

NLRB CRAFT SEVERANCE POLICIES: PREEMINENCE OF THE BARGAINING HISTORY FACTOR AFTER MALLINCKRODT

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Under Section 9(a) of the Labor Management Relations Act of 1947, the agent selected by a majority of the employees in an appropriate bargaining unit is the exclusive representative of all the employees in that unit for the purpose of collective bargaining.¹ Section 9(b) of the Act empowers the National Labor Relations Board to determine the appropriate unit:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employee unit, craft unit, plant unit, or subdivision thereof²

The entrustment to the NLRB of the right to designate appropriate bargaining units has created numerous problems. One of the most controversial and complex problems is the choice which the Board often is required to make between a craft and an industrial unit. Unlike most unit determination cases, it involves the overt conflict between employee interest groups.

The various skilled craft groups have raised a number of cogent arguments in favor of separate representation. First, being a minority in an industrial unit creates the feeling among craftsmen that their particular interests are being ignored. Second, the high degree of skill possessed by these "labor aristocrats" provides their representatives with greater economic bargaining power, thus allowing them to command higher wages and benefits for members of the unit. The mixing of skilled and unskilled employees tends to dilute this bargaining power, thereby lessening the benefits which the employer is willing to offer. On the other hand, the industrial unions forcefully argue that separate bargaining units jeopardize the rights of all employees, in that a strike by the skilled workers could effectively shut down the employer's entire operations. Industrial unions also argue that the larger unit enhances their bargaining power with employers. Further, it is claimed that the separation of employees into different units leads to

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¹ 29 U.S.C. § 159(a) (1964).

² 29 U.S.C. § 159(b) (1964).

competitive animosity with the concomitant disruption of industrial harmony.

The employers involved in these craft disputes usually concur in the position taken by the industrial unions. First, it is felt that bargaining with one unit is less formidable than dealing with two or more units. Second, employers fear bargaining separately with several different unions, particularly when each union possesses the power to disrupt their entire operations.

Because of these diverse and often competing interests, it has been particularly difficult for the NLRB to formulate a policy which recognizes these interests as well as the interest of the public in maintaining labor stability. This difficulty has been reflected in the decisions of the Board during the past thirty-five years, a period during which the Board has unsuccessfully attempted to balance these interests in a way which would effectuate the broad policies of the Act. The purpose of this article is to examine the NLRB's past and present craft unit policies and the application of these policies. This, it is submitted, will reveal an existing dichotomy between current Board policy and practice. While the Board has articulated a policy which professes to examine all relevant factors in the determination of an appropriate unit, it has, in fact, emphasized only those factors which are supportive of its apparent preference for the industrial unit.

I. THE HISTORICAL DEVELOPMENT

When Congress enacted the National Labor Relations Act of 1935,³ the subsequent, extended controversy involving the determination of the appropriate industrial or craft unit was not foreseen. It was generally assumed that the American Federation of Labor's (AFL) policy of recognizing craft units would alleviate this problem.⁴ How-

³ 29 U.S.C. §§ 151-66 (1964).

⁴ From the late 1800s until the mid 1930s, the AFL was concerned only with organizing the skilled labor force. It was not until after enactment of the National Labor Relations Act in 1935 that the craft versus industrial unit conflict surfaced. During 1936 and 1937, the then Committee for Industrial Organization conducted a spectacular organizing drive in the mass production industries. Shortly thereafter, in May, 1938, the Committee transformed itself into the Congress of Industrial Organizations and pledged itself to the advancement of industrial unionism. After an attempt to unite the organizations failed, the nation found itself in the midst of a war for control of the labor force. This conflict resulted in modification of the objectives of both labor organizations and the placement of substantial burdens upon the NLRB. One labor historian has noted:

The government became involved through the NLRB, which was inevitably called upon to settle the problems of proper bargaining units in industry after industry. Even under peaceful conditions its task was not an easy one since the CIO claimed all employees regardless of what work they did and the AFL claimed all men who accomplished any task however faintly it resembled a

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ever, during the first few cases before the Board, there developed a noticeable trend toward favoring the larger integrated industrial units over the smaller craft units.⁵ In 1937 the Board modified this position and instituted a policy which granted self-determination elections to craft units during the period of initial organization.⁶ Under this policy the employees in the craft were allowed, when all other factors were "evenly balanced," to choose in an election between the union contending for the comprehensive unit and the union contending for the craft unit.⁷

A. *The American Can Doctrine*

In *American Can Co.*⁸ the Board was confronted for the first time with a situation in which there had been an earlier determination in favor of an industrial bargaining unit. In dismissing the petition for severance a majority of the Board stated:

The Board is not authorized by the Act to split the appropriate unit thus established by collective bargaining and embodied in a valid exclusive bargaining contract.⁹

This decision established a Board policy of denying craft severance where there existed a stable history of collective bargaining. From 1939 to 1947 the Board generally continued to adhere to its decision in *American Can* and to deny most severance requests.¹⁰ In the early

craft. In the midst of bitter conflict the work of the NLRB became much more difficult.

J. Rayback, *A History of American Labor* 363 (1966). See also J. Winfrey, *The Appropriate Bargaining Unit Decisions of the National Labor Relations Board* 141-51 (1965).

⁵ See, e.g., *Portland Gas & Coke Co.*, 2 N.L.R.B. 552, 1 L.R.R.M. 10 (1937); *S. L. Allen & Co.*, 1 N.L.R.B. 714, 1 L.R.R.M. 29 (1936).

⁶ *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294, 1A L.R.R.M. 122 (1937).

The NLRB's determination of the appropriate unit for collective bargaining arises in the context of either an initial organization or a craft severance. Craft severance is "a process by which a group of skilled workers, recognized as a definable craft group, splits off from the union representing both themselves and a larger group of less skilled workers in order to establish a separate craft unit." Memoranda of the Legislative Reference Service, Library of Congress, March 20, 1968, reported in *Daily Labor Report* No. 39 (Feb. 27, 1969).

⁷ *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294, 300, 1A L.R.R.M. 122, 126 (1937).

The use of these "Globe" elections was heavily criticized by Board Member Edwin Smith. Member Smith argued that by allowing minorities to vote for separate representation, the Board disregarded the interests of the majority and magnified the risk of strikes by powerful craft units which could effectively shut down an entire operation. *Allis Chalmers Mfg. Co.*, 4 N.L.R.B. 159, 175-77, 1A L.R.R.M. 275, 280-81 (1937).

⁸ 13 N.L.R.B. 1252, 4 L.R.R.M. 392 (1939).

⁹ *Id.* at 1256, 4 L.R.R.M. at 394.

¹⁰ See, e.g., *Pacific Tel. & Tel. Co.*, 23 N.L.R.B. 280, 6 L.R.R.M. 307 (1940) (toll maintenance employees denied separate unit); *Todd-Johnson Dry Docks, Inc.*, 18 N.L.R.B. 973, 5 L.R.R.M. 460 (1939) (9 craft groups denied separate units); *West Coast Wood*

1940s, however, the Board developed the "craft-identity" exception to the *American Can* doctrine. Under this exception craft severance could be granted where the craft had maintained its separate identity, in spite of its inclusion in an industrial unit. The Board articulated this "craft-identity" exception in the *General Electric Co.*¹¹ case.

