

STUDENT COMMENTS

APPROPRIATE BARGAINING UNIT DETERMINATIONS IN THE RETAIL CHAIN INDUSTRY

The initial issue to be resolved in any union organizational campaign is that of the appropriateness of the petitioning union's requested bargaining unit. The National Labor Relations Board is often called upon to resolve disputes as to this matter, pursuant to its authority under Section 9(b) of the National Labor Relations Act (NLRA).¹ Section 9(b) gives broad discretion to the Board in its exercise of this responsibility, requiring only that, in weighing the conflicting claims of management and the unions, the Board "assure to employees the fullest freedom" in exercising the rights to organize and be represented by the bargaining agent of their choice.²

The interests of union and management in representation cases come into conflict over the size of the bargaining units established under section 9(b), since each side generally seeks the unit that it feels will be most conducive to its victory in a representation election. In organizing retail chains the unions have generally sought small units, often ones containing only a single store in a chain, due to the relative ease with which such units can be organized.³ Retail chain employers have generally sought to impose upon the unions the more difficult task of organizing larger, multistore groupings. In addition, since retail chain operations are often characterized by a high degree of administrative centralization, retail employers tend to favor bargaining units which conform to their administrative districts and accordingly do not threaten to fragment their operations. This comment will assume that a policy favoring single-store units as presumptively appropriate is

¹ Section 9(b) provides that: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ." 29 U.S.C. § 159(b) (1970).

The Board has wide discretion in the area of unit determinations; its decisions will not be overturned unless they are shown to be "arbitrary and capricious." *NLRB v. Lou De Young's Mkt. Basket, Inc.*, 406 F.2d 17, 23-24 (6th Cir. 1969); accord, *NLRB v. Li'l Gen. Stores, Inc.*, 422 F.2d 571 (5th Cir. 1970); *NLRB v. Sun Drug Co.*, 359 F.2d 408 (3d Cir. 1966). For findings of abuse of discretion, see, e.g., *NLRB v. Davis Cafeteria, Inc.*, 396 F.2d 18 (5th Cir. 1968); *NLRB v. Purity Food Stores, Inc. (Sav-More Food Stores)*, 376 F.2d 497 (1st Cir. 1967).

² 29 U.S.C. § 159(b) (1970). Section 7 outlines the rights protected: "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities . . ." 29 U.S.C. § 157 (1970).

³ The Board's recent policy of favoring single-store units has been "an organizational life saver" for the labor unions; one union official has indicated that "the single unit policy has put us ten years ahead of where we would have been." Sirkin and Yeomans, *Effects of the NLRB's Unit Policies in the Retail Chain Store Industry*, 23 Lab. L.J. 80, 97 (1972).

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essential for the protection of the organizational and representational rights of retail chain employees.⁴

The Board is not strictly bound by its own precedents in exercising its discretionary power to make unit determinations. Historically, however, it has adhered to certain policies which can be detected in its decisions. It has utilized two major tests for retail store unit appropriateness, one looking to the extent of union organization and the other to the degree of local autonomy. In determining the degree of local autonomy, it has relied primarily upon three criteria: local managerial independence, geographical proximity, and employee interchange. It will be submitted, however, that the Board has redefined and inconsistently applied these criteria and by so doing has made major shifts in policy. On the whole these shifts have been made sub silentio; the Board has rarely articulated reasons for the changes.

This comment undertakes to trace the pattern of change insofar as it is discernible in the Board's application of its tests and criteria for determination of appropriate retail store bargaining units. It will focus first upon the pre-1947 period of reliance on the extent of union organization and then upon the decade, ending in 1962, when the Board restrictively defined the criteria by which it tested for local autonomy and rarely found a single-store unit appropriate but rather favored larger units composed of administrative divisions. The comment will then examine what has come to be known as the Board's *Sav-On* policy, developed during the decade since 1962, wherein the Board so applied and redefined the three criteria that it consistently approved of single-store units. Finally, it will be submitted that a recent series of decisions reveals a new pattern of Board vacillation. Such cases as *Twenty-First Century Restaurant Corp.*⁵ and *Gray Drug Stores, Inc.*,⁶ which rejected single-store units, were succeeded but not explicitly overruled by *Walgreen Co.*,⁷ which reaffirmed the appropriateness of such units. The uncertainty produced by *Walgreen's* about-face, coming as it does after a history of major and unexplained policy changes, underlines the urgent need for the Board to fix its standards and to clarify its current policy.

I. EARLY UNIT DETERMINATIONS: THE "EXTENT OF ORGANIZATION" AND "*Safeway*" PERIODS

In its quest for appropriate units for the retail chain industry, the Board has sought units composed of employees with a "community of

⁴ During the ten years following its decision in *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962), discussed at notes 47-63, the Board has explicitly stated the same assumption. See, e.g., *Haag Drug Co.*, 169 N.L.R.B. 877, 67 L.R.R.M. 1289, 1291 (1968): "Absent a bargaining history in a more comprehensive unit or functional integration of a sufficient degree to obliterate separate identity, the employees' 'fullest freedom' is maximized, we believe, by treating the employees in a single store or restaurant of a retail chain operation as normally constituting an appropriate unit for collective-bargaining purposes."

⁵ 192 N.L.R.B. No. 103, 78 L.R.R.M. 1015 (1971).

⁶ 197 N.L.R.B. No. 105, 80 L.R.R.M. 1449 (1972).

⁷ 198 N.L.R.B. No. 158, 81 L.R.R.M. 1065 (1972).

interests," which is usually interpreted to mean common skills and working conditions.⁸ In assessing "community of interests" the two main tests which the Board historically has considered are the extent of union organization⁹ and the degree of local autonomy possessed by the retail store(s).¹⁰

The Board's earliest retail chain unit determinations approved both single-store¹¹ and city-wide¹² bargaining units. The Board often based these earliest determinations primarily upon the petitioning union's extent of organization and largely excluded other factors;¹³ the fact that workers in part of an employer's chain were unique in their desire for unionization was used as the key indicator of appropriateness.¹⁴ The Board's main justification for this "extent of organization" doctrine was a desire to expedite the stages preliminary to the commencement of collective bargaining "lest prolonged delay expose the organized employees to the temptation of striking to obtain recognition"¹⁵

However, it was felt in Congress that the Board's unquestioning acceptance of unit requests was an abandonment of the responsibility imposed upon the Board by section 9(b) to determine whether or not a unit was appropriate. In the debate over the Taft-Hartley amendments in 1947, Senator Robert Taft summed up this congressional criticism: "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."¹⁶ Congressional reaction to the Board's extent of organization approach culminated in the enactment in 1947 of Section 9(c)(5) of the NLRA,¹⁷ which prohibits the Board from using extent of organization as the controlling factor in unit determinations. It may be surmised that the statute's prohibition against *controlling* use in no way impairs the viability of extent of organization as a factor.

