargaining patterns, but it would also necessitate additional expenditures for a new election which might increase labor-management friction. All of these undesirable results would seem likely if a rival union were the party challenging the appropriateness of a unit that had been established several years before.

Now pending before the Supreme Court are two cases which present the question whether Section 10(e) of the Taft-Hartley Act broadens the scope of review of unfair labor practice proceedings. However, even if the Court decides that the statutory review now is broader, such a holding would be unlikely to affect appro-

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126 Thus, the proscription against refusing to bargain indicates the expected consequence that the party charged will be ordered to bargain.

127 For example, in determining whether action by an employer constitutes an interference or restraint with respect to the rights of the employees, his motive is often highly material. In determining whether the discharge of an employee was discriminatory, motive is always material.


appropriate unit findings in view of the distinction which the courts have apparently adopted. *

* [Since the writing of this article, the United States Supreme Court has handed down decisions, see NLRB v. Pittsburgh S.S. Co., 71 S. Ct. 453 (1951) and Universal Camera Corp. v. NLRB, 71 S. Ct. 456 (1951), in which the broadening of the scope of review anticipated by the writers has been confirmed under both the Taft-Hartley Act and the Administrative Procedure Act. While the implications of these decisions are rather far reaching on the general issue of the scope of review, see Jaffe, Judicial Review: "Substantial Evidence on the Whole Record", 64 Harv. L. Rev. 1233 (1951), the context of the opinions and correspondence with the writers of the article discloses nothing to indicate the need for a change in the conclusion as to the effect on review of appropriate bargaining unit cases stated in the article. Ed.]