[1]The group must demonstrate that it is a true craft, [2] that it has not been a mere dissident faction but has maintained its identity as a craft group throughout the period of bargaining upon a more comprehensive unit basis, and [3] that it has protested inclusion in the more comprehensive unit¹²

Eventually the Board liberalized its "craft-identity" exception and, in some cases, granted severance even where the craft had not satisfied the third test—protestation against inclusion in the larger unit.¹³

B. Section 9(b)(2) of the National Labor Relations Act

Despite the increased use of the "craft-identity" exception, the *American Can* doctrine was bitterly protested by the AFL. In response to the AFL's appeal for remedial action, Congress enacted Section 9(b)(2) of the National Labor Relations Act. It was provided therein that

the Board shall not . . . decide that any craft unit is inappropriate for [collective bargaining] on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation¹⁴

The legislative history of this amendment reveals the existence of a widespread feeling that the *American Can* doctrine, even as modified by the "craft-identity" exception, effectively precluded craftsmen from exercising the free choice guaranteed by the Act.¹⁵

Preserving Co., 15 N.L.R.B. 1, 5 L.R.R.M. 104 (1939) (boommens and rafters denied separate units).

¹¹ 58 N.L.R.B. 57, 15 L.R.R.M. 33 (1944).

¹² Id. at 59, 15 L.R.R.M. at 33. The Board further noted that "[a]s an alternative [to the craft identity exception], a craft group may show that the production and maintenance unit was established without its knowledge, or that there has been no previous consideration of the merits of a separate unit." Id.

¹³ See, e.g., *Allied Chem. & Dye Corp.*, 71 N.L.R.B. 1217, 19 L.R.R.M. 1098 (1946); *International Minerals & Chem. Corp.*, 71 N.L.R.B. 878, 19 L.R.R.M. 1059 (1946).

¹⁴ 29 U.S.C. § 159(b)(2) (1964). The procedure for determining the appropriateness of a craft unit under § 9(b)(2) is outlined in detail in § 9(c) of the Act and in the NLRB's Statement of Procedure, 29 C.F.R. §§ 101.17-.21 (1969).

¹⁵ S. Rep. No. 105, 80th Cong., 1st Sess. 12 (1947).

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After enactment of section 9(b)(2), officials of the Congress of Industrial Organization (CIO) asserted that the provision would allow craft groups to obtain severance regardless of the consequences to the more comprehensive unit. This fear proved unfounded, for one year after this enactment the Board decided the *National Tube Co.*¹⁶ case in which it rendered its first interpretation of section 9(b)(2).

C. *The National Tube Doctrine*

In *National Tube Co.* the petitioner requested severance of certain bricklayers who had been part of a production and maintenance unit. In dismissing the petition the Board reasoned that section 9(b) only prohibited using a prior unit determination as the *sole* basis for disallowing craft severance.¹⁷ It maintained that a history of stable collective bargaining could still be used as a factor in determining the propriety of the requested severance.¹⁸ Applying these principles to the facts in *National Tube*, the Board held that the high degree of functional integration when combined with the history of successful industry bargaining in the basic steel industry constituted an overwhelming argument in favor of the more comprehensive unit.¹⁹

In each of the three years from 1948 through 1950, the NLRB reaffirmed its interpretation of section 9(b)(2) and extended the *National Tube* doctrine to other industries. Thus the denial of craft severance was extended to the wet milling,²⁰ lumber,²¹ and aluminum²² industries which, like basic steel, were characterized by both highly integrated production methods and a stable history of collective bargaining.

D. *The American Potash Doctrine*

It was not until 1954 in the *American Potash & Chem. Corp.*²³ case that *National Tube's* "integration of operations" theory was seriously challenged. In a three-to-two decision, the Board again reviewed the legislative history of section 9(b)(2) and concluded that

the right of separate representation should not be denied the members of a craft group merely because they are employed in an industry which involves highly integrated production processes and in which the prevailing pattern of bargaining

¹⁶ 76 N.L.R.B. 1199, 21 L.R.R.M. 1292 (1948).

¹⁷ Id. at 1205, 21 L.R.R.M. at 1293.

¹⁸ Id. at 1205-06, 21 L.R.R.M. at 1293.

¹⁹ Id. at 1207-08, 21 L.R.R.M. at 1295.

²⁰ Corn Products Ref. Co., 80 N.L.R.B. 362, 23 L.R.R.M. 1090 (1948).

²¹ Weyerhaeuser Timber Co., 87 N.L.R.B. 1076, 25 L.R.R.M. 1173 (1949).

²² Permanente Metals Corp., 89 N.L.R.B. 804, 26 L.R.R.M. 1039 (1950).

²³ 107 N.L.R.B. 1418, 33 L.R.R.M. 1380 (1954).

is industrial in character. We shall, therefore, not extend the practice of denying craft severance on an industry-wide basis.²⁴

Although rejecting the use of functional integration and a history of industry bargaining as a basis for denying craft severance, the Board refused to upset the application of the "integration of operations" theory in the *National Tube* industries (basic steel, lumber, aluminum and wet milling) because it was not deemed "wise or feasible" to upset patterns of bargaining which had become firmly established after *National Tube*.²⁵

Under the NLRB's new interpretation of section 9(b)(2), the principle was established that a self-determination election should be granted where the petitioning union can meet a dual burden of proof: "(1) the departmental group is functionally distinct and separate and (2) the petitioner is a union which has traditionally devoted itself to serving the special interest of the employees in question."²⁶ The *American Potash* doctrine constituted a drastic change from *National Tube* in that it greatly favored craft severance and effectively disregarded the interests of the employer and the industrial union.²⁷ Despite this apparent favoritism and the inconsistency of using a double standard (one for the *National Tube* industries and a second for other industries), the Board's decision in *American Potash* was, with one exception,²⁸ never seriously challenged.

²⁴ Id. at 1421-22, 33 L.R.R.M. at 1382.

²⁵ Id. at 1422, 33 L.R.R.M. at 1382.

²⁶ Id. at 1424, 33 L.R.R.M. at 1383. The majority explained:

If millions of employees today feel that their interests are better served by craft unionism, it is not for us to say that they can only be represented on an industrial basis or for that matter that they must bargain on strict craft lines. All that we are considering here is whether two craft groups should have an opportunity to decide the issue for themselves. We conclude that we must afford them that choice in order to give effect to the statute.