The Board's initial reaction to the passage of section 9(c)(5)

⁸ See, e.g., F.W. Woolworth Co., 144 N.L.R.B. 307, 308-09, 54 L.R.R.M. 1043, 1044 (1963); Great A & P Tea Co., 128 N.L.R.B. 342, 343-44, 46 L.R.R.M. 1314 (1960).

⁹ E.g., Sav-On Drugs, Inc., 138 N.L.R.B. 1032, 1035, 51 L.R.R.M. 1152, 1153 (1962); First Nat'l Stores, Inc., 26 N.L.R.B. 1275, 1280, 7 L.R.R.M. 45 (1940).

¹⁰ E.g., Sav-On Drugs, Inc., 138 N.L.R.B. 1032, 1034-35, 51 L.R.R.M. 1152, 1153 (1962); Great A & P Tea Co., 85 N.L.R.B. 680, 681, 24 L.R.R.M. 1454 (1949). The Board has also treated the employer's past bargaining history as an important test in some cases. See, e.g., Robert Hall Clothes, Inc., 118 N.L.R.B. 1096, 40 L.R.R.M. 1322 (1957); Spartan Dep't Stores, 140 N.L.R.B. 608, 52 L.R.R.M. 1074 (1963).

¹¹ E.g., Koppers Stores, 73 N.L.R.B. 504, 20 L.R.R.M. 1003 (1947).

¹² E.g., First Nat'l Stores, Inc., 55 N.L.R.B. 1346, 14 L.R.R.M. 91 (1944).

¹³ E.g., First Nat'l Stores, Inc., 26 N.L.R.B. 1275, 7 L.R.R.M. 45 (1940); First Nat'l Stores, Inc., 55 N.L.R.B. 1346, 14 L.R.R.M. 91 (1944).

¹⁴ See cases cited in note 13 *supra*.

¹⁵ Garden State Hosiery Co., 74 N.L.R.B. 318, 321, 20 L.R.R.M. 1149 (1947).

¹⁶ 93 Cong. Rec. 6860 (1947).

¹⁷ Section 9(c)(5) provides that: "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5) (1970).

appeared to be a sharp about-face. Not only did it limit its use of the extent of organization test, but it developed a virtual presumption against the appropriateness of single-store units. Requests for single-store¹⁸ and less than division-wide multistore¹⁹ units were denied, even when the extent of organization, accompanied by other factors such as geographic isolation, pointed to the appropriateness of such units.²⁰ The Board was willing to approve single-store units²¹ and less than division-wide multistore units²² only when this approval was unequivocally necessitated by geography or extreme local managerial independence. In 1951 the Board gave this post-1947 policy a definitive formulation in *Safeway Stores, Inc.*:²³ "absent unusual circumstances, the appropriate collective bargaining unit in the retail . . . trade should embrace all employees within the categories sought who perform their work within the Employer's administrative division or [geographic] area."²⁴ Thereafter, the Board's preference for multistore units which encompassed either administrative districts or geographic areas was continuously reaffirmed for more than a decade.²⁵

During this decade, as the Board continued to deny single-store units,²⁶ it came to rely primarily upon the degree of local autonomy possessed by the retail store.²⁷ The most important indicium of local autonomy was the degree of *local managerial independence*, measured in terms of the distribution of authority between local store managers and district or area managers.²⁸ The *geographic proximity* of the stores within a proposed unit was also considered, often in contrast to the proximity of these stores to those excluded from the proposed unit.²⁹ Similar evaluations were made with respect to the degree of *employee interchange*.³⁰

In testing for local autonomy, the Board applied these three criteria in a manner which discouraged single-store and less than

¹⁸ E.g., *Westbrook Enterprises, Inc.*, 79 N.L.R.B. 1032, 22 L.R.R.M. 1498 (1948).

¹⁹ E.g., *C. Pappas Co.*, 80 N.L.R.B. 1272, 23 L.R.R.M. 1227 (1948).

²⁰ *Grand Union Co.*, 81 N.L.R.B. 1016, 23 L.R.R.M. 1444 (1949), overruled by *V.J. Elmore 5¢, 10¢ & \$1.00 Stores, Inc.*, 99 N.L.R.B. 1505, 30 L.R.R.M. 1206 (1952).

²¹ E.g., *American Stores Co.*, 82 N.L.R.B. 882, 23 L.R.R.M. 1627 (1949).

²² E.g., *Walgreen Co.*, 114 N.L.R.B. 1168, 37 L.R.R.M. 1115 (1955).

²³ 96 N.L.R.B. 998, 28 L.R.R.M. 1622 (1951).

²⁴ *Id.* at 1000, 28 L.R.R.M. at 1622. To substantiate this position, the Board cited *Kroger Co.*, 88 N.L.R.B. 194, 25 L.R.R.M. 1320 (1950); *C. Pappas Co.*, 80 N.L.R.B. 1272, 23 L.R.R.M. 1227 (1948).

²⁵ E.g., *Paxton Wholesale Grocery Co.*, 123 N.L.R.B. 316, 43 L.R.R.M. 1424 (1959); *Food Fair Stores, Inc.*, 114 N.L.R.B. 521, 36 L.R.R.M. 1607 (1955); see *Daw Drug Co.*, 127 N.L.R.B. 1316, 1319, 46 L.R.R.M. 1218, 1219 (1960).

²⁶ E.g., *Paxton Wholesale Grocery Co.*, 123 N.L.R.B. 316, 43 L.R.R.M. 1424 (1959); *Robert Hall Clothes, Inc.*, 118 N.L.R.B. 1096, 40 L.R.R.M. 1322 (1957); *Sparkle Mkts. Co.*, 113 N.L.R.B. 790, 36 L.R.R.M. 1388 (1955).

²⁷ E.g., *United Cigar-Whelan Stores Corp.*, 104 N.L.R.B. 409, 32 L.R.R.M. 1145 (1953).

²⁸ See, e.g., *Food Fair Stores, Inc.*, 114 N.L.R.B. 521, 36 L.R.R.M. 1607 (1955).

²⁹ E.g., *Weis Mkts., Inc.*, 125 N.L.R.B. 148, 151, 45 L.R.R.M. 1094, 1095 (1959).

³⁰ E.g., *Crown Drug Co.*, 108 N.L.R.B. 1126, 1127, 34 L.R.R.M. 1141, 1142 (1954).

division-wide multistore units. While full local authority over hiring, discharging, wage increases and promotions indicated that single-store units might be appropriate,⁸¹ the Board usually concluded that local managerial independence was lacking even when only minor chain influence was apparent.⁸² The Board also paid close attention to centralization of such administrative functions as advertising⁸³ and record-keeping⁸⁴ in gauging local managerial independence. Relatively low levels of employee interchange were viewed by the Board as negating local autonomy; for example, the Board found "frequent" interchange in one case where there were five transfers per month among forty-eight stores.⁸⁵ There was also a tendency to find geographic "proximity" between relatively distant stores.⁸⁶ In sum, the Board's application of the standards of local autonomy tended to insure that the "unusual circumstances"⁸⁷ required by *Safeway* for a finding of an appropriate single-store unit were not often discovered.

The Board established this large-unit policy solely by means of its restrictive definition of the standards of local autonomy. At no point during the *Safeway* period did the Board attempt to explain its reasons for the policy or to justify it in terms of the necessity of assuring to employees "the fullest freedom" of self-organization.⁸⁸ The Board's policy may have been based on an interpretation of section

⁸¹ E.g., Walgreen Co., 114 N.L.R.B. 1168, 37 L.R.R.M. 1115 (1955).

⁸² See, e.g., Weis Mkts., Inc., 125 N.L.R.B. 148, 45 L.R.R.M. 1094 (1959); Father & Son Shoe Stores, Inc., 117 N.L.R.B. 1479, 40 L.R.R.M. 1032 (1957); Food Fair Stores, Inc., 114 N.L.R.B. 521, 36 L.R.R.M. 1607 (1955).

⁸³ E.g., Quality Food Mkts., Inc., 126 N.L.R.B. 349, 350, 45 L.R.R.M. 1316 (1960).

⁸⁴ E.g., Paxton Wholesale Grocery Co., 123 N.L.R.B. 316, 317, 43 L.R.R.M. 1424, 1425 (1959).

⁸⁵ Father & Son Shoe Stores, Inc., 117 N.L.R.B. 1479, 40 L.R.R.M. 1032 (1957); see Goldblatt Bros., Inc., 119 N.L.R.B. 1340, 1343, 41 L.R.R.M. 1288, 1289 (1958). In most cases during the *Safeway* period, the Board stated, without providing substantiation, that there was "frequent" or "some" interchange. E.g., Winn-Dixie Stores, Inc., 124 N.L.R.B. 908, 911, 44 L.R.R.M. 1533, 1534 (1959); Food Fair Stores, Inc., 114 N.L.R.B. 521, 522, 36 L.R.R.M. 1607 (1955).

⁸⁶ See, e.g., Bonwit Teller, Inc., 84 N.L.R.B. 414, 417 n.9, 419, 24 L.R.R.M. 1283 (1949) (stores twenty-five miles apart considered "proximate"); Father & Son Shoe Stores, Inc., 117 N.L.R.B. 1479, 40 L.R.R.M. 1032 (1957) (stores fifteen to one hundred and ninety miles away added to requested unit).

⁸⁷ *Safeway Stores, Inc.*, 96 N.L.R.B. 998, 1000, 28 L.R.R.M. 1622 (1951).

⁸⁸ In a 1964 case rejecting the *Safeway* approach, Members Leedom and Jenkins presented a possible justification for *Safeway* in their dissenting opinion. Frisch's Big Boy Ill-Mar, Inc., 147 N.L.R.B. 551, 553-57, 56 L.R.R.M. 1246, 1247-49 (1964). They maintained that there was an identity of interests among employees in a highly centralized chain possessing uniform wages and working conditions; they argued that "the contract terms with the union selected by the employees in the single-restaurant unit will undoubtedly have a potent impact on the terms and conditions of employment of all the other employees in the chain." Id. at 557, 56 L.R.R.M. at 1248. While it is possible that a similar policy consideration formed the basis of the Board's *Safeway* policy, this is unlikely since the issue of the impact of union contract terms on unorganized employees was never mentioned in the *Safeway* line of cases.

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9(c)(5) as disfavoring single-location units, although the section's legislative history indicates that this was not the intent of Congress.³⁹

II. THE DEVELOPMENT AND APPLICATION OF THE SINGLE-STORE PRESUMPTION

In 1961 the Board, after a change in membership,⁴⁰ decided *Hot Shoppes, Inc.*,⁴¹ which indicated that the *Safeway* policy of refusing to approve single-store or less than division-wide multistore units was about to be abandoned. The Board stated in *Hot Shoppes* that the availability of appropriate larger units did not militate against finding the smaller unit appropriate.⁴² Then, in 1962, the Board made the decisive break with its prior policy of unit determinations that had been forecast by *Hot Shoppes*. In *Sav-On Drugs, Inc.*,⁴³ the Board adopted the position that the retail chain employees' right to self-organization was impeded by the Board's post-*Safeway* overemphasis on administrative divisions and underemphasis on geographic remoteness, local managerial autonomy, and extent of union organization.⁴⁴ In order to alter this mistaken emphasis, the Board added the possibility that single-store units might be appropriate even despite the absence of unusual circumstances that *Safeway* had required. The Board noted that in "innumerable" instances the organizational desires of employees had been thwarted under the *Safeway* policy of requiring large-scale, multistore organizational drives in situations where single-store units should have been found appropriate.⁴⁵ The Board directed an election in a single-store unit because of the local manager's full control over hiring of part-time employees, "geographic separation," the "infrequent" employee interchange, and the extent of union organization.⁴⁶

³⁹ Senator Robert Taft explained the limited intent of section 9(c)(5): "Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of . . . businesses whose operations are widespread. It is sufficient answer to say that the Board has evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical considerations, etc., any one of which may justify the finding of a small unit." 93 Cong. Rec. 6860 (1947).

⁴⁰ In 1961 President Kennedy appointed Chairman McCulloch and Member Brown to the Board.

⁴¹ 130 N.L.R.B. 138, 47 L.R.R.M. 1258 (1961).

⁴² Id. at 141 n.12. The Board is not required to find the perfect or best possible unit; it is only required to find an appropriate unit. See *Agawam Food Mart, Inc.*, 162 N.L.R.B. 1420, 1423, 64 L.R.R.M. 1197, 1199 (1967). For a discussion which maintains that the Board should seek the most appropriate unit, see Rains, *Determination of the Appropriate Bargaining Unit by the NLRB: A Lack of Objectivity Perceived*, 8 B.C. Ind. & Com. L. Rev. 175 (1967).

⁴³ 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962).