Id. at 1422-23, 33 L.R.R.M. at 1382-83. Subsequent Board decisions established the necessary elements of a "true craft," *Diamond T. Utah, Inc.*, 124 N.L.R.B. 966, 44 L.R.R.M. 1563 (1959); *International Harvester Co.*, 119 N.L.R.B. 1709, 41 L.R.R.M. 1375 (1958); *Reynolds Metals Co.*, 108 N.L.R.B. 821, 35 L.R.R.M. 1136 (1954), and of a "traditional representative," *Industrial Rayon Corp.*, 128 N.L.R.B. 514, 46 L.R.R.M. 1345 (1960), enforcement denied, 291 F.2d 809, 48 L.R.R.M. 2484 (4th Cir. 1961).

²⁷ See 107 N.L.R.B. at 1433, 33 L.R.R.M. at 1388 (dissenting opinion of Member Peterson).

²⁸ This exception occurred in *NLRB v. Pittsburgh Plate Glass Co.*, 270 F.2d 167, 44 L.R.R.M. 2855 (4th Cir. 1959). The United States Court of Appeals for the Fourth Circuit refused to enforce an order to bargain with a craft unit which had been determined appropriate pursuant to the *American Potash* rule.

The court criticized the NLRB's decision in *American Potash* on two grounds. First, it maintained that the Board's new test effectively permitted the craft unit to determine the issue of severance for itself, and thus constituted an abrogation of the Board's statutory duty to determine the appropriate unit. Id. at 172, 44 L.R.R.M. at 2858. Furthermore, by applying a rule which disregards the interests of the plant or industrial unit, the

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Although the Board proclaimed that *American Potash* was only a "new interpretation" of section 9(b)(2), it is submitted that the Board which decided *American Potash* adopted a pro-craft unit philosophy which was diametrically opposed to the earlier Board's pro-industrial unit philosophy. At the same time, however, the *American Potash* Board was hesitant to overrule the deeply entrenched "integration of operations" theory. Thus, the Board attempted a political compromise by allowing the *National Tube* industries to retain their status while refusing to extend this privilege to other industries. The NLRB, however, was undaunted by this criticism,²⁹ for it was not until 1966 that the Board undertook a complete review of the policies established in *American Potash*.

II. THE *Mallinckrodt* DOCTRINE

In December, 1966, the NLRB was presented with a petition which requested severance of a group of instrument mechanics from an existing production and maintenance unit. It was in this case, *Mallinckrodt Chem. Works*,³⁰ that the Board instituted a major policy change with respect to the craft severance issue. In a four-to-one decision the Board rejected *American Potash* with regard to the standards developed therein and the favored treatment accorded the *National Tube* industries.³¹

At the outset of its opinion the majority examined the employer's operations—the manufacture of uranium metal—and concluded that it constituted a highly integrated process which was dependent upon a continuous flow system.³² Then, using the first of the *American Potash*

Board will frequently arrive at results which will be arbitrary and unreasonable, and thus subject to reversal by the courts. Id. at 174, 44 L.R.R.M. at 2860.

Second, the court held that the result was in fact arbitrary and discriminatory in the case at bar because the flat glass industry is indistinguishable from the *National Tube* industries in which, even after *American Potash*, the Board has persisted in denying severance by applying a different rule. Id. The court thus objected not only to the general substantive rule of *American Potash*, but also to the exception which continued the *National Tube* policy in the aluminum, unit milling, steel, and lumber industries. The court observed that this exception is subject to independent attack because all future cases involving the *National Tube* industries will be determined solely on the basis of prior Board determinations—a clear violation of the mandate of section 9(b). Id. at 175, 44 L.R.R.M. at 2861.

See also *Royal McBee Corp. v. NLRB*, 302 F.2d 330, 50 L.R.R.M. 2158 (4th Cir. 1962), in which the Fourth Circuit Court of Appeals again refused to enforce a Board order on the ground that the Board's severance policies were arbitrary and discriminatory. Id. at 332, 50 L.R.R.M. at 2160.

²⁹ See, e.g., *E.I. duPont de Nemours & Co.*, 126 N.L.R.B. 885, 886 n.3 (1960). However, a short time after the decision in *Pittsburgh Plate Glass*, Member Fanning did call for a review of the Board's severance policies. *Mallinckrodt Chem. Works, Uranium Div.*, 129 N.L.R.B. 312, 315 n.3, 46 L.R.R.M. 1539, 1540 n.3 (1960).

³⁰ 162 N.L.R.B. 387, 4 L.R.R.M. 1011 (1966).

³¹ Id. at 396-97, 64 L.R.R.M. at 1015-16.

³² Id. at 389, 64 L.R.R.M. at 1012.

tests, the Board determined that the instrument mechanics were skilled workmen with identifiable interests and thus constituted a "true craft group."³³ The Board, however, found that the second of the *American Potash* tests was not met, for the petitioner did not qualify as a traditional representative of this particular craft.³⁴ At this point the Board could have dismissed the petition on the ground that the second *American Potash* standard was not met. Rejecting this approach, the majority stated that a mere failure to show that the petitioner was a traditional representative of the craft group was not sufficient, in and of itself, to constitute a ground for dismissal.³⁵

Examining the historical development of the craft severance rules, the Board reasoned that the *American Potash* decision neglected to consider "all the relevant factors" and, as a result, only the desires of the craftsmen were being considered.³⁶ Recognizing the impropriety of this, the majority commented:

Underlying [craft severance] determinations is the need to balance the interest of the employer and the total employee complement in maintaining the industrial stability and resulting benefits of an historical plant wide bargaining unit as against the interest of a portion of such complement in having an opportunity to break away from the historical unit by a vote for separate representation.³⁷

After once again reviewing section 9(b)(2) and concluding that the legislature intended to give the Board broad discretion, the majority rejected the *American Potash* doctrine, admitting that it had prevented the Board from "discharging its statutory responsibility to make its unit determinations on the basis of all relevant factors, including those factors which weigh against severance."³⁸ Furthermore, the Board continued, the decision in *American Potash* created an arbitrary distinction between industries by continuing the *National Tube* policy in certain favored industries while rejecting it in other integrated industries.³⁹

The majority in *Mallinckrodt* specifically overruled both *American Potash* and *National Tube* to the extent that those cases granted or denied craft severance without considering *all* relevant factors. The new approach outlined in *Mallinckrodt* involves an examination

³³ Id. at 390, 64 L.R.R.M. at 1013.

³⁴ Id. at 391, 64 L.R.R.M. at 1013.

³⁵ Id.

³⁶ Id. at 396, 64 L.R.R.M. at 1016.

³⁷ Id. at 392, 64 L.R.R.M. at 1014.

³⁸ Id. at 396, 64 L.R.R.M. at 1016.

³⁹ Id.

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of all relevant "areas of inquiry" including, but not limited to, the following:

1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.
2. The history of collective bargaining of the employees sought at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.
3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.
4. The history and pattern of collective bargaining in the industry involved.
5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.
6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.⁴⁰

The Board applied these new standards to the facts of the case, and concluded that the policies of the Act would not be effectuated by allowing the petitioner to "carve out" a separate bargaining unit.⁴¹ The majority based its dismissal of the petition on: (1) the intimate relationship between the work of the instrument mechanics and the production process, that is, the high degree of functional integration;⁴² (2) the twenty-five year history of bargaining, including the fact that the record demonstrated that the incumbent union had provided ade-

⁴⁰ Id. at 397, 64 L.R.R.M. at 1016.