⁴⁴ Id. at 1033, 51 L.R.R.M. at 1153.

⁴⁵ Id. at 1033-34 & n.4, 51 L.R.R.M. at 1153 & n.4.

⁴⁶ Id. at 1034-35, 51 L.R.R.M. at 1153. The store managers were in charge of day-to-day operations; they could interview full-time applicants and make recommendations. Id. The Board played down *Sav-On's* importance by stating that it had "simply added

The significance of *Sav-on* was formally recognized by the Board two years later, in *Frisch's Big Boy Ill-Mar, Inc.*⁴⁷ In this case, *Sav-On* was characterized as an abandonment of the Board's "prior general policy of making unit determinations in [the retail chain] industry coextensive with the employer's administrative division or the involved geographic area."⁴⁸ *Sav-On* had analogized single stores to single plants for unit determination purposes;⁴⁹ since Section 9(b) of the NLRA⁵⁰ has been interpreted by the Board as creating a presumption that single-plant units are appropriate,⁵¹ *Frisch's Big Boy* completed the plant/store analogy by ruling that a single-store unit is presumptively appropriate.⁵²

In *Sav-On* and *Frisch's Big Boy* the Board continued to deal with the same criteria that it had used in the *Safeway* period—local managerial independence, employee interchange, and geographic proximity—to assess the factor of local autonomy. However, the Board's definition of "significant" managerial independence, "close" geographic proximity, and "substantial" employee interchange was altered significantly. For example, in later cases which relied on *Sav-On*, the Board de-emphasized such administrative functions as centralized recordkeeping while stressing the extent of actual local managerial independence.⁵³ The Board in one post-*Sav-On* decision pointed out that:

[m]ore significant [than centralized administrative functions] is whether or not the employees perform their day-to-day work under the immediate supervision of a local store manager who is involved in rating employee performance, or in performing a significant portion of the hiring and firing of the employees, and is personally involved with the daily matters which make up their grievances and routine problems.⁵⁴

the possibility—as in manufacturing and other multiplant enterprises—that a single location or grouping other than an administrative division or geographical area may be appropriate."Id. at 1033-34 n.4, 51 L.R.R.M. at 1153 n.4. See also *Weis Mkts., Inc.*, 142 N.L.R.B. 708, 53 L.R.R.M. 1141 (1963).

⁴⁷ 147 N.L.R.B. 551, 56 L.R.R.M. 1246 (1964) (representation case), 151 N.L.R.B. 454, 58 L.R.R.M. 1438 (1965) (unfair labor practice case), enforcement denied, 356 F.2d 895 (7th Cir. 1966).

⁴⁸ 147 N.L.R.B. at 551, 56 L.R.R.M. at 1247.

⁴⁹ See the statement in the *Sav-On* decision which is quoted in note 46 supra.

⁵⁰ 29 U.S.C. § 159(b) (1970).

⁵¹ *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551 n.1, 56 L.R.R.M. 1246, 1247 n.1 (1964). In support of this position the Board cited a case in which it had ruled that: "A single-plant unit, being one of the unit types listed in [section 9(b)] . . . as appropriate for bargaining purposes, is presumptively appropriate." *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 51 L.R.R.M. 1344 (1962) (footnote omitted).

⁵² 147 N.L.R.B. at 551 & n.1, 56 L.R.R.M. at 1247 & n.1.

⁵³ E.g., *Haag Drug Co.*, 169 N.L.R.B. 877, 878, 67 L.R.R.M. 1289, 1291 (1968); *Allied Stores, Inc.*, 175 N.L.R.B. 966, 71 L.R.R.M. 1147 (1969).

⁵⁴ *Haag Drug Co.*, 169 N.L.R.B. 877, 878, 67 L.R.R.M. 1289, 1291 (1968).

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Thus, after *Sav-On*, the Board developed a willingness to look beyond the employer's centralized administrative functions to the actual day-to-day authority of store managers. This approach, when coupled with the Board's recognition that ordinarily "the individual store managers represent the highest level of supervisory authority present in the stores for a substantial majority of the time,"⁵⁵ significantly modified evaluation of the standard of local managerial independence. In applying this revised criterion in the post-*Sav-On* cases the Board became willing to find managerial independence sufficient to justify a single-store unit where the local manager could not hire full-time employees but did have some influence regarding acceptance of applicants for part-time work.⁵⁶ It is apparent that the Board had become reluctant to let limited local managerial authority block the employees' freedom of self-organization.

In evaluating standards other than managerial independence which indicate the degree of local autonomy possessed by a retail store, the Board in one post-*Sav-On* case found interchange involving twelve percent of the work force per month no obstacle to single-store units.⁵⁷ In the same case, the presence of excluded stores "within a few blocks" did not create sufficient geographic proximity to negate the appropriateness of a single store unit,⁵⁸ while in other cases a distance of three miles showed "geographic separation"⁵⁹ and a four mile separation demonstrated "different competitive markets,"⁶⁰ pointing to the appropriateness of single-store units.

In sum, the Board after *Sav-On* utilized the criteria⁶¹ of local

⁵⁵ *Grand Union Co.*, 176 N.L.R.B. 230, 232, 71 L.R.R.M. 1216, 1218 (1969). The Board noted that regional supervisors made visits to each store on the average of "2.5 times per week" but concluded that this presence of supervisors, even if many of their visits lasted "an entire day," would not negate local managerial independence. *Id.* at 231-32, 71 L.R.R.M. at 1218.

⁵⁶ *Agawam Food Mart, Inc.*, 162 N.L.R.B. 1420, 64 L.R.R.M. 1197 (1967). The Board never specifically referred to the distribution of hiring authority with respect to full-time employees. The Board's protracted discussion of the local manager's minor role in hiring part-time employees creates a strong inference that local managers played an even smaller role in the hiring of full-time employees. *Accord*, *May Dep't Stores Co.*, 175 N.L.R.B. 514, 71 L.R.R.M. 1026 (1969); *Purity Food Stores, Inc. (Sav-More Food Stores)*, 160 N.L.R.B. 651, 63 L.R.R.M. 1007 (1966), enforcement denied, 376 F.2d 497 (1st Cir. 1967).

⁵⁷ *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551, 552, 56 L.R.R.M. 1246 (1964).

⁵⁸ *Id.* at 554 (dissenting opinion).

⁵⁹ *Agawam Food Mart, Inc.*, 162 N.L.R.B. 1420, 64 L.R.R.M. 1197 (1967).

⁶⁰ *Primrose Super Mkt., Inc.*, 148 N.L.R.B. 610, 57 L.R.R.M. 1057 (1964), enforced without opinion, (1st Cir.) (unreported), cert. denied, 382 U.S. 830 (1965), rehearing denied, 353 F.2d 675 (1st Cir. 1965).

⁶¹ In further contrast to the approach of the *Safeway* period, in *Sav-On* and subsequent cases the Board often noted that "no labor organization is seeking to represent employees on a broader basis." *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 1035, 51 L.R.R.M. 1152, 1153 (1962); *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551, 553, 56 L.R.R.M. 1246, 1247 (1964). While such statements did not indicate that the Board had reverted to its original policy of relying primarily on the union's extent of organization, they did demonstrate use of this test as a means of emphasizing that there need be only a finding of an appropriate unit.

managerial independence, geographic proximity and employee interchange in a manner that customarily allowed a finding of an appropriate single-store unit. The Board summarized this development in one post-*Sav-On* case: "Our experience has led us to conclude that a single store in a retail chain, like single locations in multistore enterprises in other industries, is *presumptively* an appropriate unit for bargaining. In cases subsequent to *Sav-On Drugs*, we have consistently found such units appropriate unless countervailing factors were present."⁶² The Board had adopted a balanced, case-by-case approach to unit determinations; single-store units were rejected only in those rare instances where the cumulative effect of substantial employee interchange and the complete absence of local control over hiring, firing, and promotions rebutted the presumptive appropriateness of single-store units.⁶³ It is submitted, then, that the Board after *Sav-On* allowed retail chain employees the fullest possible exercise of their right of self-organization by favoring the single-store unit.

III. CURRENT DEVELOPMENTS: VACILLATION IN BOARD POLICY, CULMINATING IN *Gray Drug Stores* AND *Walgreen*

Since the 1961 change in Board membership noted above may be considered a partial explanation for the Board's departure in *Sav-On* from its prior policy, it might be thought that this same factor is a sufficient explanation for the more recent and dramatic unit policy fluctuations described below. However, it should be noted at the outset that changes in membership appear to be of little use in explaining the latest changes in unit policies.⁶⁴

A. *Revival of the Safeway Approach Regarding Single-Store Units*

Four recent cases have indicated Board reinterpretation of the criteria which demonstrate local autonomy and hence Board movement away from *Sav-On's* endorsement of single-store units. In the 1969

⁶² *Haag Drug Co.*, 169 N.L.R.B. 877, 67 L.R.R.M. 1284, 1290 (1968).

⁶³ See *Horn & Hardart Co.*, 170 N.L.R.B. 988, 67 L.R.R.M. 1512 (1968); *Pep Boys—Manny, Moe & Jack*, 172 N.L.R.B. No. 23, 68 L.R.R.M. 1308 (1968); *Star Mkt. Co.*, 172 N.L.R.B. No. 130, 68 L.R.R.M. 1497 (1968).

⁶⁴ The same Board, composed of Chairman McCulloch and Members Fanning, Jenkins, Brown and Zagoria, which developed the *Sav-On* line of cases unanimously decided, in 1969, the first case to depart from *Sav-On* (*Mott's Shop-Rite, Inc.*, 174 N.L.R.B. 1116, 70 L.R.R.M. 1388 (1969)). Two 1971 cases that went against *Sav-On* were decided by Chairman Miller and Member Kennedy with Member Fanning dissenting (*Twenty-First Century Restaurant Corp.*, 192 N.L.R.B. No. 103, 78 L.R.R.M. 1015 (1971); *Waikamilo Corp.*, 192 N.L.R.B. No. 102, 78 L.R.R.M. 1018 (1971)). In 1972 a similar case was decided by Chairman Miller and Members Kennedy and Penello with Members Fanning and Jenkins dissenting (*Gray Drug Stores, Inc.*, 197 N.L.R.B. No. 105, 80 L.R.R.M. 1449 (1972)), while another 1972 case that returned to *Sav-On* was the unanimous decision of Members Fanning, Kennedy and Penello (*Walgreen Co.*, 198 N.L.R.B. No. 158, 81 L.R.R.M. 1065 (1972)). All five cases are discussed in detail *infra*.

UNIT DETERMINATIONS IN THE RETAIL CHAIN INDUSTRY

decision *Mott's Shop-Rite, Inc.*,⁶⁵ the Board found an absence of local authority in spite of local power to hire and fire part-time employees and to discipline and recommend discharge of full-time employees.⁶⁶ In a finding reminiscent of the *Safeway* approach, the Board emphasized the geographic "proximity" of stores which were seven to thirty-four miles away from the requested unit store.⁶⁷ An even greater departure from the *Sav-On* approach came in 1971 with *Twenty-First Century Restaurant Corp.*⁶⁸ and *Waiakamilo Corp.*⁶⁹ In *Twenty-First Century* the Board found a proposed single-store unit inappropriate because local managers possessed only "minimal" discretion,⁷⁰ because of occasional employee transfers among the stores,⁷¹ and on the basis of geographic proximity—the seven stores in the administrative district which included the requested store fell within a ten mile radius.⁷² Significantly, the manager's "minimal" discretion included complete authority over most hiring,⁷³ most training, and some firing,⁷⁴ as well as effective power over all discharges, raises and work schedules.⁷⁵ In *Waiakamilo* the Board accepted the employer's argument that a unit of one of five restaurants within a fifteen mile radius would "unduly fragmentize" its business.⁷⁶ The Board found that employee transfers involving less than one percent of the total work force per month⁷⁷

⁶⁵ 174 N.L.R.B. 1116, 70 L.R.R.M. 1388 (1969).

⁶⁶ *Id.* The Board also found "substantial" employee interchange. *Id.* at 1117, 70 L.R.R.M. at 1390. Although in certain cases the Board had found single-store units inappropriate before *Mott's Shop-Rite*, the unusual factual situations make these cases clearly distinguishable from *Sav-On*. See text at note 63 *supra*. One 1967 Board decision is less clearly distinguishable from *Sav-On*, although there was significantly less local autonomy in this case than in *Mott's Shop-Rite*. See *Caribbean Restaurants, Inc.*, 162 N.L.R.B. 676, 64 L.R.R.M. 1061 (1967).

⁶⁷ 174 N.L.R.B. 1116, 70 L.R.R.M. 1388. For discussion of the *Safeway* approach see note 36 and accompanying text *supra*.

⁶⁸ 192 N.L.R.B. No. 103, 78 L.R.R.M. 1015 (1971).

⁶⁹ 192 N.L.R.B. No. 102, 78 L.R.R.M. 1018 (1971).

⁷⁰ 78 L.R.R.M. at 1016 (1971).