⁴¹ Id. at 398, 64 L.R.R.M. at 1017.

⁴² Id.

quate representation for the craftsmen;⁴³ and (3) the importance of labor relations stability in an industry vital to the country's national defense.⁴⁴

Member Fanning's dissent, as did the majority opinion, reviewed section 9(b)(2) and its legislative history. However, he disagreed both with the standards adopted by the majority and the application of those standards. He concluded that Congress intended the Board to accord identical treatment to both the severance and the initial organization of craft units,⁴⁵ and he minimized the importance of a history of plantwide bargaining.⁴⁶ In addition, he found that section 9(b)(2) created a presumption in favor of craft representation in a severance petition.⁴⁷

Member Fanning then proposed a different set of standards to be used in deciding craft severance cases. First, with respect to the relevance of a successful history of collective bargaining, he agreed that severance should be denied where there is a showing that the interests of the craft and industrial employees have been merged, or, alternatively, that the pattern of representation in the rest of the industry has been one of plantwide rather than craft representation.⁴⁸ However, he then qualified this rule by stating that he would

nevertheless, permit such separate representation where it is necessary to free a small group of skilled craftsmen from a bargaining structure in which, because of their minority position, their legitimate special interests have been subordinated to the interests of the majority of unskilled employees.⁴⁹

Thus, in his view a stable history of collective bargaining is of only minor importance in determining the propriety of a requested craft severance.

Second, with respect to functional integration Member Fanning disagreed with the majority of the Board. He noted that although the presence of a highly integrated production system would not "necessarily" destroy the right of skilled employees to seek representation in a separate unit it would, in fact, tend to dissipate the separate identity of craft employees.⁵⁰ It would appear that while he would not disregard

⁴³ *Id.* at 399, 64 L.R.R.M. at 1017.

⁴⁴ *Id.* at 398, 64 L.R.R.M. at 1017.

⁴⁵ *Id.* at 402, 64 L.R.R.M. at 1019.

⁴⁶ *Id.* at 403, 64 L.R.R.M. at 1019.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

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the nature of the particular production process, he would require a higher degree of integration before denying severance than would the majority.

Finally, Member Fanning concurred in the remaining "standards" adopted by the majority. He observed that the majority included the *American Potash* standards within the *Mallinckrodt* test—that the employees constitute true craftsmen, and that the petitioning union be a "traditional representative" of such employees—and that these standards would weigh in favor of severance though no longer conclusively.⁵¹ In addition, he agreed that consideration should be given to any attempts made by the craft employees to maintain their separate identity despite their inclusion in the broader unit, including consideration of the past opportunities, if any, which have been afforded them to obtain separate representation.⁵²

Applying these standards to the facts in *Mallinckrodt*, Member Fanning found that the three grounds set forth in the majority's opinion were not sufficient to justify a dismissal of the petition. He rejected the argument that the integration of the employer's operations had merged the interests of the skilled and unskilled employees and had thus destroyed the separate identity of the craft.⁵³ He further contended that the majority's conclusion would be inconsistent with the *E.I. duPont de Nemours* case⁵⁴ decided that same day in which the majority granted a self-determination election despite an operation which allegedly was more highly integrated than that in *Mallinckrodt*.⁵⁵ With respect to the bargaining history and labor stability arguments, he indicated that an examination of the company's history revealed that in three prior instances separate units had been carved out from the production and maintenance unit, and that such multi-unit bargaining had not been disruptive of labor stability.⁵⁶ Consequently, he concluded that section 9(b)(2) required the Board under these circumstances to grant a self-determination election to the skilled craftsmen.⁵⁷

While both opinions advance a policy of flexibility in order to compromise the diverse employee interests, the majority has implicitly demonstrated a partiality toward the more comprehensive unit (and, thus, industrial employees) whereas Member Fanning favors separate representation (and, thus, craft employees).

⁵¹ Id. at 403-04, 64 L.R.R.M. at 1019.

⁵² Id. at 404, 64 L.R.R.M. at 1019.

⁵³ Id. at 406, 64 L.R.R.M. at 1021.

⁵⁴ *E.I. duPont de Nemours & Co.*, 162 N.L.R.B. 413, 64 L.R.R.M. 1021 (1966).

⁵⁵ 162 N.L.R.B. at 405-06, 64 L.R.R.M. at 1020-21.

⁵⁶ Id. at 405, 64 L.R.R.M. at 1020.

⁵⁷ Id. at 407, 64 L.R.R.M. at 1021.

III. THE *Mallinckrodt* DOCTRINE APPLIED

In applying the principles established in *Mallinckrodt*, the NLRB has followed a discernible pattern; a majority of the Board has continually placed heavy reliance upon the existence of a long history of industry-wide or plant-wide collective bargaining.⁵⁸ It is submitted that this reliance has caused the NLRB to grant or deny severance on the same "stable history of bargaining" criterion utilized in *American Can.*⁵⁹ Member Fanning's persistent opposition to this trend has engendered a series of four-to-one splits which commenced with *Holmberg, Inc.*,⁶⁰ decided on the same day as *Mallinckrodt*.

Professing to apply the new *Mallinckrodt* standards, the majority in *Holmberg* based its denial of severance upon two findings: first, that the craft group shared a substantial community of interests with the other employees⁶¹ and, second, that the twenty-four year history of stable bargaining demonstrated that the craft group had been adequately represented.⁶² Member Fanning attacked the finding of a community of interests by marshalling several facts indicating the weakness of that common bond. He noted that the petitioning employees worked in a separate location under separate supervision and spent 80 percent of their time performing skilled functions.⁶³ He stressed the differences in wage rates and contractual provisions and accused the majority of ignoring these factors while giving undue weight to those working conditions and benefits which were similar for both the craft group and other employees.⁶⁴ Having refuted the finding of a community of interests, he concluded that "an examination of [the *Mallinckrodt*] standards and their application to the facts herein reveal that, in fact, conclusive weight is being given to the broader bargaining history."⁶⁵

This pattern was repeated with little variation in the subsequent

⁵⁸ See, e.g., *McCord Corp.*, 169 N.L.R.B. No. 7, 67 L.R.R.M. 1082 (1968); *Aerojet-General Corp.*, 163 N.L.R.B. No. 23, 64 L.R.R.M. 1427 (1967); *American Bosch Arma Corp.*, 163 N.L.R.B. No. 23, 64 L.R.R.M. 1403 (1967), wherein the requested severances of toolroom employees were all denied. See also *Allied Chem. Corp.*, 165 N.L.R.B. No. 23, 65 L.R.R.M. 1285 (1967), wherein the Board in a four-to-one decision (Member Fanning dissenting) denied severance to a unit of carpenters; and *Jordan Marsh Co.*, 174 N.L.R.B. No. 187, 70 L.R.R.M. 1445 (1969), wherein severance was denied to a unit of bakers.