⁷¹ The interchange involved less than two percent of the entire work force per month. *Id.* The transfers were apparently of short duration for the purpose of special promotional efforts; there was evidence that regular, day-to-day employee interchange was nonexistent. *Id.* at 1018 (dissenting opinion). Temporary and irregular transfers, such as those precipitated by the promotional efforts, have traditionally been given little weight by the Board. See, e.g., *Walgreen Co.*, 198 N.L.R.B. No. 158, 81 L.R.R.M. 1065, 1066 (1972) (Regional Director's Decision); *Goldblatt Bros., Inc.*, 119 N.L.R.B. 1340, 1343, 41 L.R.R.M. 1288, 1289 (1958).

⁷² 78 L.R.R.M. at 1015-16.

⁷³ The store manager had full control over hiring at the minimum wage rate, but needed approval for hiring at higher rates. *Id.* at 1015. Most employees were hired at the minimum wage. *Id.* at 1017 (dissenting opinion).

⁷⁴ *Id.* at 1015-16; see the dissenting opinion at 1017.

⁷⁵ *Id.* at 1017-18 (dissenting opinion). The store manager was technically empowered to recommend raises and discharges. However, the dissent indicates that the store manager's recommendations were never overruled by the district manager. *Id.*

⁷⁶ 192 N.L.R.B. No. 102, 78 L.R.R.M. 1018, 1019 (1971) (Regional Director's Decision).

⁷⁷ *Id.* at 1020 & n.7 (dissenting opinion).

and that total local control over all hiring and some discharges⁷⁸ constituted "frequent" transfers and "little [local] discretion," thus necessitating a multistore unit.⁷⁹

The fourth decision, *Gray Drug Stores, Inc.*⁸⁰ also reveals a change in the content and application of unit determination standards and accordingly a weakening of the presumptive appropriateness of single-store units. The petitioners, a local of the Retail Clerks Union, sought a representation election in a unit which contained the employer's eleven retail drug stores in Dade County, Florida, and which cut across two of the employer's administrative subdivisions.⁸¹ Alternatively, the union sought single unit elections for each of the eleven stores.⁸² The employer maintained that the appropriate unit should include all thirty stores in its Florida Division.⁸³ The store managers in *Gray Drug* were admittedly in charge of day-to-day operations and direction of the work force.⁸⁴ They interviewed and evaluated prospective employees, hired employees "in certain circumstances," had authority to suspend and discipline, and were consulted by district managers on evaluation and promotion of employees.⁸⁵ Furthermore, "soda fountain managers" could "effectively recommend" the hire of new employees.⁸⁶ The Board felt these facts failed to demonstrate local managerial independence and found that this lack of independence, together with "frequent interchange"⁸⁷ and "geographic prox-

⁷⁸ Store managers could hire and train employees. They could discharge employees for pilferage or insubordination. *Id.* at 1019 n.4. The dissent maintained that "for all practical purposes" employees could be discharged by the local managers. *Id.* at 1020.

⁷⁹ *Id.* at 1019-20.

⁸⁰ 197 N.L.R.B. No. 105, 80 L.R.R.M. 1449 (1972). Although the Board approved single-store units in the period between *Twenty-First Century* and *Gray Drug*, their unique factual situations may have been determinative. See *Angeli's Super Valu*, 197 N.L.R.B. No. 22, 80 L.R.R.M. 1282 (1972) (minimum geographic separation was ninety-two miles); *Short Stop, Inc.*, 192 N.L.R.B. No. 184, 78 L.R.R.M. 1087 (1971) (employer conceded the appropriateness of single-store units). But cf. *Angelus Furniture Mfg. Co.*, 192 N.L.R.B. No. 137, 78 L.R.R.M. 1056 (1971).

⁸¹ 80 L.R.R.M. at 1449-51.

⁸² *Id.* at 1449.

⁸³ *Id.*

⁸⁴ *Id.* at 1450.

⁸⁵ *Id.* In contrast to the practice of the post-*Sav-On* cases, the Board did not mention the crucial question of the extent to which the district managers followed the store managers' recommendations in these areas. See *Haag Drug Co.*, 169 N.L.R.B. 877, 881 n.15 (1968). As a further anomaly, the Board stressed "effective" authority as the basis for excluding soda fountain managers from the unit. 80 L.R.R.M. at 1452. On the other hand, the Board in *Gray Drug* took careful note of the extent of centralized administrative functions. *Id.* at 1450.

⁸⁶ 80 L.R.R.M. at 1452. See 29 U.S.C. § 152(11) (1970).

⁸⁷ 80 L.R.R.M. at 1451. There was approximately seven percent interchange per month among the thirty Florida Division stores. *Id.* at 1450-51. The interchange was occasioned by such special events as new store openings; there was no regular, day-to-day interchange. *Id.* The Board usually gives little weight to this type of interchange. See note 71 *supra*. The Board did not present any figures specifically dealing with the eleven Dade County stores, nor did it compare transfers within the proposed unit with transfers to excluded stores. This constitutes a departure from the *Sav-On* approach. Cf. *Crown Drug Co.*, 108 N.L.R.B. 1126, 1127, 34 L.R.R.M. 1141, 1142 (1954).

imity,"⁸⁸ "negate[d] the identity"⁸⁹ of the requested single-store units.

When read together, *Mott's Shop-Rite*, *Twenty-First Century*, *Waiakamilo* and *Gray Drug* demonstrate that, although the Board continued to profess adherence to the presumptive appropriateness of single-store units and to deal with the standards of local managerial independence, interchange, and geographic proximity, it had come to consider the single-store presumption easily rebuttable if the employer presented even a tenuous argument that local autonomy was lacking. The Board had once again shifted its unit policy through a redefinition of the significance of facts pointing to the existence of local autonomy.

The Board's departure from *Sav-On's* approval of single-store units was most clearly manifested in the transformation of the Board's standard of local managerial independence. During the *Sav-On* period the Board tried to weigh the impact of the local manager's authority, no matter how limited, on the employees' day-to-day performance of their work.⁹⁰ Regardless of any veto reserved to higher authorities, if there was actual local authority in the areas of hiring and firing or local supervision and evaluation of employees, then there were strong indications that *an* appropriate unit, though possibly not the *most* appropriate unit, was present.⁹¹ The Board, in *Mott's Shop-Rite*, *Twenty-First Century*, *Waiakamilo* and *Gray Drug*, appeared to have discarded this approach for one which gave emphasis to the employer's professed distribution of managerial authority.⁹²

It should be noted that no alteration in the retail chain industry had precipitated *Sav-On's* acceptance of single-store units. The Board had found that this acceptance was necessitated by the need to protect the employees' right to self-organization;⁹³ at the time when *Gray Drug* was decided, nothing had changed so as to alleviate this necessity. Further, the experience of retail chains after *Sav-On* indicated that, contrary to the predictions of retail chain employers,⁹⁴ the greater ease of self-organization made possible by the presumptive appropriateness of single-store units did not interfere with management's goal of maintaining highly centralized operations.⁹⁵ Thus, the

⁸⁸ 80 L.R.R.M. at 1451. Paradoxically, the Board, while relying on the factor of geographic proximity, failed to present any figures showing the distances between the stores.

⁸⁹ *Id.*

⁹⁰ See text at notes 55-56 *supra*.

⁹¹ See, e.g., *Haag Drug Co.*, 169 N.L.R.B. 877, 67 L.R.R.M. 1289 (1968). See note 42 *supra*.

⁹² See, e.g., *Waiakamilo Corp.*, 192 N.L.R.B. No. 102, 78 L.R.R.M. 1018, 1020 (1971) (dissenting opinion).

⁹³ *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 1033, 51 L.R.R.M. 1152, 1153 (1962).

⁹⁴ E.g., *Waiakamilo Corp.*, 192 N.L.R.B. No. 102, 78 L.R.R.M. 1018, 1019 (1971); *Purity Food Stores, Inc. (Sav-More Food Stores)*, 160 N.L.R.B. 651, 652, 63 L.R.R.M. 1007, 1008 (1966).

⁹⁵ *Sirkin and Yeomans, Effects of the NLRB's Unit Policies in the Retail Chain Store Industry*, 23 Lab. L.J. 80, 96 (1972).

policy reasons underlying *Gray Drug's* departure from *Sav-On* are not readily apparent. In fact, this departure could trigger noxious consequences. For example, since it is essential to the functioning of many chains that district or area managers retain at least a potential veto over local managerial decisions, the view that such veto powers are destructive of local autonomy would preclude the establishment of otherwise appropriate single-store units in many instances. Further, as noted by Member Fanning in his dissent in *Twenty-First Century*, "To [the rank-and-file worker] the right of self-organization vouchsafed by the Act seems a myth if hundreds of other chain employees he may never see, whose immediate employment problems revolve around their own local managers, must also be a part of the same organizing effort."⁹⁶

B. *A New Approach in Multistore Unit Determinations:
Emphasis on Employer Administrative Districts*

Apart from its weakening of the presumptive appropriateness of single-store units, *Gray Drug*, as pointed out by dissenting Members Fanning and Jenkins, is also a "significant departure from . . . earlier Board practice"⁹⁷ in the area of multistore unit determinations. In spite of its history of fluctuations in the area of single-store retail unit determinations, in the past the Board has held consistently that multistore units may be based either on administrative districts or on geographic areas.⁹⁸ *Gray Drug* suggests that the Board now favors the former.

After refusing the single-store unit, the Board, in *Gray Drug*, turned to the union's request for a metropolitan area-wide unit and noted that some stores on the fringe of the metropolitan area were farther from its center than they were from some excluded stores on the fringe of a neighboring county. Therefore the Board concluded that the proposed unit would not constitute a distinct geographic area.⁹⁹ The Board continued: "But, *more importantly*, a unit of Dade County stores would not reflect the separate community of interest which stems from common supervision."¹⁰⁰ Since the union's requested multistore unit was neither geographically distinct nor, more significantly, coextensive with the employer's administrative subdivisions, the Board found appropriate a unit containing twice as many stores and comprising two of the employer's districts.¹⁰¹ The Board's statement that conformity to administrative districts is more significant than conformity to geographic areas strongly suggests that the Board has rejected the use of these two criteria as distinct and equally viable

⁹⁶ 78 L.R.R.M. at 1016.

⁹⁷ 80 L.R.R.M. at 1453.

⁹⁸ *Id.* at 1451.

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ *Id.* at 1450-52.

bases for unit determinations, and has instead adopted an approach which grants preeminence to units comprising complete administrative districts.

It is unquestionably true that a geographically based unit is more suitable for use in a working relationship between labor and management when it is not only geographically cohesive but also coextensive with the employer's administrative divisions. But the Board's statutory task is merely to find *an* appropriate unit, not to determine the *most* appropriate unit.¹⁰² By requiring conformity to administrative districts in multistore units the Board would be abandoning the responsibilities imposed by the NLRA.¹⁰³ Prior to the amendments of 1947, the Board allowed a similar abandonment to take place through its "extent of organization" doctrine, which allowed extensive labor union manipulation of bargaining unit size.¹⁰⁴ Making administrative districts determinative would give retail chain employers the capability of fixing the size and shape of the employees' bargaining units. In many cases the ability to control the size of the unit could prohibitively increase the magnitude of the union's organizational task, thus enabling the employer to determine the outcome of the representation election, to the detriment of the union and the employees.¹⁰⁵ Further, the existing problems in the area of multistore units will be compounded if the Board readopts the approach to single-store units taken in *Twenty-First Century* and *Gray Drug*, since a weakening of the single-store alternative will create greater demand for multistore groupings.

C. Walgreen Co.: A Return to the Sav-On Policy

The Board's movement away from *Sav-On's* endorsement of single-store units has been abruptly curtailed during its formative stage. The recent case of *Walgreen Co.*¹⁰⁶ indicates continued Board adherence to the interpretation of local autonomy which has pre-

¹⁰² See note 42 supra.

¹⁰³ "The Board shall . . . assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA] . . ." 29 U.S.C. § 159(b) (1970).

¹⁰⁴ See text at notes 13-16 supra.

¹⁰⁵ In addition to enhancing the employer's power in the area of controlling the size and shape of units based on administrative districts, the Board's decisions in *Twenty-First Century* and *Waiakamilo* may be allowing employers too much leverage by confining its consideration of local managerial autonomy to an examination of employer assertions as to the nature and degree of local autonomy, such as the policies set forth in operations manuals. *Waiakamilo Corp.*, 192 N.L.R.B. No. 102, 78 L.R.R.M. 1018, 1020 (1971) (dissenting opinion). The willingness of employers to use these powers to defeat union requests for small bargaining units is indicated by the actions of some employers in analogous situations. For example, there is evidence that some employers have artificially increased employee transfers so as to rebut the single unit appropriateness. *Purity Food Stores, Inc. (Sav-More Food Stores)*, 160 N.L.R.B. 651, 658 n.16, 63 L.R.R.M. 1007, 1011 n.16 (1966); Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 W. Res. L. Rev. 479, 497 & n.69 (1967).