⁵⁹ See generally Note, Unit Determination and the Problem of Craft Severance, 19 W. Res. L. Rev. 326 (1968); 8 B.C. Ind. & Com. L. Rev. 988 (1967).

⁶⁰ 162 N.L.R.B. 407, 64 L.R.R.M. 1025 (1966).

⁶¹ *Id.* at 409, 64 L.R.R.M. at 1026.

⁶² *Id.* at 410, 64 L.R.R.M. at 1026.

⁶³ *Id.* at 411, 64 L.R.R.M. at 1027.

⁶⁴ *Id.* at 412, 64 L.R.R.M. at 1027-28.

⁶⁵ *Id.* at 412, 64 L.R.R.M. at 1028.

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cases of *Lear-Siegler, Inc.*⁶⁶ and *Mobil Oil Corp.*⁶⁷ In *Mobil*, Member Fanning found the majority's denial of severance inconsistent with an objective application of *Mallinckrodt* to the facts, and determined that the majority's emphasis on functional integration and a long and stable bargaining history had betrayed its lack of objectivity.⁶⁸ He noted that the majority's continued emphasis on functional integration would effectively deny to any employees engaged in a supporting function the right to separate representation, and that the effect would be to virtually eliminate bargaining by plant "subdivision," despite the mandate of section 9(b)(2).⁶⁹ The majority responded to this charge by specifically disclaiming any implication that it was establishing a presumption against the appropriateness of plant subdivision units,⁷⁰ and cited two cases in which severance had been awarded to such units.⁷¹

In his dissent in *Mobil*, Member Fanning further denounced the presumption that the mere presence of a history of industry or plant-wide bargaining is indicative of adequate representation and stable industrial relations. He questioned whether those groups traditionally granted separate representation would now be required to show overt protest actions against the larger unit in order to qualify for separate representation.⁷² Instead of the adequacy of representation being determined by Board fiat, he advocated that the craft group be permitted to express by vote its reaction to representation by the larger unit.⁷³ Thus, in effect, he would eliminate the second area of inquiry of the *Mallinckrodt* doctrine—consideration of the history of collective bargaining. It appears that he would order an election in any case where the proposed unit had demonstrated that application of at least one of the six *Mallinckrodt* tests would weigh in favor of severance. This would be a clear abdication of the Board's responsibility to determine the appropriate unit and would result in many of the same problems which existed under the *American Potash* rule.

⁶⁶ 170 N.L.R.B. No. 114, 67 L.R.R.M. 1522 (1968).

⁶⁷ 169 N.L.R.B. No. 35, 67 L.R.R.M. 1154 (1968). See also cases cited at note 58 *supra*.

⁶⁸ 169 N.L.R.B. No. 35 at 11, 67 L.R.R.M. at 1157.

⁶⁹ *Id.* at 10 n.13, 67 L.R.R.M. at 1157 n.13.

In *Dundee Cement Co.*, 170 N.L.R.B. No. 66, 67 L.R.R.M. 1409 (1966), Member Fanning again made reference to his colleagues' disregard of § 9(b) of the Act:

If [§ 9(b)] . . . is now to be ignored on initial organization, there is ample precedent to suggest it is even less likely to be adhered to by this Board in the disposition of subsequent representation issues.

Id. at 15, 67 L.R.R.M. at 1414.

⁷⁰ 169 N.L.R.B. No. 35 at 7, 67 L.R.R.M. at 1156.

⁷¹ See *Buddy L Corp.*, 167 N.L.R.B. No. 113, 66 L.R.R.M. 1150 (1968); *Mesta Mach. Co.*, 167 N.L.R.B. No. 10, 66 L.R.R.M. 1007 (1967).

⁷² 169 N.L.R.B. No. 35 at 10-11, 67 L.R.R.M. at 1157.

⁷³ *Id.* at 11, 67 L.R.R.M. at 1157.

As the Board continued to apply the principles enunciated in *Mallinckrodt*, the importance of the bargaining history factor became more apparent, and in *Radio Corp. of America*⁷⁴ the petitioning group attempted to circumvent that factor. The Board dismissed a petition for severance citing as one ground the long history of stable bargaining.⁷⁵ The petitioner had attempted to overcome this point by arguing that since the broader unit had contained both guards and non-guards—a situation prohibited by Section 9(b)(3) of the Act—the overall production and maintenance unit was inappropriate.⁷⁶ Accordingly, it was advanced, there was really no history of bargaining which the Board could consider in applying the principles of *Mallinckrodt*.⁷⁷ The panel, however, rejected this argument, holding that it was unnecessary to pass upon the appropriateness of the existing unit. The Board reasoned:

One of the factors that *Mallinckrodt* requires us to consider is the history of collective bargaining, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations. In considering the bargaining history, we are not determining the appropriateness of the existing unit, as that question is not in issue. . . . Rather, we are merely passing upon a petition to grant a craft unit and, in doing so, we are considering the history of amicable bargaining in the larger unit as a factor showing stability in the present situation, as opposed to what the labor relations outlook might be if severance were granted.⁷⁸

The Board's position would appear to be defensible; again, accepting labor relations stability as a primary objective in determining a craft severance case, the existing unit should be examined only to determine its effect on the total labor relations environment.

The opinions of the NLRB in those cases where craft representation has been denied profess to observe the principles and policies of *Mallinckrodt*. However, those decisions consistently raise doubt as to whether these principles and policies are being applied in an objective fashion. Even those cases where the Board has granted separate representation do not signify a departure from the Board's subjective application of the six *Mallinckrodt* tests. Those cases since *Mallinckrodt* in which a craft unit has been deemed appropriate by the

⁷⁴ 173 N.L.R.B. No. 72, 69 L.R.R.M. 1368 (1968).

⁷⁵ *Id.* at 13, 69 L.R.R.M. at 1372.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 13-14, 69 L.R.R.M. at 1373. It was also noted that the Act only prohibits the Board from finding a mixed unit of guards and non-guards, but does not prevent the parties from consenting to such a unit. *Id.*

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Board may be divided into two categories: first, those which involve the initial organization of a craft unit not previously represented in collective bargaining, and to which a more liberal rule has been applied and, second, those in which the craft employees were members of a broader unit but were not actually represented by that unit.