¹⁰⁶ 198 N.L.R.B. No. 158, 81 L.R.R.M. 1065 (1972).

vailed since *Sav-On*. The petitioning union¹⁰⁷ in *Walgreen* sought a single-store unit; the employer argued that an appropriate unit must include its eleven retail drug stores in Dade County, Florida.¹⁰⁸ The store managers had authority over "most" hiring and could recommend discharges, though these recommendations were always scrutinized and sometimes disapproved by the district manager.¹⁰⁹ Initial pay raises were routinely scheduled, although store managers did possess authority to recommend later increases which were subject to approval by the district manager.¹¹⁰ The Regional Director indicated that these factors established local managerial independence.¹¹¹ This independence, together with the absence of substantial employee interchange,¹¹² and in light of the three to fifteen mile separations between the proposed unit store and the excluded stores,¹¹³ demonstrated the appropriateness of the single-store unit.

The Board distinguished *Walgreen* from *Gray Drug*, primarily on the grounds of differences in the number of visits by central management personnel to the stores and the extent of local authority over day-to-day operations.¹¹⁴ However, the distinction between the visits of undisclosed duration by district managers two to three times per week in *Gray Drug*¹¹⁵ and the repeated visits by various regional supervisors in *Walgreen*, often extending to "several days" in duration,¹¹⁶ would not appear sufficient to explain the opposite results.¹¹⁷ The relative authorities of the local store managers in *Walgreen* and *Gray Drug* appear, on balance, equivalent. While the *Walgreen* managers had greater discretion in the area of hiring,¹¹⁸ the *Gray Drug*

¹⁰⁷ Retail Clerks Union Local 1625 was the petitioner in both *Walgreen* and *Gray Drug*.

¹⁰⁸ 81 L.R.R.M. at 1065, 1066.

¹⁰⁹ Id. at 1065 (Regional Director's Decision).

¹¹⁰ Id. After two years' service, an employee's raises ceased to be routine. Id. Neither the Regional Director nor the Board indicated the extent to which the store manager's recommendations concerning subsequent raises were followed.

¹¹¹ Id. at 1066.

¹¹² In a seven month period less than ten employees were transferred into or out of the requested single-store unit. Id.

¹¹³ Id.

¹¹⁴ Id. at 1066-67 (Board's Decision).

¹¹⁵ 80 L.R.R.M. at 1450.

¹¹⁶ Each store was visited by two district managers once per month and by two assistant district managers once per month. The former visits were of brief duration, while the latter lasted "several days." 81 L.R.R.M. at 1065-66.

¹¹⁷ This is particularly true in light of the fact that the Board has generally minimized the importance of visits by central management personnel in the past. See note 55 *supra*.

¹¹⁸ In *Walgreen*, the store manager hired "most" employees. 81 L.R.R.M. at 1065. The power of the *Gray Drug* store managers to interview and evaluate prospective employees, as well as to hire them "in certain circumstances," is difficult to compare to the power of *Walgreen's* managers, since the Board in *Gray Drug* did not examine the significance of the district managers' "final say." 80 L.R.R.M. at 1450. Further, any such comparison must consider that in *Gray Drug* soda fountain employees were effectively hired at the local level. See text at note 86 *supra*.

managers, unlike their *Walgreen* counterparts, had the authority to suspend and discipline employees.¹¹⁹ Furthermore, the contrast, which the Board did not mention, between the Board's emphasis on the limited local authority in the areas of hiring and firing in *Walgreen*, and its disparagement of the extensive local power in these areas in *Twenty-First Century* and *Waiaakamilo*, would appear to undercut the continued precedential value of those earlier decisions.¹²⁰ In particular, the Board's willingness to recognize the day-to-day authority of the store managers in *Walgreen* constitutes a reaffirmation of *Sav-On*.¹²¹ Regrettably, the Board's refusal in *Walgreen* to expressly overrule or disapprove these earlier cases leaves room for argument concerning the conclusiveness of the decision's reinstatement of the presumptive appropriateness of single-store units.

The entire history of single-store unit determinations in the retail chain industry has been one of change and transition. The Board's earliest attempts to ensure maximum employee freedom of self-organization culminated in acknowledgment after *Sav-On* of the presumptive appropriateness of the single-store unit. The recent *Mott's Shop-Rite*, *Twenty-First Century*, *Waiaakamilo* and *Gray Drug* cases applied the standards of local managerial independence, geographic proximity and employee interchange in such a manner as to weaken seriously this presumptive appropriateness. If allowed to continue, this trend could have led to a substantial curtailment of employee freedom.¹²² Fortunately, the *Walgreen* decision appears to have precluded continuation of the aberrant application of these standards. Unfortunately, this recent period of vacillation may be interpreted as an indication that previously stable and acceptable Board standards are again in flux, thus encouraging increased litigation.

CONCLUSION

Maximizing employee freedom of self-organization is the ultimate goal of the Board's retail chain bargaining unit determinations. The Board's experience has demonstrated that protection of this right requires that single-store units be presumptively appropriate; its recent tendency to undercut this presumption posed a threat to employee

¹¹⁹ *Gray Drug Stores, Inc.*, 197 N.L.R.B. No. 105, 80 L.R.R.M. 1449, 1450 (1972). Since the Board, in *Walgreen*, attempted to demonstrate that local authority existed, omission of any reference to local suspension and discipline powers strongly implies that these powers were not present.

¹²⁰ But cf. *Bank of America Nat'l Trust & Savings Ass'n*, 196 N.L.R.B. No. 76, 80 L.R.R.M. 1081, 1087 (1972) (Kennedy, Member, dissenting).

¹²¹ See text at notes 55-56 *supra*. The strength of this reaffirmation of the *Sav-On* approach is somewhat lessened by the fact that one member of the Board panel which decided *Walgreen* recently argued that local bank managers lacked independence because they did not control regional administrative or labor relations policies. *Bank of America Nat'l Trust & Savings Ass'n*, 196 N.L.R.B. No. 76, 80 L.R.R.M. 1081, 1087 & n.13 (1972) (Kennedy, Member, dissenting). The local autonomy standards applied in *Bank of America* are identical to the standards used in retail chain decisions. See *id.* at 1082-84.

¹²² See note 105 *supra*.

freedom. It is submitted that through *Walgreen* the Board has properly reaffirmed the single-store presumption, and that the Board should, through express disapproval of such cases as *Twenty-First Century* and *Gray Drug*, complete this reaffirmation, thereby discouraging further unnecessary litigation. It is further submitted that the Board should not destroy the balance it has previously sought to achieve in its case-by-case search for appropriate multistore units by attempting to make such groupings conform to employers' administrative districts.

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