*E.I. duPont de Nemours & Co.*⁷⁹ was the first of the cases involving initial organization. When compared with its companion case, *Holmberg*, *duPont* demonstrates that separate representation in the context of initial organization is more readily permitted than severance from an existing broad unit because generally it is less disruptive of industrial harmony. In *duPont* the Board found a high degree of functional integration: the employer's operation consisted of a continuous flow process; the craft employees spent more than 90 percent of their time in production areas, and their work was coordinated with that of the production operators.⁸⁰ Notwithstanding these findings, the majority concluded that this functional integration, where there were no "other considerations of . . . overriding force,"⁸¹ had not resulted in a merger of the separate community of interests:

[Functional integration] is not in and of itself sufficient to preclude the formation of a separate craft bargaining unit, unless it results in such a fusion of functions, skills, and working conditions between those in the asserted craft group and others outside it as to obliterate any meaningful lines of separate craft identity.⁸²

In a concurring opinion Member Fanning reiterated his accusation that in this initial organization case, as in severance cases, conclusive weight was being given to the bargaining history factor. He agreed with the majority "except to the extent that it relies on the absence of bargaining history on a more comprehensive basis as a reason for finding that the [craft employees] constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act."⁸³ The similarity of the facts in *duPont* and *Mallinckrodt* makes it difficult to reconcile the disparate results. The fact that the craft unit was approved in *duPont*—which is distinguishable

⁷⁹ 162 N.L.R.B. 413, 64 L.R.R.M. 1021 (1966). See also *Mesta Mach. Co.*, 167 N.L.R.B. No. 10, 66 L.R.R.M. 1007 (1967); *Fremont Hotel, Inc.*, 168 N.L.R.B. No. 23, 66 L.R.R.M. 1250 (1967); *Myers Drum Co.*, 165 N.L.R.B. No. 107, 65 L.R.R.M. 1454 (1967), where the Board, in granting separate self-determination elections, placed great emphasis upon the fact that the requested employees had been previously unrepresented.

⁸⁰ 162 N.L.R.B. at 416-17, 64 L.R.R.M. at 1023.

⁸¹ *Id.* at 419, 64 L.R.R.M. at 1024. It appears that the only "consideration" which the Board would have deemed of "overriding force" was a history of collective bargaining. *Id.* at 418, 64 L.R.R.M. at 1024.

⁸² *Id.* at 419, 64 L.R.R.M. at 1024.

⁸³ *Id.* at 421, 64 L.R.R.M. at 1025.

from *Mallinckrodt* only in the total absence of prior bargaining history—lends considerable support to the opinion expressed by Member Fanning.

Although the case of *Anheuser-Busch, Inc.*⁸⁴ is frequently considered to represent the granting of a severance petition, it is in fact a case involving initial organization. Notwithstanding several factors which weighed heavily against separate representation, the NLRB granted the separate unit emphasizing that there was no relevant history of collective bargaining because the electrical maintenance department had been established subsequent to the last collective bargaining agreement, and the electricians had not participated in that agreement.⁸⁵ Thus, the Board stated that it viewed "the situation . . . as the initial establishment of a unit rather than a case of severance from a traditional unit."⁸⁶ A comparison of this case with the earlier *Square D Co.*⁸⁷ case indicates that the Board gave conclusive weight to the bargaining history factor in *Anheuser-Busch*. Separate representation was denied in *Square D* on facts indistinguishable from those in *Anheuser-Busch* except for a thirteen-year bargaining history.

Another case which has been considered a severance case but which more closely resembles initial organization is *Safeway Stores, Inc.*⁸⁸ There, a unit of bakers was severed from a larger unit of retail clerks. The Board noted that, although the craft group had been fully represented by the broader unit, the employer in 1963 had reorganized the bakery department by assigning to the bakers new responsibilities which were typical of the skilled bakers' trade.⁸⁹ The Board also found that the proposed craft unit had a separate community of interest by emphasizing (1) the different working hours,⁹⁰ (2) the separate and distinct lines of seniority,⁹¹ and (3) the lack of interchangeability of employees between the bakery and the rest of the store.⁹² The Board concluded that "the bargaining history of the [bakers'] inclusion in the broader unit [did] not militate against their severance, *particularly in view of the recent changes in the employer's method of baking, and the changed job requirements.*"⁹³ (Emphasis added.) It

⁸⁴ 170 N.L.R.B. No. 5, 67 L.R.R.M. 1376 (1968).

⁸⁵ Id. at 4, 67 L.R.R.M. at 1377.

⁸⁶ Id. The Board further noted that "while not controlling in a non-severance situation, the *Mallinckrodt* tests are useful" in initial organization cases. Id.

⁸⁷ 169 N.L.R.B. No. 140, 67 L.R.R.M. 1336 (1968).

⁸⁸ 178 N.L.R.B. No. 64, 72 L.R.R.M. 1133 (1969).

⁸⁹ Id. at 4, 72 L.R.R.M. at 1134.

⁹⁰ Id. at 5, 72 L.R.R.M. at 1135.

⁹¹ Id.

⁹² Id. at 4-5, 72 L.R.R.M. 1135.

⁹³ Id. at 6, 72 L.R.R.M. at 1135.

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appears that, absent the drastic job reorganization, the Board would have denied severance relying upon the bargaining history factor.⁹⁴

Two additional facts were offered in order to rationalize the Board's apparent change in policy. First, a consideration of conditions in the rest of the "industry" demonstrated that other retail supermarkets in the geographical area had entered into contracts with the petitioning union covering instore bakers, and that affiliates of the petitioning union represented bakers in other Safeway stores located elsewhere.⁹⁵ Second, an examination of conditions within the local unit revealed that labor relations stability had not been disrupted by separate representation for meat cutters in the same stores.⁹⁶

It is submitted that the rationale advanced in *Safeway* would not be applied by the Board to industries unlike the retail grocery business. In manufacturing industries the fragmentation of bargaining units produces the corresponding likelihood of a "double strike" situation, where the separate craft unit, because of the skill of its members and the essential nature of their work, has the economic power to shut down the entire production operation. It is suggested that such power would not accrue to the unit of bakers severed in *Safeway*. Thus, severance might be conducive to immediate industrial peace without causing future economic harm to the employer.

The second category includes cases in which actual severance from an existing broader unit was permitted principally because the craft employees were not in fact represented by that unit. In *Jay Kay Metal Specialties Corp.*,⁹⁷ the Board noted that, although the craft group previously had been included in an overall production and maintenance unit, the collective bargaining agreements had permitted the employer to negotiate individually with the craft employees regarding job classifications, wage rates and other conditions of employment. It was found that in fact such individual negotiations had occurred.⁹⁸ Thus, the Board concluded that the craftsmen had maintained their separate community of interest.⁹⁹

In *Buddy L Corp.*¹⁰⁰ severance was granted where the history of bargaining demonstrated that, although the craft group was ostensibly a part of the broader unit, it had not participated for the previous four

⁹⁴ Cf. *Buckeye Village Mkt., Inc.*, 175 N.L.R.B. No. 46, 70 L.R.R.M. 1529 (1969), where a 22-month bargaining history was considered "substantial, if not controlling, in determining the appropriate unit." *Id.* at 5, 70 L.R.R.M. at 1531.

⁹⁵ 178 N.L.R.B. No. 64 at 5-6, 72 L.R.R.M. at 1135.

⁹⁶ *Id.*

⁹⁷ 163 N.L.B.R. 719, 64 L.R.R.M. 1426 (1967).

⁹⁸ *Id.* at 720-21, 64 L.R.R.M. at 1427.

⁹⁹ *Id.* at 721, 64 L.R.R.M. at 1427.

¹⁰⁰ 167 N.L.R.B. No. 113, 66 L.R.R.M. 1150 (1967).

years in any collective bargaining negotiations.¹⁰¹ In fact, the craft employees had dealt directly with management concerning grievances rather than utilizing the contractual grievance procedure.¹⁰² This separate community of interests was reinforced by findings that the employees constituted a true craft group,¹⁰³ that their work was functionally distinct from production work,¹⁰⁴ and that the petitioning union was a traditional representative of such employees.¹⁰⁵ The history of industry and plant bargaining was considered, but the evidence was found to be inconclusive; thus, because it could not be determined that severance would disturb the stability of industry labor relations, it was felt that "to deny separate representation where to do so advances the cause of stability little, if at all, might also carry the seeds of instability."¹⁰⁶

IV. THE *National Tube* INDUSTRIES AFTER *Mallinckrodt*

During the period when the Board adhered closely to the *National Tube* doctrine,¹⁰⁷ the NLRB created what became known as the four "favored industries," principally because of their immunity from the rule of *American Potash*.¹⁰⁸ However, with the adoption of the *Mallinckrodt* principles, the Board stated that in future craft severance cases it would show no preference for or against severance, that all relevant factors would be considered, and that all industries would be treated equally. Since that time the Board has had occasion to re-examine only two of the four favored industries, lumber and aluminum. A review of those cases indicates that the vestiges of earlier special treatment still persist, and that the Board has still placed heavy reliance upon the industry history of bargaining.

All three of the petitions for separate representation which have arisen in the lumber industry have been dismissed by the Board. In *Timber Products Co.*,¹⁰⁹ the Board noted that the "integration of operations" theory of *National Tube* and *Weyerhaeuser Timber*¹¹⁰ had been relegated by *Mallinckrodt* to being "but one relevant factor in determining the appropriateness or inappropriateness of a proposed unit, regardless of the industry involved."¹¹¹ The denial of separate

¹⁰¹ Id. at 5, 66 L.R.R.M. at 1151.

¹⁰² Id.

¹⁰³ Id. at 2, 66 L.R.R.M. at 1150.

¹⁰⁴ Id. at 4, 66 L.R.R.M. at 1151.

¹⁰⁵ Id. at 3, 66 L.R.R.M. at 1150-51.

¹⁰⁶ Id. at 6, 66 L.R.R.M. at 1151-52.

¹⁰⁷ See p. 415 *supra*.

¹⁰⁸ See pp. 415-17 *supra*.

¹⁰⁹ 164 N.L.R.B. No. 109, 65 L.R.R.M. 1189 (1967).

¹¹⁰ See note 21 *supra*.

¹¹¹ 164 N.L.R.B. No. 109 at 9, 65 L.R.R.M. at 1189-90.

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representation in *Timber Products* appears to rest principally upon the finding that the requested employees did not constitute a true craft group but were merely "specialized workmen."¹¹² However, the Board noted that, although there was no history of bargaining at Timber Products' plant, the pattern of bargaining in the lumber industry has been on a plant-wide rather than a craft basis, and has been conducive to labor relations stability.¹¹³ The implication is clear that even had the employees been deemed a true craft group, their case would not have been viewed as other initial organization cases. Rather, because in the majority's view functional integration is common to all lumber industry operations, the industry pattern of bargaining would probably control. In his dissent Member Fanning rightly commented that "the result reached by the majority herein is dictated more by consideration of the history of bargaining in this industry than by a consideration of whether these employees qualify as craftsmen under our recent *Mallinckrodt* and *duPont* decisions."¹¹⁴ He pointed out that the craft qualifications of the electricians found here to be mere specialists were comparable to those of the electricians in *duPont* who had been granted a self-determination election.¹¹⁵

Apparently, the majority were aware of this inherent inconsistency as they felt compelled to offer assurances that the dismissal of this petition should not be construed as foreclosing separate representation in the initial establishment of "appropriate" craft units in the lumber industry.¹¹⁶ These assurances were an attempt to respond to Member Fanning's criticism:

[V]iewing this denial of a craft unit on initial organization in conjunction with the recent *Mallinckrodt* decision, with its emphasis on prior bargaining history whenever severance is requested, it seems quite unlikely that a unit of maintenance electricians has any possibility of being found appropriate at this plant at any future time. This type of craft employee, foreclosed generally "in lumber" from separate representation during the 18-year sway of *Weyerhaeuser*, is still foreclosed despite the apparent demise of *Weyerhaeuser*.¹¹⁷

In the second lumber industry case, *Potlatch Forests, Inc.*,¹¹⁸ a Board panel dismissed a petition for separate representation, again

¹¹² Id. at 10, 65 L.R.R.M. at 1190.

¹¹³ Id. at 9, 65 L.R.R.M. at 1189-90.

¹¹⁴ Id. at 17, 65 L.R.R.M. at 1193.

¹¹⁵ Id. at 12, 65 L.R.R.M. at 1191.

¹¹⁶ Id. at 11 n.16, 65 L.R.R.M. at 1190 n.16.

¹¹⁷ Id. at 16, 65 L.R.R.M. at 1192-93.

¹¹⁸ 165 N.L.R.B. No. 89, 65 L.R.R.M. 1454 (1967).

finding that the employees were specialists and not craftsmen. The Board found that the multi-plant bargaining agreement did not apply to the new plant where the requested employees worked. Thus, the panel impliedly conceded that this was a case of initial organization, but, unlike *Timber Products*, relied entirely upon the finding that the employees were specialists. The panel did not allude to the industry pattern of bargaining, but their failure to do so should not be interpreted as a change in policy, for it appears that the craft qualifications of the employees in *Potlatch* were considerably weaker than those of the employees in *Timber Products*. Thus, it was unnecessary for the Board to place reliance upon the industry pattern of bargaining in order to support dismissal of the petition.

In *United States Plywood-Champion Papers, Inc.*,¹¹⁹ the most recent of the three lumber industry cases, the "specialist" approach was inapplicable as the employees did not claim to constitute a craft unit but, rather, sought severance as a departmental unit.¹²⁰ Dismissal was based in part upon a merger of community of interests brought about by a history of common supervision, functional integration, similarity of work, and transferability of employees among departments.¹²¹ As in *Timber Products*, the industry history of bargaining appears to have been controlling even though there was found to be no relevant plant-wide history of bargaining because bargaining had been suspended during the preceding seven years.¹²² The majority noted

that the employer is engaged at least in substantial part in the basic lumber industry. This industry has historically bargained on a plant-wide basis, which has been conducive to a substantial degree of stability in labor relations, and this background was a substantial reason for the rule announced in *Weyerhaeuser Co.* We no longer adhere to the *Weyerhaeuser* doctrine, but determine the appropriateness of units in this industry based on the same factors as any other type of enterprise. However, the integrated nature of the operations as well as the industry bargaining pattern and stability which were the underlying reasons for the *Weyerhaeuser* decision remain valid factors to be considered and weighed in making unit findings, even though they were not sufficient in and of

¹¹⁹ 174 N.L.R.B. No. 48, 70 L.R.R.M. 1163 (1969).

¹²⁰ *Id.* at 2, 70 L.R.R.M. at 1163.

¹²¹ *Id.* at 12, 70 L.R.R.M. at 1166-67.

¹²² *Id.* at 10, 70 L.R.R.M. at 1166.

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themselves to preclude consideration of other relevant factors.¹²³

The decisions in *Timber Products*, *Potlatch Forests* and *United States Plywood-Champion* raise doubt as to the Board's application of the principles established in *Mallinckrodt*. The *National Tube* doctrine created a pattern of integrated unit collective bargaining in the lumber industry. *Mallinckrodt* specifically rejected that doctrine. The NLRB, however, despite its pronouncements to the contrary has continued to rely upon this "established pattern of bargaining" to deny both the severance and the initial organization of craft units in the lumber industry.

Only one case has arisen in the aluminum industry since the adoption of the *Mallinckrodt* standards. In *Alcan Aluminum Corp.*¹²⁴ the Board dismissed a request for a unit of maintenance employees and granted one for an overall production and maintenance unit.¹²⁵ In so ruling the majority presented a detailed factual analysis to substantiate its finding that the employer's operations were highly integrated.¹²⁶ As in two of the lumber cases, reference was made to the fact that while *Mallinckrodt* overruled *National Tube*, the integrated nature of the employer's operations and the pattern of bargaining in the industry were still relevant considerations in making unit determinations.¹²⁷

In his dissent Member Fanning commented that the majority's decision left craft and maintenance employees in the aluminum industry in the same position as before *Mallinckrodt*:

[The *Mallinckrodt*] decision in significant part dealt with a promised end to plantwide unit guarantees in four basic industries. My colleagues subscribed to this principle, but they have now effectively negated application of it in the aluminum industry, just as their *Timber Products* decision . . . did in the lumber industry.¹²⁸

¹²³ Id. at 10-11, 70 L.R.R.M. at 1166.

Two members dissented on the basis that the facts were indistinguishable from those presented in the earlier case of *Crown Simpson Pulp Co.*, 163 N.L.R.B. No. 109, 64 L.R.R.M. 1409 (1967), where a self-determination election had been granted to the maintenance department employees of a pulp mill operation. 174 N.L.R.B. No. 48 at 17-18, 70 L.R.R.M. at 1168.

¹²⁴ 178 N.L.R.B. No. 55, 72 L.R.R.M. 1097 (1969).

¹²⁵ Id. at 11, 72 L.R.R.M. at 1101.

¹²⁶ Id. at 1-10, 72 L.R.R.M. at 1098-1101.

¹²⁷ Id. at 10, 72 L.R.R.M. at 1101.

¹²⁸ Id. at 13, 72 L.R.R.M. at 1102.

CONCLUSION

The decision of the NLRB in *Mallinckrodt* was an admirable attempt to achieve an optimal compromise solution to the craft unit dilemma. The pronouncements therein represented the successful culmination of a history of unsuccessful craft unit policies. The principles established by the Board in *Mallinckrodt* are to be commended. However, subsequent application of those principles reveals that, in reality, the standards set forth in *Mallinckrodt* have been used not to *reach* a conclusion, but rather to *support* one. For example, in the lumber industry cases, the Board placed heavy reliance upon the high degree of functional integration. But in the *duPont* case, where there was an equal degree of integration, it "reasoned" that this factor was "not in and of itself sufficient to preclude the formation of a separate craft unit."¹²⁹ Such legerdemain makes irresistible the conclusion that "in actual operation the decision to deny or grant separate representation has frequently been used as the criterion to determine which factors will be utilized and in what manner."¹³⁰

Member Fanning's recurring criticism that his colleagues have consistently given conclusive weight to the bargaining history factor also has merit. The Board's craft unit determinations substantiate this accusation. Of approximately thirty craft severance cases brought before the Board, only three were won by the petitioning union,¹³¹ and these cases, *Buddy L Corp.*,¹³² *Jay Kay Metal Specialties Corp.*,¹³³ and *Safeway Stores, Inc.*,¹³⁴ cannot be considered typical craft severance cases for reasons explained earlier.

Member Fanning's accusations, however, represent an attack merely upon the penumbra of the NLRB's craft severance policies. The crux of the issue involves a choice between craft unionism and industrial unionism. More specifically, the Board majority has weighed the diverse interests of the skilled and unskilled employees along with the interdependency of the bargaining power relationship and has concluded that the few must sacrifice for the good of all.

Despite this favoritism, there is still much to be said in behalf of the NLRB's craft unit determinations. Should the Board adopt a policy of freely granting separate representation to craft employees, it may well be sowing the seeds of labor relations instability. The

¹²⁹ 162 N.L.R.B. at 419, 64 L.R.R.M. at 1024.

¹³⁰ Cohen, *Two Years Under Mallinckrodt: A Review of the Board's Latest Craft Unit Policy*, 20 Lab. L.J. 195, 214 (1969).

¹³¹ It should be noted that a Board panel did grant one of three severance petitions in *National Cash Register*, 168 N.L.R.B. No. 130, 67 L.R.R.M. 1041 (1967).

¹³² See pp. 427-28 *supra*.

¹³³ See p. 427 *supra*.

¹³⁴ See pp. 426-27 *supra*.

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members are clearly aware that a lenient policy toward severance of craft employees from the larger comprehensive unit may undermine the bargaining position of the majority of the firm's employees. The recent experience of a large paper manufacturer is illustrative of the disruption which unit fragmentation may create. The company's production employees were represented by an industrial union while the boiler room employees constituted a separate unit represented by a different union. The collective bargaining agreement for the larger unit expired on August 8. After several days of negotiation and a brief strike, a new agreement was reached. On August 16 the agreement with the boiler room employees expired and their representative insisted upon higher benefits than had been given to the production workers. The company now found itself between Scylla and Charybdis. To accede to the union's demands would induce resentment and disharmony among the production workers. However, to stand fast would invite a strike and possible disruption of the entire production process. Thus, a minority of employees successfully forced both the employer and the full complement of production workers into a position from which *only* the minority could benefit.

Although the NLRB's craft severance decisions have merited Member Fanning's criticisms, the policy alternative he advocates is pregnant with the seeds of industrial unrest. His opinions indicate an attempt—despite protestations to the contrary—to apply a rigid rule which would in nearly all cases lead to fragmentation of the bargaining units. One need only examine the industrial relations problems of the railway, maritime, newspaper and construction industries to appreciate the unwholesome consequences of such fragmentation. Multi-union bargaining in these industries has nourished inter-union rivalries, disrupted the free flow of commerce and necessitated extensive government intervention in the collective bargaining process. Congress surely did not intend to foster such a chaotic and unstable relationship.

The decision in *Mallinckrodt* set forth principles capable of solving most of the craft severance issues. The missing factor is a formula of unbiased, objective application of these principles. While the NLRB can supply this missing factor, it has thus far declined to do so.

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